

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON RULE 61 APPLICATION

CASE NO: HC-MD-CIV-ACT-OTH-2017/01488

In the matter between:

IBB MILITARY EQUIPMENT AND ACCESSORY

APPLICANT/DEFENDANT

SUPPLIES CLOSE CORPORATION

And

NAMIBIA AIRPORTS COMPANY

RESPONDENT/PLAINTIFF

Neutral citation: *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)

Coram: MASUKU, J

Heard: 26 September 2017

Delivered: 8 November 2017

Flynote: Civil Procedure – Rules of Court – Rule 61 – irregular step or proceedings – Rule 32 (9) and (10) – the need to attempt to amicably resolve matters before launching interlocutory proceedings – application for condonation for late filing of rule 61 application – whether necessary – Rule 76 – whether instituting action proceedings in matters where the decision of a statutory body rather than a review in terms of Rule 76 amounts to an irregular step or proceeding, within the meaning of Rule 61.

Summary: The applicant, a company registered in Namibia, was awarded a tender for the upgrading of two airports in Namibia by the respondent. The applicant was also granted an exemption by the respondent from complying with its tender and procurements requirements. At the time the tender in issue was awarded, the respondent had a Board of Directors in office, whose term eventually expired. When a new Board came into office, it appears to have been dissatisfied with the award and the exemption referred to earlier. The respondent, acting upon the Board's instructions, instituted proceedings to set aside the said award and exemption and also sought a declarator that there was no binding and enforceable contract between the parties. In doing so, the respondent issued a combined summons, which the applicant argued constituted an irregular step or proceeding and had to be set aside.

Two preliminary issues were also raised, namely the applicant's alleged failure to comply with the provisions of rule 32 (9) and (10) before launching the rule 61 application and that no application for condonation of the late filing of the rule 61 application was made.

Held – that the applicant did attempt to comply with the provisions of rule 32 aforesaid by addressing a letter to the respondent, alerting it to the applicant's intention to launch the rule 61 application. The court found that the applicant had done its part in complying with the said provisions and that the allegation of failure to comply with the said subrules was in the circumstances ill-founded. The respondent's contentions in this regard were not upheld.

Held further – that in relation to the application for condonation, there was no need for the applicant to apply for condonation for the reason that it notified the respondent as soon as it became aware of the alleged irregularity in terms of rule 61.

Held – that an applicant under Rule 61 must within ten days of becoming aware of the irregular step or proceeding, apply for the setting aside of the same.

Held further - that the applicant only became aware of the irregular step after consulting its counsel and that in the circumstances, there was no reason for the applicant to have sought condonation as the notification of the rule 61 application was filed as soon as the irregularity alleged was brought to its attention.

Held – that there is no hard and fast rule that dictates that all proceedings for the review and setting aside of a decision of an administrative body must necessarily be brought on application in terms of rule 76.

Held further – that there may be circumstances in which on account of the nature of the proceedings, particularly the foreseeability of a dispute of fact arising, may point to the advisability of employing action proceedings.

Held – that in the instant case, rule 76 was not suitable for the reason that it was the plaintiff itself and not another party, that sought the setting aside of its decision and that in light of the relief sought, which includes a declarator, action proceedings were appropriate.

Held further – that in employing action proceedings in the instant case, the applicant's procedural rights were not compromised as it could apply for discovery very early in the proceedings and could, in this regard, be unlikely to be affected by non-disclosure as it was the respondent, which has nothing to hide, that seeks the setting aside of the award and exemption in question.

Held – although there may be an element of delay in the issuance of the summons by the respondent, the applicant was not without a remedy as it could file a counter-claim in respect of any losses it allegedly suffered as a result of the delay in launching the proceedings, an avenue that would not have been open to it if Rule 76 had been followed.

The preliminary points raised by the respondent, were thus dismissed by the court. The Rule 61 application moved by the applicant was also dismissed with costs.

ORDER

1. The application in terms of Rule 61 is hereby dismissed.
2. The applicant is to pay the costs of the respondent consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to 1 December 2017 at 10:00, for a further case planning conference, in the light of the ruling.
4. The parties are to file a revised joint case plan not less than three days before the date stipulated in paragraph c) above.

RULING

MASUKU, J:

Introduction

[1] Presently serving before this court, under the judicial scalpel, is one critical question for determination, *viz*, can review proceedings be properly instituted before this court via a combined summons? The related question is, if so, under what circumstances may this be permissible?

