REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. I 1956/2014

In the matter between:

[C…….] [V…….] **APPLICANT**

And

[J……..] [A…….] [V……..] **RESPONDENT**

Neutral citation: *[V……] v [V……] (*I 1956-2014*) [2015] NAHCMD 117 (26 May 2015)*

CORAM: MASUKU, AJ.

Heard: **07 May 2015**

Delivered: **26 May 2015**

Flynote: PRACTICE – Application of the provisions of rule 32 (9) and (10) and consequences of failure to comply therewith. Rule 61 its, contents and implications revisited in application to matrimonial proceedings. FAMILY LAW – The matters that may be raised in an affidavit of non-return and implications of Rule 89 (4) and alleged failure to comply therewith.

SUMMARY – The court issued a restitution order following a divorce action which was not contested. An agreement reached by the parties awarded custody of the minor children to the applicant. On the return day, in his affidavit of non-return the respondent alleged that the applicant's boyfriend was molesting the parties' girl child and contested the issue of custody on that basis. The applicant moved an application in terms of rule 61 alleging that no notice had been given to the applicant's boyfriend regarding the allegations. Held, rule 61, being an interlocutory application, the applicant ought to have complied with the provisions of rule 32 (9) and (10) which are peremptory and the court stated it was inclined not to hear the matter for that reason.

The court, in dealing with the rule 61 application stated that the said application was bad for it did not make the necessary allegations and held further that the respondent was at large to revisit the issue of the custody of children in his affidavit of non-return. Held further that the respondent was not in breach of the provisions of rule 89 (4) as the matter before court was not based on adultery. Held that the rule 61 application was bad and it was dismissed with costs.

ORDER

The application in terms of rule 61 is hereby dismissed with costs.

JUDGMENT

MASUKU, AJ.,

[1] This matter has a chequered history, and to which an alleged sad episode involving a minor child, constitutes a sorry appendage.

[2] The parties were married out of community of property in Windhoek on 9 March 2010. The marriage still subsists. Three children were born from the union, one of whom was legitimated by the marriage.

[3] It would appear that cracks developed in the union as a result of which the applicant sued the defendant for divorce on grounds that I consider immaterial for present purposes. It would appear further that an agreement was entered into by the parties regarding the divorce and ancillary issues. More importantly, the issue of custody of the minor children was, in terms of the agreement referred to above, awarded to the applicant.

[4] Restitution proceedings commenced and an interim order was issued calling upon the defendant to show cause as to why the bonds of marriage should not be dissolved and why the settlement agreement should not be made an order of court. At that stage, the matter took a nasty and painful twist. In his affidavit of non-return, in which the respondent was called upon to show cause why the interim order should not be made final, while not contesting the divorce, he contested the issue of custody being given to the mother, not because she is unfit as a mother but because, so he alleged, her paramour was sexually abusing the parties' minor girl child. He claims to have interviewed the child and her teachers and apparently took steps to have her see an expert to deal with the trauma of the alleged incident. I am not going to attempt to resolve the disputes attendant to this aspect of the matter.

[5] It is an uncontested fact that criminal charges have been preferred against the applicant's lover and trial is yet to commence. It would appear from the papers that the applicant stands by her man and the respondent has taken custody of the children in the interim, an issue that the applicant takes strong exception to, considering that one of the grounds upon which the applicant sought divorce, was that the respondent abuses drugs and alcohol, an issue that in the applicant's mind, renders the respondent eminently unfit to take custody of the children.

[6] The matter is presently before court, not on the merits of the divorce or ancillaries but because the applicant has filed a notice of an irregular step or proceeding in terms of rule 61. The said rule reads as follows:

> '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 the knowledge of the irregularity is not entitled to make such application.
>
> An application under subrule (1) is an interlocutory application and must be on notice to all parties and must specify in the notice the particulars of the irregularity alleged as well as the prejudice claimed to be suffered as a result of the irregular step.'

I shall return to deal with the provisions of this rule closely at the appropriate juncture.

