REPORTABLE **CASE NO. A 244/2007**

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES **APPLICANT**

and

THE CHAIRMAN OF NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY (NAMFISA) **1ST RESPONDENT**

CHIEF EXECUTIVE OFFICER OF NAMFISA **2ND RESPONDENT**

CORAM: HOFF, J

Heard on: 2009.02.03

Delivered on: 2009.02.13

JUDGMENT:

HOFF, J: [1] The applicant gave notice of an *"application for review in terms of Rule 53 of the Rule of Court"* in which he sought the following relief:

"1. Condoning applicant's non-compliance with rule 53 (4) and (5) and delay (if any) for bringing this application within a reasonable time.

2. Setting aside and correcting the decision of second respondent to appoint Mrs Lilly Brandt to act as the Chief Executive Officer of Namfisa (for?) the months September 2007 and during May/June 2008.

3. *Setting aside and correcting the entire purported resolutions of first respondent dated 16th July 2003, 8th October 2007 and 11th June 2008 respectively.*

4. Ordering that the respondents pay the costs of this application, severally and jointly, one paying the other to be absolved.

5. Further and/or alternative relief."

[2] The respondents opposed this application by giving notice of an application in which an order in the following terms would be sought:

"That the applicant's application initiated under the notice – heading "Notice of Application for Review in terms of Rule 53 of the Rules of Court dated 17 July 2008 and under case number A 244/07 and is hereby struck-out, alternatively struck from the roll, and in either of the aforementioned events, with costs on a scale as between attorney and client, including costs of instructed counsel, alternatively that the applicant's aforementioned application be stayed with immediate effect pending the applicant's compliance with this Honourable Court's order of 9 October 2007 in respect of the payment of legal costs, and further pending the payment by the applicant of the costs occasioned by this application."

[3] The respondents alternatively sought relief in terms of Rule 30 of the Rules of this Court to the effect that the *"application for review"* along with the accompanying affidavit be struck-out since it constituted and irregular step and/or improper step.

[4] The applicant in turn raised four points *in limine*.

These points as well as the merits of respondents' application to strike-out were argued before me. The applicant appeared in person. Mr Obbes appeared on behalf of the respondents.

[5] Though it is customary to first decide points *in limine* I shall presently not follow such a procedure because of averments by the second respondent to the effect that the applicant is in contempt of Court and that he cannot approach this Court until such time as he had purged his contempt.

[6] It is common cause that Pickering AJ on 9 October 2007 and under case number (P) I 244/07 *inter alia* ordered:

> *"That no further proceedings will be lodged before the applicant pays the costs of today."*

[7] It is also common cause that the applicant never paid those costs. Subsequently the applicant launched another application in this Court which prompted the respondents to bring a Rule 30 application in which the respondents sought to have applicant's application be struck as an irregular and/or improper step.

[8] This Rule 30 application was heard by Mainga J who delivered judgment on 25 July 2008.

The applicant in his opposition to the Rule 30 application *inter alia* submitted that the previous judgment was void *ab initio* since Pickering AJ heard the application and gave

judgment contrary to the rule, *nemo iudex in sua causa*. Applicant further, submitted that since the order of Pickering AJ was void *ab initio* such an order could simply be disregarded and that he was entitled for an order declaring such order to be void.

Mainga J in his ruling had the following to say:

> *" ... I must find that respondent is bound by the order by 9 October 2007 per Pickering AJ. He can only initiate proceedings under case (P) I 244/07 ... if he pays the costs of 9 October 2007 or once he has succeeded to set aside that order in the Supreme Court. Before and until the two alternatives are done the doors are closed."*

[9] The applicant presently repeated the same submissions raised before Mainga J. He submitted that in terms of the provisions of Article 25 of the Constitution of Namibia he is entitled to approach a competent court in order to protect his fundamental rights. In addition he again submitted that the order of Pickering AJ was void *ab initio* and could simply be ignored. In this regard this Court was referred to the matter of *Mogotsi and Others v Pienaar and Others 2000 (1) SA 577 (TPD) where Van Dyk J said the following at 580 G*:

> *"From the aforegoing it would seem that an order which is void due to lack of jurisdiction need not be declared void can simply be disregarded."*

[10] This statement does not assist the applicant and should be read in context. The following appears from the head note:

> *"On a proper interpretation of ss (1) and (2) of the Extension of Security of Tenure Act 62 of 1997, a party initiating legal proceedings within the ambit of that Act has the following choices of forum: the magistrate's court having territorial jurisdiction, or the Land Claims Court; or the High Court, but only with the consent of all the parties to the proceedings.*

In the present matter, where a landowner had obtained an eviction order in a High Court against occupiers in circumstances which made the Extension of Security of Tenure Act applicable and the consent of the occupiers to the proceedings being instituted in the High Court had not been obtained, the Court declared the eviction order void for lack of jurisdiction."

