

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case Number: 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 288 (14 September 2018)

CORAM: MASUKU J

Heard: 15 March 2018

Delivered: 14 September 2018

Flynote: Civil procedure - Applications – Rule 61 – Irregular proceedings – what constitutes irregular proceedings - requirements to be satisfied by applicant therefor.

Summary: The applicant had instituted an application in terms of Rule 61 of this court's rules, alleging an irregular proceeding in light of a judgment by this

Honourable Court in 2011 in the same matter, specifically order 3 and seeks for the Honourable to dismiss and/or set aside the judgment of 2011.

This matter has been in the litigant “arena” since 2010. The main application has been heard in 2011. The applicant seeks to find whatever means necessary to strike out or set aside the judgment in 2011.

Held that – The applicant’s interpretation of Rule 61 of this Court’s Rules is correct, however that it does not pertain to this matter as judgment has already been delivered in 2011.

Held – The application in terms of Rule 61 is hereby dismissed with costs.

ORDER

1. The application in terms of Rule 61 is hereby granted.
 2. The applicant is to pay the costs occasioned by this application on a scale as between attorney and client.
 3. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J:

Introduction

[1] This matter, between the parties cited above, is long suffering and has occupied the court’s roll for a long time. It has served before court and has mutated from one form to the other seemingly without end.

[2] The application presently before me, is one for irregular proceedings raised by the respondent in terms of rule 61, read together with rules 8, 76 and 103. The relief sought by the respondent is couched as follows:

'1. That, in terms of Rule 61 (read with the applicable rules of court referred to hereunder) the notice of motion and affidavit dated 25 November 2014, and the application initiated in terms thereof and/or its purported service constitutes an irregular and/or improper step as envisaged in rule 61 of the Rules of this Honourable Court and is hereby struck-out, alternatively set aside.

2. That in terms of rule 61, read inter alia with rules 8, 76 and 103 of the current Rules of Court, as well as Rules 31, 44 and 53 of the Previous Rules of Court applicable at the time of the delivery of the judgment under case number A244/2010, the application is irregular and/or improper and is hereby dismissed, alternatively struck-out alternatively set aside.

3. That, in light of the judgment of this Honourable Court in the matter of NAMFISA v Christian & Another 2011 (2) NR 537 (HC), and specifically order 3 thereof, the present application is irregular improper and stands to be dismissed, alternatively struck-out alternatively set aside.

4. That the respondent pays the costs of this application on a scale as between attorney and own-client.

5. Further or alternative relief.'

[3] The rule 61 application, is moved in the light of an application moved by the applicant by virtue of a notice of motion dated 25 November 2015 and in terms of which the applicant sought an order in the following terms:

'1. Ordering that the operation and execution of the Court order delivered by Smuts J, on 27 May 2011, pending the hearing and out come of the application launched on 25 November 2014 for its setting aside in terms of the common law principle *ex dubito justitiae*. (the *ex dubito justitiae* application).

2. Directing that the Respondent pays the costs of this application if the Respondent opposes the application.

3. Directing that paragraph 1 above operates as an interim interdict pending the decision of *ex dubitio justitiae* application.’

The parties

[4] The applicant is a litigant in person, a Namibian male adult, residing at Onyati Street 336, Katutura, Windhoek.

[5] 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 situate at 154 Independence Avenue, 8th Floor, Sanlam Centre, Windhoek.

Background

[6] The main application between the applicant and respondent was heard and decided in the respondent’s favour by this court in 2011. The applicant, it would seem, approached this court seeking, as appears in para [3] above, to stay the operation of a judgment delivered by Smuts J on 27 July 2011.

[7] More particularly, para 3 of the NAMFISA 2011 judgment issued by Smuts J. reads as follows:

‘3. No legal proceedings of whatever nature may be instituted by Mr Christian against Namfisa in any courts or inferior court without the prior leave of this court or a judge of this court. Such leave shall not be granted unless the court of the judge in question, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is a prima facie ground for such proceeding.’

¹ Act 39 of 1984.

[8] It is particularly in the light of the above order by Smuts J, that the respondent has launched this rule 61 application. It would seem that the respondent principally questions the applicant's right to bring the application in question and contends that the said application constitutes an irregular step or proceeding.

[9] As is evident from the rule 61 notice, the respondent has raised a number of grounds upon which it contends that the applicant's application constitutes an irregular step or proceeding. It may not be rendered necessary to traverse all the various grounds on which the objection to the proceeding is predicated.

Issues for determination

[10] The main issue for determination is whether any application by the applicant can be entertained by this court in view of para 3 of the Smuts J 2011 judgment, quoted in para 7 above. Another issue that may require determination, is whether the applicant has a right to the orders sought in the said application.

[11] Regarding the first issue, it is clear that the High Court, per Smuts J expressed itself in very clear and unambiguous language regarding the peremptory steps that the applicant should take should he, for any reason, wish to institute any proceedings in this court. This order was categorical in para 3 and required the applicant to seek prior leave from a Judge of this court before launching any proceeding before this court.

[12] It is the respondent's contention that the applicant has not sought such leave as ordered nor has it been granted to him. In this regard, it is contended that the applicant has, in the circumstances, no *locus standi* to bring this application short of complying with the court order, which is compulsive in its language and binding in its terms.

