REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: A 80/2015

LINDEQUEST INVESTMENT NUMBER FIFTEEN CC **APPLICANT**

And

BANK WINDHOEK LIMITED **1ST RESPONDENT**

DEPUTY SHERIFF – WINDHOEK **2ND RESPONDENT**

Neutral citation: Lindequest Investment Number Fifteen CC v Bank Windhoek Ltd (A 80/2015) [2015] NAHCMD 100 (27 April 2015)

CORAM: MASUKU AJ.

Heard: 9 April 2015

Delivered: 27 April 2015

Flynote: Practice – applications and motions – urgent application. Requirements of Rule 73(4) – court held that urgency is not satisfied where the applicant has created the urgency. Court held that an applicant in urgent applications must make a full and frank disclosure of all circumstances affecting urgency and that failure to do so may imperil that party's success. Held further that the applicant was guilty of abusing court process. Urgency was held to be self-created and the applicant was ordered to pay costs on the punitive scale.

RULING

MASUKU, AJ.:

[1] After hearing argument on 9 April 2015, I issued an order captured below and indicated that reasons would follow. The reasons follow below.

[2] The applicant, a registered close corporation, approached this court on an urgent basis seeking the following relief as set out in the notice of motion[1]:

1. 'Condoning the applicant's non-compliance with the Rules of this Honourable Court and the time periods prescribed in therein in so far as these have not been complied with and directing that this matter be heard as one of urgency as contemplated in Rule 73 (3) of the Rules of Court;
2. Directing that the respondent stay the sale in execution under case no. 1282/2006 planned to be held on 9 April 2015 at 12h00 in respect of Erf 2621, Extension no.4, Khomasdal, Windhoek pending the hearing in due course of the declaratory application under case no. A72/2015.
3. Directing the respondent pays the costs of this application only in the event of the respondent opposing this application.
4. Directing that paragraph 2 above operates as an interim interdict pending the hearing of case no, A72/2015.'

[1] See Notice of Motion dated 8 April 2015.

Applicant's case

[3] The application was accompanied by a certificate of urgency signed and a founding affidavit deposed to by Mr. Heinrich Schroeder, who describes himself as the sole member of the applicant. I will in due course traverse the allegations contained in the affidavit filed of record and on which the application is predicated. It is important to mention that having listened to the arguments presented by the parties herein, I indicated that the court's refusal to have the matter enrolled as one of urgency with costs, thereby refusing to grant the application sought in terms of prayer 1 recorded above.

[4] The applicant alleges that under Case No. 1282/06, the registrar of this court granted a judgment against it by default on 7 June 2006. It is alleged further that the said judgment was void *ab initio* for the reason that the said Registrar, though being a public officer, was not, however, a judicial officer as envisaged in terms of the provisions of article 78[2], thus rendering the said default judgment liable to be set aside. As a result of the said judgment, according to the applicant's papers, a sale in execution of judgment was advertised for 9 April 2015. It is this sale that the applicant seeks to have this court distrain on the grounds that the Registrar of this court had no authority and legal competence to issue the said order.

[5] The applicant further alleges that when the said judgment by default was issued, it was completely oblivious thereto and did not, therefore, have any opportunity to make representations thereon. The applicant further deposes that the said default judgment was 'for the past 9 years successfully suppressed' by the respondent and the applicant was unaware thereof[3]. The applicant states further that during March 2015, it was served with a notice of sale in execution in pursuance of the said default judgment. It deposes further that it thereupon wrote and served a letter on the registrar claiming that the said writ had been issued in the absence of a judgment and stated that it was

[2] Constitution of the Republic of Namibia.
[3] See paragraph 18 of the Notice of Motion.

unaware of the judgment on which the writ was predicated and also requested a copy of the writ[4]. The applicant claims that the registrar did not respond to its letter.

[6] In its further depositions, the applicant claims that in view of the registrar demurring to its letter referred to above, and in view of the cold reality that the sale in execution was going to proceed on schedule, it then brought an application to stay execution of the said judgment, which judgment it contends was issued 'on the strength of unlawful and unjust default judgment' which is 'per se interdictable as a matter of urgency pending the outcome of Case No. A27/2015.'[5] The applicant stated further, that if pursued to its logical conclusion, the execution of the sale would infringe on his fundamental rights to housing and a fair trial. Finally, the applicant further alleged that it was never afforded an opportunity to make representations before the default judgment was entered and did not, have the opportunity to submit its defence before the grant of the said judgment.

