REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1069/2015

In the matter between:

1.1.1.1.	**LENA OWOSES-LOUW**
	1st PLAINTIFF
CORNELIUS EKANDJO	**2nd PLAINTIFF**
VERONIKA EKANDJO	**3rd PLAINTIFF**
SHAUN FREDERICKS	**4th PLAINTIFF**
ANTONIO RICARDO CLOETE	**5th PLAINTIFF**
THEODOSA KAAPULO MONICA NGHISHEKWA	**6th PLAINTIFF**
USIEL MBINGE	**7th PLAINTIFF**
NDAMUNOGENKA KAALI	**8th PLAINTIFF**
And	
KHOMS REGIONAL COUNCIL	**DEFENDANT**

Neutral citation: *Louw v Khomas Regional Council (A 164-2015) [2015]* NACHMD 187 (10 August 2015)

Coram: Schimming-Chase AJ

Heard: 3 August 2015

Delivered: 10 August 2015

Flynote: Practice – Irregular Proceedings – Setting aside in terms of rule 61 – Taking a further step –Rule 61(1) providing that application for setting aside may be made only if the applicant applies to the managing judge to set it aside within 10 days after becoming aware of the irregularity, provided that if that party has taken any further step in the cause of the matter with knowledge of the irregularity, he or she is not entitled to make such an application.

Irregular proceedings – Object – Procedure catered for by rule 61 is appropriate for irregularities of form rather than substance. A plea of lack of jurisdiction, *locus standi* or prescription should be dealt with via delivery of special plea and not in terms of rule 61.

Summary: Plaintiffs instituted an action for damages in high court based on unjust enrichment, and for payment of compensation for work done whilst they were in the employment of the defendant in acting capacities. The plaintiffs' claim essentially relates to work performed by them, and the discharge of additional duties falling outside the scope and sphere of their normal employment which they were not paid for. Defendant applied to set aside summons as an irregular proceeding on the ground that the high court does not have jurisdiction to hear the matter, which was a labour matter disguised as a damages claim. The purpose of the rule 61 procedure is to enable a party to a cause to apply to set aside a step or proceeding taken by the other party as an irregular step or proceeding, if that step is also prejudicial to the party. It also affords a party an opportunity to compel its opponent to comply with the rules of court on pain of having the said irregular step set aside. It is a procedure catering for irregularities of form rather than substance. It is well established by now that where a party raises the jurisdiction of the court, the appropriate course to adopt is to deliver a special plea.

ORDER

1. The application in terms of rule 61 is dismissed with costs.

2. The matter is postponed to 7 September 2015 for a case planning conference.

RULING

SCHIMMING-CHASE, AJ

(b) The defendant in this matter applies to set aside the plaintiffs' combined summons as an irregular step (in terms of rule 61), on the grounds that the plaintiffs' cause of action constitutes a labour dispute that this court has no jurisdiction to hear.

(c) The plaintiffs oppose the application.

(d) Mr Murorua, appearing on behalf of the plaintiffs, raised three points *in limine* in an opposing affidavit deposed to by him. The first point is that the defendant is barred from proceeding with the application in terms of rule 61 because it was late in lodging it. The second point is that the defendant took a further step with knowledge of the irregularity by participating, not only in the compilation of the case plan in terms of rule 23(3), but also in obtaining a subsequent case planning order. The third point is that the grounds of objection contained in the rule 61 (1) notice are substantive and relate in essence to the question of the jurisdiction of this court to hear the matter, accordingly, the defendant should have filed a special plea as opposed to proceeding in terms of

rule 61.

(e) The defendant also filed a notice to strike certain averments in Mr Murorua's opposing affidavit on the grounds that the allegations are scandalous or vexatious due to reference being made in the affidavit to privileged communications between the defendant and its legal representative. In view of the order I make, I propose not to deal with the Notice to Strike, but I have not in any way considered the averments sought to be struck, as they are entirely irrelevant to the matter before me.

(f) Rule 61 is similar to the since repealed rule 30, which dealt with irregular proceedings. As a result the principles dealing with what must be contained in a rule 30 notice, as well as the relevant requirements necessary for a successful application to set aside an irregular proceeding, are apposite.

(g) First, an application under this rule need not be supported by an affidavit. All that is required is that the notice must specify the particulars of the irregularity or impropriety complained of. It is analogous to an exception and does not provide for any form of reply. Exceptions can be made in proper instances, if justified, with the sanction of the court.[1]

(h) The defendant attached 8 separate annexures to its notice in terms of rule 61 relating to earlier proceedings between the same parties at the office of the Labour Commissioner, as well as proceedings between the same parties before the Labour Court. I hold the view that the defendant's notice in terms of rule 61 certainly did not require to be supported by annexures. The opposing affidavit was similarly unnecessary for purposes of adjudication of the application to set aside the summons.

