



**REPORTABLE**

CASE NO: SA 36/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES**

**Appellant**

and

**NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY**

**Respondent**

**Coram:** CHOMBA AJA, MOKGORO AJA and NKABINDE AJA

**Heard:** 11 March 2019

**Delivered:** 7 October 2019

**Summary:** This appeal underlines, among other things, the importance of the constitutional imperative in terms of Art 81 of the Namibian Constitution of the Republic of Namibia (the Constitution) specifically in relation to the decision of the Supreme Court in 2009 on the question of an established legal principle on authorisation when an individual acts on behalf of a legal entity. It underscores, also, the effect of the decision of the Supreme Court on previous decisions of the High Court pertaining to the said legal principle following rescission of default judgment. Additionally, the appeal affirms the principles regarding delegation of powers and ratification.

The appeal is a sequel to a string of applications resulting from the action instituted by the appellant for payment of the sum of over N\$2 000 000 with interest and a resultant default judgment that was rescinded in favour of respondent – Namibia Financial Institutions Supervisory Authority (NAMFISA or respondent) and a certain Mr Frans Johan Jansen van Rensburg. The claim is founded on the allegation that the former chief executive officer (CEO) of NAMFISA interfered with the appellant's right in terms of Art 21(1)(j) of the Constitution to do business as an insurance agent in September 2002. The respondent was served with the summons and it then filed a power of attorney and defective notice of intention to defend without a proper authorisation. Mr van Rensburg was not served with the summons. The appellant obtained default judgment without making the High Court aware of the fact that notice of intention to defend (albeit defective for want of a proper resolution by the Board of NAMFISA) had been filed and that Mr van Rensburg had not been served with the summons even though he had been sued on his personal capacity to pay the amount claimed jointly and severally with NAMFISA.

The default judgment was rescinded, allegedly, by agreement between the parties. After the rescission, the parties launched a litany of applications and counter-applications spanning over a period of ten years now. The appellant's incessant gripe concerned the issue of lack of authority by those who purported to act on behalf of NAMFISA. He maintained that the rescission judgment was a nullity because NAMFISA was not properly before the court when it applied for that judgment.

In one of the applications by NAMFISA the High Court granted a permanent stay in respect of a number of proceedings brought by the appellant and directed, among other things, that future litigation by him against NAMFISA could only be instituted with the prior leave of the court. Subsequent to these orders the appellant, without the High Court's prior leave, unsuccessfully launched yet other applications with a view to set aside the rescission judgment against him and revive the default judgment previously granted in his favour.

The appellant then approached this Court for declaratory relief. Respondent filed a document ('PS6') purporting to be NAMFISA's resolution to ratify the previous unauthorized legal steps. The Supreme Court held that Mrs Lily Brandt, then the acting CEO of NAMFISA, had no authority to institute and prosecute the rescission application and to give the power of attorney to LorentzAngula Inc to represent NAMFISA. Consequently, LorentzAngula Inc lacked the necessary authority to act on behalf of NAMFISA in defending the action as well as applying for and obtaining rescission.

The appellant then launched proceedings in the High Court seeking to give effect to the decision of the Supreme Court. The court *a quo* dismissed the application with costs because no prior leave had been obtained. In addition, the court *a quo* ordered the Registrar of the court to refer the matter to the Prosecutor-General for a decision regarding whether the appellant should be prosecuted for contempt of court.

On appeal this Court, in light of Art 81 of the Constitution – and giving effect to the decision of the Supreme Court which reaffirmed the established principles outlined in the decision of the South African Appellate Decision in the *Cape-Mall* regarding lack of authority. This Court *held* that the lack of authorization or failure to file a resolution of the legal entity rendered the rescission judgment null and void. It relied also on the South African Appellate Decision in *Tödt* as well as the decision of this Court in *Willem Petrus Swart* (where the remarks in *Macfoy* – regarding nullity – was quoted with approval) and *held* and that all steps taken consequent to the Supreme Court judgment were a nullity. The Court held that the purported ratification had no legal effect. It held that the rescission judgment had to be set aside and ordered the respondent to pay costs in favour of the appellant in the form of disbursements.

As regards the default judgment this Court, after inviting the parties to submit written arguments on the correctness of that default judgment, *held* that the default judgment was erroneously granted against Mr van Rensburg as he was not served with the summons. The Court further *held* that the appellant had failed to tender

evidence to establish liability and prove the *quantum* of damages claimed. Additionally, despite the fact that the respondent/NAMFISA had shown an intention to defend the action, the appellant failed to give a notice of set down for default judgment to it in terms of rule 31 of the Old Rules of the High Court – in terms of which the default judgment had been sought and granted.

The appeal was upheld. The rescission was declared null and void and set aside and the respondent was ordered to pay the appellant's costs in the form of disbursements. The default judgment was set aside with no order as to costs and the matter was remitted to the High Court to be placed under judicial case management to determine the further conduct of the case.

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## APPEAL JUDGMENT

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NKABINDE AJA (CHOMBA AJA and MOKGORO AJA concurring):

### Introduction

[1] The issues in this appeal emanate from a litigation dragging on for more than ten years. Since the institution of the action in 2007 by Mr Hendrik Christian (the appellant) and subsequent decision *a quo* granting default judgment, the parties have been embroiled in a litany of applications – including interlocutory applications – relating to the lack of authority on those purportedly acting on behalf of the first respondent, Namibia Financial Institutions Supervisory Authority – A corporate entity (NAMFISA). The said issues touch on certain declaratory relief sought *ex parte* in the High Court of Namibia Main Division<sup>1</sup> (High Court) by the appellant. Although the application was brought *ex parte*, the respondents, NAMFISA and Mr van Rensburg – the erstwhile Chief Executive Officer of

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<sup>1</sup> *Hendrik Christian t/a Hope Financial Services v Namibia Financial Institutions Authority* (A 35-2013) [2016] NAHCMD 188 (30 June 2016).

NAMFISA – were cited only for the purpose of service. NAMFISA was duly served with the summons but, as will become more evident later in this judgment, Mr van Rensburg was not.

[2] At the centre of the dispute is the binding nature of the decision of this Court in the matter between the parties, under case number SCR1/2008<sup>2</sup> (Supreme Court Judgment). The Supreme Court sustained the appellant's objection that Messrs LorentzAngula Inc had not shown that they were and are duly authorised to act on behalf of [NAMFISA] in opposing the application; filing heads of argument in support of its opposition and to otherwise appear on behalf of [NAMFISA]. Following this decision, the appellant approached the court *a quo* and asked it to declare —

- (a) the [Supreme Court decision] (relating to a power of attorney filed without a resolution) to apply to the rescission proceedings in the High Court under Case No. A244/2007;
- (b) the principles in the decision of the South African Supreme Court of Appeal in *Tödt*,<sup>3</sup> regarding voidness, to apply to the rescission judgment;
- (c) the lack of authorisation of LorentzAngula Inc (the legal representatives of NAMFISA) to bring the rescission judgment to fall in the category of *ex debito justitiae*<sup>4</sup> by right; and

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<sup>2</sup> *Hendrik Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority and others* Case No SCR1/2008, delivered on 17 June 2009.

<sup>3</sup> *Tödt v Ipser* 1993 (3) SA 577 (A) at 589C (*Tödt*).

<sup>4</sup> Loosely translated to mean to be deemed to have been set aside.

- (d) the rescission a deprivation of the appellant's vested rights in the default judgment.

The High Court, per Geier J, dismissed the application, hence this appeal.

[3] It needs to be mentioned, straightaway, that in light of the uneasiness expressed by the appellant regarding the alleged posture of certain Judges the appellant was assured, at the outset of the hearing, that his right to a fair trial would be safeguarded. Indubitably, the Namibian Constitution (the Constitution) guarantees everyone a fair trial as a fundamental right. In relevant part Art 12(1) of the Constitution provides that 'in the determination of their civil rights and obligations . . . all persons shall be entitled to fair and public hearing by an independent, impartial and competent Court. . . . '.

[4] On 5 June 2017, the date on which this matter was initially set down for hearing, the appellant filed a document entitled 'ARTICLE 12: FAIR TRIAL'. He recounted certain statements which he described as 'compelling facts' allegedly giving rise to fear – that he will not be afforded a fair appeal hearing. To avoid prolixity, it is not necessary to give full details of his narration. It suffice to mention certain parts thereof:

'The reasonable fear that the appeal hearing will not be fair after I have repeatedly read the judgment of Geier J and consulted authorities on the issue of fair trial, I am experiencing reasonable fear that the appeal hearing will not be fair.

