REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON POINTS *IN LIMINE*

Case no: HC-MD-CIV-MOT-GEN-2021/00005

In the matter between:

HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES	**APPLICANT**
and	
THE REGISTRAR OF THE HIGH COURT AND SUPREME COURT	**1ST RESPONDENT**
ENSAFRICA NAMIBIA INC	**2ND RESPONDENT**
NAMIBIA FINANCIAL INSTITUTION SUPERVISORY AUTHORITY	**3RD RESPONDENT**

Neutral citation: *Hendrik Christian t/a Hope Financial Services v The Registrar of the High Court and others* (HC-MD-CIV-MOT-GEN-2021/00005) [2022] NAHCMD 362 (22 July 2022)

Coram: SIBEYA J
Heard: **01 July 2022**
Delivered: **22 July 2022**

Flynote: Motion Proceedings – Points *in limine* – lack of authority to oppose the application – Taxation is an integral part of the judicial process – The Supreme Court

did not interfere or limit a party's right to legal representation – NAMFISA not barred from appointing its legal practitioners of choice at taxation.

Summary: The background on which this present contempt of court application, instituted by the applicant, is premised, is based on the fact that the applicant, some years ago, instituted proceedings for damages against the third respondent (NAMFISA). NAMFISA filed a notice to defend the action but did not file a plea and the *dies* expired. The applicant, as a result, obtained default judgment. NAMFISA applied for rescission of the default judgment and the court rescinded the judgment. The applicant appealed the rescission judgment.

On 7 October 2019, the Supreme Court upheld the appeal and found that the deponent to the affidavit filed in support of the rescission application lacked the necessary authority to bring the rescission application on behalf of NAMFISA. The Supreme Court declared the rescission of judgment null and void and set it aside and also set aside the default judgment that was earlier granted in favor of the applicant. The Supreme Court then ordered NAMFISA to pay the applicant's costs in the form of disbursements regarding the proceedings from the application for rescission until the appeal proceedings.

The applicant now approaches this court seeking an order to hold the respondents in contempt of the Supreme Court judgment in Case No. 36/2016 delivered on 7 October 2019. The applicant further seeks an order to interdict the first and second respondents from allowing the second and third respondents to attend the taxation of costs awarded by the Supreme Court. The application is opposed by ENSAfrica and NAMFISA.

The applicant raised several points of law *in limine*, more particularly that because the Supreme Court found that the deponent to the affidavit filed in support of the rescission application lacked the necessary authority to bring the rescission application on behalf of NAMFISA, NAMFISA could therefore not appoint ENSAfrica as its representative in the related taxation.

Mr Christian inflexibly demanded that a ruling be delivered on the points of law *in limine* raised before the merits of the contempt application could be heard.

Held that, a perusal of the entire judgment does not expressly bar or deprive NAMFISA of its constitutional right to legal representation of its own choice. The right to legal representation is an entrenched right that must be respected by all.

Held that, the Supreme Court did not bar NAMFISA from engaging legal practitioners of its choice in proceedings subsequent to the appeal against the rescission judgment including taxation. The Supreme Court did not even attempt to interfere or limit NAMFISA's entrenched right to legal representation and therefore NAMFISA is at liberty to engage legal practitioners of its own choice in future proceedings including proceedings at taxation.

Held that - The applicant's points *in limine* are dismissed.

ORDER

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1. The applicant's points *in limine* are dismissed.

JUDGMENT

SIBEYA J:

Introduction

[1] This court is overburdened with a plethora of cases between Mr Christian and Namibia Financial Institutions Supervisory Authority. There is, however, still no imminent end in sight to this drawn-out legal battle between the two parties.

[2] The applicant approached this court seeking an order to hold the respondents in contempt of the Supreme Court judgment in Case No. 36/2016 delivered on 7 October 2019. The applicant further seeks an order to interdict the first and second

respondents from allowing the second and third respondents to attend the taxation of costs awarded by the Supreme Court.

