



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
EX TEMPORE JUDGMENT

In the matter between:

Case no: I 210/2013

ESCON ELECTRICAL CC
CHRISTIAAN JOHANNES SNYMAN

1ST PLAINTIFF
2ND PLAINTIFF

and

BANK WINDHOEK LTD

DEFENDANT

Neutral citation: *Escon Electrical cc & Another v Bank Windhoek Ltd* (I 210/2013)
[2017] NAHCMD 258 (06 July 2017)

Coram: GEIER J
Heard: 06 July 2017
Delivered: 06 July 2017
Released: 06 September 2017

Flynote: Practice — Judicial Case Management — Sanctions - Series of Non-Compliances by party and legal practitioner with the Court's Case Management Orders — Court will impose sanctions as contemplated in rules 53 and 54

Practice — Judicial Case Management — Sanctions – Factors to be taken into account - In the exercise of the discretion as to what sanctions should be imposed the Court also taking into account the case management history of the case, the

explanation or lack thereof offered for the particular non-compliance or non-compliances and the factors listed in Rule 56 of the Rules of Court –

Practice — Judicial Case Management — Sanctions – Factors - In the exercise of the discretion as to what sanctions should be imposed the question also arising whether or not the defendant's legal practitioner's remissness in the matter should be attributed to his client or not? –

Practice — Judicial Case Management — Sanctions – In casu Court finding that the limit beyond which a litigant cannot escape the results of his legal practitioner's lack of diligence or the insufficiency of the explanations tendered had been reached and that the Defendants continuous failure to deliver its witness statements, in non-compliance with the applicable Case Management Orders, had hampered the speedy disposal of this case. The important aim of the expeditious finalization of the case as embodied in the Rules of Court and the Case Management System was not achieved for that reason and that it be concluded that this failure was caused by remissness of a most serious degree and that it was this remissness that had thwarted the said central overriding objectives of the case management process in this case. The Court ultimately deemed it fit to exercise its discretion by striking the Defendant's pleadings and barring the Defendant from prosecuting its defences in accordance with Rules 53(2)(a) and (b) of the Rules of Court. As a result Default Judgment was granted in favour of the Plaintiff.

Summary: The facts appear from the Judgment.

ORDER

1. The defendant's application in terms of Rule 55 delivered on 22 June 2017 is hereby dismissed with costs.
2. The defendant's pleadings are hereby struck and the defendant is barred from prosecuting its defences, in accordance with Rules 53(2)(a) and (b) of the Rules of Court.

3. As a result the court grants default judgment in favour of the plaintiffs, against the defendant for:
 - 3.1 Payment to the 1st plaintiff in the amount of **N\$1 051 241.03**;
 - 3.2 Payment to the 2nd plaintiff in the amount of **N\$80 659.89**;
 - 3.3 Interest on the aforesaid amounts at the prescribed rate of 20% per annum, *a tempore morae* as from 25 March 2011 alternatively, 14 February 2012 to date of final payment;
 - 3.4 The reversal of all debits for interest charges debited by the defendant against each of the plaintiff accounts in question as from 01 April 2011 to date of this order.
 - 3.5 Costs of suit, such costs to include the costs of one instructed- and one instructing counsel.
4. The matter is regarded as finalised.

JUDGMENT

GEIER J:

[1] The arguments which served before me this morning in this case emanate from a sanctions order which this court made on the 16th of June 2017 and which directed the defendant to file an affidavit by a specified date explaining its failure to file witness statements to date and to show cause, why, sanctions as contemplated by Rules 53 and 54 of the Rules of Court should not be imposed. This order also regulated the procedure for the possible exchange of papers should the plaintiff decide to oppose the application to be released from sanctions on the part of the defendant.

[2] Before I turn to the arguments made by counsel in this matter, I believe that it is apposite to first set out the case management history of this case, which is a 2013 case, instituted as far back as February 2013.

THE CASE MANAGEMENT HISTORY

[3] The first significant event, after the exchange of pleadings, occurred on 6 May 2014, when the then Managing Judge gave notice of a Status Hearing for the 13th of May 2014. Importantly this notice states the purpose for calling the hearing namely:

‘ ... to determine the status of the matter ...’

and more importantly :

‘ ... to make such orders as are appropriate for the just ...’ - *and I emphasise*
– and ‘ ... speedy disposal of the case.’

[4] On the 13th of May 2014 a case plan provided by the parties was made an order of court.

[5] It is important to note that the case plan, which was so adopted by the then Managing Judge, directed that discovery was to be made within 20 days of the replication.

[6] The case was then postponed to 29 September 2014 for a case management hearing and on the 25 September 2014, the parties filed a case management report dated 13th of August 2014. That was the first case management report that was filed in this case.

[7] The first case management report recorded that the plaintiffs had made discovery. The report did not record, but it implied at the same time, that, by that stage the defendant had failed to make discovery.

[8] Importantly also, the first case management report recorded that expert testimony was not foreseen.

[9] This report was co-signed by the defendant's legal practitioner of record, Mr Slabber.

[10] The next court order of the 29th of September 2014 is missing from my papers.

[11] On the 29th of October 2014 the case was however postponed to 28 November 2014 for another case management hearing.

[12] On the 24th of November 2014 the case was postponed to the 19th of January 2015 for a status hearing.

[13] On the 19th of January 2015 the case was postponed to 16 February 2015 ' ... to allow for settlement ... '.

[14] On 16 February 2015 the case was postponed to 30 March 2015 to enable the parties ' ... to discuss settlement ... '.

[15] A status report was filed on 27 March 2015 suggesting that the matter should return to a case management hearing and accordingly, on 30 March 2015, the case was postponed to 27 April 2015 for the third time for a case management hearing.

[16] In anticipation of that event the parties now filed an amended joint case management report on 23 April 2015.

[17] Importantly that amended case management report now indicated that the plaintiffs' witness statements should now be delivered on or before 15 May 2015 and that the defendant's witness statements would be filed by 29 May 2015.

[18] It is also important to note that the parties recorded the dates for the filing of expert summaries which, for the plaintiffs' expert were to be filed on or before 29

May 2015, whereas the expert summaries on behalf of defendant had to be delivered on or before 12 June 2015.

[19] Again it was recorded that the Plaintiff had already made discovery and that the Defendant had not. It was now indicated that the Defendant ' ... shall file and deliver its discovery as well its respective bundle of discovered documents on or before 8 May 2015 ... '.

[20] The parties recorded once more that expert testimony was to be called and even that the adjudication of the qualifications of experts would be dealt with in the proposed pre-trial order, once the experts' reports, summaries and statements had been delivered.

