

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

Practice Direction 61

<p><b>Case Title:</b></p> <p>HOCHLAND PARK PHARMACY CLOSE CORPORATION CC/2005/0079 1<sup>st</sup> APPLICANT</p> <p>GRAHAM TOWN FOURTEEN CLOSE CORPORATION CC/2013/11743 2<sup>nd</sup> APPLICANT</p> <p>LIPOLELA BENEDICTA QHOLA ID.NO PASSPORT NO. RC 008100 3<sup>rd</sup> APPLICANT</p> <p>TOITOI WILLIAM KAGISO MOLOI ID NO. 71040110247 4<sup>th</sup> APPLICANT</p> <p>WINNIFRIDA BAWINILE MOLOI 5<sup>th</sup> APPLICANT</p> <p>and</p> <p>SME AND MEDIUM ENTERPRISES LIMITED NO. 2011/0174 RESPONDENT</p>	<p><b>Case No:</b></p> <p>HC-MD-CIV-MOT-REV-2021/00214</p> <p><b>Division of Court:</b></p> <p>High Court, Main Division</p>
<p><b>Case Title:</b></p> <p>MOLOI TRADING ENTERPRISES REG: CC/2014/1109 1<sup>st</sup> APPLICANT</p>	<p><b>Case No:</b></p> <p>HC-MD-CIV-MOT-REV-2021/00241</p> <p><b>Division of Court:</b></p>



**REASONS FOR ORDERS:**Introduction

[1] The applications by the respondent in terms of rule 61 stem from applications that were brought by the applicants, seeking orders from the High Court to review, rescind or set aside the judgment in case no. HC-MD-CIV-ACT-CON-2018/02168 granted on 03 December 2019 and the judgment in case no. HC-MD-CIV-ACT-CON-2020/03245 granted on 19 October 2020 in the High Court in favour of the SME AND MEDIUM ENTERPRISE LIMITED NO 2011/0174, which are cited as the Respondent in both review applications.

[2] The respondent in both reviews contends that the court does not have jurisdiction to grant the review relief prayed for by the applicants and seeks orders for the review applications in terms of rule 76 to be set aside, alternatively struck out in terms of rule 61. The respondent further contends that the immovable properties of the applicants have not been declared specially executable, but rather that the writs that were issued in terms of case no. HC-MD-CIV-ACT-CON-2018/02168 and case no. HC-MD-CIV-ACT-CON-2020/03245 were only in respect of the movable properties of the applicants.

[3] The applicants raised many issues in their notices of motion and heads of argument, however, the two primary issues that this court will decide on are whether this court has the jurisdiction to review its own judgments and whether the applicants met the requirements for rescission applications to be entertained by this court.

Parties

*Applicants in case no: HC-MD –CIV-ACT-MOT-REV-2021/00214*

[4] The first applicant is Hochland Park Pharmacy Close Corporation CC/2005/0079, duly incorporated and registered in accordance with the provisions of the Close Corporation Act, 1988 (Act No. 26 of 1988).

[5] The second applicant is Graham Town Fourteen Close Corporation CC/2013/11743, duly incorporated and registered in accordance with the provisions of the Close Corporation Act, 1988 (Act No. 26 of 1988).

[6] The third applicant is Lipolelo Benedicta Qhola, in her capacity as the Managing Member of the second applicant.

[7] The fourth applicant is Toitoi William Kagiso Moloi, and the fifth applicant is Winnifrida Bawinile Moloi, and both are members in first applicant.

*Applicants in case no: HC-MD –CIV-ACT-MOT-REV-2021/00241*

[8] The first applicant is Moloi Trading Enterprises Reg: CC/2014/1109, with the second applicant Toitoi William Kagiso Moloi as a member thereof and the third applicant, Winnifrida Bawinile Moloi, is a member in first applicant.

*Respondent*

[9] In both matters the respondent is SME and Medium Enterprises Limited NO. 2011/0174, under the care of Fisher, Quarmby & Pfeifer, Windhoek, Namibia.

*Parties in current matter*

[10] The above mentioned applicants are such in the main applications and respondents in the Rule 61 application, but for all intents and purposes will be referred to as applicants collectively.

[11] The respondent is such in the main application and the applicant for the rule 61 application, but will be referred to as the respondent in this ruling.

Rule 61 Requirements

[12] The respondent relies on rule 61 for this court to set aside the application brought by the applicants. It provides as follows:

'(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) An application under subrule (1) is an interlocutory application and must be on notice to all parties and must specify in the notice the particulars of the irregularity alleged as well as the prejudice claimed to be suffered as a result of the alleged irregular step.'

