REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 95/2013

In the matter between:

TUMAS GRANITE CLOSE CORPORATION	**FIRST APPLICANT**
JÜRGEN HOFFMANN	**SECOND APPLICANT**

And

THE MINISTER OF MINES AND ENERGY	**FIRST RESPONDENT**
THE MINING COMMISSIONER	**SECOND RESPONDENT**
THE PERMANENT SECRETARY IN THE MINISTRY OF MINES AND ENERGY	**THIRD RESPONDENT**

Neutral citation: *Tumas Granite Close Corporation v The Minister of Mines and Energy* (A 95/2013) [2014] NAHCMD 210 (10 July 2014)

Coram: PARKER AJ
Heard: **18 June 2014**
Delivered: **10 July 2014**

Flynote: Practice – Irregular proceeding – Two-stage approach enunciated by Supreme Court in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) adopted in present enquiry – If step is irregular, court to determine whether innocent party prejudiced – In instant case respondents' filing of answering affidavit constituting irregular step – Court held that the irregular step prejudiced applicants because the step whittled away the applicants' procedural

rights under rules of court – Consequently, court upheld the rule 30 application and treated the filing of the answering affidavit as a nullity.

Summary: Practice – Irregular proceeding – Two-stage approach enunciated by Supreme Court in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) adopted in present enquiry – If step is irregular, court to determine whether innocent party prejudiced – Applicants by notice requested respondents to deliver documents required for the prosecution of applicants' review application – Respondents refused or failed to deliver the documents and instead filed answering affidavit because in their view the documents were not necessary for the applicants to pursue the application – It is not up to an administrative body or official to decide that a document which a person, who is aggrieved by a decision of that body or official and who desires to bring that decision under review, is not necessary or required for the person to pursue the review application – Court found that the step taken by the respondents was irregular – Court held that since the step amounted to the taking away of the applicants' procedural rights under the rules of court the step substantially prejudiced the applicants – Court concluded, therefore, that the irregular step was a nullity – Court held that an irregular step that has the effect of whittling away the right of a person must always prejudice that person such and prejudice is undoubtedly substantial – Consequently, the rule 30 application succeeded and the court struck out the answering affidavit.

ORDER

(a) The respondents' answering affidavit is struck out with costs, including costs of one instructing counsel and one instructed counsel.

(b) The respondents must on or before 29 July 2014 deliver to the applicants' legal practitioners of record the documents listed in the request, dated 27 May 2013 and filed of record the same date.

(c) The parties' legal practitioners must attend a status hearing in open court at 08h30 on 31 July 2014 in order for the court to determine the further conduct of the matter.

JUDGMENT

PARKER AJ:

[1] The provenance of the present proceeding lies in the judgment delivered by the court in November 2012 where the court ordered, among other things, that the first respondent must take a decision on the first applicant's application for a reconnaissance licence not later than 31 January 2013. It would seem, in compliance with that order, the first respondent took a decision and advised the applicants on 28 January 2013 that the application for a reconnaissance licence had been unsuccessful.

[2] Aggrieved by the first respondent's decision the applicants launched an application in terms of rule 53 of the repealed rules of court to review and set aside that decision. In terms of those rules the respondents delivered the record of proceedings respecting the making of the decision. The applicants were not satisfied with the record that they had received. Consequently, they delivered a notice in terms of rule 53(1)*(b)* of the repealed rules of court, calling upon the respondents to deliver further certain documents. It is important to underline the significant point that the applicants asked for clearly identified and specified documents. It cannot, therefore, be said that, looking at the list of documents sought by the applicants, the applicants were on a fishing expedition.

[3] To cut a long story short, the respondents' legal practitioners failed and refused to show as much as professional courtesy by informing the applicants' legal practitioners that they would not deliver the documents sought. Brushing aside the

applicants' notice without justification, the respondents took the step of filing answering affidavits.

[4] It is the filing of the respondents' answering affidavit that aggrieved the applicants; and they have sought redress by launching a rule 30 application (rule 30 in the repealed rules of court). The basis of the rule 30 application, as argued by Ms Schneider, counsel for the applicants, is that by prematurely delivering their answering affidavit (that is, the next set of affidavits after founding affidavits in application proceedings) the respondents have in effect deprived the applicants their procedural right to have the complete record delivered to them which would in turn lead to their procedural right to amend their notice of motion and supplement their supporting papers after perusing the additional documents that they had requested from the respondents, if the respondents had delivered them.

