REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 402/2013

In the matter between:

DEREK VAN DER MERWE **APPLICANT**

and

NEDPLAN INSURANCE BROKERS (PTY) LTD **1ST RESPONDENT**

NEDBANK NAMIBIA LIMITED **2ND RESPONDENT**

OLD MUTUAL LIFE ASSURANCE COMPANY (NAMIBIA) LIMITED **3RD RESPONDENT**

FILLEMON ERASTUS **4TH RESPONDENT**

Neutral citation: *Van Der Merwe v Nedplan Insurance Brokers (Pty) Ltd* (A 402/2013) [2014] NAHCMD 34 (5 February 2014)

Coram: CHEDA J

Heard: 26 November 2013

Delivered: 5 February 2014

Flynote: Urgent application – Applicant who was due to be evicted and his contract was cancelled is justified to apply for an urgent application only in certain circumstances. – Applicant breaching the material term of the contract has himself to blame if the other party cancels the agreement in terms of the provisions of the said agreement. Balance convenience favours the party who is cancelling the agreement. Costs on an ordinary scale – Courts should be slow in granting costs on a higher

scale against a losing party as this might discourage the public from asserting their rights in the courts.

Summary: Applicant acted dishonestly by falsifying a client's finalisor form. Third respondent cancelled their contract and evicted him. Applicant to blame and not allowed to get relief through an urgent application. The courts should not as a general rule grant costs on a higher scale against a losing party unless he was unreasonable in his pursuance of his rights to the court. Costs awarded on the ordinary scale.

ORDER

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1) The application be and is hereby dismissed with costs;
2) Applicant be and is hereby ordered to pay the costs of first, second and third respondents, such costs to include one instructing and one instructed counsel; and
3) No costs are awarded in favour of fourth respondent.

JUDGMENT

CHEDA J

[1] This is an application for an interdict, whose relief is as follows:

"2.1 An order interdicting and restraining first and second respondents from cancelling the applicant's Broker's Agency Agreement with first and second respondents;

2.2 An order interdicting and restraining first and second respondents from withholding any commissions, trailing, or otherwise, due and which in future may become payable to applicant;

2.3 An order directing third respondent to immediately reinstate the applicant's Broker Code with third respondent;

2.4 An order directing third respondent from withdrawing its referral of the matter to the Life Assurers' Association of Namibia (LAAN);

2.5 An order interdicting and restraining first, second and third respondents from precluding and/or barring applicant from concluding new insurance business and to render financial advice and services to his existing and any new clients;

2.6 An order directing first, second and third respondents to institute and conduct a formal and proper investigation into the complaints and alleged charges against the applicant, in terms of which the applicant is properly informed of the complaints of forth respondent and the charges levied against him by third respondent, and in terms of which applicant is afforded the opportunity to formally answer to such complaints and charges;

2.7 An order in terms of which first and second respondents is restrained and interdicted from transferring applicant's client base to any other financial advisor.

3. Issuing an order directing that the relief set out in paragraph 2.1 to 2.7 shall, subject to a further order of the Court, operate as immediate interim relief pending the finalization of the investigation to be instituted by first, second and third respondents as prayers for in paragraph 2.6 supra.

4. Authorising the applicant to amend his notice of motion and to supplement his papers, if necessary, within 10 days from the date of this order.

5. issuing an order that first and second respondent, together with any of the other respondent who opposes this application pay the costs of this thereof jointly and severally, the one paying the other to be absolved."

[2] First respondent is a private company, duly registered and carrying out its business in accordance with the laws of Namibia. Second respondent is a registered commercial bank, dully registered in accordance with the Banking Act No 33 of 1965 and caring out its business as such. Third respondent is also a duly registered company in accordance with the laws of Namibia and operating as such. The fourth respondent is a business man residing in Okahandja cited by virtue of any interest he might have in the outcome of this matter.

