CASE NO.: A 244/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY **APPLICANT**

and

HENDRIK CHRISTIAN **1ST RESPONDENT**

HEWAT SAMUEL JACOBUS BEUKES **2ND RESPONDENT**

CORAM: **SMUTS, J**

Heard on: 22 & 23 March 2011
Delivered on: 27 May 2011

JUDGMENT

SMUTS J: [1] The applicant is the Namibia Financial Institutions Supervisory Authority ("NAMFISA"), a body corporate established under its empowering legislation by the same name, Act 3 of 2001. It seeks wide-ranging relief against the first respondent, Mr Hendrik Christian. The second respondent is Mr HSJ Beukes. He was cited because he was party to one of the matters which form the subject matter of the dispute between the parties. No relief is sought against him, except for costs in the event of his opposition to this application. He has opposed the application and also presented written and oral argument when the matter was heard. Where there is reference in this judgment to the respondent, it will be to Mr Christian.

[2] At the root of this application is an action instituted by Mr Christian against Namfisa in 2007 under Case No I 2232/07 ('the action'). Mr Christian obtained default judgment against Namfisa in that action on 7 September 2007. That order was however rescinded, by agreement on 5 October 2007. Despite the rescission of judgment, Mr Christian has brought several applications and other legal proceedings against Namfisa.

[3] It is apparent from the facts that Mr Christian has not been prepared to accept that the order of rescission of judgment has been final and binding upon him. He has thereafter proceeded to launch several applications in connection with that judgment. As has been demonstrated in the papers, Mr Christian adopts the attitude that he is entitled to simply ignore the judgment which rescinded the default judgment. As a consequence, Namfisa contends that he is acting *mala fide* or at the very least vexatiously and seeks relief as a consequence.

[4] The ensuing disputes between the parties arise from Mr Christian's approach regarding the rescission of that judgment which had occurred with his consent through counsel who had appeared on his behalf. Several of the

applications have been disposed of but there are a number which are still pending, as set out below.

[5] In this application, Namfisa seeks final relief against Mr Christian in terms of the Vexatious Proceedings Act and under the common law. It seeks an order under the common law that the action and pending applications be permanently stayed and that Mr Christian be directed to pay all Namfisa's costs on a punitive scale of attorney and own client. Namfisa also seeks an order under s 2(b) of the Vexatious Proceedings Act, 3 of 1956 ("the Act") that no legal proceedings may be instituted against it by Mr Christian without the leave of the Judge President or another Judge assigned by him for that purpose and that such leave will not be granted unless the Judge President or his assignee is satisfied that the proceedings are not an abuse of process of court and that there are *prima facie* grounds for such proceedings. The applicant also seeks an order that several applications, listed in the notice of motion instituted by Mr Christian against it are permanently stayed. The applicant also seeks an order declaring that Mr Christian is held to be in contempt of court of three specific orders referred to and seeks a sentence to be imposed upon Mr Christian in respect of the contempt contended for. The applicant also seeks an order directing that Mr Christian's suspended sentence for contempt of court imposed by Van Niekerk, J on 11 December 2008 be put into operation. The applicant has also applied to strike out certain portions of Mr Christian's answering affidavit.

[6] When the matter was heard on 22 and 23 March 2011, the applicant was represented by Mr PG Robinson SC and the two respondents appeared in person. Written heads of argument were filed in advance of the hearing.

[7] Shortly before the date of hearing, Mr Christian filed a notice entitled **"The assigned Judge may have an interest"**. It was stated in this notice that I may have an interest in these proceedings because I had, as counsel, represented the Momentum Group Ltd in an application in 2005, which went on appeal the

following year. Mr Christian was the applicant in that application and the Momentum Group and Namfisa were respondents as were two other parties. Namfisa and the Momentum Group were separately represented each by a different legal team and different instructing counsel. It was stated in the notice that Mr Christian was **"inclined to suspect that Dave Smuts's judgment may be influenced by his involvement in the foregoing cases and as a result be biased against the respondents" (sic)**. It was also stated however that the concern raised in the notice was not meant to **"impugn the integrity of the assigned Honourable judge is a genuine concern without any improper motive"**.

[8] At the outset of the proceedings, I enquired from Mr Christian whether he would want to make any application with reference to or as a consequence of this notice which he had filed. It was clear to me that Mr Christian was well aware of his right to bring an application for my recusal as he had twice applied for the recusal of judges in certain of the applications referred to in this application. It is after all incumbent upon parties to make such an application at the outset of proceedings. Mr Christian, with the knowledge of my involvement as counsel for the Momentum Group Ltd in those proceedings, informed me in unequivocal terms that he did not wish to bring any such application. In the absence of such an application. I then informed the parties that I would proceed to hear the matter. I then heard full oral argument by the parties on 22 and 23 March 2011 and reserved judgement on 23 March 2011.

[9] Subsequent to the hearing of argument on the matter and at a time when the preparation of my judgment had reached an advanced stage, my attention was drawn to a notice of application which was filed with the Registrar of this Court on 11 May 2011. In this application, the respondents in this application, Messrs Christian and Beukes, apply for an order to the following effect:

"1. Ordering that it was impermissible for the Honourable Judge Smuts to sit on this case on 22-23 March 2011 resultantly unconstitutional alternatively that the Honourable Judge should have recused himself.

2. Ordering that the application be remitted for hearing before alternative judge.

3. Restraining the Honourable Judge Smuts from delivering the judgment in this matter". **(sic)**

[10] No new mater with reference to Mr Christian is contained in this further application. There is however a reference made concerning Mr Beukes to other proceedings which I refer to below. This application has not yet been set down or responded to. It has now been brought on an urgent basis and no interim relief is sought against me. In view of my duty deliver judgments or matters which service before me, I do consider that this further application, which is yet to be heard, would constitute any bar to finalising my judgment. I accordingly do not propose to deal with it, save to correct certain factual matters contained in it or to place them in their correct context.

[11] In this further application there is reference to the notice provided under the heading "the assigned judge may have an interest" and a statement made that neither I nor the Registrar replied to was termed a "letter". The notice however did not constitute a letter in any sense and was, as I pointed out, referred to and dealt with at the very outset of hearing of this matter when it was called on 22 March 2011. The further application also refers to the same application of 2005 referred to in that notice concerning which it is now stated by the respondents:

> "the above case is about unlawful interference of Adv. Smuts (as he then was) in (my) (first respondent) lawful economic activities of **transferring members' interests in self-financed-retirement Annuity Fund to Metropolitan Life Namibia Retirement Annuity Fund".**

[12] It was also stated that Mr Van Rensburg, the second defendant in the action referred to below filed the answering affidavit in support of Momentum.

