REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 35/2013

In the *ex parte* application of:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES **APPLICANT**

IN RE: DECLARATION OF RIGHTS IN CASE NO: 244/2007 (HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & ANOTHER) PURSUANT TO SUPREME COURT JUDGMENT IN CASE NO: SCR1/2008 (HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & 2 OTHERS)

Neutral citation: *Christian ta Hope Financial Services* (A 35-2013) [2016] NAHCMD 188 (30 June 2016)

Coram: GEIER J

Heard: **12 May 2016**

Delivered: **30 June 2016**

Flynote: Declaration of rights — when granted — Court to approach the question of a declarator in two stages. 'First, is the applicant a person interested in any existing, future or contingent right or obligation. Secondly, and only if satisfied at the first stage, the court decides whether the case is a proper one in which to exercise its discretion. An

existing dispute is not a prerequisite for jurisdiction under s 16(c) of the High Court Act No 16 of 1990. There must, however, be interested parties on whom the declaratory order will be binding. The absence of an existing dispute may, of course, incline the court, in the exercise of its discretion, not to grant a declarator.

Contempt of Court – applicant prima facie in contempt of a number of court orders granted by another judge in a related case – court holding that it was not necessary in such circumstances to act immediately against the applicant in the protection of the authority and integrity of the court or the maintenance of the orderliness of proceedings. Court however considering itself duty- bound not to ignore the seemingly blatant disregard by the applicant of the courts orders, which were clearly binding on him at all times As the applicant's actions could not simply be overlooked it was deemed appropriate to refer the matter to the Prosecutor- General for her to decide whether or not the applicant should be prosecuted in the ordinary course for contempt.

Summary: The applicant had originally brought an application certain declaratory relief aimed at the revival of a default judgement which had been granted in his favour, but which was subsequently rescinded by agreement. The applicant thereafter litigated excessively and vexatiously against the respondent who then brought and was granted a permanent stay in respect of a number of cases. The court granting the permanent stays also directed that the applicant could only litigate against the respondent with prior leave. In spite of these orders the applicant launched the present directly related application for declaratory relief without prior leave. The court thus dismissed the application for these grounds. In any event no declaratory relief court be granted these circumstances.

ORDER

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1. The application is dismissed with costs on the attorney and own client scale, such costs to include the costs of one instructed- and one instructing counsel.

2. The applicant is this ordered to pay the wasted costs occasioned by the postponement of the matter on 22 July 2015, such costs to include the costs of one instructed- and one instructing counsel.

3. The Registrar is directed to refer this matter to the Prosecutor-General of the Republic of Namibia in order for her to decide whether or not the applicant should be prosecuted for contempt of the court orders granted by Smuts J in *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR 537 (HC) at [104].

JUDGMENT

GEIER J:

[1] It is seldom that one case is so intertwined with its preceding case history.

[2] A better understanding of this introductory remark will be obtained from the summation of the factual background found in *Namibia Financial Institutions Supervisory Authority v Christian*[1], which I believe should be set out herein, as this summary will conveniently show the interrelation of that case, and its history, with the present one, which aspect will, in turn, become relevant to the outcome of this case.

[3] The litigation history of the parties, against which Smuts J had to make his decision at the time was as set out as follows in his judgment:

‘The action

[1] 2011 (2) NR 537 (HC)

[23] In the action, Namfisa is cited as the first defendant, Mr F van Rensburg, a previous Chief Executive Officer of Namfisa, is cited as second defendant. The summons was signed by Mr Christian personally. Mr Robinson argued that it fails to disclose the cause of action against Namfisa or Mr Van Rensburg and that default judgment should not have been granted and that the judgment would also be set aside mero motu by the court as a judgment erroneously sought and/or granted. There is much merit in that submission.

[24] The action seeks to hold Namfisa and Mr Van Rensburg liable for the sum of N$2 911 402,15 together with interest at the rate of 20% on that sum from September 2002 to date of payment on the grounds of an alleged unlawful interference with the plaintiff's right to do business as an insurance agent in September 2002 on the part of Mr Van Rensburg, acting in the course and scope of his employment with Namfisa. Mr Christian alleged that the unlawful conduct relates to Mr Van Rensburg interfering with his business by forbidding the transfer of members' interests in the Self-Financed Retirement Annuity Fund in South Africa to Metropolitan Life Namibia Retirement Annuity Fund. It is contended in the particulars of claim that Mr Christian only became aware of the reasons for Mr Van Rensburg's alleged wrongful conduct in August 2005.

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

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

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

[28] Mr Robinson further argued that the attempts by Mr Christian to suggest that Mr Van Rensburg's conduct took place in 2002 do not stand up to scrutiny. He pointed out that the alleged corroboration for this assertion is to be found in Mr Christian's own letter of 26 April 2005 addressed to the Registrar of Pension Funds. This self-serving letter was addressed to Mr Van Rensburg. In its heading, it refers to an email by Mr Van Rensburg during September 2002 to a certain Mr Olaf Badenhorst of Momentum. Mr Van Rensburg states under oath that he cannot recall ever having seen Mr Christian's letter, but Mr van Rensburg also points out that his own email was dated in 2000 and not in 2002 as suggested by Mr Christian. Significantly, Mr Christian did not produce the email in question. It was contended by Mr Robinson that the reason for this is self-evident, namely that it does not exist. Mr Robinson accordingly contended that there is no basis to have suggested in the summons that Namfisa should be held vicariously liable for the alleged delict of Mr Van Rensburg. Upon the disputed facts properly approached, I find that the approach by Mr Van Rensburg, which forms the basis for the alleged interference, occurred in 2000 and not 2002 as alleged by Mr Christian.