[13] In this regard, I agree with the respondent that the applicant does not have the right to bring this application at this stage. In this connection, the concept of *locus standi* is not used in its wide sense but to indicate that the applicant has not shown that he has the right to bring the current proceedings in the light of the clearly peremptory terms of the 2011 judgment. This is so notwithstanding that in the wider sense, the applicant does otherwise have standing to bring the proceedings. This right can only be exercised once the applicant has fully complied with the aforesaid compulsive order issued in 2011.

[14] It is abundantly clear that the applicant has not sought to appeal against this decision more than seven years later and for that reason, it remains binding and effective on him and on this court as well. This court, in the circumstances, cannot revisit it as it has become *functus officio*, it having fully and finally exercised its jurisdiction in this matter. Any remedy that the applicant has, lies with the Supreme Court, and as intimated, it does not appear that the applicant approached the Supreme Court to invoke either its appellate or review jurisdiction in this matter.

[15] In the circumstances, I am of the considered view that the respondent is correct in submitting that the applicant has no right to bring this application, short of him fully complying with the order of Smuts J. This court cannot be seen to speak in a forked tongue by running with the hares and chasing with the hounds. The message must be clear and consistent as an order of court transcends the particular judge who issued it. It remains an order of court and is binding until a formal legal process to set it aside has been properly and successfully launched.

[16] I have read the basis for the applicant's opposition of the application, together with his oral submissions. One thing is clear – he does not show that he has complied with the order, nor, I may add, does he state that he was subsequently exempted by this or any other competent court, for that matter, from compliance therewith. There is, in the circumstances, nothing to be said for the applicant, save to point him to the court order and call upon him to

comply with it. It is the key that can unlock the portals of this court to him, in this and any other matter he may be minded to institute in the future.

[17] In view of the foregoing, I am of the considered view that this point is so compelling and decisive of the applicant's right to bring this application such that it is unnecessary to decide the other issues, weighty as they are, raised by the respondent. The other points include the point that this court may not depart from its judgment, as it cannot sit in review over its own judgment.² The applicant simply does not have the right, short of complying with Smuts J's order, to bring this or any other application before this court.

[18] Before drawing the curtain on this matter, it is necessary that I advert to an argument raised by the applicant. This was in relation to the issue of costs. Mr. Christian argued that the respondent decided to latch on this case when it is, in a sense, not a party and is as it were, uninvited. He argued therefor that the respondent is not entitled to costs in this matter, as it is not a protagonist in the true sense in this word.

[19] Mr. Philander, for the respondent, took an opposing view. He reasoned that the applicant cited the respondent as a party in this matter in the first place. Furthermore, he sought an adverse order as to costs against the respondent in the event the latter opposed the order, which the respondent has done. I agree with Mr. Philander in this regard. The argument advanced by the applicant simply holds no water.

[20] The respondent was drawn by the applicant into the pools of these proceedings, showing that it has an interest. Not only that, the applicant, as it has turned out, sought to access the portals of this court with dirty hands in a sense, by launching an application without following the edict that this court pronounced.

[21] The respondent, as a responsible citizen, has an unyielding constitutional duty, as a constitutional citizen, to ensure that orders of court

² *Balzer v Vries and Others* (A 06/2014) [2014] NAHCMD 32 (4 February 2014).

are strictly complied with and where the court's orders have not been complied with, to draw the court's attention to that fact. In the circumstances, I am of the view that Mr. Philander is eminently correct in his submissions.

Costs

[22] The issue of costs, it has been authoritatively stated, many times without number, lies within the court's discretion. Ordinarily, costs have to follow the event. In this case, there is no reason why the applicant should not be ordered to pay the costs as the court has upheld the respondent's case and found against him. The only question for determination, is whether the costs should be on the punitive scale as applied for by the respondent.

[23] It is trite learning that punitive costs are not lightly granted by the courts. This is so because parties who lose cases should not be deterred from accessing the courts by the chilling effect punitive costs engenders. On the other hand, there are circumstances in which the court will issue an order for punitive costs and in this regard, an array of factors may influence that decision, for instance the party's untoward and discreditable behaviour, either in launching the proceedings or in the manner they have conducted themselves or the litigation in question..

[24] In the instant case, it is clear that the applicant has acted in direct contravention of an order of this court and seeks relief without complying with this court's order of 27 May 2011, of which he is undoubtedly aware. This is conduct, the court cannot countenance. Even after the respondent brought the ill-advised nature of the application to the applicant's attention, he proceeded undeterred and persisted in the matter being heard. This therefor commends itself as a proper case in which to issue costs on the attorney and client scale, as I hereby do.

Order

[25] Having regard to the foregoing, it is this court's view that the following order is appropriate:

1. The applicant's application dated 25 November 2015, is hereby declared to be an irregular step within the meaning of Rule 61 of this court's Rules and is hereby struck from the roll.
2. The applicant is ordered to pay the costs of this application on the scale between attorney and client.
3. The matter is removed from the roll and is regarded as finalised.

T S Masuku
Judge

APPEARANCE:

APPLICANT: In person

RESPONDENT R Philander
of ENSAfrica | Namibia (incorporated as
LorentzAngula Inc.), Windhoek