REPORTABLE

Case no: A 172/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JACK'S TRADING CC **APPLICANT**

and

THE MINISTER OF FINANCE **1ST RESPONDENT**

THE COMMISSIONER OF THE OFFICE OF THE COMMISSIONER FOR CUSTOMS AND EXCISE **2ND RESPONDENT**

and

OHORONGO CEMENT (PTY) LTD **THIRD RESPONDENT/ INTERVENING RESPONDENT**

Neutral citation: *Jack's Trading CC v The Minister of Finance (A172/2012) [2012] NAHCMD 42 (29 October 2012)*

CORAM: **SMUTS, J**

Heard on: 4 October 2012

Delivered on: 29 October 2012

Flynote: Application for leave to execute a judgment – principles restated – counter application for rescission under rule 44(1)(a) by an intervening party – principles governing a rule 44(1) application for rescission set out.

ORDER

1. The application to give effect to the order of 31 August 2012 pending the appeal is refused.
2. The first and second respondents are directed to pay the applicant's costs of that application, including the costs of one instructing and two instructed counsel.
3. The counter application for rescission of the judgment and the order of 31 August 2012 by intervening applicant is dismissed with costs.
4. The intervening applicant is directed to pay the costs of the counter application, including the costs of one instructing and two instructed counsel.

JUDGMENT

SMUTS, J.:

[1] This interlocutory application for leave to execute a judgment of this court delivered on 31 August 2012 has a number of unusual features.

[2] The applicant in this application succeeded in the main application to set aside a decision taken by the Minister of Finance with effect from 27 July 2012 as set out in a government notice of the that date to impose additional duty upon the importation Portland cement. The first and second respondents have appealed against that success and the applicant applies to execute the judgment.

[3] The events leading up to the main application take on further significance in view of subsequent developments as set out in this interlocutory application. The background facts which led to the main application are the following.

[4] On 6 August 2012, the applicant launched the main application to declare the additional duty on the importation of Portland cement as imposed in a government notice of 27 July 2012 of no force and effect. The notice in question was attached to the founding affidavit and was signed by the Minister and dated 27 July 2012 in what appears to be her handwriting as well. The text of that notice (the impugned notice) under the heading "Notification of taxation proposal: additional duty: Customs and Excise Act, 1998 (Act 20 of 1998)": was as follows:

> "In terms of section 13 of the Interpretation of Laws Proclamation, 1920 (Proclamation No 37 of 1920), I give notice that, under section 65(1) of the Customs and excise Act, 1998 (Act 20 of 1998), on 18 April 2012, tabled a taxation proposal in the National Assembly for additional duty to be levied on importation of Portland cement specified in the table with effect from today, 27th July 2012."

[5] The applicant had contended in the main application that the procedure contemplated by s65 of the Customs and Excise Act 20 of 1998, (the Act) had not been complied with and that the failure to do so invalidated the notice. The main application was opposed by the two respondents cited in it, namely the Minister of Finance and the Commissioner for Customs and Excise, cited as first and second respondents respectively. The application was essentially opposed on two bases. The respondents took issue with the urgency with which it was brought and secondly raised a contrary interpretation to be placed upon s65 to that contended for by the applicant.

[6] In the course of that answering affidavit deposed to on behalf to the Minister, the Commissioner admitted that the Minister had promulgated the notice attached to the founding affidavit for the imposition of the additional duty to be levied with the effect from 27 July 2012. The Commissioner also added that the respondents, "after considering further the representations by the applicant made the decision for the new duty to only be effective from 27 July 2012 and not 18 April 2012 when a taxation proposal was tabled before the National Assembly."

[7] This answering affidavit was deposed to on 10 August 2012. The matter was set down for hearing on 15 August 2012 when it was fully argued. Judgment was reserved and delivered on 31 August 2012.

[8] Shortly after judgment was delivered and on 4 September 2012, the respondents noted an appeal against it to the Supreme Court of Namibia. Part of that notice incorrectly stated that the appeal was against the judgment and order in which this court had "dismissed the appellant's application with costs in the following terms". The notice of appeal brought about this interlocutory application. It was then served on 10 September 2012 and set down for hearing on 18 September 2012. This interlocutory application was for the purpose of seeking an order to give effect to the order granted by this court on 31 August 2012, pending the determination of the appeal. In it, the applicant referred to the test for applications of this nature and contended that it had met these requirements, namely establishing the potential of irreparable harm, prejudice if leave to execute were to be refused, addressing the question of prospects of success in the appeal and the balance of hardship and convenience which, the applicant submitted, favoured it.

