REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 115/2012

In the matter between:

RONALD PATRICK KURTZ **APPLICANT**

and

ERNA IRENE KURTZ (born SIMEON) **FIRST RESPONDENT**

ESSIE HERBST **SECOND RESPONDENT**

Neutral citation: *Kurtz v Kurtz* (A 115/2012) [2013] NAHCMD 178 (27 June 2013)

Coram: PARKER AJ

Heard: **29 May 2013**

Delivered: **27 June 2013**

Flynote: Practice **–** Judgments and orders – Rescission of order – Application in terms of rule 44(1)*(a)* of the rules – Court finding that there was irregularity in the proceedings and the court was not legally competent to grant the order sought to be rescinded – Consequently the court concluded that the order was erroneously sought and erroneously granted, and accordingly granted the application.

Summary: Practice – Judgments and orders – Rescission of order – Application brought in terms of rule 44(1)*(a)* of the rules to rescind application granted in the absence of the applicant – Court finding that there was a clear error in the set down hearing date obviously resulting in the absence of the applicant at the hearing – Court found that the respondent's counsel bore a duty to have drawn the attention of the court to this material matter – Court also found the court was not legally competent to grant the order against the trust when the trust was not a party to the proceeding – Court concluded that the applicant has succeeded in establishing that the order was erroneously granted – Consequently, court held that the order should be rescinded without further enquiry and it is not necessary for the applicant to show good cause for rule 44(1)*(a)* to apply.

Flynote: Costs: Award of costs – Costs not to follow event where successful party's counsel disobeyed a court order for filing of heads of argument.

Summary: Costs: Award of costs – In instant case successful applicant's counsel failed to file heads of argument timeously – Court found that para 20(6) of the practice directions should be invoked – Consequently, in exercise of its discretion court refused to order that costs should follow the event – Court accordingly made no order as to costs.

ORDER

(a) The order granted by the court on 7 September 2012 is rescinded.

(b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The applicant, represented by Mr Phatela, has brought an application on notice of motion in which he seeks an order in terms appearing in the notice of motion. It is a rescission application based on rule 44(1)*(a)* of the rules of court. The first respondent ('the respondent') has moved to reject the application and raises some points *in limine*.

[2] In his heads of argument, Mr Dicks, counsel for the respondent, articulates the preliminary points of objection briefly thus. At a case management conference the applicant's counsel undertook to file replying affidavit, which was already overdue, on or before 20 March 2013 and so simultaneously file an application for condonation of the late filing of the replying affidavit. Counsel failed to file the applicant's replying affidavit. Furthermore, counsel failed also to file timeously heads of argument in terms of the practice directions. Mr Dicks submits that for the applicant's contempt of court the rescission application should be dismissed with costs.

[3] I find that no replying affidavit is properly before the court; and so the court will not take cognizance of the replying affidavit filed out of time. As to the heads of argument; it is my view that heads of argument are for the convenience of the presiding judge. In the instant case, I am able to determine the application without the benefit of written heads of argument of Mr Phatela. In any case, para 20(6) has an answer to the issue at hand. In virtue of this provision in the practice directions together with the reasoning and conclusions put forth in paras 4 et al, I think it would be, unreasonable, unfair and unjudicial to dismiss the rescission application at the threshold of these proceedings. I would therefore determine the application on the basis of the founding affidavit and the opposing affidavit. And I shall invoke para 20(6) of the practice directions in dealing with Mr Phatela's late filing of his heads of argument.

[4] A prelude to the present application ('rescission application') is briefly this. Para 5.2 of a Settlement Agreement between the applicant and the respondent which is incorporated in their final divorce order records the following:

'The parties will endeavour, within 30 days from the date of the final order of divorce, to reach an agreement as to how the estate is to be equally divided between them, failing which the parties agree that an independent mutually agreed upon receiver will be appointed to so divide the joint estate with the normal functions and powers so given to a receiver.'

[5] The parties failed to agree as to who should be appointed receiver/liquidator. As a result, on 11 June 2012 the respondent (applicant in that application) brought an application in the court for the appointment of a liquidator/receiver and other relief. The applicant (the respondent in that application) then filed a notice of intention to oppose the application which was set down to be heard on Friday, 22 June 2012 on the motion court roll. It was not heard on that date. The hearing of the application was postponed on three occasions until it was removed from the motion court roll on 27 July 2012, apparently because it became opposed.

