

“ANNEXURE 11”  
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

<b>Case Title:</b> CARLOS JORGE PAIS MACHADO vs ANICETO ALBERTA FERRAZ AND ANOTHER	<b>Case No:</b> HC-MD-MOT-EXP-2017/00433
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE CLAASEN, ACTING JUDGE	<b>Date of hearing:</b> 22 JANUARY 2019
	<b>Delivered on:</b> 13 FEBRUARY 2018
<b>Neutral citation:</b> <i>Machado v Ferraz</i> (HC-MD-MOT-EXP-2017/00433) [2019] NAHCMD 27 (13 February 2019)	
<b>Results on merits:</b> Heard on the merits.	
<b>The order:</b> Having heard <b>Mr Engelbrecht</b> on behalf of the Applicant and <b>Mr Kasper</b> on behalf of the respondent and having read the documents filed of record:  <b>IT IS ORDERED THAT:</b>  1. The rule <i>nisi</i> issued by the court on 23 February 2018 is discharged.  2. The applicant is ordered to pay the respondent's cost.  3. The matter is removed from the roll and is regarded as finalised.	
<b>Reasons for orders:</b>	
<u>INTRODUCTION</u>  1. On 23 February 2018 the applicant, an <i>incola</i> of this court, obtained an order to attach specified earthmoving equipment, which was parked at the second respondent's premises in Rundu. The purpose of the attachment was to find jurisdiction, alternatively to confirm jurisdiction, as a precursor to issue summons against the first respondent, who is businessman that resides in Luanda, Angola. The	

summons against the first respondent, who is businessman that resides in Luanda, Angola. The proceedings was instituted on an urgent *ex parte* basis, and the order was given with a return date of 13 April 2018. The matter was opposed by the first respondent and the second respondent indicated it will abide by the court's ruling.

## BACKGROUND

2. Before delving into the merits, I deviate slightly into the history of the matter. Once the matter became opposed, the respondent was given until 11 May 2018 to file an answering affidavit and the applicant was given until 23 May 2018 to reply, if so inclined. A status report indicates that the legal representative for the first respondent anticipated difficulty in complying with that date, and called a Rule 32 (9) meeting on 25 April 2018. The parties were unable reach an agreement. It became an opposed condonation for the late filing of answering papers, albeit through a late opposing affidavit. It was set down for hearing on 1 June 2018, but the condonation application did not proceed. On 30 November 2018, both parties were granted condonation on an unopposed basis. Additionally the applicant was afforded until 12 December 2018 to file a replying affidavit, if any.
3. On 15 January 2019, one day prior to the due date for heads of argument by both parties, counsel for the applicant convened a chamber meeting, as he was in need of condonation. By that time, no replying affidavit had been filed. This placed the first respondent between a rock and a hard place, as heads of argument were due without insight into a replying affidavit. At the outset the first respondent's legal representative was inclined to oppose the condonation, but as the realization came that it will delay the matter, he ended up not doing so and condonation was granted.
4. A revised timeline was set for the replying affidavit, by close of business on 16 January 2019 and both parties were directed to file their heads of argument by the 17<sup>th</sup> of January 2019, two days before the hearing date. It turns out the replying affidavit was filed after hours, as the e-justice system registered it on the next day. The applicant's heads of argument were filed in the same last minute fashion, after the defendant filed its heads of argument. Furthermore, no indexing was done. The court condoned the non-compliance and proceeded with the hearing to avoid vacating the date. At this juncture, I must state that it is undesirable for a party who is *dominis litis* to conduct litigation in such a manner, and this court takes a dim view thereof.

## MERITS

5. Returning the merits, the cause of action stems from a debt of USD 316 000.00 that was not paid. It was the applicant's case that during the years 2006 to 2011 he bought and delivered various fish products at the request of the first respondent. According to the applicant the purchases were done in Walvisbay, Namibia.
6. According to the first respondent he engaged in business transactions with the applicant, but only in respect of earthmoving and construction work and never in the trading of fish products. The first respondent deposed that transactions in respect of the delivery of various fish products took place between the father of the first respondent and a company Luso Commercial Lda, based in Cubango province, Angola. Furthermore, it was averred that the deliveries occurred through the local representative in Angola, Mr Ukoma(Ze), but that the father of the first respondent settled the debt in full by depositing the funds into the company's bank account at Banco de Fomento Angola.

