

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2018/00411

In the matter between:

**MAESTRO DESIGN STUDIO T/A MAESTRO
OPERATIONS CC**

APPLICANT

and

THE MICRO LENDING ASSOCIATION OF NAMIBIA

RESPONDENT

Neutral Citation: *Maestro Design t/a Maestro Operations CC v The
Microlending Association of Namibia* (HC-MD-CIV-MOT-GEN-2018/00414)
[2020] NAHCMD 140 (7 May 2020).

CORAM: MASUKU J

Heard: 19 February 2020

Delivered: 07 May 2020

Flynote: Civil Practice – application for rescission – rule 103 – requirements therefor – Practice Directives – 3(5) and 29 discussed – a party is entitled to notice before an order is issued dismissing a claim or defence –

Legal Ethics – the need lawyers to notify a fellow legal practitioner if there are adverse allegations made against him or her raised by a new client.

Summary: The applicant brought an application for rescission of certain orders dismissing its plea and counterclaim and an order granting default judgment against the applicant. The applicant alleged that the judgment was granted in error because it had not been notified of the prospect of its defence and counter-claim being liable to be struck out for non-compliance with court orders. The respondent applied for the application to be struck from the roll for non-compliance with certain practice directives.

Held: that PD 27, which calls on a party in an application for rescission to file the said application under the case number of the main case, serves a purpose as it avoids the judge dealing with the rescission application having to consider two different files, when the cause of the complaint is likely to be found in the documents filed of record in the main file.

Held that: Legal Practitioners should ensure that this PD is followed to the letter and that any further non-compliance therewith, is likely to be visited with an appropriate sanction in the future.

Held further that: in an application in terms of rule 103, a party is not required to show good cause for the non-compliance and that the applicant has a bona fide defence. It suffices if the party can point to an error, which if the judge granting the order had been made aware of, he or she would not have granted the order.

Held: that a party which stands to have its claim, defence, or counterclaim struck out for non-compliance with an order of court or other direction, is entitled to notice of the possibility of striking out the said proceeding on account of the seriousness and far-reaching effect of the order.

Held that: Legal practitioners are entitled to bring it to the notice of colleagues if there are allegations made against them by erstwhile clients in view of the

damage this may herald on the said legal practitioners so that they can respond to the allegations.

The application in terms of rule 103 was granted for the reason that the applicant was not given notice of the possibility to strike out his defence and counterclaim. The applicant was nonetheless ordered to pay the costs.

ORDER

1. The order dated 23 October 2018 granting a judgment by default to the Respondent, is hereby set aside.
2. The order dated 2 October 2018 striking out the applicant's defence and counter-claim, is hereby rescinded and is set aside.
3. The Applicant is ordered to pay the costs of this application, consequent upon the employment of one instructing and one instructed Counsel.
4. The matter is referred to the Managing Judge to continue with the matter.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] October 2018 was an unhappy month for the applicant in this matter. On 2 October 2018, an order striking out the applicant's defence and counterclaim, was issued by this court. This was shortly followed on 23 October 2018, by an order granting default judgment against the applicant, in the amount of N\$ 68 000, with costs.

[2] Aggrieved by these adverse orders, the applicant approached this court seeking an order essentially rescinding and setting aside the aforesaid orders and on grounds that shall be traversed shortly below.

[3] It is the sustainability of the relief sought by the applicant that is the sole focus of this judgment. In this regard, it is necessary to state that the respondent has come out – guns blazing, as it were, calling for the status quo to be maintained and in perpetuity. Who, between the two protagonists, is on the correct side of the law in this regard, will be evident by the time this judgment is brought to a close.

The applicant's case

[4] The applicant's case is predicated on the founding affidavit of Mr. Johannes Shigwedha, who describes himself as the sole member of the applicant, Maestro Operations CC t/a Maestro Design Studio. He states that in November 2017, he was served with a combined summons in which the applicant was sued by the respondent, the Micro- Lending Association of Namibia, the respondent herein.

