

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION  
JUDGMENT**

**CASE NO. HC-MD-CIV-MOT-GEN-2018/00130**

In the matter between:

**AHMED MOHAMMED RASHED**

**APPLICANT**

and

**THE INSPECTOR-GENERAL OF THE  
NAMIBIAN POLICE**

**1<sup>ST</sup> RESPONDENT**

**MINISTER OF SAFETY AND SECURITY**

**2<sup>ND</sup> RESPONDENT**

**THE PROSECUTOR-GENERAL OF NAMIBIA**

**3<sup>RD</sup> RESPONDENT**

**BANK OF NAMIBIA**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Rashed v The Inspector-General of the Namibian Police*  
(HC-MD-CIV-MOT-GEN-2018/00130) [2018] NAHCMD 165 (13 June 2018)

**CORAM:** MASUKU J

**Heard:** 18 May 2018

**Delivered:** 13 June 2018

**Flynote:** Urgent application for release of money seized from applicant pursuant to acquittal after a criminal trial – Civil procedure – jurisdiction – whether it is proper for the High Court to grant an order compelling compliance with the order of a lower court - Rules of Court – Rule 73 – Urgency – Rule 32 (9) and (10) – attempt to resolve matter amicably not followed – Rule 41 – application for intervention – application to managing judge on notice to other parties – attachment of counter-application as annexure to answering affidavit – effect thereof. Contempt of court – whether proved.

**Summary:** The applicant was arrested at Hosea Kutako International Airport after being found in possession of a large amount of foreign currency (equivalent of N\$ 642 580). He was arraigned before the Windhoek Regional Court where he was charged with the contravention of certain provisions of the Prevention of the Organised Crime Act and the Regulations of the Exchange Control Act. He was later acquitted and the trial court ordered that the money seized be returned to him. After the order was not complied with, the applicant moved an urgent application for the release of the money and for a declarator that the respondents were in contempt of the court order.

*Held* – that the High Court may, in exercise of its inherent jurisdiction grant an order enforcing the Regional Magistrate Court's decision as that court did not have the wherewithal to do so as he apparently had a right which is constitutionally protected and that the court could not in good conscience turn him away remediless.

*Held further* – that the applicant was *prima facie* entitled to the order in light of the favourable order in his favour. The Prosecutor-General did not file an application for stay of execution of the order and the court found that for that reason, the trial court's order was bound to be complied with and that the application for leave to appeal did not stay the effect of the order.

*Held* – that the 3<sup>rd</sup> respondent's attempt to file a counter-application as an annexure to the answering affidavit was irregular, as the application was not properly filed in terms of the rules and could thus not be entertained.

*Held further* – that the application for intervention by the Minister of Finance irregularly filed as it was not filed in compliance with rule 73 relating to urgency and further did not comply with rule 32 (9) and (10).

*Held further* – that an application for intervention in terms of rule 41 is an interlocutory application to be made to the managing judge as it is interlocutory in nature and effect.

*Held that* – before making application in terms of rule 41, the applicant should first comply with the provisions of rule 32 (9) and (10) and that failure to do so results in the application being struck from the roll.

*Held further* – that there is no evidence that the respondents acted contumaciously and that their non-compliance with the order was *mala fide*.

The court concluded that on the papers, as the applicant had an order in his favour, which was on the face of it valid, no case had been made by the respondents as to why the application could not be granted as prayed. The application was accordingly granted as prayed.

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### ORDER

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1. The respondents be and are hereby ordered to comply with the order of the Regional Magistrates Court, dated 28 March 2018, releasing the money seized by them to the applicant forthwith.

2. The applicant is ordered, in dealing with the money referred to in paragraph 1 above, to comply with the relevant laws and regulations that govern the possession of foreign currency in Namibia.
3. The First, Second, Third Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed counsel.
4. The application for intervention by the Minister of Finance, is hereby struck from the roll with costs, consequent upon the employment of one instructing and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

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## JUDGMENT

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MASUKU J:

### Introduction and background

[1] International airports are zones where eternal vigilance takes pre-eminence. In that regard, a high degree of surveillance, safety and security is strictly observed. Hosea Kutako International Airport, in Namibia, is no exception in this regard.