[2] This question is raised by the applicant in an application in terms of Rule 61 of the Rules of this court, where the applicant seeks to have the combined summons issued by the respondent set aside on the ground that same constitute an irregular step or proceeding, within the meaning of the said rule.

[3] For purposes of this ruling, I shall refer to the parties as 'the applicant' and 'the respondent', respectively.

Background

[4] This application emanates from action proceedings that were instituted by the respondent in this application, which is the plaintiff in the review action, for the review of its own decision to award a tender to the applicant in these proceedings. The applicant is the defendant in the action proceedings.

Relief sought

[5] In terms of the notice of motion, the applicant, seeks an order:

- a) 'Condoning, to the extent that it may be necessary at all, the non-compliance, if any, of the defendant with the 10 days prescribed by the provisions of Rule 61(1);
- b) Directing that the Combined Summons and particulars of claim of the plaintiff be set aside as an irregular step or proceeding as contemplated by Rule 61(1);
- c) Directing the plaintiff to pay the costs of this application and all other costs incurred by the defendant in defending this matter up to the date of this order; and
- d) Granting defendant such further and or alternative relief as this Honourable Court may deem fit.'

Needless to say, the respondent has opposed the application on grounds that shall be traversed as the ruling unfolds.

The Parties

[6] The applicant, is IBB Military Equipment and Accessory Supplies C C, a Close Corporation incorporated in terms of the Close Corporations Act.¹ Its place of business is situate at Omaruru Street, Erospark, Windhoek.

[7] The respondent is the Namibia Airports Company, a company duly registered and incorporated in terms of the Companies Act,² and the Airports Company Act.³ The plaintiff is a State Owned Enterprise, in terms of the State Owned Enterprises Act.⁴ 2 of 2006. It is common cause that the respondent is an administrative body in terms of the provisions of Article 18 of the Namibian Constitution.

Question for determination

[8] The main question confronting this court is to determine whether or not, the institution of action proceedings, for the review and setting aside of a decision taken by an administrative body constitutes an irregular step or proceeding. It is not a task for this court, at this stage, to make a determination on the merits or demerits of the review itself. The brief factual background given in this ruling is merely aimed at contextualizing the proceedings before this court and towards conducing to an understanding of the issues at stake.

Setting in which the issue for determination arises

[9] It appears to be common cause that on 24 June 2016, the Board of Directors of the respondent, awarded the applicant a tender for the upgrading of the Eros and the Hosea Kutako International Airports. This award, was preceded by a letter of exemption, in terms of which the said Board exempted the applicant from having to comply with the

¹Close Corporations Act No. 26 of 1998.

² Companies Act No. 28 of 2004.

³ Airports Company Act No. 25 of 1998.

⁴ State Owned Enterprises Act No. 2 of 2006.

plaintiff's prescribed and accepted tender procedures. In the intervening period of time, it appears common cause that a new Board of Directors was appointed and the previous one that made the decisions complained of, has since become defunct.

[10] Disgruntled by the award of the tender to the applicant by its previous Board of Directors on its behalf, which to it smacks of impropriety, committed by the previous Board, the respondent caused a combined summons to be issued by the Registrar of this court on 2 May 2017. The respondent seeks the following relief in that suit:

- a) An order setting aside the purported exemption decision; and/or
- b) An order setting aside the purported award letter;
- c) An order declaring that no binding and enforceable agreement had been entered into between the applicant and the respondent for the upgrading of the two Airports.
- d) Costs of suit, including costs of one instructing and two instructed counsel.

[11] The combined summons was issued more or less eleven months after the tender had been awarded to the applicant. On 8 May 2017, the applicant entered an appearance to defend the action. On 22 May 2017, a case planning conference notice was issued by this court, calling upon the parties to attend a case planning conference on 1 June 2017. The notice required the parties to file a joint case plan three days before the scheduled case planning conference hearing date. The parties indeed filed a proposed joint case plan on 31 May 2017. Therein, it was indicated that the applicant would be bringing an application in terms of Rule 61.

[12] On 6 June 2017, and seemingly after the case planning conference hearing, the applicant filed the Rule 61 application, as earlier intimated. The respondent filed its opposition to the said application on 7 June 2017. I now proceed to deal with the main issues that arise for determination *ad seriatim*.

