'Not Reportable'

CASE NO: A 244/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES	**1st Applicant**
HEWAT SAMUEL JACOBUS BEUKES	**2nd Applicant**
AUGUST MALETZKY	**3rd Applicant**

and

LORENTZANGULA INC.	**1st Respondent**
SAMUEL RUBEN PHILANDER	**2nd Respondent**
ADOLF DENK	**3rd Respondent**
LILY BRANDT	**4th Respondent**
NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY	**5th Respondent**
FRANS JOHAN JANSEN VAN RENSBURG	**6th Respondent**
LAW SOCIETY OF NAMIBIA	**7th Respondent**
DISCIPLINARY COMMITTEE	**8th Respondent**
ANTI-CORRUPTION COMMISSION	**9th Respondent**

***CORAM*: PARKER J**

Heard on: 2011 March 4

Delivered on: 2011 April 15

JUDGMENT

PARKER J:

[1] The three applicants have brought application under Case No. A 244/2010 by notice of motion for relief in terms set out below; and the affidavit of the first applicant is the founding affidavit; together with a confirmatory affidavit of the second applicant and another confirmatory affidavit of the third applicant:

1. Granting 2nd and 3rd applicants leave to intervene as applicants.

2. Condoning the first applicant's consolidation of applications against respondents for the purpose of a consolidated hearing.

3. Declaring that the Fifth and Sixth Respondents were in default delivery of notice of intention to defend in Case No. (P) I 2232/2007.

4. Declaring that the First and Second Respondents acted on behalf of Fifth and Sixth Respondents in Case No. (P) I 2232/2007 without being authorized and/or instructed by Fifth and Sixth Respondents to do so.

5. Declaring that the First and Second Respondents acted on behalf of Fifth Respondent without having been authorized by Fifth Respondent in Case No. A 244/07 during September/October 2007.

6. Declaring the affidavit of Fourth Respondent and confirmatory affidavit of Third Respondent in Case No. A 244/07 filed with this Honourable Court during September 2007 as objectionable and not receivable as evidence.

7. Declaring the Round-Robin resolutions by the Fifth respondent since October 2007 in Case No. A 244/07 as unlawful and of no force or effect.

8. Directing Seventh and Eighth Respondents, tasked with the administration and enforcement of the Legal Practitioners Act 15 of 1995, to comply with their statutory duties in terms of sections 32 and 33 of the Legal Practitioners Act 15 of 1995.

9. Further and/or alternative relief.

[2] The nine respondents cited are motley of persons, including natural persons and three statutory bodies, namely, the seventh respondent, the eighth respondent and the ninth respondent. For the avoidance of doubt I must signalize the point that the present proceedings concern Case No. A 244/07 *only*. (Italicized for emphasis)

[3] The applicants argue that since the respondents have not filed any opposing affidavits and so, therefore, according to the applicants, this Court should consider the founding affidavit only in the determination of the present application. In support of its argument the applicants referred to this Court two South African cases, namely, *Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA) and the hackneyed *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). To say that the Court should determine the application on the basis of the founding affidavit only because there is no opposing affidavit is *petitio principii*. It adds to nothing: it is labour lost. Be that as it may, the fact that there is no opposing affidavit does not entitle this Court to accept as sufficient evidence whatever they state in their founding affidavit. The width of the wording of rule 6(5)(f) is instructive. It says that where no answering affidavit is delivered within the period named in the notice of motion the applicant may after the expiration

of the said period apply to the Registrar to allocate a date for the *hearing* of the application. (Italicized for emphasis) Hearing means considering the papers filed of record; and that is what I shall do presently. In so doing, I shall treat seriatim each prayer in the notice of motion, and I shall then return to *Valentino Globe BV v Phillips and Another* and *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.

Prayer 1

[4] Mr. Hewat Samuel Jacobus Beukes and Mr. August Maletzky have applied for leave to intervene as second and third applicants, respectively. I find on the papers that the purported entitlement of Beukes and Maletzky to intervene in the present application is based on the following. As respects Beukes; the first applicant states in his founding affidavit (which is confirmed in Beukes's confirmatory affidavit –

> The Second Applicant is Hewat Samuel Jacobus Beukes an adult make, self-employed Labour Consultant, who in exchange for five (5) percent of the rights in the total claim against Fifth and Sixth Respondent rendered services to me since August 2007 and residing at Cnr. of Kroonwed and Dodge Avenue, Erf. 4479, Khomasdal, Windhoek.