. . . [T]he judges in the Highest Court of the country should be the first to understand when they should decline to sit on a case or consult the parties as to their perception if there may be any element to induce such suspicion. . . . '

[5] At the hearing of this appeal and given the above concerns, the appellant was asked whether he still harboured the fear. Specifically, he was asked whether he had any objection in this Court, as constituted,<sup>5</sup> adjudging this appeal. This was done to dispel any notion of apprehended bias by the appellant. To this question, the appellant answered in the negative.<sup>6</sup>

### Background

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<sup>5</sup> Comprising of Chomba AJA, Mokgoro AJA and Nkabinde AJA. This was so particularly in relation to the Acting Judge of Appeal Chomba, who was part of the coram in the Supreme Court decision (under case number SCR1/2018).

<sup>6</sup> In particular, the appellant had no objection in Chomba AJA hearing the appeal.

[6] The genesis of the dispute is the delictual action instituted by the appellant against NAMFISA and Mr van Rensburg in the High Court in August 2007 under Case No I2232/2007. It is undisputed that Mr van Rensburg was not served with the summons. This is despite that he was sued in his personal capacity and was said to be jointly and severally liable with NAMFISA for the payment of more than N\$2 000 000.00. The action was based on the alleged unlawful interference with the appellant's economic activity guaranteed under Art 21(1)(j) of the Constitution.<sup>7</sup>

[7] The appellant averred that with the promulgation of the Long-term Insurance Act, 1998, Southern Life (also known as Momentum Life) decided to close down its offices in Namibia and moved to South Africa. When moving, it transferred to South Africa members' funds kept in the Namibian registered Self-Financed Retirement Annuity Fund and, according to him, concealed the annuity funds business under book for long-term insurance with that transfer. He discovered that the funds could be repatriated to Namibia on certain conditions, including his entitlement to a commission at the rate of 2.5 percent of the gross transfer value of the funds.

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<sup>7</sup> In relevant parts, Art 21 of the Constitution reads:

'(1) All persons shall have the right to:

...

(j) practise any profession, or carry on any occupation, trade or business.'



[8] The repatriation, the appellant claimed, started in 2001 but Momentum Life refused, without providing reasons, to process further transfer transactions in 2002. He stated that requests for reasons were ignored by Mr van Rensburg. Later, seemingly after the lodgement of a complaint by the appellant, the South African Pension Fund Adjudicator ruled, in 2002, that if the funds were not repatriated the complainants could approach the High Court of Namibia for relief. As I understand the papers, it appears that Mr van Rensburg later admitted having instructed Momentum Group not to process further transfers.

[9] Against this backdrop the action was instituted against NAMFISA and Mr van Rensburg but the latter was not served with the summons<sup>8</sup> despite that he was sued in his personal capacity and was said to be jointly and severally liable with NAMFISA for the payment of over N\$2 000 000.00.

[10] NAMFISA filed a notice of intention to defend through a power of attorney filed by LorentzAngula Inc. As will become apparent later in this judgment, the power and notice were filed without NAMFISA's proper authority. A plea was not filed. When the *dies* expired the appellant applied for and obtained default judgment under case I2232/2007 against NAMFISA and Mr van Rensburg. Subsequently, a Writ of execution was obtained. The appellant then applied for a garnishee order against the First National Bank account of NAMFISA and threatened to execute against Mr van Rensburg. Following the Writ, the Deputy Sheriff – Windhoek, attached N\$5 825 904.30 in NAMFISA's banking account which was in respect of the amount claimed in the summons, inclusive of interest.

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<sup>8</sup> Seemingly, the Deputy Sheriff filed a return of non-service. A copy thereof could not be traced in the record.

[11] The default judgment was rescinded in 2007 on urgency under case number A244/2007 (rescission judgment). The rescission judgment was, seemingly, obtained by agreement. In the application for rescission the notice of motion reflects that the affidavits of certain individuals, including that of Messrs van Rensburg and Ruben Philander, were to be used in support of that application. Additionally, the notice reflects that both NAMFISA and Mr van Rensburg) had appointed the offices of LorentzAngula Inc as an address where they would accept notice and service of all processes. LorentzAngula Inc signed the notice of motion as the applicants' legal practitioner.

[12] The affidavit in support of the application for rescission was deposed to by a certain Mrs Lily Brandt, allegedly as the acting CEO of NAMFISA. She stated, among other things, that she was duly authorised by the CEO of NAMFISA, Mr Rainer Ritter, to depose to the founding affidavit and launch the rescission application on behalf of NAMFISA. She elaborated that she was so authorised in terms of s 29 of the Namibia Financial Institutions Supervisory Authority Act.<sup>9</sup> Mrs Brandt stated that Mr van Rensburg aligned himself with the relief sought and had, according to her, filed an affidavit to that effect. In spite of a thorough search, this affidavit could not be traced in the bundles filed of record. The deponent further confirmed that the summons was not served on Mr van Rensburg by the Deputy Sheriff but that the latter only became aware of same on 10 September 2007, when he was contacted telephonically by the Deputy Sheriff after a return of non-service.<sup>10</sup>

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<sup>9</sup> 3 of 2001.

<sup>10</sup> The return of non-service, referred to as annexure LB3, could not be found in the record.

[13] Subsequently and on an urgent basis the appellant applied, unsuccessfully, to set aside the alleged agreement to rescind the default judgment. He explained that the agreement was not obtained voluntarily. In dismissing that application with costs the High Court ordered him not to proceed with the matter until the ordered costs were paid. Even so, the appellant spiritedly continued to litigate in the High Court.

[14] The appellant's constant gripe in the series of applications concerned the lack of authority by NAMFISA's CEO, acting CEO and its legal representatives, LorentzAngula Inc. Broadly, his contentions were that the appointment of Mrs Brandt as NAMFISA's acting CEO, for the month of September 2007, was unlawful and therefore null and void with the consequence that she could not have legally taken any decision on behalf of NAMFISA during that period; that the effect of lack of authority on the part of LorentzAngula Inc to defend the action and file notice of intention to defend, apply for and obtain rescissions was void *ab initio* and that all proceedings founded on the void rescission order were also void and had to be disregarded.

[15] Most of the said applications, filed under the rescission application case number A244/07 – seeking to reverse the order rescinding the default judgment, resulted in certain adverse orders being granted against the appellant. The synopsis in the following chart is illustrative:

	Date Of Application	Case No:	Parties To Proceeding	Essence Of Claim	Outcome

			<b>(Applicant(s) // Respondent(s)</b>		
	08/08/2007	12232/2007	Summons: <b>H. Christian</b> // Namfisa & 1 other	Claim N\$2911.402.15  Default judgment was granted on 5 September 2007.	Default Judgment obtained on 7 September 2007
1.	12/09/2007	A 244/2007	Namfisa & FJJ Van Rensburg // H. Christian, Registrar Of High Court & Deputy Sheriff-Windhoek	Urgent application to re rescind order of 7/09/2007 under case number 1 2232/2007	Agreement between parties to rescind order of 07/09/2007 made an order of court on 05 October 2007.
2.	08/10/2007	A244/2007	<b>H. Christian</b> // W. Boesak, L Murorua, Namfisa, FJJ Van Rensburg & Deputy Sheriff-Windhoek	Urgent application by H Christian to set a side order of 5/10/2007, rescinding order of 7/9/2007 under case 12232/2007 (# 1 above)	<b>Application dismissed on ground of lack of urgency on 9/10/2007. cost awarded in favour of Namfisa &amp; FJJ van Rensburg. <u>May not proceed until costs have been paid</u></b>
3.	10/10/2007	A244/2007	Notice of Appeal - <b>H Christian</b> // NAMFISA & 5 others	Appeal noted by H Christian against order of 5/10/2007, rescinding the order of 7/9/2007 (#1 above)	No prosecuted in Supreme Court .See further rule 30 Application under #5 below
4.	10/10/2007	A244/2007	Notice of appeal- <b>H. Christian</b> // W Boesak & 4 others	Appeal noted by H Christian against order of 9/10/2007	Not prosecuted in Supreme Court ( <b>Appeal Lapsed</b> ).
5.	31/10/2007	A244/2007	NAMFISA & FJJ Van Rensburg // H Christian & 5 others	Rule 30 Application by Namfisa & Van Rensburg that appeal noted against order of 5/10/2007 (#3 above) constitutes an irregular step	27/11/2007  <b>Application upheld and notice of appeal set aside with costs in favour Namfisa &amp; Van Rensburg.</b>
6.	3/12/2007	A244/2007	Notice of Appeal – <b>H Christian</b> // Namfisa & 5 others	Appeal noted by H Christian against order of 27 /11/2007 (#5 above) setting aside the notice of appeal filed in respect of order of 5/10/2009	Not prosecuted in Supreme Court( lapsed)
7	02/11/2007	A297/2007	NAMFISA & 1 // H. Christian	Urgent Application by Namfisa & 1 other to stay the	<b>Order granted staying execution of default judgment granted by</b>