Issues arising

[13] Before dealing with the main issue identified for determination, namely, whether it is proper to seek the review and setting aside of a decision made by an administrative body via a combined summons, there are two issues that were raised by the respondent *in limine* that the court has to first dispose of. They are -

- a) Whether or not an application for condonation for the late filing of the rule 61 application, was required, and if it was, whether same should be granted;
- b) Whether the applicant complied with the provisions of Rule 32(9) and (10) before launching the said rule 61 application. I deal with these preliminary issues hereunder. Provisional application for condonation

[14] It is the applicant's position that its legal practitioner had not considered the propriety of the proceedings brought against it by the respondent, at the time its notice of intention to defend was filed. It was only on 22 May 2017, when the applicant's sole member, Mr. Omar, and the applicant's legal practitioner met counsel that they were advised that the respondent employed the wrong procedure, in bringing the review of administrative action by way of action proceedings.

[15] It was further argued on behalf of the applicant, that at all material times prior to 22 May 2017, the applicant's legal practitioner was of the view, that it had to wait for a case planning conference to be scheduled by the managing judge and only thence could any intended application to strike the respondent's pleadings, be addressed in the case plan.

[16] It was for this reason that it was argued on behalf of the applicant that firstly, because the applicant only became aware of the irregularity of the proceedings on 22

May 2017, it did not have to apply for condonation for filing the Rule 61 application on 6 June 2017, because then it would have complied with the ten days requirement in Rule 61(1). However, if it is accepted that the ten days referred to in Rule 61(1) had commenced running on the date that the notice of intention to defend was filed on 8 May 2017, then the ten days requirement would not have been met and in which case condonation of the 'marginal late filing' of the Rule 61 application is prayed for.

[17] It was further argued on behalf of the applicant that the respondent cannot be said to have been prejudiced by the late filing of the application as the provisions of Rule 23 supersede those in Rule 61(1). In that regard, it was further contended, irrespective of the date upon which a defendant becomes aware of an irregularity in terms of Rule 61, the first intimation of an intention to strike out a summons must be included in the proposed joint case plan. It was further argued that, had the applicant first waited to file the proposed case plan before filing this application whilst having knowledge of the irregularity, same would have constituted a further step and the applicant then would have been barred from filing an application in terms of Rule 61.

[18] Rule 23 provides that:

'As soon as the docket of a case has been allocated to a managing judge he or she must inform the parties of the time and date, being a date not more than 15 days from the date of docket allocation, that a case planning conference will be held for the purpose of considering a case plan and in that behalf direct the parties on Form 4 to submit a case plan for consideration at the case planning conference.'⁵

[19] In that case plan, the parties must indicate *inter alia*;

⁵ Rule 23(1) of the Rules of the Namibian High Court.

‘whether the defendant intends to except to or apply to strike out the plaintiff’s particulars of claim and if so, the basis of the exception or strike out and a proposed date for the hearing of that exception or application to strike out, the dates for filing all necessary papers in respect of the exception or strike out, as well as the dates for filing heads of argument;’⁶

‘Where a party wishes to proceed in terms of either subrule 3(a), (b) or (c), the case planning conference must take place only after judgment on the application has been given by the managing judge on a date determined by him or her. . . .’⁷

[20] Rule 61 (1), on the other hand, provides that:

‘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.’⁸

[21] What is clear, is that both Rules, refer to cases, which have been assigned to a managing judge. In respect of Rule 61 however, it would seem that the application to have set aside an irregular proceeding or step ‘may’ be brought within ten days of becoming aware of the irregularity and the applicant must not have taken a further step after becoming aware of such an irregularity. Furthermore, whereas Rule 61 may apply to both opposed motion proceedings and defended action proceedings, Rule 23 only applies to defended actions. Furthermore, the use of the words ‘the case plan must include these’, indicates that if there is an indication to strike out the plaintiff’s combined summons, then same should be indicated in the case plan.

⁶ Rule 23(3)(b) of the Rules of the Namibian High Court.

⁷ *Ibid* 23 (5).

⁸ *Ibid* Rule 61(1).

[22] I can imagine two scenarios playing out. Firstly, if as the applicant alleges, it was not aware of the irregularity on the date it filed the notice of intention to defend, then it would not have been obliged to file a Rule 61 application at that stage and the ten days in terms of Rule 61(1) would then only have elapsed on 5 June 2017. In that event, there would, in my view, be no need for an application for condonation for failure to comply with the Rule 61(1) ten days requirement. There appears to be no time limit within which a party in the position of the defendant should become aware of the irregularity, failing which a forfeit must be claimed by the other side.

[23] Furthermore, and in the alternative, I agree with the applicant, that as a case planning conference was scheduled, calling upon the parties to file a joint case plan and whereas they had to indicate therein whether, *inter alia* they intended to bring an application to strike the respondent's combined summons, they would in any event not have been out of time, as they would have had to wait for directions from the managing judge as to when the intended application would have to be brought and the timelines for filing the necessary papers in respect of that application.

