

“ANNEXURE 11”

Practice Direction 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> <i>Josephina Kiiipule Kalimba v Remigius Hafeni Kalimba</i>	<b>Case No.:</b> HC-MD-CIV-ACT-MAT-2018/00569
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard/tried before:</b> Honourable Mr Justice B Usiku J	<b>Date of hearing:</b> 17 May 2019
	<b>Delivered on:</b> 28 June 2019
	<b>Reasons released on:</b> 28 June 2019
<b>Neutral citation:</b> <i>Josephina Kiiipule Kalimba v Remigius Hafeni Kalimba</i> (HC-MD-CIV-ACT-MAT-2018/00569) [2019] NACHMD 212 (28 June 2019)	
<b>The Order:</b> Having heard counsel for both parties and having read documents filed of record:  <b>IT IS ORDERED THAT:</b> <ol style="list-style-type: none"><li>1. The defendants’ application for “reinstatement” of his defence or for relief from sanctions is dismissed.</li><li>2. The defendant is ordered to pay the plaintiff’s costs occasioned by the application.</li><li>3. The matter is postponed to 7 August 2019 at 15:15 for rcr proceedings.</li><li>4. The plaintiff is directed to file a status report on or before 26 July 2019.</li></ol>	

**Reasons: Practice Direction 61(9)**Introduction

[1] This is an application by the defendant to have his defence reinstated after the defendant's pleadings including his defence were struck out in terms of rule 53 (2), on 6 February 2019.

[2] The defendant and the plaintiff are engaged in a divorce action. The court on 16 October 2018 made the following order in chambers:

'Having read the pleadings for HC-MD-CIV-ACT-MAT-2018/00569 and other documents filed of record:

IT IS RECORDED THAT:

The settlement agreement was concluded by the parties, but not yet signed by both parties. The parties request a postponement to finalize signature by both parties.

IT IS HEREBY ORDERED THAT:

1 The case is postponed to 07/11/2018 at 15:15 for restitution of conjugal rights proceedings hearing; and

2 The parties are directed to file a joint status report on or before 01/11/2018'.

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[3] The parties failed to comply with the above order in that they did not file their joint status report by due date and the court on 6 November 2018 issued the following order:

'Having read the pleadings for HC-MD-CIV-ACT-MAT-2018/00569 and other documents filed of record:

IT IS RECORDED THAT:

Despite having been ordered to file a joint status report on or before 01/11/2018, the parties have not done so.

IT IS ORDERED THAT:

1. The case is postponed to 06/02/2019 at 15:15 for Sanctions hearing; and

2. The parties are directed to file respective sanctions affidavit(s) on or before 31/01/2019,

explaining their reasons for non-compliance with court order dated 16/10/2018 (failure to file a joint status report) and showing cause why sanctions contemplated under Rule 53(2), should not be imposed'.

[4] The plaintiff complied with the above order and filed her sanctions affidavit on 31 January 2019 but the defendant failed to file his. The legal practitioner for defendant filed a notice of withdrawal as attorney of record on 5 February 2019 and attached correspondences with the defendant's insurance that the defendant refused to sign the settlement agreement. The court, on 6 February 2019 made the following order:

'Having heard MS. ANGULA, for the Plaintiff and having read the pleadings for HC-MD-CIV-ACT-MAT-2018/00569 and other documents filed of record:

IT IS RECORDED THAT:

The Plaintiff has filed a sanctions affidavit. The Defendant has not filed a sanctions affidavit, despite the last court order directing him to do so.

IT IS HEREBY ORDERED THAT:

1 The explanation given by the Plaintiff for non-compliance with court order 16/10/2018 and the Plaintiff is relieved from sanctions;

2 The Defendant's pleadings are struck out; and

4 The case is postponed to 03/04/2019 at 15:15 for RCR Proceedings hearing'.

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[5] The defendant now applies to this court "in terms of rule 56" for reinstatement of his defence that was struck out by the above order on 6 February 2019 and he seeks the following relief:

- a) The defendant's defence be re-instated.
- b) Costs of suit, only in the event of the plaintiff opposing the relief sought in this matter.
- c) Further and/or alternative relief.

#### The application of the defendant

The plaintiff raised three points *in limine*, namely that: -

- a) The plaintiff did not comply with the provisions of rules 32(4), 32(5), 32(9) and 32(10)

before launching the said rule 56 application.

- b) The defendant has not filed an application for condonation in respect of the defendant's non-compliance with court orders dated 16 October 2018, 6 November 2018 and the non-appearance in court on 6 February 2019 as was required, before filing the rule 56 application';
- c) The rule 56 application is an irregular step, in so far that the rules make no provision for an application for "reinstatement" of defence. In this respect the plaintiff duly filed a rule 61 application.

[6] In argument the defendant contends that the application that he launches is in effect an application to relieve him from the sanctions imposed by the court on 6 February 2019.

#### Analysis

[7] The points *in limine* raised by the plaintiff in respect of the defendant's non-compliance with rules 32(9) and (10) and to the effect that the application launched by the defendant for re-instatement of his defence in terms of rule 56 amounts to an irregular proceeding and are valid and are hereby upheld.

[8] In regards to the point *in limine* regarding the non-filing of a condonation application, I am of the view that a condonation application is not applicable in the circumstances. Sanctions were imposed for non-compliance and if the defendant is aggrieved by the sanctions order, his recourse lies in seeking a variation or the rescission of the sanctions order or to appeal against the order. The point *in limine* based on defendant's non-filing of a condonation application is therefore rejected.

[9] Despite having upheld the plaintiff's two points *in limine* above, I am constrained to point out that in the matter of *Tsumeb Mall v Hallie Investment Number Two Hundred and Twenty-Two and another* (I724/2016) [2019] NAHCMD 201 (21 June 2019) this court has held that it is not open to a litigant to apply for relief from sanctions imposed in terms of rule 53(2). The remedy for a litigant aggrieved by a sanctions order in such circumstances is either to apply for the rescission of the order in question or to appeal against such order, as it is that order that closes the court's door to the litigant.

[10] Suffice to say that, in any event the defendant is not entitled to the relief he seeks and his application therefore falls to be dismissed with costs.

**IT IS ORDERED THAT:**

1. The defendants' application for "reinstatement" of his defence or for relief from sanctions is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the application.
3. The matter is postponed to 7 August 2019 at 15:15 for RCR proceedings.
4. The plaintiff is directed to file a status report on or before 26 July 2019.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Second Defendant</b>
Helena Iifo Instructed by AngulaCo Inc, Windhoek	Vanessa Kauta Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek