

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2017/00204

In the matter between:

**MARIA ADELIA FERNANDES**

**APPLICANT**

and

**BALEIA DO MAR INDUSTRIAL SAFETY SUPPLIES CC**

**FIRST RESPONDENT**

**BALEIA DO MAR PROPERTIES CC**

**SECOND RESPONDENT**

**THE CHAIRPERSON OF THE MUNICIPAL COUNCIL  
OF WALVIS BAY**

**THIRD RESPONDENT**

**THE MUNICIPAL COUNCIL OF WALVIS BAY**

**FOURTH RESPONDENT**

**TRUST MARKET SHIP CHANDLERS & BAKERY CC**

**FIFTH RESPONDENT**

**THE MINISTER OF URBAN AND RURAL DEVELOPMENT**

**SIXTH RESPONDENT**

**Neutral citation:** *Fernandes v Baleia Do Mar Industrial Safety Supplies CC* (HC-MD-CIV-MOT-GEN-2017/00204) [2018] NAHCMD 337 (17 October 2018)

**Coram:** ANGULA DJP  
**Heard:** 13 June 2018  
**Delivered:** 17 October 2018

**Flynote:** Civil Practice – Judgment and Orders – Rescission of Order – Application brought in terms of rule 103 of the Rules of this Court – In an application for rescission of a judgment or order brought in terms of rule 103, an applicant is not required to show good cause, or the prospects of success.

Application for leave to intervene in the proceedings – Applicant is required to satisfy the court that he or she has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment or order of the court; that he or she has a *prima facie* case or defence.

**Summary:** The first and second respondents obtained judgment on 27 January 2018 against the third and fourth respondents, in the absence of the applicant – In terms of the said order, the chairperson of the Council and the Council itself were *inter alia* ordered to ensure that any construction works already undertaken at Erf 688, Walvis Bay ('the property') in terms of the building permit number 688 were demolished immediately – The applicant is the co-owner of the property.

The applicant brought an application to have the above demolition order rescinded and set aside. Furthermore, the applicant sought an order to intervene in a review application pending before court

The first and second respondents opposed the application and raised a point *in limine* that the applicant lacked *locus standi*. In support of this point, the respondents contended that the property had been already been donated during April 2010 to two children of the applicant and the deceased. The respondents contended in the alternative that even if the court were to find that the applicant was the owner of the property, she did not have substantial nor direct interest in the matter.

*Court held:* The applicant has the necessary *locus standi* by virtue of the fact that she is a co-owner of the property through her marriage in community of property to her late husband.

Furthermore, the applicant had the necessary *locus standi* in her capacity as the duly appointed *executrix* of her late husband's estate who was the registered owner. In that capacity too, she has the standing and interest with respect to the property. Furthermore, the donation of the property to her two children has not been registered by means of a notarial deed nor was the transfer of ownership registered by the Registrar of Deeds in the Deeds Office. Therefore until such time that the donation is registered, the applicant was and remained the co-owner of the property.

*Court held further:* With regards to the rescission, an application brought in terms of rule 103 of the Rules of the Court, an applicant is not required to show good cause, or the prospects of success. Furthermore, an order or judgment that was erroneously sought or granted in the absence of any party affected by it, should without further enquiry, be rescinded or varied.

*Court held further:* The applicant was a necessary party and should have been cited as a party to the main application. The applicant as a co-owner of the property and a duly appointed *executrix* of her late husband's estate has a direct and substantial interest in the demolition order granted. The demolition order could not be carried into effect without negatively affecting or prejudicing the applicant or her interests in the property.

*Court held further:* For an applicant who seeks leave to intervene in proceedings to succeed, he or she must satisfy the court that he or she has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment or order of the court. Furthermore, the applicant must satisfy the court that he or she has a *prima facie* defence or cause of action.

*Court held further:* The applicant has a right as co-owner of the property to protect her property. The demolition order is aimed at destroying the improvements which have been effected on the property which has improved or increased the value of the property. It was therefore clear that the applicant would suffer prejudice as a result of the order of the court being implemented and if the applicant was not allowed to intervene in the proceedings to place her defense before court why the structures or improvements effected upon the property should not be demolished.