[13] Ms. Campbell's arguments on behalf of the respondent is that a two-step inquiry is necessary and cited the case of *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*,<sup>1</sup> wherein NGCOBO AJA at para 124 stated:

'As pointed out above, the court has discretion whether or not to set aside the irregular step. This is implicit, if not explicit from Rule 30 (3). I endorse the statement in *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* that the court has discretion whether or not to grant the application to set aside the irregular step even if the irregularity has been established. The court may, in the exercise of its discretion, overlook the irregularity. A relevant consideration is prejudice. Prejudice that is required relates to the exercise of a party's procedural right or duty to respond to a communication received or to the taking of a next step in the sequence of permissible procedure to ripen the matter for proper orderly hearing.'

[14] Ms. Campbell argued on behalf of the respondent that it is prejudiced in that:

'It will be put to the expense of investigating, researching, consulting and drafting affidavits to deal with the numerous and wide-ranging issues, including those belatedly and improperly introduced by the applicants, in circumstances where all such effort and costs would be unnecessary and wasted, bearing in mind that the applicants have failed (on their own facts) to establish any basis or cause of action in terms of the Rules and in particular, in view of the fact that the process adopted by the applicants are not countenanced by rule 16, 65, 76, 103 or the law.'

[15] The review applications (and subsequent papers) were drafted by someone pretending to be legally learned and is replete with irrelevant, unrelated legal gibberish which cannot be sustained in law. Prejudice to the respondent, if required to deal with all of the allegations, is proven.

<sup>1</sup> *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC).

## Jurisdiction

[16] The court's jurisdiction to review proceedings is governed by rule 76. Rule 76(1) stipulates as follows:

'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 an 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.'

[17] The law further in terms of section 16 of the High Court Act 16 of 1990 provides that:

'The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall in addition to any powers of jurisdiction which may be vested in it by law, have power-

- (a) to hear and determine appeals from all lower courts in Namibia;
- (b) to review the proceedings of all such courts...'

[18] Ms. Campbell argued that this court does not have jurisdiction to review its own decisions and referred the court to the case of *Schameera Seven (7) Reg: CC 2002/2211 v Standard Bank of Namibia Limited*<sup>2</sup> at and this court will refer to that same judgment where Masuku J at 11, para 37 stated that:

'I am of the considered opinion that the only conclusion that can be reached in the circumstances, is that this court, whereas it has power to review decisions of inferior courts and tribunals, does not have the jurisdiction to review its own decisions and proceedings. That power lies only with the Supreme Court.'

[19] Looking at the law that governs review proceedings, it is clear that this court is not vested with the jurisdiction to review its own judgments.

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<sup>2</sup> *Schameera Seven (7) Reg: CC 2002/2211 v Standard Bank of Namibia Limited* (HC\_MD\_CIV\_MOT\_REV\_2020/00355) [2021] NAHCMD 449 (30 September 2021).

## Rescission

[20] The review applicants in their prayers also asked the court to rescind the judgments and set it aside.

[21] Rule 16 deals with rescission of default judgments and reads as follows:

'(1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) The court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N\$5000 set aside the default judgment on such terms as to it seems reasonable and fair...'

[22] Rule 103 deals with variation and rescission of orders or judgments generally and reads as follows:

'In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment -

- a) erroneously sought or erroneously granted in the absence of any party affected thereby;
- b) in respect of interest or costs granted without being argued;
- c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission;
- d) an order granted as a result of a mistake common to the parties.'

[23] Rescission applications are not tantamount to review applications.

[24] The applicants did not make out a case for rescission of any of the judgments they sought to review.

Conclusion

[25] This court does not have the jurisdiction to review its own decisions.

[26] Applicants did not meet the requirements of rescission applications.

[27] The manner in which the matters were brought before this court and the relief sought constitutes irregular proceedings. Thus, the application brought by the respondents in terms of rule 61, in both matters, is upheld, thereby bringing the entire matter to finality.

Order

[28] Therefore and in the premises the following orders are made:

[28.1] The review applications of the applicants are set aside and struck as being irregular proceedings as contemplated in Rule 61 of the Rules of the High Court.

[28.2] The applicants in the review proceedings shall pay the costs of the respondent which shall not be capped in terms of Rule 32(11) and shall include the costs of one instructing and one instructed legal practitioner.

[28.3] The matters are removed from the roll and are regarded as finalised.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
<b>Counsel:</b>	
<b>Applicants</b>	<b>Respondent</b>
L.B Qhola Third Applicant acting in person for HC-MD-CIV-MOT-REV-2021/00214 Windhoek, Namibia and;	Y. Campbell Instructed by Fisher, Quarmby & Pfeifer Windhoek, Namibia



<p>T.W.K Mloi Second Applicant acting in for HC-MD-CIV-MOT-REV- 2021/00241 person Windhoek, Namibia</p>	
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