[7] It must be mentioned in this regard and for the sake of completeness that the applicant filed an application dated 31 March 2015 in which it prayed for the default judgment forming the subject matter of the present proceedings to be declared void. This was undertaken under Case No. A72/2015. It will be seen that it is this application that the applicant claims should be decided first by this court before the writ of execution can be sanctioned as foreshadowed in prayer 4 of the notice of motion. A very formidable case, it would appear, on the applicant's depositions. What did the respondents do?

[8] Before I answer that question, it is fitting that I must first comment on the manner in which the notice of motion was drafted by the applicant. Prayer 2 of the notice of motion applies for stay of execution and directing the 'respondent' to stay the said sale. It is common cause, from a reading of the notice of motion that two parties are cited in the papers as respondents. The respondent against whom this prayer is directed between the two respondents has not been identified with any or the requisite degree of

[4] See paragraph 20.
[5] See paragraph 25.

particularity. Furthermore, prayer 3 directs 'the respondent' to pay the costs of the application in the event same is opposed. Once again, no particularity in that regard is achieved.

[9] One may be tempted to conclude that the court is being fastidious in these observations, particularly considering that the applicant is represented by its sole member who is not a legal practitioner. That is plainly not so. I say so because it must be recalled that the notice of motion is not just a document that can or should be loosely drafted. It is the basis on which any order the court may be minded to grant should be predicated. For that reason, it must be drafted with a presence of mind and particularity which will ensure that no doubt or argument should take place regarding the nature, effect and scope of the order sought. Furthermore, no debate should ensue regarding which respondent is being ordered to do or perform or not perform what duty in terms of the notice of motion. Where a loose reference is made, as in this case to 'the respondent' without specifying which and where the respondents are more than one, the applicant runs the real risk that the application is declared bad for inexactitude. Notices of motion must be clear, direct and the model of clarity as to whom the court should order to do what. In the instant case, I will adopt a benevolent approach and consider the applicant's position as a litigant which is not represented by a legal representative. This should not, however, be regarded as a standard and a precedent to be followed in future. Even lay litigants must be subject to the requirements of specificity and accuracy when it comes to the framing of the notice of motion.

First respondent's case

[10] In response to the application, the 1st respondent's counsel came to court at the time appointed by the applicant for the hearing of the application and indicated their opposition to the application. Despite strenuous opposition by the applicant at first, the 1st respondent applied for an adjournment for an hour and a half or so, to enable it to file an answering affidavit because in the respondent's counsel's submission, the application was frivolous and an abuse of the court process. I allowed the respondents

the time to do so and on resumption of the application, they filed a brief affidavit deposed to by one Ms Elysia Liesel Brits, the senior legal manager of the 1st respondent's collections branch in Windhoek. In the said affidavit, Ms. Brits chronicled what appears to be the chequered history of the litigation between the applicant and the first respondent.

[11] She alleges, with reference to supporting documents for the most part that:

a) the registrar of this court granted default judgment against the applicant on 7 June 2006, which included the declaration that the said property be rendered executable;
b) the applicant launched an application under case I 1282/2006[6] dated 18 January 2007, (annexed to the papers) which was dismissed by the court;
c) the applicant launched yet another application, dated 28 April 2008 for stay of the default judgment under case no. I 1282/2008;[7]
d) on 1 August 2008, the applicant lodged an application for an interim interdict staying the sale in execution of the said judgment;
e) the applicant filed an appeal to the Supreme Court of Namibia, which lapsed.

I shall, in due course, return to deal with this chronicle of events at the appropriate time and what colour they paint on the entire proceedings.

[12] In essence, the respondents claim that the application is not urgent, alternatively, that if it is urgent, the urgency was of the applicant's own making and an abuse of the process of the court. They thus applied that the court should refuse the enrolment of the case as one of urgency and order the applicant to pay the costs thereof. In this regard, the court's attention was drawn to the founding affidavit of the applicant and some of the timelines recorded therein.

The law applicable

[6] See annexure "EB 2" of the 1st respondent's affidavit.
[7] See annexure "EB 4" of the 1st respondent's affidavit.

[13 The relevant rule governing urgent application is rule 73[8]. Rule 73 (1) provides the following:

> 'An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter is so urgent that it should be heard at any time or on any other day.'