[5] And what is the argument on the other side, as articulated by Mr Nkiwane, counsel for the respondents? It is only this. The proper procedure the applicants ought to have followed according to Mr Nkiwane was for the applicants to bring an application to compel the respondents to deliver the identified and specified documents they had requested by notice after the time limit to deliver same had expired and the respondents had failed or refused to deliver them. Mr Nkiwane argued further that if the respondents did not launch an application to compel, then the respondents could not be expected to wait indefinitely; hence the filing of the answering affidavit. Mr Nkiwane's further argument is, as I understand him, that the filing of the answering affidavit does not prejudice the respondents because, so the respondents' decided, the documents requested would not assist the applicants in pursuing the relief sought.

[6] At the threshold of determining the present application I should deal with argument by Mr Nkiwane in support of his objection to the applicants' counsel, Ms Schneider, delivering from the Bar to the court, at the commencement of the hearing of the application, a list of authorities additional to those in her heads of argument. It seems to me superficially attractive as counsel's argument may be, it is a *reductio ad absurdum* as I demonstrate. Mr Nkiwane's argument amounts to this. Since Mr

Nkiwane has not had sight of the list of authorities the court should disregard the authorities because since Mr Nkiwane had not had sight of them Mr Nkiwane is not able to comment on them by, for example, distinguishing them.

[7] I should say that no counsel is entitled to prescribe to the court what authorities the court should consider in the determination of an issue in proceedings. When counsel refers authorities to the court, counsel is merely assisting the court in the court's own research when adjudicating a cause or matter. The court does not have to rely on only authorities referred to it by counsel in their heads of argument.

[8] Assuming Mr Nkiwane had sight of the authorities, Mr Nkiwane's opinion – and opinion it is – about them as to whether they are distinguishable does not bind the court. The court is entitled to pore over the authorities and form its own opinion about them; whether to accept them as binding or persuasive or accept them as binding or persuasive but distinguishable on the facts of the instant matter. And as I have said previously, the court can do its own research and if the court finds authorities, which are not in the heads of argument of counsel, and which the court desires to rely on the court does not call counsel back to court for the purpose of affording counsel the opportunity to comment on those authorities the court has unearthed. As I say, Mr Nkiwane's argument is a *reductio ad absurdum*: it has, with the greatest deference to counsel, no logical and sustainable cogency and relevance.

[9] In any case, as it turned out, two of the cases on the additional list are squarely in point on the issues under consideration in the application. I am referring particularly to *China State Construction Engineering Corp v Pro Joinery CC* 2007 (2) NR 675 (HC) and *Aussenkehr Farms v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC). For instance, the Supreme Court case *Aussenkehr Farms* is binding on this court, and I did not see any reason to declare it distinguishable. In sum, Mr Nkiwane's objection cannot on any pan of scale take the respondents' case any further: it is accordingly rejected. If the objection and the argument in support of it succeeded in doing anything; they succeeded in prolonging the proceedings unnecessarily.

[10] Having perused the papers filed of record and having carefully considered submissions by counsel on both sides of the suit it is my view that the determination of the rule 30 application turns on a very short and narrow compass.

[11] The respondents do not dispute that they have failed and refused to respond to the applicants' request that they deliver certain identified and specified documents which, as far as the applicants were concerned, they needed and required in order to properly put their case before the court. In my opinion it is not up to an administrative body or official to decide that a document, which a person, who is aggrieved by a decision of that body or official and who desires to bring that decision under review, is not necessary or required for the person to pursue the review application. In the instant case, the aggrieved persons, the applicants, did request from the respondent certain identified and specified documents which would enable them to amend, add to or vary the terms of their notice of motion and supplement the supporting affidavit in terms of the rules of court (rule 53 of the repealed rules).

[12] From the respondents' papers and their counsel's submission it leaves no doubt that the respondents admit – unwittingly, may be – that they took an irregular step; except that, as far as they are concerned, they had a good reason to take the irregular step. And the reason is that the time limit to respond to the applicants' request for the documents had expired and an application to compel them to respond had not been forthcoming, and, so, as Mr Nkiwane submitted, 'it would be unjust and unreasonable to expect the applicants to keep the matter in abeyance until the end of time ….'

