

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING IN TERMS OF RULE 64**

Case No: HC-MD-CIV-ACT-CON-2017/02946

In the matter between:

**HAROLD NDEVAMONA AKWENYE**

**PLAINTIFF**

**and**

**SOPHIA NDESHIPANDA AMADHILA**

**DEFENDANT**

**Neutral Citation:** *Akwenye v Amadhila* (HC-MD-CIV-ACT-CON-2017/02946)  
[2018] NAHCMD 252 (21 August 2018)

**CORAM:** PRINSLOO J

**Heard:** 30 July 2018

**Delivered:** 21 August 2018

**Reasons:** 23 August 2018

**Flynote:** Procedure – Notice in terms of rule 64 containing unconditional settlement offer – Such party to be cautious utilising rule 64 and must ensure strict compliance to the provisions of the rule cited in settling under rule 64.

**Summary:** The parties entered into an agreement in which the defendant breached the terms thereof and the plaintiff ensued to seek relief in terms of the agreement. The defendant however opposed the relief sought by the plaintiff.

On 26 October 2017, a case plan was adopted as filed by the parties and the matter was postponed to 30 November 2017 for a case management conference hearing. For various reasons advanced by the defendant's legal practitioners, the plea that should have been filed as per court order dated 26 October 2017 was not filed. Due to the defendant's failure to file her plea, the plaintiff proceeded to file an application for default judgment against the defendant. The defendant applied for condonation for her non-compliance with the relevant court order which was opposed by the plaintiff. The parties then proceeded with filing papers and this court's ruling dated 27 April 2018 refused condonation for defendant's non-compliance, rendering the defendant being barred *ipso facto* from partaking in court proceedings.

In a last resort attempt, the defendant filed a Rule 64 notice with an unconditional tender to settle the claim of the plaintiff. The defendant offered an amount of N\$ 769,334.87 to the plaintiff in full and final settlement of the claim against the defendant. Furthermore, the defendant filed a status report indicating to this court she gave the plaintiff a Rule 64 notice in which the plaintiff failed to respond to.

During submissions, the defendant was of the view that the court should take cognizance on the fact that the defendant made a *bona fide* offer on the alternative prayers to the plaintiff's claim, and submitted that the defendant should not be further sanctioned under the circumstances in the court's refusal for the plaintiff to accept offer made on the alternative claim.

The plaintiff, however, of the view that defendant was *ipso facto* barred from pleading as the condonation application incorporating the upliftment of the bar was denied. As a result, the defendant must appeal against this judgment and have it properly prosecuted. The plaintiff was furthermore of the view that in light of the

offer made on the plaintiff's alternative prayers, such would only be introduced if, and only when the court ruled upon the unenforceability of the alleged cancellation of the agreement in favor of the defendant, and seeing that the defendant is *ipso facto* barred from pleading, her defence is not before this court and therefor the plaintiff's claim stands unchallenged.

Held – It is important to understand that the plaintiff is not obliged to accept the offer/tender and if the plaintiff does not accept the tender the action proceeds in the normal way. Failure to accept an unconditional tender by a plaintiff can be to his or her own peril when the issue of cost is considered.

Held further – the rule 64 notice made by the defendant falls short of the requirement of rule 64 in light of the fact that the alternative claim by the plaintiff relied on by the defendant is not the main relief sought by the plaintiff.

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### ORDER

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The relief sought by the defendant to compel the plaintiff to accept her tender in terms of Rule 64 in respect of the claims are incompetent and leave is granted to the plaintiff to proceed with his application for default judgment.

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### JUDGMENT

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PRINSLOO J:

#### Introduction

[1] The plaintiff instituted action against the defendant for three different claims. Claim 1 constitutes a claim in terms of a written agreement of sale for fixed property situated in Windhoek. In terms of the agreement between the parties the

defendant sold the property to the plaintiff, and the plaintiff purchased the property for the purchase consideration of N\$ 521,286.19. The plaintiff would be entitled to transfer of the property on the payment by the plaintiff of the purchase consideration and payment of the transfer cost on demand of the defendant's conveyancer. Possession of the property would then be provided to the plaintiff upon registration of transfer of the property. The plaintiff in compliance with his obligations in terms of the written agreement paid the amount of N\$ 521,286.19 to Nedbank Namibia Ltd for the benefit of the defendant. The defendant breached the terms of the agreement in failing and refusing to give transfer of the property into the plaintiff's name, despite demand. In the alternative to claim 1 the plaintiff claimed on the basis of unjust enrichment payment in the amount defendant was so enriched and the plaintiff was so impoverished.

