

“ANNEXURE 11”

Practice Direction 61

**IN THE HIGH COURT OF NAMIBIA
(TO THE SUPREME COURT OF NAMIBIA)**

Case Title: <i>Foibe Tuyenikelao Amutenja v Eneas Josef Amutenja</i>	Case No.: HC-MD-CIV-ACT-OTH-2019/02282
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 30 July 2020
	Delivered on: 30 July 2020
Neutral citation: <i>Amutenja v Amutenja</i> (HC-MD-CIV-ACT- OTH-2019/02282) [2020] NAHCMD 322 (30 July 2020)	
The Order: Having heard Mr. Haraseb on behalf of the plaintiff and Ms. Malambo on behalf of the defendant and having read the pleadings and other document filed of record: IT IS ORDERED THAT: 1. The defendant’s application for condonation of non-compliance with the court order dated 29 July 2019, is granted, and the automatic bar is lifted. 2. I make no order as to costs.	

3. The defendant must file his plea and counterclaim, if any, on or before 14 August 2020.
4. The plaintiff must file replication and plea to counterclaim, if any, on or before 28 August 2020.
5. The defendant must file replication for plea to counterclaim, if any, on or before 04 September 2020.
6. The defendant must file discovery affidavit and exchange bundles of discovered documents on or before 18 September 2020.
7. The matter is postponed to 21 October 2020 at 15:15 for Case Management Conference hearing
8. The parties must file joint case management report on or before 14 October 2020.

Reasons: Practice Direction 61(9)

Introduction

[1] This is an application by the defendant for condonation of his non-compliance with a court order dated 29 July 2019. That order directed the defendant to, among other things, deliver his plea and counterclaim, if any, not later than 14 August 2019. The defendant did not deliver the plea and/or counterclaim. It is that default that gave rise to the present application.

Background

[2] On 21 July 2014 this court granted a final order of divorce, in favour of the plaintiff, dissolving the marriage between the plaintiff and the defendant. That order, among other things, also directed that the joint estate of the parties should be equally divided.

[3] On 21 May 2019, the plaintiff instituted the present action claiming for a specific forfeiture order in respect of certain Erf No. 1465, Otjiwarongo, which is part of the joint estate.

[4] On 26 June 2019, the parties filed a joint case plan and subsequently the court issued a case plan order on 29 July 2019, among other things, directing the defendant to file his plea not later than 14 August 2019, and postponed the matter to 16 October 2019 for a case management conference. At that time the plaintiff was legally represented and the defendant was not.

[5] On 28 August 2019, plaintiff's legal practitioner filed a unilateral status report indicating, among other things, that the defendant has not complied with the court order dated 29 July 2019, and that the defendant intended to apply for default judgment.

[6] On 03 September 2019 Mr Nicky Ngula of Nicky Ngula Attorneys, Ondangwa, came on record as legal practitioner for the defendant. The following day, the defendant's legal practitioner filed a unilateral status report, setting out, among other things, that the defendant did not comply with the court order dated 29 July 2019 on account that he was not legally represented at the time as well as on account of ill-health, and that the defendant intended to apply for condonation of the non-compliance and intended to apply for the matter to be transferred to the Northern Local Division.

[7] On 04 October 2019 the parties filed a joint case management report, proposing among other things, dates for filing of the parties' respective discovery affidavits and for delivery of the parties' respective witness statements.

[8] On the 14 October 2019 the court adopted the parties' joint case management report and directed the parties to file their respective discovery affidavits and witness statements by certain dates, and postponed the matter to 19 February 2020 for Pre-Trial Conference.

[9] On 18 February 2020, Messrs Nicky Ngula Attorneys filed a notice of withdrawal as defendant's legal practitioners of record. According to the return of service, the notice of withdrawal was served on the defendant on 11 February 2020.

[10] On 19 February 2020 new attorneys representing the defendant appeared. On that day the court issue directions regarding the exchange of documents in respect of the application for condonation of defendant's non-compliance with the court order dated 29 July 2019.