*Court held further:* That it is of the view that the applicant has made out a case that she has a *prima facie* case or defense to the main application.

---

### ORDER

---

1. The order granted in favour of the respondents on and in the absence of the applicant's is hereby rescinded.
2. The applicant is granted leave to intervene in the main application.
3. The respondents are ordered to pay the costs of this application on the scale of attorney and client such costs to include the costs of one instructed and one instructing counsel.
4. The applicant is to file her opposing affidavit to the main application on or before 31 October 2018.
5. The respondents to file their replying affidavits on or before 7 November 2018.
6. The matter is postponed to 14 November 2018 at 08h30 for status hearing.

---

## JUDGMENT

---

ANGULA DJP:

### Introduction

[1] I have before me an application in which the applicant, Mrs Fernandes, seeks an order to intervene in a review application. She further seeks the rescission of an order directing the Municipal Council of Walvis Bay, *inter alia* to demolish structures erected on an immovable property of which she is a co-owner, pending the outcome of the said review application.

[2] On 27 January 2016, the first and second respondents obtained an interim order against the Chairperson of the Council of the Municipal of Walvis Bay ('the Council') and the Council itself. The order was confirmed on 27 January 2017. In terms of the said order, the chairperson of the Council and the Council itself were *inter alia* ordered to ensure that any construction works already undertaken at Erf 688, Walvis Bay ('the property') in terms of the building permit number 688 were to be demolished immediately. It is that order that the applicant sought to rescind and have set aside.

### The applicant's case

[3] The applicant states that she brings this application in her personal capacity as co-owner of the property and also in her capacity as *executrix* of the estate of her late husband Mr Fernandes, to whom she was married in community of property.

[4] The applicant asserts in her affidavit that she is a co-owner of the property but was not cited as a party to the proceedings at which the demolition order was made, neither was she served with the application papers. She further contends that she is a necessary party and has a direct and substantial interest in the order that was granted; and that she should have been cited and served with the papers at the commencement

of the proceedings. The applicant therefore seeks an order to intervene in those proceedings and to have the demolition order rescinded.

[5] It is the applicant's case that on or about 27 October 2017, while she was on the island of Madeira, she was informed by her son, Manuel, about the application which had been brought by the first and second respondents in which they sought an order to demolish the structures which have been erected on the property. It would appear that a copy of the application papers was delivered to her legal practitioner, who is also acting as her agent in the liquidation and distribution of her late husband's estate. She then contacted her legal practitioner, who informed her that the application did not concern the estate and therefore there was no need for her to intervene in the proceedings.

[6] The applicant returned to Namibia in early December 2017 and consulted her legal practitioner again about the demolition order. The legal practitioner reiterated his previous opinion that it was not necessary for her to intervene in the proceedings.

[7] The applicant states that during 2010 she and her late husband had decided to donate the property to their son Manuel Fernandes and daughter Manuela Fernandes-Luise. However, no effect has been given to the written donation and as a result the property is still registered in the name of her late husband. It is the applicant's testimony that she intends revoking the donation to her son and daughter on the ground of ingratitude on their part.

[8] The applicant asserts further that the structure or improvements which have been erected on the property have become her property through accession as a co-owner of the property. She therefore claims that as a co-owner she has a direct and substantial interest in the order granted to demolish the structures erected on her property. It is further the applicant's case that failure to cite her as a party to the proceedings was fatal to the application and to the resultant order and therefore, she claims, the order was erroneously granted in her absence.

[9] The applicant states further that after due consideration and further consultation with her legal representative, they obtained counsel's opinion on her prospects of success if she were to apply for leave to intervene in the proceedings. An opinion was obtained in June 2017, which advised her about her *locus standi* and her need to intervene in the proceedings.

[10] The applicant further states that according to the allegations in the supporting affidavit in the main application it is alleged that the improvements on the property were carried out without a valid building permit and without the consent of the owners of the adjacent properties. The applicant does not dispute that the second respondent is the owner of the adjacent erf number 689. The applicant further points out that insofar as the initial permit has been revoked by the Council, she has in the meantime filed an application with the Council for the approval of the improvements which were erected on the property under the revoked permit.