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

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

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

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

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

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

Default judgment

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

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

[37] On 10 September 2007, the deputy-sheriff served a writ of execution upon Namfisa arising from the action. It was thereafter established by Namfisa that Mr Christian had on 7 September 2007 and after the notice of intention to defend had been served upon him, and without any notice to Namfisa, brought an application for default judgment against Namfisa and Mr Van Rensburg — even though there had been no proper service of the summons upon Mr van Rensburg. It was also established and not disputed by Mr Christian that he did not inform the court of the fact that Namfisa had served the notice to oppose upon him. Had he done so, the court would clearly not have granted the default judgment. I infer upon the papers and what

was stated in argument that this was why Mr Christian did not disclose its existence to the court. The omission in the circumstances constituted misleading of this court in order to secure the granting of the judgment. On this basis alone, the default judgment should be set aside given the fraudulent manner it was obtained. The order granted was itself also defective as is pointed out in the founding papers. At the instance of Mr Christian, he managed to obtain a different version of the court order. Based upon that order, he then proceeded with the issuing of a writ of execution.

Rescission

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

[39] It is however clear from the multiplicity of applications which then ensued, that Mr Christian has not considered himself to be bound by the order rescinding the default judgment. Mr Christian contends that he is not bound by the conduct of his counsel agreeing to the rescission and has instead repeatedly endeavoured to execute upon the default judgment fraudulently obtained by him. Mr Christian's contention that he is not bound by the rescission of the default judgment is premised upon his contention that Namfisa had not properly instructed and authorised Lorentz Angula Inc to represent it in the action and in the application for rescission and that Namfisa's acting Chief Executive Officer, who had deposed to the founding affidavit in the rescission application, was not authorised to represent Namfisa in launching that application. The acting Chief Executive Officer made it clear, however, that Namfisa's board had by delegation of its powers and assignment of duties assigned the final approval in respect of litigation to the Chief Executive Officer. This would include the initiation of proceedings on its behalf. This was pursuant to a board resolution. The Chief Executive Officer was at the time visiting Europe and had in turn under s 29 of its empowering legislation (Act 3 of 2001) delegated those powers conferred upon him to the acting Chief Executive Officer in his absence,

as is expressly authorised by s 29. The attack upon the authority of the acting Chief Executive Officer is thus without any merit at all.

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

Further applications

[41] Despite this, Mr Christian then launched an application on 8 October 2007 set down for 9 October 2007 (under case No A 244/07). In this application Mr Christian sought to have set aside the 'undertaking of the parties as pronounced by the court on 5 October 2007'. He did so on the grounds that the agreement was not voluntary and was based upon 'misinformation as to the purported inclination of the Honourable Presiding Judge to rule in favour of Namfisa' and was based upon 'coercion by fallacious threats as to costs'. This application came before Pickering AJ on 9 October 2007. It was dismissed for lack of urgency with costs on a special scale. Pickering AJ further ordered that 'the applicant (Mr Christian) may not proceed in this matter until he has paid the costs set out by this court dated 9 October 2007'.

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

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

refused. Shortly after the order was granted by Parker J, Mr Christian again gave notice of his intention to appeal against the judgment of Parker J.

[44] The rule 30 notice in respect of Mr Christian's original notice of appeal came before Frank AJ on 27 November 2007 who granted the application to set aside the two notices of appeal. Shortly afterwards, on 3 December 2007, Mr Christian noted an appeal against the order of Frank AJ.

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

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

[47] The first rule 30 application by Mr Christian came before Hoff J on 6 May 2008 who on the same day found that the matter was opposed and should proceed on an opposed basis. Mr Christian then on 3 June 2008 filed two further applications firstly to rescind the order of Angula AJ postponing the matter of 4 April 2008 and in the second instance to rescind the order of Hoff J that the matter should proceed on an opposed basis. The respondents in those applications again gave notice in terms of rule 30 to set aside those applications to rescind the two respective orders.

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

[49] In the meantime and on 17 July 2008, Mr Christian launched an application to review the appointment of the Acting Chief Executive Officer of Namfisa and various resolutions of its board under case No A 273/2009. Namfisa opposed this application and filed a rule 30 application which was heard on 3 February 2009. Judgment was subsequently delivered upholding the rule 30 application and dismissing the review application with costs.

[50] Despite the sequence of events and the orders of 9 October 2007 of Pickering AJ and that of Parker J of 2 November 2007, Mr Christian and Mr Beukes on 30 July 2009 launched an application under case No A 273/2009 in which they sought an order declaring the rescission judgment of 5 October 2007 to be void and to vary the court order of 9 October 2007 with regard to the punitive costs order. They also sought to set aside all proceedings under case No A244/07 being the rescission application. This application followed a ruling of the Supreme Court of 17 June 2009 in respect of a review brought by Mr Christian in the Supreme Court in respect of the proceedings of 5 October 2007 (the rescission of judgment). In those proceedings in the Supreme Court, Mr Christian objected to the representation of Lorentz Angula Inc and contended that they were not authorised to represent the respondents in the Supreme Court. The Supreme Court, per Maritz JA, found that the power of attorney relied upon by Namfisa had not been supported by resolution of the board of Namfisa as is required by the rules of that court and that Namfisa was thus not properly before that court. The review however proceeded because there were powers of attorney filed on behalf of the other respondents, being natural persons. Judgment on the merits of that review is yet to be delivered.