[11] It surely is not applicant's case that when Pickering AJ made the order on 9 October 2007 that this Court had no jurisdiction to make such an order.

[12] It is further common cause that the applicant had filed on 10 October 2007 (prior to the judgment by Mainga J) a notice of appeal but that his appeal has lapsed due to failure to prosecute in the Supreme Court. Applicant now submitted that he has initiated review proceedings but this cannot assist the applicant since review proceedings do not stay the operation of court orders.

[13] Numerous cases held that court orders must be complied with and remain valid until such time as such order has been set aside by a competent court of law.

[14] In *Hadkinson v Hadkinson [1952] 2 All ER 567 at 569 Romer L J* had the following to say regarding court orders:

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham L.C., said in Chuck v Gremer (1) (Coop. temp. (1 Cott. 342):

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt."

[15] In the same case Denning L J expressed himself as follows at 575 A – B:

"... I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not in itself a bar to his being heard, but if his disobedience is such that, so long it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then the court may it its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

[16] In *Hamutenya v Hamutenya 2005 NR 76* this Court as per Maritz J (as he then was) stated the position regarding compliance with court orders as follows at 78 B – G:

"In pressing the point in limine on behalf of the respondent, Mr Boesak reminded the Court of the dire consequences to the administration of justice and the maintenance of order in society if orders of Court are disregarded with impunity. Recognising the considerations of public policy which underline the need to respect and comply with order of that kind, the Court said in Sikunda v Government of the Republic of Namibia and Another 2001 (2) NR 86 (HC) at 92 D – E:

'Judgments, orders, are but what the Courts are all about. The effectiveness of a Court lies in execution of its judgments and orders. You frustrate or disobey a Court order you strict at one of the foundations which established and founded the State of Namibia. The collapse of a rule of law in any country is the birth to anarchy. A rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded.'

Authority for this approach is also to be found in a case both parties drew the Court's attention to. In Kotze v Kotze 1953 (2) SA 184 (C) Herbstein J said at 187 F:

'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.'
It is for these reasons that Froneman J pointed out in Bezuidenhout v Patensie Sitrus Beherend BpK 2001 (2) SA 224 (E) at 229 B – D:

'An order of a Court of law stands until set aside by a Court of competent jurisdiction. Until that is done the Court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 (W) at 494 A – C). A person may even be barred from approaching the Court until he or she has obeyed an order of Court that has not been properly set aside (Hadkinson v Hadkinson [1952] 2 All ER 567 (CA); Byliefeldt v Redpath 1982 (1) SA 702 (A) at 714).'

[17] In *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President's Office and Others 2004 (2) SA 602 (ZS) at 609 B* the court expressed itself as follows:

"In my view, there is no difference in principle between a litigant who is in defiance of a court order and a litigant who is in defiance of the law. The Court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged."

[18] It is clear from the aforementioned authorities that a litigant may be barred from approaching a Court until he or she has obeyed an order of such Court which has not been set aside.

[19] Applicant's reliance on the provisions of Article 25 of the Constitution is misplaced since a litigant, in my view, cannot utilize the provisions of Article 25 in order to evade compliance with a court order.

[20] The applicant has in spite of the judgment by Mainga J that he must comply with the Court order of Pickering AJ or have it set aside, launched his present *"review application"*.

[21] In my view the applicant is in willful disregard of this Court's order (dated 9 October 2007) and stubbornly persists with his non-compliance of that order.

[22] This Court cannot in the face of applicant's continued contempt of an order of this Court grant him the relief prayed for in his "review application". This Court thus refuses to consider his application.

[23] Regarding the issue of costs I am of the view that in the instant case this court should mark its disapproval in respect of the conduct of the applicant by making a special cost order.

[24] In the result the following order is made:

1. Applicant's application *"Notice of Application for Review in terms of Rule 53 of the Rules of Court"* dated 17 July 2008 under case number A 244/07 is struck from the roll.

2. Applicant is ordered to pay costs on an attorney-client scale including costs of instructed counsel.

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HOFF, J

ON BEHALF OF THE APPLICANT: **IN PERSON**

Instructed by:

ON BEHALF OF THE 1ST & 2ND RESPONDENTS: **ADV. OBBES**

Instructed by: **LORENTZ ANGULA INC.**