

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,  
WINDHOEK  
RULING



MAIN DIVISION,

CASE NO: HC-MD-CIV-MOT-GEN-2019/00424

In the matter between:

**EVELINE MARIA KOBER**

**APPLICANT**

and

**IAN R. MCLAREN N.O.**

**1<sup>ST</sup> RESPONDENT**

**MASTER OF THE HIGH COURT**

**2<sup>ND</sup> RESPONDENT**

**LEOPOLD KLAUS KOBER JNR**

**3<sup>RD</sup> RESPONDENT**

**MATHILDE KOBER**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Kober v McLaren N. O.* (HC-MD-MD-CIV-MOT-GEN-2019/00424) [2020] NAHCMD 418 (16 September 2020)

**CORAM: MASUKU J**

**Heard: 15 September 2020**

**Order: 15 September 2020**

**Reasons: 16 September 2020**

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**REASONS**

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**MASUKU J:**

[1] This is an opposed motion that was set down by the court in consultation with the parties on 18 June 2020 for hearing on 15 September 2020.

[2] The applicant, approached the court seeking the following relief:

‘1. Condone the applicant’s non-compliance with the Rules of this Honourable Court and time periods prescribed in so far as these has (*sic*) not been complied with.

2. Grant leave to the applicant to institute action/and or necessary processes against the Third and Fourth Respondents by way of edictal citation, via email service upon:

3. The third respondent at the following e-mail address being [office@kober.at](mailto:office@kober.at); and

4. The fourth respondent at the following email address being [mathikober@msn.com](mailto:mathikober@msn.com).

5. Declare the appointment of the First Respondent null and void, as he was not appointed by the second applicant but by the person who did not have authority to appoint the First Respondent and or issue Letter of Executorship in the capacity of the Master of the High Court.

6. Alternatively, if the Honourable Court held that the letter of Executorship issued by the Second Respondent’s office is valid, the Honourable Court should review and set aside the appointment of the first respondent as the Executor of the estate of Leopold Kober for the following reasons:

7. It is undesirable that he continues as Executor in the estate;

8. He is incompetent an (*sic*) cannot continue to administrate the said estate.

9. In the event the Honourable Court rules in favour of the prayers in paragraph 5 above, direct the Master of the High Court to appoint me as the executor of the estate as I am the only person who still has property in the Estate.’

[3] The notice of motion is much longer and since the essence of the prayers sought has been captured above, it is not necessary, to quote verbatim the rest of the relief sought.

[4] It is worth mentioning that the applicant has since the launch of the application, acted in person and this may, to some extent explain the inelegance in drafting the relief sought, as captured in part above.

[5] On 7 September 2020, a few days before the hearing of the matter as set down, the applicant filed a unilateral status report in which she essentially stated that she was unable to obtain legal representation as a result of the COVID-19 Regulations and that she is unable to raise money due to the lockdown restrictions. She further mentioned that all the lawyers she had telephoned to represent her told her they were affected by COVID-19. Last, but by no means least, the applicant stated that even if she could obtain the services of a lawyer, since she falls within the category of persons highly vulnerable to COVID-19, she may contract the virus as Windhoek is the epicentre of the said virus.

[6] The applicant then requested the court to assist her with *pro bono* counsel and to also condone her non-compliance with the order regarding the filing of heads of argument. It is important to mention that the applicant did not comply therewith and no explanation therefor, let alone an application for condonation filed in regard thereto.

[7] I must mention as a matter of necessity, that the applicant, throughout the management of the case from inception, never at any stage indicated to the court that she required to obtain the services of a legal practitioner. She had at every stage, personally put her hands to the plough. The issue of legal representation was never formally raised, save as stated, in the status report and even then, barely a week before the date set for hearing.

[8] It has been mentioned times without number that this court operates on a non-adjourment policy when it comes to matters properly set down for hearing. It is only in very limited and exceptional circumstances and on proper application that the court may be minded to grant an application for a postponement. There is no application for a postponement in this matter neither, I may add, has the applicant even mentioned the issue of a postponement in her status report referred to earlier.