[13] It is important to place on record that in those proceedings I merely represented Momentum as counsel. There could be thus no question of any interference on my part as to Mr Christian's economic activities in any conceivable sense. I also point out that Mr Van Rensburg filed an affidavit on behalf of Namfisa in that matter and did not file any affidavit in support of the opposition to the application by Momentum which was entirely separately dealt with.

[14] Mr Christian further contends in his supporting affidavit that it was Mr Van Rensburg's answering affidavit (and not what was stated on behalf of Momentum in those proceedings) which forms the basis of his cause of action referred to below. Mr Christian also contended that "Adv. Smuts (as he then was) have strong feelings against the subject matter in that he represented the above-mentioned parties on the matter that could affect his ability to be impartial" **(sic).** He also referred to the official employed by Momentum to instruct lawyers and counsel was a certain Mr. Jooste. I record that my appointment as counsel was however by a local firm of legal practitioners and not by Mr Jooste (whom I did not consult or meet prior to the hearing of the matter).

[15] These facts were known to Mr Christian well in advance of the hearing when he had become aware that I allocated the matter. Indeed, he had addressed his notice to which I have referred and referred to that earlier matter, giving rise to my enquiry as to whether he wished to make an application as a

consequence of what was contained in it. As I have said, he declined that invitation. No factual matter which arose after the date of hearing is referred to or relied upon by him in this further application.

[16] There is however a further issue raised in his affidavit with reference to Mr Beukes that concerns my subsequent representation of Momentum in an entirely unrelated application which he alleges occurred on 24-27 January 2011. He proceeds to quote from a typed transcript of my oral submissions which I made concerning Mr Beukes in paragraph 9.2 of Mr Christian's affidavit:

> "*My Lady, may I just say something I am going to ask Your Ladyship against if this man is not able to conduct himself in a manner which the Court requires, the demeanour of this Court instead of insulting legal practitioners who are properly here to appear I am going to ask Your Ladyship* ***to commit him for contempt, to hold him contempt.*** *He can* ***go down in the cells*** *downstairs until this Court is finished and he will sit down when I am talking"*

[17] I also place on record that the quotation in question did not occur on 24-25 January 2011 when I represented Momentum in an opposed application. (I did not remain in the matter to its conclusion on 26 or 27 January 2011, when my co-counsel took over). The quotation was however stated at an earlier hearing of the same matter on 16 February 2010. The quotation provided by Mr Beukes is not entirely correct. The word on the first line should have been "again" and not "against". But more importantly, he did not provide the context for it, which is crucial to appreciate its meaning. What in fact occurred is that Mr Beukes interrupted a submission I was making and stated:

> *".....counsel Smuts seems to be having delusions of grandeur since this morning. He must behave humanely and know his place....."*

My submission which he quotes then follows in the context of this interruption and prior interruptions on his part and in the context of another legal practitioner who appeared for a different respondent placing on record earlier on 16 February 2010 that during the prior hearing of the matter on the preceding Friday (12 February 2010), Mr Beukes had in open Court stated of him."

"he is appearing here, coming in from the street like a stray dog"

and Mr Beukes further stated that this practitioner had "lost his path. He should not be in this Court but there he sits. Arrogantly presumptuously....." this also appears from the transcript of proceedings on 12 February 2010.

[18] The context of the quotation provided by Mr Beukes demonstrates that it was submission made as counsel in entirely unrelated proceedings where Mr Beukes appeared and was an applicant. This was well known to him and to Mr Christian prior to the hearing of this application who was also an applicant in that matter and in attendance.

[19] Messrs Christian and Beukes do not allege that they became aware of any facts relating to recusal after the matter was fully argued. I also point out that, no relief is sought against Mr Beukes, except for costs given his opposition to the application.

[20] In the light of the aforegoing, I do not consider that this further application constitutes a bar to my giving judgment in the application and I also do not deal with the further application as it is pending.

The Hearing

[21] Both the applicant and Mr Christian asked me to hear and determine certain issues as preliminary matters at the outset. The applicant sought to have its striking out application heard *in limine.* Mr Christian submitted that the several preliminary points raised by him in opposition to the application should also first be heard. I declined both invitations to hear issues *in limine* and, in the exercise of my discretion, ruled that the respective parties should direct their respective arguments on all matters in the usual sequence rather hear and deal with matters on a piece-meal basis.

[22] Before dealing with the forms of relief sought by the applicant, I first propose to set out the factual background to this application in some detail. In doing so, it emerges that despite certain denials, most of the facts which are material to the relief sought by the applicant are not properly placed in issue by Mr Christian upon the approach set out in Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd [1] which has been repeatedly followed by this Court. [2] Where certain of those material facts had been denied by Mr Christian, I am satisfied that they have not been genuinely or *bona fide* placed in issue and refer to instances of that nature below.

The action

[23] In the action, Namfisa is cited as the first defendant, Mr F van Rensburg, a previous Chief Executive Officer of Namfisa, is cited as second defendant. The summons was signed by Mr Christian personally. Mr Robinson argued that it fails to disclose the cause of action against Namfisa or Mr van Rensburg and that default judgment should not have been granted and that the judgment would also

[1] 1984(3) SA 623 (A) at 634-635
[2] Kauesa v Minister of Home Affairs and others 1994 NR 102 (HC) at 108 G; Grobbelaar and another v Walvis Bay Municipality and another 1998(3) SA 408 (Nm HC).

be set aside *mero motu* by the Court as a judgment erroneously sought and/or granted. There is much merit in that submission.

[24] The action seeks to hold Namfisa and Mr van Rensburg liable for the sum of N$2, 911,402.15 together with interest at the rate of 20% on that sum from September 2002 to date of payment on the grounds of an alleged unlawful interference of the plaintiff's right to do business as an insurance agent in September 2002 on the part of Mr van Rensburg, acting in the course and scope of his employment with Namfisa. Mr Christian alleged that the unlawful conduct relates to Mr van Rensburg interfering with his business by forbidding the transfer of members' interests in the Self-Financed Retirement Annuity Fund in South Africa to Metropolitan Life Namibia Retirement Annuity Fund. It is contended in the particulars of claim that Mr Christian only became aware of the reasons for Mr van Rensburg's alleged wrongful conduct in August 2005.

