REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 9/2013

In the matter between:

AUGUST MALETZKY **APPLICANT**

and

THE MINISTER OF JUSTICE **1ST RESPONDENT**
THE ATTORNEY-GENERAL **2ND RESPONDENT**
STANDARD BANK NAMIBIA LIMITED **3RD RESPONDENT**

Neutral citation: *Maletzky v Minister of Justice* (A 9/2013) [2013] NAHCMD 316 (08 November 2013)

Coram: CHEDA J
Heard: **17 and 25 September 2013**
Delivered: **08 November 2013**

Flynote: Rule 30 application is a must for a party who is of the view that the other party has taken an irregular step or proceeding – Court will only grant the application if its failure to do so will result in prejudice to respondent – Where applicant's actions amount to a nullity such nullity cannot be revived by the court.

Flynote: Practice directives and rules of the court should be complied with by all litigants – Any party with a direct and substantial interest in a matter should be joined to the proceedings unless it has waived its right in that regard – A legally qualified person even though not registered to practice law cannot claim to be a lay person to an extent of being exempted in as far as his understanding of legal procedures, rules and practice directives of the courts are concerned.

Summary: Applicant alleged the unconstitutionality of Rule 45 (12) (h) and (i) of the Rules of the High Court under which the court is empowered to carry out a judiciary enquiry of a judgment debtor's ability or otherwise of paying his/her debt. Third respondent applied for dismissal of the said application on the basis of an irregularity being non-compliance with the rules of the court and practice directives. Applicant argued that he had substantially complied with the rules of the court but was not bound by the practice directives as these were for registered legal practitioners. Although he was legally trained and holds a BCom degree (in law) and an LLB degree, though not registered to practice law he regarded himself as a layman who was not privy to the goings –on in the courts.

ORDER

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1. That Rule 30 application is granted.
2. That applicant shall pay the costs of suit and such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

CHEDA J [1] Applicant lodged an application before this court on the 16th of January 2013 where he sought the following relief:

(1) Condonation of non-compliance with the rules of court;

(2) Declaration of the unconstitutionality of Rule 45 (12) (h) and (i) of the High Court Rules;

(3) Costs of the application if opposed.

[2] The brief background of this matter which has given rise to this application is that applicant is a judgment debtor in a matter where third respondent is a judgment creditor.

In terms of Rule 45 (h) and (i), of the rules of court, the court is empowered to carry out a financial enquiry on a judgment debtor in order to ascertain his ability or otherwise to liquidate its debt to the judgment creditor. Rule 45 (h) provides:

> *"(h) Whenever a court gives judgment for payment of a sum of money against a party (hereinafter called 'the debtor') the court may forthwith investigate whether the debtor is able to satisfy the judgment and for that purpose may require the debtor's attendance to give evidence on oath, and to produce such documents as the court may direct, and allow the judgment creditor to adduce such evidence as the court may think fit*".

Whereas (i) provides:

> *'(i) the judgment creditor may by notice call upon the judgment debtor to appear before the court on a day fixed by such notice, and to produce such documents as may reasonably be necessary, in order that the court may investigate his or her financial position, and any debtor who, having been served with such notice, fails without good cause to appear, may be personally attached for contempt of court and whenever the debtor appears pursuant to such notice the court may proceed as set forth in the preceding paragraph*.'

[3] It is applicant's contention that application of the above stated rule is in violation of his rights as enshrined in article 12 (1) (a) and (f) of the constitution of Namibia which provides thus:

> *'(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.*'

'(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such person's testimony which has been obtained from such persons in violation of Article 8 (2)(b) hereof.' This matter is yet to be argued before the court.

[4] The third respondent filed a Rule 30 application which deals with irregular proceedings. Third respondent has attacked applicant's 'application on three grounds and I shall deal with then *seriatim*.

(A) ***Service***

(1) It was Mr Van Vuuren's argument that applicant did not comply with Rule 6(5)(a) of the court. Which deals with service of applications other than exparte applicants.

