REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Finkenstein Homeowners' Association // Cedric Nieuwoudt & Karin Nieuwoudt	**Case No:** HC-MD-CIV-ACT-OTH-2019/04500
	Division of Court: High Court
Heard before: Honourable Mr Justice Ndauendapo	**Delivered on:** **4 November 2020**
Neutral citation: *Finkenstein Home Owners' Association v Nieuwoudt* (HC-MD-CIV-ACT-OTH-2019 /04500) [2020] NAHCMD 504 (4 November 2020)	

The order:

1 The point *in limine* raised by the respondents that there was non-compliance with Rules 32(9) and 32(10) by the applicant is dismissed.

2 Costs shall be costs in the Rule 61 application.

3 The case is postponed to 10 November 2020 at 09:00 for Rule 61 application. (Reason: To agree on Rule 61 application).

Background facts

[1] On 10 and 11 August 2020 the defendants (respondents) launched a rescission application to rescind and set aside (in terms of Rule 103 to set aside) a court order (including costs) dated June 2020. The court order granted an interim relief to the plaintiff (applicant) interdicting the defendants to operate a Bed and Breakfast on the estate known as Finkenstein. The Applicant then launched a Rule 61 application seeking an

order to set aside the Rule 103 application of the defendants (respondents) as an irregular proceeding.

[2] The respondents in their heads argued that the plaintiffs did not comply with Rule 32(9) and (10) when the Rule 61 application was launched.

Non-compliance with Rule 32(9) and Rule 32(10)

[3] Mr. de Beer for the respondents argued that, rule 32(9) stipulates a prerequisite to launching any interlocutory application, in that a party must before launching it, seek an amicable resolution thereof with the other party and only after the parties have failed to resolve their dispute may such proceedings be delivered. Non-compliance with rules 32(9) and (10) is fatal to the application.

[4] He argued that the Rule 61 application is an interlocutory application and Rules 32(9) and (10) are applicable.

[5] He further argued that the applicant did not attach the letters exchanged between the parties, and it is not before court, and neither was evidence pertaining to the content of the letter in Rule 32(9) placed before court under oath through an affidavit. The letters were further not uploaded to show compliance with Rule 32(9) before the application was launched.

[6] If the applicant did trust the court by providing the letter dated 17 August 2020 which was issued at 15:17 on 17 August 2020, the court would have been able to read that applicant demanded a reply from respondents before noon on 18 August 2020. It is submitted that such is not seen as seeking an amicable resolution.

[7] On 19 August the applicant averred, inter alia, that the Rule 103 proceedings is on proper construction an appeal, while the applicant ignored that a Notice of Motion was filed, based on a founding affidavit, being a step totally different from appeal process. However, the letters were not placed before court and cannot be placed before court without an affidavit and the content of the letters cannot be considered. It remains that the applicant has the onus on showing compliance with Rule 32(9), which it did not, and the applicant cannot be entertained.

[8] The wording of Rule 32(9) dictates that an applicant must seek an amicable

resolution, which means that the applicant is obliged to propose an amicable solution and not simply demand that the step, i.e. filing of a Rule 103 rescission application be withdrawn or that respondents must propose “other alternatives”. It is submitted it is polarized in engagement and dismissive, which does not comply with the requirements and purpose of Rule 32(9).

[9] By own admission of applicant, the Rule 32(10) report was incorrect. The notice, if it is indeed a notice of motion, was launched on Monday 21 August 2020, after demand in its letter dated 19 August that respondents respond on 19 August 2020, which it submitted clearly shows that the applicant merely paid lip-service to compliance with Rules 32(9) and (10) and proceeded regardless to initiate the Rule 61 notice. The correct, according to the applicant, Rule 32(10) report was filed on 24 August 2020, which was after the launching of the Rule 61 notice, clearly a non-compliance with Rule 32(10) which direct that:

‘The party bringing any proceeding contemplated in this rule must, before instituting the proceedings, file with the registrar details of the steps taken…’ (our emphasis)

[10] The Rule 32(10) report did not fully address the steps taken. It does not explain what amicable resolution was proposed. It is submitted that a blatant demand to withdraw the Rule 103 application does not constitute any reasonable step to amicably resolve any issue. Even if the letters were attached to the report, the applicant had the onus to explain the steps. Counsel relied on the judgment In *Marungu v Maghoma* (HC-MD-CIV-ACT-MAT-2018-01927) [2020] NAHCMD 85 (6 March 2020) wherein the Honorable Mr. Justice Usiku, J said:

‘The established legal position is that compliance with rule 32(10) is mandatory. The non-compliance with the rule almost invariable leads to the matter being struck from the roll.’

[11] In *CC v JV* [2016] (1) NR 214 at p 217 para 10 and 11, the Honourable acting judge (as he then was) Masuku, J confirmed that:

‘[10] It must be noted that from the nomenclature used, 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 “rendered the application fatally defective.”

[11] It is plain, in my view, that failure to comply with either or both requirements in rule 32(9) and (10), is fatal.'

[12] Mr. Marais for the applicant, argued that the applicant, before launching the application took the following steps in compliance with rules 32(9) and 10. Letters were exchanged between the parties. The letters from the defendants (respondents) were marked without prejudice and could not be loaded on ejustice. The Rule 32(10) report was filed on 21 August 2020 and an amended report was filed on 24 August 2020. The amended report was filed to include a letter which was received from the respondents after the first report was filed on 21 August 2020. A face to face meeting could not be arranged due to Covid19 restrictions.

[13] I fully agree with the submissions by the applicant that the nature of a Rule 61 application is such that there is nothing in between-you either withdraw the irregular proceeding or the applicant will approach the court to have the irregular proceedings set aside. In addition, the applicant could not take any further step because in terms of rule 61 a party that has taken any further step in the cause or matter with knowledge of the irregularity is not entitled to make such an application. There is also a time constrained within which such an application must be launched. The application must be launched within 10 days of becoming aware of the irregular proceeding. The dispute between the parties has been characterized by extreme animosity between the parties that I doubt that any face to face meeting would have yielded any amicable solution .To compound matters, the Covid 19 restrictions greatly prevented parties to meet face to face according to counsel for the applicant. The first Rule 32(10) report was filed on Friday, 21 August 2020 and an amended report, to include a letter received after the first report was filed, was filed on Monday, 24 August 2020. Given all that, it is my considered view that there was compliance with rules 32(9) and 10.

G.N. NDAUENDAPO **JUDGE**	
For the applicant: Mr Marais SC, assisted by Ms Campbell & Mr Obbes – Instructed by Engling, Stritter & Partners Windhoek	For the respondents: Mr. de Beer Of de Beer Law Chambers Windhoek