CASE NO. A 244/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES	**APPLICANT**
and	
NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY	**1ST RESPONDENT**
FRANS JOHAN JANSEN VAN RENSBRUG	**2ND RESPONDENT**
RAINER RITTER	**3RD RESPONDENT**
LILLY BRANDT	**4TH RESPONDENT**
ADOLF DENK	**5TH RESPONDENT**
REGISTRAR OF THE HIGH COURT	**6TH RESPONDENT**

CORAM: HOFF, J

Heard on: 2008.05.06

Delivered on: 2008.05.08

Reasons on: 2008.05.09

JUDGMENT:

HOFF, J: [1] It appears from the papers filed that applicant obtained a default judgment in the amount of N$2 911 402.15 against first and second respondents on 2 September 2007 by and order of this Court.

[2] On 5 October 2007 this order was rescinded and set aside by agreement between the parties. The writ of execution was also set aside with immediate effect. On 9 October 2007 applicant brought an urgent application that the order dated 5 October 2007 be set aside on the basis that he had allegedly been fraudulently induced by the first and second respondents to consent to the rescission of the judgment obtained on 2 September 2007.

This application was dismissed with costs due to lack of urgency and the applicant was ordered to pay first and second respondents' costs before any further proceedings could be lodged.

[3] The applicant subsequently filed notices of appeal against both the 5th and 9th October 2007 orders.

[4] On 2 November 2007 first and second respondent succeeded in an application to stay the execution of the writ pending the finalisation of the applicant's appeals. Against this order applicant also appealed.

[5] On 16 November 2007 first and second respondents launched a Rule 30 application against the applicant's notice of appeal against the order of 5 October 2007. On 27 November 2007 this Court set aside the applicant's notice of appeal.

Applicant appealed against this decision too.

[6] On 27 March 2008 applicant launched a substantive application in which he sought the order of 5 October 2007 be declared *void ab initio*. In this application four additional respondents were cited.

[7] On 31 March 2008 first to fifth respondents gave notice to the applicant of their intention to oppose this application. It is appears from this notice to oppose that a Mr Dawid Afrikaner signed for the receipt thereof on 31 March 2008 at 10h40 at the residence of the applicant. This notice of intention to oppose the substantive application was filed on the Court file on 31 March 2008 having regard to the date stamp of the Registrar.

[8] Applicant informed this Court that he attended to the Court file on 2 April 2008 in order to prepare on index.

[9] It appears from the transcription of the proceedings that the parties appeared on 4 April 2008 in Court before Angula, AJ ostensibly to argue the substantive application dated 27 March 2008.

[10] The applicant appeared in person and the respondents were represented by Mr Obbes.

The applicant, Mr Christian, informed the Court that he had not been served with a notice of intention to oppose his application. Applicant was then informed by the Judge presiding that there was such a notice on the Court file to which applicant persisted that such a notice was never served on him. Applicant was then informed by the Court that on the face of it, it appears

that the application is opposed. Mr Obbes submitted that the applicant was not properly before Court due to the Court order given on 9 October 2007 and requested that the matter be postponed for *"full and further argument"*. Mr Obbes also alluded to the irregular manner in which applicant has once again approached this Court which was another aspect respondents wished to address at the appropriate forum and that they reserved their rights to do so in that regard.

[11] The applicant retorted that respondents never filed and never served a notice of intention to defend and questioned how under these circumstances they could be allowed to address the Court.

[12] The following exchange appears from the record:

Court:	*"But Mr Christians, you are not even allowed to be here in terms of the Court order which was issued in October.*
Mr Christian:	*I appealed against this Court order. I appealed.*
Court:	*You appealed, yes there is a problem with you that is the problem that you have, because you have an appeal raised an appeal which is pending which you appealed against that order, and now you are coming with another application, so (intervention).*
Mr Christian:	*Yes, but that application (intervention).*

Court: *Can you just hear me, don't interrupt me.*

Mr Christian: *Okay.*

Court: *You have appealed, what you need to do is to pursue your appeal against that order. There is an order which prevent you to proceed, to make any steps until you pay the costs. You have done correctly by appealing against that order, but what you are trying to do now by coming to Court again before that order is set aside, is not proper. So that is the matter which then would have to be decided by another Court now, because it's now opposed, because there is already an order which prevents you, which ordered you not to take any further steps until you have paid the costs of this application."*

[13] The application was subsequently postponed to a date to be arranged with the Registrar.

[14] This matter was hereafter enrolled on 6th May 2008 when the parties appeared before me. The applicant appeared in person and the first to fifth respondent were represented by Mr Philander.

[15] The applicant addressed two issues.

Firstly, he felt aggrieved by the conduct of the instructing counsel, the conduct of instructed counsel as well as the conduct by the presiding judge during the proceedings on 4 April 2008.

Secondly, he persisted that he had never been served with a notice of intention to oppose his application launched on 27 March 2008 and that the application should thus proceed on an unopposed basis.

[16] Regarding the first issue, the applicant submitted that it was the duty of the instructing counsel as well as the duty of instructed counsel always to act in good faith and that they were obliged to draw the presiding judge's attention to the fact that he was a partner of the instructing legal firm and that it was thus inappropriate for him to hear the matter. Similarly, it was submitted, that the presiding judge should have *mero moto* refused to hear the application since he was aware of the fact that he is a partner in the instructing firm.