(B) Non-joinder – It is third respondent's argument that applicant failed to join other interested parties bearing in mind that his prayer with regards to the declaration of Rule 45 (12) (h) and (i) of the Rules of the High Court as unconstitutional has an adverse effect on other interested parties, namely the Judge President, the Registrar of the High Court, the President of the Republic of Namibia, the Deputy Sheriffs in other districts, the Law Society of Namibia and various other institutions and parties. Mr Van Vuuren further referred the court to the provisions of rule 6(2) which stipulates how a Notice of Motion shall be addressed. The said rule reads:

'*6. (1) …..*

(2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such person, otherwise it shall be addressed to the registrar only'

It is his further argument that applicant's failure to join other interested parties renders it an improper application which should not be placed before the court.

(C) Condonation of non-compliance with the Rules of the court and practice directives – It is his submission that applicant has failed to make any allegations establishing good cause for the court to condone his non-compliance with the rules. This, according to him has resulted in third respondent's suffering prejudice in these proceedings as it does not know what case it has to meet.

[5] In response to this application, Mr Maletzky who is a self-actor, admitted that indeed he did not comply with the requirements of the practice directives. His argument is that he genuinely believed that these requirements only apply to legal practitioners, of which he is not. He argued that rules of court should be distinguished from practice directives. He submitted that in as much as he has an extensive experience with court matters that does not qualify him to be a legal practitioner to an extent that he is expected to comply with practice directives. In fact he regards himself as a layman.

[6] With regard to the question of the joinder/citation, Mr Maleszky admitted that the parties that were cited include the Minister of Justice and the Attorney General. He further admitted that the rule requires the citation of parties with direct and substantial interest, but, he had not cited them because he was of the strong view that notification of interested parties should not necessarily be by court process, but that a letter will suffice as he did by sending a letter to the Judge President. He referred the court to a matter before this court, but, yet to be finalized. This unfortunately cannot be considered as it is not an authority

He further argued that his citation of the Minister of Justice is adequate and as such it was not necessary to cite the Registrar of the High Court as the Minister of Justice is the appointing authority of the Registrar of High Court, Attorney General and other Ministry of Justice related officials. With regard to the Law Society he stated that he saw no reason why he should cite the Law Society *per se* as any legal practitioner involved in this matter is a member of the Law Society and the Law Society will eventually know of this issue and can challenge it through its own members who will ultimately advise the Law Society. He was so adamant that he stated:

> '*my Lord, in respect of the Law Society, with the greatest of respect my lord, I fail to see the relevance of them being cited in this matter*.'

[7] I should point out from the onset that third respondent is no longer challenging the question of service of the process. Therefore, there is no need for me to consider it. The only issues which fall for determination are the non-joinder and non-compliance with the rules of court.

[8] With regards to non-joinder, Rule 10 (1) of the rules of the High Court provides that:

> *'(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he or she brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing the same question of law of fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing*.'

Whereas Rule 10 (3) provides that:

> *'(3) Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any or the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action*.' (my emphasis)

At the center of these rules is the similarity of the question of law and fact.

[9] The catch phrase therefore is 'substantially the same question of law or fact'. Applicant seeks a declarator to the effect that the financial enquiry which the third respondent intends to carry out under rule 45 (12) (h) and (i) of the Rules of the High Court is unconstitutional as it infringes his constitutional rights which are protected under article 12 of the Namibian Constitution.

While he acknowledges that indeed he did not cite the Judge President etc. he is adamant that firstly with regard to the Judge President, a letter to him highlighting his concern about his perceived infringements of his rights was adequate. The same applies to the citation of the Minister of Justice as his view is that as the minister appoints these officers, service on him is service on all of them as well. Therefore such service should be deemed as proper service.

[10] A direct and substantial interest is an interest in the right which is the subject matter by the litigant and not merely a pecuniary interest, see *Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*[1]. Our courts have in the interest of justice, adopted a strict approach to the need for joinder of parties with direct and substantial interest to an extent that when that need becomes apparent, they will ensure that interested parties are afforded an opportunity to be heard. This of course, is in line with the time honoured and revered principle of *Audi Alteram Partem* rule, see *Exparte Body Corporate of Caroline court* [2] and *Pretorius* v *Slabbert*[3].

