REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-MOT-REV-2019/00239

In the matter between:

OVAMBANDERU TRADITIONAL AUTHORITY	**APPLICANT**

and

MINISTER OF URBAN AND RURAL DEVELOPMENT	**1ST RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF NAMBIA	**2ND RESPONDENT**
TURIMURO HOVEKA	**3RD RESPONDENT**
COUNCIL OF TRADITIONAL LEADERS	**4TH RESPONDENT**
GOVERNOR OF OMAHEKE REGION	**5TH RESPONDENT**
HOVEKA TRADITIONAL AUTHORITY	**6TH RESPONDENT**

Neutral Citation: *Ovambanderu Traditional Authority v Minister of Urban and Rural Development and Others*(HC-MD-CIV-MOT-REV-2019/00239) [2022] NAHCMD 59 (17 February 2022).

CORAM: MASUKU J

Heard: **26 January 2022**

Delivered: **17 February 2022**

Flynote: Practice - Rules of Court – Irregular proceedings – rule 61 – Requirements for application thereof discussed – Rule 52 – Amendment of pleadings – Failure to file notice to amend on all parties when same was served on all the parties inviting them to objection thereto – Rule 2 – effect of filing of court document after 15h00.

Summary: The applicant launched proceedings to set aside the designation of the 3rd respondent as chief of the Hoveka Royal House (now the 6th respondent). On receipt of the application, the 1st, 2nd, 4th and the 5th respondents in their answering papers, raised the issue of non-joinder of the 6th respondent as a traditional authority. Initially applicant was of the view that the 6th respondent did not exist but later discovered indeed it exists.

Pursuant to the discovery of the existence of the 6th respondent applicant brought an application for its joinder and to also amend the notice of motion in terms of rule 76 with other ancillary relief. The application was granted as prayed for.

Respondents seek in the current proceedings to have the joinder and amended notice of motion filed as granted by the court be set aside in terms of rule 61. They contend that it was an irregular step to apply for joinder when the respondents had first raised the issue of non-joinder in their answering papers. The respondent argued that the court ought to have determined its point of law first. Further, it was contended that the applicant failed to give notice to all the parties of its intention to amend as required in rule 52. Moreover, further contended the respondents, the amended notice of motion did not only incorporate relief in respect of the 6th respondent it had introduced new relief to the proceedings.

The applicant resists the rule 61 application on the basis that the application fails to meet the mandatory requirements of the said rule and that the application was filed out of time.

Held: The insistence by the respondents that the court should have dealt with the issue of non-joinder, is in the face of the concession by the applicant, unnecessary and would be a waste of judicial time and resources as well as escalate costs unnecessarily.

Held: It is paramount that an applicant in terms of rule 61 must meet the requirements set out in the rule before the court considers whether it is an irregularity or improper step and if prejudice has been established.

Held that: The respondents failed to comply with the relevant portions of rule 61 in that they failed to identify the irregularity alleged and the prejudice to be suffered. This is sufficient to non-suit the respondents in the present application.

Held further that: The application for joinder was brought with the knowledge and agreement of the parties and later granted by court. A step or proceeding that has been authorised by an order of court before it being implemented, cannot, on any basis, be classified as irregular or improper within the meaning of rule 61.

Held: There is no prejudice when amendment documents are served on any party with invitation to oppose and that party elects not to oppose.

Held that: Though the e-justice system allow parties to file court papers anytime and anywhere, this does not do away with the time frame for filing court papers in terms of rule 2.

The application in terms of rule 61 was dismissed wit costs, subject to rule 32(11).

ORDER

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1. The First, Second and Fourth Respondents' application in terms of Rule 61 is dismissed.
2. The First, Second and Fourth Respondents are ordered to pay the costs of the application, subject to the provisions of Rule 32(11).
3. The matter is postponed to **03 March 2022** at **08h30,** for further directions regarding the further conduct of the matter.
4. The parties are ordered to file a joint status report, together with a draft court order on or before 28 February 2022.