				execution of the (default) judgment pending the outcome of the appeal noted by Mr. Christian	<b>Silungwe, AJ on 7/9/2007, pending the finalization of the appeal noted by H. Christian</b>
8.	05/11/2007	A 297/2007	H .Christian // Namfisa & 1 other	H. Christian notes appeal against order staying the execution of the (default) judgment (#7 above)	Not prosecuted in the Supreme Court (lapsed)
9.	27/03/2008	A244/2007	H. Christian// Namfisa, FJJ Van Rensburg, Rainer Ritter, Lilly Brandt, Adolf Denk & Registrar of the High Court.	Application by Mr. Christian to declare order of 5/10/2007 <i>void ab initio</i> , alternatively that order was obtain by fraud and be set aside	<b>Application dismissed with costs on 25/10/2008.see rule 30 application under #10 below.</b>
10.	8/04/2008	A244/2007	NAMFISA & FJJ Van Rensburg ,R Ritter, L Brandt & A Denk // H Christian & Registrar of High Court	Rule 30 Application that Application of 27/03/2008 (#9 above) is irregular.	<b>Application upheld on 25/10/2008 with costs, dismissing application to declare order of 5/10/2007 void ab initio. (#9 above)</b>
11.	9/04/2008	A244/2007	H Christian //NAMFISA,FJJ Van Rensburg ,R Ritter ,L Brandt, A Denk & Registrar of High Court	Rule 30 Application by H Christian that notice of intention to oppose 27/03/2008 Application (#9) above on behalf of Respondents constitutes an irregular step	Rule 30 Application by Mr Christian dismissed on 8/05/2008 ( Hoff, J) and ordered that application of 27/03/2008 (#9 above) proceeds on opposed basis
12.	15/04/2009	A244/2007	H Christian // NAMFISA , FJJ Van Rensburg ,R Ritter ,L Brandt, A Denk & Registrar of High Court	Rule 30 Application that rule 30 Application of Namfisa & others (#10 above) is irregular as respondents are not parties to application dated 27/03/2008 (#9 above)	Application opposed by relevant respondents. Rule 30 Application subsequently withdrawn by H Christian on 16/06/2008 on the ground that it was "wrongly termed".
13.	3/06/2008	A244/2007	<b>H Christian // NAMFISA ,FJJ Van Rensburg ,R. Ritter,L Brandt, A Denk &amp; Registrar of High Court</b>	Application to set aside order of Court dated 8/05/2008 ordering that the application of 27/03/2008 (#9	Application dismissed – see Rule 30 application dated 11 /06/2008 (#15.below).

				above) should proceed on an opposed basis (#11 above)	
14.	3/06/2009	A244/2007	H. Christian //NAMFISA,FJJ Van Rensburg ,R Ritter,L Brandt, A Denk & Registrar of High Court	Application to set aside the order of court of 4/4/2008 (order by Angula ,AJ to postpone application of 27/03/2008 (#9 above)for date to be arranged by registrar)	Application dismissed – see Rule 30 Application dated 11/06/2008 (#16. Below).
15.	11/06/2008		NAMFISA,FJJ Van Rensburg ,R Ritter, L Brandt ,A Denk // H Christian &Registrar of High court	Rule 30 Application that application set aside order by Hoff J, i.e. that application of 27/3/2008 proceeds on an opposed basis (#11 &13 above) is irregular.	<b>Heard together with # 16. Below, on 7/10/2008 .Application upheld as per order dated 31/10/2008.Application s by H Christian dated 3/6/2008 (# 13 &amp;14 above) dismissed with costs</b>
16.	11/06/2008		NAMFISA,FJJ Van Rensburg ,R Ritter, L Brandt ,A Denk // H Christian &Registrar of High court	Rule 30 Application that application set aside order of 4/4/2008 to postpone application of 27/3/2008 to a date to be arranged by the registrar (#14.above) is irregular.	<b>Heard together with # 15. above, on 7/10/2008 .Application upheld with costs as per order dated 31/10/2008.Application s by H Christian dated 3/6/2008 (# 13 &amp;14 above) dismissed with costs</b>
17.	17/07/2008	A244/2007	<b>H Christian</b> // Chairman of NAMFISA & CEO of NAMFISA	Application for review i.t.o. Rule 53 reviewing decision to appoint Ms Brandt to act as CEO during September/ October 2007,setting aside resolutions of NAMFISA	Application struck from the roll with costs .See Rule 30 Application (#18below).
18.	7/08/2008	A244/2007	Chairman of NAMFISA & CEO of NAMFISA // H Christian	Rule 30 application that Rule 53 application is irregular due to non-compliance with order of 9/10/2007 (#2 above)	<b>Application upheld and application 18/07/2008 struck from the roll with costs on 13/20/2009</b>
19.	13/11/2008	A244/2007 A345/2008	<b>H Christian</b> // Chairman of	Application by H Christian for a	Rule 30 application

			NAMFISA & CEO of NAMFISA and chairperson of SOE Governance council	declaratory on interpretation of section 5(2) of Namfisa Act,2001 and interpretation of Namfisa Board resolution of 16/7/2003.	pending
20.	19/11/2008	A244/2007 A345/2008	Chairman of Namfisa and CEO of Namfisa // H Christian	Rule 30 Application launched by Namfisa for order declaring application of 13/11/2008 (#19 above)irregular	On motion court date of Rule 30 application ,court commenced with contempt proceedings against H Christian .Rule 30 application still pending
21.	05/03/2009	A34/2009	Ex parte application : <b>H Christian</b>	Ex Parte Application by H Christian for a declaratory on the interpretation of section 5(2) of Namfisa Act, 2001	Matter not set down i.t.o. Rules of Court. (set down for Tuesday ) Matter did not proceed
22.	03/04/2009		Ex parte application : <b>H Christian</b>	Ex Parte Application by H Christian for a declaratory on the interpretation of section 5(2) of Namfisa Act,2001	Court removed matter from roll due to lack of service on interesting parties
23.			Ex parte application : <b>H Christian</b>	Ex Parte Application by H Christian for a declaratory on the interpretation of section 5(2) of Namfisa Act,2001	Matter heard on 24 April 2009 and court ruled that matter is regarded as opposed. Matter still pending.
24	30/07/2009	A273/2009	<b>H Christian &amp; H Beukes // Namfisa &amp; 1 other</b>	Application seeking to declare the order of 5 October 2007 in A244/2007 void, varying court order of 9 October, setting aside all orders obtained in case A244/2007 since 05 October 2007.	Rule 30 Application raised (#25 below). Matter still pending.
25	16/10/2009	A273/2009	Namfisa & other // H Christian	Rule 30 Application (subsequent to Rule 30(5) Notices as per Court order dated 7/10/2009) that Application dated 30/7/2009 (#24	Rule 30 application still pending.

				above)is irregular	
26.	30/10/2009	A366/2009	Ex parte application: <b>H Christian &amp; H Beukes</b>	Application for review i.t.o. Section 32(4) High Court Act.	Matter struck from the roll due to non-appearance by applicants. Matter not served on interested parties.
27.	06/11/2009	A366/2009	Ex parte application : <b>H Christian &amp; H Beukes</b>	Application for review of Deputy Sheriffs failure to perform statutory duty re execution of rescinded order of 12 September 2007(Sec 32(4))	Matter removed from the roll due to non-service on interested parties.
28.	13/11/2009	A366/2009	Ex parte application : <b>H Christian &amp; H Beukes</b>	Review application in terms of section 32(4)of the High Court Act,1990	Application dismissed as per #29 below
29.	20/11/2009	A366/2009	Namfisa & Another // <b>H Christian &amp; H Beukes</b>	Application to dismiss main application A366/2009, alternatively grant leave to intervene.	<b>On 20 November 2009 Court dismissed the main application (#28) by Beukes &amp; Christian with costs.</b>
30.	23/11/2009	A366/2009	<b>H Christian &amp; H Beukes // Namfisa &amp; Another</b>	Application to declare judgment of 20 November 2009 (above )void	Rule 30 raised and matter still pending (#31)
31.	26/11/2009	A366/2009	Namfisa & Another // <b>H Christian &amp; H Christian</b>	Rule 30 application declaring application dated 23 November 2009 irregular	Matter postponed for date to be arranged with registrar. Matter still pending
32.	27/11/2009	A411/2009	Namfisa & Another // <b>H Christian &amp; H Beukes</b>	Urgent application inter alia to declare <b>H Christian &amp; H Beukes</b> in contempt of Court orders of 9 October 2007 (#2 above) and 20 November 2009(#29 above)	Matter postponed on 27/11/2009 to date to be arranged with Registrar together with <b>Christian &amp; Beukes</b> application 23/11/2009