[2] Claim 2 is based on an oral lease agreement relating to the property in issue wherein the plaintiff claims payment in the amount of N\$ 126 000 for rental for the period June 2014 to July 2017 which is due, owing and payable. Claim 3 is based on a donation wherein the plaintiff donated a certain vehicle to the defendant, which donation the plaintiff revoked. In his prayers the plaintiff prays for the confirmation of the revocation of the donation and an order directing the defendant to retransfer the vehicle into the plaintiff's name and return possession of the vehicle to the plaintiff. In the alternative if it was found that the defendant was no longer in possession of the vehicle payment in the amount of N\$ 77 000.00.

[3] On 26 October 2017, this court adopted the case plan as filed by the parties and the matter was postponed to 30 November 2017 for a case management conference hearing. The defendant failed to file her plea as set out in the court order dated 26 October 2017. Due to the defendant's failure to file her plea as per court order dated 26 October 2017, the plaintiff proceeded to file application for default judgment against the defendant. The defendant applied for condonation for her non-compliance with the relevant court order which was opposed by the plaintiff. The parties then proceeded with filing papers and this court gave

judgment in light of the non-compliance by the defendant and this court made the following order:<sup>1</sup>

'a) The application for condoning the defendant's failure to comply with court order dated 26 October 2018 is refused with costs, cost of one instructed and one instructing counsel.

b) Matter is postponed to 24 May 2018 at 15:00 for Status Hearing (Reason: Plaintiff intend to move an application for default judgment in terms of Rule 15).

c) Aforesaid application must be set down in terms of the Rules and Practice Directions.'

[4] The result of the ruling dated 27 April 2018 is that the defendant is *ipso facto* barred from pleading.

[5] On 17 May 2018 the defendant filed a Notice in terms of Rule 64, which reads as follows:

'1. **KINDLY TAKE NOTICE** that the Defendant unconditionally tenders to settle the claim of the Plaintiff prayed for in paragraph 3, 6 and 12 of the Plaintiff's Particulars of Claim. The Defendant offers an amount of N\$ 769,334.87 to the Plaintiff in full and final settlement of the claim against the Defendant.'

[6] It is important to note that the paragraphs referred to in the Rule 64 relates to the alternative to claim 1, claim 2 and the alternative to claim 3, and the amount tendered appears to be the sum total of the monetary value of the aforementioned claims.

[7] On 31 May 2018 the plaintiff filed a notice of application for default judgment. Hereafter on 09/07/2018 the defendant filed a status report indicating that the defendant tendered payment in terms of Rule 64 but that the plaintiff has failed to

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<sup>1</sup> *Akwenye v Amadhila* (HC-MD-CIV-ACT-CON-2017/02946) [2018] NAHCMD 114 (27 April 2018).

respond to the offer. Defendant further submitted that the offer is reasonable in that it is based on the plaintiff's claim and that it would be in the interest of justice that the court compel the plaintiff to consider the offer. In turn the plaintiff filed a reply in terms of Rule 64 indicating that the plaintiff will not accept the tender as it is not regarded as reasonable.

[8] At the status hearing the counsels acting on behalf of the parties were ordered to file heads of argument on the issue if the court can compel the plaintiff to accept the offer in terms of Rule 64.

#### Submissions on behalf of the Defendant

[9] Ms. McLeod, on behalf of the defendant, conceded that the defendant is barred from pleading but argued that the court should take cognizance on the fact that she made a *bona fide* offer on the alternative prayers to the plaintiff's claim, and submitted that the defendant should not be further sanctioned under the circumstances in the court's refusal to compel the plaintiff to accept offer made on the alternative claim.

[10] In her heads of argument Ms. McLeod made submissions relating to the relationship and the socio-economic status of the parties, which is not relevant at this point in time and I will not discuss it for purposes of this ruling.