[2] In line with the ethos expressed in the paragraph above, Mr. Rashed, a Namibian resident, cited in this application as the applicant, was apprehended at Hosea Kutako International Airport on 6 December 2013. He was found in possession of various denominations of money in foreign currency, the equivalent of N\$ 642 580. He was accordingly arrested and charged in terms of the provisions of the Prevention of Organised Crime Act,<sup>1</sup> and the Foreign

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<sup>1</sup> Act No. 29 of 2004.

Currency Regulations.<sup>2</sup> The said amount was confiscated from him and handed over to the Bank of Namibia for safe-keeping. It is for that reason that the Bank of Namibia is cited as the 4<sup>th</sup> respondent in these proceedings.

[3] As the wheels of justice turned at full throttle, the Windhoek Regional Court, in due course churned out a verdict in terms of which the applicant was acquitted of the offences charged. That was not all. That court further ordered that the money seized from the applicant must be returned to him forthwith. This judgment did not sit well with the 3<sup>rd</sup> respondent. She noted an application for leave to appeal against the said order, designed to impugn the said decision. That matter is pending before this court it would seem.

[4] In the intervening period, the applicant issued a letter of demand, calling upon the respondents to comply with the court order by releasing the money in question. This has up to now not been done. In frustration, the applicant approached this court on an urgent basis, seeking the following relief:

'1. That this application be heard as one of urgency and that non-compliance with any rules or forms prescribed in the Rules of this Honourable Court, as far as they relate to time periods and service, be condoned in terms of Rule 73 (3);

2. Ordering and directing the First and Second Respondents and those acting under their direction to forthwith comply with paragraph 27 of the judgment of the Regional Court by Magistrate I. T. Velikoshi dated 28 March 2018, within 24 hours of this order.

3. Holding the First and Second Respondents in contempt of court for failure to comply with the above-referred part of the judgment;

4. Costs against the respondents on the scale of attorney and client;

5. Such further and/or alternative relief as the Honourable Court may deem fit.'

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<sup>2</sup> Regulations 3(3) of the Exchange Control Regulations, 1961, as read with Reg, 3(1), 5, 7, 8 and 22 of the Exchange Control Act No. 9 of 1933.

[5] It is common cause that the Windhoek Regional Magistrate's Court, upon acquitting the applicant of the main charges and the alternative charge preferred, ordered the Namibian Police 'to return to the accused the following currency as per Exhibit A . . .', which it is common cause, has not been done. I will investigate the respondents' reasons proffered for the non-compliance and will, in due course, decide whether the applicant has made out a case for the relief sought.

#### Preliminary issue

[6] During the course of the hearing, the court requested the parties to address the issue of whether this court has jurisdiction to enforce the judgment of another court, i.e. of a lower court. This question loomed large for the reason that ordinarily, where a court's order has not been complied with, the natural and logical thing to do, is to approach that very court to enforce its order, and if necessary, on the pain of a sanction of one kind or the other.

[7] Mr. Nekwaya, for the applicant, acting in line with the court's directive, in due course filed heads of argument in this regard and for which the court is highly indebted. I do not intend or have the wherewithal at this juncture, to investigate this matter scrupulously in view of the urgency that attaches. It may well be that on another occasion, the court will dedicate a more detailed analysis of this issue that will hopefully authoritatively redound to clarity on this issue.

[8] In particular, Mr. Nekwaya argued that this court has been approached to grant the relief in terms of its inherent jurisdiction, invested by the High Court Act.<sup>3</sup> It was his argument that the Regional Court does not, in the scheme of the relevant legislation, have power to issue the order sought by the applicant in this case. It would appear that in terms of the provisions of s. 3 of the Magistrates' Court Act,<sup>4</sup> the regional divisions are exclusively

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<sup>3</sup> Sections 2 and 16 of Act. No. 19 of 1990.

<sup>4</sup> Act No. 32 of 1944.

empowered to try persons in respect of criminal matters and this can be gleaned from s. 3 (1) (g) of the said Act.

[9] Sections 26 to 29 vest the Regional Magistrate Courts with civil jurisdiction in respect of persons and causes of action. A reading of those sections seems to suggest that the powers to grant the relief sought in this matter is not arrogated by the Legislature to the Regional Court. There is in this regard, a Latin maxim, which reads, '*ubi ius ibi redium*', which when interpreted means, where there is a right, there is a remedy. Is this not a proper occasion in which to invoke this maxim?

