

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
REASONS FOR JUDGMENT**

Case No: A313/2004

In the matter:

**THE CHIEF EXECUTIVE OFFICER OF  
NAMIBIA FINANCIAL INSTITUTIONS  
SUPERVISORY AUTHORITY**

**APPLICANT**

and

**LEGAL SHIELD NAMIBIA LTD**

**RESPONDENT**

**Neutral citation:** *The Chief Executive Officer of NAMFISA v Legal Shield Namibia*  
(A313-2004) [2013] NAHCMD 289 (16 October 2013)

**Coram:** VAN NIEKERK J

**Heard:** 23 August 2004

**Delivered:** 24 August 2004

**Flynote:** Practice – Application for postponement – Opposed on basis of agreement allegedly reached that main application be granted – agreement found to be proved – application for postponement refused.

---

## REASONS FOR JUDGMENT

---

VAN NIEKERK, J:

[1] In this matter I made a ruling on 24 August 2004. The applicant requested reasons for my decision. These reasons follow.

[2] In this matter Manyarara, AJ previously placed the short-term insurance business of the respondent (also referred to as ‘the company’) under curatorship in accordance with the provisions of section 6 of the Financial (Investment of Funds) Act, 1984 (Act 39 of 1984). Retired Chief Justice G J C Strydom and Mr H A R Meiring were appointed as joint curators of the said business and given certain powers of curatorship and management over the business. The Court also issued a rule *nisi* returnable on 14 November 2004 and calling on the respondent to show cause why, *inter alia*, the appointment of the curators should not be confirmed. The curators were further directed:

- '12.1 to compile a statement reflecting the overall financial position of the company, with specific reference to its assets and liabilities and to any business conducted by the company or any of its subsidiaries, affiliated or associated companies, involving money received from policyholders and other parties in connection with insurance business, and to report thereon to this Honourable Court on the return day. Such report shall be filed by not later than 20 October 2005;
- 12.2 to report to this Honourable Court on any irregularities committed by the company, its directors, management or auditors and the contravention of any laws in the conduct of its business;

- 12.3 to recommend to the Honourable Court on the return day what further steps should be taken and by whom, in order to safeguard the interest of policyholders and other creditors of the company;
- 12.4 to furnish the applicant with progress reports on the curatorship as they deem fit;
- 12.5 to report to the Honourable Court on the return day regarding the viability of the business and any other entity in which the company has a direct interest, and the ways to ensure the survival of the business in particular with regard to the protection of the interests of policyholders;
- 12.6 should the curators suggest that the business of the company be placed in liquidation, to make their suggestions with regard to the number of persons, their experience and training to be appointed as liquidators of the business of the company; and
- 12.7 should the curators propose that the rule nisi be confirmed and their provisional appointment be made final, to give an indication of the term required for completion of the curatorship.'

[3] On 22 August 2005 the Registrar of this Court informed me that the matter was set down on 23 August 2005 for relief to be granted by agreement between the parties as set out in a notice of motion ('the main application') filed on the same date in the following terms:

1. That the return date of the Rule *Nisi* is brought forward.
2. That the Rule *Nisi* be discharged.
3. That the Board of Directors of Legal Shield Namibia Limited be reinstated and vested with the powers in terms of the Articles of Association of the Company and the Company's (*sic*) Act, Act 61 of 1973.
4. That the Respondent pays the costs as set out in paragraph 9.6 and 9.8 of the court order dated 12<sup>th</sup> May 2005. As far as the remaining costs is (*sic*) concerned, each party to pay each own costs.

5. That the Registrar of Short Term Insurance withdraw (*sic*) the Section 17(11) Notice.'

[4] On the same day the curators filed a report dated 19 August 2005 in which they deal with their tasks as directed by the Court. In paragraph 19 of the report they set out a summary of material conclusions as follows:

- (i) The financial position of the company is strong and the systems controlling monies received from policyholders conforms to all fiduciary and audit requirements. (section 5)
- (ii) The viability of the business, in particular regard to the protection of the interests of policyholders, is healthy. (Section 6)
- (iii) All directives of the Registrar [of short-term insurance], which led to the Sec 17(11) notice, have either been satisfied or substantially complied with, in a manner which we submit should easily satisfy the Registrar as being just and equitable. (Section 4).
- (iv) The Curators, having completed their assignment in terms of the Court Order, can add no further value and request to be released.'

[5] In paragraph 22 of the report they deal with the issue of cost and recorded:

**'22. Costs**

As discussed in Section4, many of the Sec17(11) directives were implemented by the company prior to the Curatorship. The Curators addressed the remaining directives.

**Recommendation**

*It is therefore fair and equitable that the Respondent pays the costs as set out in paras. 9.6 and 9.8 of the Order. As far as the remaining costs are concerned, that each party pays its own costs.'*

[6] In paragraph 24 of the report the curators state that all matters have been resolved to the satisfaction of the curators and that the respondent is in compliance

with the applicant's directives. They then recommend precisely what is set out in the prayers of the notice of motion quoted above.