[21] On the 27th of April 2015, this amended case management report was adopted by the court and the case was postponed to 29 June 2015 for a pre-trial hearing.

[22] On the 3rd of June 2015 a Status Report requesting an extension of time was filed and on the 29th of June 2015 the matter was postponed for a Status Hearing before Miller AJ, who then became the Managing Judge in this case. Miller AJ postponed the case to the 20th of August 2015, again for a status hearing. The case was then postponed from the 20th of August 2015 to the 12th of November for pre-trial and on the 12th of November 2015 he postponed the case to the 4th of February 2016 for another Status Hearing.

[23] Interestingly the Status Report filed on 3 February 2016 recorded that the defendant still had not filed the witness statements, which originally had to be filed by 27 April 2014 and subsequently by 29 May 2015.

[24] It was also recorded that the defendant still had not made any discovery.

[25] The report also lamented the fact that the plaintiff had also requested additional discovery in terms of Rule 28(8) of the Rules of Court as far back as the 14th of December 2015 and that this request had not still not been complied with by the 3rd of February 2016.

[26] On the 4th of February 2016 the case was again postponed for pre-trial to the 25th of February 2016.

[27] On the 25th of February the matter was postponed to 28 April 2016 for a Status Hearing.

[28] On the 28th of April 2016 the matter was postponed to the 30th of June 2016 for another Status Hearing.

[29] On the 30th of June 2016 the matter was postponed to 21 July 2016 again for pre-trial.

[30] This time the parties filed a pre-trial proposal dated 19 July 2016.

[31] Here it is important to note that this pre-trial proposal, in paragraph 13 (2) (d), recorded that the defendant intended to only call two witnesses, namely one Ryan Geysler and one Ina Muir.

[32] It was also pointed out that the case management report, which had been made an order of court on 27 April 2015, had directed:

- a) the plaintiff to deliver witness statements by the 19th of May 2015 and
- b) the defendant to deliver its witness statements by the 29th of May 2015, and
- c) that the plaintiffs had delivered their witness statements on the 19th of May 2015,

and

- d) that the defendant still had not delivered any witness statements, but that such witness statements would now be delivered on the 31st of August 2016.

[33] The parties again indicated that they would rely on expert testimony.

[34] It was further recorded that the plaintiff had delivered a Rule 28(8) Notice in December 2015 to which still no reply had been furnished by defendant.

[35] Importantly the parties now also envisaged that a joint inspection was to be conducted by the parties' experts and that an inspection by both parties' experts, on the defendant's systems, had been conducted during June 2016. Expert notices and summaries would now be delivered by the 31st of August 2016.

[36] On the 21st of July 2016 the pre-trial proposal was adopted by the managing judge and in such circumstances the proposed time lines so became court orders.

[37] On the 27th of July 2016 trial dates were allocated for 3 to 7 April 2017.

[38] Here it is important to note that this order gave the defendant more than eight months to get its house in order – and - to use a phrase - 'to get its ducks in a row for trial'.

[39] Miller AJ then retired during early 2017 and in such circumstances this file became allocated to me during or about February 2017. On an initial perusal of the file I noted that there had been no activity since July 2016, and, accordingly, I deemed it fit to issue an order, out of chambers, on 22 February 2017, reminding the parties that their case remained set down for trial for 3 to 7 April 2017.

[40] By the trial date it became clear that the defendant had still not made any discovery, had not complied with the Rule (28)(8) Notice and had not filed any witness statements.

[41] On the 31st of March 2017 - that was on the Friday before the Monday - on which the trial was due to start - an application in terms of Rule 55 was belatedly filed on the defendant's behalf. In that application the defendant now sought the court's condonation for the failure to file its witness statements and it also sought the postponement of the trial.

[42] The affidavit made in support of this application is short and accordingly I incorporate its contents into this judgment:

'I the undersigned,

Hereby state under oath:

1. I am attending to the matter for Defendant on behalf of Dr Weder, Kauta & Hoveka Inc.
2. In terms of the Pre-Trial Order the due date for filing Expert Witness Notices and Summaries was 31 August 2016, which Plaintiff duly complied with.
3. The understanding between me and Plaintiff's legal practitioner was that Defendant's two witness statements would be filed shortly after receipt of Plaintiff's expert witness summary.
4. After receipt of Plaintiff's expert witness summary I intended to attend to Defendant's witness statements promptly. Unfortunately these good intentions did not realise due to my deteriorating physical and mental abilities and thereafter entirely escaped my mind.
5. I was diagnosed with widespread lung and brain cancer on 01 March 2016 and then firstly underwent radiation therapy. Since May 2016 to date I receive tri-weekly chemotherapy. These treatments unfortunately affect physical and mental capacities.
6. During the last week of February 2017 my secretary informed me that Defendant's instructed Counsels have made enquiries as to their briefs. I in haste then attended to preparing these briefs. In doing so it to my shock and dismay dawned on me that I had not filed Defendant's two witness statements (Mr Geyser and Mrs Muir).
7. I immediately contacted Plaintiff's legal practitioner, Mr Kutzner, and informed him of my dire straits and requested whether Plaintiff would object to a postponement of the trial scheduled for 4 April 2017. Mr Kutzner reverted to me some week later indicating that Plaintiff would not object to an extremely late filing of Defendant's witness statement so that the trial could run its course as scheduled.
8. In the meantime Defendant's instructed counsel alerted me that Defendant would need to call as witness a Mr Muleka of PWC who at the time did an inspection of Plaintiff's computers. Defendant's in-house legal advisor established that Mr Muleka is currently based in Abu Dhabi and would be returning to Johannesburg shortly. To compound the time

frames Defendant's Senior Instructed Counsel, Mr Corbett, had a scheduled trip to Europe scheduled for 10 to 27 March 2017.

9. I reverted to Mr Kutzner informing him that in the circumstances it would be grossly reckless of me not to attempt to seek a postponement of the trial on behalf of Defendant.

10. Me and Mr Kutzner then met and he benevolently and graciously agreed that Plaintiff would not object to a postponement should the Court be inclined to do so. I prepared a Rule 32(9) report which Mr Kutzner and I signed on 14 March 2017. The original is attached hereto.

11. I accordingly pray that the Court condone my inexcusable mind lapses and grant a postponement of the trial to a date that suits the Court and the respective instructed Counsels. All Plaintiff's wasted costs as between attorney and client are to be borne by me personally, save for any instructed Counsel reservation fees that Plaintiff's might have.'