[24] That being said, in the circumstances of this case, I find that there is nothing submitted by the respondent to gainsay the applicant's version, deposed to on oath, as to when it became aware of the irregularity, namely on 22 May 2017 when counsel was consulted.

[25] In any event, I am of the considered opinion that it would be perverse to hold a party, such as the applicant in this case, to a case that does not, after fully considered advice, accurately represent its position for the reason that it belatedly became aware of its true case on the advice of counsel. The critical time, in terms of rule 61, is when it became aware of the irregularity for the first time, and not when it ought to have become so aware.

[26] Furthermore, I am of the view that the applicant's attention was brought to the alleged irregularity at a time when not much water had passed under the bridge to found a proper argument that the irregularity was raised too late in the day and would call for the undoing of certain steps by the respondent. It is for that reason, that I find that there was no need for the applicant to file an application for condonation in the peculiar circumstances of this case. The respondent's contention in this regard, is for that reason, to be dismissed, as I hereby do.

Alleged non-compliance with rule 32 (9) and (10)

[27] Regarding compliance with rule 32 (9) and (10), it was argued, on behalf of the applicant that it had, by letter dated 24 May 2017, informed the respondent that the procedure employed by it was irregular and that the applicant would consider bringing a rule 61 application, to have the combined summons set aside. The applicant, in an attempt to obviate the need to bring this application intimated, requested the respondent to withdraw its combined summons. By e-mail, dated 29 May 2017, the respondent replied but did not, as would have been expected, address the issue of whether it would withdraw its combined summons advised. All it did, was to inform the applicant that amend its particulars of claim. In that light, the applicant then filed a report in terms of rule 32 (10), wherein it explained its attempt to comply with the relevant rule but for the respondent's non co-operation.

[28] It was further argued on behalf of the respondent that the applicant failed to comply with rule 32 (9) and (10) and that the entire application should be 'dismissed on this ground alone'.

[29] I do not agree with the respondent in its argument. It is clear from the report file by the applicant that the applicant wrote letters to the respondent informing the respondent that it wished to institute a Rule 61 application, in terms of which it would seek an order

for the respondent's combined summons to be struck and that the respondents should withdraw their action to obviate the need for such an application. The respondent did not respond to this particular aspect and in a letter dated 29 May 2017, merely indicated that they would apply for an amendment of the particulars of claim, as the numbering of the same was not in order.

[30] The respondent did not deal directly with this issue, nor did it seek to engage the applicant on this matter. It is clear that the applicant reached out to the respondent in an attempt to engage the respondent in discussions regarding ways to amicably resolve the matter so as to avoid having to lodge the Rule 61 application but the respondent refused to play ball, as it were. In the circumstances, I find it challenging to fathom how, the applicant could have taken this matter any further, as it was clear that the respondent intentionally refused to go down that route without saying so in so many words.

[31] In this regard, I form the view that the issue that the applicant intimated it wished to raise in the rule 61 application was a fundamental issue and did not amount to it attempting to play a game of marbles with the respondent, just to waste the court's time and that of its opponent with meritless and fruitless endeavours.

[32] Finally, I must comment on the respondent's prayer that the application should be dismissed for failure to comply with rule 32 (9) and (10) aforesaid. In *Mukata v Appolos*,⁹ this court indicated, per Parker A.J., and correctly so, in my view, that failure to comply with the aforesaid subrules results in the matter being struck from the roll. To dismiss the application altogether, would be very harsh in the extreme, without having dealt with the issues arising on the merits, particularly without having afforded the erring party an opportunity to show cause why such a drastic step should not be taken.

⁹ *Mukata v Appolos* I 3396/2014 [2015] NAHCMD 54 (12 March 2015).

[33] It is for the foregoing reasons that I find that the applicant has complied with Rule 32 (9) and (10). The respondent's entreaties regarding the upholding of this point must therefore fall to the ground. I accordingly find that this matter is properly before court for adjudication on the merits.

[34] Having dismissed the respondent's preliminary points of law that clears the way for the court to now deal with the main question for determination, as stated earlier in the judgment. I proceed straightway to deal with that momentous issue.

Whether the review proceedings should have been instituted by way of an application in terms of Rule 76 or by way of action?

