

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR REINSTATEMENT

CASE NO. A199/2012

In the matter between:

ADOLF HANS GERHARDT DENK

APPLICANT

and

**THE CHAIRPERSON OF THE DISCIPLINARY
COMMITTEE FOR LEGAL PRACTITIONERS**

FIRST RESPONDENT

HENDRIK CHRISTIAN

SECOND RESPONDENT

RUBEN SAMUEL PHILANDER

THIRD RESPONDENT

THE LAW SOCIETY OF NAMIBIA

FOURTH RESPONDENT

Neutral Citation: *Denk v The Chairperson of the Disciplinary Committee for Legal Practitioners (A 199/2012) [2018] NAHCMD 405 (14 December 2018)*

CORAM: MASUKU J

Heard: 14 September 2018

Delivered: 14 December 2018

Flynote: Civil Procedure – application for reinstatement of an application for rescission – requirements to be met by applicant therefor – Rules of Court – Rule 32(9) and (10) – whether non-compliance therewith is fatal to the application for reinstatement.

Summary: The applicant, a legal practitioner, was found guilty by the Disciplinary Committee for Legal Practitioners of dishonourable or improper conduct following a complaint by the second respondent. He successfully challenged that finding. Unbeknown to him, the second respondent obtained an order rescinding and setting aside the finding favourable to him. He launched an application for the review of that order, which was not opposed. The matter was placed on the motion court roll but because the applicant's legal practitioners had not received the returns of service in good time, the matter was struck from the roll. The applicant now seeks to have his application for rescission of the order granted but the second respondent opposes same claiming chiefly that the applicant has no interest in the order obtained by the said respondent.

Held – that a party seeking reinstatement must provide a reasonable and acceptable explanation for the matter being struck from the roll and that he or she has good prospects of success.

Held further – that the applicant had provided a reasonable and acceptable explanation in that the matter could not have proceeded in the absence of the returns of service, which had not been provided in good time by the Deputy-Sheriff and that the late receipt of the returns of service was outside the control of the applicant.

Held – that the applicant had bright prospects of success as his application for rescission is based on the uncontested fact that he had not been served with the application which resulted in the order in his favour being set aside, considering that same had been served on legal practitioners who had not been appointed by him as his legal practitioners of record.

Held further – that the applicant had an interest in the order granted in his absence since the said order had a decisive bearing on his status as a legal practitioner in good standing.

Held – that rule 32 (9) and (10) is not applicable to the peculiar facts of this matter for the reasons that the application for rescission had not been opposed by the applicant and that any non-compliance had to do with the practice directions and required only the court to make a finding as to whether a good and acceptable explanation for the non-compliance with the practice directions had been proffered.

The application for reinstatement was granted with costs.

ORDER

1. The Applicant is granted leave to re-enrol his application for rescission in terms of the provisions of rule 103 of this court's rules.
2. The Second Respondent is ordered to pay the disbursements incurred by the Applicant in this application.
3. The application is removed from the case management roll and is to be re-enrolled on the proper motion court roll.

RULING

MASUKU J:

Introduction

[1] This matter has a chequered history. It has been interned in this court's system for far too long as it relates to matters that date back to 2012, if not even before. It has clogged the system and it is necessary for the matter to be moved forward, and hopefully, for the matter to be resolved once and for all.

[2] The applicant, Mr. Denk, is an Advocate of this court. He had approached this court in terms of rule 103, essentially seeking the rescission of an order of this court, which he claims was issued without his knowledge although it affects his rights and interests.

[3] In a prescriptive mode, the applicant states that the application was served on all the respondents but no order is sought against them, save the 2nd respondent, Mr. Christian, who is acting in person. He has opposed the application on grounds that shall be traversed as the judgment unfolds further.

[4] In his founding affidavit, the applicant deposes that his application, dated 21 November 2017, was placed on the motion court roll for hearing. He states that it was served on the 2nd respondent, who did not oppose same. The application was set down for hearing on 8 December 2017 on which date it was struck from the roll for reasons that shall be apparent as this ruling unfolds. The essence of this application is to seek the re-enrolment of the rule 103 application, which the 2nd respondent opposes.