[11] The relief sought by applicant has far reaching consequences as it affects the entire social, political, legal, commercial and economic strata of the nation. The parties who have not been cited are necessary parties as their non-joinder will no doubt result in serious prejudice to them. The relief sought has an adverse effect on all interested parties and even if that issue had not been raised by third respondent, the court is still empowered to raise it *moro motu* in order to safeguard the interest of third parties, see, *Amalgamated Engineering Union v Minister of Labour*[4]. In that case the court made it clear that where the need for joinder becomes apparent, the court has no discretion and will not allow the matter to proceed without a joinder or the giving of judicial notice of proceedings to the other party. This principle has been authoritatively followed by our courts and has stood the test of time. The court can only exclude the other party if it is satisfied that the said party has waived its right to be joined. In *casu,* third respondent has established the necessity of a joinder. I, therefore, find an immediate difficulty in finding that an issue such as this can be ignored unless the parties themselves have categorically waived their legal rights not be joined.

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[1] Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1993 (2) SA 737 (NM).
[2] Exparte Body Corporate of Caroline court 2001 (4) SA 1230 (SCA).
[3] Pretorius v Slabbert 2000 (4) SA 935 (SCA) at 939C-F.
[4] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A).

[12] In the event of third parties waving such rights, such a waiver should be a free and informed choice. The application for Rule 30 finds comfort in this application as the parties are necessary and have direct and substantial interest, see *Skyline Hotel v Nickloes*[5]. Any party with such interest should be notified in terms of the acceptable and normal procedure provided for by the rules of the court unless the court directs otherwise. In an attempt to notify the Judge President and the President of the Republic of Namibia, he addressed a letter to the Judge President in the following manner: and copied to His Excellency the President of the Republic of Namibia.

> '*Office of the Judge President*
> *High Court Building*
> *Luderitz Street*
> *Windhoek*
> *Republic of Namibia*
>
> *Att: Honourable Judge-President Petrus N. Damaseb*
>
> *Dear Sir,*
>
> ***RE: NOTICE OF MOTION DECLARING RULE 45 (12) UNCONSTITUTIONAL CASE NO: A 9/2013****.*
>
> *Above matter refers.*
> *Receive undercover hereof copies of the Notice of Motion filed of record with the Registrar of the High Court.*
>
> *The purpose hereof is to solicit your intervention in the foregoing case as you may have an interest therein, refer to:*
>
> *Intervention Application by the Judge President in Case NO: 324/2011 in the matter between the Ombudsman and others and Government of Republic of Namibia and others.*
>
> *We trust you find the above in order.*
>
> *Yours respectfully,*

[5] Skyline Hotel v Nickloes 1973 (4) SA 170 E at 171.

(Signed)

African Labour and Human Rights Centre
Per AUGUSTY MALETZKY

CC: PRESIDENT OF THE REPUBLIC OF NAMIBIA
HIS EXCELENCE HONOURABLE HIFIKEPUNYE POHAMBA
STATE HOUSE
ROBERT MUGABE AVENUE
WINDHOEK
REPUBLIC OF NAMIBIA'

[13] The fact that applicant wrote a letter to the Judge President and copied it to His Excellence the President of the Republic of Namibia is a clear indication that he was alive and conscious of the need to alert them of his intention to challenge the constitutionality of rule 45. The thought was indeed in order as this is his constitutional right to do so. The only issue is the manner of alerting them which was not properly carried out. The law provides the manner in which this should be done.

[14] The letter in my view seeks the Judge President's administrative intervention and cannot in my opinion be said to be a court process as envisaged by the rules and common practice of these courts.

[15] The parties referred me to various case authorities of which I am grateful.

[16] The first point is that applicant has not made an application for condonation, apart from mere reference to it. The correct legal position in our jurisdiction is that condonation should be applied for and applicant must give a satisfactory explanation on his founding papers for his failure to comply with the rules or to act timeously. Rule 27 of the Rules of court provide for condonation of non-compliance with the rules of court on good cause shown. In *casu*, there is no such application and therefore there is no case which was made out for condonation.

