CASE NO: I 2239/09

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA FINANCIAL INSTITUTIONS

SUPERVISORY AUTHORITY ENGINEERS **APPLICANT**

and

RAINER LUDWIG RITTER **RESPONDENT**

CORAM: **NDAUENDAPO, J**

Heard on: 18 January 2010

Delivered on: 26 October 2010

JUDGMENT

NDAUENDAPO, J:

[1] This is an application for Rescission of Judgment.

[2] The respondent, Mr. Rainer Ritter, was the Chief Executive officer of the Namibia Financial Institutions Supervisory Services Authority (hereinafter referred to as NAMFISA).

[3] On 10 March 2009 the board of Namfisa suspended Mr. Ritter and notified him that it will institute a disciplinary enquiry against him. The board alleged that he committed various acts of misconduct. The enquiry was set down from 11 to 15 May 2009. On 11 May 2009 the disciplinary enquiry commenced. The next day the lawyers of Mr. Ritter, represented by Adv. Smuts, SC, on the instructions of Kirsten & Company, approached the lawyers of Namfisa represented by Adv. Narib on the instructions of Muluti & Partners with a view to negotiate a settlement. A settlement proposal was made to the lawyers of Namfisa. They in turn communicated that to the board. The board discussed the proposal and rejected it and made a counterproposal. The next day the hearing contuined and the first witness was called to testify. He gave detailed evidence and was also cross-examined at length. That afternoon the lawyers of Mr. Ritter informed the lawyers of Namfisa that their client has accepted the counter offer. Mr. Narib then contacted the board and informed them accordingly. The board convened to discuss same and according to Mr. Ritter and Adv. Smuts, SC, a settlement was reached. That evening Adv. Smuts, SC, phoned Adv. Narib to confirm that a settlement was reached and according to Smuts, SC, Adv. Narib confirmed same.

[4] Mr. Ritter, based on the alleged settlement agreement, issued summons against Namfisa claiming an amount of N$830 000-00. In his particulars of claim he, *inter alia,* claims that:

> *"The Defendant breached the terms of the settlement agreement on 31 May 2009 by failing to make such payment and furthermore and in any event repudiated such contract by exhibiting a deliberate and unequivocal intention no longer to be bound by it".*

[5] Namfisa, represented by Ueitele & Hans Legal Practitioners, filed a notice of intention to defend the action. Mr. Ritter then filed an application for summary judgment. The application

was not opposed timeously and summary judgment was granted in his favour. Mr. Uietele then filed an application for rescission of judgment and it was opposed by Mr. Ritter.

[6] When the matter came before me on 18 January 2010, it was to hear arguments on the application for rescission of the summary judgment. Adv. Theo Frank, SC, and Dicks appeared on behalf of Mr. Ritter and Mr. Ueitele on behalf of Namfisa.

[7] Points *in limine:*

Adv. Frank, SC, raised three points *in limine:*

Firstly, he objected to the filing of two further affidavits of Lily Brandt (the then acting CEO of NAMFISA) on behalf of Namfisa dated 14 January and 22 February 2010 respectively. Secondly, he also objected to the handing up of Annexure ("SF1") Round Robin Resolution passed by the board of Namfisa). The basis of the objection was that the affidavits and "SF1" were filed out of sequence and out of time and no application was filed to ask the permission of the Court to file them and no condonation application was filed. He referred this Court to the case of Otjozondjupa Regional Council v Dr. Nghifindaka and 2 Others (Case No. LC 1/2009) delivered on 22 July 2009) where Muller J held (at 7-8) that:

> "Rule 6(5)(e) provides that only three sets of affidavits; it provides further that: 'the court may in its discretion permit the filing of further affidavits'. The authorities in this regard are clear namely that a further set of affidavits will only be allowed in the discretion of the court. This affidavit cannot just be filed, but the party who wants those affidavits to form part of the record of proceedings must first seek the permission of the court in advance and only if the court allows further affidavits, same

may be filed and will then form part of the record. In the unreported judgment of ***Christine Paulus & 3 others v The Swapo Party and 7 others*** the following was said at page 9, par. 4:

'It is trite law that an opposed motion as a rule consists of three sets of affidavits. It follows then that a forth set could only have been filed after leave of the court have been sought and granted. In ***Piechaczek v Piechaczek 1921 (SWA)*** on p. 51 Gutsche J held that the Registrar should not accept further affidavits subsequent to the three sets of affidavits the admissibility of such further affidavits should be argued from the bar'.

(James Brown & Hamez (Pty) Ltd v Simmons No. 1963 (4) 656 (A) of 660

E-F. Such further sets of affidavits should not even be filed with the Registrar and should not form part of the record before they are allowed by the court".

[8] Mr. Ueitele submitted that the respondent should have brought a Rule 30 application (irregular proceedings) instead of raising objections from the bar. I do not agree with that submission. Rule 30(1) says that a party to a cause in which an irregular step or proceeding has been taken by any other party 'may' apply to Court to set aside the step or proceeding. Rule 30(1) does not impose a peremptory duty on the applicant to bring such an application. It was open to the applicant to raise the objection against the filing of those affidavits without filing a Rule 30 application.

[9] It is common cause that those affidavits were additional (fourth/fifth affidavits) and no permission was sought in advance from the Court to file those affidavits. No explanation was given as to why those affidavits were filed in the first place and no application for condonation for the late filing thereof was made. Rules are there for the smooth functioning of the courts.