33.	08/12/2009	A411/2009	H Christian & H Beukes // Namfisa & others (registrar)	Urgent application to compel respondents to set the matter (a411/2009) down within two days after hearing of urgent application on 11 December 2009.	Court obtain a date from Registrar and matter (A411 /2009) postponed to 28 January 2010. On 28 January, postponed sine die .Matter still pending.
34.	19/05/2010	A244/2007	H Christian // Namfisa & another	Application to declare F Van Rensburg's decision to prohibit applicant's lawful economic activities unconstitutional.	Rule 30 Application raised. (#35 below)Matter still pending.
35.	08/06/2009	A244/2007	Nanfisa & 1 Other // H Christian	Notice of Application i.t.o. Rule 30 that Application dated 19 May 2009 is irregular	H Christian opposed Rule 30 application on grounds such as that Rule 30(5) notices were not given. Application still pending subject to full bench decision in A332/2009 (W Goseb & others v MRLG &H &RD & others)
36.	20/08/2008	SCR1/2008	H Christian // Namfisa ,Van Rensburg & CEO of Namfisa	Application to Chief Justice to exercise review jurisdiction i.t.o. Supreme Court Act and set orders of 9 October 2007 ,27 November 2007 & 4 April 2008 aside	Matter heard on 17 June 2009, Supreme Court to determine whether it will exercise its Review discretion. Judgment still outstanding
37.	23/06/2009	SCR1/2008	H Christian // Namfisa ,Van Rensburg & CEO of Namfisa	Application i.t.o. Article 81 of constitution to reverse Supreme Court 's decision in respect points <i>in limine</i> raised at hearing of application to review on 17 June 2009 (#36)	No date assigned by the Registrar of the Supreme Court
38.	15/02/2011	A244/2007	H Christian, H Beukes & A Maletzky // LA Inc & 8 Others (SR Philander, A Denk, L Brandt Namfisa, FJJ Van Rensburg, LSN, Disciplinary Committee, ACC)	Application by H Christian & Others for order seeking leave to intervene (Beukes & Maletzky). Consolidating applications, Rensburg did not file	Matter set down for the 4 <sup>th</sup> March 2011. On 4 March court decided to hear substantive application together with Rule 30 Application by some respondents and notice i.t.o Rule 6 by ACC. The 3 applicants

				notice of intention to defend in case (P) I 2232/2007, declaring 1 <sup>st</sup> & 2 <sup>nd</sup> respondents were not authorised to act o.b.o Namfisa & van Rensburg, etc.	conceded to this in open court.  <b>Judgement (Parker, J) delivered on 15 April 2011: Application (substantive) dismissed with costs (instructing &amp; instructed counsel)</b>
39.	30/03/2011	A244/2010	<b>H Christian &amp; H Beukes // Namfisa</b>	Filed an Application with Supreme Court to invoke review jurisdiction in respect of A244/2010	<b>Application declined</b>
40.	06/05/ 2011	A244/2007	<b>H Christian, H Beukes &amp; A Maletzky // LA Inc &amp; 8 Others</b>	3 Application for leave to appeal to Supreme Court	Heard on 23 January 2012. <b>Application dismissed with costs ( Judgment delivered on 22 March 2012, Parker, AJ)</b>
41.	11/05/2011	A244/2010	<b>Namfisa // H Christian &amp; H Beukes</b>	H Christian files application for recusal of Smuts, J and interdicting Smuts, J from delivering his judgment in A244/2010 heard on 22 & 23 March 2011	No date allocated. Matter not Heard.
42.	27/09/2011	A244/2010	<b>H Christian &amp; H Beukes // Namfisa</b>	Application for leave to appeal order of Smuts, J delivered on 27 May 2011	<b>Heard on 30 January 2012. Application struck in respect H Christian. In respect of Beukes application dismissed with costs. In respect of both Messrs Beukes and Christian application to strike granted with costs.</b>
43.	March 2012	SA 20/2012	<b>H Christian &amp; H Beukes</b>	Condonation for delay in prosecuting of appeal and lodging of copies of appeal records	Not heard yet ( Sept. 2012)
44.	23/09/2012	A196/2012	<b>H Christian // Namfisa</b>	Application to be exempted from providing security for	Application struck from the Roll with costs on 18 January 2013. Cost

				costs i.r.o. Appeal	taxed ,but not paid
45.			<b>H Christian // Namfisa</b>	Apply for security to be determined by Registrar i.r.o. Appeal	Security determined on 12 June 2013 by Registrar but not paid
46	15/02/2013	A35/2013	<b>H Christian</b>	Launch Ex parte application to inter alia rescind rescission order made by consent of H Christian	Still pending. Application for leave to oppose made. Court dismissed application on ground of lack of authority, but joined Namfisa as party 29 January 2014
47.	11/07/2013	A244/2007	<b>H Christian</b>	File Petition to Chief Justice re order of Parker J in case A244/2007 on 04 April 2013	Petition dismissed on 03 September 2013
48.	August 2013	A244/2007	<b>H Christian</b>	Filed further documents to petition under #47 above	
49.	28/07/2013	A196/2012	<b>H Christian</b>	File Petition to Chief Justice re ruling of Smuts J on 18 January 2013 re application to be exempted from providing security pending appeal.	Chief Justice's decision received on 28 /11/2013 that no transcript or judgment or order attached to petition. Petitioner granted an opportunity to rectify the omissions.

[16] In yet other applications, the High Court dismissed the applications and issued adverse orders against the appellant including an order in an application (a) to stay proceedings under case number A244/07, A345/08, A34/09 and A273/09 in which the appellant sought an order declaring the rescission judgment of 5 October 2007 to be void and to vary the order of court of 9 October 2009 with regard to punitive costs order; (b) prohibiting the appellant from litigating except with the leave of the court and (c) holding the appellant to be in contempt of orders in relation to cases number A244/07,<sup>11</sup> A297/07<sup>12</sup> and A366/09.<sup>13</sup>

[17] The said adverse orders did not dissuade the appellant from persisting with his disputation. He approached the Supreme Court for certain declaratory relief.

Supreme Court judgment or decision (under Case No: SCR1/2008)

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<sup>11</sup> On 9 October 2007.

<sup>12</sup> Of Parker J on 2 October 2009.

<sup>13</sup> Of Manyarara AJ on 20 November 2009.

[18] During 2008 the appellant approached the Supreme Court by an application styled 'Application for Review'.<sup>14</sup> He cited NAMFISA, Mr van Rensburg and the CEO of NAMFISA as first, second and third respondents, respectively. The appellant raised three points in *limine*: First, that the 'Notice of Opposition' purportedly filed on behalf of the three respondents by LorentzAngula Inc should be disregarded because the power of attorney authorising them to act was not accompanied by a resolution. Secondly, that the heads of argument filed on their behalf in opposition of the said review application should also be disregarded essentially for the same reasons. Thirdly, that because the complaints in that review application were aimed at the alleged irregularities committed by three different Judges of the High Court, the application was not directed as much against the respondents as it was against the three Judges. It was thus objectionable, so the contention went, for counsel appearing on behalf of the three respondent to defend the conduct of the three Judges concerned.

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<sup>14</sup> See in this regard para 1 of the judgment by this Court under case number SCR 1/2018.

[19] The respondents opposed the review application on the basis that it was impermissible in law and therefore had to be struck from the roll. The Supreme Court remarked that although the application was styled 'Review application' it was not because of the wording of rules 5(4)(b) and 11 of its Rules (Supreme Court Rules). The Court made it clear that those rules concerned appeals from the High Court and do not apply to applications brought to the [Supreme Court] as a [court] of first instance<sup>15</sup> as it was the case in that review application.