[3] The brief historical background of the matter is, as presented by applicant in his founding affidavit Applicant. Applicant is a financial advisor rendering financial and insurance services to clients of third respondent in terms of a Broker's Agency Agreement [hereinafter referred to as "the agreement'] between himself and second respondent. Between the 12th of September 2012 to 14 September 2012, he met fourth respondent wherein discussions were held regarding fourth respondent's financial plans. This resulted in him giving fourth respondent certain financial advise regarding his retirement annuity. Fourth respondent had by agreement, signed a finalisor form in order for applicant to process. At the beginning of February 2013 a need for fourth respondent to sign another finalisor form arose but, he could not be located. Having failed to locate fourth respondent, he effected certain alterations and submitted the form as if it had been personally signed by fourth respondent. On the strength of this new finalisor form a new retirement annuity policy was issued.

[4] During the month of July 2013, fourth respondent noticed that certain deductions were being made from his account by third respondent and he complained. Third respondent carried out investigations which revealed that, in fact, the finalisor form was not signed by fourth respondent, but, by applicant himself.

[5] Applicant does not dispute making alterations to fourth respondent's finalisor form and he explained to third respondent the circumstances that led to his signing the said form, but, it appears that it did not go down well with the third respondent..

[6] In October 2013 third respondent wrote a letter to him informing him that the agreement with first and second respondent had been cancelled due to his misconduct being that he had submitted fictitious business documents. The cancellation was in terms of clause 13 of the said agreement which reads:

> *"**13. TERMINATION***
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> *This agreement may be terminated by the Company or the Bank at any time and without any payment in lieu of notice, at any time, should the Financial Advisor engage in conduct which (sic) is unacceptable to the Bank or commits a breach of material obligation under this agreement, or is guilt of any act which at common law would entitle the Company or Bank summarily to terminate this agreement. Likewise, this agreement may be terminated summarily by the Financial Advisor at any time if the Company commits a breach of a material obligation under this agreement or if it has been guilty of any act which would at common law entitle the Financial Advisor to summarily terminate this agreement."*

[7] Between the 21st October 2013 and 31 October 2013 applicant through his legal practitioner attempted to solicit an explanation from first to third respondents to no avail. It is as a result of that conduct that he mounted this urgent application.

[8] The first three respondents have opposed the application on various grounds, amongst which is lack of urgency. Applicant in his founding affidavit explicitly set forth the circumstances upon which he believes the matter was urgent. At the time of filing this application he was still waiting for what he considers an adequate response from respondents. However his “waiting” has now being aroused by a threat of the vacation of his offices and abrupt cancellation of his contract which he challenges as he is of the view that it was done in contravention of the rules of natural justice (*audi alteram parten rule*) I am persuaded by his reaction to bring this matter to court on an urgent basis as he genuinely believes that the courts should come and protect what he perceives to be his rights. At this point a good cause for urgency has been made.

[9] Third respondent has argued that applicant did not comply with the rules and principles for an urgent application and that the service of the said application was defective as it failed to explicitly state the circumstances upon which he avers the application was urgent. It should be borne in mind that the court has an unfettered discretion to dispense with the inadequate service which discretion should of cause be exercised judiciously. For that reason the inadequate service is condoned in terms of Rule 27 (3) which provides:

> “*The court may on good cause shown, condone any non-compliance with these rules……..”*

[10] I do not propose to delve into the lengthy, but, legally sound arguments by both counsel in this matter with regards to urgency as I find that the necessary requirements have been met. What is of extreme importance in my opinion is to proceed to deal with the issue of the interim order sought by applicant and vigorously resisted by respondents..

[11] The success of an interim relief depends on the establishment of the following requirements by applicant:

a) a prima facie right;
b) a well-grounded apprehension of irreparable harm of the interim relief, if it is not granted;
c) that the balance of convenience favours the granting of the relief sought; and
d) there is no satisfactory remedy.

[12] In addition to that, they argued that service is not in accordance with Rule 4 (1) (a) of the Rules of the Court as it should have been effected by the Deputy Sheriff. While this is correct, I hold the view that applicant in his founding affidavit clearly states the circumstances of his complaint and such omission is accordingly condoned.

