



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

Case No: I 724/2016

In the matter between:

TSUMEB MALL (PTY) LTD

PLAINTIFF

and

**HALLIE INVESTMENT NUMBER TWO HUNDRED AND
TWENTY-TWO CC T/A SPUR
PATRICK KAUTA**

1ST DEFENDANT

2ND DEFENDANT

Neutral citation: *Tsumeb Mall (Pty) Ltd v Hallie Investment Number Two Hundred and Twenty-Two (I 724/2016) [2019] NAHCMD 201 (21 June 2019)*

Coram: USIKU, J

Heard on: 28 March 2019

Delivered: 21 June 2019

Flynote: Practice – Applications and Motions – Application for relief from sanctions – Analysis of rules 53, 54 and 56 in respect of sanctions – Application for relief from sanctions reserved for situations where a rule, practice direction or court order provides for automatic sanctions in the case of default and not applicable to situations where a

litigant was afforded opportunity to explain the default and he/she either fails to do so or where his/her reasons are found to be not good reasons and sanctions imposed pursuant thereto – In the latter circumstances, the remedy for the litigant is to apply for rescission or variation of the court order in question or to appeal against such order – Defendants’ application for relief from sanctions dismissed with costs.

Summary: The defendants were ordered to file their witness statements by a certain date. They failed to do so. Subsequent to that, the defendants were ordered to file a sanctions affidavits by a certain date, explaining their reasons for the failure to file witness statements and showing cause why sanctions contemplated under rule 53 (2) should not be imposed. The defendants failed to do so. However, the defendants filed a sanctions affidavit about three days later. The defendants did not apply for condonation for the late filing of the sanctions affidavit and no condonation, therefore, was granted. The court imposed sanctions striking-out the pleadings filed by the defendants in terms of rule 53(2)(b) and dismissing the defendants’ counterclaim in terms of rule 53(2)(c). The defendants filed an application for relief from sanctions. The court held that the court order imposing sanctions is not the type of court order in respect of which an application for relief from sanctions may be applied for in terms of rule 56. The remedy for the defendants lies in applying for and obtaining rescission or variation of the relevant court order, or alternatively lies in an appeal against such order. Application for relief from sanctions dismissed with costs.

ORDER

1. The defendants’ application for relief from sanctions, imposed by this court on 01 August 2018, is hereby dismissed.
2. The defendants are ordered to pay jointly and severally the one paying the other to be absolved, the costs of the plaintiff occasioned by this application, such costs are to include costs of one instructing and one instructed legal practitioner.
3. The matter is postponed to 31 July 2019 for purposes of making such orders as are appropriate for the just and speedy disposal of the case.

4. The party/parties are directed to file a status report on or before 25 July 2019.

JUDGMENT

USIKU, J:

Introduction

[1] This is an application by the first and second defendants for relief from sanctions imposed by this court on 01 August 2018.

[2] On 01 August 2018 this court made an order in the following terms:

'In the absence of both parties and having read the documents filed of record in chambers:

IT IS RECORDED THAT:

By court order dated the 28 February 2018 the Defendants were ordered to file their witness statements on or before the 18 May 2018. The Defendants did not do so. The Defendants also did not apply for condonation for the non-compliance with the court order dated 28 February 2018. By court order dated 06 June 2018, the Defendants were directed to file a sanctions affidavit on or before the 27 July 2018. The Defendants did not do so. Instead the Defendants filed a sanctions affidavit on 31 July 2018. No reasons have been furnished for this non-compliance and no condonation application has been filed in this respect. From the sanctions affidavit, it is clear that the Defendants were aware as of mid-April 2018 that they would not be in position to meet the 18 May 2018 deadline, yet they did not apply for an extension of time. In the explanation furnished, no indication is given as to when the Defendants would be in position to file their witness statements. All in all, this court is not satisfied with the explanation given by the Defendants, and the undermentioned sanctions are imposed.