[7] The respondent has, in the interregnum, whilst not admitting that there is any irregular step in this matter, raised an issue of procedure. The respondent has claimed that the applicant, before launching the present application, failed and/or neglected to comply with the mandatory provisions of rule 32 (9) and (10) of the rules of this court. It is necessary, for the sake of completeness, to cite the relevant rule the applicant is alleged to have fallen foul of.

<u>Implications of rule 32</u>

[8] Rule 32 (9) and (10), respectively, read as follows:

> '(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication.
> (10) The party bringing any proceedings contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter resolved amicably as contemplated in subrule (9), without disclosing privileged information.'

[9] Is there merit in the procedural issue raised by the respondent herein? In trying to ward off the accusation of non-compliance with rule 32 (9) and (10), the respondent's counsel argued that this is a matter that involves the interests of minor children and that the court should, for that reason, not adopt a fastidious approach, by insisting on the application of the provisions of rule 32 , quoted above, lock stock and barrel, but should overlook whatever deficiencies were there, in order to reach a speedy determination of the matter in the interest of the minor children. The respondent, on the other hand, stuck to his guns and claimed that the said rule was peremptory and that no grounds are alleged which would justify the non-compliance therewith and that none are envisaged in the rules.

[10] There is no debate in this case that, irregular steps or proceedings under rule 61 are interlocutory in nature. That this is the case can be seen from the provisions of rule 61 (2) quoted above. For that reason, it is my considered view that the provisions of rule 32 (9) and (10) therefore apply to irregular steps or proceedings. It must be noted that from the nomenclature used, that compliance with the provisions of rule 32 (9) and (10) is peremptory. In this regard, it must be recalled that the lawgiver chose to use the words 'must'. There can be no clearer intention of the peremptory nature thereof in that regard than the use of that word. Furthermore, immediately after the word 'must', is the word 'before instituting the proceeding'. The import is that a party, who seeks to raise an

application for an irregular step must before launching the said proceeding do two things: (a) seek an amicable solution to the dispute and (b) file with the registrar details of steps taken to attempt to resolve the matter amicably. (emphasis added).

[11] It is plain, in my view, that failure to comply with either or both requirements in rule 32 (9) and (10), is fatal. The court cannot proceed to hear and determine the interlocutory application. The entry into the portals of the court to argue an interlocutory application must go via the route of rule 32 (9) and (10) and any party who attempts to access the court without having gone through the route of the said sub-rules can be regarded as improperly before court and the court may not entertain that proceeding. In colloquial terms, that party may be said to have 'gatecrashed' his or her way into court. Gatecrashers are certainly unwelcome if regard is to be had to the provisions of the said subrules.

[12] A proper reading of the above rule suggests unequivocally that once an application is interlocutory in nature, then the provisions of the subrule are peremptory and a party cannot wiggle its way out of compliance therewith. Rule 61, as mentioned above, pronounces itself as interlocutory and this admits of no doubt or debate. For that reason, I am of the considered view that a party may not circumvent compliance with the said subrules, whatever the circumstance and the one at hand, namely, that the case involves minors, is not, in my view one that brooks an exception. In point of fact, I would incline to the view that matters involving minors should be on top of the list of matters that are subjected to amicable resolution first.

[13] I say so for the reason that in the instant case, for instance, some unsavoury allegations are made concerning a minor child and because court papers are normally open to the public, a lot of harm can be visited on the minor child should such allegations escape and reach the public domain. I am of the view that dealing with matters in amicable resolution is far better and conduces to maintaining the confidentiality and dignity of the parties than when some gory details regarding parties' alleged pernicious behaviour is dealt with, investigated and ventilated in open court. I

am of the view that the applicant has failed to raise any sound reasons why she did not comply with the mandatory provisions of the rule and which compliance would redound to the benefit of the parties and preserve whatever stigma may have serve to attract to the child concerned regarding the ventilation of the alleged criminal behavior involving her in open court.

[14] There is no denying that the applicant did not seek an amicable resolution of the dispute and this much is admitted. Furthermore, there is no document filed with the registrar stating the steps taken to have the matter resolved amicably. Regarding the latter issue, I am of the view that the steps undertaken to resolve the matter amicably must be in writing. It was not contemplated that the parties would merely go to the registrar and orally narrate the steps. A record of what was attempted must remain on file even for the court to be satisfied at the appropriate juncture that compliance with the rule has been undertaken and not merely lip service thereto.