[5] On receipt of the summons, he instructed Ms. Alvine Samuel, a legal practitioner of Samuel Legal Practitioners to defend the proceedings. This was done. Mr. Shigwedha deposes that the matter remained defended by the applicant's legal practitioners until Ms. Samuel, on 22 June 2018, 'inexplicably withdrew as Applicant's legal representative'. He deposes further that several attempts to persuade Ms. Samuel to get back on record for the applicant were an exercise in futility.

[6] On 4 September 2018, Mr. Shigwedha further deposes, the applicant received a letter from the respondent's legal practitioners to which was attached a court order dated 8 August 2018. This court order called upon the applicant to comply with the respondent's notice in terms of rule 28(8). This rule relates to discovery. The order, further indicated that the matter was postponed to 03 October 2018 for a status hearing.

[7] Mr. Shigwedha states on oath that he did not understand the import of rule 28(8) notice but nevertheless understood that the applicant should be represented in court on the date to which the matter was postponed. He could not secure legal practitioners for the applicant on time and decided to personally attend court on behalf of the applicant. He intended, he states, to explain the applicant's predicament; apply for more time to instruct a legal practitioner for the applicant and to inform the court of the reason why the rule 28(8) order had not been complied with.

[8] He states that he arrived in court and discovered that the matter was before Mr. Justice Usiku. He went in court to await the calling of the matter, only to learn later that an order had been issued by the learned Judge in chambers on the previous day, namely 02 October 2018. On 4 October 2018, further deposes Mr. Shigwedha, he received another letter from the respondent's legal practitioners informing him that the matter had been postponed to 24 October 2018 to enable the court to deal with the application for judgment by default applied for by the respondent. The learned Judge in chambers, also granted this judgment, on the eve of the date on which it had been set down.

[9] He then engaged the applicant's present legal practitioners of record, who advised that it was improper to oppose the application for default judgment. Instead, they advised, the applicant should apply for the setting aside of the orders stated in the notice of motion. It then came to his attention that the applicant had violated certain court orders, including delivery of witness' statements (13 June 2018); order for delivery of an answering affidavit or raise a question of law and compelling the applicant to comply with

the rule 28 notice. These non-compliances, Mr. Shigwedha states, he was not previously aware of.

[10] The applicant states that the application is brought in terms of rule 103 of the rules of this court. In dealing with the requirement of good cause, he states that he was not aware of the court orders because they were never brought to his attention by his erstwhile legal practitioner, Ms. Samuel. She never informed him of the need to file the documents necessary and required by the court orders in question.

[11] The applicant further questions the propriety of striking out his defence and dismissing his counterclaim. He states that he was not aware of the court order compelling him to comply therewith. He states further that the matter was dealt with in chambers, thus denying him an opportunity to deal with the reasons for the non-compliance. Perchance, if the court had heard him, it may have arrived at a different conclusion, he submits.

[12] The applicant, in the affidavit, further lays the blame for the non-compliances at the door of its erstwhile legal practitioners. In this regard, the following appears in the founding affidavit:¹

'I am advised that although principally the litigant shall not in all circumstances be absolved from non-compliance with the rules of court by his attorney, being the representative that the litigant has chosen for himself; a litigant who engages the services of an attorney and counsel is also entitled to expect that such professional will prosecute his or her cause with due regard to the rules applicable to the conduct of proceedings, and that depending on the circumstances of the case, the attorney's neglect should not, in the circumstances of the case debar the applicant, who was himself in no way to blame, from relief.

2.1.1.4.2 I submit that the circumstances of this case fall within the ambit of the exception to the rule that the litigant is bound by the conduct of his attorney. Applicant was entitled to expect that every effort will be made by Ms. Samuel to ensure that its case is properly prepared and presented.'

¹ Para 21.2.4.1 and 21.2.4.2 of the founding affidavit.