[17] Mr Maletzky argued that he is a layman and as such he deserved to be treated as such which ultimately means that he should be exempted from normal compliance with rules and practice directives. These courts have for time without number held that rules of court should be complied with. In *Belete Worku v Service air/Equity Aviation (Pty) Ltd and others*[6] (Unreported judgment of the High Court of Namibia) Miller, AJ at page 5 had this to say:

> '*The rules of court are not mere technicalities, they are substantiative rules of law with which applicants who approach the courts must comply and the applicant will do well to bear that in mind in seeking justice in the courts*.'

[18] These courts have previously held that all litigants are expected to comply with rules of court, that in my view includes practice directives, see *Magistrate's court v Minister of Justice and another*[7]. I may go further and state that practice directives are a necessary cog in the wheels of justice. Their impact on the smooth running of the judicial system cannot be played downed, as doing so will adversely affect the very aim and object of uniformity and predictability by all litigants. Any litigant who fails to comply with them and fails to offer a reasonable explanation for such failure stands the risk of a censure by the courts. All litigants should observe rules. In the matter of *Trans-African Insurance Co. Ltd v Maluleka*[8], Schreiner JA remarked:

> '*No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice*.'

This, therefore, stands to reason that all litigants are obliged to comply with all the rules and practices prevailing in the courts.

[19] The party which is aggrieved by non-compliance of the rules is entitled to certain remedies which the court can on its discretion order, see, *Sasol Industries (Pty) ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Martinusen.*[9]. In as much as the court has such discretion regarding non-compliance it should not condone such non-compliance to the other party's prejudice. In *casu*, non-compliance with the rules

[6] Belete Worku v Serviceair/Equity Aviation (Pty) Ltd and 23 others (A 248/2011) Delivered on 30/09/2011.
[7] Magistrate's court v Minister of Justice and another (unreported judgment of appeal no A 223/2009)
[8] Trans-African Insurance Company Ltd v Maluleka 1956 (2) SA 273 at 278 F.
[9] Sasol Industries (Pty) Ltd t/a LH Martinusen 1992 (4) SA 466 (W).

either by action and/or omission was solely caused by applicant himself, a position which he clearly admits but, believes that he had no obligation to do so as he is not a legal practitioner. Applicant is unfortunately wrong as this goes against the law.

[20] This in fact is the current and correct legal position as evidenced in the matter of *South African Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd*[10]*;* wherein the principle in M*inister of Prisons and another v Jongilanga and in Trans-African Insurance Co. Ltd v Maluleke*[11] the same reasoning was adopted in the matter of *Gariseb v Bayer*[12] where Hoff J remarked '*This court has a discretion to overlook any irregularities in procedure which does not work any substantial prejudice*.' (my emphasis). Again the same principle was applied with more emphasis in *China State Construction Engineering Corporation (South Africa) (Pty) Ltd v Pro Joinery CC* [13] where Silungwe J stated the following:

> '… *The fact that the court enjoys unfettered discretion to condone a procedural irregularity does not, in my view, perforce mean that all procedural irregularities (without any exception whatsoever) are, per se, capable of being condoned. In other words, not every single procedural irregularity is capable of being condoned. Whereas it is probable that a large number of procedural irregularities may be capable of being condoned, it is nevertheless, conceivable that there may well be occasional procedural irregularities of such gravity as to constitute a nullity. A nullity has no legal effect and, as such, it cannot be condoned*.'

[21] The effect of this non-compliance is a nullity and such a nullity has a great danger to the whole essence of the proceedings, sight not being lost of the court's discretion to condone. The court is guided by the legal position made clear in our law as stated by *Herbstein and Van Winsen,* the Civil Practice of the Supreme Court of SA, 4th ed, P 562, where the leaned authors state:

> '*In a number of cases it has been held or accepted that where the procedural step which has been taken amounts to a nullity, it cannot be condoned.'*

[10] South African Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd.
[11] South African Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd 1983 (3) SA 47 (E) at 57 (A-D); Minister of Prisons and another v Jongipanga 1983 (3) SA 47 (E) at 57 A-D and in Trans-African Insurance Co Ltd v Maluleke 1956 (2) SA 273 (A) at 278 – G
[12] Gariseb v Bayer 2003 NR 118 at 121
[13] China State Construction Engineering Corporation (South Africa) (Pty) Ltd v Pro Joinery CC 2007 (2) NR 675 (HC) at 683 G-H