[51] The application by Messrs Christian and Beukes of 30 July 2009 was opposed. On the day following the notice of opposition, Messrs Beukes and Christian on 5 August 2009 filed a document entitled 'Notice of objection to authority' denying the authority of Lorentz Angula Inc to represent the respondents in that application. That application was postponed on 7 August 2009 and on 10 August 2009 Messrs Christian and Beukes gave notice to file a rule 30 notice to set aside the notice of opposition and the resolution relied upon for it. On 19 August 2009 Namfisa and Mr Van Rensburg gave notice in terms of rule 30 to set aside the application of 30 July 2009 and the notice objecting to the authority and the rule 30 application of 10 August 2009. When

this rule 30 application came before court on 11 September 2009, Mr Christian objected to it on the basis that in terms of rule 30(5) notice ought to have been given prior to the notice of application under rule 30. On 7 October 2009, the court incorrectly found in Mr Christian's favour that a notice in terms of rule 30(5) should precede a notice in terms of rule 30. As a consequence, Namfisa then gave a rule 30(5) notice on 16 October 2009. The application by Mr Beukes and Mr Christian of 30 July 2009 is thus still pending and is subject to the rule 30 applications I have referred to. It is because of this (30 July 2009) application, in which Mr Beukes is an applicant, that he has been cited as a respondent in these proceedings.

[52] Following the judgment of 7 October 2009 in favour of Mr Christian with reference to rule 30(5), Mr Christian on 8 October 2009 once again instructed the deputy-sheriff, with reference to the original writ and garnishee order, and pointed out to the deputy-sheriff that the order relied upon by the latter not to proceed with executing the writ was void ab initio. Mr Christian then proceeded to instruct the execution of the writ and for it to be finalised by no later than 14 October 2009. When the deputy-sheriff did not act upon the writ, Mr Christian launched an application for an order to compel him to do so on 13 November 2009. The application was set down for hearing on 20 November 2009. Namfisa and Mr Van Rensburg had not been cited in that application. They then brought an application set down on the same date, dismissing the ex parte application, alternatively granting them leave to oppose it. When the matter came before the late Manyarara AJ on 20 November 2009, he dismissed the ex parte application and directed that Messrs Beukes and Christian pay the costs of the application for intervention on an attorney and client scale. In addition he made an order that no further proceedings may be brought by any person which would have the effect of reviving the rescinded order of 7 September 2007 or endeavouring to set aside the order of 5 October 2007. Reasons for these orders were to be provided subsequently. Manyarara AJ however unfortunately died thereafter and before reasons were given.

[53] On 24 November 2009 Messrs Beukes and Christian again served I an application under case No A 366/2009, enrolled very shortly thereafter on 27 November 2009, to declare the judgment and order of 20 November 2009 to be void. Namfisa and Mr Van Rensburg however brought an application on 27 November 2009 to declare the actions of Messrs Christian and Beukes to be in contempt of the order of court of 20 November 2009. Despite this, on 9 December 2009 Messrs Christian and Beukes served an urgent application under case No A 411/2009, enrolled for 11 December 2009, seeking an order that the contempt application brought by Namfisa should be set down within a period of two days. When the matter came before the court on 11 December 2009 it was postponed to 20 January 2010 but could not

proceed on that day due to the fact that there was not a judge available on that date. It was then postponed to 28 January 2010. On 26 January 2010 Messrs Christian and Beukes filed an answering affidavit in the contempt application again challenging the authority of both Namfisa and Mr Van Rensburg to bring it. The application was then postponed on 28 January 2010 to afford the applicants the opportunity to reply. That application (case No A 411/2009) is still pending.

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

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

[56] Namfisa also refers to case No A 34/2009, which is an ex parte application brought on 5 March 2009 and enrolled shortly thereafter but not placed on the roll as it had not complied with practice directives of this court. On 3 April 2009 Mr Christian launched a similar application without serving it upon Namfisa. This matter was removed from the roll to enable Mr Christian to effect service upon Namfisa. It was subsequently opposed and postponed for a date to be arranged with the registrar. It is also currently pending. There is also reference to an application by Mr Christian of 19 May 2010 brought under case No A 244/2007 and to a review application launched by Mr Christian on 13 November 2008 under case No A 345/2008 against the Chairperson of Namfisa and others. … '.[2]

[2] *Namibia Financial Institutions Supervisory Authority v Christian* op cit at [23} to [56]

[4] It was because of this plethora of litigation that Mr Christian found himself on the receiving end of an application brought by Namfisa for:

‘ … final relief … in terms of the Vexatious Proceedings Act 3 of 1956 and under the common law.’ [3]

[5] In the referred to case Namfisa then sought:

‘ … an order … that the action and pending applications be permanently stayed and that Mr Christian be directed to pay all Namfisa's costs on a punitive scale of attorney and own client. Namfisa also *sought* an order under s 2(b) of the Vexatious Proceedings Act that no legal proceedings may be instituted against it by Mr Christian without the leave of the Judge President or another Judge assigned by him for that purpose and that such leave will not be granted unless the Judge President or his assignee is satisfied that the proceedings are not an abuse of process of court and that there are prima facie grounds for such proceedings. The applicant also *sought* an order that several applications, listed in the notice of motion instituted by Mr Christian against it, are permanently stayed. The applicant also *sought* an order declaring that Mr Christian is held to be in contempt of court of three specific orders referred to and *that* a sentence to be imposed upon Mr Christian in respect of the contempt contended for. The applicant also *sought* an order directing that Mr Christian's suspended sentence for contempt of court, imposed by Van Niekerk J on 11 December 2008, be put into operation. The applicant has also applied to strike out certain portions of Mr Christian's answering affidavit. … ‘.[4]

[6] For the reasons set out in his judgment Smuts J then granted the following relief:

‘[104] In the result, I make the following order:

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

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

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[3] *Namibia Financial Institutions Supervisory Authority v Christian* op cit at [5}
[4] *Namibia Financial Institutions Supervisory Authority v Christian* op cit at [5}

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

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

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

5.1 The order of Pickering AJ of 9 October 2009 under case No A 244/2007.
5.2 The order of Parker J of 2 November 2009 under case No A 297/2007.
5.3 The order of Manyarara AJ of 20 November 2009 under case No A 366/2009.

