REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 2304/2013

AND I 1573/2013

In the matter between:

BENEDICTA DONATUS	**PLAINTIFF**

And

DR. A. MUHAMEDERAHIMVO	**1ST DEFENDANT**
DR. I BURGER	**2ND DEFENDANT**
DR. S.J. SPIES	**3RD DEFENDANT**
ROMAN CATHOLIC HOSPITAL	**4TH DEFENDANT**

And

BENEDICTA DONATUS	**PLAINTIFF**

And

MINISTRY OF HEALTH AND SOCIAL WELFARE	**DEFENDANT**

Neutral citation: *Donatus v Muhamederahimvo & Others; Donatus v Ministry of Health and Social Services (I 2304/2013; I 1573/2013) [2016] NAHCMD 49 (2 March 2016)*

CORAM: MASUKU J

Heard: 10 February 2016
Delivered: 2 March 2016

Flynote: **HIGH COURT RULES** - Rule 28 (8) on discovery and Rule 53 on sanctions for non-compliance with court orders or directives considered and applied.

Summary: In a claim for damages arising out of an alleged negligent medical treatment of the plaintiff by the defendants, when called upon make discovery in terms of rule 28, the defendant, under Case No. I 1573/2013, the Ministry of Health and Social Welfare, filed a discovery affidavit that was considered by the plaintiff to have been deficient. The court, at the instance of the plaintiff, and with the defendant not objecting thereto, ordered the defendant, pursuant to the provisions of rule 28 (8), to discover certain documents under oath. The defendant, in an answering affidavit denied its liability to discover same, claiming that it had already indicated the non-existence of these documents previously. The defendant also took issue with the applicability of rule 28 (8) in the present circumstances. *Held* – the defendant had failed to comply with the order on the discovery. *Held further* – that although the plaintiff had not fully complied with all the requirements of rule 28 (8), there was no prejudice to the defendant as a result and that a proper case had been made for the invocation of rule 28 (8). *Held further* – that the defendant is to comply with orders of court even if it forms the view that same may be incorrect. *Held* – for the defendant's non-compliance with the court's order, the defendant was liable to be sanctioned in terms of rule 53 of the rules of court. *Held further* – that the order to strike out the defendant's defence for non-compliance with a court order or directive, was one to be issued in consideration of all attendant

facts and in line with the dictates of fairness and justice and that all matters, in relation to sanctions, must turn on their own facts and circumstances. *Held further* – that notwithstanding the defendant's aforesaid non-compliance, an order for the defendant to pay costs occasioned by the non-compliance was condign in the circumstances. The defendant was further ordered to pay the costs of the hearing.

ORDER

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1. The defendant is ordered, within seven (7) days from the date of this order, to comply with this court's order dated 11 November 2015.
2. The defendant is ordered to pay the costs occasioned by its non-compliance with the said order.
3. The defendant is ordered to pay the costs of this hearing, namely, the costs of one instructing and one instructed council.
4. The matter is postponed to 27 April 2016 at 15h15 for a status hearing.
5. Should the defendant not comply with the order in paragraph 1 above, the plaintiff may apply to court on papers duly amplified for an order in terms of Rule 53 striking out the defendant's defence.

JUDGMENT

MASUKU J.,

[1] At issue in this judgment is an order issued by this court calling upon the defendant, the Ministry of Health and Social Welfare to discover certain documents. The Ministry is challenging the propriety of this order and the correctness of the steps taken by the plaintiff in dealing with matter.

[2] It is acutely necessary, in the circumstances, to briefly chronicle the issues that give rise to the matters in contention. The plaintiff is an adult Namibian female from Walvis Bay. She avers that following a serious automobile accident on 10 August 2010, she was admitted at Otjiwarongo Hospital for treatment of severe injuries that she had sustained. She avers in a nutshell that said the hospital failed or neglected to administer any or adequate treatment in respects that I need not elaborate for purposes of this judgment.

[3] The plaintiff consequently claims an amount of N$ 250 000 for past medical and hospital expenses; N$ 1, 750 000 in respect of estimated future medical and hospital expenses, N$ 300 000 for loss of earnings; N$ 4 320 000 for future loss of earnings and N$ 600 000 as general damages. Needless to say, the defendants deny liability and the matter is nearing ripeness for trial.