On Behalf of The Applicant

[35] It was argued on behalf of the applicant that, by instituting the review proceedings by summons, the respondents are depriving the applicant an opportunity to have sight of the record of proceedings at an early stage of the proceedings. The court, asked whether the procedure for discovery would not alleviate the issue of not getting the record in terms of Rule 76. It was argued on behalf of the applicant that, the Rule 76 allows the applicant to have sight of the record of proceedings before it sets out its defence.

[36] In action proceedings, it was argued, discovery is only made after the close of pleadings. This would then, unnecessarily burden the applicant with the need to amend its pleadings and witness statements, if the record of proceedings were only to be made available to it at such an advanced stage. It was further argued that such a situation would then necessitate an amendment of the pre-trial order as well. This was argued, would go against the very grain of these new rules of court, particularly the overriding objectives of judicial case management to be found in rule 1 (3).

[37] Secondly, it was also argued that the delay of eleven months to institute these proceedings, has resulted in the applicant incurring substantial expenses, that is more or less N\$ 5 million - in their attempts to provide services as per the tender they were awarded. Mr. Barnard for the applicant, argued that if, as the respondents hold, that a party has an option to institute review proceedings in respect of decisions taken by administrative bodies and or officials, either by way of action or application, then there was no point in the drafters of the rules of court, crafting a rule specifically dealing with specific kinds of applications.

[38] In reply to the respondent's argument, Mr. Barnard's first point of objection and rightfully so, was the reference in the respondent's heads of argument to a 'recent Supreme Court' judgment, in *Hangula v Motor Vehicle Accident Fund*¹⁰ which restated the law, but there is no authority cited. Mr. Barnard, handed up the judgment referred to in the respondent's heads and submitted that firstly, the judgment is not one of the Supreme Court but of this court. Secondly, it is a judgment delivered in 2009 and is not as recent as the respondent made it out to be in its heads of argument. Thirdly, Mr. Barnard argued that the said judgment does not even deal with review applications. He was correct on all accounts.

[39] Regarding the issue of prejudice it was argued that the respondent instituted the review proceedings by way of action, so as to avoid the need to file an application for condonation explaining why, review proceedings were only instituted after eleven months and not sooner. In conclusion, it was argued that invariably in almost every review application there are disputed facts. If same cannot be resolved on paper, it is referred to oral evidence.

¹⁰*Hangula v Motor Vehicle Accident Fund* I 704/2009 [2012] NAHCMD 108 (18 April 2012).

On Behalf of the Respondent

[40] Mr. Heathcote correctly argued that, before the summons could be set aside for irregularity, such irregularity would have to be proven. He further argued that proving an irregularity alone was not sufficient to warrant striking the respondent's combined summons, but that the applicant needed prove the prejudice it would suffer due to the irregular step or proceeding alleged. It was his further contention that, firstly, if one has a claim, one does not sue the Board, but the company. Secondly, if one cannot sue the existing Board, one certainly cannot sue a defunct Board. Thirdly, he further contended, a company cannot sue itself. Lastly, he submitted, the provisions of rule 76 are there to be used by private persons against whom the administrative body or official has taken an adverse decision and which they wish to have the said decision set aside.

[41] According, to Mr. Heathcote, the applicant wishes to protect the decision that was taken in its favour and thus cannot rely on rule 76, which is intended for applications to set aside an adverse decision of an administrative body or official. He also argued that where there are delays in instituting review proceedings, the consequence is that the review would not succeed. He further submitted that in the first letter, addressed to the respondent by the applicant, the applicant did not mention the issue of delay, which it now makes a meal of in the application.

[42] Regarding the *Hangula* judgment, cited in the respondent's heads of argument, and referred to in paragraph [38] above, Mr. Heathcote maintained that those are the trite principles and conceded, however, that there are no hard and fast rules. He argued that rule 76 does not apply to an administrative body that wants its own decision set aside. In terms of rule 76(2), he submitted, the decision-maker is called upon to show cause why its decision should not be reviewed and set aside. The rest of the provisions of rule 76, it was argued, have the same consequence.

[43] A further argument advanced on behalf of the respondent was that the former rule 53, the equivalent of the current Rule 76, did not take away a party's common law rights of review. In this regard, it was pointed out that in the present matter whilst the applicant wishes to have the agreement entered into between itself and the respondent upheld, the

respondent is desirous of the exact opposite. This, it was submitted, would create a clear dispute of fact and as such, it is argued that in such action proceedings are required. In conclusion, it was argued that the action that was instituted was not limited to reviewing the decision of an administrative body or official, but also sought an order setting aside the agreement between the parties for non-compliance with the *essentialia* of a valid contract.