As indicated earlier, this application was filed on and set down for hearing at 09h00 on a court day and it was therefore not subject to the further stringent conditions applicable to an application which is heard on a day that is not a court day or at some other time than that stipulated above. In the latter instance, it would seem to me, even a certificate of urgency by a lay litigant would not suffice if the matter is sought to be heard on some other day than a court day or time than that prescribed in the sub-rule. This, it would seem to me, is to avoid abuse of the urgency procedures and dragging the court into sitting at ungodly times or hours and on days when no extra degree of urgency exists than the normal one which would be met if the application is heard on an urgent basis at 09h00 on a court day.

[14] [Sub-rule (4), on the other hand exacts a duty on an applicant for the enrolment of a matter on urgency, to "explicitly" state in the affidavit accompanying the application (a) the circumstances which he or she avers render the matter urgent and (b) the reasons why he or she claims he or she cannot be afforded substantial redress at a hearing in due course. In the instant case, the applicant claims that its property is due to be sold in execution and that the sale was scheduled to take place at 12 noon on the date on which the application was heard. In a normal case, one would hold that the applicant had complied with the requirements of the said sub-rule (4).]

[15] In the instant case, the respondents argued quite strenuously that in the instant case, the urgency that obtains has been the creation of the applicant's and that for that reason, the court should not lend its processes to abuse by enrolling the matter as an urgent one. In this regard, the court's attention was drawn to certain deposition made in the founding affidavit, which in the respondent's submission ineluctably shows that the

[8] Rules promulgated by the Judge President which came into operation on 16 April 2014.

urgency in this matter was engineered, so to speak, by the applicant. First, is that the default judgment sought to be set aside was granted in June 2006, almost some 9 years ago. The respondent also attached applications made by the applicant challenging the judgment that were on the whole, unsuccessful. This included an appeal to the Supreme Court, which was unsuccessful.

[16] More importantly, the applicant states that in March 2015, he was served with a notice of sale in execution[9]. The applicant states that it thereupon, on 26 March 2015 addressed a letter to the registrar 'informing her that the notice of sale in execution was issued without a judgment. I further informed her that I am not aware of the judgment, and requested also a copy of the writ of execution.'[10] The applicant contends that the letter he wrote evoked no response from the registrar or from the respondent. It was then that the applicant decided to launch an application for the declaration of the default judgment *void ab initio.* As mentioned earlier, this application is dated 31 March 2015.

[17] There are a few matters that must be noted and which the respondent pointed out during argument. First, the rule requires an applicant to state 'explicitly the circumstances which he or she avers render the matter urgent:' In *Stefanus Nande Nghiimbwasha And Another v The Minister of Justice And Others,*[11] this court had occasion to deal with the importance of the word 'explicitly' occurring in the subsection. At paragraph 12 and 13, the court expressed itself in the following terms:

> '[12] The first allegation the applicant must 'explicitly' make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must 'explicitly' state the reasons why it is alleged he or she cannot be granted substantial redress at a hearing in due course. The use of the word 'explicitly', it is my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to underscore the level of disclosure that must be made by an applicant in such cases. [13] In the English dictionary, the word "explicit" connotes something 'stated clearly and in detail. Leaving no room for confusion or doubt'. This

[9] Paragraph 19 of the founding affidavit.
[10] Paragraph 21.
[11](*A 38/2015) [2015] NAHCMD 67 (20 March 2015).*

> therefore means that a deponent in an affidavit in which urgency is claimed or alleged, must state the reasons for the urgency 'clearly and in detail, leaving no room for confusion or doubt'. This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence, neither hiding nor hoarding any relevant information relevant to the issue of urgency.'

[18] Has the applicant complied with this onerous degree of disclosure in the present application? I think not. For starters, the applicant appears to be economic with vital information that should, if properly and fully disclosed, assist the court in making the correct judgment call on the issue of urgency or lack thereof. In paragraph 19, the applicant states that, 'During March 2015 I was served with a notice of sale in execution marked Annexure 'STAY 2'. Crucially, the date when this notice was served is not stated and the court is left in doubt and confusion as to when this may have been. The dates when certain important events occur do become important in such matters as the court should in exercising its discretion do so on a full compendium of all relevant facts. How can an applicant, who does not disclose all relevant materials and details expect the court to find for him or her?

[19] The date when this notice was received is in my considered view critical as it has a direct bearing as to whether the applicant did not take an unduly long period in approaching the court. This is so considering the respondent's contention that the applicant is the one who created the urgency in this matter. In this regard, the date when the applicant first became aware of the notice of sale and when it took the steps to have same set side are in my view crucial. In the *Stefanus Nande Nghiimbwasha* case, the court stated the following[12]:

> 'In this regard, an applicant can be chary in the affidavit on issues relating to the urgency to its own detriment, thus affecting the court's ability to properly exercise its discretion in that party's favour and may actually render the court unable to properly deal with the

[12] Paragraph 24 of the judgment.

