NOT REPORTABLE

CASE NO. PS 1/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BANK OF NAMIBIA **PLAINTIFF**

and

EDMUND BUYS **DEFENDANT**

CORAM: CORBETT, A.J

Heard on: 1 November 2011

Delivered on: 15 December 2011

JUDGMENT

CORBETT, A.J: .

[1] On 18 August 2008 this Court granted provisional sentence against the defendant. On 17 June 2011 the plaintiff made application to this Court in

terms of Rule 45 (12) (h), (i) and (j) for an order that the defendant pay the judgment debt off in instalments, such instalments to be determined by the Court. Together with that application a notice was served on the defendant to appear before this Court for the Court to investigate the defendant's financial position in terms of Rule 45. A subpoena *duces tecum* was also issued by this Court requiring that the defendant bring to Court a list of documents pertaining to his financial situation. The defendant filed a "*notice of intention to oppose*" the Rule 45 application and brought an application in terms of Rule 30. The application was opposed giving rise to this hearing. In this judgment I make reference to the parties as in the provisional sentence summons.

[2] In the Rule 30 application the defendant sought orders setting aside the application in terms of Rule 45, the notice to the judgment debtor and the subpoena *duces tecum* as irregular, improper or "*unconstitutional*" proceedings.

[3] Rule 30 (1) provides:

> "A party to a cause in which an irregular step or proceeding has been taken by any other party may, within 15 days after becoming aware of the irregularity, apply to court to set aside the step or proceeding…."

The Rule grants to a party to judicial proceedings the opportunity to have set aside an irregular step which has been taken and which has been prejudicial. It would be inapposite to challenge the constitutionality of rule 45 by way of a Rule

30 notice since on a proper reading of Rule 30 the rule applies to irregularities of form rather than matters of substance. [1] It also seems to me that Rule 30 (1) relates to irregular steps taken by a party to a cause prior to that cause being determined by way of a judgment. Judgment determines the cause and the parties metamorphose into the judgment creditor and the judgment debtor. An exception would obviously be where a party files a notice of appeal. [2] It would thus follow that rule 30 could not be invoked to attack proceedings in terms of Rule 45. In view of the approach I take in this matter it is unnecessary to decide this issue.

[4] The time limit in Rule 30 (1) is imposed in order to ensure that litigation takes place in an orderly fashion. This time limit begins to run after the objecting party becomes aware that a step has been taken which is irregular. [3]

[5] When an application in terms of Rule 30 is brought out of time and without condonation, it may be dismissed. Cloete J in the matter of *Uitenhage Municipality v Uys* said: [4]

> **"**If therefore the notice of the objection was filed in terms of Rule of Court 30 (1) it was delivered after the expiry of the 14 days laid down by such Rule. There was therefore non-compliance with that Rule. But the respondent has contended that he was not by the Rules of practice required to give notice of the objection

[1] Singh v Vorkel, 1947 (3) SA 400 (C) at 406
[2] South African Druggists v Beecham Group plc, 1987 (4) SA 876 (T) at 881D - E
[3] Minister of Law and Order v Taylor N.O, 1990 (1) SA 165 E, at 167F
[4] 1974 (3) SA 800 (E), at 802 E - H

> and that he indeed could *in limine* at the hearing of the main application have taken the point that the affidavit objected to should not be admitted. It seems to me that the answer to this contention is that having chosen to give notice of his objection he was required to do so according to the Rule of Court which was applicable, namely Rule 30 (1), and he is not entitled now simply to ignore the provisions of this Rule and, by not referring to it, to seek to take his procedure outside the ambit of its requirements. The respondent cannot conceive and apply his own rules of procedure when there is an appropriate Rule which governs the position. The procedure in giving notice as the respondent has done must, it would seem, be governed by the appropriate Rule 30 (1). Having elected to bring his application in this form he must stand or fall by the Rules of Court which govern it. According to the provisions of that Rule it was out of time. This argument alone, in my view justifies the dismissal of the objection."

