

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO. A 244/2010

In the matter between:

HENDRIK CHRISTIAN

APPLICANT

and

NAMIBIA FINANCIAL INSTITUTIONS

SUPERVISORY AUTHORITY

RESPONDENT

Neutral Citation: *Christian v Namibia Financial Institutions Supervisory Authority* (A 244/2010) [2018] NAHCMD 19 (8 February 2018)

CORAM: MASUKU J

Heard: 31 January 2018

Delivered: 8 February 2018

Flynote: Application for rescission of an order – Rule 66(3) – the duties of a respondent desirous of opposing an application – whether it is permissible for a respondent to file both an answering affidavit and also raise points *in limine*. Whether a judge is at large to overturn a judgment or order of a judge of co-ordinate jurisdiction.

Summary: The applicant applied to court for an order setting aside a previous court order, in terms of which the parties, who had filed answering and replying affidavits, were ordered to argue certain points of law *in limine* first.

The applicant took issue and argued that a respondent cannot properly file an answering affidavit and also raise points *in limine* at the same time.

Held – there is nothing wrong with a respondent who wishes to oppose an application to raise both points of law and file an answering affidavit dealing with the issues raised in an affidavit. The issue will always depend on the peculiarities and nuances of the case at hand;

Held – that the rules must not be interpreted and applied mechanically or slavishly but with a view to making them a handmaid of justice and not the mistress.

Held further – that where a party is dissatisfied with an order or judgment of the High Court, it is in very limited and circumscribed circumstances where the High Court can rescind or vary its judgment. The ordinary route is for the dissatisfied party to appeal to the Supreme Court.

Held – that in the peculiar circumstances of this case, no facts or considerations had been raised that would imbue a judge of the High Court to set aside the order sought to be impugned.

The application for rescission of the order was thus set aside with costs.

ORDER

- a) The applicant's application is dismissed.
- b) Costs will follow the event.
- c) The matter is postponed to 15 March 2018 at 10h00 for the hearing of the main application.

RULING

MASUKU J:

Introduction

[1] This matter has a chequered history, which has spanned over a period of more than seven years, with a number of legal skirmishes. The latest instalment in the action is an interlocutory application brought by the applicant, a litigant appearing in person. He seeks an order declaring that an order made by Mr. Justice B. Usiku, who managed this matter before it was allocated to me, is wrong and must be set aside.

The parties

[2] As indicated above the applicant is a self-actor, a Namibian male adult, who resides in Onyati Street 336, Katutura, Windhoek. His adversary, the respondent, is the Namibian Financial Institutions Regulatory Authority, created and established in terms of the Financial Institutions Act.¹ Its place of business is at 154 Independence Avenue, 8th Floor, Sanlam Centre, Windhoek.

Background

[3] Although the applicant has stated that he has no abiding dispute with the respondent herein, what is clear is that both parties have been slugging it out in this court, litigating for some time. In this regard, the applicant filed an application, in essence seeking an order that the operation and execution of an order delivered by Mr. Justice Smuts on 27 May 2011, be set aside on the basis of the common law principle *ex debito justitiae* and that the respondent should pay the costs of the application. Needless to say, the application is opposed by the Respondent.

¹ Act No.3 of 2001.

[4] The bone of contention giving rise to the present ruling is an order dated 25 July 2017, handed down by Mr. Justice Usiku. It reads as follows, in part:

‘1. The points of law raised by the Respondent in its unilateral case management report dated (sic) the 10 May 2017 shall be heard first before the main application, as points of law are dispositive, if upheld, of the application.

1. The matter is postponed to 18 October 2017 for hearing on the point of law raised by the Respondent.’

[5] It is the applicant’s position that the said order, especially in paragraph 1 above, is wrong in law and must therefore, be set aside by this court, in the applicant’s own words, *ex dubito justitiae*. I will deal with the reasons advanced by the applicant for this proposition below.

Issues for determination

[6] There are, in my view, two principal issues that need determination in this regard. The first, is whether the applicant is correct in his position that the learned Judge erred in issuing the order he did. The second issue is, if I find that the applicant is correct in his contention, is this court, as presently constituted, entitled at law, to set aside that order, or it is one that must be referred to the Supreme Court for determination.