[20] The Supreme Court held that an application for leave to review under section 16 of the Supreme Court Act<sup>16</sup> (Act) and followed by the Court's decision to invoke its jurisdiction under that section would be followed by directions regarding the further conduct of such proceeding as envisaged in rules 7 and 12 of the Supreme Court Rules. The Court concluded that none of the said rules and section 16 therefore applied to the appellant's review application.<sup>17</sup> It remarked that it was nonetheless seized with the application and opposition in which it was contended that the 'review' application was impermissible and had to be struck from the roll. The Court considered the appellant's argument and reliance on *Mall (Cape) Pty Limited*<sup>18</sup> that being a corporate body, NAMFISA's power of attorney without an accompanying resolution authorising the signatory thereof to execute it did not suffice.

[21] In deciding the issue the Court was not unmindful of the fact that the legal practitioners at LorentzAngula Inc are officers of Court and accepted, *prima facie*,

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<sup>15</sup> Supreme Court judgment at para 2.

<sup>16</sup> 15 of 1990 (Act).

<sup>17</sup> See Supreme Court judgment above n 20.

<sup>18</sup> *Mall (Cape) Limited v Merino Ko-operasie Beperk* 1957 (2) SA 347 (C) at 351G (*Cape-Mall*).

that they would not place a power of attorney before the Court which had been signed by an individual other than the one under whose name and hand it had been executed. However, the Court remarked, in as much as the power of attorney of the first respondent is signed by an individual purporting to act on authority of a corporate entity, NAMFISA, the same consideration does not apply to that individual. The Court found that the legal practitioners would normally not be privy to the resolution tabled and passed at meetings of NAMFISA's board and would not necessarily know that NAMFISA had actually resolved to so authorise the person who had signed the power of attorney in this instance.

[22] As regards an authorisation to act on behalf of a legal entity the Supreme Court restated the principles outlined in the *Cape-Mall* and said:

'The rule in the [*Cape-Mall*] is in my view a salutary one. Whenever a power of attorney is filed of record authorising a legal practitioner to appear on behalf of a corporate entity, in a manner such as the one currently before the Court, *the minimum evidence required would be a resolution of the corporation from which it should be apparent that that person who had signed the power of attorney had been authorised to execute it in those terms. In the absence of such a resolution, this Court is not satisfied on the papers before it that sufficient evidence exists to show that the first respondent has authorised opposition to this application; instructed LorentzAngula Inc to file head of argument and to appear on its behalf.*<sup>19</sup> (Emphasis added.)

[23] The Supreme Court thus ordered:

1. The objection that Messrs LorentzAngula Inc. has not shown that they are duly authorised to act on behalf of the first respondent in opposing this

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<sup>19</sup> Id at para 6.

application; to file heads of argument in support of its opposition and to otherwise appear on behalf of the respondent is sustained.

2. All the other points *in limine* are dismissed.'

#### High Court proceedings under case A35/2013

[24] The appellant, still aggrieved by the various orders *a quo*, then applied to the High Court (under case number A35/2013) with a view to enforce the Supreme Court judgment.<sup>20</sup> He sought relief to declare—

- (a) that the Supreme Court judgment (under case number SCR1/2008 relating to the power of attorney filed without a resolution) applies to the rescission proceedings under case number A244/2007;
- (b) the principles set out in *Tödt* to apply to the rescission proceedings;
- (c) that the lack of authority to LorentzAngula Inc to bring the rescission judgment into the category that attracts *ex debito justitiae* - to set it aside by right;
- (d) that the rescission deprived the appellant of his vested rights in the default judgment obtained under Case No I2232/2007 on 7 September 2007; and

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<sup>20</sup> Above [23].



(e) null and void, all proceedings consequent to the rescission.

[25] According to the appellant, the purpose of the application was to take cognisance of the Supreme Court judgment (in SCR1/2008) relating to the same legal and factual issues in the rescission judgment which he contended, sustained both the principle of *res judicata* and doctrine of estoppel. The appellant was steadfast that the Supreme Court decision applied to the rescission application and legally empowered the High Court to disregard its own judgments and deal *de novo* with the power of attorney filed in the rescission application because the High Court had been under a mistaken belief that Mrs Brandt and LorentzAngula Inc had been duly authorised whereas they were not.

[26] The appellant contended that the lack of resolution rendered the rescission to be set aside and that the matter fell squarely within the ambit of *Tödt*<sup>21</sup> where the South African Appellate Division held that the judgment will be void if there is, among other things, no proper mandate. He relied on the decision of this Court in *Willem Petrus Swart*<sup>22</sup> where the remarks in *Macfoy*<sup>23</sup> regarding nullity were cited with approval.

[27] Needless to say and as correctly stated in the affidavit supporting the declaratory relief sought, the appellant put the issue of lack of authority throughout the litigation in sharp focus. This aspect was not gainsaid by the respondent. In fact, it was endorsed by the deponent to the answering affidavit on behalf of the

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<sup>21</sup> See *Tödt* above footnote 3.

<sup>22</sup> *Willem Petrus Swart v Koos Brandt SA* (17/2002) [2003] NASC 16 (28 October 2003) (*Swart*).

<sup>23</sup> *Macfoy v United Africa Co. Ltd* (1961) 3 All E.R. (*Macfoy*).

respondents, Mr Shiimi, when he correctly acknowledged that the '*authority point has been raised by the [appellant] on a number of occasions, each time unsuccessful.*' He said that the appellant's renewed attack necessitated a response.

[28] The appellant maintained that his right is founded on the default judgment and the Supreme Court decision. He also relied on Art 81 of the Constitution in terms of which the decisions of this Court are binding on the High Court unless reversed.<sup>24</sup>

[29] In its opposition of the application NAMFISA relied on the alleged valid resolution by its Board dated 16 July 2003 and attached 'PS1' – the delegation authorising steps to defend or take legal action – as proof thereof. Based on 'PS1' - Mr Shiimi maintained that the relevant steps on behalf of NAMFISA were, therefore, authorised. He stated that the authority of the Board to take decisions on litigation was delegated to the CEO with the obligation to inform the Board of decisions taken. Mr Shiimi also referred to 'PS2' – the resolution taken at the

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<sup>24</sup> Art 81 must be read with s 17, 32 and 33 of the Supreme Court Act. For completeness, in relevant parts these provisions read:

Article 81 provides the Binding Nature of a Decision of the Supreme Court:

'A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.'

Section 17 provides that:

'(1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court. . . .'

Section 32 provides that;

'The process of the Supreme Court shall run throughout Namibia and any judgment or order of the Supreme Court shall have force and effect in Namibia.'

Section 33 provides that:

'Any judgment or order of the Supreme Court sitting as a court of appeal shall be executed and enforced by the High Court in like manner as if it were an original judgment or order of the High Court.'

meeting of the Board on 8 October 2007. This was described as the delegation of the power of the Board signed by all members of NAMFISA. It was contended on behalf of NAMFISA that Mrs Brandt, the acting CEO at the relevant time in 2007, was authorised to act through the delegation of authority by the CEO, Mr Ritter, during the period of his absence. Mr Shiimi remained steadfast that LorentzAngula Inc was thus authorised to represent NAMFISA.

[30] It was contended further on behalf of NAMFISA that on 20 February 2014 the Board passed a further resolution, 'PS6', to defeat any possible challenge to the authority in opposing the application and to give instructions to LorentzAngula Inc. 'PS6' reflects the alleged resolution of the Board: authorising the opposition of the application and authorising Mr Shiimi to take all necessary steps. Additionally, it reflects the purported resolution by the Board of NAMFISA that all previous steps in regard to litigation be ratified in as far as it may be necessary.

[31] Mr Shiimi also drew this Court's attention to the fact that there were orders by Smuts J, as he then was, which were not disclosed by the appellant. These orders, he stated, include an order (a) permanently staying the action and proceedings under case numbers A345/2008, A34/2009, A 273/2009, A 411/2009, A366/2009 and A244/2007; (b) prohibiting the institution of legal proceedings by the appellant against NAMFISA except with the leave of the court; (c) of contempt of court in relation to case numbers A244/2007 (rescission order on 9 October 2009), A297/2007 (order of Parker J of 2 November 2009) and A366/2009 (order of Manyarara AJ of 20 November 2009). That, Mr Shiimi contended, showed that

the appellant was acting in bad faith and should, for that reason alone, be mulcted with a special order for costs.