#### APPLICABLE LAW

7. The rationale behind orders of attachment *ad fundandam jurisdictionem* is to confer jurisdiction, where there is no existing ground of jurisdiction. This is as opposed to attachment *ad confirmandam jurisdictionem* which serves to confirm jurisdiction that the court already has, based on another ground of jurisdiction. Ultimately the purpose is to secure an asset for execution purposes if the eventual order would be favourable to the plaintiff.
8. The renowned book *Pollak on Jurisdiction*<sup>1</sup> lay down the requirements for this type of application as: (1) the respondent is a *peregrinus*; (2) the property sought to be attached is that of the respondent; and (3) there is a *prima facie* case in the sense that he must tender evidence which, if accepted, will establish a cause of action. The burden of proof rests on the applicant on a balance of probabilities.
9. In applications of this nature, the court is not called upon to investigate the merits of the claim. Instead the parameters of the enquiry are confined to whether an order for attachment must be issued or not. *In casu a rule nisi* was granted, so the question was whether it must be confirmed or discharged.

#### APPLICATION TO THE FACTS


10. In looking at whether the applicant has met the requirements for this application, it was clear that the first respondent is a *peregrinus* of this court. In respect of the component of establishing a cause of

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<sup>1</sup> David Pistorius, Second Edition, Juta & Co Ltd, p 85

action, the court had regard to the unreported matter of *Labuschagne vs Gaerdes*<sup>2</sup> wherein it is stated that *prima facie* proof is sufficient at this stage. Though the first respondent disputes liability on the cause of action, the court accepts that the applicant has a *prima facie* case, given the low threshold in respect of this type of proceeding.

11. The matter turns on the last requirement, namely whether the attached property belongs to the first respondent. The applicant bears this onus on a balance of probabilities, yet the aspect was neglected in the founding affidavit. The applicant merely refers to pictures of the attached property which was forwarded by the second respondent. In its answering affidavit, the first respondent pertinently denied that he was the owner of the attached property, which denial the applicant did not refute or traverse in his replying affidavit. It was merely noted. It is trite that a factual allegation that is not denied or admitted is deemed to have been admitted. Therefore the applicant did not discharge the onus that the attached property was that of the first respondent.
12. The applicant only in heads of argument raised the point that the first respondent's documents should be ignored as it was not sufficiently authenticated. The rules of this court afford the court some discretion and in view of the commissioning documents that were uploaded on the morning of the hearing, the court was prepared to accept the affidavits. It must be said that a party should be apprised of the case it is expected to meet and surprise tactics are not fair play. This court echoes the sentiments expressed by Parker AJ in *Haufiku vs Kaukungwa*<sup>3</sup> that such a practice ambushes the other side and it is not to be encouraged by the courts.
13. In conclusion, the applicant has not shown on a balance of probabilities that the attached property belongs to the first respondent. In the result the rule *nisi* is discharged and the applicant is ordered to pay the cost of the respondent.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>

<sup>2</sup> Unreported case *Labuschagne vs Gaerdez* ( A 63/2014) [2014] NAHCMD 277 ( 22 September 2014) at para 22

<sup>3</sup> ( A 25/2016)[2017]NAHCMD 64 (9 March 2017)

<p>H Engelbrecht <i>of</i> Tjombe-Elago Law Firm, Windhoek</p>	<p>G L Kasper <i>of</i> Murorua Kurtz Kasper Inc., Windhoek</p>
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HC-MD-CIV-MOT-EXP-2017/00433

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION,  
HELD AT WINDHOEK  
ON WEDNESDAY, THE 13<sup>th</sup> DAY OF FEBRUARY 2019  
BEFORE THE HONOURABLE JUSTICE CLAASEN

In the ex parte application of:

**CARLOS JORGE PAIS MACHADO**

**APPLICANT**

and

**ANICETO ALBERTO FERRAZ**

**1<sup>st</sup> RESPONDENT**

**ADVANCE TRUCK REPAIRS CC**

**2<sup>nd</sup> RESPONDENT**

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**COURT ORDER**

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Having heard **MR ENGELBRECHT**, on behalf of the Applicant and **MR KASPER**, on behalf of the First Respondent and having read the Application in respect of case number **HC-MD-CIV-MOT-EXP-2017/00433** and other documents filed of record:

**IT IS HEREBY ORDERED THAT:**

- 1 The rule nisi issued on 23 February 2018 is hereby discharged.
- 2 The Applicant is to pay the First Respondent's costs herein.
- 3 The matter is removed from the roll and regarded as finalized.

**BY ORDER OF THE COURT**

**REGISTRAR**

**TO:**

HASANI ENGELBRECHT  
On behalf of  
Applicant  
Tjombe–Elago Inc.  
36 Promenaden Road  
Windhoek  
Namibia

**AND TO:**

GILROY LEONARD KASPER  
On behalf of  
1<sup>st</sup> Respondent  
Murorua Kurtz Kasper Incorporated  
NO 27 HEINITZ BURG STREET  
LUXURY HILL  
KLEIN WINDHOEK  
WINDHOEK  
KHOMAS REGION  
Namibia  
ANDREAS VAATZ  
On behalf of  
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