[9] After this interlocutory application was served, a concern known as Ohorongo Cement (Pty) Ltd launched an application to intervene in this interlocutory application (and in the appeal). It is a local cement manufacturer which had recently (in February 2011) commenced production of cement at its plant near Otavi where it employs some 316 employees. It referred to the fact that the erection of the cement manufacturing plant and related developments had represented an investment in excess of N$2 billion. This concern, which I refer to as the intervening applicant, also pointed out that it was an infant industry and that the additional duty had been imposed for its protection and benefit. It accordingly submitted that it had a direct and substantial interest in the relief sought in the interlocutory application as well as in the main application and that it should be recognised as a necessary party to both. This application for intervention was dated 19 September 2012 and the intervening applicant sought to set it down on that same date. The interlocutory application and the application for intervene did not

proceed on 18 or 19 September 2012. A case management meeting was held for the purpose of determining dates for the exchange of further affidavits and the matter was set down for hearing on 4 October 2012.

[10] At the case management meeting held in chambers, the applicant indicated that it no longer opposed the intervention application. The intervention application was then granted in chambers but in doing so, I expressly pointed out that I had granted the application as it was not opposed and stated that I did not accept that the intervening party was a necessary party as had been contended for in the founding affidavit in support of the intervention application. This was confirmed by counsel at the hearing on 4 October 2012. I also did so in view of the broader view of *locus standi* which has been expounded by the Supreme Court[1] in applications in challenges upon legislation – which would also in my view include subordinate legislation –and for the purpose of the benefit of further argument on issues before the Supreme Court when the appeal is heard.

[11] On 25 September 2012, the Minister deposed to an opposing affidavit to the interlocutory application. This affidavit was served on 26 September 2012. In this affidavit, the Minister raised a preliminary point. The Minister referred to the order of this court which declared the notice dated 27 July 2012 a nullity. The Minister attached a copy of that notice, which had also been attached to the founding affidavit in the main application (where it had been admitted on her behalf as being the promulgated government notice imposing the additional duty). She stated with reference to that notice that it had at all times been her intention to promulgate it, but further stated: "however when I forwarded the notice to the Directorate Legal Drafting for promulgation, I was advised that the effective date could only be the date when I tabled the taxation proposal in the National Assembly, that date been 18 April 2012.
The notice was therefore amended by the Directorate Legal Drafting and promulgated on 15 August 2012 in the Government Gazette."

[1]Africa Personnel Services v Government of Namibia 2009(2) NR 896 (SC) at par 37-44; Trustco Ltd v Deeds Registries Regulation Board 2011(2) NR 726 (SC) par 12-19

[12] The Minister then proceeded to attach an extract from the Government Gazette dated 15 August 2012 of a notice which reflected a commencement date of 18 April 2012 and thus in different terms to the impugned notice which had been set aside (whose commencement date was 27 July 2012). The Minister further "submitted" that the notice which had been declared a nullity by this court had never been promulgated, despite the admission made on her behalf to that effect. The extract from the Government Gazette of 15 August 2012 comprised Government Notice 298 of 2012 by the Minister which provided for a similar imposition of additional duty but with its commencement date being 18 April 2012. The notice was issued in the name of the Minister and it curiously was dated 18 July 2012.

[13] The Minister did not in her affidavit disclose when the advice have been given by the Directorate of Legal Drafting and when it was received. Nor did she state when she signed and authorised the notice which appeared in the gazette. But the Minister did however state (and accept) that the notice which had been set aside in the judgment (with an implementation date of 27 July 2012) was "ultra vires s65 (1) of the Act and therefore unlawful." The Minister further submitted that the implementation date could only had been 18 April 2012 in compliance with s65 (1).

[14] In the applicant's replying affidavit, it was pointed out that the Commissioner, who deposed to the affidavit on both his own behalf and that the Minister, had admitted the promulgation of the impugned notice which was set aside. There was also reference to an email dated 27 July 2012 sent by the Chief Customs and Excise Officer in the Ministry to his colleagues informing them that as of Sunday 29 July 2012 the additional duty on Portland cement would take effect from 27 July 2012. It was also confirmed in this email that the Minister had signed the table (setting out the new duty) to this effect (and thus with reference to the notice which was set aside). It was thus clear that on 27 July 2012 and after the Minister had signed the impugned notice, customs and excise officers had been instructed to implement it with a commencement date of 27 July 2012. It was also submitted in reply that the Minister sought to withdraw a material admission

contained in the main application without showing good cause and that the Minister would be bound by it. It was also contended that the respondent would be estopped from denying the promulgation of the impugned notice. The applicant also took issue with the Minister's contention that she had been frank, transparent and open with this court.

