

“ANNEXURE 11”

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Hendrik Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority and Another</i>	Case No.: I 2232/2007
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 2 June 2020
	Delivered on: 2 June 2020
	Reasons released on: 12 June 2020
Neutral citation: <i>Christian v Namibia Financial Institutions Supervisory Authority</i> (I 2232/2007) [2020] NAHCMD 216 (2 June 2020)	
The Order: Having heard Mr Christian the Plaintiff in person and Adv. Nekwaya , on behalf of the Defendants and having read documents filed of record: IT IS ORDERED THAT: 1. The point in limine raised by the plaintiff (to the effect that the deponent to first defendant’s answering affidavit is not authorised to oppose the application) is dismissed. 2. The plaintiff’s application in terms of rule 61(1) is dismissed. 3. The plaintiff is ordered to pay the costs of the first defendant occasioned by first defendant’s opposition to the present application. Such costs to include costs of one instructing and one instructed counsel.	

4. The matter is postponed to 25 June 2020 at 08:30 for status hearing, alternatively for a further case plan conference.
5. The parties are directed to file a joint status report (or joint further case plan) on or before 19 June 2020.

Reasons for orders:

Introduction

[1] This is an application by the plaintiff in terms of rule 61(1). The application was instituted in response to the delivery by the first defendant on 17 December 2019, of a notice of intention to defend. Attached to the aforesaid notice of intention to defend are the following documents, namely: “Special Power to Sue and Defend” and “Resolution 25/11/2019”.

[2] In his rule 61(1) application the plaintiff alleges that the said:

- (a) notice of intention to defend,
- (b) “Special Power of sue and Defend” and,
- (c) “Resolution 25/11/2019”,

constitute irregular and/or improper steps and should be set aside.

Background

[3] This matter has a long history. I am not going to recite its history herein, however I will only condense a part thereof which is relevant to the present proceedings.

[4] On 07 October 2019, the supreme Court remitted the present matter to the High Court to be placed under judicial case management, for further conduct and determination of the matter.

[5] On 04 December 2019, this court, among other things, directed:

(a) the plaintiff to cause the combined summons together with a copy of the court order dated 04 December 2019, to be served on the second defendant by the deputy sheriff. The plaintiff was directed to refer the aforesaid documents to the deputy-sheriff for service, on/before 13 December 2019; and,

(b) the first defendant to file a rules-compliant notice of intention to defend, if any, within 10(ten) days of the making of the court order dated 04 December 2019, and, the court postponed the matter to 04 March 2020 for status hearing and for making such orders as are appropriate.

[6] On 6 December 2019 the plaintiff requested the court to provide him reasons for the court order dated 04 December 2019, especially reasons for directing the first defendant to deliver a notice of intention to defend.

[7] The court furnished the plaintiff the reasons he requested, on 09 December 2019.

[8] The plaintiff did not refer the documents referred to in paragraph [5] (a) hereof to the deputy-sheriff for service by 13 December 2019.

[9] On 17 December 2019, the first defendant delivered its notice of intention to defend, with documents referred to in paragraph [1] hereof, annexed thereto.

[10] On 15 January 2020, the plaintiff filed a document titled "Notice in terms of rule 32(9)". In that document the plaintiff pointed out that:

(a) first defendant did not comply with rule 14(4),

(b) legal practitioners for first defendant are not authorised or instructed to defend the matter and to appear on behalf of the first defendant; and that,

(c) the notice of intention to defend was not filed within 10 (ten) days of the making of the court order dated 04 December 2019.

[11] The plaintiff indicates therein, that he only became aware of the above irregularities

on 15 January 2020. The plaintiff then invited the first defendant to reply, in the context of the rule 32(9), to the abovementioned concerns, within 2 (two) days of receipt of the notice.

[12] On 22 January 2020 the plaintiff filed a “notice in terms of rule 32(10)”.

[13] On 23 January 2020 the first defendant filed its return in terms of rule 6.

[14] On 24 January 2020 the plaintiff filed the present application in terms of rule 61(1) on notice of motion accompanied by an affidavit.

[15] On 4 March 2020, the court directed:

(a) the first defendant to file its answering affidavit, if any, on or before 20 March 2020,

(b) the plaintiff to file a replying affidavit, if any, on or before 3 April 2020,

(c) the plaintiff to file his heads of argument on or before 17 April 2020,

(d) the first defendant to file its heads of argument on or before 30 April 2020 and, postponed the matter to 8 May 2020 for the hearing of the plaintiff’s rule 61 application.

