'Reportable'

SUMMARY

CASE NO.: A 244/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES AND OTHERS *v* LORENTZANGULA INC. AND OTHERS

PARKER J

2012 March 22

Practice - Applications and motions – Application for leave to appeal from order of the Court – Court explaining difference between final judgment or order and interlocutory judgment or order – In instant case, Court finding that the order the applicants have applied to appeal from is a final order because that order is definitive of the rights about which the parties are contending in the application that was then before the Court and, therefore, the relief sought therein – Consequently, Court concluding that the present application is not necessary and is not required in terms of s. 18(3) of Act No. 16 of 1990 – Accordingly Court dismissing application with costs.

Practice - Applications and motions – Application for leave to appeal from order of the Court – Court finding that the Court not entitled to consider any other matter not before the Court and therefore outwit the instant application.

Costs - Costs – On the scale as between attorney and client – Relying on authority Court finding that by bringing the application the applicants may have been misadvised but their conduct has not reached the point where the Court may be justified in exercising its discretion to award costs on the scale as between attorney and client.

Held, that the order that the applicants now in the instant proceedings apply for leave to appeal from is a final order because it is definitive of the rights about which the parties are contending in the application that was then before the Court and, therefore, the relief sought therein; and that an order is final which determines the matter in dispute.

Held, further, that the fact that an order is conclusive as to the subordinate or preliminary matter with which it deals does not make such order conclusive of the main dispute or conclusive of the final rights of the parties, which a decision in due course is to determine; and that such an order is an interlocutory order.

Held, further, that the test as to whether an order is final or interlocutory was the nature of the application to the court; and not the nature of the order which the court made.

Held, further, that it would be wrong and unjudicial on any count – in terms of the Namibian Constitution and the High Court Act, 1990 (Act No. 16 of 1990) and the Rules of Court – for the Court to determine any other issue outwit an application that was instantly before it.

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 BEUKES	**2nf 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: 2012 January 23

Delivered on: 2012 March 22

JUDGMENT

PARKER J: [1] The applicants have brought an application by notice of motion issued from the Court on 6 May 2011 for leave to appeal the order of the Court made on 15 April 2011('the 15 April 2011 order') in a judgment delivered the same day ('the 15 April 2011 judgment') under Case No. A244/2007. The first to

sixth respondents ('the respondents') have moved to reject the application. The first applicant appears *per se*. There is no appearance by the second applicant *per se* or by counsel; likewise the third applicant.

[2] At the commencement of the hearing the first applicant informed the Court that the third applicant had gone to Cape Town, South Africa, for medical attention. No credible proof in that behalf was placed before the Court. As to the second applicant's position; with the greatest deference to the second applicant, I only take a fleetingly perfunctory look at the second applicant's 'For FILING' communication that found its way on the file of the present matter. It is, with respect, irrelevant and otiose; it is labour lost: it is not an affidavit (or an annexure to an affidavit) within the meaning of rule 6 (1) of the Rules and so it has no probative value in these proceedings. Accordingly, I conclude that no good cause has been shown by the second and third applicants why they did not appear in court for the hearing of an application which, together with the first applicant, they themselves have dragged the respondents to court to meet and for which on 17 January 2012 all three applicants jointly filed heads of argument. I do not, therefore, find any good reason why the train of justice should wait for the second and third applicants to board at their whim and pleasure and convenience. In the circumstances, to wait for them would be unjustifiable and also prejudicial to the respondents.

[3] I must reiterate the point here – as I did at the commencement of the hearing of this application – that the only burden of this Court *in casu* is to determine an application for leave to appeal under Case No. A244/2007 which was brought on 6 May 2011, not least because it is this application which, as I have said previously, the respondents *in casu* have been brought to court to meet;

and *a fortiori*, it would be wrong and unjudicial on any count – in terms of the Namibian Constitution and the High Court Act, 1990 (Act No. 16 of 1990) and the Rules of Court – for this Court to determine any other issue outwit the application instantly before it. In this regard I rehearse hereunder what I said in my 15 April 2011 judgment, and I mention in parentheses that the Constitution and the law on the point under consideration have not been amended or repealed since 15 April 2011, and so nothing has changed:

> '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.'

For all the aforegoing, it is with firm confidence that I respectfully reject the applicants' submission that this Court should disregard orders previously made by the Court and 'deal *de novo*' with matters that had been determined by the Court and which do not concern the present application at all. I have said *ad nauseam* that as far as the present proceedings are concerned this Court is only entitled to determine the application only now before it, which is an application for leave to appeal the Court's 15 April 2011 order. I, therefore find that the South African cases referred to the Court by the applicants (i.e. *Tödt v Ipser* 1993 (3) SA 577 (A); *Virginian Cheese and Food Company (1941) Pty Ltd v Minister of Agricultural Economics and Marketing and Others* 1961 (1) SA 229 Appendix II (T)) are of no assistance on the point under consideration and so, with the greatest deference to the applicants, I will not waste precious time reviewing them.

[4] It is the submission of Mr. Philander, counsel for the respondents, that the 15 April 2010 order is not an interlocutory order but a final order on account of the fact that that order disposed of the application then before the Court on the merits and, therefore, the relief sought therein; *ergo*, the applicants do not require the leave of the Court to appeal from that order to the Supreme Court. And what is the argument on the other side? Only that, 'the said application (relating to the 15 April 2011 judgment) was heard as an interlocutory application in that the relief sought are matters incidental to the main dispute, namely, that the rescission judgment obtained by the "respondent" is void.' This argument is, with respect, superlatively baseless at best and disingenuous at the opposite end. In the 15 April 2011 judgment the Court made it abundantly clear as follows:

> '[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.'