[32] What the appellant wanted, Mr Shiimi contended, was for the High Court to revisit the application for rescission and make an order contrary to the order rescinding default judgment. He contended that the High Court was *functus officio*. Mr Shiimi further said that the merits of the rescission application had been argued before Smuts J who made findings on the merits of that application.

[33] Even if the High Court was minded to revisit the application for rescission, so the contention went, the rescission was granted for good reasons as the default judgment was not only void because of lack of service of the summons on Mr van Rensburg but also because the defendants were not proved to be liable. In other words, the appellant had failed to discharge the onus to establish the defendants' liability. For instance, Mr Shiimi explicated, Mr van Rensburg was employed by the Ministry of Finance in 2000, when the events forming part of the claim allegedly took place. At that time, so the explanation went, NAMFISA had not yet been established and was not the successor in title to the Ministry of Finance. NAMFISA thus urged the High Court to dismiss the application with costs on a punitive scale of attorney and client.

[34] In reply the appellant joined issue with the respondent, pointing out that the appointment of the acting CEO (Mrs Brandt) was improper because s 5(2) of the 2001 Act, which solely governs the appointment of an acting CEO, had not been complied with. This meant that the steps taken by Mrs Brandt during September

2007, regarding the lodgement of the application for rescission and signing of power of attorney in favour of LorentzAngula Inc on 12 September 2007, were illegal and of no force and effect.

[35] Section 5(2) provides that 'if the office of the chief executive officer is vacant or if he or she is for any reason unable to discharge his or her functions, the board *must* in consultation with the Minister, appoint a person to act as chief executive officer for the time being.' Additionally, the appellant stated that no provision in the Act<sup>25</sup> (the 2001 Act) empowered the CEO to appoint an acting CEO. The appellant further joined issue with Mrs Brandt's purported delegation of powers by the Board.

[36] On 30 June 2016, almost seven years after the Supreme Court decision in 2009, the High Court<sup>26</sup> per Geier J, dismissed the appellant's application for a declaration of rights in the rescission proceedings (A244/2007) with a punitive costs order, on attorney and own client scale. The Court *a quo* made that order after sketching the case history and because the appellant's previous attempts to revive the default judgment had failed. Additionally his subsequent interlocutory applications, followed by permanent stay orders by Smuts J, had also failed.

[37] The High Court held that the appellant acted in contempt by not seeking the leave of the court when instituting the further proceeding as was ordered by Smuts

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<sup>25</sup> Act 3 of 2001.

<sup>26</sup> High Court Judgment at para 55.

J, thus rendering it *functus officio* and the dispute *res judicata* through the rescission order.<sup>27</sup>

[38] As a further basis for dismissing the application the Court *a quo* relied<sup>28</sup> on the following 2011 remarks by Smuts J, in *Namibia Financial Institutions Supervisory Authority v Christian*:<sup>29</sup>

‘39 It should again be said that also the relied upon Supreme Court decision delivered on 17 June 2009 under case SCR1/2008, is of no assistance to the applicant. The applicant had quite clearly relied on this decision in the case which was heard by Smuts J as the learned Judge already then, in his judgment, had explained what the decision of Maritz JA was all about when he stated:

“. . . [The appellant] and Mr Beukes on 30 July 2009 launched an application under case no A273/2009 in which they sought an order declaring the rescission judgment of 5 October 2007 to be void and to vary the court order of 9 October 2007 with regard to the punitive costs order. They also sought to set aside all proceedings under case No A244/07 being the rescission application. This application followed a ruling of the Supreme Court of 17 June 2009 in respect of a review brought by [the appellant] in the Supreme Court in respect of the proceedings of 5 October 2007 (the rescission judgment). In those proceedings in the Supreme Court, [the appellant] objected to the representation of LorentzAngula Inc and contended that they were not authorised to represent the respondents in the Supreme Court. The Supreme Court, per Maritz JA, found that the power of attorney relied upon by [NAMFISA] had not been supported by resolution of the board of [NAMFISA] as is required by the rules of that court and that [NAMFISA] was thus not properly before that court. This review however proceeded because there were powers of attorney filed on behalf of the other respondents, being natural persons. Judgment on the merits of that review is yet to be delivered. . . .”

<sup>27</sup> High Court judgment at para 28.

<sup>28</sup> *Id* at para 50.

<sup>29</sup> 2011 (2) NR 537 (HC) Smuts J's judgment.

40 . . . The relied upon interlocutory judgment of the Supreme Court does accordingly not bolster the applicant's case for a declaratory [relief] in any way as also it cannot show any tangible and justifiable advantage in relation to the applicant's position as far as this case is concerned.

. . .

44 I can also think of no compelling further reason why, in such circumstance, any court of law would exercise its discretion in favour of an applicant who has sought declaratory relief, in "legal proceedings", aimed at the same party, which the applicant, by virtue of a court order, has clearly been prohibited from bringing, or if he wasn't, was at least prohibited from bring such further proceedings, without leave having been granted on the basis that a court, in spite of the litigation history, first having satisfied itself that the further case would not again amount to an abuse of the process of the court and that, at least would be *prima facie* grounds for such further legal proceedings. I simply cannot detect any such *prima facie* grounds. In any event I believe that I have already made it clear that I consider the current application a further abuse of process on the part of the applicant, at least, in respect of those cases which have been permanently stayed.

45 Finally it should be said that the permanent stay of cases I2232/2007 and A244/2007 (and all the other listed in the order), as well as the aforesaid conditional prohibition to institute further legal proceedings against [NAMFISA], without leave, which was not obtained, *in any event renders all the other questions raised in this application [hypothetical] abstract and/or academic, in circumstances where there simply cannot be any actual (i.e. any legally recognisable dispute) between the parties. . . .*

[39] Manifestly, the remarks above were made after the Supreme Court judgment in 2009 in which the Supreme Court specifically dealt with the question of authority. Interestingly, that issue had – on the acquiescence of NAMFISA itself – been endlessly raised by the appellant in various applications *a quo*.

This appeal

*Issues for determination on appeal*

[40] Apart from the issues raised *in limine* which require no determination particularly in the view I take of the matter, the issues that call for determination are separated into a preliminary issue (and I will resolve it speedily), key and subsidiary issues. The preliminary issue relates to a non-compliance with rule 5(b) of the Rules of this Court – to file and deliver relevant numbers of copies of a complete appeal record. The question is whether the belated filing should be condoned for the lapsed appeal to be reinstated. The answer is in the affirmative. Although the non-observance with the Rules of our Courts has become increasingly intolerable, it is not insignificant that the appellant is a lay person. He proffered a reasonable explanation for his failure to file a complete record timeously. The deadline for filing the complete record was 30 September 2016 and the appellant sought condonation for the delayed filing on 20 October 2016. The delay was not inordinate and the application was unopposed. The appellant also sought an order striking out the respondents' heads of argument. In the view I take of the matter, I would dismiss the striking out application for lack of merit.

[41] Key and subsidiary issues are (a) whether the Supreme Court judgment in 2009 apply to the rescission judgment under case number A244/2007; if so, (b) what is the effect of the Supreme Court judgment on all proceedings *a quo* subsequent to the rescission judgment? (c) whether 'PS6' (the purported authorisation) constitutes a proper authority following the Supreme Court judgment; and (d) given the interests of justice and the public interest considerations ostensibly implicated, whether the default judgment was appropriately sought and granted and whether it escapes scrutiny.



*Does the Supreme Court decision apply to the rescission judgment?*

[42] The issues for determination arise from the contentions similar to those raised *a quo*. For brevity, it is not necessary to repeat all the parties' arguments in this regard. It suffices to mention that NAMFISA maintained that the Supreme Court judgment does not assist the appellant. Reliance was placed, primarily if not wholly, on the aforementioned remarks of the High Court, per Smuts J. Remarkably, NAMFISA did not suggest that the Supreme Court judgment is wrong and should, therefore, be reversed and neither did it suggest that the decision is contradicted by a lawfully enacted Act of Parliament in terms of Art 81 of the Constitution.

