

“ANNEXURE 11”

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: FREEDOM SQUARE (PTY) LTD v THE SOCIAL SECURITY COMMISSION	Case No: HC-MD-CIV-ACT-CON-2017/04390
	Division of Court: MAIN DIVISION
Heard before HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 13 July 2020
	Delivered: 31 July 2020
Neutral citation: <i>Freedom Square (Pty) Ltd v The Social Security Commission</i> (HC-MD-CIV-ACT-CON-2017/04390) [2020] NAHCMD 327 (31 July 2020)	
Results on merits: Not on the merits.	
The order: Having heard MS NYASHANU , on behalf of the Plaintiff and MR TJITERE , on behalf of the First defendant and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. The filing of expert witness statements of Messrs Jacob Wasserfall, Donovan John Bolton, Herman Martins and Dirk Herman Van Der Merwe constitutes an irregular step as envisaged by rule 61 of the Rules of Court.2. The expert witness statements are set aside.3. Insofar as the aforementioned witnesses' evidence may relate to liability issues as crystallised in the joint status report dated 20 August 2019, the plaintiff is directed to file its cured witness statements on or before <u>28 August 2020</u>.4. The first defendant is directed to file its further factual witness statements on or before <u>9 October 2020</u>.5. Cost to follow the result. Such cost to be limited to rule 32(11).6. The case is postponed to 29/10/2020 at 15:00 for Pre-trial Conference.7. The counsel who will be conducting the trial must be personally present during the pre-trial meeting	

between the parties and must be actively involved in the drafting of the proposed pre-trial order.

8. Pursuant to the pre-trial meeting the parties **must** file a joint proposed pre-trial order on or before 24 October 2020.

Reasons for orders:

PRINSLOO J

The parties

[1] The plaintiff, Freedom Square (Pty) Ltd is a private company incorporated and registered in accordance with the laws of Namibia. The first defendant, the Social Security Commission, is a juristic person established in accordance with the provisions of section 3(1) and (2) of the Social Security Act¹. Only the first defendant is relevant for purposes of these proceedings. Parties will be referred to as they are in the main action.

The claim

[2] The plaintiff instituted action against the defendant for an alleged breach of contract and claims damages in the sum of N\$17 148 950.87 (reduced amount). The pith of the plaintiff's case is cancellation of the agreement of sale dated 13 September 2013, in terms of which the defendant acquired Erf 8769 from the plaintiff. The plaintiff further seeks confirmation of alleged cancellation of the agreement of sale and re-transfer of the property to it.

The current application and relief sought

[3] The application presently before me is one for irregular proceedings raised by the first defendant in terms of rule 61² of the Rules of Court. The relief sought by the first defendant is couched as follows:

- 1.1 Declaring that the Plaintiff's unsigned witness statements filed on 25 November 2019 ('the witness statements') are irregular, alternatively constitute an irregular step as envisaged by Rule 61 of the Rules of the High Court.

¹ 34 of 1994.

² (1) A party to a cause or matter in which an irregular step or proceeding has been taken by any other party may, within 10 days after becoming aware of the irregularity, apply to the managing judge to set aside the step or proceeding, but a party that has taken any further step in the cause or matter with knowledge of the irregularity is not entitled to make such application.

1.2 Declaring that the witness statements are set aside.

1.3 Alternatively, and only in the event that this Honorable Court declines the orders in paragraphs 1.1 and 1.2 above, a direction that the first defendant be granted 30 days from the date the plaintiff delivers any cured witness statements to deliver their further factual witness statements.

1.4 Directing the Plaintiff to pay the cost of this application on a scale of one instructing and two instructed counsel, not to be capped in terms of Rule 32(11).

1.5 Further and/or alternative relief.'

The grounds relied upon for the relief sought

[4] The parties sought leave from this court to separate the merits and quantum for reasons that are not of importance at this stage, which leave was granted on 4 September 2019. On the same date the parties were issued with a court order directing them to file their factual witness statements on 25 November 2019 and 20 January 2020 respectively.

[5] On 25 November 2019, plaintiff uploaded six (6) witness statements in compliance with the aforementioned court order. The first defendant takes issue with these witness statements, in that:

- a) The witness statements were not signed by either the witness or the legal practitioner;
- b) The witness statements contains inadmissible hearsay;
- c) Four of the witness statements constitutes expert evidence and have been filed contrary to the parties' joint status report dated 20 August 2019 and the court order of 4 September 2019.
- d) In addition to the non-compliances with the court order dated 4 September 2020 the expert witnesses' statements were filed contrary to rules 24 and 29.
- e) The expert witness statements prematurely deal with the deferred issue of quantum when only further factual witness statement pertaining to the issue of liability was permitted at this stage.