[43] Interestingly - and my immediate comment in this regard - is going to relate to paragraphs 3 and 7 of Mr Slabber's Affidavit where he refers, as a point of departure, to an understanding between him and the plaintiff's legal practitioner, that the witness statements could be filed shortly after receipt of the plaintiff's expert statement and where he indicates that this was not done or that they could now be filed shortly before trial. Here I need to point out that it is no longer open to the parties to agree to the relaxation of time lines imposed by case management orders, if one has regard to the requirements of Rules 54(1) and (2) of the Rules of Court.

[44] In the main Mr Slabber however alerts the court to his serious medical condition. He explains also how it came about that he realised that the required witness statement had not yet been filed.

[45] Here it needs to be pointed out that no exact dates are provided by Mr Slabber.

[46] Interestingly enough he now indicates for the first time that the defendant was now of the intention to call a Mr Muleka of Price Waterhouse Coopers and that this witness was currently in Abu Dhabi and would be returning to Johannesburg shortly.

[47] Instructed senior counsel was also on a scheduled trip in Europe and thus could not assist. Finding himself in such a fix he contacted Mr Kutzner, who acts on behalf of the plaintiff, and who benevolently, and graciously agreed that the plaintiff would not object to a postponement of the set trial and the late filing of witness statements.

[48] It is by now history that the court granted the postponement of trial. It did so reluctantly - and mainly - on the basis of Mr Slabber's serious medical condition.

[49] Importantly the court then refused to make an order relating to the requested condonation for the defendant's failure to file any witness statements. The decision on this aspect thus stood over and was further regulated by the order of 16 June 2017.

[50] As the postponement, as I have already said, was based- and essentially granted on compassionate grounds, I was also prepared to allocate new trial dates to the parties as soon as possible. This was also done to ameliorate the prejudice which had been occasioned to the plaintiffs by the further delay, whose cases had been delayed since 2013. Trial dates were not immediately available. Accordingly, and once this factual impasse had been resolved, a meeting was called in chambers for the allocation of new trial dates. This meeting occurred on 16 June 2017 on which date the court then set the matter down for trial in 2018 for the period of 5 to 9 February. On that occasion the court also made the abovementioned sanctions order as it became clear during the chamber meeting that the defendant still had not filed any witness statements by that date and subsequent to the postponement that had been granted on 3 April 2017.

[51] In response to this order Mr Slabber filed a second application in terms of Rule 55 in which he again requested condonation for the defendant's failure to file witness statements. Also this is a short affidavit and I therefore incorporate its contents into this judgment:

'I the undersigned,

ATTIE SLABBER

Hereby state under oath:

1. I am attending to the matter for Defendant on behalf of Dr Weder, Kauta & Hoveka Inc.
2. On 31 March 2017 I on behalf of Defendant brought an Application in terms of Rule 55 in support of which I attached an affidavit by myself setting out the reasons for my remiss in filing Defendant's witness statements.
3. In terms of the Court Order of 3 April 2017 the application for postponement was granted and the parties were directed to approach the Managing Judge in Chambers for new trial dates by 28 April 2017.
4. The meeting in chambers did not realise due to trial dates for 2018 not yet being available.
5. On 16 June 2017 a Case Management hearing was called for inter alia the allocation of trial dates.
6. A trial date for the week of 5 to 9 February 2018 was set and a Sanction Hearing for 6 July 2017 was ordered.
7. The reasons for Defendant not filing any witness statements since 3 April 2017 to date are set out in the following paragraphs.
8. Mr Muleka, the witness I referred to in paragraph 8 of my affidavit of 31 March 2017, returned from Abu Dhabi to South Africa only on 12 June 2017.
9. Defendant also during the last week of May instructed me, to consult with Mr Shane Kemp who is in Johannesburg as an expert witness. His Company has been doing IT security and penetration tests for Defendant for some time.
10. My logistical dilemma after 3 April 2017 is simply that two witnesses have to be flown in from South Africa and their time schedules and those of Defendant's two instructed counsels have to be co-ordinated. The one witness in any event only returned to South Africa on 12 June 2017.
11. Given the time schedules of Defendant's instructed counsels I regarded it not practical to arrange piecemeal consultations with Defendant's two local witnesses for purposes of filing some witness statements since 3 April 2017.

12. I envisage that all Defendant's witness statements will be ready to be filed by not later than 18 August 2017.
13. Given the trial date of February 2018, Plaintiff can hardly be prejudiced by the further delay.'

[52] My immediate comment on this affidavit is that it is glaring that again no precise dates were provided by Mr Slabber against which it can be determined which steps were taken by whom and when?

[53] It was also noted that no further reliance was placed on Mr Slabber's medical condition.

[54] It also emerged that during the period from 3 April 2017 to the date of the filing of the second affidavit the schedules of the two unnamed instructed counsel and the witnesses still had not been coordinated. No date, according to the affidavit, on which any such envisaged consultation or consultations were to occur, was disclosed. No firm basis was provided from which it can be ascertained that the further self-imposed time line for the filing of witness statements by 18 August 2017 would now- and could now, realistically, be achieved.

[55] It should be kept in mind in this regard that all previous promises, which had been made in this regard, had remained unfulfilled.

[56] On this occasion however the plaintiffs did avail themselves of the opportunity to answer to Mr Slabber's sanctions affidavit. As also this affidavit is fairly concise and I incorporate its contents into, on this judgment:

'I the undersigned,

CHRISTIAAN JOHANNES SNYMAN

do hereby make oath and state that:

1. I am:
a major male with full legal capacity;

the sole member of the First Plaintiff;

duly competent and authorised to depose to this affidavit and to oppose the Defendant's application for condonation for the late filing of its witness statements; personally, acquainted with the facts deposed to herein, which facts are both true and correct.

2. I have read the founding affidavit pursuant to paragraph 1 of 16 June 2017 Court order, deposed to by Mr. Attie Slabber. Before I answer the specific allegations therein contained I deem it necessary to provide the above Honourable Court with a brief history of this matter.

THE HISTORY

3. Summons in this matter was served on the Defendant in this matter on 20 February 2013, prior to the coming into force of the new rules of court;

3.1 On 11 April 2014, the above Honourable court issued an order compelling the Defendant to provide further particulars to a request for such particulars delivered on 12 December 2013.

3.2 Such further particulars were subsequently provided and the pleadings in the above matter closed on 12 May 2014;

3.3 Plaintiffs' claims against the Defendant is of limited compass. It is this:

3.3.1 On 25 March 2011, First Plaintiff had a credit balance on its current account held at defendant of N\$8,533.34 and I had a credit balance on my account at Defendant of N\$132,141.51;

3.3.2 On 25 March 2011, the defendant transferred or caused to be transferred amounts totaling N\$1,051,214.03 from First Plaintiff's account and an amount of N\$80,659.89 from my account to various unknown accounts which transfers were not authorised by Plaintiffs, not aimed at extinguishing any debt of the Plaintiffs and were fraudulent.