#### Opposition by the respondents

[11] Only the first and second respondents opposed the application. I will refer to them in this judgment jointly as 'the respondents' for the sake of brevity. The opposing affidavit has been deposed to by the applicant's son, Mr Vicente Fernandes. He is the sole member of the second respondent and holds 75 per cent member's interests in the first respondent.

[12] Initially the respondents had raised three points of law *in limine*, but two of those points have been abandoned and only one point is being persisted with and that is the alleged lack of *locus standi* on the part of the applicant to institute these proceedings. I will accordingly refer to the allegations concerning the point that the applicant lacks *locus standi*.

[13] In support of this point *in limine*, the deponent points out that the property was donated to two children of the applicant and the deceased by way of a written deed of donation on 20 April 2010. The deponent however admits that the property has not yet

been transferred to the said children. As regards the applicant's intimation that she is considering revoking the donation due to ingratitude, the deponent points out that the applicant cannot revoke the donation which was made by her deceased husband. The deponent further argues that even if the court were to find that the applicant has *locus standi* based on her co-ownership of the property, she does not have a direct and substantial interest in the matter.

[14] As regards the application for the rescission of judgment, the deponent submits that there is no duty on the court to find a defence for the applicant. He argued further that the applicant ought to have brought the application within a reasonable time but has failed to do so. Furthermore, it is submitted, not every mistake or irregularity is open to correction in terms of rule 103. It is the respondents' case that the application for rescission is intertwined with an application for leave to intervene and therefore the applicant must show a *prima facie* defence, which she has failed to do on the papers.

[15] As regards the application for leave to intervene, it is contended on behalf of the respondents that the applicant has failed to prove that she has a direct and substantial interest in the matter; that she will be prejudiced by the court order, that the application is serious and not frivolous; and that she has a *prima facie* defence or cause of action.

#### Point in limine considered

[16] I proceed to consider the point raised that the applicant lacks the standing to bring the application.

[17] Mr Wylie, in his heads of argument, referred the court to *Financial Services and Another v de Wet NO and Others*<sup>1</sup>, where the test for *locus standi* was set out at para 142 as follows:

'The test for *locus standi* was generally expressed with reference to the interests in the subject matter of the case which the litigant was required to have in order for the relief to be granted at

---

<sup>1</sup> 2002 (3) SA 525 (C) at para142.



his behest. Whether a particular litigant's interests would suffice would always depend upon the facts of each particular case.'

[18] Counsel submitted that even if this court were to find that the applicant has the *locus standi*, based on the fact that she is still the owner of the immovable property, still she does not have a direct and substantial interest in this matter. Mr Barnard, for the applicant, correctly in my view, points out that the abstract transfer of ownership of immovable property is applicable in Namibia. In terms of that system, transfer of ownerships is not dependent upon the validity of the underlying transactions: ownership of immovable property is transferred upon the registration of such transfer of ownership in the Registry of Deeds by the Registrar in the Deeds Office.

[19] It is common cause that the applicant is a co-owner of the property in her personal capacity through her marriage in community of property to her late husband. On that ground alone, she has the standing and interest in the property. It is also not disputed that she has been duly appointed as an *executrix* of her late husband's estate. In that capacity too, she has a standing and interest with respect to the property.

[20] It is further common cause that the donation of the property has not yet been registered by means of a notarial deed nor is the transfer of ownership registered by the Registrar of Deeds in the Deeds Office. Until such time that the donation is registered, the applicant is and remains a co-owner of the property. My conclusion is therefore that the applicant as a co-owner and also in her capacity as the *executrix* of her late husband's estate, has the necessary *locus standi*. The point *in limine* thus stands to be dismissed. I proceed to consider the application for rescission of the demolition order.

#### Application for rescission of the order

[21] This application has been brought in terms of rule 103 of the Rules of this Court. Rule 103(1)(a) reads as follows:

'103(1) In addition to the powers it may have, the court may of its own initiative Or on application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

(a) erroneously sought or erroneously granted in the absence of any party affected thereby; (underlining supplied).'

