

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**PRACTICE DIRECTIVE 61**

Case no: HC-MD-CIV-ACT-CON-2022/04707

In the matter between:

**STANDARD BANK NAMIBIA LIMITED**

**PLAINTIFF**

and

**PHILIP AGRIEP MWANDINGI**

**DEFENDANT**

**Neutral citation:** *Standard Bank Namibia Limited v Mwandingi* (HC-MD-CIV-ACT-CON-2022/04707) [2024] NAHCMD 157 (5 April 2024)

**Coram:** OOSTHUIZEN J

**Heard:** 25 March 2024

**Delivered:** 5 April 2024

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**ORDER**

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**IT IS ORDERED THAT:**

1. The cancellation of the agreement so concluded between the parties is hereby confirmed.
  
2. The defendant to restore possession of the said 2018 Toyota Hilux XC 2.8 GD-6 4X4 RAIDER 6MT with engine number 1GD0497472 and serial no. AHTHA3CC203353655 to the plaintiff, failing which the Deputy Sheriff is authorized to take possession of and deliver the 2018 Toyota Hilux XC 2.8 GD-6 4X4 RAIDER 6MT with engine number 1GD0497472 and serial no. AHTHA3CC203353655 to the plaintiff.
  
3. The Deputy Sheriff to take possession of and deliver the said vehicle to the plaintiff wherever it may be found;
  
4. Plaintiff is granted leave to apply for:
  - (i) Damages, if any, in an amount to be calculated by subtracting the current market value of the goods or the sale price of the goods, as well as a rebate on unearned finance charges from the balance outstanding;
  
  - (ii) Interest on the said damages at the rate of 7.50% from date of cancellation of the said agreement to date of payment;
  
5. Costs of suit between attorney and client;
  
6. The case is regarded as finalised and removed from the roll.

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## REASONS

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OOSTHUIZEN J:

[1] Plaintiff sold a 2018 Toyota Hilux XC 2.8 GD-6 Raider 6MT pick-up truck to the defendant during August 2018 and at Windhoek by way of a written Instalment Sale Agreement. Defendant received the aforesaid vehicle on 18 August 2018.

[2] On 28 September 2022 the defendant was still indebted to the plaintiff in the amount of N\$344 406.25.

[3] The plaintiff issued summons against the defendant on 27 October 2022 wherein it *inter alia* demand the return of the vehicle and leave to claim damages at a later stage (after selling the vehicle) for the balance then still outstanding (if any)

[4] The defendant was served with the summons on 10 November 2022 at Erf 892, 23 Mbabane Street, Wanaheda, Windhoek in terms of rule 8(2)(b) of the rules of court.

[5] The defendant duly oppose/defend the summons through instructed legal practitioner.

[6] The case went through the pleading stage and on 18 June 2023 and in chambers after reading the joint case management report of the parties, the managing Judge issued a case management order.

[7] On 13 July 2023 the legal practitioner of the defendant withdrew from the case and caused the notice of withdrawal to be served on the defendant, together with the case management order of 18 June 2023, on 17 July 2023.

[8] The aforesaid case management order which was served on the defendant on 17 July 2023 ordered the defendant to file his witness statement on or before

15 August 2023. The defendant however did nothing. He did not file a witness statement and never requested condonation until he was ordered to do so on 19 February 2024, and then did not bother to request condonation timeously, did it ten days late without any explanation under oath.

[9] As it is at present it seems that the oath of the defendant is not reliable.

[10] The defendant's condonation affidavit ordered to be filed on or before 15 March 2024 was filed on 25 March 2024.

[11] In this condonation affidavit the defendant declares that the case management order of 18 June 2023 required him to file his witness statement on or before 15 August 2023.

[12] In paragraph 3 of his condonation affidavit, the defendant carries on and untruthfully declares as follows:

"My Legal Practitioner withdrew on the 17<sup>th</sup> of June 2023, prior to getting the Court Order."

[13] The documents filed on e-justice and the sequence are however clear. *Vide* paragraphs [6] to [8] and [12].