3.3.3 On 30 March 2011 Defendant, as it was compelled to do, duly credited First Plaintiff's and my accounts with the amounts so transferred.

3.3.4 Subsequently thereto the Defendant received for its own account and

amount of N\$83,591.12.

3.3.5 On 7 February 2012, the Defendant in writing admitted that the transactions in question were fraudulent.

3.3.6 On 13 February 2012, the Defendant notwithstanding its admission nonetheless debited the First Plaintiff's account and my account with the difference between the amounts fraudulently transferred and the amount recovered.

3.3.7 These debits were not authorised by First Plaintiff or me.

3.3.8 First Plaintiff and I also allege in the alternative that Defendant undertook, as an interim arrangement to credit First Plaintiff's account with the amount of N\$1,131,873.92, conduct a forensic investigation and reserved the right to recover such amount if the outcome determines "*no negligence or liability on Bank Windhoek.*"

3.3.9 The forensic report does not state that the defendant was not negligent.

3.3.10 Despite this Defendant nonetheless effected the unauthorised debits alluded to earlier.

3.4 On 9 December 2015, the Plaintiff delivered a request for specific discovery for numerous records. This request was not complied which caused a considerable delay in the finalization of the report by Plaintiffs' expert, which report was finalised on 27 June 2016.

3.5 In a status report delivered on 3 February 2016 it was recorded that in an amended case management report, made an order of court on 27 April 2015 the Defendant was required to deliver witness statements on/before 29 May 2015, which it has failed to do. The Defendant also failed by that time to deliver its discovery affidavit.

3.6 The parties' joint pre-trial report was signed and delivered on 19 July 2016. In such report, the Defendant indicate that it intends to call as witnesses:

3.6.1 Ryan Geyser;

3.6.2 Ina Muir.

3.7 The report contains no indication that Defendant intended calling any expert.

3.8 Notwithstanding the Defendants undertaking in the earlier amended case management report referred to above, to deliver its witness statements by 29 May 2015, by 19 July 2016 it had failed to deliver such statements.

3.9 The Defendant undertook to deliver such witness statements on/before 31 August 2016.

3.10 This report was adopted by and made an order of Court on 21 July 2016.

3.11 On 26 July 2016, the above Honourable Court set the matter down for trial on 3 to 7 April 2017.

3.12 On 22 February 2017, the above Honourable Court again confirmed the trial dates for 3 to 7 April 2017.

3.13 The reason provided at the time was, in essence, that, Defendant's legal practitioner of record forgot to deliver same. The costs were tendered.

3.14 My witness statement was delivered on 19 May 2015;

3.15 A summary of my expert's evidence was delivered on 1 September 2016 and an updated version on 2 March 2017.

3.16 On/about 31 March 2017 the Defendant brought an application in terms of Rule 55, requested a postponement to enable to deliver its witness statements and an undertaking was given to file same.

3.17 I have waited since at least 1 September 2016 for the trial to proceed.

3.18 I reluctantly agreed to a postponement.

3.19 I shall now deal with the Defendants' allegations.

4. **AD PARAGRAPH 1 THEREOF:**

4.1 I take note of the allegation therein.

5. **AD PARAGRAPH 2 THEREOF:**

5.1 I admit the allegation therein contained, including in particular the admission of remissness.

6. **AD PARAGRAPH 3, 4, 5 & 6 THEREOF:**

6.1 I admit the allegations therein contained.

7. **AD PARAGRAPH 7 THEREOF:**

7.1 I take note of the allegation therein contained.

8. **AD PARAGRAPH 8 THEREOF:**

8.1 I take note of the allegation therein contained.

8.2 I point out that in paragraph 8 of the Defendant's earlier application in terms of Rule 55, it is stated, amongst others that:

"...Defendant would need to call as witness Mr. Muleka of PWC who at the time did an inspection of Plaintiff's computers...Mr Muleka is currently based in Abu-Dhabi and would be returning to Johannesburg shortly..."

8.3 I am advised that a person who requires an indulgence must as soon as he/she realises that he has failed to comply and requires an indulgence:

8.3.1 Apply to court for such indulgence; and

8.3.2 Attempt to comply as soon as possible.

8.4 Since 31 March 2017 until 12 June 2017, when Mr Muleka allegedly returned to South-Africa, another two months and 12 days lapsed. This was four days before the parties had to appear in chambers on 16 June 2017.

8.5 Despite the fact that the said Mr. Muleka admittedly returned to South-Africa on 12 June 2017, his witness statement remains outstanding on date hereof.

8.6 I point out that neither Mr. Muleka nor Mr. Shane Kemp are witnesses identified in the pre-trial minutes. They cannot be called as witnesses unless the pre-trial minutes are amended. This will require further pre-trial proceedings.

8.7 The witness statements of the two witnesses identified in the pre-trial minutes of 19 July 2015, to wit: Ryan Geyser and Ina Muir have similarly not been delivered and remains outstanding. No explanation for this failure is provided.

9. **AD PARAGRAPH 9, 10 & 11 THEREOF:**

9.1 These allegations are so vague, bold and sketchy that I cannot answer same.

9.2 I point out that the delay since the last week of May 2017 until date hereof is not explained.

9.3 I submit that it is simply not sufficient to refer to a logistical dilemma without providing any detail as to when such witnesses will indeed be interviewed. I point out that it is not stated if consultations have been arranged and if so, when such consultation will be held.

9.4 I submit that if anything is to be gathered from the scan(t) information provided it is that the Defendant simply fails to give the matter the attention which it deserves.

10. I respectfully submit that the history of this matter and the paucity of information provided:

10.1 displays a total disregard for the structured form of litigation envisaged by the Rules of Court, which disregard is gaining momentum as the case progresses; and

10.2 fails to give the non-compliance the priority it deserves and that it has no real intention of purging its non-compliance in the near future at all.

11. I also respectfully submit further that my prejudice has reached a point where same can no longer be remedied by an appropriate order for costs. The Defendant has unlawfully

debited the amounts in question against First Plaintiff's and my accounts. It has had an enormous effect on me and my family. The Defendant simply, through its non-compliance, does everything in its power to delay the finalisation of this action.

12. Wherefore I humbly pray that the application for condonation be refused with costs, such costs to include the costs of one instructing and two instructed counsel.'

[57] My immediate comments on the answering affidavit are:

a) that the case management history bears out the averment that the plaintiffs have substantially complied at all times and with their case management obligations;

b) that it is correct that the defendant knew about the need to provide a witness statement for Mr Muleka since counsel alerted Mr Slabber to this need but that unfortunately in this regard no dates had been provided but that it can be safely be assumed that the defendant must have known of this requirement from or about February 2017 at the latest.