[10] Although he did not make reference to this maxim in particular, the tenor of the submissions by Mr. Nekwaya inexorably leads to a conclusion that he is in full agreement that this would be the proper course to follow in this matter. In particular, Mr. Nekwaya, in his erudite heads of argument, referred the court to a judgment from the Western Cape Division of the High Court in *Daniela Stander v Roger Christopher Marais*,<sup>5</sup> delivered by a Masuku AJ (not the author of this judgment).

[11] It would appear in that case that the court was faced with a situation where it had been approached to grant relief in a matter where its jurisdiction was not clear-cut. In this regard, the relief sought appeared to bear on the enforcement of fundamental rights and the court resoundingly came to the view that it should come to the aid of the applicant in that matter.

[12] In dealing with the question whether the High Court could, in exercise of its inherent jurisdiction, enforce orders made by a lower court, the learned Acting Judge reasoned and said the following:

'In any event, this Court has inherent power to regulate its processes and to grant justice to parties serious about enforcing their constitutional and legal rights. In my view, it is constitutionally permissible to rely on the principle of the High Court's inherent jurisdiction to resolve real disputes affecting ordinary people's rights.

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<sup>5</sup> 2015 (3) SA 424 (WCC) at 429.

Inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair hearing between them.’

[13] I agree with the sentiments expressed so powerfully above. It is clear from Art. 78 of the Constitution, read with the High Court Act,<sup>6</sup> that this court has inherent jurisdiction. I am therefore of the considered opinion that this court cannot, when a person approaches it for relief, shrug its shoulders dismissively and wave that person away, saying, “Sorry. Go to the court that issued the order’, when it appears that court may not have the jurisdiction necessary to come to the aid of such a party. This would be particularly pernicious in this case, where the applicant alleges that his rights to property, which are constitutionally protected, are allegedly being violated by the State. It would be a gross injustice for this court to send the applicant away remediless, as it were.

[14] In *Prosecutor-General v Miguel and Others*<sup>7</sup> it was held that this court is vested with inherent jurisdiction to make any order not prohibited by law and when it is just and equitable to do so, having regard to the circumstances attendant to the matter. See also *National Housing Enterprise v Beukes and Others*.<sup>8</sup> I accordingly adopt that reasoning and hold, subject to the reservations expressed in paragraph [7] above, that the applicant has, on the balance, shown that this court has the jurisdiction to hear and determine this matter and to issue an appropriate order, given the lack of jurisdiction by the trial court, yet there is a need to enforce that court’s order, which it cannot, on account of it being a creature of statute, do. I shall accordingly proceed to grapple with the merits of the matter.

Is the applicant entitled to the relief sought?

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<sup>6</sup> Act 16 of 1990.

<sup>7</sup> 2017 (2) NR 381 (HC).

<sup>8</sup> 2015 (2) NR 577 (SC) at para 13 p. 581.



[15] In answering this question, it is fair to state upfront that in the ordinary course of things, the applicant is *prima facie* entitled to the relief sought. I say so for the reason that there is an order of a competent court that made a declaration and an order in his favour. To this extent, I would incline to the view that he is on firm ground. What has to be investigated are the reasons proffered by the respondents as to why he should not be entitled to enjoy the fruits of the judgment in his favour. What do the respondents say? Do their contentions stand up to legal scrutiny?

[16] In answering the question in the immediately preceding paragraph, I will consider the respective positions of the respondents. In this regard, I should pertinently mention that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file any papers in this matter. The 3<sup>rd</sup> respondent, the Prosecutor-General, I should say filed an answering affidavit that is very ambivalent and of a vacillating nature.

[17] She deposes that once the order releasing the money to the applicant was issued on 28 March 2018, her office got a copy of the judgment on 6 April 2018. A decision was then taken to note an appeal against the judgment of the Regional Court. In this regard, on 23 April 2018, an application for leave to appeal, together with an application for stay of the execution of the judgment were prepared. Ultimately, a decision not to pursue the application for stay was taken and the Government Attorney chose to engage the applicant's legal practitioners instead of approaching the court for necessary relief.<sup>9</sup>

[18] The 3<sup>rd</sup> respondent further states that on 26 April 2018, the present application was launched by the applicant and she could not therefor bring her application for stay of execution of the judgment. In this regard, the 3<sup>rd</sup> respondent continues and states:<sup>10</sup>

'I could not at this point bring my application to stay the execution of the order as the applicant had already instituted his application. It was then that I had to bring the

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<sup>9</sup> Paragraph 10 of the answering affidavit.