6. Mr Christian is sentenced to a fine of N$5000 or, in default of payment, six months' imprisonment, plus a further period of imprisonment of 12 months, which further period of 12 months' imprisonment is suspended for five years on condition that Mr Christian is not convicted of or committed for contempt of court during the period of suspension.

7. The respondents are directed to pay the costs of the applicant on the scale as between attorney and client and to include the costs of one instructed counsel and one instructing counsel.' [5]

[7] It was against this background that Mr Christian, as applicant, again, launched a further application. This is the case serving currently before this court.

[8] It had the following hallmarks:

a) it was brought on an *ex-parte* basis;

b) although brought on an *ex parte* basis it was served on Namfisa;

[5] *Namibia Financial Institutions Supervisory Authority v Christian* op cit at [104}

c) on the occasion when it first served before the court, in the motion court for the hearing of unopposed matters, when questioned by myself, Mr Christian frankly conceded that his latest *ex parte* application had been served on Namfisa, as Namfisa was an interested party; [6]

d) despite this acknowledgement Mr Christain thereafter opposed all efforts of Namfisa to oppose his application, and thus also the joinder of Namfisa, *'tooth and nail'*; [7]

e) ultimately, and by virtue of its order of 28 January 2014, the court, in the exercise of its inherent powers, ordered the joinder of Namfisa, as a respondent to the applicant's *ex parte* motion - to ensure that all persons - with the requisite interest in the subject matter of the dispute - and whose rights might be affected - were before the Court.[8]

[9] Through it the applicant now seeks declaratory orders in the following terms:

'1. Declaring that the Supreme Court Judgment in Case No. SCR1/2008, relating to a power of attorney filed without a resolution of an artificial person (**Namfisa**), is wholly apposite, *mutatis mutandis*, to the rescission proceedings under Case No. A244/2007 instituted on 12th September 2007;

1. Declaring that the passage from the Selma Patricia Tödt v Claude Walter Ipser, Case 194/91 in the Supreme Court of South Africa (Appelate Division), relating to the type of cases in

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[6] See for instance : *Namibia Financial Institutions Supervisory Authority v Christian t/a HopeFinancial Services* (A 35/2013) [2014] NAHCMD 54 (28 January2014) reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2014/54.html at [28] to [29]

[7]See generally *Namibia Financial Institutions Supervisory Authority v Christian t/a HopeFinancial Services* (A 35/2013) [2014] NAHCMD 54 (28 January2014) op cit and at [31], see also *Christian v Namibia Financial Institutions Supervisory Authority* (A 35-2013) [2015] NAHCMD 146 (11 February 2015) reported on the Namibia Superior Courts website at http://www.ejustice.moj.na/High%20Court/Judgments/Pages/Civil.aspx , *Namibia Financial Institutions Supervisory Authority v Hendrik Christian t/a Hope Financial Services* (A 35/2013) [2015] NAHCMD 87 (31 March 2016), reported on SAFLII at http://www.saflii.org/na/cases/NAHCMD/2016/87.html , *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* (A 35/2013) [2015] NAHCMD 65 (10 February 2016) reported on SAFLII at http://www.saflii.org/na/cases/NAHCMD/2016/65.html

[8] See *Namibia Financial Institutions Supervisory Authority v Christian t/a HopeFinancial Services* (A 35/2013) [2014] NAHCMD 54 (28 January2014) at [52]

which judgment is void, is wholly apposite, *mutatis mutandis*, to the rescission judgment in Case No. A244/2007 obtained on 5th October 2007;

2. Declaring that the defect of lack of authorization of LorentzAngula Inc. brings the rescission judgment in Case No. A244/2007 into the category that attracts *ex debito justitiae*, i.e to have it set aside by right;

3. Declaring the rescission a deprivation of applicant's vested right in the default judgment obtained from this Honourable Court in Case No. I 2232/2007 on 7th September 2007;

4. Declaring all other proceedings consequent to the rescission void;

5. Granting the applicant further and/or alternative relief as the Court may deem fit to restore the *status quo ante* as at 7th September 2007.'

[10] In support of this relief the applicant states that this court has an inherent jurisdiction to set aside its own order and that the Supreme Court judgment, delivered *ex tempore* in Case SCR1/2008 on 17 June 2009 empowers the High Court to set aside its own judgment and to deal *de novo* with the power of attorney filed in the rescission application brought under case A 244/2007.

[11] The purpose of the application was formulated in somewhat incomprehensible terms – but it would seem that the self-proclaimed aim of this application was:

a) to inquire into the rescission order granted in Case A 244/2007 and to determine again the applicant's right to the default judgment originally obtained in that matter and;

b) to restore the applicant's position which he had obtained by virtue of the default judgment which he had obtained against Namfisa, which judgment had however been rescinded.

[12] It thus emerged that the self-proclaimed purpose of the declaratory relief now sought was squarely aimed at the relief granted against the applicant in Case A 244/2007.

[13] The applicant's right was described as a right founded in the Supreme Court's judgment made in case SCR 1/2008 *Hendrik Christiaan t/a Hope Financial Services v Namfisa and 2 others*. It was contended that the Supreme Court's judgment had declared the rescission order (presumably granted under case A 244/2007) as *ipso jure void-*

[14] Again it is to be noted that this formulation of the applicant's perceived right reveals that the declaratory orders, now sought, where all aimed at the relief granted against the applicant in case A 244/2007.