[15] The applicant also referred to the failure on her part to provide any explanation why the admission of such a material nature, foundational to the application, should be withdrawn and why. The applicant further contended that there was to a duty on her part or on the part of her legal representatives to have informed this court of the promulgation of the different notice which appeared in the gazette of 15 August 2012, the day upon which the matter was heard. This was amplified in the argument by Mr Cassim SC who, together with Mr G. Hinda, appeared for the applicant, stated that neither the Minister nor her legal representatives had informed the applicant or the court in the further period after the reservation of judgment on 15 August 2012 until the delivery of judgment 31 August 2012 of the promulgation of the further notice in the gazette.

[16] Very shortly after the Minister's opposing affidavit was served, the intervening applicant applied by way of a counter application to the interlocutory application for the rescission of this court's judgment delivered on 31 August 2012 under rule 44(1)(a) on the grounds that it was erroneously sought and erroneously granted by this court in the absence of the intervening applicant. The founding affidavit in support of this counter application also served as its answering affidavit to the interlocutory application. In this counter application, it was contended by the intervening applicant that there was an irregularity in the proceedings in the main application in that the intervening applicant as a necessary and interested party was not joined and that the application was thus granted in its absence, as a person affected thereby. The intervening applicant pointed out that when the main application was initiated there had been no notice published in the gazette by the first respondent and that the applicant was erroneous in seeking the relief in the main application and for it to be granted in the absence of the published

gazette. It was also contended that the reasoning of the court in its interpretation of s65 was so flawed as to amount to the judgment being erroneously granted.

[17] I first deal with the interlocutory application. The counter application for rescission under rule 44(1) is then considered.

Interlocutory application

[18] The parties accepted that the applicable principles to in applications of this nature are set out in Southern Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd[2] (by Corbett JA, as he then was), as had been recently followed by this court in Walmart Stores Incorporated v Chairperson of the Namibian Competition Commission and 3 Others[3].

[19] Mr Cassim submitted that there was no merit in the respondent's appeal by reason of the concession in the Minister's affidavit that the impugned notice was ultra vires the provisions of s65 and thus a nullity. Mr Botes who appeared for the Minister and the Commissioner however contended, that the appeal enjoyed what he termed excellent prospects of success, despite the Minister's own acknowledgement that the impugned notice was ultra vire the provisions of s65 and a nullity. Mr Heathcote SC, who together with Mr D Obbes, appeared for the intervening applicant was even more adamant about the prospects success of the appeal in view of his contention that the approach of the court in its interpretation of s65 was so patently erroneous that it should found a basis for the rescission of the application under rule 44(1)(a).

[20] I agree with Mr Cassim's submission that there was plainly a duty on the part of the legal representatives for the Minister or the Minister herself to inform this court of her *volte face* after the Minister had come to the realization that the impugned notice

[2]1977(3) SA 534 (A) at 545 C-D

[3]Unreported, 15 June 2011. The criticism leveled against this judgment on appeal did not refer to or include the portion of the judgment dealing with principles governing such applications and particularly in following the Southern Cape Corporation – case.

was a nullity. The date given on the notice which was published in the gazette of 15 August 2012 was that of 18 July 2012. Yet the Minister in her affidavit stated that the advice she had received that the impugned notice was a nullity from the Directorate of Legal Drafting occurred after she had supplied it to the directorate. That would only have occurred after she had signed it on 27 July 2012 and forwarded it to that Directorate (and prior to the date of publication of the gazette of 15 August 2012 and the hearing on the same date). Yet the subsequent notice in the gazette is inexplicably dated 18 July 2012.