<sup>10</sup> Paragraph 11 of the answering affidavit.

counter-application together with the answer, which is attached hereto as annexure 'OMI 3'. The letter to the applicant's legal practitioner was copied to me further explaining the opinion for the engaging of the applicant. We attach hereto the Government Attorney's letter dated 25 April 2018 marked as annexure 'OMI 4'.

[19] I interpose and mention that in paragraph 17 of her answering affidavit, the 3<sup>rd</sup> respondent states that the judgment of the court *a quo* has not been set aside and thus remains valid and enforceable but the State has exercised its right to challenge the correctness of the decision made by the lower court and which deserves equal protection. I do not understand what steps were taken by the respondents to challenge the said decision as the said decision by the 3<sup>rd</sup> respondent's own admission, remains valid in the absence of a stay of execution, which was not moved.

[20] Equally disturbing is the allegation that the 3<sup>rd</sup> respondent made a counter- application. It is not before me. It was not delivered nor properly filed in terms of the rules. A bundle of papers, purporting to be a counter-application, was merely attached and made an appendage to probably 'decorate' the 3<sup>rd</sup> respondent's answering affidavit. Parties do and have to fully and squarely respond to counter-applications filed against them. These counter-applications must not be attached as annexures to other court papers properly filed. It comes as no surprise that the so-called counter-application was never argued, not even by the 3<sup>rd</sup> respondent's own legal representative, who might have forgotten that there was such an application, as it took a back seat. It could accordingly not see the light of day, as it was not launched in the conventional and rule-compliant manner.

[21] The 3<sup>rd</sup> respondent proceeds to say the following at para [18] of her answering affidavit:

'I am aware that the prosecutor who handled the matter could have made the application to stay the execution of the order but could not do so, for reasons. The failure to apply for the stay could have been as a result of the fact that the applicant was acquitted on all the charges and that the time the prosecutor did not see any

basis to apply for the stay. I submit that the failure to apply to the stay the execution of the judgment was not unreasonable or negligent in the circumstances.’ (Emphasis added).

[22] I have underlined the portion recorded above, for the reason that the reasons proffered for not moving the application for stay are not disclosed. In the absence of the reasons, it hardly lies in the mouth of the Prosecutor-General, with respect, to make a value judgment that the failure to stay the proceedings was neither unreasonable nor negligent. In any event, the reasons why the application was not moved are irrelevant. The important issue is that the said proceedings were not initiated and apparently upon legal advice period! In that regard, there appears to be nothing that prevents this court from granting the applicant the relief he seeks.

[23] The question that then looms large is on what basis can this court not grant the application in view of the depositions of the 3<sup>rd</sup> respondent. A conscious decision, it would seem, was taken and upon legal advice, not to bring an application for stay of execution of the learned Regional Magistrate’s order. By the 3<sup>rd</sup> respondent’s own admission, that order stands to be enforced unless stayed or properly set aside. Furthermore, according to the 3<sup>rd</sup> respondent, and she is correct in her submission, in the absence of such an order, the leave to appeal does not serve to stay the execution of the order of the court *a quo*.

[24] In the premises, I am of the considered view that the 3<sup>rd</sup> respondent has not made any case legally for non-compliance with the order. Even if the court may sympathise with the 3<sup>rd</sup> respondent, sympathies are simply not enough. There must be a proper legal basis for granting any order this court may be minded to make. In this case, there is nothing before court as I have also mentioned that the counter-application touted is not before court and was never properly raised nor argued. In the instant case, I am of the considered view that there is no basis in law set out by the 3<sup>rd</sup> respondent for refusing the relief sought by the applicant in the particular circumstances of this case.

[25] I now turn to consider the answering affidavit filed by the 4<sup>th</sup> respondent. I do so for purposes of establishing whether a case for refusing the order has been made therein. The affidavit is deposed to by Mr. Bryan Eiseb, the Director Control and Legal Services at the 4<sup>th</sup> respondent Bank.