[58] In spite of this seemingly new realization, that Mr Muleka's evidence would now be required, the case management history exposes that the parties were well aware of the need and of their intent to utilise expert testimony as this would be required, as disclosed by the case management report of 23 April 2015 and the pre-trial proposal dated 19 June 2016. The contents of these reports, in my view, prove the acute awareness for the need of expert statements since April 2015 also on the Defendants part.

[59] It emerges further that the failure to comply with the orders of 27 April 2015 and of 21 July 2016 is not explained, save, and in so far as Mr Slabber's medical condition, as disclosed in his 31 March 2017 Rule 55 affidavit, has a bearing on this issue, since 1 March 2016. I will return to this aspect.

[60] Even if one accepts that it was difficult to file Mr Muleka's witness statement by now it is glaring that no explanation has been offered why the originally envisaged witness statements, ie. those of Mr Geyser and Mrs Muir were not filed long ago. The now advanced excuse that it would not be practical to arrange piece meal

consultations with the defendant's two local witnesses and the experts must be a recent fabrication which is to be rejected for the following reasons:

- a) If regard is had to the amended case management report of 23 April 2015 and the pre-trial proposal of 19 July 2016 - both of which were made orders of court - it emerges that at that stage already expert testimony was anticipated and was catered for;
- b) At no stage was the suggestion then made that it would not be practical to first file the witness statements, of the witnesses Muir and Geysler, piece meal;
- c) This suggestion is now made for the first time at the end of June 2017, at a stage when the impact of the string of fragrant non-compliances of the defendant in this regard are up for scrutiny in order to determine the appropriate sanctions in respect thereof.

[61] Against such background it must be inferred that the excuse offered in this regard was simply contrived as a stratagem to escape from the potential serious consequences that might be imposed in terms of Rules 52 and 53 of the rules of Court.

[62] On behalf of the plaintiff the point is well taken - and I quote:

'It was not sufficient to simply refer to a logistical dilemma without providing any detail as to when such witnesses will indeed be interviewed and that it was not even stated in such, if such consultations have been arranged and then they will be held". And further that the defendant fails to give the matter the attention it deserves that the conduct of the defendant this place a total disregard for the structure form of litigation as envisaged by the rules of court which disregard is gaining momentum as the case progresses. That the defendant fails to give the non-compliances the priority they deserve that the defendant has no real intention of (indistinct) the non-compliance in the future at all.'

ARGUMENT

[63] At the hearing of this matter Mr Malherbe, who appeared on behalf of the Defendant, faced the difficult task of having to ward off sanctions which were looming, given the afore sketched history of this matter. He hammered home the point that a postponement of the trial had been granted in this instance in early April 2017 to enable the Defendant to now get its house in order and that the plaintiffs' legal practitioner had agreed to such a postponement. He pointed out that it was inconsistent for the plaintiffs to now come and vehemently oppose the second application for condonation made in regard to the non-filing of witness statements. He pointed out that there was some confusion in the ranks of the defendant's legal practitioners as to what the impact of the court's failure to grant the sought condonation for the late filing of witness statements was, as already sought in the application of 31 March 2017.

[64] He pointed out that the defendant did face logistical difficulties as far as the one expert witness was concerned and he submitted from the bar that by now initial consultations had taken place and that a further consultation was apparently set for later in the month.

[65] Unfortunately these aspects, which could have been addressed in a replying affidavit - in respect of which a time line was also set by the court order of 16 June - was not utilised. I will however accept, although this is strictly speaking, not permissible, that the defendant has by now taken some steps to, eventually, procure the long-overdue witness statements.

[66] On the aspect of prejudice Mr Malherbe also repeatedly made the point that any prejudice that had been occasioned by the further delay in this matter would be cured by the continuous running of interest on the Plaintiff's claim. New trial dates had been set for February 2018 and any prejudice that would be suffered by the further delay of this case, would thus be cured through the running of such interest.

[67] He also submitted that the defendant considered itself under bar as far as the filing of witness statements was concerned.

[68] In regard to the latter argument it needs to be said immediately that I do not follow that argument. It is so that the rules of court provide for an automatic bar

when a party fails to deliver a pleading, as ordered in a case management order. A witness statement is not a pleading. Accordingly rule 54(3) of the Rules of Court has no application.

[69] Mr Malherbe is of course correct that the failure to file witness statements, as ordered, is a situation that could not just simply have been ignored. In such situation it would have been incumbent on the defendant - and the rules of court provide for this scenario – to bring an application in terms of Rule 55 - to request the extension of any ordered time line within which a particular step or proceeding would have had to be brought or taken.

[70] Mr Malherbe submitted further that the court should bear in mind that also a costs order could cure any prejudice occasioned to the plaintiffs. In this regard it can immediately be stated that Mr Slabber had personally tendered the wasted costs of the postponement of the trial in April 2017, on a higher scale, but that it would appear that a costs order will not really have the desired effect.

[71] Mr Malherbe then brought two decided cases to the court's attention. The one was the case of *Donatus v Muhamedrahimov & Others : Donatus v Ministry of Health and Social Services*¹, which I must say I have not read. At a cursory glance it however seems to me that the case relates to a failure to make discovery in accordance with a notice filed in terms of Rule 28(8) and what sanctions were to be applied as a result.

[72] The various passages, to which counsel drew the court's attention during the hearing, however indicate clearly that the judgment is to the effect that when a court is faced with the consideration of the imposition of sanctions, that any such consideration, and any discretion, that will be exercised in this regard, is to be made on a case by case basis, where the particular circumstances of each case will have to be taken into account. Obviously aspects of fairness and what is just will also come into play. I have no quarrel with these general principles, which will obviously have to be taken into account.

¹ (I 2304/2013; I 1573/2013) [2016] NAHCMD 49 (2 March 2016) See also : *Donatus v Ministry of Health and Social Welfare* 2016 (2) NR 532 (HC)

[73] The court was also alerted to its own judgement delivered in the case *Namhila v Johannes*² where this court had refused to condone a series of serious non-compliances on the part of defendant and - where importantly (also for this case) the point was made that the court - in most instances - would as a point of departure - avoid imposing sanctions that would - so to speak - shut the doors of the court to a litigant. The court had in that case also followed the established line of authority that, nevertheless, there time might come where a party could no longer hide behind the remissness of his or her or its legal practitioner of record. Ultimately – and this was also the request made by Mr Malherbe to this court – the court should not to shut the doors of the court to the defendant and that no sanctions should be imposed, save for a costs order.