[21] What is entirely absent is a proper explanation from the Minister as to how this all could have occurred and for the glaring contradiction between her version and the date given in the gazette for the notice. When I asked Mr Botes who appeared for the Minister for an explanation for the contradictory versions on the papers and for the failure on the part of the Minister or her representatives to inform the applicant and the court on 15 August 2012 of the publication of the further notice which appeared in the gazette of 15 August 2012, he stated that he could not offer any further explanation to me than was set out in the Minister's affidavit. These issues called out for an explanation. Yet a hopelessly inadequate explanation was given. The inference on the facts before me is inescapable. The Minister or Commissioner or their representatives had misled the court by the non disclosure of the further notice in circumstances when there was clearly a duty to have disclosed the further notice when the application was heard on 15 August 2012.The gazette was dated 15 August and would presuppose that the Minister would have decided upon that notice and authorized it before 15 August 2012. The Minister states under oath that it was promulgated on 15 August 2012. Then there was the further period after judgment was reserved until its delivery on 31 August 2012. Yet nothing was said to the court or the applicant about the further notice at the hearing on 15 August or even afterwards before judgment was given on 31 August 2012. No originally signed notice by the Minister to the effect of the published notice in the gazette of 15 August 2012 was attached to her affidavit. No explanation was given for that omission. Nor was any explanation given as to quite how the date stated in that

gazette for the published notice was 18 July 2012, in direct conflict with the Minister's version given under oath.

[22] It is not clear to me what effect there would be in granting the interlocutory application pending the determination of the appeal. The Minister has after all accepted that the impugned notice was a nullity and would not act on it, and proceeded subsequently to issue the notice as published in the gazette of 15 August 2012.

[23] It is also not clear to me quite why an appeal against the order of this court setting aside that very notice which the Minister herself has acknowledged as ultra vires (and thus a nullity) was noted and is being prosecuted. It was the decision reflected in that notice which was set aside. An appeal is after all against that result and not the reasoning upon which it is based.

[24] In view of the subsequent notice and its publication in the gazette, it would in my view not serve any purpose to grant the application to execute the order of this court. It follows that that application should be refused. Mr Botes submitted that it was evident from the answering affidavit that the impugned notice was merely a draft – intended to be promulgated but which was amended after advice was received. This submission is unfortunately not borne out by the facts. It was unequivocally admitted on behalf of the Minister that she had promulgated the (impugned) notice in question. There is thus no basis in fact for this submission made by Mr Botes.

[25] Mr Botes further submitted that the applicant's attempt to "shift the blame" to the Minister for its own failure to investigate the promulgation was untenable and the applicant's persistence with the interlocutory application constituted an abuse of process and should attract a punitive costs order. The first submission rests on a very cynical premise which I cannot accept. For this submission to hold water, Mr Botes would have it that the unequivocal admission under oath on behalf of the Minister by the Commissioner of promulgation should not be accepted and should require further

investigation. That cannot be so. A person in the position of the applicant would in any view be entitled to rely upon that, particularly in the context of the prior enquiry.

[26] Whilst the continuation of the interlocutory application after the Minister's affidavit may not be well advised, I certainly do not consider that it should attract any sanction in view of the misleading of the court which had preceded it. Had the respondents withdrawn their appeal and tendered costs in view of the Minister's concession that the impugned notice was ultra vires, Mr Botes' submissions may have carried more weight. But in the absence of an explanation for the misleading of the court, I am declined to accept his proposal. On the contrary, in view of the conduct on the part of the respondents in admitting the promulgation of the impugned notice coupled with the contemporaneous acknowledgment that it was to be implemented in accordance with its terms (with effect from 27 July 2012) and the failure to disclose the publication of the subsequent notice to the applicant or to this court and to provide an adequate explanation for that failure, despite being under duty to do so, I have no hesitation in granting a costs order adverse to the first and second respondents by reason of this very unsatisfactory conduct. It clearly warrants the censure of this court and will be in the form of an adverse costs order. That costs order is set out in the order reflected at the conclusion of this judgment.

[27] I turn now to the rescission application.

Rescission application under rule 44(1)(a)

[28] The intervening applicant's application for rescission is brought under rule 44(1)(a) of the rules of this court. The relevant portion of the rule provides:

"(1) The court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary –

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[29] The question to be determined is whether, upon the facts of this case, the judgment and order given on 31 August 2012 can properly be rescinded in terms of rule 44(1)(a) and further whether facts of this matter give rise to an error contemplated by that rule and thus whether the order was erroneously sought or granted because of that error.

[30] The starting point in an analysis of this nature is the fundamental principle that once a court has pronounced a final judgment or order, it is *functus officio*. The background to the equivalent rule in South Africa in the context of this well established principle was, with respect, lucidly set out and summarised by the South African Supreme Court of Appeal in Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)[4] where the court stated:

"[4] As I shall try to explain in due course, the common law before the introduction of Rules to regulate the practice of superior Courts in South Africa is the proper context for the interpretation of the Rule. The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Genticuro AG). That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. These are for the most part conveniently summarised in the headnote of Firestone SA (Pty) Ltd v Genticuro AG (supra) as follows:

'1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the Court overlooked or inadvertently omitted to grant.

