



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

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| Case Title: TOMAS KAPUTA V WILBARD SHILUNGA | Case No: HC-MD-CIV-ACT-CON- 2018/01655 |
| | Division of Court: HIGH COURT(MAIN DIVISION) |
| Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE | Date of hearing: 21 OCTOBER 2021 |
| | Date of order: 22 OCTOBER 2021 |
| Neutral citation: <i>Kaputa v Shilunga</i> (HC-MD-CIV-ACT-CON-2018/01655) [2021] NAHCMD 489 (22 October 2021) | |
| Results on merits: Merits not considered. | |
| The order: Having heard MARCO SCHURZ , on behalf of the Plaintiff(s) and RAY SILUNGWE , on behalf of the Defendant(s) and having read the pleadings for HC-MD-CIV-ACT-CON-2018/01655 and other documents filed of record: | |

Ruling:

1. The application for irregular proceedings in terms of rule 61 is hereby struck.
2. Cost to stand over and to be determined in the main action.

Further Conduct:

Whereas the Plaintiff wishes to enforce the order made in terms of Rule 59 by the Registrar in respect of security for costs:

3. **The Parties must comply with the following procedural steps:**
 - 3.1 Plaintiff must file his application in terms of Rule 59(4) on or before 4 November 2021;
 - 3.2 Defendants must file their opposing papers, if any, on or before 11 November 2021;
 - 3.3 Parties must file their notes on argument on or before 16 November 2021.
4. The case is postponed to **18/11/2021** at **09:00** for Interlocutory Hearing (Reason: Hearing).

Reasons for orders:Introduction

[1] On 15 February 2021 the defendant was ordered to furnish security for costs in the amount of N\$50 000.00 within 10 days from the date of determination.

[2] On 10 June 2021 the parties were referred to a pre-trial conference and were ordered to resolve the issue of costs payable by the defendant.

[3] On 09 July 2021 the plaintiff filed a proposed joint status report wherein the parties indicated that the defendant intends to amend his special plea and as such the pre-trial should be kept in abeyance pending the application to amend the special plea. The parties then provided this court with suggested timelines as to when the pleadings relating to the amended special plea would be filed. The proposed joint status report was adopted and made an order of court as per the request of

the parties.

[4] In terms of the preceding court order the parties had to comply with the following procedural steps:

'IT IS ORDERED THAT:

1. The case is postponed to 12/08/2021 at 15:00 for Status Hearing (Reason: Interlocutory (To Bring)).
2. The parties are directed to comply with the following procedural steps:
 - 2.1. The defendant shall file his notice to amend his plea/ special plea on or before 16 July 2021;
 - 2.2. The plaintiff shall file his notice of objection, if any, on or before 30 July 2021;
 - 2.3. If no objection is filed, the defendant shall file his amended plea/ special plea on or before 02 August 2021;
 - 2.4. In the event of an objection from the plaintiff, the parties must comply with Rule 32 (9) and (10) on or before 06 August 2021.
3. A joint status report must be filed on or before 09 August 2021.'

[5] The defendant filed his pleadings in terms of the court order. The plaintiff however took a different route. Instead, in terms of the joint status report filed by the defendant on 09 August 2021, the parties indicated that the plaintiff intended to bring an application for irregular proceedings in terms of rule 61 as he held the view that the defendant's amended special plea was filed irregularly. The court adopted the timelines as set out in the joint status report for the filing of the pleadings relating to the irregular proceedings application.

[6] The plaintiff's case is that *inter alia* the defendant's amended special plea has been filed irregularly because the defendant has not furnished the security as determined on 15 February 2021. The parties further did not resolve the issue of security of costs as ordered by the court on 10 June 2021.

[7] The defendant's case in turn is that the plaintiff brought his application out of time and not in accordance with the timeline as provided for in rule 61 (1). In addition thereto the defendant's case is that he filed his amended plea in accordance with the court order, as sanctioned by the court on

09 July 2021, pursuant to a joint status report by the parties.

[8] The signature of the parties to the proposed joint status report signifies their assent to the contents thereof. The plaintiff signed and filed the proposed joint status report wherein the parties sought to deal with the defendant's amended special plea knowingly that the defendant had not furnished security as determined.

[9] Rule 59 (4) of the Rules of the High Court states:

'If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to the managing judge on notice for an order that such security be given and that the proceedings be stayed until the order is complied with.' {own emphasis}

[10] Currently before this court is an application by the plaintiff in terms of rule 61 to struck out alternatively set aside the defendant's amended special plea and not an order seeking to stay these proceedings until security has been furnished as provided for in rule 59 (4).

[11] In Court-Managed Civil Procedure of the High Court of Namibia¹ Damaseb JP made it clear that court orders must be complied with. If a party is dissatisfied with a decision of the court, and it is appealable, the recourse lies in appealing it and not ignoring it. An order, even if wrong, must be complied with.

[12] Having regard to the abovementioned authority I am on the view that the defendant's amended special plea is not irregularly filed and complies with the directives by the court. The plaintiff signed the proposed joint status report whilst knowing that the defendant has not complied with the court order of 15 February 2021, resulting in the parties taking the next step in moving the matter forward. The plaintiff at the time of signing the proposed joint status report, should have raised the issue of cost and should have not signed the said proposed joint status report which was consequently made an order of court.

¹ 1st ed at para 9-125 p 244.

[13] My order is therefore as set out above.

| Judge's signature | Note to the parties: |
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| <p>PRINSLOO Judge</p> | <p>Not applicable.</p> |
| Counsel: | |
| Plaintiffs | Defendants |
| <p>Marco Schurz Of Delport Legal Practitioners</p> | <p>Ray Silungwe Of Silungwe Legal Practitioners</p> |