[9] Rule 68 of this court's rules governs situations where either of the parties to an application does not attend court. It reads as follows:

'If on the date of set down for the hearing of an application the –

- (a) applicant does not appear, the court must grant an order dismissing the application and may, in its discretion, make such order as to costs as the court considers reasonable and fair; . . .' (Emphasis added).

[10] Ms. Van der Westhuizen, who appeared for the 1<sup>st</sup> respondent, requested the court in the first instance, to send out its orderly, to call the applicant's name, before the invocation of the provisions of rule 68 above. An officer of the Namibian Police Force went to call the applicant's name within the court's precincts and reported that the applicant did not appear to be in attendance.

[11] Notwithstanding the applicant's absence, Ms. Van der Westhuizen was nonetheless wary of taking the open and full advantage of the provisions of rule 68, quoted above. She, fairly, in my opinion, inclined to the view that there were serious shortcomings in the application that would warrant the matter to be struck from the roll, rather than the more serious, and possibly final effect of an order dismissing the application.

[12] It was pointed out on the 1<sup>st</sup> respondent's behalf that the applicant sought leave from the court to serve the 3<sup>rd</sup> and 4<sup>th</sup> respondent via edictal citation, considering that the said respondents are resident outside the court's jurisdiction. There are, however, no proper proceedings for edictal citation instituted by the applicant. It also appears that no case is made for the granting of such an order on the papers.

[13] Furthermore, there is no proof of service filed of record evidencing full and proper service of the application on the said respondents. I have searched high and low but like the 1<sup>st</sup> respondent's counsel, have failed to find any application in terms of rule 12.

[14] It must be mentioned that from a reading of the papers, the 3<sup>rd</sup> and 4<sup>th</sup> respondents are heirs to the estate in question in these proceedings. As a

matter of law, they have a right to be cited and served with the application, considering that theirs is not just a joinder for convenience. Their joinder is one of necessity as they, being heirs in the estate, have a direct and substantial interest in the application and the relief sought in particular.<sup>1</sup> Their absence before court cannot be simply overlooked and regarded as inconsequential.

[15] Ms. Van der Westhuizen pointed to a number of non-compliances by the applicant, including, as mentioned, the failure to file heads of argument as ordered by the court. She also did not file her replying affidavit within the time prescribed by an order of court and in regard to these non-compliances, there is no application by her for condonation therefor.

[16] The issue of service on the 3<sup>rd</sup> and 4<sup>th</sup> respondent is very fundamental and may not be glossed over. I am of the view that the proper order to issue in the circumstances, is to strike the matter from the roll. This will afford the applicant the time to ensure compliance with all the court orders and supremely, to ensure that the said respondents are properly notified of the proceedings and are duly served with the relevant process and are afforded time to place their respective positions before court.

[17] Lastly, I am of the view that there is no reason why the applicant should not be ordered to pay the costs attendant to the proceedings. As stated above the applicant is not before court and no leave therefor, was prayed for nor granted. Furthermore, there is no application at all before court for the postponement of the matter, considering that the applicant has been aware for weeks on end that the matter was due for hearing.

[18] The 1<sup>st</sup> respondent engaged counsel and came to court ready to fire on all cylinders, only to be advised to hold his fire because of the opponent's absence from the proceedings without leave from the court. It would be unfair

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<sup>1</sup> *Maritz v Master of the High Court* (A 226/2012) [2012] NAHCMD 6 (16 January 2012); *Mdlalana v van der Decken NO and Others* (3777/2016) [2016] ZAECGHC 154 (15 November 2016).

in the circumstances for the 1<sup>st</sup> respondent to be placed out of pocket in this connection. The applicant thus is liable for the 1<sup>st</sup> respondent's costs.

[19] It is for the foregoing reasons that I granted the order striking the matter from the roll with costs, consequent upon the employment of one instructing and one instructed counsel.

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T.S. Masuku  
Judge

## APPEARANCES:

APPLICANT: No appearance

FIRST RESPONDENT: C. Van der Westhuizen  
Instructed by Francois Erasmus & Partners,  
Windhoek.