2. The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.

[4] 2003 (6) SA 1 (SCA) at par 4-9 (footnote excluded)

3. The Court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.

4. Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.'

In the Genticuro AG case Trollip JA left open whether or not this list is exhaustive. The authorities also refer to an exceptional procedure under the common law in terms of which a court may recall its order immediately after having given it, or within a reasonable time thereof, either meru motu or on the application of a party, which need not be a formal application (De Wet and Others v Western Bank Ltd (supra); First National Bank of South Africa Ltd v Jurgens and Others; Tom v Minister of Safety and Security. This procedure has no bearing on this case.

[5] It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially (Theron NO v United Democratic Front (Western Cape Region) and Others) and Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another.

[6] Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.

[7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)). In the present case the application was, as far the Rule is concerned, only based on Rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted."

[31] After this exposition of principle, the court in Colyn further stated that the trend of the courts is not to give a more extended application to the rule to include all kinds of

mistakes or irregularities.[5] The court further made it clear that the real issue is to determine the nature of the error in question and whether it amounted to an error in terms of the rule, regardless as to whether it manifested itself in the record of proceedings or not.[6]

[32] In a subsequent matter, the Supreme Court of Appeal also made it clear that a judgment granted against a party in its absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment.[7] The court in that matter further held that where a judgment to which a party would be procedurally entitled cannot be considered to have been granted erroneously by reason of facts not known to the judge who granted that judgment if a judge in that matter would have been entitled to grant it.[8] The fundamental purpose of rule 44 is after all to expeditiously correct an obviously wrong judgment or order[9].

[33] I turn now to the contentions advanced by the intervening party and to the facts of this matter.

[34] Mr Heathcote essentially raised three arguments in support of the reliance by the intervening party upon rule 44(1)(a). In the first instance he contended that the judgment was erroneously sought and granted by virtue of an irregularity in the proceedings in that the intervening party had not been joined. Secondly, the intervening party contends that it was an error to have sought a judgment at the time when the government notice had not been published in the gazette. Thirdly he submitted that the reasoning of the court in its interpretation of s65 was so fundamentally flawed that it constituted a patent error and amounted the judgment being erroneously granted for that reason alone.

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[5]At par 8 and with reference to De Wet and Other v Western Bank Limited 1979(2)SA 1031 (A)

[6]In par 10

[7]Lodhi 2 Properties Investment CC v Bondev Developments 2007 (6) SA 87 (SCA)at par 17

[8]Supra par 25

[9]See Erasmus *Superior Court Practice* (updated addition) at B1-306G and the authorities referred in footnote 7

[35] The last of these arguments can be quickly disposed of. When it was raised, I enquired from Mr Heathcote whether he was aware of any authority to support such a proposition. He could refer to none. This was not surprising because it is the purpose of an appeal to correct judgments where the reasoning of a court is found to be wrong – let alone patently wrong, as he submitted. Nor did he however refer me to authority to the contrary in which it was made clear that where an order is wrongly granted by the court in the sense of the mis-exersise of its discretion or in its reasoning, then that would render the judgment and order appealable and thus not erroneously granted or sought within the meaning of this rule[10]. The intervention applicant's third submission is thus entirely without substance.

[36] I turn to the contention on behalf of the intervening applicant that there was an irregularity in the proceedings by granting the judgment and order in its absence. I have already referred to the intervention application and to the contention on the part of the intervening applicant that it was a necessary party to the proceedings. I have also referred to the basis upon which intervention was granted.

[37] The applicant had in the main application cited the Minister, the repository of the power to cause such a notice to be published to bring about an increase in duty under s65. The applicant also cited the Commissioner for Customs and Excise, given the function of that office in administering the provisions in question. Those respondents opposed the application. Affidavits were filed and submissions were made on behalf by the decision maker whose decision to bring about the increase in duty in the subordinate legislation in question was challenged as well as the administering functionary. No point of non-joinder was raised.