[15] The applicant then endevours to justify the bringing of this application on an *ex parte* basis with reference to what is stated in *Herbstein & Van Winsen* (Ed?) at page 1062. He alleged purportedly that he does not seek relief against any persons but:

> ' … merely a declaration of rights (as the remedy) in that the litigation between the parties had come to an end as the Supreme Court, as it was put, ' had already adjudicated the same matter.'

[16] It was alleged that the lack of authority of Mrs Lilly Brandt and LorentzAngula Inc. resulted - *ex dibito justitiae* - in the right to have the order (again I presume the order in Case A 244/2007 rescinding the default judgment granted in his favour) set aside.

[17] The request for a declaration of rights was thus made for a determination of rights pursuant the said Supreme Court decision.

[18] The applicant then sets out his view of the case history under case I 2232/2007 which resulted in the said default judgment and the rescission of such judgment granted under case A244/2007.

[19] The applicant discloses, without providing any detail – that he has since 5 October 2007 brought various applications to have the courts declare the said rescission of judgment void.

[20] The applicant states that all of these applications where in vain and that they were *"oppressive proceedings'* in which the courts adopted an *'indifferent attitude'* towards the applicant.

[21] Importantly the applicant at least also mentions that he was found guilty of contempt of court for disregarding the rescission order, dated 5 October 2007, by Smuts J:

"for reasons not supported by single evidence in the court file and without a valid executable judgment against the applicant, without regard to its nullity in law."

[22] He goes on to allege in the founding papers why, in his view, Smuts J's remarks, made in the course of the proceedings, serving before him, and were the learned Judge agreed with counsel for Namfisa, were *"wholly unsustainable"*.

[23] After outlining certain authorities the applicant summarizes the foundation for the relief now sought as follows:

'39.1 The default judgment granted by this Honourable Court in Case No. I2232/2007 on 7th September 2007.

39.2 The Supreme Court judgment in Case No. SCR1/2008 on 17th June 2009.

40. It is further clear that there was and is concrete invasion of the above rights in that:

40.1 The rescission application launched on behalf of the respondent on the strength of a power of attorney given by Mrs. Lily Brandt without a resolution of respondent, which resulted in a rescission judgment deprived me of my vested right in the default judgment.

40.2 Despite the binding nature of the Supreme Court judgment in Case No. SCR1/2008 and that that litigation involved judicial determination of the same question of law and same issue of fact, to which the Applicant and NAMFISA were parties, the High Court failed to apply *mutatis mutandis* to the rescission proceedings in Case No. A244/2007. Thus, I am deprived of my vested right in the Supreme Court judgment in Case No. SCR1/2008.'

[24] On the basis of which he then submitted in conclusion that:

'48. … it is respectfully submitted that the case is justiciable and/or ripe for the Court to make a declaratory order as set out in the notice of application in that:

48.1 Applicant affected by a rescission order which can be properly described as a nullity is entitled *ex debito justitiae* to have it set aside, the Court has no power to impose any terms upon the applicant, and the Court, in its inherent jurisdiction, can set aside its own rescission order.

48.2 This application is principally seeking the enforcement of the Supreme Court judgment in Case No. SCR1/2008 in the High Court in Case No. A244/2007 in the rescission of 12th September 2007.

48.3 The Supreme Court judgment in Case No. SCR1/2008 is final and binding on the High Court.'

THE IMPACT OF THE 2011 ORDERS

[25] It has already been mentioned that it was noted from the founding papers, that the applicant had made a flirting reference to the fact that he had been convicted of contempt of court by Smuts J – He did however neither elaborate nor disclose the fact that he was also convicted by Van Niekerk J on 11 December 2008, as appears from the judgments which have since been reported.[9]

[26] On closer scrutiny of the self-disclosed judgment it emerged that that judgment, and the relief sought then, by the respondent, stemmed from the applicant's non-acceptance of the rescission of the default judgment, which he had obtained under case

[9] *Christian t/a Hope Financial Services v Chairman of Namibia Financial Institutions Supervisory Authority and Others* (1) 2009 (1) NR 22 (HC), at [40], *Christian t/a Hope Financial Services v Chairman of Namibia Financial Institutions Supervisory Authority and Others* (2) 2009 (1) NR 37 (HC) at p 37 and *Christian and Another, Namibia Financial Institutions Supervisory Authority* v 2011 (2) NR 537 (HC) at [97]

No. I 2232/2007 on 7 September 2007 and which was subsequently rescinded, with his consent, and in his presence, on 5 October 2007 under Case A 244/2007.[10]

[27] It appears further from that judgment that, amongst others, cases I 2232/2007 and A 244/2007 where permanently stayed.[11]

[28] In addition the orders made by Smuts J on that occasion also expressly dictated that:

'3. No legal proceedings of whatever nature may be instituted by Mr Christian against Namfisa in any courts or inferior court without the prior leave of this court or a judge of this court. Such leave shall not be granted unless the court or the judge in question, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is a prima facie ground for such proceeding.'[12]

[29] It is important to note here that the applicant has once again flouted further orders of this court, in this case the order made by Smuts J on 27 May 2011, in that no prior leave from this court, or from another judge of this court was obtained by the applicant before he instituted the current *ex parte* application under case A35/2013, admittedly also aimed at Namfisa and the cases which had been permanently stayed.