The application

[11] From the defendant's application for condonation, it appears that the defendant had applied for legal aid, and Messrs Nicky Ngula Attorneys were subsequently appointed to represent him. The aforesaid attorneys were to apply for the required condonation as well as to conduct this matter further on the defendant's behalf. The defendant also relates that he suffers from cervical-spine injury, as a result of a motor vehicle accident on 22 October 2005. The documents attached to the defendant's application confirm that the defendant is wheelchair-bound as a result of that accident.

[12] In addition, the defendant relates that when it became apparent that Messrs Nicky Ngula have not carried out his instructions, he re-applied for legal aid on 18 February 2020 and Messrs Sibeya and Partners were appointed to represent him.

[13] In conclusion, the defendant submits that the failure to file his plea timeous was not due to remissness on his part.

[14] The application for condonation is opposed by the plaintiff. The plaintiff contends that the defendant has not made a out case for the relief sought in his notice of motion. The plaintiff further argues that the defendant's explanation for the default does not constitute sufficient explanation and that the defendant should not escape the consequences of his

non-compliance with the court order by shifting blame on his erstwhile legal practitioners. The plaintiff also points out that the defendant has not dealt with, in his application, the prospects of his success on the merits. The plaintiff, therefore, submits that the application for condonation be dismissed.

Analysis

[15] It is trite that, an applicant for condonation is required to:

- (a) satisfy the court that he or she has reasonable explanation for his/her default, and
- (b) show the court that he/she has reasonable prospects of success on the merits of the case.

[16] The two requirements have to be simultaneously present, for the applicant to succeed. The absence of one may result in the failure of the condonation application. The court will usually grant condonation, provided that the applicant has given a reasonable explanation for the non-compliance and the application is made promptly.

[17] In the present matter the record shows that when Messrs Nicky Ngula Attorneys came on record they indicated that the defendant wished, among other things, to apply for condonation. However, when the parties filed a joint case management report, there was no specific request for directions made, on behalf of the defendant, regarding the proposed dates for the exchange of papers in respect of the condonation application which the defendant intended to launch. Instead, the parties sought specific directions on the proposed dates for the delivery of witness statements and discovery affidavits.

[18] In the circumstances of this case, I have considered the health condition of the defendant as set out in his papers as well as efforts he has taken to re-apply for legal aid when it became apparent that his instructions were not appreciably complied with. I have further considered that the non-compliance occurred at the time when he was not legally represented and possibly awaiting the outcome of his application for legal aid. With the

above considerations in mind I am satisfied that the explanation furnished by the defendant is a satisfactory explanation, in the circumstances.

[19] Insofar as prospects of success on the merits are concerned, it is common cause that the defendant has not specifically addressed the issue of prospects of success, in his application. However, a glance at the pleadings and documents filed, shows the following aspects as apparent, namely, that:

(a) the final order of divorce dated 21 July 2014 has ordered division of the joint estate. It does not appear from the papers filed that such order was appealed against or set aside, and,

(b) the content of the pleadings filed, viewed against the backdrop of the relief claimed.

[20] From the above aspects, it appears apparent that prospects of success exist, even though the same was not explicitly raised by the defendant in his application.

[21] For the above reasons, I am satisfied that sufficient cause exists that warrants the granting of the condonation prayed for and the defendant's application, therefore, stands to be granted.

[22] Insofar as costs are concerned, it is apparent from papers filed of record that legal aid is being rendered to the defendant. In terms of existing authority, costs may not be awarded against a person to whom legal aid is rendered.¹ For that I am not going to make an order as to costs.

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

1. The defendant's application for condonation of non-compliance with the court order dated 29 July 2019, is granted, and the automatic bar is lifted.

2. I make no order as to costs.

¹ See: *Mentoor v Usebiu*: Case No. SA 24/2015 (19 April 2017) para 21 and *Beukes v Benade and Another* Case No. SA15/2005 (13 April 2018) para 30.

3. The defendant must file his plea and counterclaim, if any, on or before 14 August 2020.
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Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Second Defendant
K Haraseb Instructed by ENSafrica Legal Practitioners, Windhoek	MM Malambo Instructed by Sibeya & Partners Legal Practitioners Windhoek