[16] On 16 March 2020 a State of Emergency was declared by the President, with effect from 17 March 2020. A period of “lockdown” was imposed with effect from 28 March 2020 to 4 May 2020. On the 8 May 2020 the matter was postponed to 2 June 2020 for hearing of the application.

Point in limine

[17] On the day of the hearing of the application, at the onset of oral argument, the plaintiff raised, for the first time, as a *point in limine*, an issue to the effect that the answering affidavit filed on behalf of the first defendant be struck out. The case for the striking out is based on the failure by the deponent to the first defendant’s answering affidavit to annex a resolution by the first defendant authorizing the deponent to the affidavit to ‘oppose’ plaintiff’s

rule 61 application.

[18] In the answering affidavit, the deponent thereto states, among other things, that he is:

(a) the General Manager: Legal Services of the first defendant and that he is,

(b) *'duly authorised to depose to the affidavit and oppose the application'* brought by the plaintiff in terms of rule 61. On that basis, the plaintiff contends that there is no supporting documents verifying the authority of the deponent to oppose the rule 61 application and that the first defendant's opposition to the plaintiff's rule 61 application be dismissed with costs.

[19] Counsel for the first defendant responds that the challenge to the authority of the deponent to the defendant's answering affidavit is being raised for the first time, from the bar, on the day of the hearing of the application. If given time, the first defendant would make necessary arrangements to furnish proof of the authority. Counsel further underlined a point to the effect that an affidavit is not necessary in respect of a rule 61 application and that it was an anomaly of the plaintiff to have instituted his rule 61 application on notice of motion, supported by a founding affidavit. To the extent that it is necessary, counsel submits, the first defendant relies on the legal argument as set out in its heads of argument, in its opposition to the plaintiff's rule 61 application.

[20] In reply, the plaintiff argues that rule 65(1) stipulates that every application must be brought on notice of motion supported by an affidavit. Rule 61 requires a party to apply for the setting aside of a proceeding, so the plaintiff contends, and that such application must satisfy the requirements of rule 65(1).

[21] In my view, for the plaintiff to invoke the principle that a party whose authority is challenged must provide proof of authority, the trigger challenge must be a strong one.¹ A deponent to an affidavit need do no more than allege that authorization has been duly

¹ Otjonzondu Mining v Purity Maganese 2011(1) NR 298(HC) at 312 D-E.

granted.² In the present case, I am satisfied that the averments made by the deponent meet the minimum requirements. On the facts of the present matter, the plaintiff is not, in my opinion, justified to question the allegation that the deponent is authorised to act on the behalf of the defendant. In any event, on the face of the a notice of intention to oppose, attached to the plaintiff's application as Annexure "61(4)", the present legal practitioners for the first defendant indicate that the first defendant opposes the application. All in all, I am satisfied that the defendant opposing the plaintiff's application is the first defendant and not some unauthorized person purporting to act on its behalf. The challenge by the plaintiff to deponent's authority is a weak and bad challenge and stands to be dismissed.

[22] I now return to first defendant's contention that a rule 61 proceeding ought not to have been brought on notice of motion accompanied by an affidavit. The first defendant is correct in its submission. There is plenty of authority to the effect that a notice in terms of rule 61 does not require to be brought on notice of motion supported by affidavit.³ All that rule 61(2) requires is that the notice must specify the particulars of the irregularities or impropriety complained of. The rule 61(2) notice is analogous to an 'exception' and normally does not require a reply.

[23] However, I am of the opinion that where an application is brought on notice of motion supported by an affidavit, such course of action does not render the application defective. Such application must be considered on its merits. In the present matter, I am satisfied that whether or not the court decides to disregard the affidavits and determines the application on the basis of the heads of argument filed by both parties, the court would still come to the same conclusion and decision made herein. For this reason, I decided not to make a decision on this issue.

The Application

[24] In his application, the plaintiff contends that the notice of intention to defend is

² Ibid, at 312 G-H.

³ See Louw v Khomas Regional Council (A164/2015) NAHCMD 187 (10 August 2015) at para.6, Chelsea Estates and Contractors CC v Speed -O- Rama 1993 (1) SA 198 (E) at E-F, Scott and Another v Ninza 1999 (4) SA 820E at 820 (E) at 823 A-D.

irregular in two main respects namely that:

(a) it was filed one day late and that the first defendant has not sought condonation for the late filing thereof, and that,

(b) it does not comply with the court order dated 4 December 2019, rule 6(4) and rule 14(4). In other words, the first defendant did not deliver a return in terms of rule 6 simultaneously with the delivery of the notice of intention to defend.