RULING

MASUKU, J:

Introduction

[1] Serving before court for determination is a rule 61 application served by the Government respondents in this matter. It is alleged by them that certain steps or proceedings undertaken by the applicant are irregular within the meaning of rule 61 and that they should, for that reason, be set aside.

[2] The application in terms of rule 61 is strenuously opposed by the applicant and it has set in comprehensive terms the bases upon which it moves the court to dismiss the application with costs. The task of the court, in the premises, in this ruling, is to establish which among the parties stands on the correct side of the law relating to rule 61 applications.

The parties

[3] The applicant is the Ovambanderu Traditional Authority, a traditional authority established in terms of s 2(1) of the Traditional Authorities Act, No.25 of 2000, and ('the Act'). The 1st respondent is the Minister of Rural and Urban

Development, duly appointed by the President of the Republic of Namibia as such, in terms of the Constitution. The 2nd respondent is the President of the Republic of Namibia, cited in his official capacity as such.

[4] The 3rd respondent is Mr. Turimuro Hoveka, an adult male Namibian who was designated as Chief of the Ovambanderu Traditional community. He is cited for the interest he may have in this matter. The 4th respondent is the Council of Traditional Leaders, a body duly established in terms of the provisions of s 2 of the Act. The 5th respondent is the Governor of the Omaheke Region and is cited in his official capacity as such. The 6th respondent is the Hoveka Traditional Authority also established in terms of the Act.

[5] For the purposes of this particular application, the applicant was represented by Ms. Bassingthwaighte on the instructions of Palyeenime Inc. The Government respondents were represented by Mr. Khama, on the instructions of the Office of the Government Attorney. The 3rd respondent did not participate in the proceedings and is deemed to abide by the decision of the court, regardless where the axe falls as it were.

Background

[6] This matter, as all matters pertaining to chieftaincy disputes do, has a long and chequered history. Due to the nature of the relief sought, it will not be necessary to delve in too much history of the entire matter but only to those aspects that have a decisive bearing on the question identified above as the one for determination in this ruling.

[7] The applicant launched proceedings in terms of rule 65 of this court, seeking an order setting aside the designation of the 3rd respondent as chief of the Hoveka Royal House. This application was opposed by the respondents, who as they are entitled to, filed answering affidavits, joining issue with the applicant.

[8] The matter underwent case management in terms of which there were certain twists and turns. On receipt of the application, the respondents filed an answering affidavit in terms of which they, amongst other things, raised points of law *in limine*. These included the issue of non-joinder of the Hoveka Royal House as a traditional authority and the contention that some of the prayers sought by the applicants in the notice of motion are incompetent or academic.

[9] In its replying affidavit, the applicant contended that the respondents misconstrued the provisions of the Act in stating that there existed a Hoveka Royal House, which needed to be joined as a party to the proceedings. The applicant was of the view that such a Royal House did not exist.

[10] It would appear that it later dawned on the applicant that there is an entity in fact by the name Hoveka Royal House and that the respondents were correct in their point of non-joinder they raised in the answering affidavit. To cure that defect, the applicant filed an application seeking the joinder of the said Royal House as the 6th respondent to the proceedings. They further sought an order that the said 6th respondent be served with the court order and all the pleadings filed of record, after which it would file its intention to oppose within 5 days of service.

[11] The applicant further sought an order for it to, within 5 days of the filing of the notice to oppose by the 6th respondent, file an amended notice of motion and a supplementary affidavit addressing issues relating the 6th respondent. The applicant further sought an order for the 6th respondent to, within 20 days of the filing of the amended notice of motion by the applicant, file its answering affidavit to the main application and the supplementary affidavit filed by the applicant as stated above.