[25] It is pointed out in the founding papers that Namfisa's empowering legislation was promulgated in 2001 and that it was only established then. Its Chief Executive Officer states that its operations started in June 2001 although Mr Christian states that it did so in September/October 2001. Mr van Rensburg was employed as its Chief Executive Officer after its establishment. Prior to that, he was the Director: Financial Institutions Supervision Department within the Ministry of Finance of the Government of Namibia. It was in that capacity that Mr Christian had approached him in 2000 with reference to the transfer of pension benefits of members of the Self-Financed Retirement Annuity Fund in South Africa. Mr van Rensburg responded in his erstwhile capacity within the Ministry to that approach on 6 October 2000 in terms which did not prohibit the transfers but merely stated that his office would have no objection to a transfer provided that the client approves, the insurance companies approve, the rules (of the Fund) make provision for those transfers and that the Commission of Inland Revenue approves. As is pointed out in the founding papers, this letter was not

written on behalf of Namfisa. It was on behalf of the Ministry of Finance of the Government at a time before Namfisa had been established.

[26] In an answering affidavit deposed to by Mr Van Rensburg in 2005 in respect of the application brought by Mr Christian against Namfisa in which Momentum was cited as a respondent and to which I have referred, Mr Van Rensburg stated that he had in 2000, requested the Momentum Group to desist from making payments from that pension fund to the funds designated by Mr Christian for his clients by reason of adverse consequences for members of the Fund. Mr van Rensburg had also requested the Commissioner of Inland Revenue not to approve such transfers for tax purposes. Mr Christian states in his answering affidavit in this application that it was this approach by Mr van Rensburg (in his e-mail in 2000) which forms the foundation of his cause of action against Namfisa, amounting to an alleged unlawful interference with his right to do business. The conduct on the part of Mr van Rensburg took place in 2000. This was before he was associated with or employed by Namfisa and well before it was established. It was pointed out by Mr Robinson that Namfisa is not the successor in title to Mr van Rensburg's previous employer.

[27] Mr Robinson submitted that these facts demonstrate that the conduct complained of took place at a time before Mr van Rensburg was employed by Namfisa. This is also confirmed by Mr van Rensburg in his affidavit in these proceedings. It would follow, he submitted, that Namfisa could not be held liable for the alleged unlawful conduct. I cannot find fault with this reasoning. For this reason alone, the action would be stillborn.

[28] Mr Robinson further argued that the attempts by Mr Christian to suggest that Mr van Rensburg's conduct took place in 2002 do not stand up to scrutiny. He pointed out that the alleged corroboration for this assertion is to be found in Mr Christian's own letter of 26 April 2005 addressed to the Registrar of Pension Funds. This self-serving letter was addressed to Mr van Rensburg. In its

heading, it refers to an email by Mr van Rensburg during September 2002 to a certain Mr Olaf Badenhorst of Momentum. Mr van Rensburg states under oath that he cannot recall ever having seen Mr Christian's letter. But Mr van Rensburg also points out that his own email was dated in 2000 and not in 2002 as suggested by Mr Christian. Significantly, Mr Christian, did not produce the email in question. It was contended by Mr Robinson that the reason for this is self-evident, namely that it does not exist. Mr Robinson accordingly contended that there is no basis to have suggested in the summons that Namfisa should be held vicariously liable for the alleged delict of Mr van Rensburg. Upon the disputed facts properly approached, I find that the approach by Mr Van Rensburg which forms the basis for the alleged interference occurred in 2000 and not 2002, as alleged by Mr Christian.

[29] Mr Robinson also pointed out that Mr Christian has studiously avoided dealing with the merits of his claim by not proceeding to trial or showing any intention to do so.

[30] Mr Christian alleges in the particulars of claim of the action that he was unaware of Mr van Rensburg's alleged instruction until being informed during 2005 by a certain Mr Jooste (of Momentum). But Mr Robinson points out that Mr Christian already knew of the position in 2002 at the very latest on his own version, assuming that he effected the transfer of members' interest during 2001 to 2002, as alleged by Mr Christian. It would then have been clear tohim that his work would have been interrupted or stopped. Mr Robinson contended that Mr Christian would have had the knowledge already then which would have prompted him to make enquiries as to the position and that Mr Christian ought reasonably to have known or could, with the exercise of reasonable care, have ascertained the facts establishing his alleged claim in 2002. As is further pointed out by Mr Robinson, Mr Christian has not issueably denied Mr van Rensburg's version that he had written an email in 2000 to that effect to the Momentum Group, which I also find to be the position.

[31] Mr Robinson submitted that whatever claims there may be would thus in any event have prescribed long before the institution of the action in 2007. The reference to acquiring knowledge of the wrong in 2005 in the particulars, he correctly pointed out, is a conclusion in law and that no facts have been provided in support of that statement. The reference to being told by Mr Jooste in paragraph 74.4 of Mr Christian's affidavit plainly constitutes in admissible hearsay evidence which falls to be disregarded (and struck, given the notice to strike it). Furthermore, the allegation in question in the particulars of claim does not in any event relate to being unaware of the cause of action (the alleged wrongful interference) but merely the reason for it. In paragraph 14 of the particulars of claim, it is stated:

> *"The plaintiff was unaware of the reasons for second defendants' aforesaid wrongful conduct until August 2005".*

[32] I agree with the submission that upon the facts properly approached any claim has prescribed.

[33] Mr Robinson accordingly submitted that the action should be permanently stayed in the exercise of the inherent discretion vested in this Court to avoid injustice and inequity to Namfisa, given these flaws to it and the vexatious conduct on the part of Mr Christian which I refer to below.

[34] The combined summons in the action was served on Namfisa on 9 August 2007. That summons is yet to be served upon Mr van Rensburg, despite a contention by Mr Christian in the rescission application that he had personally served the summons on Namfisa for Mr van Rensburg. That would not constitute service in accordance with the rules and would have no force and effect. Mr van Rensburg had ceased to be an employee of Namfisa during 2005, to the knowledge of Mr Christian.

Default judgment

[35] After service of the summons on 9 August 2007, Namfisa had decided to oppose the relief sought and to instruct certain legal practitioners, LorentzAngula Inc., to defend the action. Notices of intention to defend were however prepared by Mr Denk, a qualified and duly admitted legal practitioner in the service of Namfisa at the time. These notices were signed by him on behalf of a specified legal practitioner within LorentzAngula Inc, Mr R Philander. A notice of intention to oppose was then personally served upon Mr Christian personally on 21 August 2007.by a legal assistant, Ms Pickering, in the legal services department of Namfisa. She had made arrangements with Mr Christian to meet him at the office of the Registrar to serve the notice to defend. Mr Christian does not dispute that he received this notice on 21 August 2007.

[36] Ms Pickering then attended the office of the Registrar with the intention of filing that notice on 21 August 2007. She was however informed at the Registrar's office that the notice would have to be served by legal practitioners of record and that a N$5 revenue stamp would need to be fixed to the notice together with a power of attorney. The legal practitioner handling the matter for Namfisa at LorentzAngula, Mr R Philander, was out of town at that stage. This was the reason why Namfisa had itself caused delivery of the notice on his behalf. Ms Pickering then handed over the notice to defend to Mr Philander's secretary for further action. It was not however brought to the attention of Mr Philander.