IT IS ORDERED THAT:

1. The pleadings, including the defence, filed by the Defendants are hereby struck out in terms of rule 53(2) (b).
2. The counterclaim filed by the 1st Defendant is dismissed in terms of Rule 53(2) (c), with costs.
3. The Plaintiff is directed to file a damages affidavit on or before the **18 October 2018**, in proof of its claim as set out in claim "B" of the particulars of claim, as well as file a draft order for the relief that the Plaintiff prays for.
4. The matter is postponed to **24 October 2018** at **15:15** for hearing the Plaintiff in respect of the relief they seek.'

[3] The reference to the order dated 28 February 2018 in the recordal part of the order is erroneous and ought to have referred to the order dated 28 March 2018. There is no order dated 28 February 2018. It was the order dated 28 March 2018 that directed the defendants to file their witness statements by 18 May 2018.

[4] Subsequent to the court order dated 01 August 2018 set out above, the defendants launched the present application for relief from the sanctions, on 20 September 2018 seeking an order in the following terms:

- '1. That the Applicants be relieved from the sanctions which were imposed by the court order of 01 August 2018, in terms of Rule 54(1) of the Rules of Court.
2. Alternatively to prayer 1 above, that, in terms of Rule 54 (1), the sanctions which were imposed on the applicants to be relaxed and that the bar on the Applicants be uplifted and leave be granted to the Applicants to defend the matter and to further prosecute their counterclaim.
3. That the time within which the Applicants have to file their witness statements including the expert opinion be extended and the Applicants are allowed to file the witness statements two days after this order.
4. That in the event of the Respondent opposing this application, Respondent be ordered to pay the costs thereof.
5. That the Respondent are ordered to pay the Applicants' wasted costs of 01 August 2018.

6. That the above Honourable Court grant the Applicants such further and/or alternative relief, as to it may seem fit.'

[5] The above application is opposed by the plaintiff.

Background

[6] On the 8th March 2016, the plaintiff instituted action against the first and second defendants jointly and severally, the one paying the other to be absolved, in respect of two claims. The first claim is, among other things, for declaration of cancellation of a lease agreement entered into by and between the parties, eviction of the first defendant from certain premises, payment of the amount of N\$ 472 230.86 plus interest thereon. The second claim is for payment of damages in the amount of N\$ 1,892.44 per day with effect from 01 March 2016, escalating annually at 6% per annum, with the first escalation starting from 01 October 2016 and thereafter annually on the 01 October of each following year until the expiration of the lease agreement i.e 30 September 2019, alternatively until such time when the premises have been re-let, together with payment of interest.

[7] The defendants entered appearance to defend the action. Later on, the first defendant filed, among other things, a counterclaim, in which the first defendant claimed for the return by the plaintiff of certain movable goods situated at the leased premises. The plaintiff defends against the counterclaim on the basis that the plaintiff is allegedly entitled to retain the movable goods in question on account of a hypothec that it allegedly has over the goods in respect of the amounts due by the first and second defendants in terms of the lease agreement.

[8] On 25 January 2017 this court granted judgment in favour of the plaintiff against the first defendant in respect of the first claim only. The matter then proceeded against the first defendant in respect of the second claim, and against the second defendant in respect of the first claim (insofar as it is applicable) and the second claim.

[9] On the 28 March 2018 the court ordered the plaintiff to file its witness statements by the 18 April 2018 and the defendants to file their witness statements by the 18 May 2018. The matter was then postponed to 06 June 2018 for a pre-trial conference. The parties were directed, in the same court order, to file a joint pre-trial report by the 30 May 2018.

[10] The plaintiff filed its witness statements timeously. The defendants did not file any witness statement by 18 May 2018, nor did the defendants file any application for extension of time or for condonation. As a consequence of the defendants' default to comply with the court order of 28 March 2018 the pre-trial conference previously scheduled for 06 June 2018 could not be held and the court had to postpone the matter to a future date for a sanctions hearing.

[11] On 06 June 2018 the court made an order in the following terms:

'Having heard **Mr Schurz**, counsel for the Plaintiff **Ms Kuzeeko**, counsel for First and Second Defendants and having read the documents filed of record:

IT IS ORDERED THAT:

1. The Defendants are to file a sanctions affidavit on or before **27 July 2018** explaining reasons for their failure to comply with court order dated 28 March 2018 (failure to file Defendants witness statements on or before 18 May 2018) and showing cause why sanctions contemplated under Rule 53(2) should not be imposed.
2. The case is postponed to **01 August 2018 at 15:15** for a sanctions hearing.'