[12] Last, but by no means least, the applicant was to then file a replying affidavit, dealing with the answering affidavit filed by the 6th respondent. The application was granted as prayed. In consequence of the order granted, the applicant filed an amended notice of motion in terms of rule 76. Because this

amended notice of motion forms the substratum of the rule 61 notice filed by the respondents, it is necessary to quote it in full. I do so below.

[13] The notice of motion reads as follows:

'KINDLY TAKE NOTICE that the applicant intends to make application to the above Honourable Court for an order in the following terms:

1. Calling on the respondents to show cause on a date to be determined by the managing judge why:

1.1 The decision of the first respondent taken during or about October /November 2018 (the exact date being unknown to the applicant) approving the intended/proposed designation of the third respondent as Chief of the Hoveka Traditional Authority should not be reviewed and set aside;

1.2 The designation of the third respondents as chief of the Hoveka Traditional Authority on 23 November 2018, pursuant to the first respondent's aforesaid approval, should not be declared null and void as contemplated in section 3(4)(a) of the Traditional Authorities Act, 25 of 2000 ('the Act');

1.3 The decision of the second respondent taken on or about 19 July 2019 and published in Government Gazette No 6965 on 1 August 2019 as Proclamation 29, recognising the third respondent as the Chief of the Hoveka Traditional Authority, in respect of the Otjimana Traditional Community, residing in the Eiseb Block, should not be reviewed and set aside alternatively declared null and void as contemplated in section 3(4)(a) of the Act;

1.4 The establishment of the 6th respondent as a traditional authority, through the designation and recognition of the third respondent as chief and the appointment of senior traditional councillors and traditional councillors, should not be declared null and void as contemplated in section 3(4) of the Act.

1.5 The first respondent's decision to announce the designation of the persons identified in Government Notice 21 of 2020 in Government Gazette 7115, as senior traditional councillors and traditional councillors of the Hoveka Traditional Authority should not be reviewed and set aside, alternatively declared null and void as contemplated in section 3(4) of the Act;

1.6 In so far as it may be necessary, Government Gazette No 6965 on 1 August 2019 as Proclamation 29 and Government Notice 21 of 2020 in Government Gazette 7115 should not be declared null and void and set aside.

2. An order directing that the costs of this application shall be paid by those who oppose the application, such costs to include the costs of one instructing and one instructed counsel.'

[14] It is important to mention that the applicant did file the supplementary affidavit, as authorised. In response thereto, the 6th respondent filed its answering affidavit, which was deposed to by Mr. Turimuro Hoveka. Confirmatory affidavits by other persons were filed on behalf of the 6th respondent. As is customary, and in line with the court order, the applicant then filed its replying affidavit to the 6th respondent's affidavit.

The rule 61 notice

[15] By notice dated 11 February 2021, the respondents, barring the 3rd and 6th respondents filed a notice in terms of rule 61, alleging that the certain documents, including the applicant's supplementary affidavit dated 12 June 2020, the applicant's amended notice of motion dated 17 October 2019, the further amended notice of motion dated, 29 January 2021, together with the accompanying supplementary affidavit, 'constitutes (*sic*) an irregular or improper step or proceedings as envisaged in rule 61 of the rules of this court and is hereby struck out and or set aside with costs.'[1]

[16] In substantiation of the grounds for declaring the said proceedings or steps irregular, the respondents alleged that they, in their answering affidavit, raised a point of law *in limine, which* the court should still determine. As such, the respondents are entitled to have a determination of that very point, with appropriate relief thereon granted by the court. By applying for joinder, it was contended, the applicant had deprived the respondents of the right to have the issue of non-joinder determined. As such, the steps taken by the applicant in that regard were irregular.

[17] It was the respondents' further contention that in terms of the court order dated 3 November 2020, the applicant was only entitled to amend its notice of

[1] Rule 61 notice at p 690-694 of the record.

motion on issues that concern the 6th respondent only. It was accordingly contended that the applicant had expanded the scope of the order, so to speak, by incorporating in its amended notice of motion, relief that is new or which relate to actions or decisions taken by the 1st and 2nd respondents. It was accordingly alleged that the terms of the relief sought was outside the scope of the relevant court order and the terms of the joint status report filed by the parties.