[37] On 10 September 2007, the Deputy Sheriff served a writ of execution upon Namfisa arising from the action. It was thereafter established by NAMFISA that Mr Christian had on 7 September 2007 and after the notice of intention to defend had been served upon him, and without any notice to Namfisa, brought an application for default judgment against Namfisa and Mr van Rensburg – even

though there had been no proper service of the summons upon Mr van Rensburg. It was also established and not disputed by Mr Christian 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 upon the papers and what was stated in argument that this was why Mr Christian did not disclose its existence to the Court. The omission in the circumstances constituted misleading of this Court in order to secure the granting of the judgment. On this basis alone, the default judgment should be set aside given the fraudulent manner it was obtained. The order granted was itself also defective as is pointed out in the founding papers. At the instance of Mr Christian, he managed to obtain a different version of the court order. Based upon that order, he then proceeded with the issuing of a writ of execution.

Rescission

[38] Namfisa's legal advisors on 11 September 2007 demanded from Mr Christian that he stay the execution of the order he had obtained. He refused to do so. An urgent application was launched to this Court to rescind the judgment and to stay the execution process. In response to this application, Mr Christian filed an application claiming that the urgent application was based upon perjury and was in contempt of Court and was furthermore incompetent and constituted an abuse of Court. This application for rescission (Case No A 244/07) was postponed and, on 5 October 2007 served before Silungwe, AJ. Mr Christian was represented by counsel on that occasion, Mr Boesak, instructed by legal practitioners. His counsel without any reservation of rights agreed to the rescission of judgment and whilst Mr Christian's was present in court and order to that effect was granted by Silungwe, AJ.

[39] It is however clear from the multiplicity of applications which then ensued, that Mr Christian has not considered himself to be bound by the order rescinding the default judgment. Mr Christian contends that he is not bound by the conduct

of his counsel agreeing to the rescission and has instead repeatedly endeavoured to execute upon the default judgment fraudulently obtained by him. Mr Christian's contention that he is not bound by the rescission of the default judgment is premised upon his contention that Namfisa had not property instructed and authorised LorentzAngula Inc. to represent it in the action and in the application for rescission and that Namfisa's acting Chief Executive Officer who had deposed to the founding affidavit in the rescission application was not authorised to represent Namfisa in launching that application. The acting Chief Executive Officer made it clear however that Namfisa's board had by delegation of its powers and assignment of duties assigned the final approval in respect of litigation to the Chief Executive Officer. This would include the initiation of proceedings on its behalf. This was pursuant to a board resolution. The Chief Executive Officer was at the time visiting Europe and had in turn under s 29 of its empowering legislation (Act 3 of 2001) delegated those powers conferred upon him to the acting Chief Executive Officer in his absence, as is expressly authorised by s 29. The attack upon the authority of the acting Chief Executive Officer is thus without any merit at all.

[40] Furthermore, the rescission order had been obtained by Mr Christian's consent (and in his presence).

Further applications

[41] Despite this, Mr Christian then launched an application on 8 October 2007 set down for 9 October 2007 (under Case No A 244/07). In this application Mr Christian sought to have set aside the **"undertaking of the parties as pronounced by the Court on 5 October 2007"**. He did so on the grounds that the agreement was not voluntary and was based upon **"misinformation as to the purported inclination of the Honourable Presiding Judge to rule in favour of Namfisa"** and was based upon "**coercion by fallacious threats as to costs**". This application came before Pickering, AJ on 9 October 2007. It was

dismissed for lack of urgency with costs on a special scale. Pickering, AJ further ordered that "the applicant (Mr Christian) may not proceed in this matter until he has paid the costs set out by this Court dated 9 October 2007'

[42] On 10 October 2007 Mr Christian noted appeals against both the orders of Silungwe, AJ rescinding the judgment and the order of Pickering, AJ of 9 October 2007. In the notice of appeal, certain of the grounds contained in the notice of appeal include that the learned Judge was **"fraudulently misled by the appellants legal practitioners … to make an order based upon fraudulent misrepresentation**" and that the appellant's consent to **"the fraudulent agreement was obtained in a fraudulent and coercive manner by his legal practitioners"**.

[43] On 31 October 2007, Namfisa gave notice in terms of Rule 30 to set aside the notices of appeal. On the same day, Mr Christian, notwithstanding the rescission of the default judgment and the order (OF Pickering, AJ) of 9 October 2007, gave instructions to the Deputy Sheriff to enforce the warrant of execution issued out of the Registrar's office on 10 September 2007. This instruction resulted in yet a further urgent application by Namfisa on 1 November 2007 seeking interdicts against Mr Christian which were granted by Parker, J on 2 November 2007. Of importance for present purposes is paragraph 2 of that order. It interdicted and restrained Mr Christian from taking any steps whatsoever to execute upon or give effect to the warrant of execution of 10 September 2007, pending the finalisation of his appeal to the Supreme Court. When the matter came before Parker, J, Mr Christian brought an application for Parker, J's recusal. It was refused. Shortly after the order was granted by Parker, J, Mr Christian again gave notice of his intention to appeal against the judgment of Parker, J.

[44] The rule 30 notice in respect of Mr Christian's original notice of appeal came before Frank, AJ on 27 November 2007 who granted the application to set

aside the two notices of appeal. Shortly afterwards and on 3 December 2007, Mr Christian noted an appeal against the order of Frank, AJ.

[45] A few months later and on 27 March 2008, Mr Christian launched an application set down for 4 April 2008 claiming that the judgment of 5 October 2007 be declared void *ab initio* alternatively to be declared to be obtained by fraud including perjury and be set aside. On 4 April 2008, it came to Mr Philander's attention that Angula, AJ, a principal in LorentzAngula Inc, would preside in Motion Court on that day. Before Court commenced, Mr Philander raised the issue with Mr Christian and proposed that the Registrar be approached to obtain hearing dates for the matter or that the matter be assigned to a different Court for hearing. Mr Christian indicated that he had no objection to the matter continuing before Angula, AJ as the matter was merely to be postponed for a date to be arranged with the Registrar. I find that Mr Christian's denial of this version – although not pertinent to the material issues in this application – not to be genuine in the circumstances.

[46] Mr van Rensburg and Namfisa filed a notice in terms of Rule 30 against the application on the basis that it was prohibited in terms of the order of Pickering, AJ of 9 October 2007 by reason of the fact that the costs had not been paid. Mr Christian also filed a Rule 30 notice objecting to the authority of LorentzAngula Inc. to represent the respondents. Shortly afterwards he filed a further Rule 30 application in which it was contended that the application should only be heard after it had been determined whether or not the matter was properly opposed. The latter rule 30 became opposed and it was then withdrawn.