[13] It was on the basis of the foregoing statements that the applicant alleged that it was erroneous of the court to have granted the order that it did without having afforded it an opportunity to be heard. The applicant proceeds to mention that it has a *bona fide* defence to the action, which it states in the affidavit. It states further that it has also a counter-claim, which it filed, but was struck out for reasons mentioned previously.

[14] For the record, the applicant prayed for an order (a) rescinding and setting aside the default judgment granted in the respondent's favour dated 23 October, 2018; (b) an order rescinding and setting aside the order dated 2 October 2018, striking out the applicant's defence and counterclaim; (c) an order varying the order dated 8 August 2018, compelling the applicant to comply with the respondent's notice in terms of rule 28(8); and (d) an order directing the matter to revert to the position it was on 7 March 2018 and for the matter to proceed in terms of the case plan order dated 7 March 2018.

[15] The applicant claims that if the orders prayed for above are not granted, it will suffer great prejudice by having to pay the amount of N\$ 68 000, claimed against it, together with costs. These, it is stated, will occasion serious injustice to the applicant.

The respondent's case

[16] The answering affidavit is deposed to by Ms. Annelize Fourie, an employee of the respondent. The respondent contests the allegation by the applicant that the orders were erroneously made by the court because there are no facts alleged in the founding affidavit, which were not in the court's knowledge when it granted the order and which would have disturbed its eventual orders.

[17] It is the applicant's case that the court, in the face of the applicant's non-compliance, was faced with no other option, but to grant the orders it did and which orders were procedurally and substantively correct in the

circumstances. It was the respondent's case that to add salt to injury, the applicant had not address the correctness of the status reports filed on its behalf, dated 18 June and 03 August 2018, respectively.

[18] It is the respondent's contention that the applicant's posture and conduct in this matter is contrary to the overriding objectives of judicial case management and must be abhorred. Finally, the respondent contended that the facts in issue in the matter do not fall within the ambit of the provisions of rule 103(1)(a) of the rules of court. This is so because the applicant failed to demonstrate that the orders granted sought to be set aside, were granted in his absence and in error. The application, asserts the respondent, ought to be dismissed with costs.

Unsolicited affidavit

[19] Ms. Alvine Mirjam Samuel, the applicant's legal practitioner, states on affidavit that on 28 February 2018, as she was perusing e-Justice, she stumbled upon this matter and went through the papers filed on e-Justice. Upon reading the affidavit filed by her erstwhile client, Mr. Shigwedha, she realised that there were allegations made by him of her, and 'which border at (*sic*) unprofessional and unworthy conduct on my part'.

[20] Ms. Samuel stated that she wished to set the record straight regarding the series of events between her and Mr. Shigwedha. She stated further that she regarded the allegations made against her to be of a serious nature and warranting her response, bordering as they were, on unprofessional and unworthy conduct on her part.

[21] Her account, recorded on affidavit, is the following: Mr. Shigwedha is not unknown to her. He had approached her to assist in this matter. He had been served with a summons and requested the deponent to defend the matter. A notice to defend and a plea and counterclaim were timeously filed as recorded in the joint case plan.

[22] She states that she did not withdraw her services 'inexplicably' as alleged. Her version is that she was receiving conflicting instructions from Mr. Shigwedha and which rendered it difficult to continue to represent the applicant. Furthermore, there was the unresolved issue of her unpaid invoices by the applicant.

[23] In relation to the first reason for withdrawal, it is Ms. Samuel's case that Mr. Shigwedha was difficult to deal with when the respondent, in compliance with a rule 28(8) application, wished to inspect the website in question, in a bid to possibly resolve the matter. On a date fixed for the inspection, Mr. Shigwedha did not attend and the inspection was thus aborted, resulting in the respondents issuing a rule 28(8)(b).

[24] The implications of the said notice were discussed with Mr. Shigwedha and a new inspection date was set for 21 June 2018 and he recanted, without informing Ms. Samuel. It is her evidence that he told her that he had changed his mind and this resulted in the application to compel being filed by the respondents.