[18] Another cause of complaint by the respondents was that the application to amend the notice of motion was incorrect in that the provisions of rule 52 had not been followed by the applicant. As such, continued the respondents, they had been deprived of their procedural rights prescribed in rule 52 (1) to (10) of the rules of court.

[19] Last, but by no means least, the respondents also claimed that the applicant had not complied with the provisions of rule 32(9) and (10) when it filed its amended notice of motion. It is on the above bases that the respondents apply that the steps stated above should be set aside as irregular or improper.

Rule 61

[20] The relevant parts of rule 61 read 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 a further step in the cause or matter with the 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 irregularity alleged irregular step.

…

(3) If at the hearing of the application the managing judge is of the opinion that that proceeding or step is irregular or improper, he or she may, with due regard to the alleged prejudice suffered, set it aside in whole or in part either against all the parties or as against some of them and grant leave to amend or make any other order that the court may consider suitable or appropriate.'

[21] The law reports and the e-justice portal are replete with judgments of the courts dealing with the interpretation of this rule. I do not find it necessary, for that purpose, to refer to those judgments, but one. This is because the judgments and rulings have laid out a beaten track on the issue. All that may be necessary to do, is to briefly lay down the important aspects of the rule in question, for the purpose of dealing with the present matter. I do so below.

[22] First, a party which contends that another has taken an improper or irregular step or proceeding, may within 10 days of becoming aware of the irregularity or proceeding, apply to the managing judge to set the said step or proceeding aside. If that party has, however, taken a further step whilst aware of the irregular step or proceeding, it forfeits the right to make the application.

[23] Second, the applicant, in terms of this rule, must serve its notice on all the affected parties. This notice must clearly provide particulars of the irregularity complained of, together with the prejudice alleged to be suffered as a result of the step or irregularity complained of. In this regard, it would appear that for the application to be entertained, the step or proceeding complained of, must be improper or irregular. If it is not, the matter should end right there.

[24] Third, if the step or proceeding is irregular, the question will be whether there is tangible prejudice suffered by the applicant, resulting directly from the irregular step or proceeding complained of. The court has a discretion in dealing with the application. If it forms the opinion that the step or proceeding is indeed improper or irregular, it may set it aside in part or in whole, if (as stated immediately above), depending on the prejudice suffered.

[25] It would appear that if there is no prejudice, the court is unlikely to grant the application and may, in that connection, overlook the irregular step or proceeding. Where there is demonstrable prejudice, the court is at large to grant the errant party leave to amend or make any order it deems suitable in the circumstances to remedy or address the complaint contained in the notice.

[26] It is probably appropriate at this juncture and to lend credence to the brief discussion above, to refer to *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd,*[2] where the Supreme Court dealt with the provisions in question, albeit under the old rules. The court said:

> 'Rule 30 contemplates two separate but interrelated enquiries, which should not be conflated. The first is whether the step or proceeding complained of is irregular. The answer to this question must be determined by considering the step itself in the light of the meaning of an irregular step or proceeding. The second enquiry, which only arises once it is established that the step complained of is irregular, is what order should follow the finding of an irregularity. In this enquiry, the court has a discretion whether or not to overlook the irregularity. It is in this enquiry that prejudice is relevant.'

[27] As intimated above, although this case dealt with the repealed rule 30, the law expounded in the above quoted case still holds good. It will be the standard employed in that case that will be followed in dealing with the diverse complaints raised by the respondents in this matter.

Determination

[28] I find it unnecessary, in view of the urgency of the matter, to deal comprehensively with all the arguments raised on behalf of the protagonists in this matter. What I consider appropriate, is to deal with each issue and in the process, deal to the length necessary, with the argument of each of the parties. In this connection, I will first deal with the issue of non-joinder raised by the respondents.