Applicable law and Analysis of facts

[44] Rule 76 provides that;

‘(1) All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official are, unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.

(2) An application referred to in subrule (1) must call on the person referred to in that subrule to - (a) show cause why such decision or proceedings should not be reviewed and corrected or set aside; and (b) within 15 days after receipt of the application, serve on the applicant a copy of the complete record and file with the registrar the original record of such proceedings sought to be corrected or set aside together with reasons for the decision and to notify the applicant that he or she has done so.

(3) The application must set out the decision or proceedings sought to be reviewed and must be supported by affidavit setting out the grounds and the facts and circumstances on which the applicant relies to have the decision or proceedings set aside or corrected.

(4) The applicant must verify the correctness of the copy so served on him or her, by comparing it with the original filed with the registrar and the applicant must – (a) cause copies of such portions of the record as may be necessary for the purposes of the review to be made; and (b) furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies.

(5) The cost of transcription of the record or portion of it, if any, is borne by the applicant and such costs are costs in the cause.

(6) If the applicant believes there are other documents in possession of the respondent, which are relevant to the decision or proceedings sought to be reviewed, he or she must, within 14 days from receiving copies of the record, give notice to the respondent that such further reasonably identified documents must be discovered within five days after the date that notice is delivered to the other party.

(7) The party receiving a notice in terms of subrule (6) must make copies of such additional documents available to the applicant for inspection and copying and the respondent must supplement the record filed with the registrar within three days after the applicant is given access to the additional documents.

(8) If a dispute arises as to whether any further documents should be discovered the parties may approach the managing judge in chambers who must give directions for the dispute to be resolved.

(9) The applicant may, within 10 days after the record has been served on him or her or within 10 days after the processes contemplated in subrules (6), (7) and (8) have been completed, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her application and supplement the supporting affidavit.

(10) The registrar must assign a managing judge in respect of an application filed in terms of this rule, and rule 66(4) does not apply in respect of such application.' (Emphasis added).

[45] In an attempt to find an answer for the question above, I read *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Institutions Supervisory Authority and Registrar of Stock Exchanges*¹¹. In this case, Parker, AJ distinguished between Rule 65 applications and Rule 76 review applications. He held that, whenever

¹¹ *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Institutions Supervisory Authority and Registrar of Stock Exchanges* (HC-MD-CIV-MOT-GEN-2016/00233) [2016] NAHCMD 365 (17 November 2016).

application proceedings for the review of a decision of an administrative body or official are instituted, they must always be on application in terms of rule 76. He was of the view that the fact that the drafters of the Rules created separate Rules for different types of applications, insinuated that they intended those particular Rules to be applied in respect of those particular applications and that Rule 65 was there to cater for any other application not encompassed in the specific application Rules. He referred to Rule 78, dealing with election applications and rule 79 relating to POCA applications to explain his conclusion. To this extent, this judgment seems to favour the position of the applicant.

[46] Mr. Barnard, for his part, helpfully referred the court to *SAFA v Stanton Woodrush (Pty) Ltd & Sons*.¹² In dealing with the issue for decision in this case, and in effect overruling previous cases to the contrary,¹³ Harms JA stated the following at paragraph [5] of the judgment:

‘Since the present proceedings are primarily review proceedings, SAFA should have utilised the provisions of Uniform Rule 53. SAFA chose not to do so. A failure to follow Rule 53 in reviewing a decision of an administrative organ is not necessarily irregular because the Rule exists principally in the interests of an applicant, and an applicant can waive procedural rights. An applicant is not, however, entitled, by electing to disregard the provisions of the Rule, to impinge upon the procedural rights of a respondent. If, as is the usual case, the proceedings are between the applicant and the organ of State involved, the latter can always, in answer to an ordinary application, supply the record of the proceedings and the reasons for its decisions. On the other hand, as in this instance, if the rights of another member of the public are involved, and the organ of State, hiding behind a parapet of silence, adopts a supine attitude towards the matter since the order sought will not affect it, (no costs were sought against the Registrar if the latter were to remain inactive), the position is materially different.’ See also *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd*.¹⁴

[47] Mr. Barnard argued strenuously and with all the powers of persuasion at his command, that in the instant case, the procedure adopted by the respondent would result

¹²*SAFA v Stanton Woodrush (Pty) Ltd & Sons* 2003 (3) SA 313 (SCA).

¹³ *South African Pharmacy Board v Norwitz* 1971 (1) SA 633; *Deputy Minister of Tribal Authorities v Kekana* 1978 (3) SA 1001.

