



CASE NO.: A 36/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CARGO DYNAMICS PHARMACEUTICALS (PTY) LTD

APPLICANT

and

THE MINISTER OF HEALTH AND SOCIAL SERVICES
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1ST RESPONDENT
2ND RESPONDENT

CORAM: UNENGU, AJ

Heard on: 30 March 2011

Delivered: 30 March 2011

Reasons on: 20 April 2011

REASONS

UNENGU, AJ: [1] The applicant by of Notice of Motion brought this application to Court and sought the following relief against the respondents:

- "1. That the Court deals with the matter as one of semi-urgency pursuant to the provisions of Rule 6(12).*
- 2. That a rule nisi be issued calling on the respondents to show cause on a date to be determined by the above Honourable Court why an order in the following terms should not be granted.*

- 2.1 *Ordering the respondents to implement and abide by the agreement entered into between the applicant and first respondent in terms whereof applicant is entitled to procure and supply the pharmaceuticals and medical equipment respondents agreed to obtain from Cuba for a period of 24 months commencing from the date of this Order.*
- 2.2 *Ordering the respondents to pay the costs of this application jointly and severally, the one paying the other to be excused.*
3. *Interdicting and prohibiting the respondents either themselves or through any intermediary from importing or arranging such importation from Cuba any medicines or pharmaceutical products for use by the respondents in Namibia pending the return date of the rule nisi.*
4. *Granting the applicant such further and/or alternative relief as the Court deems fit."*

[2] In support of the application, Mr Titus Nakuumba deposed to the Founding Affidavit for the applicant and attached to it various letters exchanged between the applicant and the respondents. The answering affidavit was deposed to by the 1st respondent, Dr Richard Nchabi Kamwi, while the confirmatory affidavit was deposed to by Mr Gilbert Habimana.

[3] During the hearing applicant was represented by Mr Coleman while Mr Hinda acted on behalf of the respondents. After submissions by both counsel,

the Court after a short adjournment, delivered its oral judgment and dismissed the

application with costs. Meanwhile, applicant by letter dated 17 April 2011 addressed to the Registrar of this Court, requesting reasons for the dismissal of the application. That will be done.

[4] In his submissions Mr Hinda, counsel for the respondents amongst others, submitted that the applicant relied on an agreement which agreement will come into effect after it has been signed. He said that such agreement has not yet been signed by the parties. According to him, such contract does not exist and therefore challenged the applicant to prove the existence thereof.

[5] Mr Coleman, for the applicant replied that applicant was not relying on the unsigned agreement between the parties nor on exhibits C - D which are, a letter by the Permanent Secretary of the Ministry of Health and Social Services to the Ambassador of Cuba in Windhoek dated 14 June 2010 and a Certificate of Authentication by the Permanent Secretary of Foreign Affairs dated 24 June 2010 respectively, but by the appointment of the applicant to procure and to supply Pharmaceuticals and Medical Equipment from Cuba to Namibia, on behalf of the Ministry of Health and Social Services.

[6] However, if regard is had to the relief sought in paragraph 2.1 of the Notice of Motion, the applicant is seeking an order ordering the respondents to

implement and abide by the agreement entered into between the applicant and the respondents and not to order the respondents to implement and abide by the appointment of the applicant as an agent of the respondents. (Emphasis added)

[7] Mr Hinda is correct, in my view. The applicant is relying on a contract which does not exist. Mr Hinda, further, contended that the applicant failed to prove the urgency of the application and said if there was one than it is self-created, because, according to him, the applicant did not come to Court as soon as possible after the cause of action arose. In supporting his contention, he referred the Court to the case of Bergman v Commercial Bank of Namibia Ltd and Another 2001 NR 48 at 49 A-J; Salt and Another v Smith NR 1990 NR 87 at 88 A-K and Makuva and Others v Lukoto Bus Service (Pty) Ltd and Others 1987(3) SA 376 at 391 H: At the end, Mr Hinda submitted that the applicant did not prove urgency and asked the Court to dismiss the application with costs.

[8] Mr Coleman on the other hand relied and submitted that the applicant was appointed by the Government to secure pharmaceuticals on behalf of the respondents. That the same appointment is being breached or is threatened to be breached by the respondents. According to him, the respondents were relying on "exhibit K" which letter he said is vague because the respondents did not produce a letter from the Cuban Authority which indicated that they (Cubans) do not want to deal with private entities. He further, submitted that the respondents have breached the arrangement because they have admitted in the affidavit to have procured medicines from Cuba. He therefore, requested the

Court to grant the applicant specific performance and referred to Christie Law of Contract, 4th Edition at page 6-7 for specific damages.

[9] As mentioned above, an oral judgment was delivered in which the application was dismissed with costs. The applicant came to Court on an urgent basis to be granted the prayers as per the Notice of Motion. It is also the submissions of Mr Coleman that the applicant wanted the Court to compel the respondents to comply with the arrangement between them and the applicant wherein the latter was appointed to procure pharmaceuticals and other things from Cuba. No alternative relief in the form of damages was asked by the applicant.

[10] Generally, an aggrieved party has a right to an order of specific performance. Innes, JA in Farmer's Cooperative Society v Berry 1912 AD 343 at 350, quoted by AJ Kerr, in his Book The Principles of Law of Contract Sixth Edition p677, has this to say:

"Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, as far as possible a performance of his undertaking in terms of the contract." (Emphasis added)

[11] It is clear from the quotation above that specific performance is possible only if permitted by circumstances. However, if during the subsistence of a

contract there is a change in circumstances necessary for its operation which change did not come as fault of either party, the contract ceases to exist. It is what happened here. In their letter to the applicant, the respondents informed the applicant as follows:

“After further diplomatic engagement on the matter with the Cuban Government it became clear to the Namibian Government that Cuban

authorities preferred to deal with the Government of Namibia as opposed to private organisations. Therefore, the Government of Namibia had no option but to accede to this intimation. This is what constitutes the changed circumstances referred to in our letter of 13th October 2010.” This is an extraction from a letter dated 9 November 2010 by the Office of Government Attorney to Messrs Sisa Namandje & Co Inc.

[12] It is apparent from the abovementioned quotation that the respondents were not informed about the changed circumstances by means of a letter but became aware of same during diplomatic engagement on the matter with the Cuban Government. There is no letter in possession of the respondents of which they could provide a copy to the applicant. Therefore, I am of the view that the respondents did nothing on their part which could be construed as an act of breach or renegade of the agreement. The respondents are forced by unforeseen circumstances which came about as a result of no fault on their part not to use the applicant as an agent in the transaction. That being the case, an order of specific performance is not possible in the present matter. The respondents indicated their willingness to enter into discussions with the

applicant regarding costs the applicant might have incurred in the matter, but decided to pursue the claim for specific performance only.

[13] I agree with the sentiments expressed by Muller, AJ (as he then was) in the matter of Salt and Another v Smith, supra regarding Rule 6(12)(b) of the Uniform Rules of the Court which requires of an applicant in an urgent application to provide reasons why he cannot be afforded substantial redress at a hearing in due course. There are no such reasons provided by the applicant in this application.

Consequently, the application by the applicant is dismissed with costs on the ground that the requirements of Rule 6(12)(b) have not been complied with.

UNENGU, AJ

ON BEHALF OF THE APPLICANT

Instructed by:

Adv. G Coleman

Sisa Namandje & Co Inc.

ON BEHALF OF THE RESPONDENTS

Instructed by:

Attorney

Adv. G Hinda

Government