[25] Ms. Samuel further deposes that she spoke to Mr. Shigwedha regarding him not attending the last meeting and the implications of him not attending regardless of the order compelling him to release the website. She further brought it to his attention that the invoices for the work done kept increasing without him making any payment therefor. She told him that she would not act any further until he had settled the outstanding invoices and that including her not dealing with the application to compel. It was her evidence that she told him that his giving of conflicting instructions was delaying the case and detrimental to litigating in good faith.

[26] Ms. Samuel states that she informed Mr. Shigwedha of her intention to cease acting for him by telephone on 21 June 2018. She indicated that she was withdrawing her representation on the basis of the unpaid invoices and the application to compel that would be lodged by the respondent, which would require funds for her to oppose. It was her further deposition that she

informed the applicant's member that he did not have good grounds to refuse to allow the inspection of the website, particularly in view of the defence advanced, namely, that the work had been completed.

[27] The upshot is that she eventually withdrew her representation of the applicant when the application to compel was filed. Mr. Shigwedha, on receipt of the notice of withdrawal, called her erstwhile lawyer, who explained that he had to appoint new legal practitioners and further explained that regarding the application to compel, he needed to be in court and gave him the date of hearing, indicating that should he not attend, there would be dire consequences to his case. He promised to see what he would do.

[28] Ms. Samuel states further that the applicant did not again request her to proceed with the matter. She states that she was willing to proceed with the matter if the applicant would settle some of her outstanding fees. She attached a letter of demand and a summons issued to recover the outstanding fees to her affidavit.

[29] In sum, Ms. Samuel stated that the applicant was aware of the rule 28 application and she had explained all she had to Mr. Shigwedha. Furthermore, she sent to a notice in terms of rule 28 to him and discussed same at length, together with the order of 13 June 2018. She denies having at any time neglected her professional responsibilities to the applicant. In this regard, she points out that all the pleadings she had to file were filed and on time.

[30] She also refuses to take responsibility for the default judgment, reasoning that she explained to Mr. Shigwedha what he had to do once the application to compel was moved. It is her case that after the withdrawal, Mr. Shigwedha, knowing what he had to do, did nothing and does not appear to have taken the matter seriously either by appointing a new set of legal practitioners or attending to the matters in court and explaining what his intentions were. She, like Pilate, in the Bible, washed her hands of any responsibility for the orders that were eventually granted against the applicant.

[31] I have searched in vain to find the replying affidavit filed by the applicant, responding to the allegations contained, not just in the respondent's affidavit, but more importantly, in the affidavit of Ms. Samuel. In the absence of a replying affidavit, the position is that the facts deposed to by the respondent and Ms. Samuel, on the *Plascon Evan's*² rule, stand. I will return to effect of this finding later in the judgment.

Practice Directives

[32] The first legal issue taken by the respondent is procedural in nature. It is contended on the respondent's behalf that the applicant, figuratively speaking, threw out the practice directives (PDs), issued by the Judge President which are applicable in this matter out the window.

[33] The court's attention, was, in particular, drawn to PD 3(5) and 29, respectively. The first provides that 'Legal practitioners and litigants must comply with all practice directions issued under this rule and failure to do so may attract sanctions.' PD 29, on the other hand provides as follows:

'An application brought under rule 103 is interlocutory and must reflect the same case number issued in the main proceedings.'

[34] It is common cause that the applicant did not comply with this mandatory requirement. This application, although interlocutory, was lodged under a different case number as if it was a set of proceedings with a life and standing of its own.

[35] There is no doubt that the applicant fell foul of this mandatory provision and the issue raised by the respondent, is perfectly justified. The peremptory nature of the provision in question was not born out of a pedantic disposition by the Rulemaker. It has legitimate reason, namely, that the judge allocated to

² *Plascon-Evan Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD).

deal with the rule 103 application, should have the full record of the proceedings before him or her when the application is under consideration.