[11] Ms. McLeod further submitted that no case was made out to this court on the plaintiff's insistence on the main prayers. Consequently, the defendant is of the view that the plaintiff would not suffer any prejudice as the defendant has tendered in full on the alternative claim.

[12] In concluding, she submits that the plaintiff is taking advantage of the fact that the defendant is barred from pleading and at no stage did the plaintiff indicate that the offer made by the defendant on the alternative claim is not reasonable and thus the refusal of the plaintiff to accept the offer made by the defendant is *mala*

*fide* and prays for an order the Plaintiff must be compelled to accept the offer in terms of Rule 64.

#### Submissions on behalf of the Plaintiff

[13] Mrs. Delpont, on behalf of the plaintiff, submits that the defendant was *ipso facto* barred from pleading as the condonation application incorporating the upliftment of the bar was denied. As a result, the defendant must appeal against this judgment and have it properly prosecuted.

[14] Mrs. Delpont argued that the alternative claim was introduced if, and only when the court ruled upon the unenforceability of the alleged cancellation of the agreement in favor of the defendant, and seeing that the defendant is *ipso facto* barred from pleading her defence is not before this court and therefor the plaintiff's claim stands unchallenged.

[15] It was further submitted that the defendant's focus on the alternative claim is misguided and the relief sought to compel the plaintiff to accept the tender in respect of the alternative claim is therefore incompetent.

[16] In concluding, Mrs. Delpont submits that the defendant's disclosure of the Rule 64 notice should be regarded as irregular and incompetent and should be disregarded *in toto*.

#### Applicable legal principles and application to the facts

[13] Rule 64 stipulates that:

'(1) In an action where a sum of money is claimed, either alone or with other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim and the offer must be signed either by the defendant or by his or her legal practitioner if the latter has been authorized in writing to sign.

(2) Where the plaintiff claims the performance of some act by the defendant, the defendant may at any time tender either unconditionally or without prejudice to perform the act<sup>2</sup> and, unless the act has to be performed by the defendant personally, he or she must execute an irrevocable power or attorney authorizing the performance of the act which he or she must deliver to the registrar together with the tender.

(3) .....

(4) .....

(5) Notice of an offer or tender in terms of this rule must be given to all parties to the action and it must state whether the-

(a) offer or tender is unconditional or without prejudice as an offer of settlement;

(b) offer or tender is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made and further whether it is subject to conditions stated in the offer or tender;

(c) offer or tender is made by way of settlement of both the claim and costs or of the claim only; and

(d) defendant disclaims liability for the payment of costs or for part thereof, in which case the reason for such disclaimer must be given and the action may then be set down on the question of costs alone.

(6) A plaintiff or a party referred to in subrule (3) may within 10 days after the receipt of the notice referred to in subrule (5) or thereafter with the written consent of the defendant or third party or on the order of court given on such condition as the court may consider to be fair, accept an offer or tender, after which the registrar having satisfied himself or herself that the requirements of this subrule have been complied with, must hand over the power of attorney referred to in subrule (2) to the plaintiff or to his or her legal practitioner.

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<sup>2</sup> "performance of an act" for example the passing of transfer of property.



(7)- (9) .....

(10) An offer or tender in terms of this rule made 'without prejudice' must not be disclosed to the court at any time before judgment has been given and reference to such offer or tender must not appear on any file in the office of the registrar containing the papers in the cause or matter.

(11) .....

(12) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of a judge after judgment has been given as a factor relevant to the question of costs.

(13) A party who, contrary to this rule, personally or through any person representing him or her discloses an offer or tender referred to in this rule to the judge or the court is liable to have cost given against him or her even if he or she is successful in the action<sup>3</sup>.'

[14] Mrs. Delpont argued that disclosing the Rule 64 notice is irregular and should be disregarded, however the prohibition against disclosure applies to an offer or tender without prejudice. It does not apply to an unconditional tender or offer.<sup>4</sup> The defendant indicates in the Rule 64 notice that she unconditionally tender to settle the claim of the plaintiff. Having said that, it is indeed questionable if the tender is unconditional.