[74] Mr Schickerling who appeared on behalf of the Plaintiffs re-emphasised the point, that had also been made in the answering affidavit, filed on behalf of his clients', that, if there was any non-compliance by a particular party to litigation, such party should immediately ask for condonation, that any such resultant application should be made promptly, and that these were factors that the court should take into account, against the Defendant, as this did not occur in this instance.

[75] With reference to the case management history of the case Mr Schickerling also made a number of submissions in regard to the defendant's identified witnesses and where the defendant had – initially - only named two witnesses that it intended to call – and - where Mr Muleka was only now - in 2017- identified as a possible further witness, in circumstances where this, for instance, had not been foreshadowed in Annexure D to the Further Particulars as delivered as far back as 6 May 2013. This submission was made with reference to a forensic data analysis, which had been conducted in regard to the facts underlying this case, and which had been filed under cover of a Price- Waterhouse Coopers letter and from which the various persons, that could potentially become witnesses in this matter, could be ascertained. If one would have regard to its contents it would appear that, save for Mrs Muir, none of the various involved parties or persons who could thus possibly be expected to become witness on the strength of the letter - and who are named in it – ever found their way into the defendant's list of witnesses.

² *Namhila v Johannes* (I3301/2011) [2013] NAHCMD 50 (28January2013) reported on the SAFLII website at <https://namiblii.org/na/judgment/high-court-main-division/13-49>

[76] It was also clear - and this was pertinently pointed out by Mr Schickerling - that the Defendant's new witness, that was now identified, belatedly in 2017, (Mr Muleka), did not feature at all in this report. Also no mention was made to the second new witness *Mr Shane Kemp* in such report.

[77] Mr Schickerling pointed to paragraph 3 of Mr Slabber's first affidavit in which the promise had been made that the defendant's two witness statements - and this could only have referred to the witnesses Muir and Geysler - would be filed shortly after the plaintiff's expert witness summary. That was a vague promise that was alluded to without providing specific dates, in circumstances, where it had already been clear that the plaintiff's witness summary had already been filed, (during last year and as far back as 1 September 2016), and in respect of which the Defendant had also received an updated version in 2017, and where all this had not triggered the promised action on the Defendant's part.

[78] Mr Schickerling further questioned why no summary, at least, could have been filed in respect of Mr Muleka who had already returned in June 2017. In this regard he pointed out that, nowadays, there were various options which could have assisted the Defendant with the compliance of its case management obligations and through which it would have been possible, with the assistance of modern technology, to conduct telephonic consultations, or consultations via Skype, or where draft statements could have been provided to counsel for settlement. He pointed out further that face- to- face consultations were no longer the only option, intimating thereby that all of the said possibilities would have been available to- and should have been utilised by the defendant - in order to ensure compliance with the case management orders - and - where at the end of the day - and only now - great reliance was placed on the argument that it would not be convenient to conduct piece meal consultations.

[79] He conceded - as far as the aspect of prejudice was concerned - that his client and also his instructing legal practitioner have sympathy with Mr Slabber's plight, but that his clients' change in stance was occasioned by the subsequent consideration that, as far as the plaintiffs were concerned, they could no longer allow the Defendant's current *modus operandi* , or rather the lack thereof, to continue.

[80] Mr Schickerling further referred to the case of *Ark Trading v Meridien Financial Services Namibia (Pty) Ltd*³ in which Levi AJ, on similar facts, had not been prepared to condone a long history of non-compliances. He further pointed out with reference to the decision made in *Disciplinary Committee for Legal Practitioners v Murorua*⁴ - where the Supreme Court had refused to condone the appellants' flagrant non-compliances of the Rules of Court - in circumstances where the disciplinary committee was constituted by senior admitted legal practitioners and where that party was also represented by instructed- and instructing counsel, all of whom were deemed to have an acute knowledge of the governing Rules of Court. In the matter serving now before the court a similar scenario prevailed as the defendant is a commercial bank and where that defendant had instructed a prominent legal firm to represent it in this litigation and where the defendant had engaged the services of instructed- and instructing counsel to present its case and where it appeared from the record that instructed counsel had even followed up from time up to time as to what the progress in the case was.

[81] The defendant and its legal practitioners should therefore be taken to know the obligations imposed by the Rules of Court and the obligations imposed on them by the case management system and orders where Judges are now tasked to drive the process.

[82] Mr Schickerling reminded the court that there comes a time where the failure by a legal practitioner can no longer be condoned and where such failure and remissness would attach to the client. He submitted, with the greatest respect to Mr Slabber's condition, that the time had come where somebody else should have taken charge of the defendant's litigation and where no explanation had been offered why this had not happened. He then made the point that this state of affairs simply should not be allowed to carry on.

[83] He also referred to the vague terminology employed by Mr Slabber in his second condonation affidavit from which it emerged only that the witness statements were now envisaged to be filed by the 18th of August 2017.

³ 1999 NR 230 (HC)

⁴ 2016 (2) NR 374 (SC)

[84] In any event - and as no replying affidavit had been filed on behalf of the defendant - the averments, made in the Plaintiffs' answering affidavit, should prevail.

[85] On the question of prejudice and the argument made by Mr Malherbe that the continued running of interest would cure any prejudice to the plaintiffs, he referred the court to a South African Constitutional Court decision⁵ in which that court had ruled that the *in duplum* rule would also continue to apply after the institution of litigation and that Mr Malherbe's submission should therefore be seen in that light.

[86] In conclusion he emphasised the prejudice suffered by his clients and that, in the circumstances of the matter, the court should dismiss the application with costs and that the court should grant judgment in favour of his clients, who had a liquidated claim in terms of Prayers 1, 2, 3, 4 and 9 of the particulars of claim.

[87] In reply Mr Malherbe again referred to the inconsistent stance adopted by the plaintiffs if one would have regard to the Status Report of 3 April 2017. He reminded the court that the defendant had been frank and had placed all the cards on the table. He pointed out that, in the circumstances of this case, where the matter had been set down for trial again, any prejudice could be cured by a costs order and that the court should ultimately take into account what was fair and just and that the court should not impose the severest of sanctions.

RESOLUTION

GENERAL CONSIDERATIONS:

[88] If one then, for this purpose, distances oneself, for one moment, from the immediate contentions made on behalf of the parties, the following further observations and findings can be made, keeping in mind also that the defendant was always tasked to explain its overall failure to any deliver witness statements, to date⁶. In this regard it is to be noted that:

⁵ See : *Paulsen v Slip Knot Inv 777 (Pty) Ltd* 2015 (3) SA 479 (CC) (2015 (5) BCLR 509; [2015] ZACC 5)

⁶ Compare : Paragraph 1 of the Sanctions Order of 16 June 2017 which reads : 'The defendant is to file an affidavit on or before the close of business of 23 June 2017, explaining its failure to file witness statements to date and to show cause, why, sanctions as contemplated in Rules 53 and 54 should not be imposed.'