[4] At the centre of the present dispute is a notice issued by the plaintiff in terms of rule 28 (8) (b) (ii) of the rules of court.[1] In order to place this notice in its proper historical context, it is desirable to briefly sketch the important events that occurred leading to the issuance of this notice. These will be cited mainly from the Judicial Case Management Orders issued by the court and on which there is by and large no controversy.

[5] In terms of a case planning order dated 9 July 2014, the parties were ordered to make discovery and exchange their bundles by 29 August 2014. It is common cause that the defendant failed to comply with same. A further order was issued on 12 November 2014 again calling upon the defendant to make discovery by 28 November 2014. Again, the defendant did not comply with the said order. On 21 January 2015, the court again ordered the defendant to make discovery on or before 6 February 2015.

[6] In a case management report dated 8 June 2015, the defendant, not having complied with previous undertakings and orders of court, further undertook to make

[1] High Court Rules of the High Court of Namibia dated 24 December 2014 issued by the Judge President

discovery by 19 June 2015. This was made an order of court. On 6 February and 19 June 2015, respectively, the defendant again failed to make discovery as ordered by the court.

[7] On 9 September 2015, the defendant filed a discovery affidavit in compliance with the provisions of Form 10 prescribed in the rules. Following this discovery affidavit, the plaintiff, by notice in terms of rule 28 (8) (a) dated 30 September 2015, called upon the defendant to provide under oath the following information:

> (a) documents and tape recordings in the defendant's possession or those that were previously in the defendant's possession;
> (b) specify in detail which documents are still in the defendant's possession; and
> (c) specify if the defendant no longer has any such documents which were previously in its possession, the whereabouts of such documents, if known.

[8] On 30 September 2015, the matter was then postponed to 28 October 2015 to enable the defendant to comply with the requirements of the said notice. At the defendant's instance, the matter was again postponed to 11 November 2015 to enable it to comply with the order. On that day, the defendant filed an answering affidavit, necessitating the postponement of the matter to enable the plaintiff to consider the said affidavit. Having considered the affidavit, the plaintiff took issue with it and applied to the court for an order calling upon the defendant to comply fully with the terms of the notice in terms of rule 28 (8) (a) aforesaid.

[9] It is important, for a full account, to reproduce the said order. It reads as follows:

> '1. The defendant in Case No. 1673/2013 is ordered to file an affidavit in response to an affidavit in terms of Rule 28 (8) (a) dated 29 September 2015.
>
> 2. Should the defendant fail to comply therewith, the matter may be dealt with in terms of Rule 28 (13).

3. That such affidavit in paragraph 1 is to be filed by 25 November 2015 and to address each request captured in the notice.
4. That the dates for filing witness statements are extended until compliance with orders in 1 and 2 above.
5. That the matter is postponed to 20 January 2016 at 15:15 for status hearing.'

[10] In response to this order, the defendant filed what it terms an answering affidavit deposed to by Mr. Joseph Seseho who describes himself therein as a deputy director in the defendant Ministry and is head of the legal support services. It is important to capture salient portions of the said affidavit for purposes of this judgment as it appears the decision may oscillate to a large extent on the contents thereof. From paragraph 3, he states as follows:

> '3. By way of summary, I set out below a brief background to this matter. I am aware that the medical records in this matter have not and cannot be located despite diligent search. I am aware that on 10 February 2015 our legal practitioner of record deposed to an affidavit indicating that the medical records sought could not be located.
>
> 4. I point out that I am advised by our legal practitioner that he has at previous case management hearings advised the plaintiff from the bar that the medical records are not available.
>
> 5. I am aware that that on 9 September 2015 the defendant filed its discovery affidavit wherein, Defendant essentially confirmed the already **reiterated** fact that the medical records were not available.
>
> 6. I believe that the procedure envisaged in terms of Rule 28 (8) of the Rules of the Court should not be utilized unless there is a basis in fact, for believing that there are additional documents which should be discovered that have not been discovered.
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> 7. In the present matter, the Plaintiff has been notified by way of affidavit, counsel's submissions from the bar as well as by way of discovery that the medical records are not available.
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> 8. I submit that in the present circumstances the procedure in terms of Rule 28 (8) has been abused and has led to unnecessary time being spent in addressing a matter that has already been addressed on numerous occasions. In the

> circumstances I submit that this Honourable Court should grant the Defendant its costs for this affidavit on an attorney client scale.'