[12] The defendants did not, again, comply with the above court order, nor did they apply for extension of time or condonation. Instead the defendants filed a sanctions affidavit on 31 July 2018, less than a day before the 01 August 2018, the date scheduled for sanctions hearing.

[13] On the 01 August 2018 the court made the sanctions order as more fully set out in paragraph 2 hereof. The defendants now apply for relief from the sanctions imposed in terms of the order dated 01 August 2018.

The defendants' version

[14] In their founding affidavit, the deponent to the defendants' affidavit sought to explain, among other things, issues raised in the court order of 01 August 2018 as issues of concern. Among such issues, the deponent submitted that the court misdirected itself by alleging that the defendants failed to comply with an order dated 28 February 2018 instead of the court order of 28 March 2018. This argument by the defendants does not advance their case. The reference to a court order of 28 February 2018 is a patent error. There is no court order in the file dated 28 February 2018 and that error does not absolve the defendants from the obligation to comply with existing court orders.

[15] In regard to their failure to file witness statements by the 18 May 2018 the defendants explain that they were of the view that the witness statements filed by the plaintiff were not rule-compliant. The defendants do not explain the basis upon which they were entitled to disregard the court order on account of their view that the plaintiff's witness statements are not rule-compliant. In addition, the defendants state that they were advised to secure an expert witness and they could only secure such witness on 28 May 2018. When it became clear that the defendants would not be able to comply with the 18 May 2018 deadline, the defendants were aware that they could apply for the extension of time within which to file the witness statements, in terms of rule 55 (1). The defendants state that they did not do so. The reason for not doing so, the defendants claim, is due to "inadvertence". However, the defendants argue that the non-compliance with the court order was not due to wilful disregard of the order, but due to oversight.¹

¹ Para 27 of the defendants' founding affidavit

[16] In regard to the non-compliance with the court order dated 06 June 2018 (failure to file a sanctions affidavit by 27 July 2018) the defendants explain that they wished to file witness statements (which they could not file by 18 May 2018) together with the sanctions affidavit. The defendants did not explain why the sanctions affidavit could not be filed separately from witness statements. Furthermore, the defendants did not establish a link between the terms of the order dated 06 June 2018 and the filing of witness statements together with the sanctions affidavit.

[17] The defendants proceed to lament the severity of the sanctions imposed in terms of the court order of 01 August 2018. They argue that the effect of such order is that the defendants are non-suited.

[18] In their replying affidavit, the defendants contend that the plaintiff's answering affidavit lacks averments necessary to show that the opposition to the defendants' application is duly authorised by the plaintiff. The defendants, therefore, argue that the plaintiff's answering affidavit be struck-out with costs and that the application for relief from sanctions be considered on an unopposed basis.

The plaintiff's version

[19] In its response to the defendants' application, the deponent to the plaintiff's answering affidavit contends that the court order of 01 August 2018, among other things, dismissed the defendants' counterclaim. The dismissal of the counterclaim, the plaintiff argues, is final in effect and this court is *functus officio* in that regard. The plaintiff submits that the defendants should have instead appealed against the order dismissing the counterclaim.

[20] In regard to the defendants' failure to file their witness statements by 18 May 2018, the plaintiff submits that nothing prevented the defendants from approaching the court, prior to the 18 May 2018, for the extension of time-limits. The defendants did not do so, they simply disregarded the court order.

[21] As far as the court order of 06 June 2018 is concerned, the plaintiff submits that the defendants did not give explanation for their non-compliance. That court order did not request the defendant to file witness statements along with a sanctions affidavit and, therefore, the defendants cannot use the delay in the compilation of witness statements as an excuse for not complying with the court order dated 06 June 2018.

[22] As regards to the defendants' *point in limine* to the effect that the plaintiff's attorney of record does not have authority to oppose the present application, the plaintiff contends that the point is a weak one. The second defendants had interacted with plaintiff's attorney of record without questioning her authority and has recently addressed a rule 32(9) letter to her asking whether the plaintiff would oppose this application. The plaintiff's attorney of record answered that the plaintiff would oppose the application. The plaintiff further contends that the defendants have not stated their grounds for believing that plaintiff's attorney of record is not authorised to oppose the present application.