[30] In so far as the manner, in which this case has unfolded, might have created the impression that this court impliedly, through its conduct, might have granted the applicant the requisite leave to litigate against Namfisa, the following should immediately be said to dispel any misconception in this regard:

a) Namfisa, at the first motion court hearing of the matter, on 22 February 2013, had insisted that it be granted the opportunity to oppose the applicants further application, the *ex parte* application brought under case A35/2013, which had been served on it;

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[10] *Christian and Another, Namibia Financial Institutions Supervisory Authority* v 2011 (2) NR 537 (HC) at [2] to [3] and [38] to [40]
[11] *Christian and Another, Namibia Financial Institutions Supervisory Authority* v 2011 (2) NR 537 (HC) at [104] orders 1 and 4
[12] *Christian and Another, Namibia Financial Institutions Supervisory Authority* v 2011 (2) NR 537 (HC) at [104] order 3

b) The court accordingly ordered that the matter be removed from the roll and that answering papers or any application which Namfisa might wish to file should be filed within 14 days from 22 February 2013.

c) This order triggered a number of interlocutory applications, which were determined by the court's judgment delivered on 18 September 2013;[13]

d) The ensuing proceedings then continued to focus on whether or not Namfisa should be granted leave to oppose the application and whether or not Namfisa should be joined as a party;

e) Once the joinder of Namfisa was eventually effected through the judgment and by the order granted on 28 January 2014, the next interlocutory skirmish resulted from Namfisa's late filing of its notice to oppose the main application, the outcome of which is reflected in the court's judgment and order made on 21 May 2014;

f) The applicant then approached the Supreme Court, requesting that court to exercise its review powers in regard to the perceived 'gross irregularities' committed by this court;

g) All proceedings under Case A 35/2013 was thus stayed in the High Court, pending the outcome of the said review;

h) After the Supreme Court had informed the applicant that it declined to entertain the applicants review he brought a rescission application for the variation of another interlocutory order made by this court. This application was struck on 11 February 2015;[14]

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[13] See : *Hendrik Christian t/a Hope Financial Services* (A 35/2013) [2016] NAHCMD 111 (18 September 2013)

[14] See : *Christian v Namibia Financial Institutions Supervisory Authority* (A 35-2013) [2015] NAHCMD 146 (11 February 2015)

i) The main application was then set down for hearing for the first time on the 22nd of July 2015;

j) The July 2015 hearing had to be postponed due to an eye operation the applicant had to undergo;

k) The matter was then set down for hearing again in October 2015, on which occasion the applicant indicated that he now wished to bring an application for my recusal; (incidentally it should be mentioned in this regard that a previous recusal application had also been brought, which was not persisted with);

l) The October hearing was also postponed to afford the applicant the opportunity to consider his position and bring the application if he so chose;

m) Eventually the threatened recusal application was brought. It was heard on 28 January 2016;

n) The application for recusal was refused for the reasons given in the judgment handed down on 10 February 2016;[15]

o) The main application could thus eventually, and for a third time, be set down for hearing on 12 May 2016.

[31] From the above sketched case history - which reflects only the most significant events - and which does not even record all the many interim case management hearings that had to be conducted during the lead- up to the main hearing - it emerges that the road, to hearing this case on the merits, was paved with interlocutory obstacles, which had to cleared first before the matter eventually became ripe for hearing. Surely, and only once all the interlocutory aspects had been disposed of, particularly those relating to ensuring that all the necessary parties were before the court, did the time come to hear the parties on all their contentions. This is then also reflected in the court's case management order, contained in the judgment on recusal and which directed that

[15] *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* (A 35/2013) [2015] NAHCMD 65 (10 February 2016)

the main application be set down for hearing on 12 May 2016 at 10h00 and that also all points *in limine*, as well as the issue of wasted costs relating to the postponement of the matter on 22 July 2015 were also to be heard on that date. All this is a far cry from granting the applicant any tacit leave to litigate against Namfisa.

[32] It is in this context and against this background that the impact of the permanent stay of cases I 2232/2007 and A 244/2007 and the aspect of the applicant's failure to obtain the requisite leave only became ripe to be considered at the hearing of 12 May 2016, even though the respondent, even before it had formally become a party to this case endeavored to draw the court's attention to the fatal bar that the Smuts judgment posed to the applicant's *ex parte* application. It does not take much to fathom that these orders, on their own, will impact fatally on the applicant's case. I will revert to this aspect.

[33] All this also explains, at the same time, why, in my introductory remarks made above, I have already alluded to the fact that I consider the litigation history between the parties as highly relevant to the outcome of this matter as it is also against this background that the applicant seeks the declaratory relief already spelt out above.

SHOULD THE APPLICANT BE GRANTED DECLARATORY RELIEF?

[34] Declaratory relief can be granted by virtue of the powers afforded to the court by Section 16 of the High Court Act 1990. This court in *Daniel v Attorney-General and Others; Peter v Attorney-General and Others*[16] reaffirmed the approach to be adopted in this regard. When the court is called upon to exercise these powers it does so as follows:

'[17] The court approaches the question of a declarator in two stages[17]. 'First, is the applicant a person interested in any existing, future or contingent right or obligation. Secondly, and only if satisfied at the first stage, the court decides whether the case is a proper one in which to exercise its discretion.'[18]

[16] 2011 (1) NR 330 (HC), see also *Merlus Seafood Processors (Pty) Ltd v Minister of Finance* 2013 (1) NR 42 (HC) at [19]
[17] *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93A – C
[18] *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality and Others* 2001 (4) SA 1144 (C) at 1153A

[18] It was decided in Ex parte Nell 1963 (1) SA 754 (A) that an existing dispute is not a prerequisite for jurisdiction under s 19(1)(a)(iii).[19] There must, however, be interested parties on whom the declaratory order will be binding. The absence of an existing dispute may, of course, incline the court, in the exercise of its discretion, not to grant a declarator.' [20]

[35] The first question which then arises is whether or not the applicant is a person interested in any existing, future or contingent right or obligation in respect of which some tangible and justifiable advantage in relation to the applicant's position can be established.