(i) I propose to dispose of the first two points *in limine* taken by Mr Murorua. The defendant's counter argument to these points, advanced by Mr Ndlovu appearing on its behalf, is that the notice in terms of rule 61 was filed on time in accordance with the court's rules, and that the only steps taken by the

[1]Chelsea Estates and Contractors CC v Speed-O-Rama 1993(1) SA 198 (E) at 202E-F; Scott and Another v Ninza 1999(4) SA 820 (E) at 823C-D.

defendant in the matter, once becoming aware of the irregularity complained of, were to "prosecute", as it were, its notice in terms of rule 61(1).

(j) On the papers, the defendant was served with the summons on 9 April 2015. The notice to defend was delivered on 22 April 2015. The case management process was initiated by the issue of a notice in terms of rule 23(1) addressed to the parties calling upon them to appear for a case planning conference on 22 June 2015, and to submit a case plan in terms of that rule. The defendant's intention to apply to set aside the plaintiffs' summons was made clear in the parties' joint case plan, and the notice in terms of rule 61 was duly delivered in terms of the case management order of this court dated 22 June 2015. The parties also complied with the necessary procedures for the hearing of interlocutory matters, in line with the provisions of rules 32(9) and (10).

(k) "Taking a further step" in a cause was authoritatively described as an act which advances the proceedings one step nearer to completion. Thus, once a further step is taken, the sub-rule precludes that party from then seeking to apply to set aside an earlier irregular step.[2] However, a notice of intention to defend, for example, is not considered as taking a further step in the sense mentioned, because it is an act done with the object of qualifying the defendant to put forward his/her defence.[3]

(l) In this matter, all actions taken on behalf of the defendant have been done in furtherance of the objective of putting forward its defence, namely, and at this stage, applying to set the summons aside. Participating in a case management process, which is judicially controlled, to facilitate the rule 61 procedure, cannot be seen or considered, on any interpretation, to be taking a further step in the process to advance the proceedings one step nearer to completion in the context of the authorities referred to above dealing with the meaning of taking a further step. The only steps that the defendant effectively

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[2] Jowell v Bramwell-Jones and Others 1998(1) SA 836 (W) at 904B-E.

[3] HJ Erasmus – Superior Court Practice (formerly Nathan, Barnett & Brink) 1994, Juta & Co Ltd at B1-192 and the authorities collected there.

took were to apply to set the summons aside in terms of rule 61. I am accordingly not persuaded by the argument that the defendant took a further step in the cause, and the first point *in limine* fails.

(m) As regards the second point *in limine*, namely that the notice was filed out of time, the rule 32(10) correspondence makes it clear that the defendant became aware on 16 June 2015 of the alleged irregular step. This fact is not disputed. Furthermore, the notice in terms of rule 61 was delivered in accordance with the case management order dated 22 June 2015. Thus the defendant was in full compliance with the necessary time limits for delivery of its notice in terms of rule 61. Accordingly, the second point *in limine* similarly fails.

(n) I now turn to the third point *in limine*, namely that the grounds of objection contained in the rule 61 notice relate to the question of the jurisdiction of this court, and accordingly the application to set aside in terms of rule 61(1) was procedurally incorrect. Mr Murorua argued that the grounds advanced by the defendant in support of the contention that the summons is irregular are substantial and not procedural in nature, because the gravamen of the complaint is that this court does not have jurisdiction to hear the action. Accordingly, it was submitted that the rule 61 application should be dismissed with costs on this ground alone.

(o) Mr Ndlovu submitted that the rule 61 application is indeed proper. As I understand Mr Ndlovu's submission, the plaintiffs' claim is not what it purports to be. The plaintiffs are in effect bringing a labour dispute under the guise of a damages claim in the high court. He further submitted that the plaintiffs were required to refer the dispute to the Labour Commissioner in terms of section 7(1)(a) of the Labour Act, No 11 of 2007, and to follow the process and procedures contained in that Act. Thus, according to Mr Ndlovu, the plaintiffs' summons was "wrong in form and wrong in forum", and even if there was some overlap with the question of jurisdiction, the proceedings in terms of rule 61 was the correct route to follow. Mr Ndlovu also argued that the defendant would be prejudiced in having to plead on the merits and continue with the trial procedure and judicial case management, when the irregularity complained of could be

dealt with earlier following the rule 61 procedure.