The parties

[3] The applicant is Mr Hendrik Christian, an adult male Namibian.

[4] The first respondent is the Registrar of the High Court and Supreme Court of Namibia, Windhoek Main Division. The first respondent will be referred to as the Registrar.

[5] The second respondent is ENSAfrica Namibia Inc, is a law firm with offices situated at LA Chambers in Windhoek. The second respondent will be referred to as ENSAfrica.

[6] The third respondent is Namibia Financial Institutions Supervisory, with offices situated at 51-55 Werner List Street, Gutenberg Plaza, Windhoek. The third respondent will be referred to as NAMFISA.

[7] Where parties are referred to jointly, they shall be referred to as the parties.

The representatives

[8] Mr Christian appeared in person while the Ms. Lewies, assisted by Mr Haraseb appeared for ENSAfrica and NAMFISA.

Background

[9] The applicant instituted proceedings where he claimed damages against NAMFISA. NAMFISA filed a notice to defend the action but did not file a plea and the *dies* expired. The applicant, as a result, obtained default judgment. NAMFISA applied for rescission of the default judgment. The court rescinded the judgment. The applicant appealed the rescission judgment.

[10] On 7 October 2019, the Supreme Court upheld the appeal and found that the deponent to the affidavit filed in support of the rescission application had no authority to bring the rescission application on behalf of NAMFISA. The Supreme Court further declared the rescission of judgment null and void and set it aside and also set aside the default judgment that was earlier granted in favour of the applicant. The Supreme Court then ordered NAMFISA to pay the applicant's costs in the form of disbursements regarding the proceedings from the application for rescission until the appeal proceedings. It is this costs order and the interpretation thereof that has held this court hostage with several litigations.

[11] The applicant brought this application to seek an order to:

(a) declare that the respondents to be in contempt of the Supreme Court judgment in Case No. SA 36/2016 delivered on 7 October 2019, particularly paragraphs 44, 48, 50, 52 and 53;

(b) declare that the respondents are in contempt of Article 81 of the Namibian Constitution;

(c) interdict the Registrar from allowing ENSAfrica and NAMFISA to attend the taxation of the costs ordered by the Supreme Court.

[12] The Registrar did not file an opposition to the applicant's application but only filed an explanatory affidavit. ENSAfrica and NAMFISA opposed the application. Answering and replying affidavits were filed, subsequently, the applicant raised the following points *in limine*:

(a) That the legal practitioner for ENSAfrica lacks the authority to deliver the notices of opposition on behalf of ENSAafrica and NAMFISA and to deliver the answering affidavit for NAMFISA;

(b) That the legal practitioner of ENSAfrica lacks the authority to appoint Adv Nekwaya as the legal practitioner for NAMFISA;

(c) That ENSAfrica filed a resolution and a power of attorney as proof of authorization in contempt of the Supreme Court judgment in Case No. SA 36/2016;

(d) That ENSAfrica created a conflict of interest and a corrupt environment;

(e) That taxation is an integral part of the Supreme Court judgment and must be set up in accordance with the rights derived from the Supreme Court judgment, failing which, such taxation will unlawfully interfere with the applicant's legal right and deprive the applicant of his legal right.

[13] NAMFISA then filed an interlocutory application for leave to file its board resolution and power of attorney. I will revert to this as the judgment unfolds.

[14] At the hearing of the opposed application on 1 July 2022, Mr Christian abandoned two of his points *in limine*, namely: that ENSAfrica lacked the authority to appoint Adv Nekwaya (presumably because Ms Lewies argued the opposition of the application for ENSAfrica and NAMFISA instead of Adv Nekwaya); and the point raised that ENSAfrica created a conflict of interest and a corrupt environment.

[15] Mr Christian persisted in the remaining three points *in limine* and minced no words in emphatically demanding that a ruling be delivered on points *in limine* raised before the merits of the contempt application could be heard. This is the ruling on the said points *in limine* in no particular order.