[36] In my view no such tangible and justifiable advantage in relation to the applicant's position *vis a vis* cases I 2232/2007 and A 244/2007 can be established in view of the permanent stay which has been ordered as far back as 27 May 2011 in respect of these cases.

[37] During oral argument the applicant again made it clear beyond doubt that the real purpose of his *ex parte* application was- and had always been - the revival of the default judgment, which had been granted in his favour, but which had been rescinded, by agreement, subsequently as far back as 5 October 2007 under case A244/2007.

[38] The settlement of the rescission application, which had been brought under case A244/277, however, not only compromised the *causa,* on which the rescission application had originally been based, but also rendered that dispute, *res judicata* through the ensuant rescission order granted by agreement between the parties in this regard.[21]

[39] It should again be said that also the relied upon Supreme Court decision delivered on 17 June 2009, under case SCR 1/2008, is of no assistance to the applicant. The applicant had quite clearly relied on this decision in the case which was heard by Smuts J as the learned Judge already then, in his judgment, had explained what the decision of Maritz JA was all about when he stated :

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[19] Section 19(1)(a)(iii) is equivalent to s 16(d) of the Namibian High Court Act 16 of 1990
[20] *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality and Others* op cit at 1153B
[21] See for instance: *Eke v Parsons* 2016 (3) SA 37 (CC) at [36]

‘ … Mr Christian and Mr Beukes on 30 July 2009 launched an application under case No A 273/2009 in which they sought an order declaring the rescission judgment of 5 October 2007 to be void and to vary the court order of 9 October 2007 with regard to the punitive costs order. They also sought to set aside all proceedings under case No A244/07 being the rescission application. This application followed a ruling of the Supreme Court of 17 June 2009 in respect of a review brought by Mr Christian in the Supreme Court in respect of the proceedings of 5 October 2007 (the rescission of judgment). In those proceedings in the Supreme Court, Mr Christian objected to the representation of Lorentz Angula Inc and contended that they were not authorised to represent the respondents in the Supreme Court. The Supreme Court, per Maritz JA, found that the power of attorney relied upon by Namfisa had not been supported by resolution of the board of Namfisa as is required by the rules of that court and that Namfisa was thus not properly before that court. The review however proceeded because there were powers of attorney filed on behalf of the other respondents, being natural persons. Judgment on the merits of that review is yet to be delivered. …’.[22]

[40] The applicant did not produce the said outstanding judgment in this court and also the court’s searches of the all the reported Supreme Court judgments, on both the SAFLII and Supreme Court websites, and in the Namibian Law Reports, since June 2009, did not establish that the judgment on the merits of the referred to review has since been delivered. The relied upon interlocutory judgment of the Supreme Court does accordingly not bolster the applicants case for a declarator in any way as also it cannot show any tangible and justifiable advantage in relation to the applicant’s position as far as this case is concerned

[41] The first leg of the applicable enquiry can accordingly not be answered in the applicant’s favour.

[42] Even if I were wrong in this regard it must clearly be said that I would, in any event, not have exercised my discretion in favour of the sought orders if one has regard to the underhand manner in which this application was originally brought on an *ex parte* basis, although it was served on Namfisa “as an interested party”. It is clear also that, under the guise of an *ex parte* application, not citing Namfisa as a respondent, and then

[22] *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR 537 (HC) at [50]

endeavouring, at every turn, to prevent Namfisa to come on record, the declaratory relief sought under case A 35/2013 was nothing more than a veiled attempt on the part of applicant to steal a march on Namfisa, who had always been a party to the proceedings under cases I 2232/2007 and A 244/2007, and whose rights, title and interest in the said judgments obtained, the applicant again sought to assail behind their back in spite of the permanent stay of prosecutions which had been granted in that regard.

[43] In addition also the order granted by Smuts J prohibiting the applicant in no uncertain terms to institute further legal proceedings of whatever nature against Namfisa in any court or inferior courts without prior leave must weigh negatively against the exercise of any discretion in favour of the applicant. No such leave has been obtained. The applicant seems once again to have acted in contempt of court orders.[23]

[44] I can also think of no compelling further reason why, in such circumstances, any court of law would exercise its discretion in favour of an applicant, who has sought declaratory relief, in "legal proceedings", aimed at the same party, which the applicant, by virtue of a court order, has clearly been prohibited from bringing, or if he wasn't, was at least prohibited from bringing such further proceedings, without leave first having been granted on the basis that a court, in spite of the litigation history, first having satisfied itself that the further case would not again amount to an abuse of the process of the court and that there, at least, would be *prima facie* grounds for such further legal proceedings. I simply cannot detect any such *prima facie* grounds. In any event I believe that I have already made it clear that I consider the current application a further abuse of process on the part of the applicant, at least, in respect of those cases which have been permanently stayed.

[45] Finally it should be said that the permanent stay of cases I 2232/2007 and A 244/2007, (and all the others listed in the order), as well as the aforesaid conditional prohibition to institute further legal proceedings against Namfisa, without leave, which

[23] *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR 537 (HC) at [104] – order no 3 – which directed that : 'No legal proceedings of whatever nature may be instituted by Mr Christian against Namfisa in any courts or inferior court without the prior leave of this court or a judge of this court. Such leave shall not be granted unless the court or the judge in question, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is a prima facie ground for such proceeding.'

was not obtained, in any event renders all the other questions raised in this application 'hypothical, abstract and/or academic, in circumstances where there simply cannot be any actual (ie. any legally recognisable dispute) between the parties.[24] Also for these reasons it cannot be said that this case is a proper one in which to exercise any discretion in favour of granting the sought relief.