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[2] *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC), p 703, para [110].

Denial of right to argue non-joinder of the 6th respondent

[29] Mr. Khama, for the respondents argued that by applying for the joinder of the 6th respondent, the applicant literally pulled the carpet under their feet as they intended to raise this issue on the merits. Due to the application for amendment, in which the 6th respondent was joined, it was Mr. Khama's argument that the respondents were thereby denied of the right to argue that point. Furthermore, the court was denied the opportunity to rule on the question of non-joinder.

[30] The first question is whether the step taken by the applicant is irregular or improper, namely, applying for the joinder of the 6th respondent. I am of the considered view that the complaint by the respondents in this regard, is devoid of merit. I say so for the reason that the parties agreed, presumably after the applicant realised that the need to join the 6th respondent was real to allow the application for joinder.

[31] The parties, in this connection, filed a duly signed joint status report dated 3 November 2020. In it, the parties acknowledged receipt of the application for joinder by the applicant, together with the relief prayed for, as captured above.[3] There is no contention that the said joint status report was subsequently made an order of court, including the relief that the applicant sought.

[32] It is accordingly clear, proper regard being had to the issues discussed immediately above that the application for joinder cannot, properly considered, be said to have been an irregular step or proceeding. The application for joinder was brought with the knowledge and agreement of the parties. The respondents accordingly fall at the first hurdle, obviating the need to deal with the issue of prejudice.

[33] A step or proceeding that has been authorised by an order of court before it being implemented, cannot, on any basis, be classified as irregular or improper within the meaning of rule 61. The court's imprimatur removes any

[3] Joint status report filed by the parties, p 1200 – 1203 of the record.

basis for arguing that the step is improper or irregular. For that to be done, where a court order to that effect is extant, the party complaining of the step would have to show that the order was granted erroneously within the meaning of rule 103. This was not done.

[34] The difficult and thorny path the respondents have to traverse barefooted as it were, is that they were party to the sanctioning of the joinder application by the court. The respondents can be hardly heard to turn around, in the circumstances, to complain.

[35] It is also important to mention that the respondents' argument is totally at odds with the overriding objects of judicial case management as set out in rule 1(3). The purpose of the rules, is to deal with the matters on their real merits, in a just, speedy, efficient and cost-effective manner. Once the applicant was made wise to the fact that the 6th respondent, despite the applicant's earlier belief, existed, it would have been an unnecessarily fastidious exercise for them to have persisted in a non-issue and have the court listen to argument and render judgment on what is at that stage a non-issue.

[36] Parties should be allowed the room and latitude, as the case develops within the case management phase, to make genuine concessions that will pave the way to the court dealing with the real and substantive issues. In this regard legal practitioners should not cling on to issues that are no longer in contention just because if argued, the legal practitioners will be on the winning side. It is not about legal practitioners but about the clients and the beneficial use of the court's time and judicial resources. Time for moot courts long expired.

[37] It must also not sink into oblivion that even if the issue of non-joinder had been determined in the respondents' favour, it would not have resulted in the application being dismissed. The proper course for the court to follow in that regard, would be to stay the proceedings and order the party to be joined and served with the relevant papers.[4] To allow the non-joinder to be heard would

[4] *Endunde v Chairperson of the Okavango East Communal Land Board* (HC-MD-CIV-MOT-GEN-2016/00384) [2018] NAHCMD 113 (27 April 2019).

have resulted in unnecessary loss of judicial time and resources, as well as escalating costs unnecessarily. The applicant's approach was thus condign and in keeping with the overriding objects of judicial case management.