- a) no explanation was given why the defendant had failed to file any witness statements, as originally ordered, by 29 May 2015;
- b) no explanation was given why the defendant had failed to deliver expert summaries, as originally ordered, by 12 June 2015;
- c) no explanation was offered why the defendant's witness statements were not, at least, filed by the 29th of July 2016, by the time of the pre-trial hearing.
- d) no explanation, save for Mr Slabber's medical condition, was given why the defendant failed to file any witness statements, as ordered, by 31 August 2016.;
- e) no explanation, save for Mr Slabber's medical condition, was given why expert summaries and notices were not delivered, as ordered, by 31 August 2016;
- f) no explanation was offered why such witness statements and/or expert notices and/or summaries were not at least delivered late or at all by the date of the trial for April 2017 – that is over a further period of more than eight months – which period must have been more than adequate to at least produce and deliver the two originally envisaged witness statements;
- g) why the court's order of 22 February 2017 - advising and reminding the parties that the trial date set for April 2017 would remain - did not trigger the late filing of witness statements, at least the late filing of those that could be obtained locally. Surely, even at that late stage, there would have been more than adequate time left to at least file the witness statements of the witnesses Geyser and Muir.

THE CONSIDERATION OF THE FACTORS LISTED IN RULE 56

[89] If one then turns against this background to the factors to be taken into account, as listed in Rule 56 (1) of the Rules of Court), it appears:

- (a) that the defendant - at no stage that - applied promptly for relief in terms of Rule 55;⁷
- (b) that the first attempt at doing so was done in order to essentially obtain a

⁷ Compare Rule 56(1)(a)

postponement of trial, that is when the first application in terms of Rule 55 of the rules was brought on 31 March 2017. This - as I have said before - was an application brought at the eleventh hour. In this regard the defendant had totally ignored the requirements set by Rule 96(3) of the rules which would have made it incumbent on the defendant to launch its application for the postponement of trial in accordance with the requirements set by that rule and not in terms of Rule 55, which application would also have had to be brought at least 10 days prior to trial;

(c) that all this could easily have been done in the time available to the Defendant and its legal practitioners, particularly since the self-admitted realisation that the trial was imminent, which occurred, according to the defendant's legal practitioners, during the last week of February 2017;

(d) that also the second application in terms of Rule 55 - that is the one now serving before the court - was not made at the defendant's instance. It, technically, emanated as a result of the court's order of 16 June 2016. At no stage did it seem to occur to the defendant and its legal practitioners that the various non-compliances where non-compliances with the court's case management orders which would have necessitated immediate and prompt applications to be submitted in terms of Rule 55 in order to be released from the binding effects of the applicable case management orders;

(e) that the continuous non-compliances with the various relevant court orders - of which Mr Slabber must have been acutely aware, as he played a central role in all of them - from the outset - point to a flagrant and intentional disregard of the defendant's obligations under case management. In this regard it should however immediately be said that I believe that it should be taken into account that Mr Slabber suffers from a serious medical condition which must have impacted negatively on his capacity to perform his case management obligations and that this aspect should be taken into account as constituting an ameliorating factor;⁸

(f) that I have already pointed out above, in detail, why I consider that there has not been a sufficient explanation for the various non-compliances perpetrated by the defendant in regard to its repeated failures to deliver any witness statements to

⁸ Compare Rule 56(1)(b)

date;⁹

(g) that it is also important to note - and I take this into account as an aggravating factor - that the defendant is also in other important respects in default: ie: the defendant has - to date - not complied with its discovery obligations, set by the Case Plan Order, as far back as 14 May 2014 - and - the defendant has - to date - not complied with- and replied to the Plaintiff's Rule 28(8) Notice, delivered as far back as 14 December 2015;¹⁰

(h) that the defendant's failure to file any witness statements - to date - is in no way attributable to the plaintiff's conduct;¹¹

THE ASPECT OF THE NEW TRIAL DATE SET

[90] At this stage a new trial date has been set. That is a fact. On the assumption that the defendant would now file its witness statements, that is by 18 August 2017, as promised, this second trial date could still be met. This is pointed out by Mr Slabber and the point was also repeatedly made by Mr Malherbe. It would appear in the final equation of the matter that this is also ultimately the strongest argument that can be mustered on behalf of the defendant, in the circumstances;

[91] Crucially however – and in view of the overall circumstances pertaining to this case – this argument fails to take into account the case's dilatory history and the Defendants bad track record. The argument obviously also ignores the string of previous unkept undertakings with reference to which it remains unlikely that the promised witness statements will even now, actually, be delivered on the promised new date;

THE ASPECT OF PREJUDICE TO THE OTHER PARTY

[92] This point is of course also made even without the consideration of the adverse consequences that the substantial delay in the prosecution of this case has already had on the plaintiffs. The plaintiffs have succinctly summarised the prejudice they have suffered as a result of the non-finalisation of this case which was instituted

⁹ Compare Rule 56(1)(c)

¹⁰ Compare Rule 56(1)(d)

¹¹ Compare Rule 56(1)(e)

as far back as 20 February 2013. They have been out of pocket in excess of N\$ 1 million as their banking accounts had been debited by the defendant (in their view) unlawfully. In addition Mr Snyman has set out how this has also impacted negatively on the 2nd plaintiff and his family in his answering affidavit delivered on 30 June 2017;

[93] I pause to point out that, on the papers before me, there is absolutely no reason why these averments should not be accepted. They clearly have to be taken into account and constitute an important factor against which any discretion is to be exercised in this case;

THE INTERESTS OF THE ADMINISTRATION OF JUSTICE

[94] Further it is so that, on the other hand, we have the defendant, a banking institution, that has managed to delay the finalisation of the plaintiff's case, since the beginning of 2013. This inordinate delay is evidenced also by this cases case management history which is clearly contrary to the overriding principles and objectives of the rules of court and the case management system which strives to achieve the finalisation of cases in the shortest period of time i.e. where cases are to be dealt with as expeditiously as possible as provided for, for example, in Rule 1(3) (d) of the Rules of Court.¹²

[95] In this regard this court is entitled to take into account also the extent to which parties have met any pre-trial requirements as provided for in Rule 4(a) of the Rules, the degree of promptness, or the lack thereof with which the parties have conducted the proceedings in terms of Rule 1(4)(c) and (d), and, the prejudice suffered as a consequence in terms of Rule 1 (4)(e).

