

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

REASONS

PRACTICE DIRECTION 61

<b>Case Title:</b> MARIA GASENOSIWE GUIMARAES // SWABOU INVESTMENTS (PTY) LIMITED	<b>Case No:</b> INT-HC-RECOD-2023/00190 / HC-MD-CIV-ACT-CON-2018/01129
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> PARKER AJ	<b>Heard on:</b> 6 OCTOBER 2023
	<b>Delivered on:</b> 6 OCTOBER 2023 <b>Reasons released:</b> 7 NOVEMBER 2023
<b>Neutral citation</b> <i>Maria Gasenosiwe Guimaraes // Swabou Investments (Pty) Limited</i> (HC-MD-CIV-ACT-CON-2018/01129 ) [2023] NAHCMD 714 (7 November 2023)	
<b>Reasons:</b>	
PARKER AJ:  [1] The following order was granted on 6 October 2023 by the court during first and second motion (rule 108) proceedings:  ‘1. The Applicant’s application for rescission is hereby dismissed with costs.  2. Costs to include one instructing counsel and one instructed counsel.  3. Matter is removed from the roll and regarded as finalised.’  [2] The applicant has requested reasons for the order. These are the reasons.	

[3] On 6 October 2023 roll of the first and second motion (rule 108) was enrolled by the applicant a rescission application to rescind an order granted by the court on 21 April 2023.

[4] When the matter was called for the hearing of the rescission application, in one breadth Mrs X announced that she represented the applicant; in another breadth, Mrs X submitted that 'unfortunately, we have no instructions on the matter'. As a matter of law and common sense, if counsel Y says during judicial proceedings that he or she represented party B, it means counsel Y has received instructions from party B to appear in court to advocate party B's case. In the instant matter, Mrs X informed the court: 'Unfortunately, I cannot address the court!'

[5] In my view, the phrase 'appearance at application' in the title of rule 68 means: A party appearing in person to move the application that he or she has instituted; or counsel informing the court that he or she was appearing before court to move the application which the party he or she represented has instituted. It does not mean such party, who is acting in person, announcing his or her presence or such counsel announcing his or her presence and not moving the application without any justification. Any argument that such act constitutes 'appearing at application hearing', within the meaning of rule 68, is *reductio ad absurdum*. For it would mean such person or such counsel could as well announce his or her presence and take his or her leave of the proceedings.

[6] For the foregoing reasons and considerations, I concluded that there was no appearance properly so called in terms of rule 68 of the rules of court. Accordingly, I applied the peremptory provisions of rule 68(a) of the rules of court and dismissed the application. In my discretion I ordered costs, because the applicant had dragged the respondent into the application which the applicant failed to prosecute without a satisfactory and sufficient explanation, much to the prejudice of the respondent. The respondent incurred costs unnecessarily. In my view such *comparuit* default of the applicant should not be encouraged, particularly in a case like the present where a judgment by default granted in April 2018 and an order declaring the property in question specially executable granted in April 2023 remains unexecuted due to the unjustified conduct of the applicant. Such conduct does not conduce to due administration of justice and in turn stultifies the rule of law upon which the Namibian Constitution is based.<sup>1</sup>

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<sup>1</sup> *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC).

[7] Based on these reasons the order set out in para 1 above was granted.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
No appearance	Y Campbell Instructed by Fisher, Quarmby & Pfeifer, Windhoek