[46] It so emerges that the second leg of the enquiry and the further related considerations can also not be answered in favour of the applicant.

[47] The application can therefore not succeed also for these reasons.

[48] In addition these findings then also obviate the need to determine the myriad of other issues, whether raised *in limine,* or otherwise, by the parties save for the issue of the wasted costs occasioned by the postponement of the main application on 22 July 2015, which had stood over for later determination.

THE COSTS OF THE POSTPONEMENT OF 22 JULY 2015

[49] The point of departure for deciding this issue must be the general rule that it is usually the applicant for a postponement that will be ordered to pay the wasted costs occasioned thereby.[25] I cannot detect any substantial reason for departing from the general rule in this instance if one takes into account in this regard that the postponement was sought and applied for by the applicant to enable him to undergo an eye operation. It is also clear that it was the applicant that sought the indulgence and obtained the benefit thereof. It is also clear that the respondent was prejudiced and inconvenienced by the postponement in that it had incurred unnecessary legal costs. In such circumstances I deem it proper to exercise my discretion in favour of the respondents, as the prejudice that was suffered was of the type that can be cured by an appropriate costs order. The applicant will thus be ordered to pay the wasted costs occasioned by the postponement of the matter on 22 July 2015, such costs to include the costs of one instructed- and one instructing counsel.

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[24] See for instance : *Erasmus Superior Court Practice* - Service at A 1 – 34 and the authorities cited in footnote 10, compare also *Stellmacher v Christians and Others* 2008 (2) NR 587 (HC) at [16] to [17]
[25] See for instance : *Christian v Metropolitan Life Namibia* 2007 (1) NR 255 (HC) at [5]

CONTEMPT OF COURT

[50] Given my findings in this matter it would appear that the applicant may now have acted in contempt of the orders 2, 3 and 4, as granted by Smuts J, on 27 May 2011, in *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR 537 (HC)[26].

[51] Here it should be mentioned that although the respondent had initially, and for the greatest part of the duration of this case, insisted that the applicant be held in contempt of court, and after having strongly argued that the applicant's case had no merit whatsoever and was brought with the sole aim of reviving a default judgment fraudulently obtained, in a mala fide manner, in which case the applicant had once again shown that he did not consider himself bound by the court orders pertaining to him, even while the period of suspension of the previous conviction on contempt had not yet expired, [27] Mr Barnard, who appeared on behalf of the respondent, surprisingly, and for inexplicable reasons, during argument, relinquished this quest and left any further steps to be taken in this regard in the hands of the court.

[52] Although the respondents have abdicated their responsibility in this regard it is clear that this court cannot just simply turn a blind eye to the applicant's non-compliant conduct as it is duty- bound not to ignore his seemingly blatant disregard of the courts orders, which were clearly binding on him at all times.

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[26] [104] In the result, I make the following order:

1. ….
2. The action instituted by Mr Hendrik Christian against the applicant and Mr Van Rensburg under case No I 2232/2007 on 8 August 2007 is permanently stayed and Mr Christian is directed to pay all costs of Namfisa in the action to date upon the attorney and client scale.
3. No legal proceedings of whatever nature may be instituted by Mr Christian against Namfisa in any courts or inferior court without the prior leave of this court or a judge of this court. Such leave shall not be granted unless the court or the judge in question, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is a prima facie ground for such proceeding.
4. The following applications — under case Numbers A 345/2008, A 34/2009, A 273/2009, A 411/2009, A 366/2009, and A244/2007, instituted by Mr Christian against Namfisa, are permanently stayed.

….. '.

[27] '[104] … 6. Mr Christian is sentenced to a fine of N$5000 or, in default of payment, six months' imprisonment, plus a further period of imprisonment of 12 months, which further period of 12 months' imprisonment is suspended for five years on condition that Mr Christian is not convicted of or committed for contempt of court during the period of suspension.'

[53] The prima facie contemptuous conduct of the applicant has been ongoing. For this reason it is in my view not necessary to act immediately against him in the protection of the authority and integrity of the court or the maintenance of the orderliness of proceedings. I have already considered that his actions cannot simply be overlooked. It would thus be appropriate in these circumstances to refer the matter to the Prosecutor- General for her to decide whether or not the applicant should be prosecuted in the ordinary course for contempt in respect of which, in my view a *prima facie* cause exists.[28]

COSTS

[54] Given the above findings in regard to the conduct of the applicant, relevant to this case, I believe that a special order as to costs is warranted as a mark of this court's displeasure of such conduct.

[55] In the result I make the following further orders:

1. The application is dismissed with costs on the attorney and own client scale, such costs to include the costs of one instructed- and one instructing counsel.

2. The applicant is this ordered to pay the wasted costs occasioned by the postponement of the matter on 22 July 2015, such costs to include the costs of one instructed- and one instructing counsel.

3. The Registrar is directed to refer this matter to the Prosecutor-General of the Republic of Namibia in order for her to decide whether or not the applicant should be prosecuted for contempt of the abovementioned court orders granted by Smuts J in *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR 537 (HC) at [104].

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[28] *S v Mamabolo (E TV Intervening)* 2001 (1) SACR 686 (CC) (2001 (3) SA 409; 2001 (5) BCLR 449; [2001] ZACC 17) were the Constitutional Court considered the constitutionality of the summary procedure in the context of the offencwe of scandalizing the court and were Kriegler J remarked at [57] to [59]

H GEIER

Judge

APPEARANCES

FOR THE APPLICANT:	IN PERSON
FOR THE RESPONDENT:	PCI Barnard Instructed by LorentzAngula Inc., Windhoek