REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, HELD AT WINDHOEK

RULING ON THE APPLICATION TO HEAR THE RULE 61 APPLICATION SEPARATELY OR JOINTLY WITH THE MERITS OF THE RESTRAINT APPLICATION

Practice Directive 61

Case Title:	**Case No:**
THE PROSECUTOR-GENERAL **APPLICANT** **APPLICANT** and **RICARDO JORGE GUSTAVO** **FIRST DEFENDANT** **TAMSON TANGENI HATUIKULIPI** **SECOND DEFENDANT** **JAMES NEPENDA HATUIKULIPI** **THIRD DEFENDANT** **SACKEUS EDWARDS TWELITYAAMENA SHANGHALA** **FOURTH DEFENDANT** **BERNARDT MARTIN ESAU** **FIFTH DEFENDANT** **PIUS NATANGWE MWATELULO** **SIXTH DEFENDANT** **NAMGOMAR PESCA NAMIBIA (PTY) LTD** **SEVENTH DEFENDANT** **ERONGO CLEARING AND FORWARDING CC** **EIGHTH DEFENDANT** **JTH TRADING CC** **NINETH DEFENDANT** **GREYGUARD INVESTMENTS CC** **TENTH DEFENDANT** **OTUAFIKA LOGISTICS CC** **ELEVENTH DEFENDANT**	HC-MD-CIV-MOT-POCA-2020/00429 **Division of Court:** High Court (Main Division)

OTUAFIKA INVESTMENTS CC TWELFTH DEFENDANT **FITTY ENTERTAINMENT CC THIRTEENTH DEFENDANT** **TRUSTEES OF CAMBADARA TRUST FOURTEENTH DEFENDANT** **OLEA INVESTMENTS NUMBER NINE CC FIFTEENTH DEFENDANT** **TRUSTEES OF OMHOLO TRUST SIXTEENTH DEFENDANT** **ESJA HOLDING (PTY) LTD SEVENTEENTH DEFENDANT** **MERMARIA SEAFOOD (PTY) LTD EIGTEENTH DEFENDANT** **SAGA SEAFOOD (PTY) LTD NINETEENTH DEFENDANT** **HEINASTE INVESTMENT (NAMIBIA) (PTY) LTD TWENTIETH DEFENDANT** **SAGA INVESTMENT (PTY) LTD TWENTY-FIRST DEFENDANT** **ESJA INVESTMENT (PTY) LTD TWENTY-SECOND DEFENDANT** and: **NDAPANDULA JOHANNA HATUIKULIPI FIRST RESPONDENT** **SWAMMA ESAU SECOND RESPONDENT** **AL INVESTMENTS NO FIVE CC THIRD RESPONDENT** **OHOLO TRADING CC FOURTH RESPONDENT** **GWAANIILONGA INVESTMENTS (PTY) LTD FIFTH RESPONDENT**	
Heard before: Honourable Justice Sibeya	**Date of hearing:** 19 April 2024 **Ruling delivered on:**

	14 May 2024

Neutral citation: *The Prosecutor-General v Gustavo* (HC-MD-CIV-MOT-POCA-2020/00429) [2024] NAHCMD 225 (14 May 2024)

The order:

1. The seventeenth to twenty-second defendants' rule 61 application filed in respect of the Prosecutor-General's supplementary replying affidavit filed on 22 February 2024 (alternatively, the allegations in paragraph 6.3 of the replying affidavit as well as the phrase "and opinion evidence" as used in paragraph 6.4 of the supplementary replying affidavit) to be declared to constitute an irregular step, alternatively, be declared to be improper as envisaged by rule 61 of the Rules of this Court and be set aside, shall be heard together with the application to strike out and the merits of the Prosecutor-General's application for a restraint order.

2. The seventeenth to the twenty-second defendants' contention to have the rule 61 application heard separately and prior to the hearing of the merits of the restraint application is refused.

3. The seventeenth to the twenty-second defendants must, jointly and severally, the one paying the other to be absolved, pay the Prosecutor-General's costs of these proceedings subject to rule 32(11).

4. The parties must file a joint case management conference report in terms of rule 71 and a draft order on or before 6 June 2024.

5. The matter is postponed to 13 June 2024 at 08:30 for a case management conference hearing.

Reasons for the order:

SIBEYA J

Introduction and background

[1] To state that this matter has occupied the court is an understatement. The court has been seized with this matter from as far back as November 2020, and wrote and delivered a total of seven judgments thus far on different aspects, the current one being the eighth and there is still no end in sight.