[15] An unconditional offer is designed for the case where the defendant admits liability on the plaintiff's claim, whole or in part, entitling the plaintiff to accept the offer and to sue for the balance of his or her claim at his peril.<sup>5</sup> In superior court practice an action is neither stayed nor terminated by an unconditional offer; the

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<sup>3</sup> See *PRIOR t/a PRO SECURITY v JACOBS t/a SOUTHERN ENGINEERING* 2007 (2) NR 564 (HC).

<sup>4</sup> Erasmus: Superior Court Practice at B1-242.

<sup>5</sup> *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 364E; *Gush v Protea Insurance Co Ltd* 1973 (4) SA 286 (E).

plaintiff is entitled to reject the offer and to increase the amount of his or her claim by amendment of his or her summons.<sup>6</sup>

[16] To consider if the tender was unconditional it is important to consider the wording of the Notice in terms of Rule 64. Under paragraph 4 of the notice it reads as follows:

**'FURTHER TAKE NOTICE** that the Defendant's offer is subject to the following conditions:

4.1 Ownership and possession of Erf No. 1305, Cimbebasia, Extension No.4, Windhoek remains vested in the Defendant;

4.2 That the written agreement signed on 23 April 2014 between the parties be cancelled;

4.3 Ownership and possession of the 2009 Volkswagen Polo motor vehicle with registration number N51935W remains vested in the Defendant, and

4.4 That the Plaintiff waives interest'

[17] It is clear that the defendant's tender is everything but unconditional and it only relates to the alternative to claim 1 and claim 2 and alternative to claim 3. It would appear that the defendant lost sight of the fact that claims 1 and 3 are for specific performance by the defendant. It is important to have regard to the preamble of alternative to claim 1 which reads as follows:

'In the event that the Honorable Court finding that the written agreement as pleaded above had not existed between the parties alternatively that the agreement so pleaded was duly cancelled by the defendant, alternatively invalid and/or unenforceable, the plaintiff claims as follows:....'

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<sup>6</sup> *Molete v Union National South British Insurance Co Ltd* 1982 (4) SA 178 (W).

Claim 3 is also not a straightforward monetary claim but indeed a prayer for registration and delivery of the vehicle and the alternative is only pleaded in the event that the vehicle was disposed of by the defendant and no longer in her possession.

[18] Therefor from reading the plaintiff's particulars of claim the alternatives to claims 1 and 3 will only be introduced if and when the court rules upon the unenforceability of the agreement in favor of the defendant, or in the case of claim 3 if the vehicle has been disposed of.

[19] Any tender in respect of claims 1 and 3 should be made in terms of Rule 64(2) which deals with specific performance and not in terms of Rule 64(1) which deals with monetary claims. The only offer capable of settling a monetary claim is an offer for the payment of a sum of money tendered and this will only apply to claim 2. I am satisfied that no tender was made in terms of Rule 64(2) to satisfy claims 1 and 3; and the tender that was made in respect of the alternative to claims are clearly made conditionally on the premise that the plaintiff does not pursue claim 1 and 3 further.

[20] It is Ms. McLeod's submission that this court should compel the plaintiff to accept her tender and that the plaintiff is unreasonable in not doing so. Ms. McLeod could however not support her prayer with any case law. It is important to understand that the plaintiff is not obliged to accept the offer/tender and if the plaintiff does not accept the tender the action proceeds in the normal way. Failure to accept an unconditional tender by a plaintiff can be to his or her own peril when the issue of cost is considered.

[21] For all intents and purposes, the rule 64 notice made by the defendant is a last ditch effort in an attempt to satisfy the plaintiff's claim however the attempt made falls short of the requirement of rule 64 in light of the fact that the alternative claim by the plaintiff relied on by the defendant does not or is not the main relief

sought by the plaintiff. It is not for the defendant to pick and choose which claim is suitable to satisfy and act upon it accordingly.

[23] My order is hereby as follows:

The relief sought by the defendant to compel the plaintiff to accept her tender in terms of Rule 64 in respect of the claims are incompetent and leave is granted to the plaintiff to proceed with his application for default judgment.

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J S Prinsloo  
Judge

#### APPEARANCES

PLAINTIFF: A Delport  
instructed by Kirsten & Co., Windhoek

DEFENDANT: J McCleod  
of Shikongo Law Chambers, Windhoek