Taxation as an integral part of the Supreme Court judgment

[16] Mr Christian argued that taxation is a judicial process that stems from a judgment or court order. Taxation finds its life from a judgment or order and therefore the rights derived from a judgment cannot be reduced or interfered with at taxation. Mr Christian's argument boiled down to the suggestion that the finding by the Supreme Court that the deponent for NAMFISA in the rescission application lacked authorization which could not be ratified meant that at taxation NAMFISA remained without authority. It was further argued by Mr Christian that the status *quo* at the Supreme Court extends to the taxation.

[17] Mr Christian is correct in his argument that taxation is a judicial process. He is further correct that the determination of rights and obligations of a party are finally determined when costs ordered by court are taxed and paid.

[18] There is no dispute that taxation is an integral part of a judicial process. Although not a court of law, taxation is a quasi-judicial process. It is an extension of the judicial process presided over by a taxing officer.[1] No issue is raised for determination in this regard, neither does confirmation that taxation is a judicial process have any bearing on this matter.

[19] It is the later part of the point raised to the effect that once the Supreme Court found that NAMFISA lacked the authority to institute the rescission application, NAMFISA lacked authority to instruct ENSAfrica to appear at the related taxation and to represent NAMFISA. This part of the question, is in my view, intertwined with the remaining points of law *in limine* and will therefore be decided together.

Lack of authority to oppose and file an answering affidavit

[20] As outlined above, Mr Christian argued that ENSAfrica lacked authority to deliver the notices to oppose and file an answering affidavit on behalf of NAMFISA. This, he argued, is what the Supreme Court stated in the judgment delivered on 7 October 2019 under Case No. SA 36/2016.

[21] It was further argued by Mr Christian that ENSAfrica failed to file a resolution by its directors authorizing the opposition of this application and therefore whatever was filed of record by ENSAfrica to oppose the relief sought is null and void.

[22] Ms Lewies did not take this argument hands down, to the contrary, she argued that the points raised do not constitute points of law *in limine*. She proceeded to argue that the Supreme Court did not bar NAMFISA from engaging legal practitioners to represent it in subsequent proceedings which includes taxation. In respect of ENSAfrica opposing the applicant's application without a resolution

[1] *Bills of Costs (Pty) Ltd and Another v The Registrar, Cape, NO and Another* 1979 (3) SA 925 (A). *Botha v Themistocleous* 1966 (1) SA 111A.

empowering it to so oppose, Ms Lewies argued that the applicant does not get out of his starting blocks to prove his points of law *in limine*. If, however, the court finds that the points raised by applicant have merit, then, the court should consider the application for leave to file the board resolution and the power of attorney authorizing opposition to the contempt application launched by the applicant.

[23] To address the issue of authority or lack thereof raised by the applicant. I will consider such an attack in reference to NAMFISA. The question is: does NAMFISA lack the authority to appoint ENSAfrica to represent it at taxation which emanates from the Supreme Court Case No. SA 36/2016?

[24] In order to appreciate this question, it is vital to have regard to the relevant portions of the Supreme Court judgment that Mr Christian places excessive dependence on his assertion. He relies on paragraphs 44, 48, 50, 52 and 53 of the Supreme Court judgment SA 36/2016 delivered on 7 October 2019.

[25] In order not to dilute the arguments raised by Mr Christian, I opt to quote the said paragraphs below:

'[44] There can be doubt that Mrs Brandt, the acting CEO of NAMFISA, had no proper authority to institute and prosecute the rescission application and to give the power of attorney to LorentzAngula Inc to represent NAMFISA (and Mr van Rensburg). During oral argument, Counsel for NAMFISA was at pains to identify part(s) in the record demonstrating that LorentzAngula Inc were properly instructed to represent NAMFISA, including Mr van Rensburg…

[48] Based on the correct legal principles regarding authority, as set out in the Supreme Court judgment,[2] it follows that LorentzAngula Inc lacked the necessary authority to act on behalf of NAMFISA in defending the action, applying for and obtaining rescission…