[13] With respect, Mr Nkiwane misses the point. It need hardly saying that the review application is not the respondents' application; and if the *domini litis*, the applicants, failed to move the application forward, as Mr Nkiwane alleges, there are rules of court that 'provide procedural devices to force a dilatory party to progress to the next step in litigation'. See *Aussenkehr Farms v Namibia Development Corporation Ltd* 2012 (2) NR 671 at 697A. Taking an irregular step as the respondents did cannot be one of the devices. And, *pace* Mr Nkiwane, it is the

respondents' failure to respond to the applicants' request and the irregular step the respondents took that are causing inordinate delay in resolution of the dispute. As I have said more than once, the applicants' request to deliver the aforementioned documents was by notice. Mr Nkiwane has not explained to the court what stood in the way of the respondents that prevented them from responding to the legitimate request in like manner and inform the applicants the reasons why they would not deliver the identified and specified documents. I do not think it conduces to fair and reasonable approach in an application proceeding for the counsel of a respondent, who receives such notice, not to extend the courtesy of responding in like manner by notice to the applicant's counsel but rather keep silent and take a step that has the effect of whittling away the procedural rights of the applicant guaranteed to him or her by the rules of court.

[14] One courteous thing that Mr Nkiwane could have done was not to file the answering affidavit of the respondents but to respond to the request in which the respondents would, for example, inform the applicants that the respondents, based on reasons advanced in the response, would not deliver the aforementioned documents and that if the applicants did not bring an application to compel the delivery within a specified time limit, then the respondents would go ahead and file their answering affidavit.

[15] In that regard, it must be remembered that it is not open to a party to assume that the other party has waived his or her rights. A right may be waived only at the instance of the party concerned. (*Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* Case No. A 01/2010 (Unreported), para 41) And, furthermore, a person who desires to rely on a waiver must prove it. (*David Hendrik de Waal and Another v Adrian Louw* Case No. A 19/2011 (Unreported), para 6) I did not hear from the applicants' counsel that the applicants waived their rights; and the respondents' counsel has not proved any waiver.

[16] Based on these reasons I have not one iota of doubt in my mind in holding that by filing the answering affidavit the respondents took an irregular step within the meaning of rule 30 of the repealed rules. The next question is: What order should

follow the finding of the irregular proceeding? This enquiry becomes necessary as I exercise my discretion whether to overlook the irregularity. See *Aussenkehr Farms v Namibia Development Corporation Ltd* at 703C-D. In my opinion any irregularity that has the effect of whittling away the right of a person must always prejudice such a person, and such prejudice is undoubtedly substantial. And, as I say, the filing of the answering affidavit in the circumstances set out previously occasioned substantial prejudice to the respondents; and so I accept Ms Schneider's submission on the point. 'On the basis of these provisions (ie rule 30(1)*(a)* of the repealed rules of court)', stated Silungwe AJ in *China State Construction Engineering Corp v Pro Joinery CC* 2007 (2) NR 675 at 678H, 'a proper course for a party who is prejudiced by an irregular step or proceeding is not simply to ignore or to treat it as if no such (step) proceeding has been taken; he should apply to court under rule 30 for an order to set aside the irregular step or proceeding'. Thus, in the instant proceeding, it is, therefore, not only proper but also an entitlement for the applicants to bring the rule 30 (of the repealed rules) application.

[17] I hold that the irregular proceeding is a nullity; not least because it has the effect of taking away a right guaranteed to the applicants by the rules in their approach to the seat of judgment of the court. And as Silungwe AJ stated in *China State Construction Engineering Corp* at 683H, 'A nullity has no legal effect and, as such, it cannot be condoned'. In any case, the critical consideration to take into account in the instant proceeding is that the respondents have not applied to the court to condone the irregular proceeding – not by application or from the Bar; and so the discretionary power of the court in rule 27(3) (of the repealed rules) referred to by Silungwe AJ in *China State Construction Engineering Corp* is not available to the respondents. And, I should add; the first respondent is an administrative official. In taking the irregular step without extending as much as courtesy to the applicants by responding to the applicants' request, the first respondent acted in breach of the requirements of fair and reasonable administrative act within the meaning of art 18 of the Namibian Constitution.

[18] Based on these reasoning and conclusions I hold the view that the application should succeed, and it succeeds, and, furthermore, that this is a proper case where

the court, in the exercise of its discretion, should not overlook the irregular proceeding which, as I have held, is a nullity. The applicants are, therefore, entitled to the relief sought in the notice of motion. On the facts and in the circumstances of the case the reasonable order to make is this: it is ordered that -

(a) The respondents' answering affidavit is struck out with costs, including costs of one instructing counsel and one instructed counsel.

(b) The respondents must on or before 29 July 2014 deliver to the applicants' legal practitioners of record the documents listed in the request, dated 27 May 2013 and filed of record the same date.

(c) The parties' legal practitioners must attend a status hearing in open court at 08h30 on 31 July 2014 in order for the court to determine the further conduct of the matter.

C Parker

Acting Judge

APPEARANCES

APPLICANT :	H Schneider Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
RESPONDENTS:	S Nkiwane Of Government Attorney, Windhoek