

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

<b>Case Title:</b> Auto Tech Truck and Coach CC v Rina's Investment CC t/a Rina's Transport	<b>Case No.:</b> HC-NLD-CIV-ACT-CON-2021/00224
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice Munsu, AJ	<b>Heard on:</b> 06 March 2023. <b>Delivered on:</b> 28 March 2023.
<b>Neutral citation:</b> <i>Auto Tech Truck and Coach CC v Rina's Investment CC t/a Rina's Transport</i> (HC-NLD-CIV-ACT-CON-2021/00224) [2023] NAHCNLD 26 (28 March 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The application in terms of rule 61 is struck from the roll.</li><li>2. Each party to pay its own costs.</li><li>3. The parties are directed to file a joint status report detailing the way forward on or before 12 April 2023.</li><li>4. The case is postponed to 17 April 2023 at 10h00 for a status hearing.</li></ol>	

**Reasons for the order:****MUNSU AJ:****Introduction**

[1] In this matter, the applicant filed a notice of irregular proceedings in terms of rule 61. The applicant seeks an order declaring the affidavits filed by the respondent as incompetent, invalid and constituting an irregular step as envisaged in rule 61 read with rules 54(3) and 55. The applicant further seeks an order striking the said affidavits and a further order that the applicant's pending application for security for costs be heard unopposed.

**Background**

[2] On 23 August 2022 the applicant filed an application for security for costs in terms of rule 59(4). On 29 August 2022, the respondent filed a notice to oppose. On 08 September 2022 the court issued an order that the respondent must file its answering affidavit on or before 12 September 2022. The respondent did not comply with the said order. On 24 October 2022, the respondent filed an application for condonation for the non-compliance with the said order. The aforesaid condonation application was not opposed and was granted.

[3] On 06 December 2022, the court issued an order directing the respondent to file its answering affidavit on or before 16 January 2023. Again, the respondent did not comply with the said order and did not file the answering affidavit as directed.

[4] On 18 January 2023, the respondent filed an answering affidavit of Fillemon Namweya and a confirmatory affidavit by Kaunapawa Angula out of time.

**The application**

[5] Mr Rainier Arangies, the sole member of the applicant deposed to the affidavit on behalf of the applicant in support of the application for irregular service. He avers that he is duly authorised to depose to the affidavit and to launch this application. According to Arangies, the applicant filed the rule 61 notice in response to the respondent's irregular step of filing an answering (opposing) affidavit after the deadline had passed without first requesting the court's condonation and lifting of the bar.

### **The opposition**

[6] The respondent opposed the application. Mr Fillemon Namweya, a member of the respondent deposed to an affidavit on behalf of the respondent. Mr Namweya raised an issue *in limine* that prior to the institution of these proceedings; the applicant did not engage the respondent to try and reach an amicable resolution of the issue of the late filing of the answering affidavit.

[7] Namweya claims that neither a phone call nor a letter was sent, and the applicant's legal representative made no attempt to meet with the respondent to try and resolve the dispute. According to Mr Namweya, the applicant did not comply with rule 32(9) and (10) which necessitates the dismissal of the application.

[8] In reply, the applicant also raised a point *in limine* to the respondent's opposition. The said issue *in limine* is premised on the basis that the respondent is a juristic person, but the deponent to the opposing affidavit makes no mention of his authority to oppose the application on behalf of the respondent.

### **Disposal**

[9] The applicant admits that it did not comply with rule 32(9) and (10). The reason provided is that rule 61(1) provides that a party that takes a further step whilst aware of the irregular step or proceeding forfeits the right to make the application. The applicant claims that it is unclear whether adhering to Rule 32(9) and (10) would be considered a further step that would bar it from making the application.

[10] Rule 32(9) provides that a party wishing to bring an interlocutory application 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 interlocutory proceeding be delivered for adjudication by the court. In *Marungu v Maghoma*<sup>1</sup> this court held that compliance with rule 32(9) and (10) is compulsory in respect of all interlocutory applications.

[11] There is no doubt that a rule 61 application is an interlocutory application. Rule 61(2) specifically states that an application for irregular step or proceeding is an interlocutory application. Thus, challenging an irregular step is an interlocutory step and must comply with rule 32(9) and (10).<sup>2</sup>

[12] It has been held that the provisions of rule 32(9) and (10) are peremptory and non-compliance therewith is fatal.<sup>3</sup> The applicant was therefore obliged to comply with the peremptory provisions of rule 32(9) and (10) before launching this application. The purpose for the engagement would have been to attempt to resolve the dispute between the parties so as to obviate the need to deliver the dispute for adjudication by the court.

[13] I find the failure on the part of the applicant to comply with rule 32(9) and (10) to be fatal thereby rendering the application defective. The approach of the court is to strike an interlocutory process initiated without complying with rule 32(9) and (10).<sup>4</sup>

### **Costs**

[14] This application was necessitated by the respondent's non-compliance with this court's order. The respondent has on a number of occasions not complied with the orders issued by this court. This has caused undue delay in the finalisation of the matter. Although

<sup>1</sup> *Marungu v Maghoma* (HC-MD-CIV-ACT-MAT-2018-01927) [2020] NAHCMD 85 (6 March 2020).

<sup>2</sup> See Damaseb PT 2020 *Court-Managed Civil Procedure of the High Court of Namibia*, 1 Ed, Juta, Cape Town at 234; *CV v JV* 2016 (1) NR 214 (HC). There is ample authority wherein parties complied with rule 32(9) and (10) in proceedings for irregular step, see *IBB Military Equipment and Accessory Supplies Close Corporation v Namibia Airports Company* (HC-MD-CIV-ACT-OTH-2017/01488) [2017] NAHCMD 318 (8 November 2017); *Finkenstein Homeowners Association v Nieuwoudt* (HC-MD-CIV-ACT-OTH-2019/04500) [2020] NAHCMD 504 (04 November 2020).

<sup>3</sup> See *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (15 March 2015); *Bank Windhoek Ltd v Benlin Investment CC* 2017 (2) NR 403 (HC).

<sup>4</sup> Damaseb PT 2020 supra at 220. See *Marungu v Maghoma* supra footnote 1.

unsuccessful, I do not find it appropriate to mulct the applicant with costs. I find that it will meet the interests of justice if each party is to pay its own costs.

**Order**

[15] In the result, it is ordered as follows:

1. The application in terms of rule 61 is struck from the roll.
2. Each party to pay its own costs.
3. The parties are directed to file a joint status report detailing the way forward on or before 12 April 2023.
4. The case is postponed to 17 April 2023 at 10h00 for a status hearing.

<b>Judge</b>	<b>Comments:</b>
MUNSU, AJ	NONE
<b>Applicant:</b> Ms W. Horn of W Horn Attorneys Oshakati.	<b>Respondent:</b> Ms K Angula of Angulaco Inc Legal Practitioners Ongwediva