[11] It will be seen from the foregoing contents of the 'answering affidavit' that the defendant essentially takes the position that it complied with the order of the court by filing on oath statements showing that the documents in question are not available. It would appear that the defendant perceives the notice issued by the plaintiff in terms of rule 28 (8) to have been nothing but harassment of the defendant by the plaintiff. A finding on the correctness or otherwise of that conclusion will be made in this judgment.

[12] Before dealing with the sustainability of the defendant's position in this matter, I find it prudent to also have regard to the discovery affidavit which gave rise to the notice in terms of rule 28 (8) as aforesaid. I deem it necessary to do so for the reason that a consideration of same may assist in determining the correctness of the said notice and could also assist in deciding whether the defendant did in fact comply with the notice as it alleges it did.

[13] The defendant's discovery affidavit, dated 9 November 2015, was also deposed to by Mr. Siseho. Part A of the first schedule thereto contains nothing. Part B of the said schedule contains all correspondence between the sets of legal practitioners; 1st and 2nd defendant's notes; witnesses' statements and lastly all other documents and correspondence brought into existence to enable defendant's case to be conducted and which are claimed to be privileged. The second schedule is also empty.

[14] Having regard to the purposes of discovery and what the defendant's affidavit did not disclose, can it be said that the defendant made a full and frank disclosure of all documents that in law were supposed to be discovered? Put differently, can it be said that the plaintiff, in issuing the notice in terms of rule (28) (8) (a), was harassing a defendant who had made a full and frank disclosure of all relevant documents for necessary for the conduct of the trial?

[15] I am of the view that the discovery affidavit filed by the defendant was as bare as can be. Having regard to the nature of the *lis inter partes,* a party should, in terms of rule 28 (1), 'make discovery, identify and describe all documents, analogues or digital recordings that are relevant to the matter in question and in respect of which no privilege may be claimed and further identify and describe all documents that the party intends or expects to introduce at the trial'.[2] What determines the documents to be discovered, in part, depends on the nature of the dispute. In a dispute over alleged professional medical negligence, I am of the view that in line with the above quoted subrule, a defendant would certainly need to discover medical records, including medical attendances, medicine prescribed, procedures undertaken, admission and discharge documents, to mention but a few, as these are not only relevant but may prove critical if not decisive in cutting the proverbial Gordian Knot in the main trial.

[16] It is clear in my view, from considering not necessarily what the discovery affidavit disclosed but rather what it did not disclose, that no full and proper discovery was made by the defendant. This is plain from the foregoing paragraph. More importantly, full and proper discovery is made where the discovering party also complies with the provisions of rule 28 (4), which have the following rendering:

> 'The party making discovery must do so on Form 10 specifying separately –
> (a) documents, analogue or digital recordings in his or her possession or in the possession of his or her agent other than the documents, analogues or tape recordings mentioned in paragraph (b);
> (b) documents, analogues or digital recordings in respect of which he or she has a valid objection to produce;
> (c) documents, analogues or digital recordings which he or she or his or her agent had, but no longer has in his or her possession at the date of the affidavit'.

[17] It is important to mention that the above requirements are not merely pedantic. They serve a purpose. For that reason, a party should identify and specify not only documents which it has an objection to discovering, but it also has an unyielding duty to

[2] Rule 28 (1).

also identify and specify documents which it had but no longer has in its possession or that of its agent at the time of discovery. Even a cursory look at the defendant's affidavit to me suggests that the defendant did not make a full and frank disclosure as required by the rules. In particular, the documents required in (a), (b) and (c) of the subrule quoted immediately above were not disclosed with by the defendant. For that reason, the conclusion that the defendant failed to make a full and frank disclosure is irresistible in the circumstances. I accordingly so hold.