[26] He sets out a very useful background to the law and regulations applicable to the case at hand. Mr. Eiseb started off by explaining usefully the reasons for imposing regulations regarding exchange control, namely, to protect Namibia's foreign reserves. In particular, he was at pains in his affidavit, to raise 'a critical issue' not dealt with by any of the other respondents. This issue relates to the power to refund or return foreign currency, which in his submissions, lies solely with the Treasury, particularly the Minister of Finance.

[27] It was his case in this regard that when foreign currency is seized in terms of the aforesaid regulations, the decision whether or not to return same, lies with the Treasury, in terms of Regulation 3(5). This decision, he further stated, is an administrative one and in terms of which the person affected by the seizure, is granted a hearing before the decision regarding the seized effects, is taken. In this regard, he further states, the question whether the person from whom it was seized may have been subjected to criminal proceedings and was acquitted, is irrelevant. He therefor opines that the Regional Court had no power to release the money as that power lies exclusively with the Minister of Finance.

[28] The deponent further stated that the 4<sup>th</sup> respondent has no *locus standi* to launch review or other proceedings to correct the decision made by the Regional Magistrate's Court, that power lying exclusively, as it does, with the Minister as aforesaid. He ends his treatise on an ominous note, namely that if the order of the court *a quo* were to be granted in the applicant's favour without recourse to Regulation 3(5), a 'travesty of justice' would be occasioned thereby.

[29] I am of the considered view that the 4<sup>th</sup> respondent's hands are tied and it does not have the wherewithal to take a position on what should have been done, as it has no power to intervene in the matter, that power lying, it would seem, solely with the Minister. It is accordingly clear that there is nothing said by the 4<sup>th</sup> respondent that would qualify as a proper legal basis for refusing the order sought by the applicant, in the absence of any intervention by the Minister of Finance, and if I may add, in the absence of an order staying the execution of the judgment of the court *a quo*.

[30] I make one observation in closing on this matter and it is this – in view of the submissions by the 4<sup>th</sup> respondent regarding the Minister's powers, a question that tortures one's mind is why the 3<sup>rd</sup> respondent did not timeously approach the court under the relevant provisions of POCA, to make appropriate orders? I say so particularly in view of the allegations by the 3<sup>rd</sup> respondent<sup>11</sup> that the applicant admitted that the money was proceeds of unlawful activity.

[31] It does not appear that the Minister, nor the 3<sup>rd</sup> respondent, for that matter, had to wait for the conclusion of the criminal trial to invoke the powers either under POCA or the Exchange Control Regulations, to appropriate the money to the State, having afforded the applicant a hearing. This remains unexplained and detracts from the modicum of plausibility that might remain of the respondents' case.

#### Intervention by the Minister of Finance

[32] In what appeared to be a very unusual occurrence, before the hearing of the urgent application, after the parties had been put to terms regarding the filing of their respective sets of papers, the Minister of Finance filed an application for intervention in the proceedings. This played out in a very unusual setting where there were two sets of legal practitioners appearing before the court on behalf of the Government respondents. Mr. Khupe

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<sup>11</sup> See para 16 of the 3<sup>rd</sup> respondent's answering affidavit.

represented the initial respondents and Mr. Kandovazu, appeared on behalf of the Minister of Finance.

[33] Mr. Nekwaya, in his address, took a swipe at the manner in which the intervention of the Minister, was sought to be undertaken. In the first instance, he questioned how the Minister intervened, as there was no certificate of urgency that was attached to his application for intervention. Furthermore, there was not even a feeble attempt on the part of the Minister to comply with the mandatory provisions of rule 73, dealing with urgent applications.

[34] I agree entirely with Mr. Nekwaya's submissions. They are sound and it is elementary learning that in a matter that is claimed to be urgent, the applicant has to comply with two main requirements, namely, making allegations as to the circumstances that render the matter urgent and secondly, why the applicant contends that he or she cannot be afforded substantial redress at a hearing in due course. See *Nghiimbwasha and Another v The Minister of Justice and Others*.<sup>12</sup> There was clearly no attempt by the Minister to comply with these peremptory requirements.