### *Unreasonable delay*

[22] The respondents' complain that the application has not been brought within a reasonable time; and that the application was brought five months after the fact and for that reason alone, the application should be refused.

### *Applicable legal principles*

[23] . The applicable legal principles when a court is considering whether a particular application has or has not been brought within a reasonable time since the event were discussed by Damaseb JP in *Kleynhans v Chairperson for the Municipality*<sup>2</sup> at para 41 of the judgment as follows:

'[41] In *Ebson Keya v Chief of Defence Forces and 3 Others*<sup>3</sup> the court had occasion to revisit the authorities on unreasonable delay and to extract from them the legal principles applied by the Courts when the issue of unreasonable delay is raised in administrative law review cases. The following principles are discernable from the authorities examined:

(i) The review remedy is in the discretion of the Court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions to avoid prejudice and promote the public interest in certainty<sup>4</sup>.

<sup>2</sup> 2011 (2) NR p 437.

<sup>3</sup> Case No. A 29/2007 (NmHC) (unreported) delivered on 20 February 2009 at 9-11, paras 16-19.

<sup>4</sup> *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C) at 968J-969A; *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F and *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) para 22.

The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That is a question of law.

- (ii) If the delay was unreasonable, the Court has discretion to condone it.
- (iii) There must be some evidential basis for the exercise of the discretion: The Court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.
- (iv) An applicant seeking review is not expected to rush to Court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.
- (v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.
- (vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify the potential respondent(s) and to warn them that a review application is contemplated<sup>5</sup>. In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay.

[42] Writing for a two-judge bench of this Court in *Disposable Medical Products v Tender Board of Namibia* 1997 NR 12 at 132D, Strydom JP said:

“In deciding whether delay was unreasonable two main principles apply. Firstly whether the delay caused prejudice to the other parties and secondly, the principle applies that there must be finality to proceedings.”<sup>1</sup>

[24] Keeping in mind the foregoing principles and considering the facts of the present matter, I am of the considered view that there is no merit in the respondents' argument

<sup>5</sup> 'Where a respondent in review proceedings is given notice that a decision is about to be taken on review such respondent knows it is at risk and can arrange its affairs so as to be the least detrimental': *Kruger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 at 170H et 172A.

with regard to this point that the applicant unreasonably delayed in launching this application. The applicant gave an explanation for the delay, which was caused by the incorrect legal view of her legal practitioner. She immediately contacted her legal practitioner after she had been informed by her son about the court case launched by the respondents. After she returned from her overseas trip, she once again consulted her legal practitioner and raised the issue of intervening with him. It was on her initiative and persistence that an opinion of senior counsel was obtained by her legal practitioner, who advised her that it was necessary for her to apply for leave to intervene.

[25] The respondents are unable to gainsay the applicant's explanation. I am satisfied with the applicant's explanation and find that it is reasonable and credible. In the exercise of my discretion, I am of the view that given the steps taken by the applicant, a period of five months is not unreasonable, taking further into consideration that the applicant has not been inactive in taking steps to bring the application. The point is dismissed. I proceed to consider whether the applicant has made out a case for the grant of the rescission of the demolition order

#### Application for rescission

#### *Applicable legal principles*

[26] The legal position is well settled – namely that in an application for rescission of a judgment or order brought in terms of rule 103, unlike an application brought in terms of the common law principles, an applicant is not required to show good cause, or the prospects of success.

[27] The Supreme Court in *Labuschagne v Scania Finance Southern Africa and Others*<sup>6</sup> said the following at para 20, with regard to this type of application:

---

<sup>6</sup> 2015 (4) NR 1153 (SC).

'Rule 44 on the other hand is designed to deal with narrow class of case where it is not necessary to show good cause, but to simply show that an order has been erroneously sought or granted.'

And further at para 21:

'Streicher JA held that where there has not been proper notice of the proceedings to the party seeking rescission, whether the fact of the absence of notice appears on the record or not, any order granted will have been granted erroneously.'