[6] The first defendant submits that the plaintiff's behaviour and non-compliance with the relevant court order causes prejudice, in summary as follows:

- a) it made it impossible for the matter to be referred to pre-trial conference and trial, and for the first defendant to comply with the court order of 4 September 2020.
- b) the filing of purported witness statements by the plaintiff that are not signed by the respective witnesses prejudices the first defendant as the witnesses may deviate from their respective

witness statements when giving oral evidence at that trial as they would not be confined to the statements they delivered.

- c) the filing of expert witness statements causes prejudice to the first defendant as it has insufficient time to find and consult experts and prepare the relevant expert notices and statements in response to the further witness statements filed by the plaintiff.
- d) unnecessary cost of litigation as the first defendant was obliged to launch an interlocutory application.

Argument on behalf of the First Defendant

[7] Before I proceed to deal with the argument advanced on behalf of the first defendant I must pause to indicate that the application before me is regarded as unopposed as there was no formal opposition filed in respect of the rule 61 proceedings. In an earlier judgment concerning the parties I have dealt with the condonation application filed on behalf of the plaintiff and its failure to file the necessary opposing papers in respect of the Rule 61 proceedings. This was discussed in detail in this court's judgment that dealt with the issue of condonation.³

[8] Mr Kauta argued that there are two narrow issues for determination by this court and those are whether the Plaintiff is entitled in law:

- a) on a proper reading of Rule 92 of the Rules of Court, to file and rely on two sets of witness statements, one signed and the other unsigned, as further factual witness statement; and
- b) to ignore the Honourable Court's order of 4 September 2019 and file expert witness statements under the guise of further factual statements and contrary to Rule 24 of this Honourable Court's Rules.

[9] Mr Kauta submitted that the plaintiff is not entitled in law to file and rely on signed and unsigned witness statements on a proper reading of rule 92, nor is the plaintiff in law entitled to ignore or vary a court order and do as it please, without applying for indulgence or variation of the court order

[10] Mr Kauta directed the court's attention to rule 92(2) which is crafted in peremptory terms to provide that:

"The witness must indicate at the end of his or her statement that he or she believes that the facts stated in

³ *Freedom Square (Pty) Ltd v The Social Security Commission* (HC-MD-CIV-ACT-CON-2017/04390) [2020] NAHCMD 270 (2 July 2020).

the statement are true to the best of his or her knowledge.”

[11] With the emphasis on the word ‘indicate’ Mr Kauta referred the court to the Oxford Dictionary which lists the following synonyms to the word ‘indicate’ , namely designate, specify, stipulate, show, demonstrate, declare or point out. Counsel argued that the designation, declaration, demonstration or showing by the witness in Rule 92(2) serves and highlight important purposes, namely that :

- a) the witness statement has been verified;
- b) the witness statement is authenticated;
- c) it constitutes and serves as notice to the opposite side which case to meet; and
- d) it serves as warning to the witness himself that if the content is not true, he could be liable for conviction on perjury or contempt of Court.

[12] Mr Kauta submitted that he is only aware of two permissible methods by which a witness may authenticate or verify his or her written witness statement, ie either by oath or signature.

[13] Counsel further referred the court to the Practice Note issued by the Judge President, which according to counsel permits verification by oath only by agreement between the parties and contended that there is no such agreement between the parties in the case at hand.

The applicable legal principles and application to the facts

[14] The purpose of the rule 61 procedure is to enable a party to a cause to apply to set aside a step or proceeding taken by the other party as an irregular step or proceeding, if it is also prejudicial to that party. The procedure affords a party an opportunity to compel its opponent to comply with the rules of court on pain of having the said irregular step set aside.⁴ The object of the rule is therefore to provide a procedure whereby a hindrance to the further conduct of the litigation, whether created by non-observance of what the rules of court intended or otherwise, is removed.⁵

Non-compliance with rule 92(2)

⁴ Visagie v Visagie, unreported, (1956-2014) [2015] NAHCMD (26 May 2015) para 17, 19-21.

⁵ Herbstein & Van Winsen: *The Civil Practice of the High Court of South Africa* 5th ed by Cilliers, Loots & Nel Vol 1 (2009) at 735.

[15] Witness statements are regulated by rule 92 of the Rules of Court. When one have regards to the Rules it is clear that there are only a few formal requirements that a witness statement must adhere to. The rule for example does not require that a witness statement must be under oath or affirmation, nor does it require that the witness statement must be signed by the witness⁶. Rule 92(2) only require the witness to state at the end of the witness statement that he or she believes that the facts stated in the statement are true to the best of his or her knowledge.

[16] The court was referred to the Judge President's Practice Note issued on the reception of witness statements in civil trial ⁷. Mr Kauta argued that the Practice Note permits verification by oath only by agreement between the parties. I however disagree with counsel in that regard because from reading para 2 of the Practice Note it is clear that parties may choose to provide a statement under oath but it is clearly not only by agreement.