And as respects Maletzky; the first applicant states in his founding affidavit (which is confirmed in Maletzky's confirmatory affidavit –

> The Third Applicant is August Maletzky an adult male employed in the capacity of Director at African Labour and Human Rights Centre, Suite 206, 2nd Floor, Continental Building, Independence Avenue, Windhoek. I have transferred

> five (5) percent of the rights in the total claim against Fifth and Sixth Respondent to the Third Applicant for services rendered since September 2007.

[5] The intervention of persons as plaintiffs or defendants is governed by the Rules of Court; and the particular part thereof provides:

> 12. Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant, and the court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.

[6] Thus, only one question arises for decision in these proceedings as respects intervention; and it is this: is Beukes entitled to join as an applicant; and is Maletzky entitled to join as an applicant? In other words; has Beukes or Maletzky placed sufficient evidence before the Court capable of establishing that he has an interest sufficient to entitle him to join as an applicant? That is to say, on the facts is the Court satisfied that Beukes and Maletzky would be entitled to bring the present application against the respondents?

[7] On the interpretation and application of rule 12 undertaken by the Court in *Yam Diamond Recovery (Pty) Ltd In re Hofmeister v Basson and Others* 1999 NR 206 it was said there that to be sound in law the interest sufficient to entitle a person to intervene must be a direct and substantial interest. Thus, an indirect (even if substantial) financial interest arising from

the first applicant's application against the respondents is not conclusive to afford Beukes and Maletzky the right to intervene as applicants. In this regard, Levy AJ said in *Yam Diamond Recovery (Pty) Ltd In re Hofmeister v Basson and Others* supra at 211I-212B thus:

> An indirect (even if substantial) financial interest arising perhaps from the outcome of plaintiff's action against the liquidators is not conclusive to afford applicant the right to be joined as a defendant. It must be in the sense formulated by Corbett J (as he then was) in the case of *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415F-H, in the following terms:
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> > 'In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) Horwitz AJP (with whom Van Blerk J concurred) analysed the concept of such a "direct and substantial interest" and after an exhaustive of the authorities came to the conclusion that "in the right which is the subject-matter of the litigation and ... *not merely a financial interest which is only an indirect interest in such litigation*". This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ... and is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court. ...'
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> (Levy AJ's emphasis)

I respectfully accept Levy AJ's dictum as a correct statement of law on the interpretation and application of rule 12 of the Rules, and so I adopt it in these proceedings, as I did in *Standard Bank Namibia Limited v Jeanetta Francis Amanda Maletzky* Case No. I 3656/2009.

[8] In the instant case, Beukes and Maletzky, as Mr Van Vuuren, counsel for the first-sixth respondents, submitted, have merely an indirect – it matters not if it is substantial – financial interest arising from the outcome of the first applicant's present application. And this is not conclusive to afford Beukes and Maletzky the right to intervene as applicants: they have no direct and substantial interest in the matters before the Court. I hold, therefore, that Beukes's and Maletzky's contention to entitle them to intervene is not sound in law. The application to intervene in terms of the notice of motion is accordingly refused with costs.

Prayer 2

[9] The applicants have prayed for an order condoning the applicants consolidation of applications against respondents 'for the purpose of a consolidated hearing'. Consolidation of application is governed by rule 11, read with rule 6(14), which make rule 11 apply *mutatis mutandis* to applications. In virtue of the said rule 6(14), for purposes of the present application, the singular word 'action' in rule 11 should be understood to stand for 'application', and the plural word 'actions' for 'applications'. The overriding test in regard to consolidation of actions or applications is convenience; that is, to say, in order to avoid multiplicity of actions and attendant costs. (Erasmus, *Superior Court Practice*: p. B-99, and the cases there cited) In this regard it has been said that rule 11 makes provision for the consolidation of actions and applications, not for the consolidation of issues. (Erasmus, ibid.) This principle of law is crucial to the determination of the relief respecting 'consolidation of application against respondents' in

these proceedings; and this principle of law leads me to the next level of the enquiry.