Analysis

[23] I now turn to consider whether the defendants are entitled to the relief they seek in terms of the notice of motion. The defendants bring the present application in terms of rule 54(1)². Rule 54 provides as follows:

'54. (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for a failure to comply imposed by rule, practice direction or court order has effect and consequences for such failure and such effect and consequences follow, unless the party in default applies for and is granted relaxation, extension of time or relief from sanction.

(2) Where a rule, practice direction or court order -

- (a) requires a party to do something within a specified time; or
- (b) specifies the consequences of a failure to comply,

² Paragraph 2 of the founding affidavit.

the time for doing the act in question may not be extended by agreement between the parties.

- (3) Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.
- (4)

[24] In my opinion, rule 54(1) simply states the effect and consequences for failure to comply with a rule, practice direction, or court order where a rule, practice direction or court order in question has prescribed a certain sanction for a non-compliance therewith. Subrule (1) clarifies that the effect and consequences for the failure to comply with a rule, practice direction or court order are those imposed by the relevant rule, practice direction or court order. The subrule further adds that a defaulting party may avert the outcome prescribed or imposed by the relevant rule, practice direction or court order if such party applies for and is granted relaxation, extension of time or relief from sanctions.

[25] Examples of rules that prescribe the effect and consequences for failure to comply include rules 23(7)³, 28(2)⁴, 28(13)⁵, 29(1)⁶ and 93(5)⁷. In other words rule 54(1) is confined to a rule or court order that specifies consequences that would follow in the event of non-compliance therewith. Put differently, rule 54 refers to a rule or court order that provides for automatic sanctions in the case of default.

[26] Insofar as rule 54 (1) refers to a court order, this is an order that prescribes the effect and consequences that will follow in the event of failure to comply with the terms of the court order in question. An example of such an order includes an order couched in the following terms:

*'The parties must deliver witness statements on or before 28 June 2019. A party may not rely on any witness evidence other than that of a witness whose statement has been delivered in terms of this court order.'*⁸

or:

'The plaintiff and defendant having failed to file their respective witness statements by due date under the court order dated 15 June 2019, the following order is issued:

1. unless the plaintiff files its witness statements on or before 28 June 2019, its claim will be struck-out without further order of the court;

³ Rule 23(7) provides: 'If no indication is given that an application or proceeding in terms of subrule 3(a), (b) or (c) will be made or initiated, the party failing to do so is precluded from bringing such proceeding unless-

- (a) it is an application seeking security for costs; or
- (b) the managing judge on good cause shown determines otherwise'

⁴ Rule 28 (2) provides: ' A document, analogue or digital recording that has not been disclosed and discovered in terms of this rule may not, except with the leave of the managing judge granted on such terms as he or she may determine, be used for any purpose at the trial by the party who failed to disclose it, but any –

- (a) other party may use such document; and
- (b) any document attached to the pleadings on which that party relies in support of allegations made by that party may be used by that party without discovery thereof under this rule.'

⁵ Rule 28(13) provides: 'If the party ordered by the managing judge to comply in terms of subrule (12) fails to do so, the managing judge may dismiss that party's claim or strike out his or her defence.'

⁶ Rule 29(1) provides: ' A person may not call as a witness any person to give evidence as an expert on any matter in respect of which the evidence of an expert witness may be received unless –

- (a) that person has been granted leave by the court to do so or all the parties to the suit have consented to the calling of the witness; or
- (b) that person has complied with this rule,'

⁷ Rule 93(5) provides: ' If a witness statement for use at the trial is not served within the time specified by the court the witness may not be called to give oral evidence, unless the court on good cause shown permits such witness to give oral evidence.'

⁸ See a similar type of an order made in terms of a similar rule in the matter of *Durrant v Chief Constable of Avon and Somerset Constabulary* (2013) EWCA Civ 1624 (17 December 2013) para 15.

