'Not Reportable'

CASE NO.: I 3086/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALEX MABUKU KAMWI **Applicant**

and

M B DE KLERK & ASSOCIATES **Respondent**

***CORAM*:** **PARKER J**

Heard on: 2012 April 3

Delivered on: 2012 May 8

JUDGMENT

PARKER J: [1] In this matter the applicant *per se* has brought an application by notice of motion in which the applicant prays for the relief set out in the notice of motion. The application is based on rule 44(1)(b) of the Rules of the High Court (hereinafter referred to as 'Rules'), and the applicant prays to this Court for an order to rescind or vary para (b) of the order made by the Court (*per* Marcus AJ) on 11 December 2009 ('the 11 December 2009 order'). The second respondent ('the respondent'), represented by Mr Horn, has moved to reject the rule 44(1)(b)

application which, as I have said previously, concerns only para (b) of the 11 December 2009 order.

[2] The basis of the application is this: according to the applicant, there is in the 11 December 2009 order an ambiguity, or a patent error or an omission because in para (b) of that order the Court made the order that the 'Respondent is ordered to pay the costs of this application, such costs to be limited to disbursements reasonably incurred'. That being the case it follows inexorably and reasonably that the burden of this Court is simply to decide whether the applicant has succeeded in establishing that there is in para (b) of the 11 December 2009 order 'an ambiguity, or a patent error or an omission' within the meaning of rule 44(1)(b) of the Rules in virtue of the fact that this Court is not sitting – and cannot sit – as an appeal court to determine an appeal from the decision of the Court presided over by Marcus AJ.

[3] It follows that what remains to be done is to consider the interpretation of rule 44(1)(b) and apply it against para (b) of the 11 December 2009 order to see if the applicant has established that there is in para (b) of that order 'an ambiguity, or a patent error or an omission' within the meaning of that rule. In this regard, I note that there is nothing in the founding affidavit that establishes – even remotely – that there is an ambiguity, or a patent error or an omission in the 11 December 2009 order. All that the applicant has done is to give reasons why, in his contention, the 11 December 2009 order should be rescinded or varied. Those reasons are based on (1) the Namibian Constitution, (2) the 'International Bill of Human Rights', (3) The Supreme Court judgment of 24 October 2008 in *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Limited* Case No. SA 32/2007 (Unreported) ('the Supreme Court judgment') where in para 41 thereof the Supreme Court held – among others which I shall refer to in due course – that

'disbursements are but a genus of costs', (4) the Competition Act, 2003 (Act No. 2 of 2003), (5) 'the practice of limiting the applicant to costs limited to disbursements has scourges of apartheid and a racists (sic) practices which are expressly condemned by our Constitution', and (6) the 'fundamental principle is that, as a general rule, the applicant should be awarded his costs in full to indemnify him from all the expenses of time, effort, money and resources he spent in defending himself from the respondent's action'. The applicant has set out all that in (1) to (6) which, in my opinion, point irrefragably to the applicant's contention that Marcus AJ took a wrong view of the law when he ordered in the 11 December 2009 order that the respondent is 'to pay the costs of this application, such costs to be limited to disbursements reasonably incurred'. But the applicant has failed completely to establish in what manner that order contains 'an ambiguity, or a patent error or omission', within the meaning of rule 44(1)(b) of the Rules that could entitle this Court to rescind or vary that order. *A fortiori*, para (b) of the 11 December 2009 order is in full compliance with the high authority of Shivute CJ, who wrote the unanimous judgment of the Court, in *Nationwide Detective and Professional Practitioners CC v Standard Bank of Namibia Ltd* supra (the Supreme Court judgment), which the applicant referred to me, in the following succinct passage in para 41 thereof:

> 'It is true that the court *a quo* held that when dealing with an award of costs in favour of a lay litigant, *a court must specify that such costs are limited to disbursements*, but it seems to me that disbursements are but a genus of costs the other being fees and that in specifying the extent of the costs to be paid to the lay litigant, the court is making an "order as to costs left to the discretion of the court".'

[Italicized for emphasis]

[4] Thus, with respect, I fail to see how the applicant can seriously argue that para (b) of the 11 December 2009 order contains 'an ambiguity, or a patent error or omission' within the meaning of rule 44(1)(b) of the Rules when what Marcus AJ ordered in para (b) of the order is exactly what the law, as laid down by the Supreme Court in *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Ltd*, expects the learned Acting Judge to order.