In ***Swanepoel v Marais & others 1992 NR. 1 of wI-J*** Levy held (at 238D-H) that:

> *"The Rules of court are an important element in the machinery of justice. Failure to observe such rules can lead not only to inconvenience of immediate litigants and the courts but also the inconvenience of other litigants whose cases are delayed thereby. It is essential for application of the law that the Rules of Court, which have been designed for the purpose, be complied with. Practice and procedure in the courts can be completely dislocated by non-compliance". The said dicta was quoted with approval by Damaseb, JP in the matter* ***RDP & others v ECN & others*** *Case No. A01/2010 where he further added that "compliance with Rules of court is no trivial matter and a very good basis must exist for departure from the Rules.*

[10] As far as the "SF1" is concerned (Round Robin Resolutions authorising Namfisa to rescend the judgment), there was no affidavit in support of annexure "SF1" and it was filed annexed to a filing notice.

In casu, no good cause was shown to exist for the departure from the rules. In the result those affidavits and annexure "SF1" are ruled inadmissible.

[11] Thirdly, Mr. Frank, SC submitted that it is trite that a legal person can only initiate applications through its duly authorized officials. If the official lacks authority, the application should be dismissed with costs.

Mr. Ueitele in his affidavit in support of the rescission application merely states that he is authorized to depose to the affidavit (which is irrelevant) and does not state that he is authorized to institute and prosecute the rescission proceedings. His reference to annexure "SF1" cannot avail him in the light of the statement that he is duly authorized to depose to

the affidavits. In any event I have ruled that "SF1" is not before court. Mr. Ueitele further argued that he has authority to institute the rescission application by virtue of the special power of attorney given to him by Ms. Lily Brand, acting on behalf of NAMFISA. The special power of attorney gives Mr.

Ueitele the power ..... 'to defend and if necessary counter claim (including any

appeal), the action instituted by the plaintiff (respondent)'. It must be remembered that the special power of attorney is an unsworn piece of paper. In ***Mall (Cape) (Pty)***

Ltd v Merino Ko-operasie Bpk **1957(2) SA 347 (C) at 351D-H,** Mr. Justice Watermeyer stated as follows:

> *"I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the Court to show that the applicant has duly authorized the institution of notice of motion proceedings (see for example* Royal Worcester Corset Co v Kesler's Stores *1927 CPD 143;* Langeberg Ko-operasie Bpk v Folscher and Another 1950(2) SA 618 (C)). *Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company has resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorized by it. There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized by the company to do so (see for example* Lurie Brothers Ltd v Arcache *1927 NPD 139, and the other cases mentioned in Herbstein and Van*

Winsen Civil Practice of the Superior Courts in South Africa at 37 and 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the application is an artificial person."

[12] Mr. Frank further submitted that Mr. Kukuri does not state in his affidavit that he is authorized to institute and prosecute the rescission proceedings. His statement that he is 'duly authorized and able to depose to this affidavit on behalf of the respondent is irrelevant because it does not establish authority. The resolution "DEF1" which Mr. Kukuri referred to is also irrelevant and does not cure the defect. That resolution authorizes the opposition to the summary judgment and not the application for rescission of judgment.

In the case of ***Ganes and Another v Telecom Namibia Ltd*** **2004(3) SA 615 of g-h,**
the Court stated that: ……."In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorized to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorized to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorized and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized. (my underlining)

In the matter of the ***Council of the Municipality of Windhoek v DB Thermal Pty Ltd and Ziton Pty Ltd*** **(case no I 1997/2004)** delivered by Parker J on 28 October 2009 said the following (at p3): "I am duly authorized by both the first and second defendant to depose to this affidavit for the purpose of opposing the plaintiff's application for amendment". Mr. Totemeyer submitted therefore that Mr. Weiler has only been authorized to depose to the affidavit for the purpose of opposing the plaintiff's applications for amendment, but he had not been authorized to oppose the applications. I accept Mr. Totemeyer's interpretation and the effect of the deponent's statement. All that Mr. Weiler is stating is that he is authorized to

depose to the affidavit, which is to be used in opposing the application; he does not state unambiguously that he has been authorized to oppose the application itself".

In the ***National Union of Namibia Workers v Naholo*** **2006(2) NR 659 HC of 669c-e,** the court held that: "an artificial person can of course, take decisions only by passing of resolutions in accordance with its regulatory framework such as articles of association, a constitution, rules or regulations. Proof of authority would then be provided in the form of an affidavit deposed to by an official of the artificial person, annexing thereto a copy of a resolution, or an extract of minutes of a meeting of which the resolution was taken which confers such authority or delegations. Hence, the mere say so of a deponent (or deponents) does not constitute proof of either authority in the absence of admissible evidence to authenticate the averment(s).

[13] In the result, I come to the conclusion that both Messrs. Ueitele and Kukuri were not duly authorized by NAMFISA to institute and prosecute the rescission application.

[14] It is therefore unnecessary to deal with the merits of the application for rescission of judgment.

In my respectful view, I do not think that the issues in this matter were complex to warrant the instruction of two instructed counsel and one instructing counsel.
In the result I make the following orders:

1. The points *in limine* are upheld and the application for rescission of judgment is dismissed;
2. The applicant is ordered to pay the costs of the respondent including costs occasioned by the employment of one instructing and one instructed counsel.

NDAUENDAPO, J

ON BEHALF OF APPLICANT:	**Mr. Frank SC & Mr. Dicks**
Instructed by:	**Kirsten & Co**
ON BEHALF OF RESPONDENTS:	**Mr. Ueitele**
Instructed by:	**Ueitele & Hans Legal Practitioners**