2. unless the defendant files its witness statements on or before 28 June 2019, its claim will be struck-out without further order of the court.⁹

[27] The effect and consequences of failure to comply with the type of order as appears above, is that the sanction for failure to comply imposed or prescribed by the court order, comes into operation automatically, unless the party in default applies for and is granted relief from sanctions.

[28] In such circumstances the defaulting party should, in my opinion, apply for relief from sanctions in terms of rule 56(1), and not in terms of rule 54 because rule 54 does not provide remedy in such a situation.

[29] The example of a court order given above is different from a court order imposing sanctions in terms of rule 53(2) in circumstances where the defaulting party was afforded opportunity to explain the default and to show cause why the sanctions contemplated under that rule should not be imposed. If the defaulting party was afforded opportunity to explain why the failure or default occurred and the party either failed to furnish the explanation or having furnished the explanation such explanation is found to be not a good reason for the default and the court imposes sanctions pursuant thereto, such party, in my opinion, cannot as happened in the present case, merely apply for relief from the sanctions.

[30] In other words, rule 53 contemplates imposition of sanctions on a defaulting party after the court had afforded a defaulting party an opportunity to explain the default and such party either fails to explain or the explanation is found by the court not to be reasonable.¹⁰ Whereas the effect and consequences of failure to comply with a rule or

⁹ See a similar type of an order made in terms of a similar rule in the matter of *Oak Cash and Carry Ltd. V British Gas Trading Ltd* (2016) EWCA Civ 153 (15 March 2016) para 14.

¹⁰ Rule 53(1) reads: '(1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to -

- (a).....
- (b).....
- (c).....
- (d).....
- (e).....
- (d).....

court order referred to under rule 54 follow automatically upon the default without affording the defaulting party an opportunity to be heard. In my opinion, the application for relief from sanctions referred to under rule 56 applies in respect of a failure to comply with a rule or court order referred to under rule 54 and does not apply to sanctions imposed under rule 53.

[31] I now turn to examine the provisions of rule 56(1), which read as follows:

'56.(1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including –

- (a) whether the application for relief has been made promptly;
- (b) whether the failure to comply is intentional;
- (c) whether there is sufficient explanation for the failure;
- (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) whether the trial date or the likely trial date can still be met if relief is granted;
- (g) the effect which the failure to comply has or is likely to have on each party; and
- (h) the effect which the granting of relief would have on each party and the interests of the administration of justices.

(2).....

(3).....'

[32] In the first place, rule 56(1) states that this rule is engaged on application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order. In my opinion, the application referred to is directed at a particular rule, practice direction or court order which had stipulated an adverse consequence in the event of failure to comply with the terms of its provisions. The first task of the court when confronted with such application is to identify the rule, practice direction or court

the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).

(2).....'

order not complied with. Thereafter, the court shall identify the nature of the failure to comply, which has triggered the operation of the rule, practice direction or court order in question.

[33] In the second place, rule 56(1) provides that when seized with the application for relief from sanction, the court will consider all the circumstances of the case, including factors (a) to (h) as set out under that rule.

[34] Having stated the foregoing, the next issue I turn to is: whether it is the intention of the rules of court that upon the imposition of sanctions in terms of rule 53(2), as happened in the present case, the next course of action to be taken by the litigant aggrieved by the sanctions order is to apply for relief from sanctions in terms of rule 56(1).

[35] In the case of *Quenet Capital Pty Ltd v Transnamib Holdings Limited*,¹¹ Masuku J, confronted with a similar issue made the following lapidary remarks:

“.....My view was premised on the fact that even if condonation were granted, that would not in any way dispose of the order dismissing the applicant’s defence. It was in my view necessary for the applicant to have applied for rescission or setting aside of that specific order as it is the one that closes the court’s portals to the applicant regarding defending the matter at the present moment. Condonation would still not assist the applicant at all.”

[36] I am in agreement with the views stated in the abovementioned excerpt and I am of the opinion that the above views apply to the present case.