[36] This is particularly so for the reason that for the most part, the error allegedly made by the court and which is sought to predicate the rescission, will be in the record of proceedings. Judges are very busy and many times, are pressured for time. To expect them to straddle two horses in respect of the same application is not only inconvenient, but a total waste of precious and valuable time that could have been dedicated to some other judicial chore, and there are many.

[37] Mr. Muhongo, for the respondent, implored the court to show its displeasure at the applicant's violation of the rule, and to mark the importance of the practice directions in issue, by striking the matter off the roll, with an order for costs.

[38] I will, this time, issue a reprieve to the applicant and am disinclined to issue the sanction proposed by Mr. Muhongo. This should not be regarded as a licence or paralysis on the part of the court in enforcing the practice directions, but a window to allow parties an opportunity to learn and ensure in future that the above practice directions are alive and that they matter. More importantly, that they do draw the invective of the court, if overlooked or violated. Forewarned, is forearmed, so goes an English saying. He or she who has an ear, let him or her, hear this word of admonition.

The applicable law

[39] It is common cause that the application brought by the applicant, is in terms of rule 103. That rule provides the following:

'In addition to any powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

(a) erroneously sought or erroneously granted in the absence of any party affected thereby; . . .’

[40] Jafta J dealt with similar provisions as the one under consideration in *Mutebwa v Mutebwa*.³ The learned Judge reasoned as follows:

‘[15] The prerequisite factors for granting rescission under this Rule are the following: Firstly, the judgment must have been erroneously sought or granted; secondly such judgment must have been granted in the absence of the applicant; and lastly, the applicant’s rights or interests must be affected by the judgment.

[16] Once those three requirements are established, the applicant would ordinarily be entitled to succeed, *cadit quaestio*. He is not required to show good cause in addition thereto.

[17] Although the language used in Rule 42(1) indicates that the Court has a discretion to grant the relief, such discretion is narrowly circumscribed. The use of the word “may” in the opening paragraph of the Rule turns to indicate the circumstances under which the Court will consider a rescission or variation of the judgment, namely, that it may act *mero motu* or upon application by an affected party. It seems to me that the Rulemaker could not have intended to confer upon the Court the power to refuse rescission in spite of it being clearly established that the judgment was erroneously granted. The Rule should, therefore be construed to mean that once it is established that the judgment was erroneously granted thereby, a rescission of the judgment should be granted.’

[41] The question for determination is whether the applicant has managed to meet the requirements of rule 103, as carefully outlined by the learned Judge above. Mr. Muhongo, for the respondent is of the strong and firm view that the applicant dismally failed to do so. Mr. Alexander, for the applicant argued contrariwise. Who is on the correct side of the law in this regard?

[42] I should start by stating that the applicant, in its affidavit addressed the issue of a bona fide defence and further stated that there was good cause for

³ 2001 (2) SA 193 (TkH) para 15-17.

the default. It is clear that this position is legally incorrect because as stated by Jafta J above, all that an applicant under this rule is required to show is an error. Once that is shown to the satisfaction of the court, the applicant is, without more, entitled to rescission.

[43] What is evident is that the applicant relies for the relief in the main, on the remissness of its legal practitioner. It claims that it should not be thrown under the bus, so to speak, for the inattention and sins of its legal practitioner. In other words, the orders were granted against it because its legal practitioner was culpably remiss. A consideration on the correctness thereof, will throw a light on the sustainability of the applicant's stance.

[44] As indicated above, the allegations on oath by Ms. Samuel, remain unanswered and therefor unruffled. The applicant had an ample opportunity to engage their correctness and accuracy, but it did not, for inexplicable reasons. For that reason, the allegations by Ms. Samuel, an officer of this court I may add, carry the day.

[45] In this regard, it becomes very clear that the applicant sought to mislead the court as to what really occurred, deflecting the blame properly attaching solely to its member, to the applicant's erstwhile legal practitioner. I view this in a very serious light as it is false and secondly, it was meant to cast aspersions and incompetence to Ms. Samuel. The allegations against Ms. Samuel have been unmistakably shown for what they are – a lie deliberately contrived by Mr. Shigwedha in order to hoodwink the court.

