

ANNEXURE "11"
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: ACASIA RESORTS (PTY) LTD vs REHOBOTH TOWN COUNCIL and 5 Others	Case No: HC-MD-CIV-ACT-OTH-2017/02378
<i>Acasia Resorts (Pty) Ltd vs Rehoboth Town Council</i> (HC-MD-CIV-ACT-OTH-2017/02378) [2019] NAHCMD 35 (22 February 2019)	
Heard / tried before: Honourable Ms. Justice Prinsloo	Division of Court: High Court of Namibia Main Division, Windhoek
	Date of hearing: 11 February 2019
	Delivered on: 22 February 2019
Result on merits: No order on merits	
The order: Having heard Adv. Maasdorp , on behalf of the Plaintiff and Mr. Kwala, Mr. Naude and Mr. Mutorwa , on behalf of the Defendants and having read documents filed of record: IT IS ORDERED THAT: a) The Plaintiff's non-compliance with the court order dated 27 September 2019 is condoned. b) The Plaintiff shall pay wasted costs to the third defendant as occasioned by its non-compliance with the court order of 27 September 2018. Further conduct of the matter:	

- c) First Defendant shall file its amended plea and/counterclaim by 15 March 2019.
- d) The Plaintiff shall file its replication to the First Defendants amended plea and/or the First Defendant's counterclaim by 3 April 2019.
- e) The Parties shall file their discovery affidavit or supplementary affidavits on or before 12 April 2019.
- f) The Plaintiff shall file its witness statements on or before 2 May 2019.
- g) The Defendant shall file their witness statements on or before 22 May 2019.
- h) The Plaintiff shall file its expert witness notices and summary on or before 11 June 2019.
- i) The Defendants shall file their expert witness notices and summaries on or before 1 July 2019.
- j) The parties are directed to conduct a pre-trial meeting, at which meeting all counsel who will be conducting the matter at trial on behalf of the respective parties, must be physically present.
- k) The parties shall deliver a draft pre-trial order by 5 July 2019.
- l) The matter is postponed to **11 July 2019** at **15:00** for pre-trial conference.

REASON IN TERMS OF PRACTICE DIRECTIONS 61

Introduction

[1] This is a matter wherein this court has requested reasons from the plaintiff as to why the court should not impose sanctions in terms of Rules 53 and 54 of the Rules of Court for the plaintiff's non-compliance with a court order dated 27 September 2018.

[2] The plaintiff has complied with this court's requests and the explanation advanced is briefly as follows

The plaintiff' explanatory note

[3] The plaintiff advanced the notion that the matter at hand is very complex and a significant one for the parties involved. Primarily, the plaintiff's legal practitioner

submits that two reasons exist for the non-compliances that occurred in this matter, namely:

- a) The manner in which the parties' representatives have conducted themselves in this case is one of the nuances that distinguishes this case from those in which this court has ordered the ultimate sanction. It partially explaining why, for example, an application for condonation or extension of time was not immediately filed on the realisation that the plaintiff would not be able to meet the timelines".
- b) The unavailability of the plaintiff counsel and it was pointed out that there was no remissness on the part of the plaintiff as: i) it followed up regularly with its representatives on progress; ii) the plaintiff was available whenever needed by its representatives; iii) the plaintiff did not instruct its representatives to defy court orders; iv) the plaintiff did not offer a false explanation.

[4] The plaintiff's legal practitioner also notes that the introduction of the judicial case management system was aimed at reducing the level of control practitioners have over the speed/pace of litigation, and further notes that the system itself acknowledges that the failure to comply with a court order is not necessarily fatal. The plaintiff's legal practitioner substantiates this point by adding that the point of every sanctions hearing is to do justice to each case based on its particular facts.

[5] On behalf of the plaintiff, the legal practitioner submitted that the prejudice, if any, to the third defendant can be cured by an appropriate cost order and prays that the plaintiff be directed to pay the third defendant's wasted costs occasioned by the non-compliance with the court order of 27 September 2018. It was further submitted that striking the plaintiff's claim would, the plaintiff's legal practitioner submits, afford an undeserving advantage sought by the first and third defendants.