[18] I should perhaps underscore the importance of full and proper discovery in such and other matters, particularly the sacredness of the oath or affirmation in discovery affidavits. I can do no better than to repeat the sentiments expressed in *Gamikaub (Pty) Ltd v Schweiger,*[3] where this court reasoned as follows at para [22]:

> 'A word of caution is in this regard in my considered view necessary. Persons who depose to discovery affidavits, whether in relation to personal matters or in a representative capacity, must appreciate that that exercise is a serious and solemn matter. The fact that standard wording is employed in the relevant forms of the rules of court does not in any way detract from the seriousness of discovery affidavits, particularly viewed in relation to the oath or affirmation made as the case may be. The words reproduced in the relevant form are not mere incantations that may be repeated with no consequence if proved to be untrue. The failure to make a full and proper disclosure when an oath or affirmation to the contrary has been taken or made, opens the deponent to possible perjury proceedings, which is a serious matter that may result in the deponent forfeiting his or her liberty, in appropriate cases, for a season. This is therefore a procedure that must be taken seriously and with a full presence of mind. It must be undertaken conscientiously and truthfully. It must not be allowed to degenerate into a sacrilege.'

[19] It is my fervent hope that this admonition will fall on fertile and not rocky ground and that this will influence and be made manifest by the direction taken by the defendant in compliance with the order that the court will be minded to make in this matter.

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[3](I 3762/2013) [2015] NAHCMD 88 (15 April 2015).

[20] In the premises, I am of the considered view that the plaintiff was within her full rights to complain about the level of discovery made by the defendant. For that reason, it would seem to me that the attack on the plaintiff launched by the defendant in the affidavit was ill-advised and very much unwarranted in the circumstances. The question that follows will be whether the plaintiff was well within her rights, in the face of the partial discovery, to proceed against the defendant in terms of rule 28 (8) (a) and if so, whether the provisions of the said subsection were complied with by the plaintiff. To come to a view on this issue, it is important to have regard to the provisions of the said subrule.

[21] Rule 28 (8) provides the following:

> 'If a party believes that there are, in addition to documents, analogues, or digital recordings disclosed under subrule (4), other documents including copies thereof or analogues or digital recordings which may be relevant to any matter in question in the possession of the other party –
>
> (a) the first named party must refer specifically to those documents, analogues or digital recordings in the report in terms of rule 24 on Form 11; and
>
> (b) the managing judge must at the case management conference give any direction as he or she considers reasonable and fair, including an order that the party believed to have such documents, analogues or digital recordings in his or her possession must –
>
> (i) deliver the documents, analogues or digital recordings to the party requesting them within a specified time; or
>
> (ii) state on oath or by affirmation within 10 days of the order that such documents, analogues or digital recordings are not in his possession, in which case he or she must state their whereabouts, if known to him or her.'

[22] I need, before making a decision on this matter, make a few remarks about this sub-rule. In the first place, for a party to invoke the provisions of this sub-rule, there must be a reasonable belief or basis for the conclusion that there are some documents, analogues or digital recordings that have not been disclosed by the discovering party. This must objectively be the case, having regard to the entire matter. Should there be

no reasonable basis for the belief, then it would appear in my view that the requesting party may be correctly characterised as abusing the discovery procedure and possibly harassing the other party, leading to the conclusion that the request is in the circumstances unreasonable and has no legal basis or foundation.

[23] As indicated above, the belief that not all the documents were not discovered in this matter is plain and can be seen from the contents of paras [17] to [19] above. From those paragraphs, it is clear how and in what respects the defendant did not comply with the discovery requirements. For that reason, I am of the considered view that a reasonable basis for invoking the provisions of rule 28 (8) existed and it cannot be said in all the circumstances that the plaintiff is on a fishing expedition or on the nefarious trail of harassing the defendant. A reasonable basis for the issuance of the notice is in my view very plain.

[24] It would appear to me that the plaintiff invoked the provisions of rule 28 (8) (b) by requiring the defendant to state on oath the position relating to the documents in question. I am of the view, however, that the plaintiff may have in a sense jumped the gun. I say so because a reading of the relevant subrule suggests that before resorting to the provisions of rule 28 (8) (b), that party must have first complied with the provisions of rule 28 (8) (a), i.e. referring specifically to those documents in this case, in the report in terms of rule 24 on Form 11. That was not done by the plaintiff in this case it would seem to me.