[7] The stage is now set for me to answer the questions that have been adverted to in the immediately preceding paragraph. I deal with the first issue first.

Was the order issued by the court wrong or incompetent?

[8] The gravamen of the applicant’s argument is that the court was not entitled to order the parties to deal with the points of law raised by the respondent in light of the fact that the respondent had already filed affidavits in which it opposed the relief sought by the applicant. In his address and heads of argument, Mr. Christian relied on the provisions of rule 66 (1), which have the following rendering:

'A person opposing the grant of an order sought in an application must –

- (a) within the time stated in the notice give the applicant notice in writing that he or she intends to oppose the application and in that notice appoint an address within a flexible radius of the court at which he or she will accept notice and service of all documents;
- (b) within 14 days of notifying the applicant of his or her intention to oppose the application deliver his or her answering affidavit, if any, together with any relevant documents, except where the Government is the respondent, the time limit may not be less than 21 days; and
- (c) if he or she intends to raise a question of law only, he or she must deliver notice of his or her intention to do so within the time stated in paragraph (b), setting such question.'

[9] The applicant accuses the respondent of having adopted a hybrid procedure, so to speak, in terms of which the respondent filed both an answering affidavit and a notice to raise points of law. Such a procedure, the applicant contends, is wrong and unacceptable and more particularly, is not in keeping with the requirements of the rules of court.

[10] In amplifying this argument, Mr. Christian argued that every Judge of this Court, upon entering the office of Judge of the High Court of Namibia, took an oath of office to uphold and to defend the Constitution of Namibia, together with all the laws of the Land. These laws, he submitted, include the Rules of Court, which he stated are binding on the courts. As such, he concluded, the learned Judge violated the procedure set out in the Rules of court when he made the order in question, allowing the respondent to file an answering affidavit and points of law in the same matter. As a result, his decision cannot be allowed to stand and must be set aside by this court, to enforce compliance with what are mandatory provisions of the rules.

[11] Needless to say, Mr. Philander, for the respondent, took a totally different posture on this issue. First, he provided the context in which the order sought to be impugned was given. In this regard, he informed the court, by reference to case management orders, that serving before the court were two mutually exclusive proposed case management reports, filed by both protagonists. In the first instance, is the case management report filed by the applicant dated 7 May 2017. In it, the applicant proposed that the court, at the hearing, deals with the interlocutory application for stay before the main application is heard.

[12] The respondent, for its part, filed a case management report dated 26 May 2016 in terms of which it requested the court to hear the points *in limine* first. It was Mr. Philander's argument that faced with these discordant positions, the court opted to follow the suggestion made by the respondent and that the court was entitled to do so and was furthermore, correct in having done so. He argued that the court acted within the province of its powers and that it must be recalled that the court was not made for the rules but rather, that the rules were made for the court.

[13] I have listened to the argument presented by both parties and am of the considered view that there was nothing wrong or improper with the decision made by the learned Judge to order the parties to first deal with the points of law. What must not be allowed to sink into oblivion, is that there are cases where a party, in its affidavit, filed in terms of rule 66 (a), also simultaneously raises points of law in the early paragraphs of the affidavit.

[14] In my experience, in this and other jurisdictions, this is known and permissible procedure that does not in anyway detract from the provisions of the rules, as each case has to be dealt with and considered in the light of its own peculiar facts and circumstances. This was such a case where the respondent was not only desirous of raising points of law only, but also responding to the substance of the factual issues deposed to on affidavit.

[15] I am of the considered opinion that if the matter was to be approached from the strict and unyielding position advocated by Mr. Christian, a lot of injustice may be occasioned to parties in the sense that some cases may not be fully and properly dealt with by either filing the notice to raise points of law only or by filing affidavits only. It would accordingly be preposterous and unjust to say a party which desires, due to the nature and peculiarity of its case, to take advantage of both procedures in the same papers, is disallowed and must choose either to file an affidavit or a notice in terms of rule 66(c). That would be nothing short of a cradle of injustice and against which this court must turn its face.