[35] In this regard, the conclusion is inescapable that he has attempted to jump the queue, which should not be allowed, short of full compliance with the provisions of rule 73. In this regard, there is only one fate that has to befall the application for intervention and it is to strike the matter from the roll for non-compliance with rule 73 as aforesaid. It would be a wrong approach for the court to start considering the nature of the issues at stake and thus overlook the non-compliance with the rules. The court is only at complete liberty to consider the main issues once its portals have been properly opened by complying with rule 73, failing which the issues on the merits, no matter how compelling they are, will not be entertained by the court.

[36] There is, however, a more fundamental procedural issue in terms of which the route taken on the Minister's behalf by his legal team, is precipitous. This would be the case even if the Minister had complied with the provisions

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<sup>12</sup> Case No. A 38/2015) [2015] NAHCMD 67 (20 March 2015).

of rule 73 and it is this – the procedure stipulated in the rules of court for applications for intervention.

[37] Applications are governed by the provisions of rule 65, which stripped to the bare bones require that an application must be moved on a notice of motion, duly supported by an affidavit which should state the facts upon which the relief sought is predicated. In this regard, the said rule 65 (1) peremptorily stipulates that ‘every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.’

[38] The question to be determined is whether the Minister’s application can be described as a new proceeding and one not forming part of an existing cause or matter. If it is, then one may argue that it need not have followed the requirements stated above.

[39] In attempting to resolve this issue, I am of the view that it is necessary to refer to the provisions of rule 70, titled ‘Miscellaneous matters relating to applications’. In particular, rule 70(2) provides that ‘Rules 40, 41, 48, 50 and 64 shall apply with the necessary modification required by the context to all applications’.

[40] Of particular note in this regard are the provisions of rule 41, which deal with the consolidation of actions and intervention of persons as plaintiffs or defendants. In that regard, the procedure stipulated in rule 41(2) is that the party seeking to intervene or to have a matter consolidated, must apply to the managing judge, on notice to all the parties, to intervene as either a plaintiff or defendant. In the context of an application then, such a party would have to apply to the managing judge, to intervene as an applicant or a respondent in the proceedings, on notice to all the other parties.

[41] In my considered view, it is a sensible approach to refer the application for intervention to the managing judge. I say so for the reason that the

managing judge would ordinarily be *au fait* with the matter pending before the court and would, for that reason, be best placed, to consider the application for intervention with relative ease as he or she would be steeped in the pleadings and the issues that arise in the main matter, thus placing him or her to make an informed decision regarding the application for intervention. Another judge, other than the managing judge would have to acquaint him or herself with the entire matter together with the application for intervention, thus unnecessarily duplicating the work between two judges, a unwise decision when regard is had to the very scarce judicial resources presently at the disposal of the court.

[42] It would appear to me that when proper regard is had to the application for intervention, which was on notice to all the other parties, the Minister did file an application on notice to all the other parties, seeking that he be allowed to intervene in the proceedings. My reading of the provisions does not seem to require that the application should necessarily be one that follows the mandatory provisions of rule 65, where an application to intervene as a party to proceedings already underway, is sought to be launched.

[43] I say so for the reason that it would appear from a reading of the provisions of rule 65, read together with the provisions of rule 41, an intervention is in a matter that is already in progress, thus obviating the need to follow the provisions where the application is new in the strict sense of the words. For the avoidance of doubt, I am of the considered opinion that an application to intervene is not one in terms of rule 65, as it does not initiate new proceedings. It is clearly interlocutory in nature and effect.

[44] Another disconcerting feature of the Minister's application is the flagrant non-compliance with the provisions of rule 32 (9) and (10). There is no question about the notorious fact that the application for intervention is interlocutory in nature and effect, as I have held above. For that reason, the intervening party has a duty to comply with the mandatory requirements of rule 32 (9) and (10) as aforesaid, particularly in the light of what have become



entrenched principles enunciated by *Mukata v Appollos*,<sup>13</sup> *Bank Windhoek Limited v Benlin Investments CC*<sup>14</sup>, and *Visagie v Visagie*,<sup>15</sup> to mention but a few cases on the application of these subrules.