This Court has frequently stated that condonation for non-compliance with the Rules is not to be regarded as a formality**.**" [5] In *Swanepoel v Marais and Others* the Court said: [6]

> "The Rules of Court are an important element in the machinery of justice. A failure to observe such Rules can lead not only to the inconvenience of the immediate litigants and of the Court but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the application of law that the Rules of Court which have been designed for that purpose, be complied

[5] Seaflower White Fish Corporation Ltd v Namibia Courts Authority, 2000 NR 57 (HC), at 59 I
[6] 1992 NR 1 (HC), at 2 I – 3A

> with. Practice and procedure in the Court can be completely dislocated by non-compliance."

[6] The Deputy-Sheriff's return of service confirms that the application in terms of Rule 45 was served personally on the defendant on 17 June 2011. This application was only filed on 27 September 2011, some 11 weeks late. The defendant did not, for reasons not explained by him, file an application for condonation in terms of Rule 27 (3). When confronted with this fact during argument, the defendant could not provide any answer. That the defendant was aware of the need to apply for condonation where he had not complied with the Rules of Court, is apparent from the judgment of Hoff J in this matter where he states: [7]

> "Mr Buys who appeared in person requested the Court to postpone the matter to enable him to bring a condonation application. He stated that he was aware that a condonation application had to be brought but that as a layperson he was unsure of the correct form it should take."

After confirming that where the Rules of Court had not complied with, the party must satisfactorily explain his or her default under oath and show that he or she has a *bona fide* defence, the learned Judge concluded: [8]

[7] Unreported judgment in this matter delivered on 18 August 2008 at p. 3, para [4]
[8] p. 5, para [9]

> "The Rules of this Court are applicable to all litigants irrespective of whether you describe yourself as a layperson or not. This Court cannot prejudice a litigant who has adhered to the Rules just because the opposing party has not complied with the Rules of this Court on the excuse that he or she is a layperson."

[7] Mr Van Zyl, on behalf of the plaintiff, referred to a further unreported decision of this Court, where Majara AJ stated: [9]

> "In addition, it is my opinion that the fact that the two applicants are lay litigants is irrelevant because they did not deny that they frequently appear in the High Court and are therefore familiar with the Court Rules and procedure which include the Practice Directives. At any rate, it is my view that their argument is tantamount to suggesting that Court Rules should apply selectively. That is untenable as every person must follow the same Court Rules and procedure."

That the Court should under certain circumstances assist lay litigants in giving meaning to the relief sought is justified. [10] However, I am in agreement with the view of this Court that the Rules of Court must apply equally to all litigants. To suggest otherwise would be to introduce a parallel system of Rules for lay litigants, which is neither desirable nor justified. It would also, in the words of Chomba AJA, put the Court "*in an invidious position if it were perceived as being partial by going to the aid of a party who has run foul of the rules of court*". [11]

---

[9] The Magistrate's Commission v The Minister of Justice and Magistrate Shaanika, an unreported decision of the High Court of Namibia delivered on 9 July 2010 under case no. 223/09

[10] Christian v Metropolitan Life Namibia Retirement Fund, 2008 (2) NR 753 (SC) at 759, para [8] Ehrlich v Minister of Correctional Services and Another, 2009 (2) SA 373 (ECD) at 383, para [36]

[11] Kamwi v Duvenhage, 2008 (2) NR 656 (SC), at 663, para [23]

[8] The defendant came across as someone not unfamiliar with Court proceedings. In this matter he conducted his own defence, filing a notice of intention to defend and an opposing affidavit in the provisional sentence proceedings. The defendant also filed detailed heads of argument in this matter. He defendant presented his argument in an articulate manner during the hearing of these proceedings. Even if this Court was disposed to entertaining this application, in the absence of an application for condonation properly brought in terms of Rule 27 (3), the Court's hands are tied.

[9] In all the circumstances, by failing to bring an application for condonation, there is no proper Rule 30 application before Court. I accordingly make the following order:

1. The Rule 30 application is struck with costs, such costs to include the costs of one instructing and one instructed counsel.

_____

CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:

Adv C van Zyl

Instructed by Van der Merwe-Greeff Inc.

ON BEHALF OF THE DEFENDANT:

The defendant in person