[47] The first Rule 30 application by Mr Christian came before Hoff, J on 6 May 2008 who on the same day found that the matter was opposed and should proceed on an opposed basis. Mr Christian then on 3 June 2008 filed two further applications firstly to rescind the order of Angula, AJ postponing the matter of 4

April 2008 and in the second instance to rescind the order of Hoff, J that the matter should proceed on an opposed basis. The respondents in those applications again gave notice in terms of Rule 30 to set aside those applications to rescind the two respective orders.

[48] The earlier Rule 30 application by Namfisa directed at Mr Christian's application of 27 March 2008 (in which Mr Christian had applied for the rescission judgment of 5 October 2007 to be declared void or to be declared obtained by fraud and to be set aside), thereafter served before Court. Judgment was handed down subsequently on 31 October 2008 and Mr Christian's application was struck with costs.

[49] In the meantime and on 17 July 2008, Mr Christian launched an application to review the appointment of the Acting Chief Executive Officer of Namfisa and various resolutions of its board under Case Number A 273/2009. Namfisa opposed this application and filed a Rule 30 application which was heard on 3 February 2009. Judgment was subsequently delivered upholding the Rule 30 application and dismissing the review application with costs.

[50] Despite the sequence of events and the orders of 9 October 2007 of Pickering, AJ and that of Parker, J of 2 November 2007, Mr Christian and Mr Beukes on 30 July 2009 launched an application under Case Number A 273/2009 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 Mr Christian in the Supreme Court in respect of the proceedings of 5 October 2007 (the rescission of judgment). In those proceedings in the Supreme Court, Mr Christian 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. The 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.

[51] The application by Messrs Christian and Beukes of 30 July 2009 was opposed. On the day following the notice of opposition, Messrs Beukes and Christian on 5 August 2009 filed a document entitled **"Notice of objection to authority"** denying the authority of LorentzAngula Inc. to represent the respondents in that application. That application was postponed on 7 August 2009 and on 10 August 2009 Messrs Christian and Beukes gave notice to file a Rule 30 notice to set aside the notice of opposition and the resolution relied upon for it. On 19 August 2009 Namfisa and Mr van Rensburg gave notice in terms of Rule 30 to set aside the application of 30 July 2009 and the notice objecting to the authority and the Rule 30 application of 10 August 2009. When this Rule 30 application came before Court on 11 September 2009, Mr Christian objected to it on the basis that in terms of Rule 30(5) notice ought to have been given prior to the notice of application under Rule 30. On 7 October 2009, the Court incorrectly found in Mr Christian's favour that a notice in terms of Rule 30(5) should precede a notice in terms of Rule 30. As a consequence, Namfisa then gave a Rule 30(5) notice on 16 October 2009. The application by Mr Beukes and Mr Christian of 30 July 2009 is thus still pending and is subject to the Rule 30 applications I have referred to. It is because of this (30 July 2009) application, in which Mr Beukes is an applicant, that he has been cited as a respondent in these proceedings.

[52] Following the judgment of 7 October 2009 in favour of Mr Christian with reference to Rule 30(5), Mr Christian on 8 October 2009 once again instructed the Deputy Sheriff with reference to the original writ and garnishee order and pointed out to the Deputy Sheriff that the order relied upon by the latter not to

proceed with executing the writ was void *ab initio.* Mr Christian then proceeded to instruct that the execution of the writ and for it to be finalised by no later than 14 October 2009. When the Deputy Sheriff did not act upon the writ, Mr Christian launched an application for an order to compel him to do so on 13 November 2009. The application was set down for hearing on 20 November 2009. Namfisa and Mr van Rensburg had not been cited in that application. They then brought an application set down on the same date, dismissing the ex parte application, alternatively granting them leave to oppose it. When the matter became before the late Manyarara, AJ on 20 November 2009, he dismissed the ex parte application and directed that Messrs Beukes and Christian pay the costs of the application for intervention on an attorney and client scale. In addition he made an order that no further proceedings may be brought by any person which would have the effect of reviving the rescinded order of 7 September 2007 or endeavouring to set aside the order of 5 October 2007. Reasons for these orders were to be provided subsequently. Manyarara, AJ, however unfortunately died thereafter and before reasons were given.

[53] On 24 November 2009 Messrs Beukes and Christian again served an application under Case No A 366/2009, enrolled very shortly thereafter on 27 November 2009 to declare the judgment and order of 20 November 2009 to be void. Namfisa and Mr van Rensburg however brought an application on 27 November 2009 to declare the actions of Messrs Christian and Beukes to be in contempt of the order of Court of 20 November 2009. Despite this, on 9 December 2009 Messrs Christian and Beukes served an urgent application under Case No. A411/2009, enrolled for 11 December 2009 seeking an order that the contempt application brought by Namfisa should be set down within a period of two days. When the matter became for the Court on 11 December 2009 it was postponed to 20 January 2010 but could not proceed on that day due to the fact that there was not a judge available on that date. It was then postponed to 28 January 2010. On 26 January 2010 Messrs Christian and Beukes filed an answering affidavit in the contempt application again challenging

the authority of both Namfisa and Mr van Rensburg to bring it. The application was then postponed on 28 January 2010 to afford the applicants the opportunity to reply. That application (Case No. A 411/2009) is still pending.

[54] These proceedings constitute the multiplicity of applications which have arisen following the institution of the action and the default judgment which was fraudulently obtained by Mr Christian. It is pointed out in the founding papers that Mr Christian, as a lay litigant representing himself, has an intimate knowledge of the rules of Court and is not deterred by the threat of costs orders obtained against him. Namfisa has obtained several costs order against him including on a punitive scale. It is also pointed out that Namfisa has incurred substantial costs opposing the relief sought and that these are in excess of N$1 million, which would include the considerable amount of time spent by its officials in addressing these applications. The endeavours by Namfisa to recover costs after they have been taxed have resulted in *nulla bona* returns. This is not disputed.

[55] Namfisa also pointed out in the papers that Mr Christian has launched attacks upon the judiciary and other officers of Court. There is reference to the instance of the application heard on 20 November 2007 when Mr Christian applied for the recusal of Manyarara, AJ accusing him of bias and conduct destroying his fundamental rights. Instances of other attacks upon other judges and officers of the Court are referred to in the founding papers and are not denied.

[56] Namfisa also refers to Case No A 34/2009 which is an ex parte application brought on 5 March 2009 and enrolled shortly thereafter, but not placed on the roll as it had not complied with practice directives of this Court. On 3 April 2009 Mr Christian launched a similar application without serving it upon Namfisa. This matter was removed from the roll to enable Mr Christian to effect service upon Namfisa. It was subsequently opposed and postponed for a date to be arranged

with the Registrar. It is also currently pending. There is also reference to an application by Mr Christian of 19 May 2010 brought under Case Number A 244/2007 and to a review application launched by Mr Christian on 13 November 2008 under Case Number A 345/2008 against the Chairperson of Namfisa and others.