[15] This court has had to pronounce upon the implications of this rule and the consequences of failing to adhere to its prescriptions. This exercise was undertaken by Parker A. J. in the case of *Irvine Mukata v Lukas Appolus*[1], where the learned Judge said the following at paragraph [6] of the judgment:

> 'It is undisputed that the plaintiff did not comply with the rule 32 (9) and (10) of the rules. Considering the use of the word "must" in rule 32 (9) and (10) and the intention of the rule maker as set out in rule 1 (2) concerning the overriding objective of the rules (see *The International University of Management v Torbitt* (LC 114/2013) [2014] NALCMD 6 (20 February 2014)), I conclude that the provisions of rule 39(9) and (10) are peremptory, and non-compliance with them must be fatal. I, therefore, accept Mr Jacob's submission that the summary judgment application is fatally defective because the plaintiff has failed to comply with rule 32(9) and (10). Consequently, the application is struck from the roll.'

[1] (I 3396/2014) [NAHCMD 54 (12 March 2015).

The court, accordingly struck the matter from the roll and refused to entertain it. It is clear, from the excerpt above, that my views coincide with those of Parker A.J. regarding the implications of this rule. In view of the foregoing, it is my considered view that the point taken by the respondent is good and should succeed. See also *Standard Bank Namibia Limited v Gertze.*[2]

Sustainability of rule 61 application

[16] I have carefully considered the matter and have decided that it is in the interests of justice and finality and also consistent with the overriding objectives referred to in the *Mukata* case, especially because the matter involves interests of minor children, and which should be brought to clarity and finality at the earliest opportunity, that I nonetheless consider whether there is any merit in the application for irregular proceeding moved by the applicant herein.

[17] According to the learned authors Herbstein and Van Winsen[3], the purpose of rule 61 is to afford a party to a cause an opportunity to have set aside an irregular step or proceeding which has been taken by the other party and which is furthermore, prejudicial. The procedure affords a party an opportunity to compel its fellow protagonist to comply with the rules of court on the pain of having the said irregular step set aside. The learned authors further state the object of the rule as being to provide a procedure by which a hindrance to the future conduct of litigation, whether created by non-observance of the rules intended or otherwise, is removed. It is stated as well that where an irregular step occasions no prejudice to the opposite party, it is best ignored or corrected by some other non-litigious means, since an application to set it side is likely to be dismissed.[4] See also *Gariseb v Bayerl.*[5] According to *Northern Insurance Co Ltd v Somdaka*[6]*,* the '. . . court has a discretion, to be exercised judicially upon consideration of the circumstances, to do what is fair to both sides', in dealing with such applications. I

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[2] (I 3614/2013) [2015] NHCMD 77 (31 March 2015).
[3] *The Civil Practice of the High Court of South Africa,* 5th edition, 2009 at page 735.
[4] *Ibid* at page 736.
[5] [2003] NR 118 at 121 I.
[6] 1969 (1) SA 588 (A) at 596 (A).

must mention that the repeal of the rules of this court has not changed the wording of the rule as it previously read, and the case law existing in relation to the old rule, by and large applies with equal force to the new rules.

[18] In view of the authorities quoted above, read in tandem with actual provisions of the rule in question also quoted above, it is important to have regard to the actual contents of the application filed by the applicant in order to decide whether the applicant's application meets muster. The application in terms of rule 61 filed by the applicant, it must be mentioned, consists of four pages and 14 paragraphs. This is, in my judicial experience very unusual for such an application to contain so many paragraphs and so many allegations. First, it must be mentioned that the application contains an analysis of the respondent's affidavit of non-return. It is structured as if it was a plea or an answering affidavit, which in my view should not be the case.

[19] It is rather difficult, in view of the unusual length and content of the application, to decipher what the complaint by the applicant in the instant matter really is. I am of the considered view that an application in terms of rule 61 is not meant to serve the same purposes as a plea in action proceedings or an answering affidavit in application proceedings by raising and responding to each and every issue, blow by blow as it were, namely to each and every allegation or averral made by the opposing party. In my view, a reading of the rule suggests that an application for irregular proceedings should contain three important decipherable and distinct elements.