[16] Mr. Philander referred the court to the Supreme Court judgment in *Rally for Democracy v Electoral Commission for Namibia*,² where the Supreme Court made some lapidary remarks about the nature, place and function of the rules of court. At para [67], the Court expressed itself in the following language:

'Given the importance of furthering these objectives and interests, there are compelling reasons why the court, as a general rule, would not countenance non-adherence to its procedures in the absence of sufficient cause. The rules, however, are not an end in themselves to be observed for their own sake. It has often been said, that the rules "exist for the court, not the court for the rules" and that the court will not "become the slave of rules designed and intended to facilitate it in doing justice. It will interpret and apply them, not in a formalistic and inflexible manner, but in furtherance of the objectives they are intended to serve. But, because the cannot conceivably be exhaustive and cater for every procedural contingency that may arise in the conduct of litigation, the court may draw on its inherent powers to relax them or, on sufficient cause shown, excuse non-compliance with them to ensure the efficient, uniform and fair administration of justice for all concerned.' (Emphasis added)

[17] The issue could not have been put any better. I endorse the remarks as though they were stated in this very case as they are apposite. In this regard, Mr. Christian quoted quite liberally from judgments of India and asked this court to borrow from that jurisdiction in this case. I would, in this connection, like to

² 2013 (3) NR 664 (SC).

quote from Mr. Christian's own heads of argument, at para 55, where the following appears:

'No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of justice. . .' (Emphasis added).

It is the case that the arguments advanced by the applicant in this case seek to place the rules of court, or the interpretation, to the position of mistress rather than a handmaid, to assist in making sure that the wheels of justice grind efficiently.

[18] An important consideration I would like to deal with, in this matter is that Mr. Christian does not say how the approach followed by the court, purportedly in violation of the rules and which I have found is not the case, has caused him prejudice. He had sufficient notice of the points of law and will be afforded an opportunity to deal with them with all the powers of persuasion at his command.

[19] On a mature consideration of this matter, I am of the view that the applicant does not show and I cannot, on my own consideration of the case, find that the procedure adopted by the court, besides not being contrary to the rules, does, in any way cause him any prejudice. As indicated, he is aware of the issues raised and should be able to address them at the appropriate time.

[20] In view of the foregoing, I am of the considered view that the contentions of the applicant cannot be upheld. In my view, the question of the application of what he refers to as the *ex debito justitiae* does not arise in the instant case and I will not make any pronouncements in this ruling on the applicability of the said doctrine. The matter at hand can be settled within the four corners of ordinary and applicable principles in this jurisdiction. A case may hopefully present itself in the future where the consideration of the doctrine may render itself necessary and opportune. This case is not one, in my judgment.

Is this court competent to overturn its own decision?

[21] I now turn to consider, albeit very briefly, the question whether, assuming the court agreed with the applicant that Mr. Justice Usiku was not correct in his approach and which I have found is not the case in any event, this would have been an appropriate case for this court to overturn its own judgment. I posed this very question to Mr. Christian and he sought to rely on the said doctrine *ex dubito justitiae*, without answering the substance of the question in any meaningful way. In particular, he said nothing about the important policy considerations it raises for the smooth and orderly dispatch of court business, as I shall endeavour to show below.

[22] It is not clear in terms of what rule the applicant brings this application for the setting aside of the order in question. This court does not, ordinarily have the power to overturn its judgments and orders except in respect of a few and narrow circumstances prescribed by the rules. In this particular regard, rule 103 bears specific resonance. It reads as follows in material and relevant parts:

‘In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time rescind or vary any order or judgment –

- (a) erroneously sought or erroneously granted in the absence of any affected party thereby;
- (b) in respect of interest or costs granted without being argued;
- (c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or
- (d) an order granted as a result of a mistake common to the parties.’

[23] A reading of the applicant’s complaint, in my view does not bring the present application within the rubric or reach of this particular rule. For starters, there is no complaint that the order in question was erroneously granted in the absence of the applicant, who is the complainant in this regard. Furthermore, it

is common cause that this is a matter that does not in any way, shape or form, deal with the issue of costs granted without same being argued.