[28] It has also been held that an order or judgment that was erroneously sought or granted in the absence of any party affected by it, should, without further enquiry, be rescinded or varied<sup>7</sup>.

[29] It has further been held that if a party has a direct and substantial interest in any order that the court might make in the proceedings or if such order could not be sustained or carried into effect without prejudicing that party, such party is a necessary party and should thus be joined in the proceedings, unless the Court is satisfied that such party has waived its right to be joined<sup>8</sup>.

[30] The legal position with regard to co-owners has been stated to be: a co-owner is a necessary party and should be joined to the proceedings; and that the question of joinder is not dependent on the nature of the subject matter of the suit, but on the manner in which, and the extent to which the Court's order may affect the interests of third parties<sup>9</sup>.

[31] Applying the principles to the facts of present matter, it is clear to me that the applicant is a necessary party and should have been cited as a party to the main application. It is common cause that the applicant is a co-owner of the property and furthermore she is a duly appointed *executrix* of her late husband's estate. Half of the

---

<sup>7</sup> *De Villiers v Axis Namibia (Pty) Ltd* 2012 NR 48 at para 21.

<sup>8</sup> *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

<sup>9</sup> *Rahim v Mahomed* 1955 (3) SA 144 (N).

property forms part of the joint estate, which falls under the applicant's authority and supervision as *executrix*. It is further clear that the applicant has a direct and substantial interest in the demolition order granted. It is impossible that such order can be carried into effect without negatively affecting or prejudicing the applicant or her interests in the property.

[32] It is not in dispute that the applicant was not cited as a party to the proceedings, nor is it in dispute that the applicant was not served with papers in the main application, even as a matter of courtesy. The respondents argue that the applicant became aware of the application. That is not an answer to the strict requirement of law. The court in *Knouwds*<sup>10</sup> matter had the following to say with regard to failure of service:

'Where there is complete failure of service, it matters not, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is presented in the proceedings. The proceedings which take place without service is a nullity and is not competent for a court to condone.'

[33] On the facts of this matter, my findings with regard to the application for rescission are that the applicant is an 'affected' party within the meaning of rule 103(1). Furthermore, the order was erroneously granted in her absence as an affected party. The demolition order is therefore liable to be rescinded. I move to consider the application to intervene.

#### Application to intervene

##### *Applicable legal principles*

[34] As regards applicable legal principles, it has been held that for an applicant, who seeks leave to intervene in proceedings to succeed, he or she must satisfy the court that he or she has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the court; that the application is not

---

<sup>10</sup> *Knouwds NO v Josea and Another* 2007 (2) 792 at [23] and [26].

frivolous; and that the allegations made by the applicant constitute a *prima facie* defence or cause of action<sup>11</sup>.

[35] In the present matter as regards the requirement that the applicant must satisfy the court that she or he has a direct and substantial interest, I have earlier, while dealing with the question whether she has made out a case for the rescission of the demolition order, found that applicant has proved that she has a direct and substantial interest in the subject matter of the main application. The applicant has a right as co-owner of the property to safeguard her property. The demolition order is aimed at destroying the improvements which have been effected on the property and have as a result improved the value of the property. It is therefore clear that the applicant will suffer prejudice as a result of the order of the court being implemented and the applicant not allowed to intervene in the proceedings to place her defense before court why the structures or improvements effected upon the property should not be demolished.

[36] I am of the view that, given issues at stake in the main proceedings, it cannot be seriously contended that applicant's application is frivolous neither are the respondents contending so. For instance the demolition process of the improvements might seriously affect the integrity or value of the main property.

[37] Mr Wylie appears to have conceded, in his heads of argument, when he submitted that the applicant's application 'for rescission is intertwined with the application for leave to intervene and for that reason the applicant is required to show *prima facie* defence'. Counsel submits that the applicant has failed to show a *prima facie* defence.

