

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Erika Penelope Husselmann v Elroy Harold Saem</i>	Case No.: HC-MD-CIV-ACT-OTH-2016/02293
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr. Justice B Usiku J	Date of hearing: 10 May 2019
	Delivered on: 10 May 2019
Neutral citation: <i>Husselmann v Saem</i> (HC-MD-CIV-ACT- OTH-2016/02293) [2019] NACHMD 145 (10 May 2019)	
The Order: Having heard Ms. Petherbridge counsel for the Plaintiffs and Adv. De Jager , counsel for the First and Second Defendants and having read documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. The application for default judgment is dismissed.2. The plaintiffs are ordered to pay the costs of the first and second defendants occasioned by the application for default judgment, jointly and severally the one paying the other to be absolved, on the scale of attorney and client and such costs include costs of one instructing and one instructed legal practitioner. It is further ordered that such costs shall not be limited as provided in rule 32(11).	

3. The matter is postponed to 24 July 2019 at 15:15 for a Pre-Trial Conference.
4. The parties are directed to file a joint pre-trial report on or before 18 July 2019.

Reasons: Practice Direction 61(9)

[1] The matter before court today for hearing is the plaintiffs' application for default judgment.

[2] On 22 January 2019 the plaintiffs filed an application for default judgment, in the midst of a pending action, after the parties had filed their respective witness statements. The basis for the application for default judgment was allegedly that the defendants had not filed a notice to defend the action, after the sixth plaintiff was joined to the action on the 29 March 2017.

[3] The defendants opposed the said application for default judgment and filed a notice in terms of rule 66(1)(c) thereto. The defendants also duly delivered their heads of argument and subsequently paginated and indexed the court file in terms of Practice Directions 48(2). In their rule 66(1)(c) notice and in their heads of argument, the defendants prayed that the plaintiffs' application be dismissed with costs on the scale of attorney and own client and that such costs should include costs of one instructing and one instructed legal practitioner. Further, the defendants also prayed that such costs not be limited as provided in rule 32(11).

[4] The plaintiffs were directed in terms of the court order dated 13 March 2019 to file their heads of argument by 03 May 2019. The plaintiffs failed to do so. Furthermore, the plaintiffs did not paginate and index the court file despite the provisions of rule 131 (8) and Practice Directions 48(1).

[5] On the 08 May 2019, about one day before the date scheduled for hearing of the application (namely the 10 May 2019), the plaintiffs withdrew the application for default judgment and tendered taxed costs of the defendants. On the same day, the defendants, in response to the plaintiffs' withdrawal of the application, filed a status report indicating that the

plaintiffs will still move for a special penal adverse costs order against the plaintiffs.

[6] In regard the matter presently before court, the defendants contend that in terms of the provisions of rule 97(1), the plaintiffs may not withdraw their application for default judgment without consent of the parties or leave of court. The purported withdrawal of the application was done after the matter was set down. The plaintiffs do not have the consent of the defendants to withdraw the application. Furthermore, the plaintiffs have not applied for leave of court to withdraw the application. On that basis, the defendants contend that the application for default judgment be dismissed with costs on a punitive scale.

[7] The plaintiffs contend that they could only withdraw the application after obtaining counsel's advice to that effect. Furthermore, the plaintiffs' legal representative contends that the law firm currently representing the plaintiffs came on record as plaintiffs' legal representatives only at a later stage after the plaintiffs' erstwhile lawyers withdrew. In regard to the terms of rule 97(1), the plaintiffs submit that they are applying for leave of the court, from the bar, to withdraw the application for default judgment. Furthermore, the plaintiffs submit that an order for costs at on a punitive scale is not justified in the circumstances.

[8] I have considered the documents and papers filed in regard to the withdrawal of the application for default judgment. I have also considered the oral arguments advanced by the parties in respect of this matter. There is no satisfactory explanation given why the application was not withdrawn before the matter was set down for hearing. The application for leave to withdraw the application for default judgment stands to be declined. I am of the opinion that the plaintiffs' application for default judgment was ill-advised and unnecessary, in view of the fact that the defendants have clearly entered appearance to defend the plaintiffs' action on the 11th August 2016. Furthermore, the defendants have filed their respective plea to the plaintiff's particulars of claim on 30 November 2016. There was, therefore, no basis for launching an application for default judgment in the circumstances. In addition, there is no acceptable explanation furnished by the plaintiffs for acting in the manner they did.

[9] For the foregoing reasons I am of the opinion that the circumstances of this case justify the granting of a costs order in favour of the defendants on the scale of attorney and client. For the same reasons, I will order that the costs in this matter shall not be limited in terms of rule 32(11). I am further satisfied that the defendants are entitled in this matter to a costs order including costs of one instructing and one instructed legal practitioner.

[10] In the result I, therefore, make an order in the following terms:

1. The application for default judgment is dismissed.
2. The plaintiffs are ordered to pay the costs of the first and second defendants occasioned by the application for default judgment, jointly and severally the one paying the other to be absolved, on the scale of attorney and client and such costs to include costs of one instructing and one instructed legal practitioner. It is further ordered that such costs shall not be limited as provided in rule 32(11).
3. The matter is postponed to 24 July 2019 at 15:15 for a Pre-Trial Conference.
4. The parties are directed to file a joint pre-trial report on or before 18 July 2019.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiffs	First and Second Defendants
M Petherbridge Of Petherbridge Law Chambers, Windhoek	B De Jager Instructed by Delport Legal Practitioners, Windhoek