[20] First, the said application should clearly identify with sufficient particularity the step or proceeding, which is alleged to be irregular. For purposes of emphasis, it must be stated that the complaint must relate either to a step taken or proceeding embarked upon by the opposing party in the advancement of the action. In my view, interpretations attendant upon or other consequences flowing from a step or proceeding cannot found a proper basis for the application if the source of complaint is not the actual step or proceeding.

[21] Second, the application must clearly and precisely identify the particulars of the step or proceeding alleged to form the basis or bases of the complaint, as the case may well be. In this regard, the applicant must in as precise and direct a manner as possible, identify the actual and direct causes of the complaint. A gathering of a multiplicity of straws, whose collective weight is hoped to appeal to the conscience and sympathies of the court will not do. Last, but by no means least, the applicant should clearly state the basis upon which he, she or it claims he, she or it shall be prejudiced if the step or proceeding or step is left unhinged. These, in my view, are clearly indicated in the provisions of the said rule. Failure to comply with any one of these issues should, in my view, render the application in terms of rule 61 liable to fail.

[22] The complaint raised by the applicant in the instant matter, and which it was alleged in argument constituted an irregular step or proceeding was that in his affidavit of non-return referred to above, the respondent, alleged that the applicant's paramour is engaging in acts of sexual misconduct with the parties' minor daughter but the alleged culprit has not been served with the papers containing such allegations, considering their prejudicial nature. It is alleged that he consequently has no opportunity to exculpate himself from the damaging allegations. Is there any merit to this attack?

[23] I think not! I say so for the reason that there is no rule that requires a party in the said third party's position, to be served with any papers in a case such as the present. And in any event, if the said third party is of the view that he ought to be heard in relation to the matter, he should file an application to intervene as a party.

[24] It must also be not forgotten that there is no irregularity whatsoever that the respondent has committed. I say so in view of the demands upon him made by the service of the rule *nisi.* In terms thereof, he was called upon to show cause why the bonds of marriage should not be dissolved and why the agreement of settlement, which by consent gives custody of the minor children to the applicant. The applicant stated in his affidavit that he has no qualms regarding the dissolution of the union but claims that he belatedly learnt that the applicant's paramour commits the acts referred to above and

which in his view render it improper or unsafe to have the children's custody awarded to the applicant as long as her alliances with the said party obtain.

[25] I find nothing wrong or untoward regarding the respondent's position. If anything, he is showing the love and concern that any responsible parent should exhibit. By so saying, I must not be understood to be saying that the said allegations are gospel truth. They still have to be decided in a court of law but it would be highly irresponsible and in fact criminal for the respondent to wait for proof beyond reasonable doubt before putting means in place to protect the safety and bodily integrity of his daughter while the case is being determined in the criminal court. The respondent's conduct bears this court's stamp of approval, in its capacity as the Upper Guardian of all minors.

[26] In this regard, the court was referred to the case of *Vahakeni v Vahakeni* [7]. In that case, Shivute C.J. considered the obligations of a defendant in matrimonial proceedings and on whom a *rule nisi* had been served, calling upon him or her, to show cause why same should not be made final. The court came to the view, after reviewing relevant precedent that on the return date, the defendant has a right to raise the issue of the ancillary orders and have same retried as it were. The learned Chief Justice said the following:[8]

> 'I also agree that the provisional nature of such rules insofar as they relate to the payment of maintenance by one spouse to another or deal with their matrimonial property rights invite and allow a defendant to show cause on the return day why the orders should not be made absolute . . .'

At paragraphs [28] and [29], the learned Chief Justice proceeded to say the following pertinently:

> 'These matters (particularly as regards the children) are so important that, given the appellant's application, they should not be decided without hearing the parties. They can

[7] Case No.S7/2006 p 125.
[8] *Ibid* at page 132 paragraph [26].