[2] This is an interlocutory application brought by the seventeenth to twenty-second defendants in the main application for a restraint order filed by the Prosecutor-General ('PG'). The only active defendants, who form part of this matter, are the seventeenth to twenty-second defendants, and they shall be referred to as 'the defendants'. Where reference is made to the PG and the defendants jointly, they shall be referred to as 'the parties'. Ms Boonzaaier appears for the PG while Mr Heathcote appears for the defendants.

[3] The main application for a restraint order by the PG against the first to the sixteenth defendants and the respondents was finalised on 17 May 2023.

[4] The application for a restraint order against the defendants took a different trajectory when the said defendants brought an application to cross-examine the PG and Mr Johannes Stefansson, which application was, in a ruling delivered by this court, dismissed. The defendants tenaciously applied for leave to appeal the said ruling to the Supreme Court and the application for leave suffered the same fate. The defendants subsequently petitioned the Chief Justice for leave to appeal and the petition was refused. It was during this process that the main application for a restraint order against the first to sixteenth defendants and the respondents proceeded to finality.

[5] Following the refusal of the petition mentioned above, the parties were granted leave to file supplementary affidavits. In the present matter, the defendants filed a notice on 8 March 2024, applying that the PG's supplementary replying affidavit filed on 22 February 2024, alternatively, the allegations set out in paragraphs 6.3 and 6.4 of the said replying affidavit and the phrase 'and opinion evidence' used in paragraph 6.4 be declared to constitute an irregular step, or proceeding as per rule 61 of the Rules of this court.

Relief sought

[6] The defendants seek the following relief in the present proceedings:

'1. The Prosecutor-General's supplementary replying affidavit filed on 22 February 2024 (alternatively, the allegations in paragraph 6.3 of the replying affidavit as well as the phrase "and opinion evidence" as used in paragraph 6.4 of the supplementary replying affidavit) be declared to constitute an irregular step, alternatively, be declared to be improper as envisaged by Rule 61 of the Rules of this Honourable Court and be set aside.

2. That the Prosecutor General's supplementary replying affidavit is struck out.

3. That the Prosecutor General be ordered to pay the costs of this application.

4. Further and/or alternative relief.'

[7] The above relief is opposed by the PG.

Should the rule 61 application be heard together with the merits of the restraint application or not?

[8] The parties are poles apart on this issue. The defendants contend that the rule 61 application must be heard prior to hearing the merits of the restraint application. The PG contends contrariwise.

Defendants' case

[9] Mr Heathcote argued that when a party files a rule 61 application, the court has no discretion but must give direction as to when such application must be heard. He argued further that the interlocutory application must be heard within 30 days of the proceedings being brought, as provided for by rule 32(2).

[10] Mr Heathcote cited the following passage from the decision of *Gondwana Collection Namibia (Pty) Ltd v Hollard Insurance Company of Namibia Limited*,[1] where Masuku J said the following:

'Thus, hearing the interlocutory applications prior to the main case will curtail the proceedings at the hearing of the main application, and will serve to separate the chaff from the corn at an early stage.'

[11] Mr Heathcote wrapped up his arguments by submitting that hearing the rule 61 application prior to the merits will justly, speedily and cost-effectively, resolve the dispute between the parties, while a refusal to separately hear thee rule 61 application would result in drafting comprehensive heads of argument on a step considered to be irregular and thus, incurring unnecessary costs.

The PG's case

[12] The PG contends that the defendants filed two interlocutory applications consisting of this rule 61 application and the application to strike out. She stated further that while in the rule 61 application, the defendants attack paragraphs 6.3 and 6.4 of her supplementary replying affidavit, the defendants seek to strike the same paragraphs in their application to strike out.

[13] Ms Boonzaaier argued that it will be in furtherance of the objectives of the Rules of this court to limit interlocutory applications. She argued that it is convenient and just, *in casu,* to hear the rule 61 application together the application to strikeout and the merits of the restraint application.

[14] Ms Boonzaaier further pointed out that the defendants agreed that the application to strike out be heard at the same time as the restraint application. This, she submitted, is extraordinary as in both the rule 61 application and the application to strike out, the court will have to consider the challenge on the same paragraphs and make a determination. She drove the point home by concluding that hearing the rule 61 application separately from the application to strike out and the restraint application will be tantamount to piecemeal adjudication of applications and, therefore, contrary to the overriding objectives of the Rules of court.