[25] The plaintiff, therefore, submits that the notice of intention to defend and its filing, is irregular and improper. The plaintiff further submits that he is prejudiced by the conduct of the first defendant and prays for the relief as set out in the application.

[26] The plaintiff further argues that the first defendant delivered the notice of intention to defend and the return in terms of rule 6, late, and that the defendant is *ipso facto* barred from delivering the same, without having sought and obtained condonation. In that regard the plaintiff contends that the provisions of rule 54 (3) and 55 are applicable to this matter.

[27] In regard to the Special Power to Sue and Defend and the Resolution, (annexed to the notice of intention to defend), the plaintiff contends both documents do not authorize ENSAfrica Namibia (the first defendant's legal practitioners) to file a notice of intention to defend in the remitted case No. I 2232/2007. The plaintiff therefore submits that, on that account, those documents are irregular and be set aside.

[28] In response, the first defendant contends that the notice of intention to defend filed on 17 December 2019 was filed within the time period directed in the court order dated 4 December 2019. The first defendant argues further that even if the notice of defend was filed without compliance with the rule 6(4), the plaintiff has suffered no prejudice. The first defendant also insists that the rule 6 return was eventually filed on 23 January 2020. The plaintiff has suffered no prejudice, so argues the first defendant.

[29] In regard to the resolution and the special power of attorney, the first defendant denies that the resolution and special power of attorney amount to irregular steps. The first

defendant argues that there is no basis for the plaintiff to allege that the first defendant's legal practitioners are not authorised to act on behalf of the first defendant in this matter.

[30] The first defendant therefore submits that the plaintiff's application be dismissed with costs and that such costs to include costs of one instructing and one instructed counsel. The first defendant further submits that a punitive costs order should be given against the plaintiff on account that the plaintiff was invited to withdraw his rule 61 application, but refused to do so. The defendant argues that the plaintiff's conduct in that regard is frivolous and vexatious.

Legal principles

[31] Rule 14 (4) provides that a defendant must deliver a return in terms of rule 6, simultaneously with the delivery of the notice of intention to defend.

[32] In terms of rule 14 (6) a notice of intention to defend may be delivered even after the expiry of the prescribed period, but before default judgment has been granted.

Analysis

[33] In terms of rule 6(1) and (2) and rule 14(4) a return in terms of rule 6 must be delivered simultaneously with the delivery of the notice of intention to defend. That is the regular thing a party is expected to do. A failure to deliver a return in terms of rule 6 contrary to the provisions of rule 6(1) and (2) and rule 14(4) constitutes an irregular step liable to be declared as procedurally impermissible, entitling the court, in terms of rule 61(4), to grant leave to the defaulting party to file the necessary return.

[34] However, in the present case, the defendant has filed the return in terms of rule 6 on 23 January 2020. When the plaintiff delivered the present application on 24 January 2020 the irregularity (namely: failure to file a rule 6 return) has been cured and was therefore non-existent.

[35] I do not agree with the plaintiff's argument to the effect that the failure to file the rule 6 return renders the notice of intention to defend defective. In my opinion, the irregularity, in such circumstances, lies with the failure to file the "return". Had the first defendant not filed a return in terms of rule 6 at all, and such failure is challenged as an irregular step, the court would have found the failure to file the return as an irregular step and would have granted the first defendant leave to file the return. The notice of intention to defend stands or falls on its own merits. Therefore, the plaintiff's submission that the notice of intention to defend should be set aside as an irregular step or procedure, on account that it was not filed simultaneously with a return in terms of rule 6, has no substance and falls to be rejected.

[36] The plaintiff submits further that the notice of intention to defend is irregular on account that it was filed late. This allegation is not borne out by any factual evidence. In terms of the court order dated 4 December 2019, the first defendant was ordered to file the notice of intention to defend within 10(ten) days of the order dated 4 December 2019. The 10(ten) days period, from 4 December 2019 expires on 19 December 2019, excluding weekends and public holiday(s). Therefore, there is no merit in the allegation that the notice was filed late. In any event, in terms of rule 14(6) a notice of intention to defend may be delivered after the expiry of the period specified, but before default judgment is granted. In other words, even if the notice was delivered late, it would not have entitled the plaintiff to the relief that he seeks. For the foregoing reasons, the plaintiff's contention that the first defendant's notice of intention to defend be set aside on the basis that it was filed late, also stand to be rejected.