[10] The question that immediately arises for determination is this: what 'applications' is the applicant referring to in prayer 2 of the notice of motion? This is crucial, remembering that rule 11 concerns consolidation of applications, not issues. (Erasmus, supra, ibid.) I have had the opportunity of poring over the applicants' papers and I do not find any list of 'applications' that the applicants pray the Court to condone their consolidation, that is, in terms of prayer 2 of the relief sought in the notice of motion. Doubtless, without a list of such 'applications' clearly and unquestionably adumbrated and placed before the Court, the Court finds it impossible – not difficult – to determine judicially the relief in prayer 2 of the notice of motion. That is to say; without knowing what 'applications' are referred to by the applicants in prayer 2 of the noticed of motion, it is impossible for the Court to decide whether the same parties on both sides of the suit in all the said 'applications' are the same parties in the present application so as to avoid a situation where the consolidation would occasion prejudice to a concerned party in one application who or which is not concerned with any dispute that the applicant may have with the other parties.

[11] For example, in the instant case I am not persuaded at all that any dispute that the applicant has with the fifth respondent, a statutory body, governed by the applicable Act, concerns the rest of the respondents. By a parity of reasoning if the applicant has a grievance relating to alleged failure

or refusal of the seventh and the eighth respondents to carry out a statutory function under the applicable Act, by what legal imagination does the relief sought in Prayer 8 concern the rest of the respondents. What is more, the ninth respondent has been dragged to Court on short notice and yet none of the relief sought in the entire notice of motion even concerns the ninth respondent.

[12] For the aforegoing, I have not one iota of doubt in my mind that keeping the reasoning and conclusions thereanent prayer 2 in my mental spectacle; I shall be acting unjudicially and unjustly if I accepted the condonation application in prayer 2 and granted an order 'condoning the applicants' consolidation of applications against respondents.' It follows that the relief in prayer 2 of the notice of motion is also refused with costs.

Prayers 3, 4, 5, 6, and 7

[13] Case No. (P) (I) 2232/2007 referred to in prayers 3 and 4, which concerns action proceedings is not properly before this Court in these proceedings. This Court is rather seized with determining an application. This Court has not one jot or title of power in law in these proceedings to take decisions on a matter that it is not seized with; and it has absolutely no power in law to sit on appeal or review of a matter decided by the Court. Any such decision as aforesaid or anything done that amounts to arrogating to itself the power of review or appeal respecting a decision taken by the Court will be an irregularity and ultra vires and absolutely wrong. The argument by the applicants that the said decisions are void and therefore this Court should not bother itself with them has no basis in law. Only a Court of

competent jurisdiction can set aside a judgment of the Court. It is not open to a litigant to decide which decision of the Court is valid and binding. This view is so elementary and logical that I need not cite any authority in support thereof: the Constitution and the High Court Act, 1990 (Act No. 16 of 1990) speak for themselves as respects this point. It is, therefore, with unwavering certitude that I decline to grant the relief sought in prayers 3, 4 and 5 in the notice of motion. By a parity of reasoning; this Court shall also not grant the relief sought in prayers 5, 6 and 7, too. Indeed, it has been said that a court will not grant a declaratory order where the issue has already been decided by a court of competent jurisdiction. (Erasmus, supra at p. 1-34, and the cases there cited) For the aforegoing, I exercise my discretion in refusing the relief sought in prayers 6 and 7, too.

Prayer 8

[14] As I have said previously, this relief concerns only the seventh and eighth respondents: it does not concern the rest of the respondents. In the nature of prayer 8, the relief sought appears to be mandamus; that is, an order to compel the seventh and eighth respondents, which are statutory bodies, to carry out a duty imposed by the Legal Practitioners Act, 1995 (Act No. 15 of 1995); and for which, see *Gideon Jacobus du Preez v The Minister of Finance* Case No. A74/2009 (Judgment delivered on 25 March 2011) (Unreported) where, relying on authorities, I explained at pp. 4-5 that mandamus is one of the purposes of judicial review.

[15] I find that on the papers, as far back as 12 November 2008, the seventh respondent caused its Director to send to the eighth respondent an

urgent letter (copied to the second respondent, the third respondent and the applicant (*qua* complainant)). In that letter the seventh respondent requested the eighth respondent to investigate the conduct of the second and third respondents; upon the strength of a complaint the applicant had communicated to the seventh respondent. In this regard, in these proceedings, I am not interested in a judgment of the Court in another matter under Case No. A194/07 which the applicants referred to in their papers.