¹⁴*Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (CPD).

in the compromise and negation of the applicant's procedural rights, which it stands to enjoy if the proceedings are brought in terms of rule 76. In this regard, he mentioned that one such right that readily comes to mind is the one relating to discovery, which would only be possible in action proceedings, after the close of pleadings, yet under rule 76, discovery of the record and all material documents is made right at the beginning. He argued, in this regard, that the discovery could then affect the pleadings as new material yielded by the late discovery, may only become available to the applicant well after the close of pleadings, necessitating an amendment of pleadings at a later stage, thus resulting in the unnecessary waste of time and costs. Are his contentions sustainable and correct?

[48] Whilst Mr. Barnard's submissions seem compelling at first blush, a reading of rule 19, which deals with the obligation of parties and legal practitioners in relation to judicial case management, states the following at (j):

' . . . to disclose critical documents to each other at the earliest reasonable time after the person becomes aware of the existence of the document;'

Mr. Heathcote, in relation to this particular argument, referred the court to the provisions of rule 18 (2) (n), which have the following rendering:

'In giving effect to the overriding objectives the court may, except where the rules expressly provide otherwise –

(n) give directions for the production or discovery of documents at a more convenient, practical and earlier time;''

[49] In view of the foregoing, I am of the considered view that even if the matter were to proceed as an action, it is clear that the applicant's fears of its procedural rights being affected negatively, can be catered for in terms of the present rules. In this regard, and appreciating the urgency that attaches to the matter, as articulated by the applicant, I am of the considered view that the court can make orders that will safe guard the applicant's fears. I am accordingly of the considered view that the applicant's procedural rights, which form a critical determinant of whether action proceedings can be instituted instead of rule

76, are well catered for and there would be no serious and irreparable harm inflicted on the applicant in this case.

[50] I find it fitting to mention that whereas the applicant may have misgivings about the procedure adopted by the respondent in this matter, one fact that cannot be wished away is that the instant case is not the run of the mill case where a third party seeks to set aside the decision of a statutory board or an administrative body. In the instant case, it is the latter body that actually seeks to have the decision made by its previous Board set aside. Rule 76, it would appear, caters for a situation where it is a body in the respondent's position that seeks the order reviewing and setting aside the decision.

[51] The portions of the relevant rule that I underlined above are the ones that point to the fact that the rule primarily applies to serve the interests of parties other than a party in the respondent's position, hence the administrative body is called upon to deliver the record and do certain acts by specified time periods. These can hardly be said to apply in the instant case as is evident from the facts.

[52] In this regard, I must mention that because the situation in this case is rather peculiar, the fears expressed in the *SAFA* case are of no application in this case as the present respondent cannot, on the facts seek to hide behind any parapet of silence as it is the one crying foul. In point of fact, the respondent can be aptly described as a party that is far from silent but actually on the mountain tops carrying a trumpet and blowing it for the attention of whoever may hear about its vociferous protestations at the award of the tender and the exemption granted to the applicant.

[53] A corollary of this argument is that being the aggrieved party, it would not be like the party described in *SAFA*, which has nothing to lose. On the facts, and if proved during the trial, the respondent would be the greatest loser if the tender it claims is tainted were to be upheld. In this regard, the respondent is the one, which stands to benefit from an early, full and frank disclosure of the relevant documents relating to the tender.

[54] Mr. Barnard, not to be undone, had another missile in his arsenal. He argued that the procedure adopted by the applicant, comes too late in the day and that his client's complaint is that because of the delay in initiating these proceedings, it has invested huge amounts in compliance with the tender it was awarded. It accordingly contends that bringing the action at this juncture, particularly in the absence of a full explanation of the delay is prejudicial to its interests in a manner that cannot be cured.

[55] Weighty as this argument may seem to be, I am of the view that the considered opinion that the applicant is afforded remedy to pursue in the action proceedings, which may not have been open to it had the provisions of rule 76 been followed. This is that for any loss that it may claim to have suffered, it is perfectly placed in this action, to file a counterclaim against the respondent. On the other hand, if the provisions of rule 76 had been followed, the type of remedies available to the applicant would have been significantly reduced. This action is an advantage rather than a disadvantage to the applicant. If it were otherwise, the applicant would have had to issue separate action proceedings to secure its rights at a greater expense than the present setting, which suits the applicant's rights in the larger scheme of things.