This application

[57] Namfisa thereafter brought this application seeking the relief against Mr Christian under the common law and the Act as well as an order declaring him to be in contempt of Court and seeking the imposition of a sentence for contempt.

[58] Mr Christian's opposition to this application is primarily based upon a number of preliminary points. These also serve to demonstrate his knowledge of the procedures of this Court. I propose to first deal with those points before dealing with the merits of the application.

Non-joinder

[59] Mr Christian objects to the non-joinder of Mr van Rensburg, a defendant in the trial action. Mr van Rensburg, however, filed a confirmatory application to the founding affidavit as part of the founding papers. He is thus aware of these proceedings and is a significant voice in support of it. As was stressed by Mohamed, J (as he then was) in a matter where the point of non-joinder was taken:

> *"The rule which seeks to avoid orders which affect third parties in proceedings between other parties is not simply a mechanical or technical*

rule which ritualistically be applied regardless of the circumstances of the case."[3]

[60] There would in my view be no need for Mr Van Rensburg to be joined, having deposed to an affidavit concerning and confirming a number of matters pertinent to the matter. His voice has thus been heard in this application. But the issue is in any event put to rest in reply. He quite clearly stated in a further affidavit filed in reply that he has no wish to become a party to the litigation and has no objection to the litigation proceeding without him being formally joined. There is thus no substance in this point and it is dismissed.

Attestation

[61] The second preliminary point raised by Mr Christian concerns the attestation of the founding and confirmatory affidavits by the commissioners of oaths in question. They did so as legal practitioners in the employ of the Government Attorney's office. Mr Christian contends that this is impermissible and in conflict with Regulation 7(1) (of the regulations promulgated under the Commissioner of Oaths Act) which provides that commissioners of oaths are precluded from administering an oath or affirmation relating to a matter in which they have an interest.

[62] Mr Christian and Mr Beukes contended that the legal practitioners in question were employed at the office of the Attorney General and, as the Attorney General is a principal legal advisor to the Government of Namibia, they had an interest in the matter because Namfisa is a State-owned enterprise in which the Government has a substantial interest. This point is also incorrectly taken.

[3] Wholesale Provision Supplies CC v Exim International CC 1995 (1) SA 150 (T) (Full bench) at 158D – E.

[63] Legal practitioners in the service of the Government Attorney would not in my view have an interest as contemplated by Regulation 7. They are not connected to the firm of legal practitioners, LorentzAngula Inc, acting on behalf of Namfisa. They are not involved in the litigation and have no interest in its outcome.

[64] Quite apart from the misplaced basis for this point, the deponent to the founding affidavit was also the deponent to the replying affidavit and in reply confirmed the statements made in the founding affidavit.

Premature

[65] A further point is taken that some of the relief sought with reference to proceedings referred to in the notice of motion is premature and unnecessary because the cases in question have not as yet been enrolled and that they are in effect **"already stayed"** as is contended by Mr Christian. That is however not correct and is gainsaid in the replying affidavit.

Estoppel

[66] In his answering affidavit, Mr Christian contended that a specific settlement agreement reached with Namfisa in which the parties each agree to pay their own costs precluded Namfisa from seeking the relief in this application. He points out that the settlement agreement in question was made an order of Court on 27 May 2009 in respect of a single matter. He contends that Namfisa is estopped from seeking its relief in this application – with reference to what he terms the doctrine of "estopped".

[67] The reliance upon the doctrine of estoppel is however misplaced and does not find application to these proceedings.

Authority

[68] Mr Christian also takes issue with the authority of Namfisa's current Chief Executive Officer by contending that his appointment is **"tainted with gross irregularity and/or clear illegality"** with reference to the selection process which preceded that appointment. His contentions in that regard are the subject matter of an application to strike by Namfisa on the grounds that those allegations are irrelevant and in any event scandalous or vexatious. I agree with the basis for that application and find that these allegations are irrelevant and prejudicial to Namfisa and fall to be struck. There is no substance to this point.

[69] Mr Christian's further opposition to the application is based upon argument directed against the orders in respect of which Namfisa seeks to hold him in contempt. These are the orders of Pickering, AJ, of 9 October 2007, Manyarara, AJ of 20 November 2007 and of Parker, J of 2 November 2007. I deal with these defences when referring to contempt of Court.

[70] I turn not to the nature of the relief claimed in this application.

The application for a permanent stay under the common law and the Act.

[71] Even though Mr Christian does not in his answering affidavit challenge the constitutionality of an order of this nature on the grounds of an infringement of his right to a fair trial and access to Courts' entrenched in Article 12 of the Constitution or to equal protection before the law entrenched in Article 10, this aspect was however addressed by Mr Robinson both in his heads of argument and in oral argument. He referred to the judgment of the Constitutional Court of

South Africa in Beinash and another v Ernst & Young and others [4] where the Court considered the provisions of the Act in the context of the right to a fair trial and the right of access to Court and held:

> **"[19] While such an order may well be far-reaching in relation to that person, it is not immutable. There is escape from the restriction as soon as a prima facie case is made in circumstances where the Judge is satisfied that the proceedings so instituted will not constitute an abuse of the process of the court. When we measure the way in which this escape-hatch is opened in relation to the purpose of the restriction, for the purposes of s 36(1)(d), it is clear that it is not as onerous as the applicants contend, nor unjustifiable in an open and democratic society which is committed to human dignity, equality and freedom. The applicant's right of access to courts is regulated and not prohibited. The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institutions in whose favour it was granted, the easier it will be to prove bona fides and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action or persons, the more difficult it will be to prove bona fides, and rightly so, because the greater will be the possibility that the public interest may be harmed. The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which is in harmony with the analysis adopted by this Court, and ensures the achievement of the snuggest fit to protect the interests of both applicant and the public."**

[72] The holding of a Court is neatly summarised in the headnote:

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[4] 1999(2) SA 116 (CC)

> **"Having demonstrated a propensity to abuse the process of the Courts, it hardly lies in the mouth of a vexatious litigant to complain of and being required to first demonstrate *bona fides* before being allowed to institute litigation."**

[73] I respectfully agree with the approach of the South African Constitutional Court that the constitutionally entrenched right to a fair trial would not preclude an applicant from obtaining relief under the Act of the nature sought in these proceedings given the purpose of the Act (and for the relief under the common law). The purpose of the Act is summarised in paragraph 15 of the Beinash judgment in the following way

> **"[15] In order to evaluate the constitutionality of the impugned section, it is necessary to have regard to the purpose of the Act. This purpose is 'to put a stop to persistent and ungrounded institution of legal proceedings'. The Act does so by allowing a court to screen (as opposed to absolutely bar) a 'person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court'. This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings."**

[74] The well reasoned approach of the Court in Beinash in my view finds application in Namibia.