[17] In the Practice Note as well as in his newly published book *Court-Managed Civil Procedure of the High Court of Namibia, Law, Procedure and Practice* ⁸ Damaseb JP actually discourages witness statements under oath:

'11-020 In fact it is preferable that it is not under oath. The only requirement is that the maker of the statement believes that the facts in the statement are true to the best of his or her knowledge. The obvious rationale of the rule is that witnesses must not be unnecessarily exposed to the risk of perjury or making a false statement under oath and to be held to their statement until they come to court and confirm the statement under oath on the record after the admonition have been given by the trial judge. The danger associated with giving sworn statements is that it limits the witness's ability after the judge's admonition to correct any inaccuracy that may have found its way into the statement during consultation with counsel.'

⁶ *Josea v Ahrens* (I 3821-2013) [2015] NAHCMD 157 (2 July 2015) para 12.

⁷ **RE: RECEPTION OF WITNESS STATEMENT IN CIVIL TRIAL**

1. I am aware that we are applying different practices when it comes to receiving witness statements in civil trial actions. In fact, some members of the profession have pointed this out to me and requested that we adopt a uniform approach. I wish to make some suggestions towards that end considering the issue is not specifically governed by a Rule of Court.

2. In the first place, the witness statement need not be under oath. In fact it is preferable that it is not under oath, unless the parties choose to provide statements under oath.

3. Counsel must be required to prepare statements that are sufficient to constitute the witness' evidence-in -chief and should not provide summaries. The statement must identify all the documents that the witness will have admitted as exhibits.

4. The statement must be read into the record by the witness personally, in English or if it is in another language in the language it was written and be interpreted on record by a court interpreter.

5. If the statement was taken in English from the witness with the assistance of an interpreter, the court must first verify that the witness is the source of the information contained in the statement, and that it was read back to him or her in the language he or she understands. At trial, the statement must be read paragraph by paragraph and be interpreted back to the witness who should be afforded the opportunity to correct any inaccuracy.'

⁸ 1st ed 2020.

[18] The witness statement also need not be authenticated or verified, unless the witness statement was taken in English from the witness with the assistance of an interpreter. In such an instance the court must first verify that the witness is the source of the information contained in the statement and that it was read back to him or her in a language he or she understands⁹. When a witness statement is in a language other than English a sworn translation is required and the sworn translator must file an affidavit with Registrar verifying the translation.¹⁰

[19] In its notice of irregular proceedings a concern was raised on behalf of the first defendant that the filing of purported witness statements by the plaintiff that are not signed by the respective witnesses prejudice the first defendant as the witnesses may deviate from their respective witness statement when giving oral evidence at the trial as they would not be confined to the statements that they delivered.

[20] The fears of the first defendant can be dispelled in this regard as it should be borne in mind that witness statements stands as the oral evidence- in-chief of the witness who execute it, unless the court orders otherwise.¹¹ A witness is not be allowed to deviate from his or her witness statement. A witness is in actual fact not even allowed to amplify his or her witness statement without leave of court and if so allowed then only in relation to new matters which have arisen since the witness statement was served on the other party. The court will only grant such leave if it considers that there is a good reason not to confine the evidence of the witness to the contents of his or her witness statement.¹²

[21] It should further be kept in mind that the presiding judge will admonish the witness at the commencement of such witness's evidence. As the Judge President pointed out in para 11-029 'the purpose of the admonition is to make the witness own up to what is contained in the witness statement in order to avoid the later excuse that the witness did not know what was written in the statement'.¹³

[22] The fact that the witness statements are neither under oath nor signed by the witness is not irregular in any way and there can be no prejudice to the first defendant in this regard. I am further satisfied that the witness statements complained of comply with rule 92(2).

⁹ Rule 92(4).

¹⁰ Rule 92(5)

¹¹ Rule 93(2).

¹² Rule 93(3).

¹³ Supra footnote 7 at 277.

Filing of expert witness statements opposed to further factual statements and contrary to Rule 24

[23] The parties agreed in their comprehensive joint status report dated 20 August 2019 that, subject to the approval of court, the merits and quantum should be dealt with separately as it would be the most cost-effective disposal of the matter. The parties agreed that there is a likelihood that the expert witnesses might reach an agreement on the quantum related issues and that evidence on those issues might not be strictly necessary where it could be found that some of the quantum consequences are without merit. The parties therefore agreed to separate the liability and pure quantum issues and proceeded to crystalize the liability issues and quantum issues in a manner akin to a pre-trial order in their aforesaid joint status report.

[24] Specific provision was made in the status report for the filing of factual witness statements and for the filing of the expert summaries and the joint expert report. However, during a meeting in Chambers with the legal practitioners on 4 September 2019 it was agreed to defer the filing of the expert notices and summaries and joint expert witness.