[24] It is true though that the applicant contends that the court committed a fundamental error, possibly of cataclysmic proportions in the applicant's parochial view, but as I have endeavoured to point out earlier, there is no error at all in the order that the court made in the circumstances of this case and this should sound a death knell to the applicability of rule 103. The issue of an ambiguity is not mentioned by the applicant and I can safely assume that it is not sought to be relied upon in this case. Finally, there is no allegation that the order in question, was issued pursuant to an error or mistake common to the parties.

[25] In *Nambala v Anghuwo*,³ the court conducted a treatise on rescission under different heads, being the equivalent of rule 44 (1), the predecessor to 103 discussed above; rule 31 (2) (b) of the repealed rules, the equivalent of rule 16 and under the common law. It appears to me that the present application also does not fall either within the common law rescission nor under rule 16.

[26] In respect of the latter, it is clear that this is not application in which default judgment is being sought and granted and the applicant then approached the court to set aside the said default judgment. In respect of the common law rescission, the court held that such an application was guided by considerations of fairness and justice and the applicant therefor had to advance a reasonable explanation as to why the judgment was granted by default.

[27] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*,⁴ the court made some lapidary remarks that are important in this case. The court said:

'The guiding principle of the common law is certainty of judgments. Once a judgment is given in a matter it is final. It may not be altered by the judge who delivered it. He

³ (I 3570/2010 [2013] NAHCMD 97 (9 April 2013).

⁴ (127/2002) [2002] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003).

becomes *functus officio* and may not ordinarily vary or rescind his own judgment. . . . That is a function of the a court of appeal.’ See also *Firestone SA (Pty) Ltd v Genticuro*.

[28] In the premises, I am of the considered view that the application for the setting aside or variation or correction of the order in question cannot stand. I must emphasise that even if I may have entertained doubts about the correctness of the order handed down by the learned Judge, it would have been legally incorrect for me, being a Judge in a court of co-ordinate jurisdiction, to be seen to alter a judgment of a fellow judge. That is pre-eminently the role and province of the Supreme Court, in which I cannot venture, save in circumstances describe earlier in this judgment and which I have found are inapplicable in this case.

[29] The applicant, in closing, referred the court to the case of *Todt v Ipser*⁵ and submitted that in that case, the Appellate Division of South Africa held that judgments are void in three circumstances, namely where there has been no proper service; where there is no proper mandate or where the court lacks jurisdiction. It was his case that the order made by Usiku J was void as the court lacked jurisdiction.

[30] It will be apparent that I have already dealt with this argument elsewhere in the judgment, albeit in a different context. There is no question about the fact that this court had and still has jurisdiction to entertain this matter and when Usiku J heard the matter and granted the order he did, the question of the court’s jurisdiction was never raised and even if it was, it was doomed to fail. I reiterate that if the applicant is of the considered view that the learned Judge adopted a wrong procedure or misinterpreted the rules, as alleged, this is a matter that is tenable before the Supreme Court. In this regard, this court’s leave may have to be sought and obtained.

⁵ 1993 (3) SA 577 (AD) at 589 C.

[31] I notice, in passing, that the applicant, in his heads of argument, has cast aspersions on the Judiciary, together with the officers of the court in this jurisdiction, for allegedly not appreciating and applying the *ex debito* maxim and instead favour readily applying principles such as *res judicata*, *functus officio* allegedly, with reckless abandon. Whether this criticism is merited or not, and whether the source of the criticism is competent, is a matter I will leave for posterity to judge. I will say nothing on this criticism in this judgment, save to point out that these are principles which have, over many decades, like the majestic Baobab tree, taken root in the rich soils of our legal landscape and serve a very important function in finality of litigation.

Disposal

[32] Having regard to all the foregoing, I am of the view that the applicant's application is bad in law and must be dismissed, as I hereby do. There is nothing wrong or incorrect, in my view, with the order issued by Mr. Justice Usiku and I so hold.

Order

[33] I therefore issue the following order in the matter, namely;

- a) The applicant's application is dismissed.
- b) Costs will follow the event.
- c) The matter is postponed to 15 March 2018 at 10h00 for the hearing of the main application.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT/RESPONDENT: H. Christiaan
(the applicant/respondent in person)

RESPONDENT/APPLICANT: R. Philander
of ENS Africa | Namibia (incorporated as
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