[46] Furthermore, the version given by Ms. Samuel, is not only supported by correspondence and court notices she filed, it is also backed by objective factors. One of these is that it is clear from the record that she filed all the pleadings that she had to in order to properly ventilate the applicant's case before court and on time. There was no application for condonation nor a need therefor. This inevitably shows that Ms. Samuel diligently pursued the applicant's case and filed all pleadings and documents on time and that

whatever rash afflicts the applicant, has been attracted by the actions and inactions of its member, Ms. Samuel expressly excepted.

[47] It also becomes very clear therefor, that Ms. Samuel withdrew as a legal practitioner of record and informed Mr. Shigwedha the implications thereof. The withdrawal, she states, and this remains uncontroverted, was motivated by the fact that her invoices were not settled and that the applicant gave her conflicting instructions, which it is clear, ended up embarrassing her as she would fix meetings for inspection of the website, only for Mr. Shigwedha, to shift the goal posts.

[48] As a result, the inattention and disregard of court orders by the applicant resulted in the striking out of the applicant's defence and counter-claim, as the court had no explanation therefor. A party, which has not complied with any court order or requirement of the rules, must, as soon as it realises its shortcoming, approach the court for appropriate relief. The applicant clearly courted the disaster that attached by not making discovery as ordered and the court had no option but to grant the orders prayed for and which according to Ms. Samuel, Mr. Shigwedha had been made wise in advance.

[49] In point of fact, there was no opposition and before court was a dreadful pattern of non-compliance that decorated the applicant's prosecution of the case. There should come a time when a party that displays a lackadaisical approach to litigation and a sorry pattern of non-compliance with court orders, to the detriment of the overriding objectives of judicial case management, to meet its comeuppance, regardless of the pain that accompanies that spectacle in particular.

[50] It has been urged on the applicant's behalf that the court committed an error in granting the orders in the absence of the applicant. Absence, in the context of the rule, it must be mentioned, does not mean physical absence. Considered in proper context, absence, means the absence of notice, namely,

where an adverse order is granted against a party without that party not having been served nor notified of the hearing where the order will be issued.

[51] In the instant case, the applicant was at all material times aware of the hearings and did not file any papers. In the circumstances, there can be no other inference to draw than that the applicant's default was wilful and at best, grossly negligent. There is no issue of fact of which the judge who granted the order was aware, that would have caused him to issue a different order had he been made aware of it.

[52] Having said the foregoing, there is a question to answer. It is this - whether, and in spite of the applicant's reckless conduct of the litigation, coupled with the non-compliances, it was correct for the court to have issued an order dismissing the defence and counterclaim without affording the applicant an opportunity to deal with the proposed sanction of dismissal. It must be mentioned that the said sanction is decisive and renders the matter *cadit quaestio*.

[53] The applicant referred the court to *Minister of Health and Social Services v Amakali*⁴ where the Supreme Court had occasion to deal with a case where an order to dismiss a claim or defence was in issue. Writing for the majority of the court, Damaseb DCJ, said the following:

'In two judgments of the High Court, that question was answered in the negative. In *Donatus v Ministry of Health and Social Welfare* 2016 (2) NR 532 (HC) an application was brought on behalf of the plaintiff to have a defence struck on the basis of non-compliance with an order for discovery. The court noted that although non-compliance with court orders may be serious, the striking of a defence is a grave matter and the court must consider each case in the light of its peculiar facts and circumstances. Masuku J noted in para 36 that the order for the striking of a defence is very serious as it has the potential, if granted, to show to the errant party, what in footballing parlance, is akin to a red card. This card effectively excludes that party from further participation in the trial. For that reason, the dictates of justice and

⁴ 2019 (1) NR 262 (SC)

fairness would in my view require that this application should not merely be made orally or in the heads of argument. Good practice, propriety and fairness would suggest that it must on account of its gravity be on notice, preferably on application, and with which the defaulting party may have an opportunity to deal. Furthermore, it will always assist the court, before issuing such a drastic order, to have had the benefit of argument by both parties where they both still have their hands on the plough, so to speak.'