[37] In the present matter, the court made the order dated 06 June 2018 directing the defendants to file a sanctions affidavit on or before 27 July 2018, at the time when the defendants were already in breach of the court order dated 28 March 2018 (failure to file witness statements by 18 May 2018). The 06 June 2018 court order specified that the

¹¹ Case No. I2679/2015 [2016] NAHCMD 104 (08 April 2016) para 21.

defendants must explain on or before 27 July 2018 reasons for their failure to comply with the 28 March 2018 order and show cause why the sanctions contemplated under rule 53(2) should not be imposed. The defendants were not galvanised into action by the 06 June 2018 order. They failed to comply with the 06 June 2018 order. They did not apply for condonation for such failure. Instead they filed a sanctions affidavit on 31 July 2018. The court did not condone the non-compliance with the 06 June 2018 order. As such, the sanctions affidavit of 31 July 2018 was improperly before court. In any event such affidavit did not provide acceptable explanation for the default in question and did not show cause why the relevant sanctions should not be imposed.

[38] In my opinion the fact that the defendants failed to comply with the 06 June 2018 is a pointer towards the seriousness and significance of the non-compliance. This is for two reasons. Firstly, the defendants are in breach of two successive court orders. Secondly, the court has underlined in the court order of 06 June 2018 the importance of compliance with the court order by specifying that sanctions contemplated under rule 53(2) are going to be considered. Thus, the sanctions imposed in the court order of 01 August 2018 did not come like a bolt out of the blue. The defendants were alerted thereto by the 06 June 2018 order and knew that some sanctions in term of rule 53 (2) would be imposed even if they did not know what sanction would actually be imposed. In other words this is not a matter where it may be said that the defendants did not know that they were at risk of sanctions being imposed. Furthermore, I am of the opinion that the sanctions imposed in this matter are proportionate to the seriousness and significance of the non-compliance, especially when viewed against the background that the defendants did not provide a reasonable explanation for the defaults.

[39] The court order of 01 August 2018 having been made in the foregoing circumstances, I am of the view that it is not open to the defendants, (and it is not the intention of the rules of court) to apply for relief from the sanctions. The considerations of finality of court orders and judgments and the undesirability of allowing litigants to have multiple bites at the cherry, do not permit the defendants to assail the propriety of the court order of 01 August 2018, under the guise of an application for relief from

sanctions. The defendants should have applied for rescission or setting aside of the court order in question, as it is that court order that closes the court's doors to the defendants. Alternatively the defendants should have brought two applications (separate or combined) namely: application for rescission/variation of the court order of 01 August 2018, and then application for relief from sanctions. In such an event the application for rescission would be considered first and if such application is successful and the order of 01 August 2018 is out of the way then the defendants would have to contend with the issue of why sanctions should not be imposed in respect of the non-compliance with the 28 March 2018 and 06 June 2018 orders. The application for relief from sanctions is not applicable in the present circumstances.

[40] In a similar matter, where a litigant sought relief whose effect if granted, would have amounted to rescission or variation of an order previously made by the court, Prinsloo J had the following remarks to say¹²:

[18] In effect, what I have before me is a request to vary the court order dated 01 November 2017 in the following terms:

'That the cost order of 01 November 2017 is not limited to N\$ 20 000.00;.....'

[19] It is trite that once a court has duly pronounced a final judgment or order, it has in itself no authority to correct, alter or supplement such judgment or order by reason that the court thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised. There are however a few exceptions to this general rule where the court may vary or rescind its orders or judgments, which have been codified in Rule 103 of the Rules of Court.....'

Then the learned judge proceeded to add at para 20-21 that:

[20] It is common cause that insofar as Rule 103 is concerned, this court can only rescind or vary its order or judgment when there is an ambiguity, error or mistake. Included in the mix though are matters where an order or judgment in respect of which the court granted interest or costs granted without being argued.

[21] What is evident from the wording of the rule is that in order for the court to consider variation or rescission an application must be brought on notice. Defendant

¹² Spangenberg v Kloppers HC-MD-CIV-ACT-OTH- 2017/01338 [2018] NAHCMD 81 (5 April 2018)

failed to bring an application on notice to all parties wherein the relief sought was clearly set out. There is therefore effectively no application before this court to consider. However, the court has acceded to the request of defendant to hear his argument regarding the issue of costs.'

