

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Hendrik Christian t/a Hope Financial Services and Namibian Financial Institutions Supervisory Authority and Another</i>	Case No.: I 2232/2007
	Division of Court: High Court (Main Division)
Heard before: Honourable Mr Justice B Usiku J	Date of hearing: 04 December 2019
	Delivered on: 04 December 2019
	Reasons requested on: 06 December 2019
	Reasons released on 09 December 2019
Neutral citation: <i>Christian v Namibian Financial Institutions Supervisory Authority and Another</i> I 2232-2007 [2019] NACHMD 540 (9 December 2019)	
Reasons: Practice Direction 61(9)	
[1] On 4 December 2019, the court made an order in the following terms: “IT IS ORDERED THAT: 1. For the present purposes, the parties to the case are the plaintiff, the first defendant and the second defendant. 2. The plaintiff is directed to cause the combined summons, together with a copy of this court order, to be served upon the second defendant by the deputy sheriff. The plaintiff is directed to refer the aforesaid documents to the deputy sheriff for service on or before 13/12/2019. 3. The second defendant is directed to file his notice of intention to defend, if any, with the	

registrar of this court at Windhoek and serve a copy thereof on the plaintiff, within 10 (ten) days of service of the combined summons upon the second defendant. The notice of intention to defendant must comply with the rules of court.

4. The first defendant is directed to file a rule-compliant notice of intention to defend, if any, within 10 (ten) days of the making of this court order.
5. In the event that it is impossible for the plaintiff through the deputy sheriff to effect service of the combined summons (together with today's court order), or in the event that the address of the second defendant is unknown to the plaintiff, the plaintiff is directed to make the application in terms of rule 13 (1), on or before 21/02/2020.
6. The matter is postponed to 04/03/2020 for status hearing, and for purposes of making such orders as are appropriate for the just and speedy disposal of the case.
7. The parties are directed to file a joint status report on or before 26/02/2020."

[2] The above court order is guided by the:

- a) findings and legal principles set out in the Supreme Court judgment, in the matter of *Hendrik Christian t/a Hope Financial Services and Namibian Financial Institutions Supervisory Authority* Case No. SA 36/2016,
- b) overriding objective set out in rule 1 (3) of the Rules of this Court; and
- c) rule 138 (b), to the effect that a case that has been registered with the registrar or has been allocated to a managing judge under the repealed rules, continues under the new rules.

[3] Prior to the making of the abovementioned order, the plaintiff had filed a proposed case plan, in which the plaintiff indicated, among other things, that the only parties to the present matter are the plaintiff and second defendant, and that the plaintiff intends to file an application in terms of rule 13 (1) since, according to the plaintiff, the whereabouts of the second defendant are unknown.

[4] On 6 December 2019 the plaintiff requested to be furnished reasons for the order directing the first defendant to file a notice of intention to defend.

[5] The reasons for making the above order arise from paragraphs 59 and 67 of the

aforesaid Supreme Court judgment.

[6] The relevant part of paragraph 59, reads as follows:

'...I accept that the notice of intention to defend was defective. However, one may not elevate form over substance. The intention itself cannot be overlooked. It follows that, having displayed an intention to defend the action, NAMFISA ought to have been given the notice of set down for default judgment in terms of rule 31(4).¹ Regrettably, that was not done. This was despite the repeated warning sounded by our courts that Rules of Court are not there for the making'.

[7] In my opinion, the above excerpt recognizes and confirms that, the first defendant, having filed notice of an intention to defend, is a party to the present proceedings.

[8] Paragraph 67 of the aforesaid judgment reads as follows:

'There is no reason to doubt that had the High Court been made aware of all the issues, it would have enabled the appellant to effect service of the summons upon Mr van Rensburg, ordered NAMFISA to file a proper authority and possibly placed the matter under judicial case management to determine the further conduct of the case with a view to ripen the matter for a fair and efficient resolution of the real issues between the parties. In my view, these omissions impact negatively on NAMFISA's and Mr van Rensburg's fair justice right. Failure by this Court to examine these matters and leaving the default judgment intact would, in the circumstances, be a mockery of justice.'

[9] In my opinion, the above-quoted paragraph confirms that the first defendant (NAMFISA) is entitled to be given an opportunity to file a rule-compliant notice of intention to defend.

¹ The equivalent of this old rule is rule 15(5) of the current High Court Rules which reads as follows: 'No notice of set down for default judgment referred to in subrule (2) need be given to a party that fails to deliver a notice of intention to defend, except that if a period of six months has lapsed after service of summons, no order may be made in terms of subrule (3), unless a notice of set down has been served on the defendant'.

[10] The matter has now been remitted to the High Court for further conduct. The High Court is now aware of the defect that affected the power of attorney that authorized Lorentz Angula to represent NAMFISA. Therefore, in line with the requirements of rule 138 (b) of the rules of this court, the court has made an order directing NAMFISA to file a proper notice of intention to defend, if it so wishes.

[11] In conclusion, it is apparent from the judgment of the Supreme Court that the parties to the present case are the plaintiff, the first defendant and the second defendant. The six last sentences of paragraph 59 and the provisions of paragraph 67 of the Supreme Court judgment make that clear.

[12] It is for the foregoing reasons that the court made an order, among other things, directing the first defendant (NAMFISA) to file a notice of intention to defend, should it be so inclined.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	First Defendant
Mr Hendrik Christian In person	Mr Kennedy Haraseb Instructed by ENSAFRICA Windhoek

