

CASE NO.: I 3087/06

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALEX KAMWI

APPLICANT

and

**MARGARETTA STEINMANN
LAW SOCIETY OF NAMIBIA**

**1st RESPONDENT
2nd RESPONDENT**

CORAM: NDAUENDAPO J.

Heard on: 22 May 2009

Delivered on: 28 March 2011

REASONS:

NDAUENDAPO J: Introduction:

[1] The applicant brought an application in terms of Rule 31(1).

[2] The notice in terms of Rule 31 (1) reads as follows:

"1. That the first and 2nd defendants in case No. I 3087/2006 are ordered to pay jointly or severally a sum of N\$6 000 000,00 hereto made up as follows:

1.1. N\$2 000 000,00 for loss of future income;

1.2. N\$1 000 000,00 for loss of business and professional profit;

1.3. N\$1 000 000,00 for interdiction caused by a fraudulent document - MS2;

- 1.4. N\$1 000 000,00 for lost chance to gain a benefit (sic);
- 1.5. N\$170 000,00 for future expenses on account of damage-causing events;
- 1.6. N\$27 000,00 as costs incurred as a result of MS2;
- 1.7. N\$1 303 000,00 for false imprisonment occasioned by MS2;
- 1.8. The interdiction order against applicant dated 9 March 2005 is declared fraudulent and invalid;
- 1.9. 20% interest per annum on each amount above from 8 November 2006 to date of final payment;
- 1.10. Costs of suit.

1.11. Further and/or alternative relief".

[3] Mr. Slabbert who appeared on behalf of the defendants filed a notice of motion in the following terms:

"1. That plaintiff's notice in terms of Rule 31(1) dated 8 January 2008 be set aside as irregular proceedings ...(3) that the particulars of the irregularity relied upon by defendants are that: the alleged confessions on which plaintiff purportedly relies for seeking judgment are not signed by Defendants personally and Rule 31(1) accordingly has no application".

[4] When the matter came before me on February 2008, Mr. Kamwi appeared in person and the defendants were represented by Mr. Slabber. Having heard submissions by both parties, I set aside the application as irregular proceedings with costs and reserved my reasons. Herein below are my reasons.

[5] The application in terms of Rule 31(1) is supported by an affidavit deposed to by Mr. Alex Kamwi. In that affidavit Mr. Kamwi alleges that:

"4. On the 4th of February 2005, 2nd Defendant represented by Adv. Dicks admitted

or alternatively confessed and acknowledged that notice MS2 is 'materially different' from AK 1 hereto annexed. Alternatively therefore, defendants admitted to fraud and fault. This confession was made at the hearing before a judge and is thus admissible in case of obtaining a judgment against defendants and is conclusive evidence of the fact. Respondent (sic) is reminded that their fraud consists not only in the wilful making of the incorrect statements but also in the withholding of material information with fraudulent intent. Respondents were aware or ought to have been aware that they produced, manufactured and authored MS2 with intent to mislead, and to diverge to such an extent from the true facts.

4.1 Respondents' admission above is a fact that is judicially noticed and need not be proven as these are facts not subject to reasonable dispute the respondents admitted and judgment against them should be granted.

.....

4.3 Respondents agreed and acknowledged that MS2 is "materially different" alternatively "fraudulent and forged" and in terms of Rule 31(1) this qualifies the court to grant judgment against respondents without any waste of time.

.....

9. As the consequences of respondents' failure to settle this matter out of court their confessions or admissions, plaintiff now seeks judgment in terms of Rule 31(1) which provides that defendants (sic) may at any time confess in whole or in part the claim contained in the summons whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to the confession. It is in terms of this rule that I now seek a judgment against defendants according to their confession or admission".

BACKGROUND

[6] On 12 May 2004 second respondent launched an application, amongst others, to interdict the applicant from practising or holding himself out as a legal practitioner. The applicant opposed that application. Annexed to the papers of the second respondent was a document marked "MS2". "MS2" is a notice of motion filed at court and purported to be signed by applicant in which he sought an order in the following terms (sic), *inter alia*, "(a) for me to be authorised to practice as a Paralegal Professional Practitioner as provided for by the Constitution of the Republic of Namibia, article 21(1) states that all persons shall have the right to (j) practice any profession or carry on any occupation, trade or business".

[7] "AK1" is also a notice of motion which was filed at court by the applicant and in which the applicant sought the same relief as in "MS2". Paragraph (c) of "MS2" states:

"The Legal Practitioners Act no 15 of 1995 section 5(1) states that a person shall be duly qualified for the purposes of section 4(1) which states that subject to the Provisions of this Act, the court shall admit and authorize to practice as legal Practitioner (any) person who upon application made by him or her, satisfies the Court that he or she - (a) is a fit and proper person to be admitted and authorised, (b) is duly qualified in accordance with the provisions of section 5; and (c)(i) is a Namibian citizen. Section 5(b) states that he/she holds a Degree, Diploma or Certificate in Law". "AK1" does not contain the above allegations.