At paragraph 33 she came to the following conclusion:

'[33] I am therefore of the opinion that the provisions of rule 103 do not find application in this matter before me to have the costs order revisited and that this court is *functus officio*. As a result, the order therefore stands.'

[41] I am fully in agreement with the principles enunciated in the foregoing excerpts and I am of the opinion that such principles are applicable to the present case, insofar as the defendants appear to seek for the variation of the court order of 01 August 2018 without bringing an application meeting the requirements of a rescission/variation application.

[42] In the present matter counsel for the defendants underlined, during oral arguments, that the defendants are not contending that the order of 01 August 2018 was granted erroneously and therefore rule 103 is not applicable.

[43] As I am of the opinion that the course taken by the defendants does not entitle them in the circumstances, to the relief they seek, it is not necessary for me to address other issues raised by the parties in the heads of argument.

[44] However, in the event that I turn out to be wrong in my view that the defendants have taken an incorrect course, I should state that I also hold the following views. I am also of the opinion that the *point in limine* raised by the defendants regarding the authority of the plaintiff's attorney of record to oppose the present application, is a weak challenge, on the basis that the defendants have not established the basis for their belief that the plaintiff's attorney is not so authorised. In the circumstances of the case, I am satisfied on the available evidence as set out in the answering affidavit that the

deponent to the plaintiff's answering affidavit is fully authorised to oppose the application. The defendants' *point in limine* therefore stands to be dismissed.

[45] Insofar as the merits of the defendants' application are concerned, in addition to what is already stated in the foregoing paragraphs, I am of the view that the defendants non-compliance with the court orders of 28 March 2018 and 06 June 2018 amounts to serious defaults. The defendants have not furnished this court with acceptable explanation for the default. As a result of the failure to comply with the court order of 28 March 2018, the pre-trial conference which was scheduled to take place on the 06 June 2018 could not take place as the court had to postpone the matter to 01 August 2018 for sanctions. The non-compliance disrupted the progress of the action and gave rise to successive satellite applications¹³ including the present one. Inevitably, that led to this matter taking an unfair amount of the already thinly spread judicial resources away from other equally deserving matters. Taking all the circumstances of the case into consideration, the relief prayed for by the defendants in the present application should not be granted and the application stands to be dismissed.

[46] As regards the issue of costs, the general rule is that costs follow the event. I am of the view that the general rule should apply to this case.

Conclusions

[47] In summary, I am of the view that the 01 August 2018 court order is not a type of a court order in respect of which an application for relief from sanctions may be made. The 01 August 2018 court order has final effect. If the defendants are dissatisfied with such court order their remedy is to apply for rescission or variation, or to appeal against the 01 August 2018 court order. It is the court order of 01 August 2018 that closes the doors of the court to the defendants regarding their wish to defend the matter. In

¹³ The defendants have indicated that they intend to file an application in terms of rule 61 (irregular proceedings) in respect of a damages affidavit filed by the plaintiff on 19 September 2018 pursuant to the court order of 01 August 2018. For that purpose the defendants have applied to this court for directions as to the filing and exchange of further documents relating thereto. On 09 November 2018 this court ruled, among other things, that the defendants seek directions in respect of the intended rule 61 application after the finalisation of the present application (application for relief from sanctions) should the defendants still be so advised at that stage.

absence of any application to rescind/vary the court order, the present application by the defendants stands to be dismissed with costs.

[48] In the result I make the following order:

1. The defendants' application for relief from sanctions, imposed by this court on 01 August 2018, is hereby dismissed.
2. The defendants are ordered to pay jointly and severally the one paying the other to be absolved, the costs of the plaintiff occasioned by this application, such costs are to include costs of one instructing and one instructed legal practitioner.
3. The matter is postponed to 31 July 2019 for purposes of making such orders as are appropriate for the just and speedy disposal of the case.
4. The party/parties are directed to file a status report on or before 25 July 2019.

B Usiku
Judge

APPEARENCES:

PLAINTIFF:

G Dicks (with him JM Van Zyl)
Instructed by Etzold- Duvenhage Legal Practitioners,
Windhoek

DEFENDANTS:

G Narib
Instructed by Dr Weder, Kauta & Hoveka Inc,
Windhoek