

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: Kassian Mukuve Mbathera vs Commissioner General, Namibian Correctional Services: Raphael Tuhafeni Hamunyela and Four Others.	Case No: HC-MD-CIV-ACT-OTH-2018/03778
	Division of Court: High Court, Main Division
Heard before: Honourable Justice Herman Oosthuizen	Date of hearing: 15 April 2019
	Delivered on: 10 May 2019
Neutral citation: <i>Mbathera vs Commissioner General, Namibian Correctional Services and Hamunyela</i> (HC-MD-ACT-OTH-2018/03778) [2019] NAHCMD 141 (10 May 2019).	
Result on merits: Plaintiff is not sanctioned. Amicus curiae appointed.	
The order: Having heard Mr Mbathera the plaintiff in person, and Mr Ncube , counsel for the defendants, and having read the documents filed of record: IT IS ORDERED THAT: [1] Plaintiff's non-compliance with the court order(s) is condoned. [2] Adv Phatela is appointed as amicus curiae to assist and represent the plaintiff. [3] Plaintiff's opportunity to file a replication to the special plea of non-joinder is preserved and to be exercised within a reasonable time to be agreed between counsel for the respective parties. [4] The special plea of non-joinder shall be heard and adjudicated with the merits in the main case.	

[5] A status hearing shall be held on Monday, **10 June 2019** at **14H00**.

Reasons for orders:

[1] On 18 January 2019 the court made the following order:

- '(1) The case is postponed to 04/03/2019 at 14:00 for Status hearing (Reason: Documents Exchange).
- (2) Special plea of prescription re English oral exam succeeds.
- (3) Defendants shall plead to the remainder and do so on or before 15 February 2019.
- (4) Plaintiff shall reply on or before 28 February 2019.'

[2] Plaintiff failed to replicate timeously and at ll.

[3] The court made the following order on 4 March 2019:

- '(1) The case is postponed to 15/04/2019 at 15:30 for Sanctions hearing (Reason: Documents Exchange).
- 54 (2) Plaintiff failed to replicate on or before 28/02/2019 and is barred in terms of Rule of the Court Rules.
- (3) Plaintiff shall file a condonation application on or before 20/03/2019(Rules 55 and 56).
- (4) Defendants shall answer on or before 03/04/2019.
- (5) Plaintiff shall reply on or before 11/04/2019.
- (6) Plaintiff's attention is drawn to Rule 53 of the Rules of the High Court.
- the (7) First defendant and his Officers at the Windhoek Correctional Facility shall avail plaintiff with assistance in order to comply with this Court Order.'

[4] Plaintiff is a prisoner serving a long sentence, with no means to instruct a private legal practitioner and until date could not obtain effective assistance from the Legal Aid Board.

[5] Rule 17(1) provides that 'The court must seek to give effect to the overriding objective referred to in rule1 when it exercises any power given to it under these rules or in interpreting any other rule of procedure or practice direction applicable in the court.'

[6] Rule 1(3). 'The overriding objective of the rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by -

- (a) ensuring that the parties are on equal footing;
- (b) dealing with a cause or matter in ways which are proportionate to -
 - (i) the amount or value of the monetary claim involved,
 - (ii) the importance of the cause,
 - (iii) the complexity of the issues and the financial position of the parties:
- (c) ensuring that cases are dealt with expeditiously and fairly;
- (d) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other causes.'

[7] 'These are rules for the conduct of proceedings in the court and for giving effect to the provisions of Article 12(1) of the Namibian constitution and the overriding objective set out in sub-rule (3) governs the application of these rules.' (Rule 1(2)).

[8] Having read and considered the documentation submitted by the plaintiff subsequent to the Court Order of 4 March 2019 and after hearing the plaintiff and Mr Ncube on 15 April 2019, it is the considered view of the court not to impose any of the sanctions provided for in Rule 53(2), but to order that plaintiff shall henceforth be represented by a court appointed amicus curiae counsel. Due to the workload of civil action judges, managing judges of which I am one may become irritated with unrepresented litigants and the manner in which they present their cases. The Court is sensitive to the foregoing.

[9] Adv Thabang Phatela, a member of the Society of Advocates has consented to be appointed as amicus curiae for the plaintiff.

[10] The court appoint Adv Phatela as amicus curiae to assist the plaintiff.

[11] The court condone the late (non-filing) of plaintiff's replication as ordered and do so in order to facilitate the future filing, within a reasonable time, of a replication to the special plea of non-joinder, if so advised.

[12] In the circumstances it will be unfair to non-suit the plaintiff and to impede his fair trial rights under the Namibian Constitution.

[13] In the premises -

[13.1] Plaintiff's non-compliance with the court order(s) is condoned.

[13.2] Adv Phatela is appointed as amicus curiae to assist and represent the plaintiff.

[13.3] Plaintiff's opportunity to file a replication to the special plea of non-joinder is preserved and to be exercised within a reasonable time to be agreed between counsel for the respective parties.

[13.4] The special plea of non-joinder shall be heard and adjudicated with the merits in the main case.

[13.5] A status hearing shall be held on Monday, **10 June 2019** at **14H00**.

Judge's signature:	Note to the parties:
Counsel:	
Plaintiff(s)	Defendant (s)

Mr Kassian Mukuve Mbathera
Plaintiff in Person
Windhoek Correctional Facility

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