[37] The plaintiff also argues that the return in terms of rule 6 should be set aside as irregular and improper on account that it was filed late, without condonation having been first sought and granted. I am of the view that rules 54(3) and 55 are not applicable in respect of the documents referred to in rule 14(4) (namely: the notice of intention to defend and the return in terms of rule 6), since the delivery of such documents may, in terms of rule 14(6) be made even after the expiry of the specified period, but before default judgment is granted. In my opinion, such document, when delivered late, in terms of rule 14(6), requires no

condonation and the question of bar referred to in rule 54(3) does not arise. In other words, in respect of the documents referred to in rule 14(4), no automatic bar comes into effect, when such document is filed out of time. This construction finds support from the provisions of the rule 14(6). For the foregoing reason, the plaintiff's contention that rules 54 (3) and 55 are applicable, has no merit and stands to be rejected.

[38] In regard to the Resolution and the special power of attorney to sue and defend, the rules do not require a legal practitioner to lodge a resolution or special power of attorney authorizing the legal practitioner to act on behalf of a company or any other body corporate. However, where a party decides to file a resolution or power of attorney, I see no harm in so doing. I have read the resolution and the special power of attorney in question. Having done so, I find no merit in the plaintiff's contention that the same do not authorise the first defendant's legal practitioners to represent the first defendant in the present proceedings. Moreover, the plaintiff has not established how he is prejudiced by the filing of the resolution and the special power of attorney in question. The plaintiff's contention that the resolution and the special power of attorney be set aside as irregular step or proceeding, therefore, stands to be rejected.

Conclusions

[39] For reasons set out in the foregoing paragraphs, I find that the plaintiff has not established irregularity afflicting the first defendant's notice of intention to defend. In addition, even if there had been any irregularity, the plaintiff has not established "prejudice" suffered or to be suffered by him if the alleged irregular proceeding is not set aside. Furthermore, the plaintiff has not established that the first defendant's resolution and special power of attorney are irregular or improper steps or proceedings. In addition, even if the plaintiff has so established, the plaintiff has not established that he has suffered or will suffer prejudice if the alleged irregular steps or proceedings are not set aside. For the foregoing reasons the plaintiff's application in terms of rule 61(1) stands to be dismissed.

[40] In regard to the issue of costs, I am of the view that the general principle that costs

follow the event must find application in this matter. Counsel for the defendant contends that the plaintiff was invited to withdraw its rule 61 application. It is argued that the first defendant had indicated that it will not insist on costs occasioned by this application if the plaintiff withdraws the application. First defendant asserts that the plaintiff declined to withdraw the application and therefore plaintiff's conduct is frivolous and vexatious. The first defendant therefore invites the court to make a punitive costs order against the plaintiff.

[41] To grant a punitive costs order the court must be satisfied that:

- (a) the conduct of an applicant justifies such an order, and,
- (b) a party-and-party costs order will not be sufficient to meet the expenses incurred by the innocent party⁴.

In the present matter the plaintiff insists that the rules of the court, as he understands them, entitle him to the relief he seeks. There are no facts indicating that the plaintiff is not bona fide, in holding such a belief. I am therefore not persuaded that the first defendant has met the first-mentioned requirement. Furthermore the first defendant has not placed evidence before me that a costs order on the normal scale will not be sufficient to meet its costs in opposing the application. I therefore, decline to grant a punitive costs order against the plaintiff. However, I am satisfied that a costs order, including costs of one instructing and instructed counsel is appropriate, and I will grant an order to that effect.

[42] In the result, I make the following order:

1. The point in limine raised by the plaintiff (to the effect that the deponent to first defendant's answering affidavit is not authorised to oppose the application) is dismissed.
2. The plaintiff's application in terms of rule 61(1) is dismissed.
3. The plaintiff is ordered to pay the costs of the first defendant occasioned by first defendant's opposition to the present application. Such costs to include costs of one instructing and one instructed counsel.

⁴ Erf 66 Vogelstrand v Municipal Council of Swakopmund 2012 (1) NR 393 at 400.

<p>4. The matter is postponed to 25 June 2020 at 08:30 for status hearing, alternatively for a further case plan conference.</p> <p>5. The parties are directed to file a joint status report (or joint further case plan) on or before 19 June 2020.</p>	
Judge's Signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	First defendants
In person, Windhoek	Mr Haraseb together with Mr E Nekwaya Instructed by ENSAFRICA Incorporated as Lorentz. Angula Inc. Windhoek