REPUBLIC OF NAMIBIA

CASE NO. I 177/2010

HELD AT THE HIGH COURT OF NAMIBIA, MAIN DIVISION

In the matter between:

DEIDRE DAWN FAITH SCHROEDER	**APPLICANT**
and	
THE REPUBLIKEIN NEWSPAPER	**1ST RESPONDENT**
CHRIS JACOBIE	**2ND RESPONDENT**
RONELLE RADEMEYER	**3RD RESPONDENT**
NAMIBIA HEALTH PLAN	**4TH RESPONDENT**
TIAAN SERFONTEIN	**5TH RESPONDENT**

QUORUM: **DAMASEB, JP**

HEARD ON: 18 JULY 2012

DELIVERED ON: 23 JULY 2012

JUDGMENT

DAMASEB, JP: [1] The applicant seeks a declarator that the judgment given by Geier AJ (as he then was) on 15 March 2011, uplifting a bar operating against the 4th and 5th respondents and allowing them to prosecute their defence against the plaintiff's claim, be declared void. It is trite that declaratory relief is a discretionary remedy. The consequence thereof of is that even if a

case is made out for it, the Court may, in the exercise of its discretion - to be exercised – judicially - decline to grant it.[1]

[2] The background to this application is that the applicant filed a claim for damages against all the respondents (cited in the main action as defendants) for alleged defamation. All defendants entered appearances to defend in the main action and it is now at the pleadings stage. She proceeded to place the defendants under bar and applied for default judgment against 4th and 5th defendants who pleaded one day later than the date on which, in the terms of the notice of bar, they should have pleaded. Faced with the application for default judgment, 4th and 5th respondents successfully applied to Court to have the bar uplifted. Geier AJ (as he then was) lifted the bar. The applicant did not participate in those proceedings.

[3] The gravamen of the relief sought is that Geier A's J order lifting the bar is a nullity because the resolution of the 4th respondent and a power of attorney filed by LorentzAngula Inc. on their behalf on the instructions of a person purporting to act as a duly authorised agent of the 4th respondent in that behalf, were all invalid. The applicant is a lay-litigant acting In Person but has demonstrated knowledge of court process and case law bearing on the subject. It is quite apparent that she has acquainted herself with the workings of the Court.

[1] *Mushwena v Government of Namibia* 2004 NR 94.

[4] The 4th respondent is a medical insurance while the 5th respondent is a natural person. Being a corporate entity, the 4th respondent can only act through a natural person who must be duly authorized thereto.

[5] It is common cause that the 4th and 5th respondents (4th and 5th defendants in the main action) failed to file a plea timeously and the plaintiff delivered a notice of bar on 12 May 2010. The 4th and 5th respondents (defendants in the main action) then delivered a plea on 21 May 2010, one day late. The applicant (plaintiff in the main action) then brought an application for default judgment dated 18 August 2010. The 4th and 5th respondents then successfully brought an application to uplift the bar. The applicant brought the present application seeking a declarator that Geier AJ's order is void. The prayer reads:

> *"1. That the High Court judgment, heard and delivered on 15 March 2011, be declared void;*
>
> *2. Costs*
>
> *3. Further and/or alternative relief."*

[6] The reasons for the requested order are set out in the founding affidavit as follows:

> *"6.* ***THE REASONS FOR THE REQUESTED ORDER***
>
> *6.1* ***RESOLUTION OF DEMOCRATIC MEDIA HOLDINGS (marked "D2"0***
>
> *6.1.1 This is neither a proper resolution of the Board of Directors of Democratic Media Holdings (Pty) Ltd, nor a proper resolution that a decision has been taken by the Board of Directors to instruct Attorneys Koep and Partners to defend an action in the High Court of Namibia against Deidre Dawn Faith Schroeder. [Emphasis added]*

6.2.2 The attached copy of the "resolution" is rather that of Mrs Christina Magdalena Greeff's insofar as she is the sole signatory of the "resolution".

6.1.3 There is nothing before court from Democratic Media Holdings (Pty) Ltd which attests to Mrs Greeff's claim as being "Managing Director."

6.2 RESOLUTION OF NAMIBIA HEALTH PLAN (marked "D3")

6.2.1 This is neither a proper resolution of the Board of Directors of Democratic Media Holdings (Pty) Ltd, nor a proper resolution that a decision has been taken by the Board of Directors to instruct LorentzAngula Inc, to defend an action in the High Court of Namibia against Deidre Dawn Faith Schroeder. [Emphasis added]

6.2.2 Secondly, it is void on the basis that it is not signed by all the trustees of the Board of Trustees.

6.2.3 Thirdly, there is nothing before court from Namibia Health Plan which attests to her claim as being the "Principal Officer".