Additional to the above-quoted para [13] of that judgment is the following sentence in para [2] of the selfsame judgment:

> 'For the avoidance of doubt I must signalize the point that the present proceedings concern Case No. A244/07 only'.

Thus, from the aforegoing passages from the 15 April 2011 judgment, it must be abundantly clear to any fair-minded reader of that judgment that that judgment and the order therein do not treat any 'rescission judgment'.

[5] As far as the present application for leave to appeal is concerned, the interpretation and application of s. 18 (3) of Act No. 16 of 1990 are apropos. Section 18 (3) provides:

> 'No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.'

The pith and marrow of the interpretation and application of s. 18 (3) of Act No. 16 of 1990 are simply that a party is not required to apply for leave of the Court to appeal from the Court's final order or judgment to the Supreme Court. Such judgment or order is appealable as of right. (See the high authority of Strydom AJA in *Minister of Mines and Energy v Black Range Mining* 2011 (1) NR 31 (SC) at 51A-B.) In *De Beers (Pty) Ltd v Jacobus Izaaks* Case No. LCA 28/2008

(Unreported) at pp. 3-4 I discussed *in extenso* the difference between a final order or judgment and an interlocutory order or a judgement thus:

> 'Counsel argued that the learned chairperson's decision granting approval for the lodging of the complaint by the respondent out of time "is a final order in that proceeding and even if it is interlocutory it irrevocably determined the rights of the parties." This circular argument, with the greatest deference, does not add any weight. It has been said authoritatively in 22 *Halsbury* (3 edn): para 506 that an order which does not deal with the final rights of the parties is termed "interlocutory"; and "it is an interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals." Thus, the fact that an order is conclusive as to the subordinate or preliminary matter with which it deals does not make such order conclusive of the main dispute or conclusive of the final rights of the parties, which a decision in due course is to determine. (See *Re Gardner, Long v Gardner* (1894) 71 LT 412 (CA); *Blakey v Latham* (1889) 43 Ch D 23 (CA); *Kronstein v Korda* [1937] 1 All ER 357 (CA); *Guerrera v Guerrera* [1974] 2 All ER 460 (CA); *Salter Rex & Co. v Ghosh* [1971] 2 QB 597 (CA).) As Lord Esher, MR stated in *Standard Discount Co v La Grange* (1877) 3 CPD 67 (CA) and *Salaman v Warner* [1891] 1 QB 734 (CA), the test was the nature of the application to the court; and not the nature of the order which the court made. I respectfully subscribe to those views.'

[6] An order is final which determines the matter in dispute. I hold that the 15 April 2011 order is final: it is conclusive of the main dispute or conclusive of the final rights of the parties which were the subject matter of the application that was brought to the Court and, *a priori*, no decision in due course is to determine that dispute or those rights after the making of the 15 April 2011 order. Moreover, it is as clear as day that the nature of the application whose determination resulted in the 15 April 2011 judgment and order indicates indubitably that the applicants sought a final order: that judgment deals with the merits of the Case A244/2007 and consequently it is definitive of the rights about which the parties are

contending in the application under that case which was heard on 4 March 2011 and from which the 15 April 2011 judgment and order ensued. For all the aforegoing, I come to the irrefragable and reasonable conclusion that I must accept Mr Philander's submission that the 15 April 2011 order is a final order: it is final and definitive of the rights of the parties in *that application* and therefore appealable as of right. (Italicized for emphasis) (*Minister of Mines and Energy v Black Range Mining* supra) I, therefore, find that the present application is not necessary or required in terms of our law.

[7] Of the view I have taken of this case, it serves no purpose to consider Mr Philander's submission that the filing notice by the applicants relating to some disciplinary proceedings be removed from the present proceedings as it forms no part of the present application. I have not taken cognizance of any such notice. The preponderance of factors I have taken into consideration are unaffected by it.

[8] It remains to consider the question of costs. Mr Philander submits that the application should be dismissed with costs on the scale as between attorney (legal practitioner) and client. The applicants may have been misadvised in bringing the present application but I do not think by so doing their conduct – for now (and I must underline 'for now') – has reached the point where the Court may be justified in exercising its discretion to award costs on the scale as between attorney and client. (See *South African Bureau of Standards v GGS/AU (Pty) Ltd,* cited with approval by the Court in *Willem Adrian Van Rhyn N. O. v Namibia Motor Sports Federation and Others* Case No. A36/200(Unreported).)

[9] For the aforegoing reasoning and conclusions, I hold that the instant application is not necessary and is not required, as a matter of law. To hold

otherwise is to misunderstand and go against a clear and an unambiguous statutory provision, as set out previously. Whereupon, the application for leave to appeal is dismissed with costs on the scale as between party and party; and the applicants must pay the costs jointly and severally, the one paying the other to be absolved.

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PARKER J

ON BEHALF OF THE APPLICANTS:	Mr H Christian In Person
COUNSEL ON BEHALF OF THE 1ST – 6TH RESPONDENTS:	
	Mr S R Philander
Instructed by:	LorentzAngula Inc.