[75] Mr Robinson also referred to the position at common law dealing with the prevention of vexatious proceedings after the proceedings have been instituted

as is summarised in Cohen v Cohen and another [5] It was held in that matter that the Courts enjoy an inherent power at common law to strike out (pending) claims that are vexatious in the sense that they were **"frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant"**. [6]

[76] As was pointed out in argument by Mr Robinson the Act prevents the institution of vexation proceedings. This is in contradistinction to the position under common law as it had been held that to the Courts do not have the inherent power to prevent the institution of vexatious proceedings. This had been found in In re Anastassiades [7] which had led to the passage of the Act in the following year in South Africa.

[77] As far as the Act is concerned, s 2(1)(b) provides:

> **"If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the**

[5] 2003(1) SA 103 (C)
[6] Paragraph 14 at p 108
[7] 1955(2) SA 220 (W)

process of the court and that there is *prima facie* ground for the proceedings.

[78] In the Cohen matter, Griesel J, (as he then was) held that an applicant was required to meet two threshold requirements in order to secure the relief under this sub-section. The first requirement is to show that a respondent had **"persistently"** instituted legal proceedings. The second is that the proceedings were **"without reasonable ground"**. The factual background which I have set out in some details shows that Namfisa has met both of these requirements. Plainly the facts paint the picture of persistence with regard to Mr Christian's institution and prosecution of proceedings against Namfisa. The action and the manifold subsequent applications which have followed it have also been demonstrably without reasonable ground. I thus find on the facts of this matter that Mr Christian's conduct has been vexatious towards Namfisa, both with reference to the relief sought against him under the Act and Common Law

[79] In this application, Namfisa seeks the relief in terms of the Act to prevent the institution of further actions without the consent of the Judge President or his assignee and in addition seeks relief at common law for the stay of the currently pending litigation. It is also clear that the nature of the relief sought is in the form of a final interdict. The applicant is required to meet the requisites for an interdict by establishing:

(a) a clear right;

(b) an injury actually committed or reasonably apprehended; and

(c) the absence of a similar or adequate alternative remedy. [8]

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[8] Joubert *et al* (The Law of South Africa Vol 11(2nd ed) at 414-416. Gonschorek and others v Asmus and another 2008(1) NR 262 (SC) at 279

[80] As is correctly pointed out by Mr Robinson, it would not be open to Namfisa in view of the scope of the Act to seek the stay of the pending action and applications in terms of the Act as the action had already been instituted and the applications launched by the time this application was brought. This is because the Act contemplates the prevention of the institution of further proceedings and not the stay of existing proceedings which had already been instituted. It is for this reason that both the powers of the Court under the Act and the inherent power to strike out or stay vexatious proceedings under common law arise in this application.

[81] As I have pointed out, Griesel, J in the Cohen matter found that the Court does have the inherent discretion to strike out or stay existing proceedings on the grounds of vexatiousness. I find that also to be the position in Namibia. These powers were thus described in Bisset and others v Boland Bank Ltd and others [9]

> **"The Court has an inherent power to strike out claims which are vexatious. (Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 271; African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 565D.)**
>
> **Vexatious in this context means 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'. (Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) .)**
>
> **This power to strike out is one which must be exercised with very great caution, and only in a clear case. The reason is that the courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who**

[9] 1991(4) SA 603 (D) at 608 E-H.

desires to prosecute an action. (Western Assurance Co case supra at 273; Fisheries Development case supra at 1338G.)

Whilst an action which is obviously unsustainable is vexatious, this must appear as a certainty and not merely on a preponderance of probability."

[82] The inherent power of a Court to stay proceedings was also dealt with by Navsa, J (as he then was) in Williamson v Schoon [10] and more recently in Absa Bank Ltd v Dlamini where this common law principle was also applied [11].

[83] Taking into account the facts set out above and the baseless nature of the action and the further applications which are still pending, it would follow that Namfisa has established a clear right to an interdict (of a permanent stay) under the common law, given the amply demonstrated vexatious conduct on the part of Mr Christian.

[84] The facts also establish an injury committed or reasonably apprehended in the sense of Mr Christian's vexatiousness with regard to both the action and the currently pending applications he has brought following the rescission of the default judgement.

[85] Finally, Namfisa has also established the absence of an adequate alternative remedy to the permanent stay of the currently pending proceedings (and the relief sought under the Act).

[86] I accordingly find that Namfisa has established both the requisites under the Act and under the common law for the relief sought in the form of permanent stays as embodied to the notice of motion.

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[10] 1997(3) SA 1053 (T)
[11] 2008(2) SA 262 (T) at par [270] – [273].

Contempt

[87] Namfisa also seeks orders declaring Mr Christian to be in contempt of the three court orders referred to in the notice of motion, namely that of Pickering, AJ of 9 October 2007, that of Manyarara, AJ of 20 November 2009 and Parker, J of 2 November 2007.

[88] Civil contempt procedures were recently reviewed by the Supreme Court of South Africa Appeal in the light of the post constitutional order in that country in Fakie NO v CCII Systems (Pty) Ltd. [12] After a thorough survey, Cameron JA (speaking for the majority of that Court) succinctly summarised the conclusions reached by the Court as follows:

> **"[42] To sum up:**
>
> **(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.**
>
> **(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.**
>
> **(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.**
>
> **(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an**

[12] 2006(4) SA 326 (SCA)

evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[89] This lucid summary of the legal position with regard to civil contempt proceedings would in my view also apply to the Republic of Namibia following the adoption of the Namibian Constitution.

[90] The applicant contends that Mr Christian is in breach of the following orders:

(a) The order by Pickering, AJ of 9 October 2007 in which it was ordered that Mr Christian **"may not proceed in this matter until he has paid the costs set out by this Court dated 9 October 2007"**.

(b) The order of Manyarara, AJ of 20 November 2009 in which Mr Christian was **"prohibited to bring any further proceedings which would have the effect of reviving this Court's order of 7 September 2007 or setting aside this Court's order of 5 October 2007 or executing the writ of execution dated 10 September 2007, prior to the aforementioned costs being paid"**.

(c) The order of 2 November 2007 by Parker, J in which Mr Christian was

"Interdicted and restrained from taking any steps of whatsoever nature in executing upon or in any manner giving effect to the

warrant of execution issued by the second respondent (the Registrar) dated 10 September 2007, pending the finalisation of the respondent's appeal by the Supreme Court,

and

"Interdicted and restrained from taking any steps of whatsoever nature in executing upon or in any manner giving effect to the order handed down by the Honourable Mr Justice Silungwe, acting under Case No I 2232/2007 on 7 September 2007, pending the finalisation of the respondent's appeal by the Supreme Court."