7. GROUNDS FOR DEFENSE AND PROSPECTS OF SUCCESS

7.1 For reasons given above, the requirements of Rule 7(2) and (4) of the Rules of the High Court have not been complied with. Rule 7(2) requires that the notice of intention to defend shall be pari passu filed with a power of attorney authorizing the legal practitioner to defend and, Rule 7(4) requires that "proof of authority to sign on behalf of such party shall be produced to the registrar who shall note that fact on the said power"

[7] The applicant submits that the two resolutions in question are 'void for lack of authority'.

IS THE RELIEF SOUGHT SUPPORTED BY THE EVIDENCE?

[8] The first question that arises in this proceeding is whether the evidence relied on in support of the application brought on notice of motion can justify the relief being sought. That is so because the resolution being impugned is said to be that of "Democratic Media Holdings" while the 4th respondent is cited as Namibia Health Plan - on the face of it a juristic person separate from Democratic Holdings which it appears (having regard to the pleadings filed of record to date) is the owner of the *Republiken* cited in the main case as the first defendant and being sued for alleged defamatory matter published in that paper. Curiously, this aspect is not taken up by the legal practitioners for the respondent, either in the notices filed to raise legal objection, or in argument. In reference to the resolution of Namibia Health Plan the applicant stated in her affidavit (para 6.2.1) as follows:

> *"This is neither a proper resolution of the Board of Directors of* ***Democratic Media Holdings (Pty) Ltd****, nor a proper resolution that a decision has been taken by the Board of Directors to instruct LorentzAngula Inc, to defend an action in the High Court of Namibia against Deidre Dawn Faith Schroeder."*

[9] In her founding affidavit the applicant refers to the 4th respondent as "a medical insurance company registered in terms of the relevant insurance laws of the Republic of Namibia with its main place of business at Hidas Centre No. 21, Nelson Mandela Avenue, Klein Windhoek, Republic of Namibia." She refers to the fifth respondent as a "major male person employed as Head of the Medscheme Namibia (Pty) Ltd…owned and controlled by the 4th respondent." It is clear from the pleadings that the 5th respondent is being sued in his personal capacity. The question of a resolution therefore does not and cannot arise in relation to him; yet the applicant's papers do not make that clear.

[10] More generally, the parties are said in the application to be the applicant, Ms Deidre Dawn Faith Schroeder, and the respondents the following:

(a) Republikein , a newspaper, as first respondent;

(b) Chris Jacobie employed by the first respondent as ' Editor in Chief', as second respondent;

(c) Ronelle Rademeyer employed by the first respondent as a 'reporter', as third respondent;

(d) Namibia Health Plan, a medical insurance company, as fourth respondent; and

(e) Tiaan Serfontein employed by Medscheme Namibia (Pty) Ltd.

The application does not say why all these entities and individuals are cited and against which of them the relief is sought; yet the notice of motion seeks 'costs' in addition to the order for declaratory relief previously mentioned. From the applicant's written heads of argument it is clear that she wanted all respondents to oppose the relief she seeks. In paragraph 5 of the heads she records: *"First point in limine: The 1st, 2nd, 3rd and 5th defendants did not oppose the application."*

[11] The manner in which the application has been brought and the relief framed is all the more confusing if regard is had to the fact that the judgment that is the subject of the application related to an application brought by the 4th and 5th respondents (only) to uplift a bar which operated against them at the instance of the applicant. Geier AJ uplifted the bar operating against 4th and 5th respondents and the remainder of the respondents in the present application were not affected by that judgment. Yet they are cited in the present proceeding without it being explained why. The application is directed to the Registrar (as it must) and to the legal practitioners Koep & Partners and LorentzAngula Inc. Koep & Partners are said to represent 1st

to 3rd respondents, while LorentzAngula Inc are said to represent 4th and 5th respondents. As already stated, in her heads of argument the applicant makes special mention that the 1st to 3rd respondents did not oppose the application. The reasonable inference is that she expected them to oppose. She does not explain why they should have opposed the present application brought by her in a matter that does not concern them.

[12] The following difficulties face the applicant in light of the facts summarised above:

(a) the resolution that is impugned is not shown on the papers to have any relationship to the 4th respondent;

(b) the application is materially defective in that no explanation is given for the inclusion of parties who were not affected by the judgment sough to be impugned, without it being apparent, or explained, why they were cited and why (on the face of the application) costs are sought against them;

(c) although the judgment concerned related to 4th and 5th respondents, the issue of a resolution had no bearing on the 5th respondent who is sued in his personal capacity. On what basis must he be denied the benefit of the judgment of Geier AJ simply because the 4th respondent may have been represented on the basis of an invalid resolution?

[13] The following further matters are worth mentioning as regards the application. In the narrative forming part of his judgment uplifting the bar, Geier AJ says the following (at para [21] of the judgment:

It appears that the 1st respondent has some knowledge of the Rules of Court and that she was therefore able to draft an Application for Default Judgment in which she also discloses technical expertise in that she attacks the validity of the applicant's notice to defend as same was delivered allegedly without a valid resolution and power of attorney". [My under lining for emphasis]

And in para [22] the learned judge stated:

"The 1st respondent was also competent enough to file the Notice of Bar which has become the central point of focus of this application".