[50] The lack of authority thus renders the rescission judgment null and void. This Court in *Swart*[3] quoted with approval the following remarks in *Macfoy* regarding nullity:

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[2] *Willem Petrus Swart v Koos Brandt SA* (SA 17/2002) [2003] NASC 16 (28 October 2003) (*Swart*).
[3] Above No. 2. See also *Tödt v Ipser* 1993 (3) SA 577 (A) at 589C *(Tödt).*

'If an act is void, then it is in law a nullity. It is not only bad. There is no need for an order of the Court to set it aside. It is automatically null and void without ado, though sometimes convenient to have the court declare it to be so. And every proceedings which is founded on it is also bad and incurable bad. You cannot put something on nothing and expect it to stay there. It will collapse.'[4]

It follows that all proceedings that followed are a nullity operating *ex tunc*. This means that the nullity operated from the moment the rescission was sought and granted and post the Supreme Court judgment.[5] …

[52] The law concerning ratification before judgment is settled. This is so because the matter is still *re integra et tempore congruo*[6] since the result of the suit is still pending and accordingly uncertain. Where ratification takes place after judgment is given in the principal's favour (as here) such ratification is of no legal effect since it would deprive the opponent to the suit (the appellant in this matter) of the right to object to the nullity of the judgment.[7] To recap, the default judgment was rescinded on 5 October 2007. During 2009 the Supreme Court pronounced on the issue regarding the lack of authority and the purported ratification was done on 8 October 2014. To that end, that ratification to authorise the opposition to the action and rescission also constituted a nullity. The High Court erred and misdirected itself in not applying the law and giving effect to the Supreme Court judgment as well as the constitution.

[53] With these closing stages − that the lack of authorisation renders the rescission judgment null and void and that all steps taken consequent to that nullity (particularly in light of the Supreme Court judgment and the Constitution) as well as the conclusion that the purported ratification had no legal effect – it becomes necessary to consider whether the resuscitated default judgment escapes scrutiny.'

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[4] *Macfoy* High Court Judgment at [26]. See also *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* (I 668/2004*)* [2013] NAHCMD 354 (22 November 2013*)* at para 33 where the court endorsed the remarks in *Swart* and added that 'a null and void process can be ignored with impunity, and even if a party has taken a further step in the proceedings, the taking of the further step cannot blow life into a legally dead step or procedure.' See also *National Union of Namibia Workers v Naholo* 2006 (2) NR 659 (HC) 669C-E.

[5] See *S v Munuma* (CC 03/2004) [2014] NAHCMD 363 (27 November 2014) at para 45. See also the following South African authorities in this regard: *Council of Review, SANDF v Mönning* 1992 (3) SA 482 (A) at 495A-D; *Moch v Nedtravel (Pty) Ltd* 1996 (3) SA (SCA) at 81-89G; *Ndimeni v Meeg Bank* 200 (1) SA 560 (SCA) at para 24 and *Take & Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA (SCA) at para 5.-

[6] A Latin maxim loosely translated to mean the decision in the matter is not yet made.

[7] See the decision of the South African Appellate Division in *Santam Insurance Limited v Kotze NO* 1995 (3) SA 301 (AD) at 310G-H.

[26] The reading of the above paragraphs reveals that the Mrs Brandt, the acting CEO of NAMFISA (then) lacked proper authority to institute and prosecute the rescission application and to give the power of attorney to LorentzAngula Inc to represent NAMFISA. LorentzAngula Inc, therefore, lacked authority to defend the action, apply for and obtain the rescission and this rendered the rescission judgment null and void. The nullity commenced from the moment that the rescission was sought and granted and post the Supreme Court judgment. The Supreme Court further restated the old principle that ratification after judgment is of no legal effect for it deprives the opponent to the suit of the right to object to the nullity of the judgment.