Applicant referred to the old adage that no one should be a judge in his own cause, and submitted that in terms of the provisions of the Constitution of Namibia all persons are entitled to be heard by a competent, impartial, and independent Court. He submitted that his fundamental rights had been infringed in this process.

Applicant developed his argument, and submitted that since the presiding judge was not meant to adjudicate upon this matter on 4 April 2008 anything said by the presiding judge must necessarily be disregarded by this Court, including the fact that the presiding judge indicated that a notice of intention to oppose his application had been filed on the Court file.

[17] Regarding the second issue of non service, applicant submitted that he does not know anyone residing at his residence called Dawid Afrikaner,

and that the onus is on the respondents to prove who Dawid Afrikaner is, and must prove why the notice of intention to oppose was not personally served on him, as prescribed by the Rules of this Court. He suggested that respondents should bring Dawid Afrikaner to Court.

[18] Mr Philander who appeared on behalf of the first five respondents submitted regarding the first issue that applicant never objected to the Angula AJ being the presiding judge since applicant raised the point of non-service and that it should be accepted that applicant wanted to proceed with the matter on that day. (Applicant in reply vehemently denied this). Regarding the second issue it was submitted that a notice was filed and was delivered at applicant's place of residence.

[19] Rule 1 of the Rules of this Court refers to *(inter alia)* the definition of "*deliver*" which means to serve copies on all parties and file the original with the registrar.

[20] In my view the fact that a notice of intention to oppose bearing the date stamp of the Registrar (31 March 2008) is *prima facie* proof that the notice of intention to oppose had been delivered. This notice was signed by someone purportedly on behalf of the applicant. The submission by the applicant that the notice of intention to defend cannot be upheld since such submission is no *evidence*. The *prima facie* proof of delivery becomes conclusive proof in the absence of any *evidence* to the contrary.

The applicant does not explain why (since 4 April 2008) he could not have deposed to an affidavit in which the service of the notice of intention to oppose is challenged.

[21] There is no admissible evidence that the notice of opposition was not properly served in terms of the provisions of Rule 4 (1) (a) (ii), no admissible evidence that applicant does not know Mr Dawid Afrikaner, no admissible evidence that Mr Afrikaner did not bring the notice to the attention of the applicant, no admissible evidence that the notice was not received by the office of the Registrar on 31 March 2008, and no admissible evidence that the notice of intention to oppose was not on the Court file at the time the matter was called on 4 April 2008.

[22] On 9 April 2008 applicant gave notice in terms of Rule 30 that applicant would apply to this Court on 6 May 2008 for an order in the following terms:

> *"1. That, in terms of Rule 30, read with Rule 1 of the Rules of this Honourable Court, the 1 – 5 Respondent's "Notice of intention to oppose" dated 28 March 2008, constitutes an irregular and/or improper step and is hereby struck-out with costs.*

[23] The applicant submitted that he did not received justice on 4 April 2008 in this case. That is his perception and I shall not gainsay that perception, however it is my considered view that the presiding judge on

that day endeavoured to bring to the attention of the applicant the fact that there was a notice of intention to defend on the Court file.

[24] Applicant submitted that when he attended to the Court file on 2 April 2008 in order to prepare the index there was no notice of intention to oppose on the Court file. However in his application in terms of Rule 30 he listed a number of grounds upon which he relied for relief. Paragraph (g) reads as follows:

> *"Rule 6 (1) (b), (c) and (d) (i) further requires that the respondents should have notified in writing that they intended to oppose the application on or before 4 April 2008.*
> *In casu the applicant was not notified of the respondent's intention to oppose."*

[25] In terms of this ground it appears to me that applicant accepted that respondents had time to notify him as late as 4 April 2008. This undermines his argument that because, according to him, there was no notice on the Court file on 2 April 2008 when he prepared the index the notice referred to by the Court is a nullity and an irregularity in the proceedings.

[26] Applicant submitted that since Angula AJ should not have adjudicated upon the matter (whether Angula AJ indeed *adjudicated* on the matter is a question of interpretation) this Court should ignore his reference to the fact that a notice of intention to oppose was on the Court file !

This Court surely can in no way close its eyes to an empirical fact namely that there is presently such a notice on the Court file and that there was such a notice on the Court file on 4 April 2008. The mere fact that it was not expedient for Angula AJ to have heard the matter does in no way detract from the very existence of the notice of intention to oppose.

[27] It appears from the record that subsequent to the matter having been postponed to a date to be arranged with the Registrar, applicant gave notice in terms of Rule 30 that an application would be brought on 6 May 2008 to have the notice of intention to oppose (dated 31 March 2008) struck-out with costs since such notice of intention to oppose constitutes an irregular and/or improper step.

[28] When I heard argument on 6 May 2008 I was not addressed by any of the parties on the Rule 30 application. Thus in the absence of heaving heard the parties on the Rule 30 application (launched on 9 April 2008) this Court is precluded from making any pronouncements on it.

[29] The applicant's submission that his substantive application dated 4 April 2008 should be allowed to proceed on an unopposed basis has in my view no foundation in law or in logic.

[30] In the result the following order is made:

The substantive application (which had been set down on 4 April 2008) should proceed on an opposed basis.

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HOFF, J

ON BEHALF OF THE APPLICANT: IN PERSON

Instructed by:

ON BEHALF OF THE 1ST - 5TH RESPONDENT: MR PHILANDER

Instructed by: LORENTZANGULA INC