Affidavits filed by the defendants' legal practitioners

The third defendant

[6] The third defendant's legal practitioner is however of the view that the plaintiff's legal practitioners failed dismally in their endeavour and failed to show good cause in their non-compliance.

[7] The third defendant's legal practitioner refers to a letter dated 13 November 2018 wherein the plaintiff's legal practitioner indicated its difficulty in complying with this court's order. The third defendant's legal practitioner however is of the view that the letter raised more questions that it answered on the basis that it only indicates that the instructed counsel was involved in complex hearings but failed to at all explain why the orders of court were not attended to.

[8] The third defendant's legal practitioner further submits that the sanctions affidavit fares no better in providing the real reasons for the delay caused by the plaintiff's legal practitioners in that it is needlessly vague and offers no indication whether consultations were held or not.

[9] The third defendant's legal practitioner is further of the view that the explanations tendered by the non-compliance are insufficient and unconvincing in that they are not supported by hard facts and evidence and is of the view there was a reckless disregard for any consequence which may follow from the non-compliance with the court order.

The first defendant

[10] The first defendant's legal practitioner also concurred with sentiments in its affidavit responding to the plaintiff's non-compliances.

Applicable law

[11] In *Donatus v Ministry of Health and Social Welfare* 2016 (2) NR 532 (HC), Masuku J made the following comments with respect to non-compliance with court orders and what must be observed in applying the appropriate sanction:

[32] It is clear from the foregoing that the court, in applying sanctions to an errant party, exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. It would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct on the proceedings; the attitude or behaviour of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case.'

Application of the law to the facts

[12] It is quite clear that the plaintiff's legal practitioners failed to comply with court order dated 27 September 2018 and to an extent, it is also quite clear the reason for the default, being that the unavailability of the instructed counsels.

[13] This court must in this regard remark that Rule 19 clearly set out the obligations of parties and legal practitioners in relation to judicial case management and I do not wish to repeat same but will highlight sub-rule (f) which reads as follows:

'(f) to comply with deadlines provided for the taking of any steps under these rules, the practice directions and any applicable law with diligence and promptitude;'

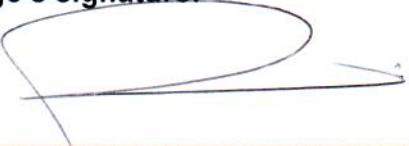
[14] The other parties to the proceedings cannot be held hostage because of the unavailability of counsel. Parties need to act pro-actively to avoid these exact circumstances that the plaintiff found itself in. This court can however not find that the plaintiff's non-compliance was blatant, reckless or intentional.

[15] This is a complex matter involving a number of parties and to dismiss the plaintiff's claim at this stage would be a punishment too harsh, also considering that the plaintiff, as client, is not to blame for the non-compliance but that it must be placed at the door of the representatives. Justice would not be served and costs would further rise up in bringing the action afresh, assuming that would be the plaintiff's next step.

[16] In order to move the matter forward and bring it to finality and have the key issues adjudicated, I see no reason why an appropriate costs order in respect of the delay caused by the plaintiff's legal representatives would not mitigate the possible prejudice suffered by the third defendant.

[17] My order is hereby as follows:

- a) The Plaintiff's non-compliance with the court order dated 27 September 2019 is condoned.
- b) The Plaintiff shall pay wasted costs to the third defendant as occasioned by its non-compliance with the court order of 27 September 2018.
- c) The further conduct of this matter as set out in my order above.

<p>Judge's signature:</p> 	<p>Note to the parties:</p>
<p>Plaintiff: R Maasdorp Instructed by Shikongo Law Chambers</p>	<p>First Defendant: F Kwala of Kwala & Co Inc.</p> <p>Third Defendant: A Naude of Dr Weder, Kauta & Hoveka Inc.</p> <p>Fifth and Sixth Defendants: Mr. Mutorwa Government Attorneys</p>