[43] Notably, the power of attorney filed *a quo* in opposition of the 'review application' is identical, in all respects, to the one filed in the rescission application. A fact which NAMFISA dared to deny was that 'PS1' and 'PS2', did not constitute the Board's resolutions to authorise the acting CEO, Mrs Brandt, to instruct LorentzAngula Inc to represent NAMFISA. Besides, the purported specific delegation of power to Mrs Brandt was not proved as there are no such statutory prescripts, under the 2001 Act, empowering the NAMFISA's Board to delegate the function (to the CEO or acting CEO) and to decide whether the application should be instituted or not. Section 29 of that Act generally deals with the '[d]elegation of power and assignment of duties.' Even if I am wrong in this regard, the presumption against sub-delegation expressed in the maxim *delegatus delegare non potest*<sup>30</sup> finds application here. The reliance on 'PS1' and 'PS2' did not therefore assist the respondent.

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<sup>30</sup> A Latin maxim loosely translated to mean a party holding derivative authority cannot delegate it to a third party.

[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.

[45] In sustaining the appellant's objection that LorentzAngula Inc had not shown that they were duly authorised in, among other things, opposing the application, the Supreme Court restated the salutary rule in *Cape-Mall* that the minimum evidence required whenever someone acts on behalf of a corporate entity is a resolution of that entity and that there can be no authorisation in the absence of such resolution. The respondent has not suggested that the Supreme Court decision is wrong and needs to be reversed nor that it is contradicted by a lawfully enacted Act of Parliament for it to be unbinding.

[46] The constitutional principle in Art 81 reaffirms the long-standing common law doctrine of *stare decisis*.<sup>31</sup> This doctrine of precedent is an incident of the rule of law aimed to advance justice to ensure, among other things, certainty of the

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<sup>31</sup> An abbreviation of the Latin maxim *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points. See the remarks by Kriegler J regarding this doctrine in the decision of the Constitutional Court of South Africa in *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) para 57. See also this court's remarks on the doctrine in *Likanyo v S* (SCR 2/2016) [2017] NASC (4 August 2017) (*Likanyo*) and *Geingob v The State* (SA 7 and 8/2008) [2018] NASC (6 February 2018).

law.<sup>32</sup> The Constitutional Court of South Africa made the following observations in *Camps Bay Ratepayers*<sup>33</sup> regarding this doctrine:

' . . . What [the principle of stare decisis] boils down to . . . is: "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*." Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts *but also binds courts of final jurisdiction to their own decisions*. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.*' (Footnotes omitted and emphasis added.)

[47] Art 81 of the Constitution therefore applies to the decision. To this end, the decision is thus not only binding on all other Courts of Namibia but is also binding on this apex Court to its earlier decision.

[48] Based on the correct legal principles regarding authority, as set out in the Supreme Court judgment,<sup>34</sup> it follows that LorentzAngula Inc lacked the necessary authority to act on behalf of NAMFISA in defending the action, applying for and obtaining rescission.

#### *Effect of the Supreme Court decision on subsequent proceedings*

[49] It can hardly be doubted that the issue regarding the lack of authorisation was raised persistently in the subsequent proceedings in the High Court. This is

<sup>32</sup> See *Daniels v Campbell* 2004 (5) SA 331 (CC) para 94.

<sup>33</sup> *Camps Bay Ratepayers Association v Harrison* 2011 (4) 42 (CC) paras 28-30.

<sup>34</sup> Above [22].

evident from the diagram depicted above showing a summary of some of the applications including many interlocutory applications filed under case number A244/7007 – the first application launched in 2007 to set aside the order rescinding the default judgment. A fact no one has denied and dares to deny in light of the force of Art 81 and case law is that the Supreme Court judgment was and remains, in the circumstances, binding on all and sundry in Namibia including all other Namibian Courts unless the decision is reversed or contradicted by an Act of Parliament.

[50] The lack of authority thus renders the rescission judgment null and void. This Court in *Swart*<sup>35</sup> quoted with approval the following remarks in *Macfoy* regarding nullity:

‘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.’<sup>36</sup>

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.<sup>37</sup>

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<sup>35</sup> Above n 22. See also *Tödt*, above footnote 3.

<sup>36</sup> *Macfoy* 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.

<sup>37</sup> 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*

*What is the effect of 'PS6'?*

[51] The Board of NAMFISA passed a further resolution, 'PS6', which was intended to defeat any possible challenge to the lack of authority. 'PS6' reflects the purported authorisation and sought to authorise Mr Shiimi to take all necessary steps to oppose the application. Additionally, it reflects that the Board resolved that all previous steps in regard to the litigation be ratified. Evidently, the Board sought to ratify the unauthorised actions by those who acted on behalf of NAMFISA.

[52] The law concerning ratification before judgment is settled. This is so because the matter is still *re integra et tempore congruo*<sup>38</sup> 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.<sup>39</sup> 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.

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*Ltd* 2004 (4) SA (SCA) at para 5.-

<sup>38</sup> A Latin maxim loosely translated to mean the decision in the matter is not yet made.

<sup>39</sup> See in this regard the decision of the South African Appellate Division in *Santam Insurance Limited v Kotze NO* 1995(3) SA 301 (AD) at 310G-H.

[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.

*Does the default judgment escape scrutiny?*

[54] As can be gleaned from the record, the appellant's persistence was basically aimed at reviving the default judgment.<sup>40</sup> During oral argument we raised questions regarding the appropriateness of that order. Although this aspect was not persisted with in the written submissions in this Court, NAMFISA had submitted *a quo* that the default judgment was rescinded for good reasons: First, because of the lack of service of the summons on Mr van Rensburg and, second, because liability had not been established. Put differently, because the appellant had failed to discharge the onus to establish the defendants' liability when the default judgment was sought and granted.

[55] In light of those contentions *a quo* this Court issued directions to enable the parties to file submissions regarding the correctness of the default judgment. Specifically, the parties were asked to file written submissions on whether given this Court's broad inherent powers and the interest of justice as well as the public interests consideration, it is entitled – of its own accord – to determine whether the

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<sup>40</sup> See Smuts J's judgment at para 37.

default judgment was properly sought and granted against both NAMFISA and Mr van Rensburg.

[56] The appellant submitted that this Court is not entitled to raise and decide on appeal and *mero motu* the issue regarding the appropriateness of the default judgment sought and granted. As I understand his submissions, he accepted, however, that the Court may invoke its review powers if an irregularity which has come to its attention has occurred. The appellant submitted that even though the interests of justice may, in the circumstances, militate in favour of this Court invoking its inherent review powers the need for finality, especially given that the lapse of time since the institution of the action, the preservation of certainty and effectiveness of court judgments, are more significant.

[57] The respondent maintained that the default judgment was wrongfully granted and that the order rescinding that judgment was correctly granted. It was submitted that both NAMFISA and Mr van Rensburg will not be able to defend the action if the default judgment is revived alternatively that they would have to commence the process of re-applying to rescind the judgment.

[58] The appellant is correct that it is not insignificant that considerable time has elapsed since the granting of the default judgment. However, an injustice should not, in my view, give way to expediency. As this Court has remarked in *Likany*,<sup>41</sup> the Supreme Court, being an apex Court, should not 'be powerless to put right a

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<sup>41</sup> See *Likany* at para 51. Although the remarks were made in the criminal law context, they find application here.

manifest injustice caused to an individual.<sup>42</sup> This is particularly so when it appears from the record of the proceedings that the court's processes were not used to facilitate the resolution of genuine dispute between the parties but rather to perpetuate unfairness and injustice. In *Aussenkehr Farms*,<sup>43</sup> this Court had the following to say about the role of courts:

'The primary function of a court of law is to dispense justice with impartiality and fairness both to the parties and to the community that it serves. Public interest in the administration of justice requires that the court protects its ability to function as a court of law by ensuring that its processes are used fairly to facilitate the resolution of genuine disputes. Unless the court protects its ability to function in that way, public confidence in the administration of justice may be eroded by a concern that the court's process may be used to perpetuate unfairness and injustice, and ultimately, this may undermine the rule of law . . . .'

[59] It is trite that a court's power to grant orders *mero motu* typically arises in relation to matters of a purely procedural nature. Although the directions were couched in that fashion, it is unquestionable that the respondents had raised, *a quo* the issue regarding the correctness of the default judgment. There was no proper service of the summons upon Mr van Rensburg who was sued in his personal capacity jointly with NAMFISA. A notice of intention to defend, albeit defective, was filed on behalf of NAMFISA. The default judgment was sought and granted in terms of the Old Rules<sup>44</sup> of the High Court. In terms of rule 31(4) of the Old Rules, a notice of set down ought not to have been given to a party in default

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<sup>42</sup> *Id* at para 51.