[45] The refrain in the cases cited above is that where a party has failed or neglected to comply with the said provisions, the court should strike the matter from the roll, underscoring thereby, the critical role played by attempts to resolve interlocutory issues amicably and as cost effectively as possible, before launching formal proceedings in that regard. These ethos must not be negated by any party. I accordingly have no option but to follow the beaten track and to strike the Minister's application off from the roll with costs.

### Conclusion

[46] In the premises, it would appear to me that the respondents have failed to advance any lawful basis, upon which, the judgment of the Regional Magistrate may not be complied with, by them. I say so for the reason that that judgment stands until it is properly set aside or its execution is properly stayed in terms of the law. It is clear that the 3<sup>rd</sup> respondent chose not to proceed for reasons not provided, with the application for stay. Her attempt to bring a counter-application did not leave the starting blocks.

[47] In this regard, it must be mentioned that even if this court were to be of the view that the submissions by the 4<sup>th</sup> respondent, in particular, are correct and that the court *a quo* erred in issuing that order it did, it does not behove this court, in the absence of a proper proceeding brought before it, to overturn the said decision. It requires the proper party to approach this court, in the proper manner and to seek appropriate relief, which will then enable this court to properly exercise its discretion and to issue an order deemed appropriate in the circumstances.

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<sup>13</sup> (I 3396/2014) [2015] NAHCMD 54 (12 March 2015).

<sup>14</sup> *Bank Windhoek Limited v Benlin Investment CC* (HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78 (15 March 2017).

<sup>15</sup> Case No. I 1956/2014) [2015] NAHCMD 117 (26 May 2015).

[48] For the reasons stated in relation to the application for intervention, I am of the view, as earlier intimated, that the Minister did not comply with the provisions of the rule 73 and accordingly, the jurisdictional facts that serve to invoke the urgency procedures were not activated. Furthermore, I am of the view that the Minister also did not comply with the mandatory provisions of rule 32 (9) and (10) in bringing this application.

[49] I must, however, mention that from the contents filed by the respondents, I cannot properly infer any *mala fides* on the part of the respondents, as discussed in *Ndemuweda v The Government of the Republic of Namibia (Minister of Health and Social Services)*.<sup>16</sup> I accordingly am not properly placed to make a declarator, as prayed for by the applicant, that the respondents acted contumaciously in the circumstances in not complying with the court *a quo*'s order.

#### Costs

[50] The ordinary rule observed is that costs lie in the discretion of the court. Generally, in this regard, the costs should follow the event. In this connection, I am of the considered view that there is no reason why the Government respondents should not be mulcted in costs in view of their failure to properly meet the applicant's case. I cannot, however, say the same of the 4<sup>th</sup> respondent, considering the tenor of its affidavit, which was largely geared towards explaining the relevant law and regulations, with a view to assisting the court. It would not be fair in such circumstances, to tar the 4<sup>th</sup> respondent with the same brush as the 3<sup>rd</sup> respondent in particular.

#### Order

[51] In the premises, and in view of the finding that no case has been made for the non-compliance with the Regional Magistrate Court's order, neither

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<sup>16</sup> (HC-MD-CIV-MOT-GEN-2017/00336) [2018] NAHCMD 67 (23 March 2018).

have proper legal steps been taken to stay the enforcement of the said order, I issue the following order:

1. The respondents be and are hereby ordered to comply with the order of the Regional Magistrates Court, dated 28 March 2018, releasing the money seized by them to the applicant forthwith.
2. The applicant is ordered, in dealing with the money referred to in paragraph 1 above, to comply with the relevant laws and regulations that govern the possession of foreign currency in Namibia.
3. The First, Second, Third Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed counsel.
4. The application for intervention by the Minister of Finance, is hereby struck from the roll with costs, consequent upon the employment of one instructing and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

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TS Masuku  
Judge

## APPEARANCE:

## APPLICANT:

E Nekwaya

instructed by Appollos Shimakeleni  
Lawyers, Windhoek1<sup>ST</sup>, 2<sup>ND</sup> and 3<sup>RD</sup> RESPONDENTS:

M Khupe

of Government Attorney, Windhoek

4<sup>TH</sup> RESPONDENT:

K Klazen

of Ellis Shilengudwa Inc., Windhoek

## INTERVENING RESPONDENT:

N Kandovazu

of Government Attorney, Windhoek