> case at all or in accordance with the level of dislocation necessary to preserve the interest or forestall the harm alleged.'

In this case, the non-disclosure of this date when the applicant became aware of the notice is material. Whether it was at the beginning, middle or whatever point in March should have been disclosed to the court.

[20] There is also a pattern that I must rebuke in the applicant's papers. It is that an applicant in such applications must make truthful statements and not exaggerate, understate or deliberately state facts inaccurately in a bid to gain the court's sympathy. Once such a course is adopted, litigants should know that this concealment of the true facts may well have a different effect. In this case, the applicant, for instance, states that the respondent 'successfully suppressed the default judgment which it obtained from the registrar and I was not aware of the default judgment'. This is evidently false because the respondent has annexed to the court applications that the applicant launched unsuccessfully over the years, thus proving ineluctably that the applicant was aware of the default judgment. Imputations of wrong-doing, which are accompanied by insinuations of fraud, concealment and bad faith should not be lightly made in the absence of proof. Where there is evidence to the contrary, as in this case, and which is not controverted, such a party should not expect the court to leave it blameless as it would have sought to gain an order on the basis of wrong information thus hoodwinking the court possibly into issuing favourable orders on the basis of ill-gotten sympathy. This is a serious matter.

[21] What becomes clear from the applicant's own papers is that it has been aware of the judgment against it for a very long time as it was issued in 2006 and that it made efforts to set same aside, which do not appear to have wrought the desired fruit. Secondly, as early as 18 March 2015, the applicant was aware of the notice of sale and the intended date of sale, being 9 April 2015. That this is the position, can be seen from the letter written by the applicant addressed to the 1st respondent, dated 18 March 2015[13]. In that letter, the applicant requested the judgment on which the sale was

[13] Letter marked 'Stay 3' attached to the founding affidavit.

predicated. I will not comment on this request. The applicant requested a reply by close of business on even date. This letter, it would appear elicited no response from the 1st respondent. It is clear that the applicant did not approach the court at that time for any relief and at a time when the matter would not have the degree of urgency it eventually allegedly had.

[22] By letter dated 7 April 2015[14], the applicant sought an undertaking from the deputy sheriff that the sale would not proceed on schedule on 9 April. The applicant discloses that it only obtained a copy of the judgment it sought on 31 March 2015. The applicant does not appear, from the papers, to have taken any urgent step to stop the sale before the hearing. This must be viewed from the position that it has already been established that the applicant knew about the judgment for a long time and did not over the years take effective steps to have the said judgment set aside. I recall that the applicant in argument, alleged that Mr. Justice Smuts did grant an order setting the said judgment aside. Strangely, no reference was made to this in the application nor was a copy of the said judgment supplied. It is a basic position of the law that he who alleges must prove. This was a very important judgment to the applicant and it had every right to brandish it to anyone who exhibited any intention to enforce the said judgment. That a copy of the judgment is not attached and no allegations about it are made under oath are telling.

[23] The application dated 31 March must, in my opinion, seen in proper perspective. It was nothing but an attempt to stifle the enforcement of a judgment that the applicant knew had been granted many years ago and which judgment stands until properly set aside. Furthermore, the applicant did not disclose to this court that previous attempts to have the said judgment set aside had failed. Nor did it disclose that it had, as alleged in argument, obtained an order setting aside the judgment by Mr. Justice Smuts. The only reasonable conclusion, in the circumstances, is that the applicant sought to abuse the court's processes by submitting an application that it well knew was ill-founded and

[14] Letter (also) marked 'Stay 3' (duplication by the applicant it must be noted).

sought to use same as a basis for the stay. Such behavior by a litigant ought, in my view, to be deprecated in the strongest possible terms.

[24] In dealing directly with the urgency, the applicant states the following at paragraph 32.1 of its affidavit, 'The cause of the urgency has arisen upon the applicant obtaining knowledge from the second respondent on 7 April 2015 of the first respondent' intention to proceed with the sale in execution on 9 April 2015. The applicant knew from the time it was served with the notice of sale in execution and did not take steps to have the sale stopped in good time, as I have said more than once. The filing of the application on 31 March 2015 without an immediate hearing and an interim interdict being applied for and granted, was not going to stop the sale. Only an agreement or an order of court would suffice for that purpose."