[22] Third respondent was faced with a nullity and was therefore required to take steps to set it aside. The steps taken by respondents are in fact in line with the legal requirement as stated in *Namibian Development Corporation v Aussenkehr Farms (Pty) Ltd*[14]*.* In that case, the leaned Judge, Heathcote, AJ dealt with the historical legal decisions, both in South Africa and Namibia. It is now our settled legal position that, the aggrieved litigant has a right to seek redress under Rule 30 and that the courts will not grant the relief sought in the absence of prejudice to the respondent, lastly and most importantly that once it is proved that the procedure taken by applicant is nullity, the courts have no power to revive it as it is dead, see also *China State Construction, Engineering Corporation (Southern African) (Pty) Ltd v Pro-Joinery* (supra). A nullity is void in other words it is dead. I cannot, but, fully associate myself with the *dictum* in *MacFoy v United Africa Co. Ltd*[15] where Lord Denning, that doyen of English jurisprudence stated:

> '*If an act is void, then it is in law a nullity. It is not only bad, but is incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it so stay there. It will collapse.'*

I am, therefore, strongly fortified by the learned Judge's reasoning and I (supra) therefore have no alternative, but, to fully associate myself with it and adopt it as the current and correct legal position.

[23] Applicant has vigorously argued that he should be treated as a lay person and therefore should be exempted from complying with the practice directives. Practice directives are part of the laws with which the courts, legal practitioners and all who elect to litigate in the courts are expected to familiarize themselves with and adhere to. The smooth running of the justice system is based on these laws and guidelines. They are therefore not an exclusive and secret manuals for judges and admitted and registered legal practitioners only. If this were so the whole administration of justice would grind to a halt.

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[14] Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd 2010 (2) NR 703 (HC).
[15] MC Foy v United Africa Co. Ltd (1961) 3 ALL ER at 1172.

[24] According to the Chambers Dictionary, 1994 ed. a layperson/layman is defined as '*a non-professional person; someone who is not trained in a particular field*'. In common parlance it refers to a person who does not understand complex or technical issues in a particular field. In other words it means a person who is not trained in a particular field.

[25] At the close of the submissions by both counsel, I asked Mr Maletzky what his qualifications were and he informed me that he holds a Bachelor of Commerce (in law) (BCom) as a first degree and a Bachelor of Laws (LLB) as a post-graduate degree. These degrees were conferred to him by the University of South Africa (UNISA), obviously through private study as opposed to full time attendances at a university. In my mind, these are very impressive qualifications obtained through what I would term "caesarian operation" as opposed to a normal birth sitting on a desk at a University. Under those circumstances, I am convinced that he is indeed a very intelligent man and a highly capable and competent professional in his chosen field of study, which is law. His intelligence is clearly manifested in his skill in articulating his arguments and his ability to refer to relevant law, be it regulations, case authorities or Latin *maxims*, His ability and competence ranks the same with any registered and admitted legal practitioner. He, however, is not registered and admitted to practice law. But,, for all intents and purposes he is a qualified lawyer and a competent one too. His only disability is the professional and administrative requirement which enjoins him to register and practice as such. In light of that with greatest respect, he does not fall within the category of a layman. His attempt to do so is futile as he is legally too big for the room where the lay persons are assembled. To allow him to be treated like a layman would be tantamount to allowing him to steal the proverbial tilapia from the judicial pond.

[26] The court cannot excuse his failure to comply with rules and practice directives which he knows and/or ought to have known. He has chosen to play ignorant when it suits him. In other words he deliberately indulges in ignorance for this purpose and this purpose alone. Justice cannot prevail under those cirmstances.

[27] Applicant has dismally failed to comply with the rules of this court, leading to the prejudice of third respondent and third respondent is therefore entitled to seek redress from the courts.

[28] Accordingly the following order is made:

1. That Rule 30 application is granted.
2. Applicant shall pay the costs, such costs to include the costs of one instructing and one instructed counsel.

M Cheda

Judge

APPEARANCES

APPLICANT:	In Person
STATE:	Mr Van Vuuren Of De Beer's Law Chamber Windhoek