[6] The respondent restored the matter to the opposed motion roll, and it was set down to be heard on '7 September 2010'. The set down hearing date is indubitably an error. It is, therefore, significant for my present purposes to advert to the letter under the hand of the applicant's legal representatives which primarily drew the attention of the respondent's legal representatives to this important error. And did the respondent's legal representatives respond and attend to the obvious error which – as I have said – is very important? No. They did not. They disregarded their colleagues' concern and rushed recklessly to court on 7 September 2012 and moved the application and obtained an order in the absence of the applicant – for obvious reasons.

[7] The obvious reason is that the application was set down for hearing on a date that had long passed. The reasonable, just and decent thing the respondent's legal representatives should have done was to be grateful to the applicant's legal representatives for drawing their attention to the wrongness of the set down hearing

date and take appropriate steps to cure the error, instead of recklessly rushing to court and moving the application. In this regard, I respectfully reject the respondent's contention that when I granted the 7 September 2012 order I had condoned the error in the set down hearing date. This contention does not accord with reality and logic. I could not have condoned that which was not brought to my attention at all.

[8] Thus, it is my view that the respondent's counsel bore a duty to have brought to the attention of the court such an important matter about the error in the set down hearing date. If the attention of the court had been drawn by counsel to the erroneous and misleading set down date, a material matter on any pan scale, the court would most certainly not have heard the application and would most certainly not have made the 7 September 2012 order. In this regard, I stated in *Disciplinary Committee for Legal Practitioners v Murorua* 2012 NR 481 at 493F that –

> '… in England a solicitor who failed to inform the court of all material matters within his knowledge and about which the court should have been informed, is guilty of professional misconduct; so, too, is a solicitor who failed to implement an undertaking given to another solicitor and a solicitor who gave false information to another solicitor, guilty of professional misconduct. (Halsbury's *Laws of England* 4 ed paras 299, 304) I do not see any good reason why such acts of misconduct should not, in terms of Part IV of the LPA (the Legal Practitioners Act), be judged to be unprofessional conduct in Namibia (with its unified legal profession), considering the interpretation and application of s 31, read with s 32(1)*(b)*, of the LPA which I discussed previously. Furthermore, it is my view that the conduct of a legal practitioner that is found to be unprofessional may also be dishonourable or unworthy conduct.'

For these reasons I find that there was an irregularity in the proceeding in which the order was granted.

[9] In view of what is said in paras 3, 6, 7, 8, 10 and 11 it would (as I have intimated previously) be unreasonable, unfair and unjudicial to dismiss the present rescission application at the threshold of the present proceedings. The first respondent's point *in limine* is, accordingly dismissed.

[10] A relevant point raised on the answering affidavit, which the court cannot overlook, and argued by Mr Phatela is this. Para 2 of the 7 September 2012 order is interwoven with some substantial parts of the order and they concern the Kurtz family trust. It is not disputed that the parties are trustees of the trust. It is therefore indubitably fair and reasonable and in accordance with the rules of court for the respondent to have joined the trust so that the trust could be heard. The trust has a direct and substantial interest in the outcome of that application and any order gravely and substantially affected it, but the trust has not been joined; and so, the court was not legally competent to have made such a deadly order in para 2 (and the related paragraphs of the 7 September 2012 order) dissolving the trust, which – as I have said previously – is not a party to that application.

[11] It is trite that in our law a court is not entitled to grant an order against a party which is not a party to the proceedings concerned. This principle of law is so fundamental to our notions of justice and fair trial that I need not cite any authority in support of it. Thus, in the instant case, I find that it was not legally competent for the court to make the 7 September 2012 order.

[12] Accordingly, I am satisfied that the applicant has established that the 7 September 2012 order was erroneously granted in the absence of the applicant, within the meaning of rule 44(1)*(a)* of the rules of court. Having so found the order should be rescinded; and it is not necessary for the applicant to show good cause for rule 44(1)*(a)* to apply. (H J Erasmus, *Superior Court Practice*, ibid., pp B1–308–309)

[13] As respects the issue of costs; in invocation of para 20(6) of the practice directions, although the applicant has been successful, in the exercise of my discretion, I decide that costs should not follow the event.

[14] In the result, I make the following order:

(a) The order granted by the court on 7 September 2012 is rescinded.

(b) There is no order as to costs.

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C Parker

Acting Judge

APPEARANCES

APPLICANT: T C Phatela
Instructed by Murorua & Associates, Windhoek.

FIRST RESPONDENT: G Dicks
Instructed by Kirsten & Co. Inc., Windhoek

SECOND RESPONDENT: No appearance