[11] The main issue in this matter hinges on the interim relief sought. I will deal with the requirements *seriatim*:

a) *Prima facie right*

Applicant entered into an agency agreement of which one of its clauses caters for a breach by either party. This clause makes it clear as to what should happen in the event of such a breach. Applicant admits his guilt of having falsified documents by pretending that it was the client who had signed the finalisor form. This is a material breach as it affects the utmost good faith of their dealings as agreed to. The question then is, having conducted himself in such a dishonest manner, does he still have a right to remain in the contract. My view is that a person who breaches a term of the agreement which goes to the root of the contract, blows his rights thereat and cannot be heard to complain when adequate steps are taken against him, as such would

have been a logical consequence of his dishonest conduct, see *Spies v Lombard*[1]. On that score, applicant has no clear right which he can ask the court to help him protect and/or restore.

b) <u>Well-grounded apprehension of Irreparable harm if relief is not granted</u>

Having found that applicant has no clear right, it follows, therefore, that whatever apprehension he harbours is not enough if it is not well grounded. How does his apprehension become well-grounded in light of allegations of wrong doing which he admits? Whatever harm occurs after this, he has himself to blame. This requirement in my view is designed to assist those genuine applicants who would not have had a hand in the impending harm or danger to their rights. Certainly, not where the unpleasant events would have been introduced by applicant. I am of the opinion that, this is not the well-grounded apprehension envisaged by the authorities.

c) <u>Balance of convenience</u>

Applicant has argued that the balance of convenience favoured the granting of the relief to himself. To support his assertion he went further and pointed out the magnititude of his portfolio and the potential loss to his 27 year old career. This may well be so, but the issue is that in the extent of a breach, respondents are no longer interested in continuing business with him. He submitted that fourth respondent had telephonically authorized him, but, unfortunately he denied this allegation which leaves applicant's argument thread bare.

[1]Spies v Lombard 1950 (3) SA 779 (A)

[13] In light of this, it is clear that the balance of convenience does not favour the granting of an interdict to him. Applicant's contract has been cancelled, if there is anyone who is favoured by the balance of convenience, in my view is non-other than third respondent.

d) <u>No other satisfactory remedy</u>

[14] In the event of a breach, the aggrieved party has a right to take legal action and such legal action should not only be by way of an urgent application. Applicant is at liberty to proceed by ordinary application. I therefore find that applicant's assertion also fails to satisfy this requirement.

[15] Taking into consideration all the submissions made by counsel in this matter, I find nothing in applicant's favour which justifies the granting of the relief prayed for.

<u>COSTS</u>

Respondents' counsel has urged the court to dismiss this application with costs at a higher scale. Costs at a higher scale are punitive and are generally reserved to mark the court's disapproval of the losing party's conduct or where a litigant has been unreasonable amongst other conducts in prosecuting his legal suit, see D*e Villiers v Murraysburg School Board*[2] and *Rautenbach v Symington*[3] 1995 (4) SA 583.

In *casu* applicant genuinely believed that he had a good case, hence my finding that the matter was urgent. It was urgent because, he has a constitutional right to assert his rights in a court of law. I find nothing out of the ordinary which can justify punitive costs against him. Courts should be slow in saddling losing litigants with higher costs as this will tend to discourage litigants from exercising their legal rights.

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[2]De Villiers v Murraysburg School Board 1910 CPD 535 at 538
[3]Rautenbach v Symington 1995 (4) SA 583

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If courts are not alive to this notion, members of the public will view the courts as a preserve of the elite which is not the case. I find no justifiable reason to punish applicant with such costs in the circumstances.

I therefore make the following order:

ORDER

1) The application be and is hereby dismissed with costs;
2) Applicant be and is hereby ordered to pay the costs of first, second and third respondents, such costs to include one instructing and one instructed counsel; and
3) No costs are awarded in favour of fourth respondent.

M Cheda

Judge

APPEARANCES

APPLICANTS	:	Ms Visser Instructed by Metcalfe Attorneys Windhoek
FIRST RESPONDENT:		Ms De Bruin Of Fisher, Quarmby & Pfeifer Windhoek
SECOND AND THIRD RESPONDENT:		Mr Van Vuuren Instructed by Engling, Stritter & Partners Windhoek