

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture</i>	Case No.: I 1216/2015
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 05 March 2020
	Delivered on: 05 March 2020
Neutral citation: <i>Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture</i> (I 1216/22015) [2020] NAHCMD 77 (05 March 2020)	
The Order: Having heard Mr Vaatz , on behalf of the Plaintiff and the same standing in for Ms Angola on behalf of the Defendant for the purpose of the joint application and having read documents filed of record: IT IS ORDERED THAT: 1. The parties’ purported joint ‘application’ to have the set-down dates vacated or set aside, is dismissed. 2. I make no order as to costs. 3. The matter remains set-down for trial for the 09-13 March 2020 and 16-20 March 2020 at 10:00.	

4. The parties are directed to attend roll call on 06 March 2020 at 08h30.

Reasons: Practice Direction 61(9)

Introduction

[1] In this matter the plaintiff and the defendant seek, jointly, to have the set-down dates for the trial of the main matter vacated or set aside.

[2] The plaintiff instituted the present action against the defendant on 16 April 2015. The plaintiff amended its particulars of claim on 24 January 2018, and thereafter the defendant amended consequentially the pleadings filed by it. The matter went through case management processes. On 26 September 2019, the matter was set down for trial for 9-13 March 2020 and 16-20 March 2020 at 10:00.

[3] On 19 February 2020, the plaintiff's legal practitioner addressed a letter to the chambers of the managing judge indicating that the parties have '*decided*' that the matter be referred to private arbitration. The plaintiff's legal practitioner further noted that the consequence of the parties' aforesaid decision is that the trial dates for which the matter is set down, are to be vacated.

[4] In response to the above letter, the plaintiff's legal practitioner was referred to, among other things, the provisions of rule 96(3) read with the provisions of rule 32.

[5] Rule 96(3) provides that when a matter has been set down for trial, a party may, on '*good cause*' shown, apply to the judge, not less than 10 court days before the date of hearing, to have the set-down dates(s) changed or set aside.

The parties' joint application

[6] On 26 February 2020, the parties filed a joint notice in the following terms, in part:

'Joint application in terms of rule 96(3) for removing matter from the roll

Be pleased to take notice that the parties hereto will apply to this Honourable Court on Friday, the 28th of February 2020 at 10:00 for an order to remove the above matter from the roll where it has been set down from the 9-13 March 2020 and again 16-20 March 2020, the reason being that the parties have agreed to refer the matter to private arbitration.

Date at Windhoek this 25th day of February 2020

signed

signed

Andreas Vaatz OBO PLAINTIFF

ELIZE ANGULA OBO DEFENDANT'

[7] The court is now called upon to consider and determine the above application in terms of rule 96(3).

Analysis

[8] In my opinion, rule 96(3) envisages an interlocutory application. Rule 1(1) describes what an application is. The application must be on notice supported by an affidavit showing '*good cause*'. I am further of the opinion that an affidavit accompanying an application in terms of rule 96(3) must, among other things, set out the following:

- (a) a satisfactory explanation, for having the set-down dates vacated or set aside,
- (b) facts showing that the application is *bona fide* and not intended to delay trial, and,
- (c) the applicant(s) must establish a *bona fide* defence or claim, based upon facts, that if proved would constitute a defence or claim, (i.e prospects of success if trial were to proceed as scheduled).

[9] The above facts must be set out clearly and with particularity to enable the court to exercise its discretion in terms of rule 96(3), on the consideration of the facts of the matter.

[10] In the present matter, the parties have filed a mere joint notice. In my opinion such notice does not constitute an application contemplated under rule 96(3).

[11] Furthermore, the parties' joint notice or their purported 'application' does not set out:

- (a) a satisfactory explanation for the delay in the parties' decision to refer the matter to private arbitration,
- (b) whether or not the parties were aware of 'private arbitration' as an option, before the matter was set down, or,
- (c) what prompted the parties to decide to refer the matter to private arbitration, only after the matter was set down, just a few days before the trial starts.

[12] I am of the view that an application in terms of rule 96(3) cannot be granted for the asking. In addition, I am of the opinion that the fact that the parties have *agreed* to vacate the set down dates does not necessarily show '*good cause*' contemplated under rule 96(3).

[13] In this matter, I am of the view that the parties have not shown good cause to have the set down dates vacated or set aside, and the parties' purported 'application' stands to be dismissed.

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

1. The parties' purported joint 'application' to have the set-down dates vacated or set aside, is dismissed.
2. I make no order as to costs.
3. The matter remains set-down for trial for the 09-13 March 2020 and 16-20 March 2020 at 10:00.
4. The parties are directed to attend roll call on 06 March 2020 at 08h30.

Judge's signature	Note to the parties:
	Not applicable

Counsel:	
Plaintiff	Defendant
A Vaatz Instructed by Andreas Vaatz & Partners Windhoek	E. Angula Instructed by AngulCo Inc Windhoek