[38] It is correct that the two applications are intertwined, but their requirements for the applicant to succeed are not the same. For instances, as has been shown earlier, in respect of the application for rescission in terms rule 103, an applicant is not required to satisfy the court that he or she has a *prima facie* defence. With the application to

---

<sup>11</sup> *Ex-parte Sudurhavid (Pty) Ltd: In re: Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1992 NR 316 HC at p 321 B-C.

intervene, the applicant must show a *prima facie* defence however it is not necessary for the applicant to satisfy the court that he or she will succeed.

[39] Mr Wylie agreed that the applicant's perceived prejudice is based on the fact that the property 'illegally' gained value due to a building permit that was subsequently set aside by this court. In this connection, counsel submits that the applicant may not be allowed to benefit from such illegal added value; furthermore the applicant is not the party who is out of pocket financially because she did not pay for the construction works. I must say, I found Mr Barnard's argument around this issue sensible and persuasive. Counsel correctly points out that when the order was granted, it was granted on an unopposed basis and therefore no contra-facts were placed before court to enable the court to make an informed and balanced decision. In any event, it is trite law that where a demolition order is sought a court has a discretion to refuse such an order and instead to award compensation to the applicant.

[40] Mr Barnard further referred the court to judgement of the South African Supreme Court of Appeal (SCA) in *BSB International Link v Readam SA*<sup>12</sup>, in which the court *a quo* had ordered that the appellant's building to be demolished to the extent necessary, in order to comply with the relevant town planning-scheme. The SCA confirmed the court *a quo* order with modifications. In ordering the modifications, the court took in consideration certain factors and expressed itself in the following words:

'In a case such as this, a court is possessed of a broad general discretion to be exercised after affording due consideration to all the relevant circumstances. Obviously, before granting a partial demolition order a court would have to be satisfied that the illegality complained of is capable of being addressed by such an order and that it is practically possible to do so. Depending on the circumstances, this may require evidence to be given by experts such as engineers and architects to ensure that the structural integrity and safety of the building are not compromised when partially demolished.'

[41] There is no indication that the court was apprised of the risk associated with the demolition of the structure. It is an important consideration, which was not drawn to the

---

<sup>12</sup> 2016 (4) SA 83.



attention of the court when it made the order. Had the applicant, as owner of the property, been cited and served with the application, she might well have raised the issue with the court and the court might have made a different order or altogether declined to make the order it did.

[42] The applicant states that she has applied for a new building permit which is still pending before the Council. The applicant states 'at the very least the appropriate relief will be that the matter be held in abeyance pending the finalisation of the new application made to the Municipality'. In my view, with this statement, the applicant appears to indicate that she intends to retain the improvements against payment of just compensation to the respondents. I am of the firm view that payment of compensation is a reasonable and relevant consideration in the circumstances.

[43] A further relevant consideration is the fact that as co-owner and custodian of the property in her capacity as *executrix*, the applicant enjoys Constitutional protection to her right to property under Article 16 of the Constitution. This court is enjoined by Article 25(4) of the Constitution to protect the applicant's fundamental right to property by awarding monetary compensation in the event of unlawful denial of her enjoyment of such right or violation where it considers to be appropriate. I am of the considered view this is such case where this court is to protect the applicant's fundamental right to her property.

[44] Mr Barnard points out that sight should not be lost of the fact that at the time when the structures were constructed, a valid building permit existed. I agree. It should be noted that the issuing of a building permit constitutes an administrative action, which remains valid until set aside and any act performed in terms of such permit remains valid until set aside<sup>13</sup>. In this connection it is important to point out that the respondents have acknowledged this position in that they have filed an application to review and to set aside the Municipality's decision to issue the permit. The review application is still pending before this court.

---

<sup>13</sup> *Oudeskraal Estate (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 at para 243H-244 A/B.

[45] A further important consideration which flows from the preceding paragraph is that the construction works sought to be demolished are not a product of an unlawful act, such as an encroachment on the respondent's property or the fact that the works were done without any permission at all and thus illegal. It is not the respondent's case that the applicant knew that her son had applied for the permit claiming to be the owner of the property.

[46] In the light of the foregoing facts and considerations, I am of the considered view, that the applicant has made out a case that she has a *prima facie* case or defence to the main application.