<sup>43</sup> *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) para 20.

<sup>44</sup> These Old Rules, having been published under Government Notice No 59 of 10 October 1990, were repealed in 2014 and replaced with the current High Court Rules which came into operation on 16 April 2014.



of delivery of notice of intention to defend.<sup>45</sup> This presupposes that where an intention to defend had be shown, a notice of set down must be given to a party seeking to defend the action. I accept that the notice of intention to defend was defective. However, one may not elevate form over substance. The intention itself cannot be overlooked. It follows that, having displayed an intention to defend the action, NAMFISA ought to have been given the notice of set down for default judgment in terms of rule 31(4).<sup>46</sup> Regrettably, that was not done. This was despite the repeated warning sounded by our courts that Rules of Court are not there for the making.

[60] Specifically, this Court, in *Katjaimo*,<sup>47</sup> has cautioned that non-compliance with the Rules hampers the work of the Court. These remarks, although said in the context of non-compliance with the Rules of this Court in a condonation and reinstatement application on an incomplete record, are noteworthy and find relevance here:

‘Sufficient warning has been given by this court that the non-compliance with its rules is hampering the work of the court. The rules of this court, regrettably, are often more honoured in the breach than in the observance. This is intolerable.

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<sup>45</sup> Rule 31 is replaced with rule 15 of the Rules.

<sup>46</sup> The equivalent of this old rule is rule 15(5) of the current High Court Rules which reads as follows: ‘No notice of set down for default judgment referred to in subrule (2) need be given to a party that fails to deliver a notice of intention to defend, except that if a period of six months has lapsed after service of summons, no order may be made in terms of subrule (3), unless a notice of set down has been served on the defendant’.

<sup>47</sup> *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 34.

<sup>48</sup> *Id* at para 34. See also the reproach by this Court in *Shilongo v Church Council of the Evangelical Lutheran Church* 2014 (1) NR 166 (SC) para 5.

[61] Regarding the appropriateness of the default judgment the appellant argued that when considering the application for default judgment the High Court heard the appellant and read the papers. Rule 31(2)(a) of the Old Rules read as follows:

‘Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, *and in the case of any other claim, after hearing evidence*, grant judgment against defendant or make such order as to it seems meet.’ (Emphasis added.)

[62] It needs to be stressed that the Rules were promulgated for the conduct of proceedings and to give effect to fair proceedings in terms of Article 12 (1) of the Namibian Constitution – to ensure, among other things, fairness in the determination of the dispute between parties. The overriding objective of the Rules is, among others, ‘to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively’.<sup>49</sup> Although these objectives were not part and parcel of the Old Rules, considerations of fairness were, indubitably, also exemplified throughout the Old Rules.

[63] The claim by the appellant was not for a ‘debt or liquidated demand’.<sup>50</sup> It was for an unliquidated claim based on delict for payment of a large sum of money. However, evident from the record no iota of oral evidence or, at the very least, evidence by affidavit was tendered to establish liability and on how the amount claimed was computed. The Court *a quo* did not deal and the respondents also did not persist with the valid contentions regarding these aspect, supposedly

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<sup>49</sup> See rule 1(3) of the current High Court Rules.

<sup>50</sup> In terms of rule 31(2)(a) of the Old Rules.

in light of the High Court's approaches to the appellant's gripe regarding lack of authority. This was just not a mere technical irregularity. The failure to establish liability and prove the damages was of fundamental importance to ensure that justice was not only done but was manifestly seen to be done.

[64] More to the point is the fact that it is common cause that the default judgment was sought and granted, as mentioned above, after the filing of the notice of intention to defend by LorentzAngula Inc. It was established by the respondent and remained undisputed by the appellant that he did not inform the High Court before it granted the default judgment that NAMFISA had served the notice of intention to oppose on him. This aspect was mentioned by the High Court,<sup>51</sup> per Smuts J, when he observed<sup>51</sup> that not only did the appellant fail to inform the High Court that the summons was not served on Mr van Rensburg but also that he—

‘ . . . did not inform the court of the fact that Namfisa had served the notice to oppose upon him. Had he done so, the court would clearly not have granted the default judgment. I infer from upon the papers and what was stated in argument that this was why [the appellant] did not disclose its existence to the court. The omission in the circumstances constitute misleading of this court in order to secure the granting of the judgment. On this basis alone the default judgment should be set aside. . . .’

[65] Additionally, the evidence available on the record (and not in the form of a plea to the claim as same was never filed) shows, as explicated by Mr Shiimi, that when the events forming part of the claim allegedly took place Mr van Rensburg

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<sup>51</sup> *Namibian Financial Institutions Supervisory Authority v Christian and another* (A244/2010) [2011] NAHC 141 (27 May 2011) para 37.

was employed by the Ministry of Finance in 2000. At that time, so the explanation went, NAMFISA had not yet been established and was not the successor in title to that Ministry. These matters ought to have been tested by way or evidence as part of establishing liability before the default judgment was granted. None was!

[66] From the reading of the record the notice of intention to defend was filed on behalf of NAMFISA only since no service of the summons had been effected on Mr van Rensburg. On this basis alone default judgment against him was erroneous. Obviously, as Smuts J correctly observed, had the Court that granted the default judgment been aware of these matters, it would not have granted same. It is not insignificant that just four days after the granting of the default judgment on 7 September 2007, a letter was addressed to the appellant advising, among other things, that the default judgment he relied upon was a nullity and that it was—

‘. . . most disconcerting that you proceeded to apply for default judgment against [NAMFISA and Mr van Rensburg], without notice to either of the [them], and without disclosing to the Court during your submissions that (a) [NAMFISA] entered an appearance to defend and (b) no proper and valid service had been effected on [Mr van Rensburg].’

I mention these aspects not detracting from the judgment of the Supreme Court regarding the established legal principles on authorisation but merely to highlight a verity impacting on the appropriateness of the default judgment.

[67] There is no reason to doubt that had the High Court been made aware of all the issues, it would have enabled the appellant to effect service of the summons

upon Mr van Rensburg, ordered NAMFISA to file a proper authority and possibly placed the matter under judicial case management to determine the further conduct of the case with a view to ripen the matter for a fair and efficient resolution of the real issues between the parties. In my view, these omissions impact negatively on NAMFISA's and Mr van Rensburg's fair justice right. Failure by this Court to examine these matters and leaving the default judgment intact would, in the circumstances, be a mockery of justice.

[68] Accordingly, the default judgment should be set aside. Consequently, the matter should be referred back to the High Court for judicial case management in terms of rule 17 and give effect to the overriding objective set out in rule 1(3) of the Rules.

#### Costs

[69] Ordinarily, costs follow the result.<sup>52</sup> Although substantially successful the appellant – a lay person indeed – has largely appeared in person in pursuit of the challenge regarding the lack of authority, not only when filing a notice of intention to defend but also in rescinding the default judgment. Had NAMFISA complied with the law from the outset, it would have filed a plea and the dispute between the protagonists might have been resolved without delay. The appellant accepted, correctly in my view, that costs in the form of disbursements will be appropriate. This view was endorsed by counsel for NAMFISA during oral argument. In so far as the setting aside of the default judgment is concerned, neither the appellant nor NAMFISA and/or LorentzAngula Inc - who filed notice of intention to oppose,

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<sup>52</sup> See, for example, *Father Petrus v Roman Catholic Archdiocese* (SA 32/2009) [2011] NASC 24 (09 June 2011) para 33.

cannot be said to be without any blemish. There should, thus, be no order as to costs.

### Order

[70] In the event, the following order is made:

- (a) The late filing of a complete appeal record in terms rule 5 (5)(b) of the Rules of this Court is condoned.
- (b) The application to strike out is dismissed.
- (c) The appeal is upheld.
- (d) The rescission judgment is declared null and void and is set aside.
- (e) All proceedings pursuant to the rescission judgment are declared null and void and set aside.
- (f) The default judgment is set aside and substituted with the following:
  - ‘(i) The application for default Judgment is dismissed with no order as to costs.
  - (ii) The matter is remitted to the High Court to be placed under judicial case management for the determination of the further conduct of the case.’
- (g) The respondent is ordered to pay the appellant’s costs in the form of disbursements in relation to the proceedings since the application for rescission until these appeal proceedings.

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**NKABINDE AJA**

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**CHOMBA AJA**

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**MOKGORO AJA**

APPEARANCES:

APPELLANT:

In Person

RESPONDENT:

M G Boonzaier

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