[38] The intervening applicant, being a local cement manufacturer was a beneficiary of the impugned decision to increase the duty on imported cement. This did not mean that it was in my view a necessary party to those proceedings and needed to be joined, given its financial interest in the decision. It would not appear to me that the failure to

[10]Seale v Van Rooyen N.O and Others 2008 (4) SA 43 (SCA) at 57 B-C and the authorities collected in footnote 15.

have cited the intervening party would give rise to an irregularity for the purpose of rule 44(1) or form the basis to invoke it in the circumstances of this specific matter, given the fact that the Minister and Commissioner of Customs and Excise had in fact been cited and served and had participated in the proceedings which had resulted in the judgment and order. Rule 44(1)(a) would not in my view apply to such an instance given one of its underlying purposes is to address circumstances where an order is obtained without the other protagonist to an issue being heard or in their absence. This is reinforced by the fact that the intervening applicant's primary opposition to the main application rests upon the interpretation of s65 which was fully argued before this court. It would also seem to me that upon the facts of this matter that the applicant was procedurally entitled to be granted the order. It did not in my view constitute a procedural irregularity to have granted such an order.

[39] It was further contended on behalf of the intervening applicant that the order had been erroneously sought and granted by virtue of the fact that the impugned notice set out in the main application had not been published in the gazette and that the additional duty set out in it had as yet not thus been imposed in accordance with s65. In my view this argument must also fail because it could not be said that the order was erroneously sought in the circumstances of the matter.

[40] The applicant had after all enquired from the Minister about the forthcoming increase in duty. It had eventually obtained the government notice in question (prior to its publication in the gazette) which had been signed by the Minister in her own hand and dated 27 July 2012, also in her own hand. This led the applicant to make a statement in its founding affidavit that the Minister had promulgated the notice in question with the additional duty specified in it and that it would be with the effect from 27 July 2012. As I have already pointed out, this was admitted under oath on the Minister's behalf by the Commissioner who is charged with the administration of the provision in question on 10 August 2012.

[41] It would also appear that the Commissioner's office had instructed officials responsible for the administering the provisions of the Act to impose the additional duty on 29 July 2012 with effect from 27 July 2012 in an email instruction attached to the replying affidavit of the applicant in the interlocutory application. It can thus not be said in the face of an admission of the promulgation of the impugned notice under oath on behalf of the Minister, confirmed in the contemporaneous instruction at the time, that the application had been erroneously sought by the applicant.

[42] Nor can it be said that the application was in the circumstances erroneously granted by virtue of the fact that the Minister had subsequently published a different notice in the gazette after apparently receiving the advice referred to in her affidavit in the interlocutory application. Upon the facts before the court at the time, it was admitted on the Minister's behalf that there had been promulgation of the notice. Given the unawareness of that fact (that the Minister had after giving the notice received such advice and decided to act upon it) both on the part of the applicant and the court at the time when the matter was argued and even thereafter until judgment was delivered, despite that fact being known to the Minister by the date of hearing, a party to those proceedings and who was represented throughout, there was no error in granting that order.

[43] The requisites for an application in terms of rule 44(1) have not in my view been met and that the application should fail for this reason. I would in any event in the exercise of my discretion in the circumstances of this matter decline the application by reason of the fact that the respondents cited in the main application had put up papers and had been represented throughout and by reason of the pertinent admission concerning the promulgation of the notice contained in those papers.

[44] It follows that the counter application to rescind the judgment under rule 44(1) is to be dismissed. The counter application was not opposed by the Minister and the Commissioner. It would follow that the intervening applicant would not be required to pay their costs. The applicant did however oppose the application. Mr Cassim sought

costs of two instructed counsel in doing so. In view of the issues raised and the importance of the matter to the parties, I am inclined to grant a costs order to that effect which was in any event not opposed by the intervening applicant which was likewise represented by two instructed counsel.

[45] I accordingly make the following order:

1. The application to give effect to the order of 31 August 2012 pending the appeal is refused.
2. The first and second respondents are directed to pay the applicant's costs of that application, including the costs of one instructing and two instructed counsel.
3. The counter application for rescission of the judgment and the order of 31 August 2012 by the intervening applicant is dismissed with costs.
4. The intervening applicant is directed to pay the applicant's costs of opposing the counter application, including the costs of one instructing and two instructed counsel.

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DF SMUTS

Judge

APPEARANCE

APPLICANT:	Cassim Sc (with him G. Hinda) Instructed by Sisa Namandje & Co. Inc.
FIRST AND SECONDRESPONDENTS:	L. Botes Government Attorney
INTERVENING APPLICANT:	R. Heathcote SC (with him D. Obbes) Instructed by Koep & Partners