[54] In view of the above judgment of the Supreme Court, which is binding on this court, I am of the view that the applicant, notwithstanding its serial non-compliance with court orders, was still entitled to notice of the consequences of the non-compliance, namely, the possibility of its defence and counterclaim being struck out. I say this with a heavy heart though, considering that Ms. Samuel had informed the applicant of this reality, as appears in her uncontested affidavit.

[55] That nevertheless becomes water under the bridge because the Judge was not aware of the internal communication between the applicant and its legal practitioners at the time he issued the orders complained of. In the circumstances, and based on the binding Supreme Court judgment, the applicant was, notwithstanding the blood on his hands, so to speak, entitled to notice of the possible dismissal of his defence and counterclaim and to be afforded an opportunity to answer thereto.

[56] It appears to me that it would also suffice, in cases where a party has not complied with an order or directions of the court, when issuing a sanctions' order, to mention in the order that if the party still fails to comply, or to give a satisfactory explanation, the court may issue a sanction, including dismissal of the claim or defence, as the case may be.

Conclusion

[57] In view of the *Amakali* judgment, it appears to me that the dismissal of the applicant's defence and counterclaim, without notice, constituted an error

within the meaning of rule 103. It also follows that the default judgment, predicated as it is on the dismissal of the claim and counterclaim, cannot, at the end of the day, be sustained in its own right.

Costs

[58] It is now a trite principle, that the awarding of costs lies within the court's discretion, which is, to be exercised judicially. In the instant case, I am of the view that there is no reason not to order the applicant, even though it has been successful in this application, to pay the respondent's costs. This is because I take a very dim view of the conduct of Mr. Shigwedha, in trying to mislead the court, as exposed by his erstwhile legal practitioner's unanswered affidavit. The respondent's opposition is without doubt not unreasonable regard had to the entire conspectus of facts in this matter.

Ethical observation

[59] As is evident, I am very concerned about the conduct of the applicant's member in telling untruths about Ms. Samuel in an apparent effort to get this court's ear and sympathy. What is of concern is that if Ms. Samuel had not been diligent, she may not have been privy to the attacks on her competence and thus unable to place the facts, as she knows them before court, as she did. In that event, her reputation and stature as an officer of the court, may have been left in tatters.

[60] It accordingly appears to me that where a legal practitioner acts for a person like the applicant in this matter, and a client makes prejudicial remarks about a previous legal practitioner, it would be ethical for the new legal practitioner, to bring the allegations and criticism levelled against the erstwhile legal practitioner, to the latter's attention, say under cover of a letter.

[61] This would enable the affected legal practitioner to decide whether or not to respond to the allegations, as Ms. Samuel did. That in my view, is the least that a legal practitioner owes to a colleague, who is learned brother or

sister, especially where these allegations will be in the public domain, on a platform like eJustice, where they will be readily available for the whole world to ingest.

Order

[62] In the premises, the application for rescission must be granted in part. For the avoidance of doubt, I refuse to grant prayers 3 and 4 of the notice of motion. There is nothing wrong with the application to compel, in terms of rule 28(8) and it cannot be wished away. The managing Judge will decide, if necessary, with the assistance of the parties, where the order granted leaves the matter in the light of the order granted below.

[63] The following order accordingly ensues:

1. The order dated 23 October 2018 granting a judgment by default to the Respondent, is hereby set aside.
2. The order dated 2 October 2018 striking out the applicant's defence and counter-claim, is hereby rescinded and is set aside.
3. The Applicant is ordered to pay the costs of this application, consequent upon the employment of one instructing and one instructed Counsel.
4. The matter is referred to the Managing Judge to continue with the matter.
5. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

Applicant: V. Alexander

Of ESI Inc.Windhoek

Respondent: T. Muhongo
Instructed by: ENS|Africa.Windhoek