[25] The parties were issued with a court order hereafter which sets out clear directions as to the time and the nature of the witness statements that were due to be filed. Following thereon the plaintiff's filed its further witness statements on 25 November 2019.

[26] However, if one have regard to the witness statements of Messrs Donovan John Bolton, Herman Martins, Jacob Wasserfall and Dirk Herman Van Der Merwe they appear to be expert witness statements, which are, due to the very nature of the statements, contrary to the court order dated 4 September 2019. These witnesses deposed to their witness statements in their capacities as Quantity Surveyors, Architect and Civil Engineer on issues of quantum.

[27] For example, in paras 3 in both the Quantity Surveyors' witness statements¹⁴ they state that they provide their witness statements as experts. At paragraphs 8, 10, 11, 12 and 13, the Civil Engineer, Mr Van Der Merwe deals with the design function and quantum, equally in direct violation of the court order.

[28] In the absence of a case management order in terms of Rule 24 read with Rule 29, it is not open to the plaintiff to arrogate to itself a right to file expert witness statements on quantum which is a separate issue in this matter.

[29] The purpose of the Rules of Court is to regulate the litigation process, procedures and the exchange

¹⁴ Messrs Donovan Bolton and Herman Martins.

of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within which the course of litigation has to proceed. The rules of engagement must therefore be obeyed by the litigants. By filing expert witness statements under the guise of further factual statements contrary to clear directions by this court and which arrangement was agreed by the parties, is clearly not a respect of the rules of engagement. More importantly there is complete disregard of the provisions of rule 24 and 29¹⁵ which clearly directs the parties in respect of expert witnesses.

[30] The filing of the expert witness statements was premature and irregular. The filing of these expert witness statements would clearly affect the further conduct of the matter. The first defendant was ordered to file its further factual witness statements by 20 January 2020. However when the plaintiff filed expert witness statements, contrary to the court order, the defendant found itself in a position where it would be forced to find and consult experts and draft the relevant expert notices and statements or be in non-compliance with a court order and would therefore be facing sanctions.

[31] Even if I disregard the prejudice that the first defendant will suffer because of its inability to secure its experts timeously, there is the question of what possible value could be attached to an 'expert's' evidence if the court never accepted and ordered that the person in question qualifies as an expert.

[32] The salient principle of our law is that in a case where any proven irregularity does not cause any substantial prejudice to the complaining party the court is entitled to overlook it. This is so because the court rules are designed to ensure fair play and thereby prevent injustice. However, in this matter I am of the

¹⁵ '29. (1) A person may not call as a witness any person to give evidence as an expert on any matter in respect of which the evidence of an expert witness may be received unless –

(a) that person has been granted leave by the court to do so or all the parties to the suit have consented to the calling of the witness; or

(b) that person has complied with this rule.

(2) A party to any proceedings is entitled to call an expert witness at the trial if –

(a) the name of the expert, his or her field of expertise and qualifications are included in the case management report required in terms of rule 24;

(b) a summary of such expert's opinion and reasons therefor are included in the report required in terms of rule 24; and

(c) the expert has indicated at the end of the report required in terms of rule 24 that he or she honestly believes that the facts stated in his or her report are true.

(3) The parties must propose in the report to be submitted to the managing judge in terms of rule 24, the date on which the particulars referred to in subrule (2) will be delivered.

(4) If there is no dispute as to the relevant qualifications of the expert witness and the managing judge is satisfied in that regard after the report in terms of rule 24 has been submitted to him or her the managing judge may, at the case management conference held in terms of rule 25, accept and order that the person in question qualifies as an expert.

(5) The managing judge must, at the case management conference held in terms of rule 25, give directions pertaining to the evidence of such experts as he or she considers suitable or appropriate.

(6) The managing judge or the court may, in any cause or matter before him or her or it, direct that there be a meeting 'without prejudice' of the parties' experts after their expert summaries have been filed for the purpose of identifying those parts of their evidence which are in issue.

(7) Where a meeting referred to in subrule (6) takes place the experts must prepare a joint report indicating those parts of their evidence on which they are in agreement and those on which they are not.'

considered view that there will be substantial prejudice on the part of the first defendant if the expert witness statements are not set aside as it will affect the overall conduct of the matter.

Costs

[33] The first defendant prays for cost of one instructing and two instructed counsel. Although the first defendant will be entitled to its cost such a cost order will be exorbitant. I am sure that this prayer was crafted with firm opposition in mind on the part of the plaintiff. However, as a result of the plaintiff's condonation application being denied this matter proceeded on an unopposed basis and not due to a lack of trying on the part of the plaintiff, but unopposed nonetheless. I am therefore of the view that this case does not justify cost of one instructing and two instructed counsel. I am further of the view that the cost must be taxed on the ordinary scale and be limited to rule 32(11).

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
.	Mr Kauta from Dr Weder Kauta and Hoveka Windhoek