Further grounds

[38] The respondents further attacked the applicant's notice of motion to amend dated 27 January 2021, together with the accompanying supplementary affidavit on various bases. These include that prayers 1 and 2 of the notice of motion, are incompetent; that the applicant was, by order dated 5 November 2020, granted leave to amend its notice of motion to deal with issues related to the 6th respondent, resulting in the new relief sought falling outside the scope of the order granted. Lastly, the respondents also complained that the applicant did not follow the route set out in rule 52 when it sought the amendments in question.

[39] It is one thing to consider the issue whether any of the grounds alleged by the respondents have any substance and quite another to decide whether the notice in terms of rule 61 complies with the requirements of the rules. Ms. Bassingthwaighte, for the applicant argued and quite forcefully too, that the respondents' notice falls foul of the mandatory requirements of the rules. Is she correct?

[40] When we consider the requirements of the rules regarding the content of the rule 61 notice, we do not necessarily deal with the two steps that the Supreme Court held should not be conflated. In this case, the applicant contends that the notice filed by the respondents does not comply with the rule in so far as it does not state the prejudice suffered by the respondents.

[41] In order to come to a conclusion on this issue, namely the compliance with the mandatory requirements of the rules in relation to the form and content of the rule 61 notice, there is no need for the court to first deal with the issue whether the steps complained of are indeed irregular or improper. In this

connection, the court is entitled to consider the notice as a whole and consider whether it complies with the mandatory requirements stated in the rules.

[42] In this particular connection, rule 61(2) is paramount. It has some formal requirements that notice should meet. These, as stated earlier, include notice to all parties; the irregularity alleged to be specified and lastly, the prejudice suffered. An applicant in terms of rule 61 must meet all these requirements before the court can consider whether at the end there is an irregularity or improper step or proceeding and also whether prejudice has been demonstrated.

[43] In the instant case, the respondents failed in their rule 61 notice to state the bases on which the supplementary affidavit should be regarded as an irregular step. This was attempted in the heads of argument, which is not permissible. The basis of the step or proceeding being regarded as irregular, must be contained in the notice and may not be stated or augmented in heads of argument. This also applies to the issue of prejudice.

[44] I agree with Ms. Bassingthwaighte for the applicants that the respondents failed to state in their rule 61 notice the grounds upon which the said steps or proceedings were irregular and what prejudice the acceptance of the said documents will visit upon them. This is, in my considered view fatal to the application in terms of rule 61 in so far as the supplementary affidavit and the relief sought, which the respondents claim is new, are concerned.

[45] I am of the considered view, regard had to the provisions of rule 61(2) that an applicant for rule 61 has to stand or fall on the contents of the rule 61 notice filed. Such applicant may not seek to deal with the cause of complaint and/or the prejudice allegedly suffered in any other document than the rule 61 notice itself. If the provisions of rule 61 are not followed, the rule 61 notice is itself irregular and should spell the end of the rule 61 proceedings, enabling the court to allow the matter to proceed in earnest.

[46] I am of the considered opinion that this should be the fate of the present application. The applicant was compelled to face a rule 61 application which was deficient in material terms in that the bases for the irregularity were not stated and the prejudice suffered was also not stated. As such, I am in unqualified agreement with Ms. Bassingthwaighte's argument in this particular connection. This should spell doom to the entire rule 61 application.

Rule 61 filed out of time?

[47] Notwithstanding my conclusion above, I will, for the sake of completeness, to proceed to deal with the other issues raised on the respondents' behalf in further attack on the steps alleged to be irregular. The applicant argued that the application in terms of rule 61 was filed out of time, namely, after the 10 day period stated in rule 61(1). Does this contention have merit?

[48] Ms. Bassingthwaighte argued that the respondents must be non-suited on the basis that their rule 61 application was filed out of time. It was her submission that the applicant's further amended notice of motion, which is the basis of the attack by the respondents, was filed on 27 January 2021 at 17:14. The respondents' rule 61 notice was, on the other hand, filed at 16:09 on 11 February 2021. She argued that this was after the 10-day period prescribed in the relevant subrule.