Background

[5] In the founding affidavit, the applicant deposes that he, together with Mr. Ruben Philander, a duly admitted practitioner of this court, were charged and found guilty of unprofessional and/or unworthy and/or dishonourable conduct by the Disciplinary Committee for Legal Practitioners. The conviction, returned on 28 June 2012, was pursuant to a complaint lodged by the 2nd respondent following the applicant signing a notice of motion on behalf of Mr. Philander, who was not in town although an urgent application was due for hearing, involving the applicant's former employer, NAMFISA.

[6] To cut a long story, the applicant and Mr. Philander challenged the decision to find them guilty before this court by way of review. On 17 May 2014, Mr. Justice Miller upheld the application for review and accordingly set aside the conviction. There were further events that unfolded in this imbroglio.

[7] It would appear that the applicant was again hauled before the disciplinary committee and was due to appear in October 2017. It is his deposition that when the documents relating to the renewed disciplinary proceedings were served, he was out of the country and that he was also taken ill. The charges for which he was to appear, he later found out, were the same as those in respect of which the review application had succeeded.

[8] It later transpired that the new charges were predicated on an order of this court granted by Parker AJ. On 29 October 2015. The said order reads as follows:

'1. The decision of the first respondent to hear the applicant's complaint in without calling the applicant as witness is set aside.

2. The decision of the first respondent taken during hearing of applicant's complaint to withdraw the applicant's complaint without having been instructed and/or authorised by applicant is set aside.

3. The first respondent's decision to hear applicant's complaint as that the fourth respondent is set aside.'

[9] It is the applicant's contention that he was never served with the application, which culminated in the granting of the order that so affected his interests. He deposes that after obtaining a copy of the record of the proceedings, he learnt that the application had been served on LorentzAngula Inc, who were described as the legal practitioners for the 2nd and 3rd respondents, who include the applicant.

[10] The applicant vehemently denies that he at any stage appointed the said law firm to represent him in the matter and that he had never been served with the notice of application for review although he was an interested party. As a result, he further deposes, he was unaware of the fact that the said application had been launched and that accordingly, the said order had been erroneously sought and granted by Parker AJ as it was granted in his absence and with him not having been served with same. This, he further

contends, was so notwithstanding that the order directly and materially affected his interests.

Bases of opposition

[11] In his opposing papers and indeed in argument, Mr. Christian argued that the applicant has no *locus standi* to challenge the order in question. He argued that the applicant has no interest in the order granted as it does not affect him but was directed at the Disciplinary Body of Legal Practitioners. It was Mr. Christian's further argument that in the application launched, no order was sought against the applicant and that he should, for that reason, be non-suited.

[12] He also contended that the applicant was, in footballing parlance, in court as a result of an offside decision, as it were. This was, according to him, because the applicant had not complied with the provisions of rule 32 (9) and (10) before he decided to launch the present proceedings, although, so the argument ran, the matter was interlocutory in nature and therefor subject to the mandatory provisions of rule 32. For failure to comply therewith, Mr. Christian urged the court to visit the proceedings with a striking of the application.

Reinstatement

[13] Mr. Denk, in the first instance, applied for an order condoning his non-compliance with the Practice Directions, which resulted in this application for condonation being struck from the roll. An explanation tendered for the non-compliance, was offered by an officer of this court, Mr. Strauss of Dr. Weder Kauta & Hoveka Inc., on affidavit He deposes that when the matter was due to be placed on motion court, he discovered that the returns of service were received late and could not meet the mandatory period of 8 days before the hearing on motion.

[14] The applicant's legal practitioners, represented by Ms. Esther Shigwedha, at motion court on the day in question, confirm that the returns of

service were not filed in good time, culminating in Ms. Shigwedha appearing before the court and requesting the matter to be removed from the roll because of the late arrival of the returns of service as stated.

[15] I am of the considered view that the applicant has proffered a reasonable explanation for the failure to comply with the Practice Directions, resulting in the non-compliance and the decision to have the matter removed from the roll. And, as it appears, the whole situation, was outside the applicant's control, as the Deputy-Sheriff failed to bring the returns of service in good time for the matter to be properly enrolled for motion court.

[16] It would be the high watermark of injustice, in the circumstances, to refuse the application for reinstatement when the applicant's legal practitioners were not at fault for all the necessary documents not being before court. I should mention that it is not unusual for this court, in such circumstances, to remove the matter from the roll, or in appropriate circumstances, to postpone same until all the necessary papers are in hand.