> and must be reopened so that the court *a quo* can satisfy itself that the final order that it will make regarding these matters is in the best interests of the children and that it is fair to both sides. [29] That the defendant, in effect be given a second bite to the cherry in a restitution action based on ancillary relief is quite implicit in a rule *nisi* which invariably calls upon the defendant to "show cause, if any, why' the orders provisionally made should not be made final.'

[27] From the foregoing, it would appear to me a wholesome and inexorable conclusion that by raising the issue of the custody of the children and the harm alleged to be perpetrated by the applicant's paramour on the parties' minor child, the respondent was very much within his rights and cannot be faulted. He was, as called upon, to show cause why the order should not be made final. If there were issues of which he was not privy at the time of the issue of the interim order, he had every right to contest these, even if it meant he had to change his mind thereon on issues on which recent information suggested he may well have not made the best decision in the agreement signed by the parties.

[28] I would, in this connection, make reference to the provisions of rule 87 (4), which may be vaguely argued to apply. The said provision states, 'Where in any matrimonial cause or matter it is alleged that an adulterous third party is involved and that party is resident in Namibia and his or her address is known, service of the summons must also be effected on that person.' (Emphasis added). I am of the considered view that the rule relates to cases where divorce proceedings are in the process of determination and allegations of adultery by a specified third party have been made. The rule requires that 'service of the summons, (which can only be served in divorce proceedings), must also be effected upon that person'. (Emphasis added).

[29] A reading of the underlined words together makes it plain that the lawgiver in this case was inexorably making reference to actual divorce proceedings and has no application to a case of custody, as is the present situation, where the issuance and service of summons was completed without any reference to allegations of adultery against the third party.

[30] The object of the said rule, it would appear to me, is to avoid a situation where a party is alleged to be intimately involved in the breaking up of a marriage by having an amorous relationship with the guilty spouse and is known and mentioned in the papers but is not served with the papers to place his or her version of events in the conundrum. This is in my view so because in that event, serious allegations suggesting a serious moral turpitude in that person are made and he or she is not afforded a platform in which to defend their character which is under assassination as it were. In other words, this rule is consonant with fairness and the principle of natural justice, *audi alteram partem* i.e. let the other party be heard.

[31] The rule, in my view, has no application in proceedings such as the present because the question of adultery by the said third party is not mentioned at all. He does not feature in the issue of divorce. In point of fact, there is no allegation whatsoever, that the said third party is an adulterous spouse. If anything, the party allegedly involved in adulterous relationships is the respondent.[9] Crucially, the parties with whom he was allegedly involved have not been mentioned. The respondent did not file any plea in which any allegation of any adulterous relationship could have possibly been made. I accordingly find that the provisions of this rule, if they are the basis of the applicant's notice in terms of rule 61 are seriously misapplied.

[32] I am of the view that if he is of the view that he is detrimentally affected by the damning allegations made against him and of which he is undoubtedly aware, the third party has other options open to him, as I have said, including him applying for intervention as a party. I am of the view that whatever order regarding the custody of the parties children is made, does not, in any way affect him or his interests.

[33] More importantly, it is well to recall that a party which moves for the setting aside of an irregular step or proceeding must show that he or she has been or is being

[9] See paragraph 6.4 of the particulars of claim.

occasioned some prejudice or injustice as a result thereof. The applicant has not shown, nor can she show that she has suffered prejudice, which is one of the jurisdictional facts that entitle the court to exercise its discretion to set aside the said step or proceeding. The applicant has no right, in my view, in the circumstances, to legally make the application on behalf of the said third party, no matter how much she may be aggrieved by the allegations against him. He is a major male adult and should stand up and secure his own rights. There is no indication at all that he is unable to exercise his rights and to protect them personally. I also find that there is no prejudice suffered by the applicant in this matter.

[34] I am of the view, in view of the foregoing that the rule 61 application filed by the applicant is also bad in law and should be dismissed with costs. I am of the view, however that the matter should be reinstated on the case management roll in order for the outstanding matters to be dealt with and hopefully resolved. Time is clearly of the essence, particularly the issue of the children's custody and in respect of which the court may be called upon to cut the Gordian knot.

[35] In the result, the application in terms of rule 61 is hereby dismissed costs.

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TS Masuku, AJ