[5] For the aforegoing, I find that the applicant has failed to establish that there is 'an ambiguity, or a patent error or an omission' in the 11 December 2009 order; and I do not find an ambiguity, or a patent error or an omission that can be attributed to Marcus AJ. I accept Mr Horn's submission on the point that in terms of rule 44(1)(b) of Rules the alleged ambiguity or patent error or omission must be attributable to the judge who wrote the judgment and who made the order. It follows that the application must fail, and it fails.

[6] For the sake of completeness I must reiterate the point that this proceeding concerns only an application brought in terms of rule 44(1)(b) of the Rules. It is, therefore, no burden of this Court in the present proceeding to look at what the taxing master did or did not do; only to say that the *ratio dicidendi* of the Supreme Court judgment is that (1) when dealing with an award of costs in favour of a lay litigant, a court must specify that such costs are limited to disbursements and (2) since disbursements are but a genus of costs, the other being fee, when specifying the extent of the costs to be paid to the lay litigant, the Court is making an order as to costs left to the discretion of the Court, and so the Taxing Master has the power to tax 'the extent of costs to be paid to the lay litigant', being disbursements.

[7] As to the question of costs in the present proceeding; Mr Horn submitted that the applicant must be mulcted in costs on the scale as between attorney (legal practitioner) and own client. The reason why, in Mr Horn's submission, such costs should be made is that the applicant was the appellant in *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Ltd* supra and so he knows very well about the judgment and so he should not have brought the present application in which he seeks the rescission or varying of para (b) of the 11 December 2009 order; and having done so, despite this knowledge, so Mr Horn argued this Court should mulct the applicant with a special costs order.

[8] The applicant's response is this. He had brought this application because in his mind there was a judgment of the Court (*per* Mtambanengwe AJ, as he then was), delivered on 29 March 2007, *Telecom Namibia Ltd v Nationwide Detectives & Professional Practitioners CC and Alex Mabuku Kamwi* (ie. the applicant in the present proceeding) Case No. (P) I 3348/2006 (Unreported) ('the Mtambanengwe judgment') which contradicts the judgment by the Court (*per* Heathcote AJ) in *Nationwide Detectives and Professional Practitioner CC v Standard Bank of Namibia Ltd* 2007 (2) NR 592 ('the Heathcote judgment'). With the greatest deference to the applicant, the applicant's argument has not one iota of merit. The Supreme Court judgment, as Mr Horn submits, does not overrule the Heathcote judgment. Indeed, Shivute CJ approved the Heathcote judgment, but added a rider which I have set out as part of the *ratio* of the Supreme Court judgment. Moreover, the Mtambanengwe judgment did not order the payment of any costs: the leaned judge made the order that 'the costs of this application are to be costs in the action', and so I fail to see in what manner the Mtambanengwe judgment contradicts the Heathcote judgment; and what is more, the Supreme Court judgment, which is apropos in the instant proceeding, has settled the law and has resolved any real or perceived contradiction

in different High Court judgments respecting the extent of costs that a lay litigant is entitled to.

[9] Indeed, in my opinion, it is the misreading of the aforementioned two High Court judgments (i.e. The Mtambanengwe judgment and the Heathcote judgment) and the Supreme Court judgment by the applicant, a lay litigant, that has resulted in the applicant bringing the present application which is singularly lacking in merit. Thus, the applicant, labouring under a misapprehension of the *ratio* of the aforementioned superior court judgments, brought the present application. The applicant, being a lay litigant acting *per se*, may have been misadvised and misguided. But I do not think the applicant's conduct in holding on intrepidly tenaciously to a position that has no wraith of merit and was therefore doomed to fail has reached the bar set by the high authority of Strydom CJ in *Namibia Grape–Growers and Exporters v Ministry of Mines and Energy* 2004 NR 194 (SC) (followed by the Court in the recent case of *Andreas Vaatz v The Municipality of Windhoek* Case No. A 28/2010 (Unreported)) to justify the award of costs on the scale as between attorney (legal practitioner) and own client.

[10] For all the aforegoing ratiocination and conclusions I make the following order:

> The application is dismissed with costs on the scale as between party and party.

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PARKER J

ON BEHALF OF THE APPLICANT:	Mr A M Kamwi In person
COUNSEL ON BEHALF OF THE RESPONDENT:	
	Mr S Horn
Instructed by:	MB De Klerk & Associates