[17] The applicant further contends that he has bright prospects of success in the application for the reason that the order he seeks to have reviewed and set aside, was granted without notice to him although he has an interest in same. In this regard, the return of service reflects indubitably that the application to set aside the order of Mr. Justice Miller was served on LozentzAngula and there is nothing to gainsay the applicant's averment that he was not served with the said application.

[18] Mr. Christian alleges that the applicant had no interest in the order that was granted in his favour, which was served on LorentzAngula. I do not agree. It is clear that the effect of the order was to set aside an order, which had cleared the applicant of the misconduct that had been held to have been proved against him. Where there is an attempt to set same aside, it cannot, in my view be argued with proper justification that a person in the applicant's position had no interest when the effect thereof would be to draw the applicant back to the doldrums of probably being declared unfit to practice in this

jurisdiction, which is a very serious matter that any person faced with that possibility, would have an interest.

[19] In that regard, it becomes clear to me that ordinarily, such a person would have had to be served with the application that sets him back to square one, namely where the black *nota* that the judgment of Mr. Justice Miller, sought to obliterate, is restored. It therefor appears to me that the applicant has not only shown that there is a reasonable explanation for the non-compliance with the Practice Directions but that there are also bright prospects of success on the rule 103 application.

[20] I say so for the reason that in *Knouwds v Josea and Another*,¹ the Judge President of this court stated that service of process is an important first step which sets a legal proceeding in motion and that where service has not been effected, the proceedings are fatal and that 'Where there is a complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding which has taken place without service is a nullity and it is not competent for a court to condone it.'

[21] It is important to consider that the applicant, whose version is not controverted, was not served with the application and only became aware of it after the fact. What can also not be denied is that the effect of the order, namely that it had the potential to affect his status as a legal practitioner of this court. In view of the service of the 2nd respondent's application on legal practitioners who were not appointed to represent the applicant and to receive process directed to him, it appears to me that the applicant has bright prospects of success in the application for rescission as the court would not, in all probability, have granted the order if it had been brought to its attention that the applicant had not been served and was therefor unaware of the order sought and the allegations on which the said application was predicated.

Rule 32(9) and (10)

¹ 2007 (2) NR 792 (HC) at 798.

[22] Regarding the 2nd respondent insisting on the application of rule 32(9) and (10) and arguing that the application should be struck from the roll for non-compliance therewith, I am of the considered view that the application for reinstatement was at the instance of the applicant acknowledging that he had not complied with the relevant practice directions. It is not one dependent for success of the participation of the other side to the main dispute.

[23] Where a party does not comply with certain practice directions in motion court proceedings, especially as in this case, where the 1st respondent had not opposed the matter when it served on the motion court roll, the 2nd respondent would not have had to be engaged in terms of rule 32(9) and (10), because the applicant would be seeking, independently of the view of the 2nd respondent, to explain his delay and ask for an indulgence directly from the court for non-compliance. Even if the 2nd respondent would agree to the application for reinstatement not being granted, that does not serve to detract from the need on the part of the applicant to file a proper application explaining the cause of the non-compliance to the court and meeting all the requirements of an application for condonation.

[24] If the position were otherwise on this matter, it would mean that the court would be reduced to a rubber stamp and the real parties who would determine whether a reasonable explanation has been made, for reinstatement to ensue, would be the parties themselves. In that event, the court would be placed in a straight-jacket, custom built by the parties for the court.

[25] In this regard, I am of the view that in the peculiar circumstances of this case, where the matter had been set down on the unopposed motion, the 2nd respondent would not have anything to say that would take away the obligation of the applicant and the right of the court, to an explanation of why the practice directions were not complied with. The invocation of rule 32 (9) and (10) accordingly does not find application in this particular context.

Conclusion

[26] In the premises, I am of the considered view that the applicant has made a good and acceptable case for the order reinstating the application for rescission in terms of rule 103 of this court's rules. There is, in my view, no merit in the opposition by the 1st respondent.

Order

[27] I accordingly issue the following order in this matter:

1. The Applicant is granted leave to re-enrol his application for rescission in terms of the provisions of rule 103 of this court's rules.
2. The Second Respondent is ordered to pay the disbursements incurred by the Applicant in this application.
3. The application is removed from the case management roll and is to be re-enrolled on the proper motion court roll.

TS Masuku
Judge

APPEARANCES

APPLICANT: In person

2nd RESPONDENT: In person