[14] That the issue now before me was an issue which properly merited being raised before Geier AJ therefore admits of no doubt. The applicant not only failed to file opposing papers to deal with the alleged invalid resolution and power of attorney so that same could be considered by Geier AJ when he heard the application for upliftment of bar, but she chose not to participate in the hearing where the notice of bar was considered. Even if she did not file opposing papers she could have raised legal objection to the resolution and the power of attorney.[2] The present application therefore seems more like an attempt to appeal or reverse the decision of Geier AJ based on defences/grounds which existed, but not raised, when the application for upliftment of bar fell for determination. It is impermissible for judges of this Court to sit on appeal against, or review of, each other's judgments and orders. In *Eger v Eger*[3] Strydom JP said at .128:

"Under these circumstances I must agree with Miss Vivier that the present application is no more than an attempt to reverse the order of this Court previously granted without indicating any changed circumstances between then and now. Even if this matter is approached on the basis of good cause shown, the answer would in my opinion be the same and, on the evidence placed before me, I would be

[2] "It is open to a party to argue any point of law based on the factual allegations in the papers without referring to those points of law in the papers themselves": per Van Niekerk J in *Grobbelaar v Council of the Municipality of Walvis Bay* 2007 (1) NR 259 at 269, para [40]H-J.
[3] 1997 NR 126 at 127F.

exercising functions sitting as an appeal Court if I should in any way change the order given by my brother Teek."

[15] There is no explanation in the applicant's papers why she did not deal squarely with the issue in proceedings then serving before Geier AJ. The objection to the resolution and power of attorney was just as valid leading up to the application for upliftment of bar as it is now. It has been held in the context of vexatious proceedings that it is vexatious to take only one of several defences at a time and that all should be taken together.[4] By parity of reasoning, it is an abuse of the court's process to choose not to raise a perfectly legitimate objection when that is called for and to raise that very point post-judgment. As a matter of public policy, the court cannot come to the assistance of a party that abuses its process, especially because the remedy of a declarator is in the court's discretion.

[16] That conclusion is buttressed in *casu* because the issue sought to be raised is really a non-issue –or at least has become so in view of the common cause fact that the fourth respondent has since filed a resolution ratifying the appointment of the present legal practitioners and the steps taken by them in defence of the matter. The resolution by the trustees of the 4th respondent dated 15 March 2012, inter alia, states:

"3. In so far as the authority of the Principal Officer from time to time to take any of the steps already taken by her in defending the matter, and the authority of LorentzAngula Incorporated to act on behalf of NHP may be challenged now, the trustees hereby ratify all and any steps taken by the Principal from time to time and Lorentz Angula Incorporated in this matter as if specifically authorized at a prior meeting of trustees."

[4] Willow House (Pty) Ltd v Sieg 1945 CPD 355

[17] Even on the assumption that the impugned resolution and power of attorney were invalid at the time, the relief cannot be granted in view of (i) the deficient nature of the application, (ii) the abuse of the court's process and (iii) the fact that the issue complained about has since become moot in view of the ratification by the fourth respondent of the steps taken by LorentzAngula, Inc in defence of the case on its behalf. A party to litigation has no right to prevent an opponent from correcting a procedural defect, unless doing so will affect vested rights.[5]

Costs

[18] The respondents who are legally represented did not raise objection to the application on the bases that I have set out in this judgment. They should have because those aspects are dispositive of this application and make it unnecessary to even consider if the judgment is void as claimed by the applicant. It is trite that a party must take such points as are necessary to end litigation and to curtail proceedings. Therefore, in *Tsamaseb v Tsamaseb*[6] a party who failed to except to particulars of claim without reasonable grounds had their costs limited for the failure to do so.[7] The respondents must suffer the same fate here.

[5] *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 at 954 B-H
[6] 2007 (1) NR 117(HC)
[7] Compare Channel Life Namibia v Finance in Education (Pty) Ltd 2004 NR 125 at 123E-J and 133A-B.

The order

[19] Accordingly, I make the following order:

A. In respect of the application

1. The application is dismissed
2. There shall be no order as to costs.

B. In respect of further case management

3. The parties in the main action are directed to meet within 10 days from this order and to generate a joint report setting out proposals for the further conduct of the case in light of the present judgment. Such report is to be filed no later than 5 days before the date mentioned in paragraph 4 below and shall address the issues set out in subrule (5) of rule 37.
4. The case is set down for case management in terms of rule 37(10) for 18 September 2012 at 8h30 for consideration by the managing judge of the parties' joint proposal, and for further directions.

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DAMASEB, JP

ON BEHALF OF THE APPLICANT:	In Person
ON BEHALF OF THE 4TH & 5TH RESPONDENTS:	Mr P Barnard
Instructed By:	**LorentzAngula Inc.**