[8] The application was heard on 4 February 2005. Mr. Dicks appeared on behalf of the second respondent and Mr. Kamwi in person. During legal argument Mr. Dicks submitted that "MS2" is materially different from "AK1". Mr. Kamwi disputed that he was the author and filed "MS2" at court. Based on the submission by Mr. Dicks, Mr. Kamwi issued summons against first and second respondents. In the amended particulars of claim he alleges that (*inter alia*).

"4. On the 12th of May 2004, 2nd defendant instigated by 1st defendant applied to the above court to have plaintiff interdicted for allegedly practicing as a legal practitioner basing their allegations on a different document and or alternatively fraudulent and forged document "MS2". At the same time 2nd defendant under the influence and instigation of 1st defendant falsely accused and laid criminal charges against plaintiff that he was practicing as a legal practitioner.

... Therefore, as a consequence of the defendants' fraudulent document "MS2", plaintiff suffered:

- (a) Loss of future income N\$2 million;
- (b) Loss of business and professional business M\$1 million;
- (c) For interdiction resulting from a fraudulent "MS2" as admitted by defendants N\$1 million;
- (d) For lost chance to gain a benefit (sic) N\$1 million;
- (e) For future expenses an account of damage - causing event N\$170 000;
- (f) As costs incurred as a result of a fraudulent "MS2" as admitted by defendants;
- (g) For false imprisonment resulting from a fraudulent "MS2" document as admitted by defendant;
- (h) 20% interest per annum on each sum above from 8 November 2006 to final date of payment;
- (l) Costs of suit."

[9] The respondents/defendants opposed the summons and also filed a plea denying all the allegations.

[10] On 8 January 2008 the applicant launched an application in terms of Rule 31(1). As mentioned above, the notice in terms of Rule 31(1) is supported by an affidavit deposed of by Alex Kamwi. In that affidavit it is alleged that:

"4. On the 4th of February 2005, 2nd defendant by Adv. Dicks admitted or alternatively confessed and acknowledge that notice "MS2" is 'materially different' from "AK1" hereto annexed. Alternatively therefore, defendants admitted to fraud and fault. This confession was made at the hearing before a judge and is thus

admissible in case of obtaining a judgment against defendants and is conclusive evidence of the fact.

9. As the consequences of the respondents' failure to settle this matter out of court despite their confessions or admissions, plaintiff now seeks judgment in terms of Rule 31(1) which provides that defendants may at any time confess in whole or in part the claim contained in the summons whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to the confession. It is in terms of this rule that I now seek a judgment against defendants according to their confession or admission."

[11] Rule 31(1) provides as follows:

"31(1) save in actions of divorce, restitution of conjugal rights, judicial separation or nullity of marriage, a defendant may at any time confess in whole or in part the claim contained in the summons. Such confession shall be signed by the defendant personally and his or her signature shall either be witnessed by counsel acting for him, not the counsel acting for the plaintiff, or be verified by affidavit, and furnished to the plaintiff, whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to such confession".

[12] The requirements of the rule with regard to the mode of execution of the confession have been held to be peremptory. In *Sunset Investments PTY LTD v Bramdan*¹ Van Heerden J stated as follows:

"the requirements of the Rule as regards the mode of execution are, in my view, peremptory. That this is the intention of the Rule flows, I think, firstly from the use of

¹ 1973(2) SA 415 (D) at 418

the word 'shall' in regard to the saying of the confession by the defendant personally and the witnessing thereof by an attorney or the verifying by affidavit such use is, generally speaking, a useful guide that a provision is peremptory rather than directory."

[13] In *casu*, what Adv. Dicks admitted to i.e. (that "MS2" is materially different to "AK1") does not by any stretch of the imagination amount to a confession in whole or in part to the claim contained in the summons of Mr. Kamwi against the defendants. In addition, the second respondent, on whose behalf, Mr. Dicks appeared did not sign the so-called confession as contended by Mr. Kamwi. Also during those proceedings when the so-called confession or admission was made, the first respondent was not party to those proceedings and therefore whatever Mr. Dicks submitted, it was on behalf of the second respondent.

[14] For all the above reasons, a case has not been made out in terms of Rule 31(1) by the applicant against the respondents.

[15] In the result, the application in terms of Rule 31(1) is ruled as irregular proceedings and is set aside with costs.

ON BEHALF OF APPLICANT:

Mr. Alex Kamwi

Instructed by:

ON BEHALF OF RESPONDENTS:

Adv. Dicks

Instructed by:

Weder, Kauta & Hoveka Inc.