

“ANNEXURE 11”  
Practice Directive 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> <i>Nghimutina v North-South Links Construction And Another</i>	<b>Case No:</b> HC-MD-CIV-ACT-CON- 2018/00434
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard before:</b> Honourable Mr Justice Usiku	<b>Date of hearing:</b> 21 September 2018 and 01 February 2019
	<b>Delivered on:</b> 01 February 2019  <b>Reasons:</b> 07 February 2019
<b>Neutral citation:</b> <i>Nghimutina v North-South Links Construction And Another</i> (HC-MD-CIV-ACT-CON- 2018/00434) [2019] NAHCMD 17 (07 February 2019)	
<b>The order:</b>  Having heard <b>Mr. Tjitori</b> , on behalf of the Plaintiff and having read the documents filed of record:  <b>IT IS ORDERED THAT:</b>  <ol style="list-style-type: none"><li>1. The Plaintiff’s claim is dismissed.</li><li>2. I make no order as to costs.</li><li>3. The matter is removed from the roll and regarded finalized.</li></ol>	
<b>Reasons for orders:</b>	

## Introduction

[1] The Plaintiff instituted proceedings out of this court against the Defendants on 12 February 2018, in which she claims for the following relief:

- (a) Payment of the amount of N\$ 116 465;
- (b) Interest at the rate of 20% per annum from date of judgment until date of final payment;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

[2] The Plaintiff averred that she and the First Defendant have entered into a partly written and partly oral agreement. In terms of the aforesaid contract the First Defendant agreed to extend and renovate the Plaintiff's house (namely: certain erf No. 4023, Katutura, Windhoek). The contract price was N\$ 647 000.40.

[3] The parties later agreed that the construction and renovation works be reduced, to bring the contract price to N\$ 456 000. [The total loan amount approved by the Plaintiff's bank ("First Capital") amounted to N\$ 456 000]. The said reduction of the works entailed removal of interlock paving and reduction of the boundary-wall, as appeared in a quotation provided by the First Defendant.

[4] The Plaintiff later informed the "Defendants" to proceed to include the interlock paving and boundary wall as per the first quotation. Thereafter, the Defendants proceeded with the extension and renovation works.

[5] First Capital paid the Defendants the total amount of N\$ 476 520. The Defendants did not finish the works on account that the funds availed to them were not sufficient to complete the extension and renovations works.

[6] The Plaintiff obtained a quotation from other contractors indicating that the total amount required to complete the outstanding works amount to N\$ 116 465. Then the Plaintiff demanded payment of N\$ 116 465, from the Defendants who declined to make such payment. The Plaintiff thereafter instituted the present action.

### Court proceedings

[7] The First Defendant did not enter appearance to defend. The Second Defendant entered appearance to defend. However, later in the course of case management proceedings, sanctions were imposed on the Second Defendant in terms of which his pleadings were struck out in terms of Rule 53 (2) (b). Thereafter, the Plaintiff prayed for default judgment.

[8] The court directed the Plaintiff to file an affidavit, setting out evidence in support of the relief sought:

(a) in view of her averments in paragraph 10 of the particulars of claim, that she had instructed the Defendants to proceed in terms of the first quotation of N\$ 647 906.40 and in view of paragraph 19 of the particulars of claim, where she averred that First Capital paid the Defendants N\$ 499 507.

(b) in view of her allegation that First Capital had paid the Defendants an amount of N\$ 100 000.00 meant for the extra-work of interlock paving and boundary-wall as per the first quotation, over and above the amount of N\$ 456 000 approved by First Capital.

[9] In her affidavit, the Plaintiff corrected her version, to the effect that the actual amount paid by First Capital to the Defendants was N\$ 476 520 (and not N\$ 499 507). Besides that, the evidence in the affidavit is not helpful in clarifying the issues set out by the court above.

[10] After the hearing of 21 September 2018, the court allowed the Plaintiff further opportunity to address its concerns, in the following terms:

**'IT IS RECORDED THAT:**

*In terms of paragraph 10 of the particulars of claim, the Plaintiff and the Defendants agreed that the Defendants may proceed in terms of the first quotation. The first quotation (which is the basis of the contract) provides that the Plaintiff would pay the Defendants N\$ 647 906, for the works to be completed. The Plaintiff, through First Capital, only paid N\$ 476 520. Now the Plaintiff seeks damages in respect of uncompleted works, though the agreed quoted amount of N\$ 647,906 was not paid by*

*Plaintiff to Defendant. The Plaintiff has not placed on record that the value of service/materials performed/delivered by the Defendants, fell below the value of N\$ 476 520, which the Plaintiff paid to the Defendants.*

***IT IS HEREBY ORDERED THAT:***

- 1 The Plaintiff may, by affidavit, place before court the missing evidence as set out above, on or before 28/01/2019;*
- 2. The case is postponed to 01/02/2019 at 09:00 for the hearing of the application in terms of which the Plaintiff seeks judgment in her favour.'*

[11] On the 01<sup>st</sup> February 2019 the Plaintiff gave oral evidence. In sum, her evidence was to the effect that she had informed the Defendants to proceed in terms of the first quotation on the understanding that she would pay for the interlock paving and boundary wall once she receives N\$ 100 000 from her Veterans Benefit Project. Beyond that, her evidence is not helpful in addressing the court's concerns as set out above. The Plaintiff did not offer evidence to the effect that the total value of the works done by the Defendants is less than the total amount of N\$ 476,520 paid to them.

Analysis

[12] In terms of paragraph 10 of the particulars of claim, the Plaintiff and the Defendants agreed that the Defendants should proceed with the construction/renovation works, in terms of the first quotation. The first quotation which is the basis of the contract, provides that the Plaintiff would pay the Defendants N\$ 647,906 for the works to be completed.

[13] The Plaintiff, through First Capital only paid N\$ 476 520 to the Defendants. The Defendants, the Plaintiff claims, did not finish the works. Now the Plaintiff seeks damages in respect of uncompleted/unfinished works, even though the quoted amount of N\$ 647 906 agreed by the parties was not paid by the Plaintiff to the Defendants.

[14] For the Plaintiff to succeed in her claim, she must prove that:

- (a) she performed her obligation in terms of the contract,
- (b) the Defendants breached the contract
- (c) she suffered damages as a result of the breach, and

(d) the quantum of the damages.

[15] The Plaintiff has not proved any of the above elements. In my opinion, the agreement averred to by the Plaintiff that the Defendants were to proceed in terms of the first quotation of N\$ 647 906 has the effect that the Plaintiff would have to pay the Defendants the total amount of N\$ 647 906 for the works to be completed. The Plaintiff did not pay such amount. Furthermore, the Plaintiff has not placed on record evidence that the value of the services/materials performed/delivered by the Defendants fell below the value of N\$ 476 520 which the Plaintiff paid to the Defendants.

[16] For the foregoing reasons the claim of the Plaintiff stands to be dismissed.

Order

[17] In the premises, I make the following order:

1. The Plaintiff's claim is dismissed.
2. I make no order as to costs.
3. The matter is removed from the roll and regarded finalized.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b>	<b>First Defendant</b>
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