[27] Nowhere in paragraphs 44, 48, 50, 52, and 53 of the Supreme Court judgment does the Supreme Court bar NAMFISA from engaging legal practitioners to represent it at the related taxation. A perusal of the entire judgment does not expressly bar or deprive NAMFISA of its constitutional right to legal representation of its own choice.[8] The right to legal representation is an entrenched right that must be respected by all.[9] The Supreme Court, being the highest court of the land would have expressly said so in no uncertain terms if it were to interfere or limit this entrenched right that all persons, including NAMFISA, are entitled to. The Supreme Court did not limit such right.

[28] All that the Supreme Court stated was that for purposes of the rescission application, the legal practitioners of NAMFISA lacked the necessary authority to institute and prosecute the rescission application and the related order obtained. The Supreme Court further found that the attempt to ratify the lack of authority after the judgment constituted a nullity. The lack of authority expressed by the Supreme Court, in my view, does not extend to any other process other than what the Supreme Court stated.

The taxation

[29] Although taxation constitutes an integral part of the judicial process, it is presided over by a taxing officer. The taxing officer carries out quasi-judicial functions. Taxation is a crucial step engaged by a party towards realization of the

[8] Article 12(1)(e).
[9] *S v Noble* (CC 10-2020) [2021] NAHCMD 275 (18 May 2021) para 37.

costs order. It is on this basis that it is *sui generis* but still dependent on a court order. That, notwithstanding, taxation is a separate process in nature and form from court action or motion proceedings. It is a post action or motion proceedings step.

[30] A party is not barred or deprived of its right to legal representation of own choice at taxation and unsurprisingly, the Supreme Court did not, even to the slightest degree, attempt to interfere with such precious right.

[31] On 11 December 2019, and about two months subsequent to the delivery of the Supreme Court judgment of 7 October 2019, NAMFISA directed its Chief Executive Officer to defend or institute legal proceedings between the applicant and NAMFISA and appointed ENSAfrica as its legal practitioners. Mr Kenneth Matomola, the Chief Executive Officer of NAMFISA signed a power of attorney appointing ENSAfrica in the matter of the applicant and NAMFISA, to be the attorneys and agents of NAMFISA in the High Court or Supreme Court and do whatever is necessary to protect the interest of NAMFISA.[10]

[32] I hold no doubt that after the delivery of the Supreme Court judgment, NAMFISA on 11 December 2019, duly appointed ENSAfrica to be its attorneys of record. ENSAfrica, therefore, were duly appointed to appear for NAMFISA at subsequent proceedings between the applicant and NAMFISA.

Conclusion

[33] The Supreme Court did not bar NAMFISA from engaging legal practitioners of its choice in proceedings subsequent to the appeal against the rescission judgment including taxation. The Supreme Court did not even attempt to interfere or limit NAMFISA's entrenched right to legal representation, and therefore NAMFISA is at liberty to engage legal practitioners of its own choice in future proceedings including proceedings at taxation.

[34] In view of the conclusions and findings made herein above, I hold that the points *in limine* raised by the applicant are of no merit and falls to be set aside.

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[10] Annexure "KSM2", "KSM3" and "KSM4" to the answering affidavit of NAMFISA.

[35] In light of the conclusion reached in this matter, I find it academic to consider the application for leave to file the board resolution and power of attorney of ENSAfrica, as it will be of no moment on the finding. Furthermore, this court does not have the luxury of time and energy to engage in academic exercises.

Costs

[36] It is a well-established principle of our law that costs follow the event. The contrary was not submitted, neither could same be found to be apparent from the record, the result of which is that costs should be awarded to the successful party.

Order

[37] In the result, it is ordered that:

1. The applicant's points of law *in limine* are dismissed.

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O S Sibeya

Judge

APPEARANCES:

APPLICANT :	H Christian Windhoek
2ND AND 3RD RESPONDENTS:	R Lewies (with K. Haraseb) With K Haraseb Instructed by ENSAfrica Namibia, Windhoek