[16] Be that as it may, it seems to me clear that the seventh respondent did not sleep on the applicant's complaint; the seventh respondent took steps necessary to deal with the complaint in terms of Act No. 15 of 1995, and the applicant was informed of such action. Thus, the seventh respondent has carried out its duty under Act No. 15 of 1995. It remains for the eighth respondent to take over the baton and carry out its duty under that Act. That the eighth respondent has failed to do; and the applicant has approached the Court to compel the eighth respondent to carry out its statutory duty. It may have been more convenient for the applicant to have brought a separate mandatory interdictory application instead of lumping it up with the other prayers in the notice of motion. But I do not see any impediment in law for the applicant to take the route he has chosen; not least because the complaint that the applicant lodged with the seventh respondent is not unrelated to the facts of the present application and the applicant is a lay litigant. Consequently, I do not think the applicants should be driven from the judgment seat for making that choice of approaching the Court in this manner as respects prayer 8.

[17] On the papers and from my reasoning and conclusions respecting prayer 8, I find that a case has been made out for the grant of the relief sought thereunder; and so I think mandamus must issue to compel the eighth respondent to carry out its statutory duty in terms of Part IV of Act No. 15 of 1995.

All Prayers

[18] I decided to hear and consider the relief sought in prayer 8; not least because the evidence and allegations of fact on the papers are sufficient to make a judicial determination thereanent. It is on the same basis that I decided to hear counsel representing the first to the sixth respondents, and the ninth respondent on the rest of the application. This is not an ex parte application. In this regard it must be remembered that the application consists of evidence and not only allegations of fact (*Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA) at 779G), and the application is the applicants' and they alone bear the onus, on the evidence and allegations of fact on the papers, to satisfy the Court that they are entitled to the relief sought because they have made out a case for its grant. The respondents do not bear such onus. In this regard I do not accept the applicant's submission that in the absence of opposing affidavits this Court must willy nilly accept what is contained in the founding affidavit as the truth, entitling them to the relief sought. Such argument is not only over simplistic and self-serving; it is also fallacious. As I have said, the founding affidavit consists of evidence and allegations of fact and the Court is entitled to weigh them to see if the evidence is sufficient and the allegations proven to sustain

the relief sought. Besides, I do not read *Valentino Globe BV v Phillips and Another* and *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* supra as enunciating any principle of law that where no opposing affidavit is filed the Court must, without more, accept the averments contained in the founding affidavit as true.

[19] The applicants' understanding of *Valentino Globe BV v Phillips and Another* supra is, with the greatest deference, palpably wrong: the applicants misread the judgment; and I must say the applicants' misreading of the judgment is put in sharper focus when they decide to self-servingly and disingenuously refer only to one lone and naked sentence from the judgment, namely, 'The founding affidavit must be accepted as true (at 779G).' It would seem the applicants do not see and appreciate that that sentence is part of eight long sentences constituting one paragraph at 779F-G and so that paragraph and the rest of the paragraphs in the judgment must be read intextextually in order to understand what Harms AJ says in the judgment. *A fortiori*, I do not think Harms AJ is enunciating a principle of law in that one, lone and naked sentence: the sentence is part of a chain of the thought process of the learned Judge of Appeal, requiring one to read all the accompanying sentences in context and the entire judgment in order for one to get a true sense of what is being proposed there.

[20] For the aforegoing reasoning and conclusions, the application is dismissed with costs in respect of prayers 1, 2, 3, 4, 5, 6, and 7; and the application is granted with costs in respect of prayer 8 only.

[23] Whereupon, I make the following order:

(1) The application is dismissed with costs in respect of prayers 1, 2, 3, 4, 5, 6, and 7 of the notice of motion; and the costs must be paid by the applicants jointly and severally; the one paying, the other to be absolved –

(a) to the first, second, third, fourth, fifth, and sixth respondents, and such costs to include costs occasioned by the employment of one instructing counsel and one instructed counsel.

(b) to the ninth respondent; and such costs to include costs occasioned by the employment of one instructing counsel and one instructed counsel.

(2) The application is granted with costs – in the form of disbursements – in respect of prayer 8 only of the notice of motion; and such disbursements must be paid to the applicants by the seventh and eighth respondents jointly and severally; the one paying, the other to be absolved.

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PARKER J

COUNSEL ON BEHALF OF FIRST APPLICANT:	In person
COUNSEL ON BEHALF OF SECOND APPLICANT:	In person
COUNSEL ON BEHALF OF THIRD APPLICANT:	In person
COUNSEL ON BEHALF OF THE FIRST-SIXTH RESPONDENTS:	Adv A Van Vuuren
Instructed by:	LorentzAngula Inc.
COUNSEL ON BEHALF OF SEVENTH AND EIGHTH RESPONDENTS:	No appearance
COUNSEL ON BEHALF OF NINTH RESPONDENT:	Adv G. Hinda Mr J Ncube
Instructed by:	Government Attorney