[14] The correct facts are that the defendant was served with the notice of withdrawal of his first set of legal practitioners and the case management order of 18 June 2023, which the defendant declared was not in the possession of his legal practitioner, on 17 July 2023.

[15] The defendant pleaded that he made more payments than what the plaintiff had credited him for. The plaintiff replicated that the monthly instalments were returned unpaid since November 2020 and that defendant only made sporadic payments in a lesser amount than the monthly instalment, resulting in penalty charges.

[16] The subject instalment sale agreement requires the defendant *inter alia* to make a final lump sum payment of N\$179 094.69 on 1 February 2023. The installment sale agreement had a duration of 54 months (4 ½ years). The defendant in all probabilities is still using the Toyota pick-up truck of the plaintiff but is not paying. Despite the aforementioned and the fact that defendant cannot pay his own legal costs, he say in his condonation affidavit that plaintiff will not suffer prejudice because plaintiff's financial losses will be mitigated by defendant's responsibility to indemnify such losses. *Vide* paragraph 7 of the condonation affidavit.

[17] In paragraph 8 of his condonation affidavit the defendant repeated and perpetuates the falsehood that he was completely unaware that he was required to file a witness statement.

[18] In paragraphs 9 and 10 of his condonation affidavit the defendant alleged good prospects of success and says that he disputes the alleged non-payments of installments. He stated that he is in possession of statements that prove that he continued to make payments past the date the plaintiff alleged.

[19] Defendant fails to show any prospects of success. He fails to discover and attach the alleged statements as proof. He fails to clearly declare that he does not owe anything to the plaintiff and fails to disclose proof thereof. Alternatively, he fails to clarify how much he still owes and how it is computed.

[20] The defendant deliberately chose not to clarify and properly plead his purported good prospects because none exists.

[21] I find it necessary to repeat the contents of the court order of 19 February 2024. That is:

'1. The defendant shall file a condonation affidavit explaining why his witness statement was never filed; why he did not participate meaningfully in the settlement opportunity accorded to him since end of October 2023 to 19 February 2024; why he should not be sanctioned and why the provisions of rule 53(2) should not be invoked.

2. Such an affidavit must be filed on or before 15/03/2024 and be accompanied by an supporting/confirmatory affidavit by the legal practitioner of the defendant.
3. The case is postponed to 25/03/2024 at 15:00 for Sanctions hearing (Reason: Absence of defendant and/or his legal practitioner).
4. The parties' attention is drawn to the provisions contained in Part 6 of the Rules of High Court.'

[22] The defendant actually conceded that he made no contribution to the settlement proposal/opportunity availed to him by the plaintiff. The defendant's newly appointed legal aid legal practitioner had occasion since 25 October 2023 to get acquainted with the case through consultation with defendant and perusal of the case documents on the e-justice file "in consideration of the proposed settlement agreement". See the status report filed on 25 October 2023. The defendant did not avail his legal practitioner with final instructions during the period of November 2023 to the end of January 2024.

[23] The defendant is wasting valuable court time and resources with a weak defence if any and do so in disregard of the overriding objectives of case management.

[24] In the result the defendant's defence is struck and final judgment is entered against him for —

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3. The Deputy Sheriff to take possession of and deliver the said vehicle to the plaintiff wherever it may be found;
4. Plaintiff is granted leave to apply for:
  - (i) Damages, if any, in an amount to be calculated by subtracting the current market value of the goods or the sale price of the goods, as well as a rebate on unearned finance charges from the balance outstanding;
  - (ii) Interest on the said damages at the rate of 7.50% from date of cancellation of the said agreement to date of payment;
5. Costs of suit between attorney and client;
6. The case is regarded as finalised and removed from the roll.

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G H OOSTHUIZEN  
JUDGE

## APPEARANCE

PLAINTIFF: Davids  
Engling, Stritter & Partners

DEFENDANT: S Kahengombe  
Kahengombe Law Chambers, Windhoek