DISPOSAL BENCHMARK CANNOT BE MET

[96] Although I accept that the referred to rules of court were initially not of application to this case it must at the same time be clear that they have been applied also in this matter since their promulgation. In such circumstances also the disposal

¹² Compare : Rule 1 (3) (d) provides : 'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively, as far as practicable, by ... (d) ensuring that case are dealt with expeditiously and fairly ... '.

timelines/benchmarks and policies set in Practice Direction 62 come into play. It is clear that this case is far beyond any applicable benchmark due to the conduct of the defendant in this litigation.

THE ASPECT OF THE DEFENDANT'S LEGAL PRACTITIONER'S MEDICAL CONDITION

[97] Finally, I should say something about the serious medical condition of the defendant's legal practitioner of record. This court is not at all insensitive to such condition from which Mr Slabber has suffered since the diagnosis of 1 March 2016. I have the greatest sympathy for his plight and the suffering he had- and has to endure since. This condition in the normal course would have gone a long way to sway any court to grant him the indulgences required.

[98] I can state categorically that this was also the primary reason why the court granted the postponement of trial earlier in April of this year.

[99] What remains inexplicable however is why the defendant's legal practitioner has not abdicated his litigation responsibilities in the acute realization - after all this is self-admitted in his affidavit filed on 31 March 2017 - that his working capacity has been negatively affected by his medical condition? While the reluctance to do so may, on the one hand, and in my respectful opinion, have been human, on the other however, Mr Slabber, being a senior and most respected legal practitioner of this court, should, in my respectful view, already have taken effective measures to avoid coming into a situation that he and his client once again find themselves in long ago. In this regard I take into account that a point can be- and was reached where this aspect can no longer prevail.

WHAT SANCTION TO IMPOSE?

[100] In the final equation this court must also take into account, when weighing what type of sanctions should be imposed, what the impact of the defendant's conduct on the administration of justice has been.

[101] This court has in numerous decisions made it clear - and the rules embody this - that also the following further below mentioned factors become relevant in this

regard. I can do no better to once again refer to the *Namhila v Johannes* decision, as cited by Mr Malherbe, in which I believe these additional relevant factors have been eloquently and pertinently addressed in the following manner:

[94] Should Mr Mbaeva's remissness in this matter, therefore be attributed to his client or not?

[95] In this regard the Appellate Division in *Moraliswani v Mamili*¹³, per Grosskopf JA, cited with approval¹⁴ what was said by Steyn CJ in *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C:

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.'¹⁵

[96] In my view that limit has been reached. The business of this court has come to a halt or at least has been severely hampered by Mr Mbaeva's flouting of the case management rules and the case management orders issued in this matter.

[97] Damaseb J P has stated in no uncertain terms that:

'The salutary rationale behind the new case management system is to ensure that the court's time and resources are deployed more productively.'¹⁶

[98] I respectfully associate myself also with what the Learned Judge President has stated further in this regard and I quote :

'As this court said although in a different context, but in terms that bear resonance in the present case :

in my view, the proper management of the roll of the court so as to afford as many litigants as possible, the opportunity to have their matters heard by the court is an important consideration to be placed in the scale in the court's exercise of the discretion, whether or not to grant an indulgence. The time taken up by wasteful litigation which could more productively and equitably have been deployed to entertain other matters must, in my view,

¹³1989 (4) SA 1 (A)

¹⁴At p 10 at A - C

¹⁵See also *Immelman v Loubser en 'n Ander* 1974 (3) SA 816 (A) 824A - B and *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799F

¹⁶See *Hübner v Krieger* 2012 (1) NR 191 (HC) at 192C at [1]

be an equally important consideration in determining whether or not to condone the failure to comply with the Rules of Court and orders of the court. It is a notorious fact that the roll of the High Court is overcrowded. Many matters deserving of placement on the roll do not receive court time, because of that litigants and their legal advisors must therefore realise that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the court.

In the interest of litigants and the public as a whole, not just the particular ones before court at any given time, the time has come for tighter court control of litigation and stricter adherence to timetables and court directions'...¹⁷.

[99] Finally, I take into account that legal practitioners and the parties that they represent have been put on notice, that the courts will no longer countenance the unlawful failure of parties and/or their legal practitioners to comply with case management rules and case management orders and that the failure to adhere thereto will attract sanctions.

[100] This emerges from what was stated in *De Waal v De Waal* 2011(2) NR 645 HC - also by the Learned Judge President - where the Court made it clear in no uncertain terms that:

Litigation is now no longer left to the parties alone. The resolution of disputes is now as much the business of the judges of this court as it is of the parties. Courts exist to serve the public as a whole and not merely the parties to a particular dispute before court at a given time. That is not possible if case management directives issued by the court are not respected. Parties and their legal practitioners must realise that the courts are going to impose the sanctions contemplated in subrule (16).¹⁸ , ¹⁹

[102] If one then – against this background - turns back and calls to mind the express purpose stated in the original Status Hearing Notice - issued in this case as far back a 6 May 2014 - it becomes clear that it was precisely the speedy disposal of this case that was hampered by the conduct, in the main, on the defendants part and that the length of the delay can be attributed to the greatest extent to the defendant's non-compliances with the various case management orders which were ironically issued with the aim to expedite also the finalisation of this case. This important aim was in such circumstances not achieved for that reason. It is clear that central to this failure is the part that the defendant has not played when it came to the filing of its

¹⁷*Hübner v Krieger* op cit at page 192 at para [2]

¹⁸At p 648 para [6]

¹⁹*Namhila v Johannes* op cit at [94] – [100]

witness statements. It must be concluded that this failure was caused by remissness of a most serious degree and that it was this remissness that thwarted the said central overriding objectives of the case management process in this case.

[103] It is also for all these reasons and those already sketched above and the facts, as analysed, that I ultimately deem it fit to exercise the discretion that I have in this regard in the following manner:

1. The defendant's application in terms of Rule 55 delivered on 30 June 2017 is dismissed with costs.
2. The Defendant's pleadings are struck and the Defendant is barred from prosecuting its defences in accordance with Rules 53(2)(a) and (b) of the Rules of Court.
3. As a result Default Judgment is granted in favour of the Plaintiff, as claimed, in terms of Prayers 1, 2, 3, 4 and 9 of the Particulars of Claim.
4. The case is regarded as finalised.

H GEIER
Judge

APPEARANCES

PLAINTIFFS:

J Schickerling

Instructed by Engling, Stritter & Partners,
Windhoek

DEFENDANT:

A Malherbe

Dr Weder, Kauta & Hoveka Inc, Windhoek