[7] However, when the matter was called on 23 August 2005, Mr *Kauta* for the applicant moved from the bar for a postponement of the main application for three weeks. He motivated the application by stating that the curators' report was only filed the day before at about 12h30 and that his client needs time to consider same and to file an affidavit in response. The curators also delivered a bundle of documents which contained the opinions of senior counsel on various matters on which the curators sought legal advice. Mr *Kauta* stated that the applicant needed time to consider these opinions and if need be, obtain legal advice thereon. He also specifically referred to the relief claimed in prayer 5 and that the applicant in his capacity as the registrar of short-term insurance (see section 5 of the Short-term Insurance Act, 1998 (Act 4 of 1998), needed to consider this relief. He stated that he had consulted with the applicant, also in his capacity as the registrar of short-term insurance and that he received instructions to apply for the postponement of the main application. He held no instructions to agree to the relief sought in the main application. He further placed on record that the applicant is on leave and could not be contacted at all. Although the return day was more than 2 months away, his client was prepared to agree that the return day be moved forward to three weeks from 24 August 2005. He suggested that, if the registrar of short-term insurance agreed with the curators, the rule *nisi* may be discharged on the shortened return day. If not, the matter could then be argued on that day.

[8] The application for postponement was strongly resisted by Mr *Smuts* on behalf of the respondent and by Mr *Koep* who appeared for the curators. They both relied for their stance mainly on an alleged agreement reached between the curators and all the concerned parties on Friday 19 August 2005 that the matter be set down during the following week for the relief set out in the notice of motion.

[9] I heard testimony by one of the curators, Mr *Meiring*, whose evidence amounted to the following: He and retired Chief Justice *Strydom* prepared a report of which a first draft was delivered to the parties on 15 August 2005. During the week a

second, third, fourth and fifth draft report was sent to the parties by e-mail. A clear indication was given that the contents would not be altered in material respects. The purpose of providing the various drafts was to keep the parties informed of the contents with a view to final roundtable discussions which were scheduled for Friday afternoon, 19 August 2005 at the chambers of the legal practitioners of the curators.

[10] The expressly stated aim of the meeting was to reach an agreement in order for the matter to be resolved and to proceed to Court on an unopposed basis.

[11] The discussions were attended by the two curators, the applicant in person and Mr Quinton van Rooyen on behalf of the respondent. At the discussions retired Chief Justice Strydom informed the parties that the curators' work had been substantially completed, that both parties had adequate time to consider their report and that the curators proposed that they agree to the report, in which the curators recommend substantially what is set out in the notice of set down. Judge Strydom further informed the parties that if agreement was reached and after consultation with the Registrar of this Court, the matter would be set down on 23 August 2005 for the agreed relief.

[12] Thereafter the two curators left the applicant and Mr van Rooyen to discuss certain matters. About an hour later they informed the curators that they had reached agreement on several issues. The one matter relating to costs was then incorporated in paragraph 22 of the report. Agreement was also reached that that the applicant would issue a licence for the Funeral Shield product of the respondent, which was not incorporated in the notice of motion. The curators then made certain changes to the final report to reflect the agreements reached. They included the contents of the relief sought today in paragraph 24 of the final report, which was e-mailed to the parties late on Friday afternoon and when no response was received the curators signed the report dated 19 August 2005 the next day. The report was formally served on the Registrar of the High Court and the parties on 22 August 2005.

[13] Mr Meiring's clear understanding was that the matter would be finalised by agreement on 23 August 2005, subject to the Court's acceptance of the report. He

further emphasized that the curators wish to be released from their duties as their task is complete and as a period of further curatorship would not be to the benefit of the respondent. As to the opinions by senior counsel, he testified that the curators had undertaken to provide copies of these to the parties after the proceedings before this Court had been finalized as a matter of courtesy and to provide a useful resource on the matters researched and discussed therein. However, as it turned out, they already provided the copies before the hearing. The intention clearly was not that the opinions were to be used by either of the parties to oppose the recommendations made in the report.

[14] During cross-examination by Mr *Kauta*, the evidence by Mr Meiring that an agreement had been reached between the parties and the curators regarding the way forward was not disputed. In fact, during argument he stated that he was not privy to any agreements the registrar of short-term insurance may have reached and he confirmed that he was not able to cross-examine Mr Meiring on this issue. Apart from this concession I in any event had no hesitation in accepting Mr Meiring's evidence and in finding that the agreement on which the respondent and the curators rely was indeed reached.

[15] Mr *Kauta* was concerned about the relief sought in prayer of the notice of motion. He pointed out that the curators have no power to direct the registrar of short-term insurance to withdraw the section 17(11) notice previously issued in respect of the respondent's business. On this aspect all the parties before me were in agreement and correctly so. The point simply is that the curators in the report recommended this action to the applicant in his capacity as the registrar of short-term insurance. Once agreement had been reached that he would indeed follow this recommendation the wording of prayer obviously became directory. In the context of the agreement plainly reached I saw no problem with granting this relief.

[16] Having considered the papers and the curators' report I was satisfied that the recommendations therein were properly made and that the relief claimed by way of agreement between the parties should be granted. As a result I refused the

application for a postponement of the matter and granted the relief set out in the notice of motion.

---

K van Niekerk

Judge



APPEARANCE:

For the applicant:

Mr P U Kauta  
of Kauta, Basson & Kamuhanga Inc

For the respondent:

Adv D F Smuts  
Instr by Mostert Legal Practitioners

For the curators:

Mr P F Koep  
of P F Koep & Company