[1] *Gondwana Collection Namibia (Pty) Ltd v Hollard Insurance Company of Namibia Limited* (HC-MD-CIV-MOT-GEN-2020/00508) [22] NAHCMD 305 (16 June 2022) para 16.

Discussion

[15] To begin with, rule 61 regulates irregular proceedings and it provides that:

'(1) 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 knowledge of the irregularity is not entitled to make such application.

(2) …

(3) The managing judge must give directions as to the hearing of such application.'

[16] Rule 61 of the Rules of this court, was intended to be a procedure designed to remove a hindrance to the future conduct of litigation. I, therefore, associate myself with the remarks by Masuku J in *Gondwana*, that hearing interlocutory applications prior to the merits of the main application has the advantage of ensuring that the court focuses on the real dispute between the parties.

[17] It should, however, be remembered that it is not cast in stone that whenever an interlocutory application is raised, same should be heard prior to the hearing of the merits of the main application, neither is it a given that every interlocutory application will be heard prior to the hearing of the main application. To the contrary, what is expected from the court is to make a determination whether, in the exercise of its discretion, and in furtherance of the objectives of the Rules, the interlocutory application should be heard prior to the hearing of the main application or not.

[18] This is what was stated in *Namibian Gymnastics v Namibia Sports Commission*,[2] when it was remarked that:

'[12] What is apparent from rule 63 (6) is that the Court has a discretion to determine

[2] *Namibian Gymnastics v Namibia Sports Commission* (HC-MD-CIV-ACT-OTH-2021/02269) [2021] NAHCMD 376 (19 August 2021) para 12. See also: *Helios Oryx Limited vs Elisenheim Property Development Company (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/02288) [2022] NAHCMD 26 (3 February 2023) paras 44-47.

whether a question of law or fact should be decided either prior to or separate from the hearing of merits of the matter. In the exercise of its discretion, the Court must bear in mind that the underlying (objectives) of the rule is to ensure convenient and expeditious disposal of litigation. It is not a given that in every case where questions of law or fact is raised and applied for by any of the parties to be heard prior to or separately from the merits of the matter, that separation will be granted. The question of law or fact raised should be carefully considered in order to properly determine or not whether it will be convenient and expeditiously dispositive of the matter to separate the hearing.'

[19] It is settled law that the court retains a discretion to determine whether or not an interlocutory application should be heard prior to and separate from the merits of the main application. It is imperative that during such an exercise, the court should have in its mental faculties, the objectives of the Rules. Rule 1(3) provides that:

'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable…'

[20] I find that the defendants, in their rule 61 application, attack paragraphs 6.3 and 6.4 of the PG's supplementary replying affidavit as being irregular. Simultaneously, the defendants seek to have the said paragraphs 6.3 and 6.4 struck out. As alluded to above, the defendants agreed that their application to strike out the said paragraphs 6.3 and 6.4 should be heard together with the hearing of the merits of the restraint application. Ms Boonzaaier argued that this approach constitutes a duplication of hearings. Mr Heathcote disagreed, and argued that the PG is assuming that the rule 61 application will fail.

[21] Mr Heathcote is correct that if the rule 61 application is upheld, then there would be no duplication. The difficulty, however, is what if the rule 61 application is unsuccessful? The answer would be a resounding duplication with the application to strike out paragraphs 6.3 and 6.4 of the PG's supplementary replying affidavit. For this reason, I find that it would not be desirable, and certainly not in the furtherance of the overriding objectives of the Rules to hear the rule 61 application on the same issues on which the pending application to strike out is premised.

[22] It follows from the above that, the hearing of the rule 61 application may not be dispositive of the matter, as in the event that the rule 61 application is not upheld, the

defendants would still mount an attack on the same paragraphs 6.3 and 6.4 at the hearing of the restraint application. The defendants would have a second bite at the cherry as it were, thus, unnecessarily duplicating the hearing and determination of the challenges to paragraphs 6.3 ad 6.4. This, I find, runs contrary to the overriding objectives of the Rules. On this basis alone, the application to hear the rule 61 application separately and prior to the hearing of the merits of the restraint application ought to fail.

[23] It was further argued by Mr Heathcote that rule 61(3) compels the court to give directions and provide a hearing date for the rule 61 application. The court must, therefore, allocate a date to hear the rule 61 application prior to hearing the merits of the restraint application, so it was argued.