(p) The purpose of the rule 61 procedure is to enable a party to a cause, to apply to set aside a step or proceeding taken by the other party as an irregular step or proceeding, if it is also prejudicial to that party. The procedure affords a party an opportunity to compel its opponent to comply with the rules of court on pain of having the said irregular step set aside.[4]

(q) The learned authors Herbstein and Van Winsen[5] opined with regard to irregular proceedings, that it is not clear to what extent an application to set aside an irregular proceeding can be used as an alternative to the exception procedure, an application to strike out or the filing of a special plea. On the one hand, it has been held that any irregular proceeding may be attacked under the rule and the fact that there is a defect going to the root of the matter in issue, does not mean that the court is precluded from dealing with the matter under the rule.[6] On the other hand it has been suggested that the procedure is appropriate only for irregularities of form rather than matters of substance.[7] It has also been held that the rule 30 procedure is inappropriate for raising an issue such as lack of *locus standi in judicio*.[8]

(r)

(s) In Deputy Minister of Tribal Authorities v Kekana at 495H-496B, it was held obiter that a defect going to the root of a claim may be attacked under the rule. In the Kekana case, an application was made to set aside a summons because the claim should have been in the form of a review application in terms of rule 53. Despite the obiter remark, the attack in that case was on the form and not the root of the plaintiff's cause, namely that plaintiff should have proceeded via motion and not action.

(t) As I understand the authorities, the irregularity complained of must be a step which at one stage or another affects the development of the suit as a

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[4]Visagie v Visagie, unreported, (I1956-2014) [2015] NAHCMD (26 May 2015) par 17, 19-21

[5]The Civil Practice of the High Courts of South Africa 5th ed Vol 1 at 740

[6]Deputy Minister of Tribal Authorities v Kekana 1983(3) SA 492 (B)

[7]Singh v Morkel 1947(3) SA 400 (C) at 406; Odendal v De Jager 1961(4) SA 307 (O) at 310F-G.

[8]De Polo v Dreyer 1989(4) SA 1059 (W)

whole. I respectfully agree with the learned authors referred to above, that the procedure in rule 61 is essentially designed to be a streamlined one in which another party is alerted to his or her failure to comply with certain forms and/or procedures as soon as possible (before the case moves on, or before further steps are taken in the matter), in order to enable the other party to correct that procedural defect so that the particular irregularity is not set aside. I do not think that the rule is to be used to deal with matters of substance such as the jurisdiction of the court. In fact, the usual method of raising a defence of absence of jurisdiction is by way of special plea. The reason why such a defence is normally raised by way of special plea, is that the lack of jurisdiction is not often apparent from the allegations in the pleadings objected to.[9]

(u) The rule 61 procedure has found application where, for example

(a) a proper power of attorney had not been filed;

(b) proper service of a summons had not been effected;

(c) an address for service of documents was not set out in the summons;

(d) pleadings were not signed in accordance with the rules or did not comply with the rules as to form;

(e) particulars of claim in an action for damages failed to comply with the provisions of rule 18(10);

(f) notice of intention to defend was irregular or delivered out of time;

[9] Viljoen v Federated Trust Ltd 1971(1) SA 750 (O) at 760A.

(g) application was brought on the grounds of urgency but no reasons of urgency were set out in the supporting affidavits;

(h) there had been premature set down;

(i) review proceedings were brought by way of action and not in terms of rule 53;

(j) an irregular notice of bar had been served in provisional sentence proceedings.[10]

(v) It is clear that the main and only thrust of the defendant's complaint is that this court does not have jurisdiction to hear this action, which Mr Ndlovu submits is a labour complaint disguised as a damages claim. In fact, in its rule 61 notice the defendant seeks *inter alia,* a declaration that the plaintiffs' cause of action constitutes a labour dispute and that the high court has no jurisdiction to hear it.

(w) To my mind, the jurisdiction point raised, is a defence that goes to the root of the claim. The question of jurisdiction can accordingly not be determined as a matter of procedure in this matter, but as a matter of substantive law, bearing in mind that this court would in any event have jurisdiction to hear a damages claim for breach of contract of employment.[11]

(x) The annexures attached to the rule 61(1) notice make it apparent that the lack of jurisdiction is not apparent from the pleadings only. I accordingly find Mr Ndlovu's argument that the rule 61 proceedings were the appropriate procedure to raise the jurisdiction of this court to be unpersuasive. The argument that the plaintiffs' were incorrect in choice of form and forum is equally unpersuasive.

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[10]HJ Erasmus *supra* para B-190 and the authorities there

[11]Nghikofa v Classic Engines CC 2014(2) NR 314 (SC) par 18 where O'Regan AJA held that there is nothing in the Act that expressly purports to exclude the jurisdiction of the High Court in relation to damages claims arising from contracts of employment.

The plaintiffs claim damages as a result of unjust enrichment. Such a claim may be instituted in this court in terms of *inter alia,* rule 7. Mr Ndlovu was also unable to provide any authority that lack of jurisdiction could be taken in terms of rule 61.

(y) In the result I find the arguments of Mr Murorua to be persuasive and the rule 61 application accordingly falls to be dismissed with costs. In light of the foregoing, I make the following order:

1. The application in terms of rule 61 is dismissed with costs.

2. The matter is postponed to 7 September 2015 for a case planning conference.

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SCHIMMING-CHASE

Acting Judge

APPEARANCES

FOR THE PLAINTIFFS	Mr L Murorua Instructed by Murorua & Associates
FOR THE DEFENDANT	Mr M Ndlovu Instructed by Government Attorney