[25] At paragraph 32.2 of its affidavit, the applicant again alleges that it had been unaware of the default judgment until the end of March 2015, an allegation that has been proved to be undoubtedly false. As pointed out earlier, the respondents filed an affidavit to which they attached applications which ineluctably show that the applicant knew about this judgment and made numerous unsuccessful attempts to have it set aside. The existence of the applications was not denied by the applicant in argument. Further incendiary allegations are made that the respondents 'unreasonably and unfairly suppressed the default judgment,' an issue I have commented upon above.

[26] All the foregoing point inexorably in one direction, namely, that the respondent knew of the judgment in question for a long time and was served with the notice of sale in good time. He did not take appropriate steps and waited until the last hour to apply for the matter to be heard on urgency. The only reasonable conclusion one can come to, taking all the matters into account, is that, as the respondent argues, any urgency in this matter that can be said to exist, is of the applicant's own making. To crown it all, the applicant deliberately withheld pertinent information from the court and in addition, volunteered information it knew to be false. This is serious and cannot be left to be consigned to the sea of forgetfulness without incident.

[27] This court has spoken emphatically about cases where urgency is a creation of the applicant. For instance, in *Mulopo v Minister of Home Affairs*[15], Damaseb JP stated the following, 'The Court has already warned that it will act sternly against those who come to this Court on self-created urgency'. Evidently, the applicant falls into this very category from the picture painted in this judgment, as can be seen from the papers filed of record, read as a whole. It only remains for the court to remind practitioners and litigants, representing themselves, the timeless words of wisdom that fell from the lips of s judge of the High Court of Lesotho in *Marumo v National Executive Committee and Others*[16], where the learned judge said:

> 'Urgency is not a hat that one can be put on or off at one's convenience. Urgency is a condition imposed upon by reasons of circumstances beyond his or her control . . .'

It follows therefore, that where a party contrives and ferments conditions that ultimately are made to appear urgent, the court should sternly turn its face. This is the conclusion I have come to regarding the urgency alleged in this matter and the dilatory and at times disruptive conduct of the applicant. The urgency alleged is the creation of the applicant and which additionally hid and hoarded critical information that had a possibly critical and decisive bearing on the very question of urgency.

[28] There is one submission that the applicant's representative made in the course of argument. He contended that the respondent's attorneys of record had not been authorized to represent the respondent in the proceedings. No authority was cited in support of this position. I have had a look at the rules of court and they do not make it a requirement for a legal practitioner who appears on behalf of a respondent in application proceedings to file authority. Even if there was such a requirement, I am of the considered view that the court should be at liberty to relax this requirement, particularly in the context of the current application where the respondent is literally dragged to court on very short notice.

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[15] [2004 NR 164 (HC).
[16] [2011] (LsHC) 92.

[29] Furthermore, there is also another factor that would, in my view, militate against upholding the applicant's contention in this regard. It is this – this is, strictly speaking not a new application, i.e. one that is being launched for the first time for a new type of relief against the respondent. It is a sequel to earlier numerous bouts of proceedings, where the above protagonists, save the 2nd respondent, have slugged it out in the boxing ring as it were. One would, for lack of a better word, term it renewed hostilities between the protagonists. It would be an exercise in sterile formalism to require of a defendant, every time a new interlocutory application is launched to have it file authority in each and every such application. I entertain no doubt in the present proceedings that it was the respondent that was desirous of defending the proceedings and the applicant said and showed nothing to detract from that clear position, all the facts taken into account.

[30] I have noted that in the order granted, I inadvertently did not make an order regarding the scale at which the costs should have been granted. It is a matter of record that Mr. Schickerling, counsel for the 1st respondent, applied for costs to be granted on the punitive scale for the reason, he contended, that the applicant is abusing the processes of this court and has made scurrilous allegations regarding the respondents 'suppressing' the judgment. It is not a case where the scale of costs was not addressed during the hearing of the application. I agree. Furthermore, as demonstrated above, the applicant withheld critical information to the court and also placed information before the court under oath which it knew was incorrect. No other case can be shown to deserve the court's censure than such a case. That being the case, the scale of costs is that of legal practitioner (attorney) and client.

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TS Masuku, AJ

APPEARANCES

APPLICANT:	The Applicant in person
RESPONDENTS:	J. Schickerling Instructed by Dr Weder, Kauta & Hoveka Inc.