[56] Another important issue, which in my view merits bringing action proceedings in this matter and which must not be allowed to sink into oblivion, is that the relief sought by the respondent goes far and beyond the limits of relief that could be obtained in terms of the strict confines of rule 76. As can be seen from the particulars of claim, the respondent, seeks *inter alia*, a declarator that no binding and enforceable contract was entered into by the parties.

[57] I am accordingly of the considered opinion that this is a matter that cannot be fully and properly canvassed and decided within the confines of the rule 76 setting, where affidavits constitute both the evidence and the pleadings. In this regard, it is clear that *viva voce* evidence will have to be adduced to support such a prayer. This matter accordingly commends itself as one in which action proceedings are eminently suitable, regard had to all the issues that arise. I cannot, in the circumstance, fault the respondent for choosing this vehicle as one that is more suitable to deliver the type of justice required in this case, having regard to the relevant issues.

[58] Mr. Barnard also took issue with the fact that the defunct Board and to which the untoward conduct has been imputed by the respondent, has not been cited in these proceedings to proffer explanations for its conduct. The players clad in combat gear are only the applicant and the respondent. That may well be correct. I am of the considered view that if the applicant's point has merit, and I cannot make a decision on that issue, it has every right to raise an issue of non-joinder. This issue cannot be a proper basis for denying the respondent the use of action proceedings in this matter, given the factual matrix of the matter.

[59] I am not one to engage in soothsaying escapades in this matter or other matters. It seems obvious, however, that the members of the previous Board may have to be called upon in court to explain their decision to grant an exemption to the applicant and to also award the tender in issue. From a bird's eye view, considering that the former Board's decision was in the applicant's favour, the applicant may well find it proper to call them as its witnesses, if so advised and it is only in action proceedings where *viva vice* evidence will be adduced that full justice may be done to the matter, without any inhibitions and boundaries inherent in application proceedings.

[60] Having said all the above in favour of the proceedings chosen by the respondent in this matter, there is a local decision by Mr. Justice Levy that Mr. Heathcote referred to. This is the case of *Federal Convention of Namibia v Speaker of the National Assembly and Others*¹⁵ where the learned Judge made the following lapidary remarks, albeit in relation to the old Rule 53:

'I do not think that Rule 53 was intended to limit in any way the common-law right of a litigant.

Inasmuch as the Rules of Court are there for the benefit of litigating parties, for the benefit of the justice, there may well be instances when the Court considers that review proceedings should not be brought by way of notice of motion, but by way of summons. For instance, a person cannot be compelled to make an affidavit but he can be subpoenaed to come to court to give evidence in a trial. In such circumstances, where the evidence of such person is essential, the review

¹⁵ *Federal Convention of Namibia v Speaker of the National Assembly and Others* 1991 NR 69 (HC).

proceedings should proceed by way of summons. Furthermore, if a substantial and material dispute of fact is inevitable, there is no point in instituting proceedings by way of motion and then having to be referred to trial.’

[61] I am of the view that this judgment puts paid any argument that may have been made regarding the irrevocable marriage, as it were, to rule 76, in regard to all matters of review. I must mention that this judgment does not part ways with the *SAFA* judgment to which Mr. Barnard referred. The circumstances of this case, in my view, cry out for the issuance of a summons in this matter, regard had to the issues at stake. It must also not be forgotten that the law, is that a party which initiates proceedings on motion whilst aware that a dispute of fact is likely to arise, courts disaster, as the court has the discretion in that event, to dismiss the application altogether.¹⁶

Conclusion

[62] Having regard to all the foregoing, I am of the view that spirited, as Mr. Barnard’s able argument was, the law on this issue and on the facts is not on his side. Whereas I have found that there was something to be said in his client’s favour in relation to the preliminary issues raised by the respondent in this matter, I am however of the considered view that his argument on the nature of proceedings adopted by the respondent in this case cannot be upheld.

Order

[63] In the premises, I make the following order:

¹⁶ Rule 67 (1).

- a) The applicant's application in terms of the provisions of rule 61 is hereby dismissed.
- b) The applicant is to pay the costs of the application consequent upon the employment of one instructing and one instructed counsel.
- c) The matter is postponed to 1 December 2017 for a further case planning conference in the light of the ruling above.
- d) The parties are to file a revised joint case plan not less than three days before the date to which the matter is postponed in paragraph 3 above.

T. S. Masuku
Judge

APPEARANCES:

APPLICANT:

T Barnard

Instructed by Weder Hoveka & Kauta, Windhoek

RESPONDENT:

R Heathcote SC

Instructed by Kangueehi & Kavendjii Inc., Windhoek