[49] Mr. Khama, while accepting the times for filing stated in the immediately preceding paragraph, argued that the application was filed in good time. It would seem to me that the answer to the question is to be found in rule 136. The said rule provides the following:

'(1) Despite subrule (2), the e-justice system is designed to provide service for 24 hours a day.
(2) In case of a process, notice or document of court being filed after the hours provided in rule 2, the date and time of filing of the document unless authorised by the registrar

or the court, considered to have been filed at 09h00 on the first court day following the date of actual filing.'

[50] Rule 2, on the other hand, which is mentioned in rule 136 above, provides the following:

'(1) The offices of the registrar must, except on Saturdays, Sundays and public holidays, be open from 09h00 to 13h00 and from 14h00 to 15h00 for the purpose of issuing any process or filing any document, but for the purpose of filing a notice of intention to defend or a notice to oppose, the office must be open from 09h00 13h00 and from 14h00 to 16h00.
(2) Despite subrule (1), the registrar –
(a) may in exceptional circumstances issue or accept documents at any time and in that case he or she must record in writing those exceptional circumstances and place such record on the file in question; and
(b) must issue process or accept documents at any time when directed to do so by the Judge-President or a judge designated by the Judge-President.'

[51] The question is, what do these rules, read together provide? Starting with rule 136, it is clear that although e-justice operates 24 hours a day, the filing of documents, process or notices is to be done in terms of rule 2, namely within the hours stated in that subrule. Notwithstanding that e-justice operates 24 hours a day, the hours for filing documents and notices are the following on working days, excluding weekends and public holidays: 09h00 to 13h00 and 14h00 to 15h00, if a party files any process or document.

[52] Where a party, however files a notice to defend or to oppose, the time stated above, is extended for 1 hour from the last time for filing, which is 15h00. This means that where a party files a notice to defend or oppose, the closing time for filing is 16h00.

[53] The import of this is that where a party files documents or processes and notices during working days, these must be filed at the latest by 15h00 in order for them to be regarded by e-justice as having been filed on that very day. If they

are documents opposing or defending proceedings, they must be filed by 16h00 to be considered to have been filed on that very day.

[54] As a result, where a party files a document, process or notice on a working day, the closing time for filing on that day, is 15h00. If, on the other hand, the document or notice being filed is a notice of intention to oppose or defend, the closing time for filing on that day is 16h00. If in both cases, a party files the respective documents after 15h00 and 16h00 respectively, the document or notice will be deemed to have been filed at 09h00, the following day.

[55] It is not necessary for present purposes to deal with the other provisions relating to exceptional circumstances provided for in rule 2(2) because they do not arise in this matter.

[56] Mr. Khama argued that because of rule 136, it means that e-justice accepts documents for 24 hours a day. That is true on a factual level. I do not however agree with his interpretation that filing of documents and notices takes place 24 hours in a day. In my considered view, rule 136 must be read subject to rule (2). This means that the times stipulated in rule 2 apply in relation to the filing of documents on e-justice.

[57] The import of this is that documents, notices and process filed after 15h00 on a working day, are regarded as being filed at 09h00 the following day. If the notices are those to oppose or defend, they are to be filed by 16h00 on a working day, failing which they will be regarded as having been filed the following day at 09h00.

[58] The notice in terms of rule 61 is accordingly not a notice to oppose or defend. In terms of rule 2, it must be filed by 15h00 in order for it to be regarded as being filed on that very day. If it is filed later than 15h00, it will be regarded as having been filed on the following day.

[59] The incontrovertible situation in this case is that the notice in terms of rule 61 was filed on 11 February 2021 at 16h09. Inevitably, the filing is deemed to have been made on the following day, namely, 12 February 2021 at 09h00. This date and time are considered in relation to the filing of the amended notice of motion, namely on 27 January 2021. It is clear that the said notice in terms of rule 61 was therefor not filed within 10 days of the notice complained of. It was therefor filed out of time and should, for that reason alone, not be considered for non-compliance with rule 61(1).