[47] I have thus arrived at the conclusion that the applicant has met all the requirements for leave to intervene in the main application. There remains an issue of costs.

#### Costs

[48] The normal rule is that costs follow the result. In terms of that rule, costs are awarded on a party and party scale. However, in appropriate cases the court has a discretion to depart from the foresaid normal rule and make a special order of costs as a sign of its disapproval of the conduct of the party who is mulcted with such order.

[49] On behalf of the applicant, Mr Barnard asks for a special costs order against the respondents such order to include the costs of instructing counsel and instructed counsel. Counsel points out that the opposition by the applicant was not reasonable in the circumstances. Furthermore, the answering affidavit, he contends, contains 'conjecture, speculations, comments, arguments' and was overburdened with unnecessary annexures.

[50] Mr Wylie argues contra-wise and asks that costs should be awarded to the respondents irrespective whether or not the applicant succeeds. It is denied that the opposition was unreasonable. Counsel argues that the applicant has failed to set out

facts pointing to the conclusion that the respondents were not entitled to the order which is sought to be rescinded. Accordingly, it is submitted that a special order of costs is warranted.

[51] As the court which made the impugned order did so on facts placed before it without the benefit of a version to the contrary, upon further reflection, I am of the view that the respondents should not have asked for an order to demolish the works already done but should have simply asked for the construction works to cease and not demolition, pending the finalisation of the review application. This so because the owner of the property, as a necessary party with a direct and substantial interest in the subject-matter of the litigation had not been cited as a party to the proceedings nor had she been served with the application. I am of the view that had the applicant been cited and served the main application, this application might not have been necessary. The case law is clear on this point that once it has become apparent that a necessary party has not been joined, the court has no discretion – it cannot proceed to deal with the proceedings until such necessary party has been joined to the proceedings<sup>14</sup>.

[52] Having regard to the foregoing, I am of the considered view that the respondents' opposition was unreasonable, unnecessary and meritless points *in limine* were raised in the face of clear facts presented and case law referred indicating the contrary. The points *in limine* were only abandoned in the heads of argument after counsel for the applicant had already wasted his time and efforts to deal with these points. Such conduct cannot be countenanced and the court must show its disapproval accordingly.

[53] It is correct, as pointed out by Mr Barnard, that the answering affidavit is overburdened with unnecessary annexures, at times without any indication of the relevance of such annexures. Furthermore, instead of denying the facts alleged or stating facts to the contrary, questions are asked. Just to demonstrate the point, I quote an example below:

'Does applicant intend to revoke all the donations made<sup>15</sup>? and;

<sup>14</sup> *Amalgamate Engineering Union v Minister of Labour* 1949 (3) SA 637.

<sup>15</sup> Paragraph 98 of the Respondents' Answering Affidavit at page 16.

Has Olivier commenced with the mandamus application? If not why not? If so, where is the proof of this<sup>16</sup>?

[54] In view of the order, I am about to make, I am of the opinion that the applicant should be awarded her costs occasioned by the respondents opposition. However, having regard to the conduct of the respondents as pointed out above, I am of the view that a special order of cost is warranted.

[55] In the result I make the following order:

1. The order granted in favour of the respondents on and in the absence of the applicant's is hereby rescinded.
2. The applicant is granted leave to intervene in the main application.
3. The respondents are ordered to pay the costs of this application on the scale of attorney and client such costs to include the costs of one instructed and one instructing counsel.
4. The applicant is to file her opposing affidavit to the main application on or before 31 October 2018.
5. The respondents to file their replying affidavits on or before 7 November 2018.
6. The matter is postponed to 14 November 2018 at 08h30 for status hearing.

---

H Angula

---

<sup>16</sup> Paragraph 157 of the Respondents' Answering Affidavit at page 23.

Deputy-Judge President

## APPEARANCES

APPLICANT: P C I Barnard  
instructed by van der Merwe-Greeff Andima Inc.,  
Windhoek

FIRST AND SECOND  
RESPONDENT: T M Wylie  
instructed by Engling, Stritter & Partners, Windhoek