[24] Rule 61(3) cited above provides that the managing judge must give directions regarding the hearing of the application. The rule does not state the period within which the rule 61 application must be set down for hearing. In my view, all that rule 61(3) requires is for the managing judge to provide directions on the hearing of the rule 61 application. The court, in my view, can provide directions by scheduling the hearing of the application on a particular day and prior to the hearing of the merits of the main application. The court can further give directions to hear the rule 61 application together with the main application, where in the exercise of its discretion, it forms the view that it will be just, speedy and cost effective if the rule 61 application is heard together with the merits of the main application. What rule 61(3) calls upon the court to do, is to give directions on the hearing of the rule 61 application, depending on the peculiar facts and circumstances of each case, and in the exercise of the court's discretion.

[25] *In casu*, I find that the directions required in rule 61(3) that meet the facts and circumstances of this matter, are to hear the rule 61 application attacking paragraphs 6.3 and 6.4 of the PG's supplementary replying affidavit together with the application to strike out the said paragraphs 6.3 and 6.4, and the merits of the restraint application at the same time. This will ensure a complete and comprehensive hearing of the matter, once and for all, and will avoid piecemeal hearings. After all, I find that, a once and for all hearing will conform to the overriding objectives of the Rules of this court.

[26] Mr Heathcote had another bow in his string and he submitted that rule 32(2)

compels the court to hear the rule 61 application, which is interlocutory in nature, within 30 days from the date of the said interlocutory application being brought. Rule 32(2) provides that 'the managing judge must conduct an interlocutory hearing within 30 days of the interlocutory proceeding being brought.'

[27] It is the intention of the rule-maker that interlocutory applications must be heard within 30 days from the date of being brought. In practice, it is at times difficult to conduct interlocutory proceedings within 30 days of being brought. Attempts must, however, be made to ensure that interlocutory proceedings are conducted within 30 days as per rule 32(2).

[28] Where as *in casu*, in my view, it is in the interest of the administration of justice and in keeping with the objective of the Rules that the rule 61 application should be heard together with the application to strike out and the merits of the restraint application, the 30-day requirement should be relaxed. In my view, the facts and circumstances of the present matter, as found above, place the matter beyond the domain of rule 32(2). After all, the rules are made for the court and not the court for the rules.

Conclusion

[29] In view of the above findings and conclusions, and in the exercise of the discretion, the court finds that justice dictates that rule 61 application and the application to strike out should be heard together with the merits of the restraint application. Failure to hear the said interlocutory applications together with the merits has the potential to multiply the hearings of the interlocutory applications and, therefore, defeat the overriding objectives of the Rules of this court. The contention that the rule 61 application, *in casu,* be heard separately and prior to hearing the merits of the restraint application fails for lacking merit.

Costs

[30] It is an established principle of our law that costs ordinarily follow the result. The PG succeeded to ward off the defendants' contention that the rule 61 application be heard separately and prior to hearing the merits of the restraint application, and is, therefore, entitled to an award of costs. Considering that this is an interlocutory

application, it follows that the costs to be awarded should be capped in accordance with rule 32(11) unless ordered otherwise. In *casu*, I find no justification to depart from the provisions of rule 32(11). The costs will thus be capped accordingly.

Order

[31] In the result, it is ordered that:

1. The seventeenth to twenty-second defendants' rule 61 application filed in respect of the Prosecutor-General's supplementary replying affidavit filed on 22 February 2024 (alternatively, the allegations in paragraph 6.3 of the replying affidavit as well as the phrase "and opinion evidence" as used in paragraph 6.4 of the supplementary replying affidavit) to be declared to constitute an irregular step, alternatively, be declared to be improper as envisaged by rule 61 of the Rules of this Court and be set aside shall be heard together with the application to strike out and the merits of the Prosecutor-General's application for a restraint order.

2. The seventeenth to the twenty-second defendants' contention to have the rule 61 application heard separately and prior to the hearing of the merits of the restraint application is refused.

3. The seventeenth to the twenty-second defendants must, jointly and severally, the one paying the other to be absolved, pay the Prosecutor-General's costs of these proceedings subject to rule 32(11).

4. The parties must file a joint case management conference report in terms of rule 71 and a draft order on or before 6 June 2024.

5. The matter is postponed to 13 June 2024 at 08:30 for a case management conference hearing.

Judge's signature:	**Note to the parties:**

Sibeya J	Not applicable.
Counsel:	
Applicant	**17th to 22nd Defendants**
M Boonzaaier Instructed by the Government Attorney, Windhoek	R Heathcote SC Instructed by Joos Agenbach Legal Practitioners, Windhoek