[25] I should mention that a reading of the two subrules does not support a conclusion that a party seeking to invoke rule 28 (8) has an option to choose between rule 28 (8) (a) or (b). It would appear that both sub subrules must be complied with *seriatim.* That this should be the case, in my view, may be gleaned from the fact that the law-giver employed the word ‘and’ between the two sub provisions, suggesting that both must be complied with. Had it been the intention of the rule giver to create an option between the two, the word ‘or’ would have been employed between the two sub provisions.

[26] The next question is whether the non-compliance with the provisions of rule 28 (8) (a) should in the instant case result in the plaintiff's notice being set aside. I am of the view that there is no serious harm or prejudice that has been shown to have enured to the defendant as a result of the non-compliance with the said provision. It must be recalled that the rules were made for the court and not the court for the rules. Where there has been non-compliance by a party but which when objectively considered does not yield an injustice or serious prejudice to the other party, the court should, in appropriate circumstances and subject to appropriate safeguards, condone the non-compliance.

[27] I am of the view that in the instant case, there is no serious prejudice that the defendant has suffered as a result of the plaintiff not having fully complied with the provisions of rule 28 (8) (a). For that reason, it would be an exercise in sterile formalism to insist on that compliance when doing so will not, in the circumstances, give any advantage to the plaintiff nor yield a disadvantage to the defendant. A running up of costs and loss of valuable time may be lost if the strict approach were to be adopted. Furthermore, I take it into account that the order issued by the court was a result of a consensus by the parties. It would be unfair, in such circumstances, to overlook that fact and insist on a fastidious approach to the issue. By so saying, the court must not be understood to be giving a message that the provisions of rule 28 (8) (a) are inconsequential and may be overlooked with no consequences. That is not so.

[28] I now revert to the said order. It is clear that the order was explicit in what it required the defendant to do and to state under oath. I am of the view that the defendant did not comply with the said order at all. This is despite its protestations made in its 'answering affidavit' that it unequivocally stated what the position with those documents is. The terms set out in the court order are clear and specific and they require a clear and precise response thereto by the defendant and this is what the court expected the defendant to do. Whatever misgivings or compunctions the defendant may have had about the correctness of the order, it does not lie in its mouth to refuse to comply with an order of court. This is so even if that party may justifiably form the view

that same was wrongly issued. It is worse in a situation like the present where the defendant participated in the issuance and framing of the order.

[29] It has been submitted on the defendant's behalf that the plaintiff, that if she formed the view that the discovery affidavit did not comply with the requirements of the rules, she did not seek to except to the said affidavit, nor did she move for same to be declared an irregular step or proceeding, nor did she follow any other process that may have led to the said affidavit being set aside. I am not persuaded by the correctness of the submissions by the defendant for reasons I have stated above, including that the defendant failed to comply with an order of court. I am not aware if the procedures suggested by the defendant in this paragraph would have been permissible and effective. I make no finding on this question and have no need to.

[30] In view of the defendant's non-compliance with the court order, the plaintiff has applied to this court to impose sanctions on the defendant in terms of the provisions of rule 53. In particular, the plaintiff prayed that the court should strike the defendant's defence in the circumstances. Rule 53 (1) reads as follows:

> 'If a party or his legal practitioner, if represented, without reasonable explanation fails to –
>
> (a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
> (b) participate in the creation of a case plan, joint case management report or parties' proposed pre-trial order;
> (c) managing judge's pre-trial order;
> (d) participate in good faith in a case planning conference, case management or pre-trial process;
> (e) comply with a case plan order or any direction issued by the managing judge; or
> (f) comply with deadlines set by any order of court,
>
> the managing judge may enter any order that is just and fair in the matte, including any of the order set out in subrule (2)'.

[31] Subrule (2), on the other hand, provides the following:

> 'Without derogating from any power of the court under these rules the court may issue an order-
> (a) Refusing to allow the non-compliant party to support or oppose any claims or defences;
> (b) Striking out pleadings or part thereof, including any defence, exception or special plea;
> (c) Dismissing a claim or entering a final judgment; or
> (d) Directing the non-compliant party or his legal practitioner to pay the opposing party's costs caused by the non-compliance.'