[60] I am acutely aware that rule 61(1), states that the proceedings thereunder, must be brought within 10 days of the party 'becoming aware of the irregularity'. The respondents do not make a case in their papers that they became aware of the irregularity on any day later than the date of filing.

[61] In *Competition Commission v Namib Mills (Pty) Ltd*,[5] the court held that the time to bring the rule 61 application, on the special circumstances of that case, which was specifically pleaded, was when the respondent in that case instructed counsel, who for the first time alerted the respondent that the step taken by the applicant was irregular. The court accordingly held that the time to compute the date of knowledge was not when the process complained of was filed but when the recipient for the first time became aware of the irregularity. Each case must be decided on its own facts.

[62] The facts in this case suggest inexorably that the respondents became aware of the irregularity from the date the application was filed, namely, on 27 January 2021. The cut-off period is important in that it seeks to avoid dilatoriness on the part of a litigant who forms the view that an irregular step has been taken by an opposing side. Such a party must not rest on its laurels but must strike while the iron is still hot. If it fails to do so, that delay or failure may be its very undoing. In the premises, and for the aforegoing further reason, I am of the considered view that the application in terms of rule 61 should fail.

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[5] *Namibia Competition Commission v Namib Mills (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2017/00061 [2019] 456 97 November 2019).

Rule 52

[63] Another arrow up the respondents' bow relates to the non-observance of rule 52, which relates to amendments. The provision, on its reading, applies to the amendment of pleadings, documents other than an affidavit. It requires a party requiring to amend the document to give notice to all other parties of the intention to amend. The respondents allege that the failure deprived it of its procedural rights in dealing with the amendment of the notice of motion in this case.

[64] Whereas one may agree that the applicant did not follow the provisions of rule 52, there is, however, no question that the applicant served the relevant papers on the respondents and they were allowed an opportunity to oppose the application. Their procedural rights which they make a lot of song and dance about, although not following the procedure in rule 52, were taken care of.

[65] The applicants do not show that they suffered any demonstrable prejudice so as to find for them in this connection. They were served with the notice of motion and had every opportunity to oppose the proposed amendment, which they did not do.

[66] Equally not worthy of being upheld is the issue regarding the relief that the respondents allege extends beyond the scope of the amendment. I am of the considered view that the argument is tenuous. In any event, the respondents had every right to file an affidavit and address the issues, as the 6th respondent did. I am of the view that the respondents' complaint in this regard is not worthy of being sustained on the facts.

Conclusion

[67] Having regard to the discussion above, together with the conclusions reached, it is my considered view that the application in terms of rule 61 is ill conceived and must accordingly fail. The opposition of the applicant was meritorious in all the circumstances.

Costs

[68] The ordinary rule relating to costs is trite. Costs follow the event. There is no conceivable basis on which the applicant, which has been successful in this application, should not obtain a favourable order as to costs. This being an interlocutory application, there is nothing placed before me to suggest that there is any basis for the costs of the application not being capped in terms of rule 32(11). The costs shall accordingly be subject to the provisions of rule 32(11).

Order

[69] In view of what has been stated above, it appears to me that the appropriate order to issue in the circumstances, is the following:

1. The First, Second and Fourth Respondents' application in terms of Rule 61 is dismissed.
2. The First, Second and Fourth Respondents are ordered to pay the costs of the application, subject to the provisions of Rule 32(11).
3. The matter is postponed to **03 March 2022** at **08h30,** for further directions regarding the further conduct of the matter.
4. The parties are ordered to file a joint status report, together with a draft court order on or before 28 February 2022.

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T. S. Masuku

Judge

APPEARANCES:

APPLICANT:	N. Bassingthwaighte Instructed by Palyeenime Inc.
RESPONDENTS:	D. Khama Instructed by Office of the Government Attorney