[91] It is established on the papers that Mr Christian has had knowledge of these orders at all relevant times. They were also given in his presence. That requisite for contempt proceedings is well established in this application. Mr Christian also does not dispute that. Namfisa has also established the multiple non-compliance with all three orders beyond reasonable doubt as set out above. The only remaining requisite is wilfulness and *mala fides.* Given the establishment of the other elements beyond reasonable doubt, Mr Christian accordingly bears the evidential burden in relation to wilfulness and *mala fides.*

[92] In his answering affidavit and in his heads of argument he instead seeks to justify his conduct in conflict with the court orders, contending that the respective orders were void or nullities for the range of reasons he raises.

[93] During his oral argument, I enquired from him whether he was aware that orders of this Court are to be complied with until and unless set aside by this Court or on appeal. He acknowledged his awareness of this trite principle. Even in a single instance of conduct in conflict with a court order, there can be no room for litigants to flout an order because they consider it to be wrong or an

nullity. But Mr Christian conducted himself on several occasions in conflict with the orders in question. As was re-affirmed by the Full Bench of this Court:

> *"All orders of this Court whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. See Culverwell v Reira 1992 (4) SA 490 (W). To hold otherwise, as Jafta, J said at 454 C in the Mjeni matter supra, "the courts would be condoning and encouraging deliberate disobedience or even conduct which holds them in utter contempt.*[13]

[94] This is also the position in English Law. In *Haddison v Haddison*,[14] Romer L J said:

> **"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of the obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."**

[95] The paramountcy accorded to the rule of law in the Namibian Constitution underlines the importance to be attached to the obligation on every person to obey a court order unless and until that order is discharged or set aside.

[96] Mr Christian's reasons and explanations provided for his non-compliance with all three court orders have not established a reasonable doubt as to whether his non-compliance was wilful and *mala fide.* Indeed his explanations show his awareness of the conflict with those orders and a persistent intention to act in

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[13] Sikunda v Government of the Republic of Namibia and Another (2) 2001 NR 86 (HC)
[14] [1952] 2 All ER 567 at 569.

conflict with those orders despite his further awareness that orders should be obeyed until discharged or set aside. I find that his non-compliance was thus wilful and *mala fide.*

[97] It follows that contempt has been established beyond reasonable doubt. The contempt was furthermore repeated and not limited to a single court order but was in respect of three orders.

[98] Contempt is a serious matter. As I have already stressed, adherence to court orders is vital to the administration of justice and disregard of orders, particularly on this scale, cannot be tolerated. I pointed out the seriousness of contempt to Mr Christian in his oral argument and that Mr Robinson had submitted that a custodial sentence would be appropriate. I invited his submissions in that regard. He stated that he was not intentionally contemptuous and that he believed his fundamental rights were infringed.

[99] Having found Mr Christian guilty of contempt of court beyond reasonable doubt, in the exercise of my discretion, I sentence him to a fine of N$5000.00 (five thousand dollars) or in default of payment 6 months imprisonment plus a further sentence of 12 months imprisonment, which further period is suspended for 5 years on condition that Mr Christian is not convicted of or committed for contempt of court during the period of suspension.

Sentence imposed by Van Niekerk, J

[100] Namfisa also sought an order directing that the suspended sentence for contempt of court imposed by Van Niekerk, J on 11 December 2008 should be put into operation. The sentence and its date of imposition are referred to in the founding papers. I do not propose to deal with this matter in view of the consession, correctly made, by Mr Robinson that the nature of the contempt was somewhat different, being in *facie curiae.* Furthermore, the sentence was only

suspended for a period of twelve months which had expired prior to bringing of this application and certainly before it was argued and judgment given. It follows that this sentence will not be put into operation.

Notice to strike out

[101] I have already referred to the application by Namfisa to strike out paragraphs 51 and 74.4 of Mr Christian's answering affidavit on the grounds of the former constitutes scandalous, vexatious and/or irrelevant matter and the letter constitutes inadmissible hearsay evidence. The former paragraph (51) concerns the contentions that the appointment of the current Chief Executive Officer of Namfisa is tainted with gross irregularity or illegality. I find that the passage in question constitutes vexatious and irrelevant matter and falls to be struck. Paragraph 74.4 constitutes admissible hearsay evidence and is struck.

[102] It follows that the application to strike succeeds with costs.

Costs

[103] Given my finding that the conduct of Mr Christian amounts to vexatiousness, a special order as to costs is warranted as mark of this Court's displeasure of such conduct.

Conclusion

[101] In the result, I make the following order:

1. The applicant's application to strike is granted with costs.

2. The action instituted by Mr Hendrik Christian against the applicant and Mr Van Rensburg under Case No. I 2232/2007 on 8 August 2007 is permanently stayed and Mr Christian is directed to pay all costs of Namfisa in the action to date upon the attorney and the client scale.

3. No legal proceedings of whatever nature maybe instituted by Mr Christian against Namfisa in any courts or inferior Court without the prior leave of this court or a Judge of this Court. Such leave shall not be granted unless the court or the Judge in question, as the case maybe, is satisfied that the proceedings are not an abuse of the process of the court and that there is a *prima facie* ground for such proceeding.

4. The following applications under Case Numbers A 345/2008, A 34/2009, A 273/2009, A 411/2009, A 366/2009, and A244/2007, instituted by Mr. Christian against Namfisa are permanently stayed.

5. Mr Christian is held to be in contempt of the following orders of this court:

   5.1 The order of Pickering, AJ of 9 October 2009 under Case Number A 244/2007;

   5.2 The order of Parker, J of 2 November 2009 under Case Number A 297/2007;

   5.3 The order of Manyarara, AJ of 20 November 2009 under Case Number A 366/2009.

6. Mr Christians is sentenced to a fine of N$5000.00 (five thousand Namibian dollars) or in default of payment 6 months imprisonment plus a further period of imprisonment of twelve months which further period of 12 months imprisonment, is suspended for five years on condition that Mr

Christian is not convicted of or committed for contempt of court during the period of suspension.

7. The respondents are directed to pay the costs of the applicant on the scale as between attorney and client and to include the costs of one instructed counsel and one instructing counsel.

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SMUTS, J

ON BEHALF OF THE APPLICANT: **ADV PG ROBINSON SC**

INSTRUCTED BY: **LORENTZANGULA INC**

ON BEHALF OF THE FIRST AND SECOND RESPONDENTS: **IN PERSON**