[32] It is clear from the foregoing that the court, in applying sanctions to an errant party, exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. In this regard, it would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct on the proceedings; the attitude or behavior of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case.

[33] In the instant case, the plaintiff's representatives have, in their heads of argument, prayed for an order striking out the defendant's defence as being the appropriate censure in the circumstances. This argument is not without foundation, considering the manner in which the defendant has, with the plaintiff and the court, to some extent, leaning backwards, to allow the defendant to put its house in order regarding the issue of discovery. It is fair to say that the plaintiff and the court have almost broken their backs in accommodating the defendant. Earlier in the judgment, as I set out the chronicle of the events in this matter, one issue sticks out like a sore thumb, and it is the drawn out extent of the defendant's non-compliance. It is fair to say that

more than a year has passed with the defendant dancing incessantly around the issue of discovery. This should not be.

[34] What compounds issues is that instead of the defendant complying with the court order pursuant to the rule 28(8) notice, the defendant sought to challenge the appropriateness of the order, an issue I have already found has no merit, the circumstances of this case sully taken into account. This has resulted in the further loss of time and escalating of costs unnecessarily. The court should, and will mark its disapproval of this type of conduct. Furthermore, what the defendant has to do is not difficult. It has to make a full and frank disclosure as the discovery it sought to make is not good discovery at all.

[35] It would seem to me that although the non-compliance by the defendant is serious and has been the subject of a number of extensions by this court, it would, however, appear that the striking of the defendant's defence is rather grave and too serious a sanction, having due regard to the nature of the claim and the amounts sought. This must not, however, be regarded as a cue by the court to litigants that it will always treat non-compliance by a party in this fashion. Each case, as indicated, will have to be treated in the light of its own peculiar facts and circumstances.

[36] I should however, mention that the order for the striking of a defence is very serious as it has the potential, if granted, to show to the errant party, what in footballing parlance, is akin to a red card. This card effectively excludes that party from further participation in the trial. For that reason, the dictates of justice and fairness would in my view require that this application should not merely be made orally or only in heads of argument. Good practice, propriety and fairness would suggest that it must on account of its gravity be on notice, preferably on application, and to which the defaulting party may have an opportunity to deal with it. Furthermore, it will always assist the court, before issuing such a drastic order, to have had the benefit of argument by both parties where they both still have their hands on the plough so to speak.

[37] I am of the view, regard had to all the circumstances of this case, that the proper order to issue in the circumstances is to mulct the defendant with an order for costs as a result of the non-compliance and this is done in terms of rule 53 (2) (d). This order for costs will have to extend, it seems to me, to the costs necessarily incurred as a result of this hearing, which are all the direct result of the defendant's non-compliance with the court's order.

[38] I should specifically mention that having regard to the defendant's behavior, namely the non-compliance with the court order for a prolonged period of time, coupled with its insistence that it had complied with same and also having the temerity to argue with the same mouth that the order had been issued irregularly with no proper basis for saying so, suggested strongly that this may have been a proper case for mulcting the defendant with punitive costs. I have been disinclined to grant the said order because it has not been applied for, coupled with the fact that the defendant did not have notice or at least sufficient notice of same. This has, however, been a borderline case, where the court was strongly minded to vindicate its authority by marking its disapproval of the defendant's conduct by issuing a cost order on the punitive scale.

[39] In the result, I issue the following order:

1. The defendant is ordered, within seven (7) days from the date of this order, to comply with this court's order dated 11 November 2015.
2. The defendant is ordered to pay the costs occasioned by its non-compliance with the said order.
3. The defendant is ordered to pay the costs of this hearing, namely, the costs of one instructing and one instructed counsel.
4. The matter is postponed to 27 April 2016 at 15h15 for a status hearing.
5. Should the defendant not comply with the order in paragraph 1 above, the plaintiff may apply to court on papers duly amplified for an order in terms of Rule 53 striking out the defendant's defence.

T. S. Masuku

Judge

APPEARANCES:

PLAINTIFF:	Y. Campbell Instructed by Cronje & Co.
DEFENDANT:	Chibwana Instructed by Government Attorney