REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 309/2015

In the matter between:

NEWTON VICTOR BAKER **APPLICANT**

And

THE MESSENGER OF COURT FOR THE
DISTRICT OF WALVIS BAY **FIRST RESPONDENT**
JACOBUS CHRISTIAAN MULLER **SECOND RESPONDENT**

Neutral citation: *Baker v The Messenger of Court for the District of Walvis Bay* (A 309-2015) [2015] NAHCMD 286 (23 November 2015)

Coram: PARKER AJ
Heard: **20 November 2015**
Delivered: **23 November 2015**

Flynote: Applications and motions – Urgency – Application brought *ex parte* – Court held that it is trite practice of the court that good faith is *sine qua non* in *ex parte* applications – Applicant owes a duty of utmost good faith to the court to make a full and proper disclosure of all material facts to the court – Failure to so act should lead to dismissal of the application – It matters not whether the facts were willfully suppressed or negligently omitted.

Summary: Applications and motions – Urgency – Application brought *ex parte* – Court held that it is trite practice of the court that good faith is *sine qua non* in *ex parte* applications – Applicant owes a duty of utmost good faith to the court to make a full and proper disclosure of all material facts to the court – Failure to so act should lead to dismissal of the application – It matters not whether the facts were willfully suppressed or negligently omitted – Applicant launched an urgent *ex parte* application and failed to disclose to court that a pending application had been pending for some five months upon the bringing of the urgent *ex parte* application – Court granted rule *nisi* – On this return day court upheld respondents' point *in limine* that that raised the issue of *lis alibi pendens* – Court found that *lis alibi pendens* existed and by not disclosing the pending proceedings in the urgent *ex parte* application applicant did not act in utmost good faith – Consequently, court discharged the rule *nisi* and dismissed the application.

ORDER

The rule *nisi* issued on 6 November 2015 is hereby discharged, and the application is dismissed with costs on the scale as between party and party, including costs of one instructing counsel and one instructed counsel in respect of the first respondent, and in respect of the second respondent.

JUDGMENT

PARKER AJ:

[1] On 6 November 2015 the court issued a rule *nisi* granting a declaratory order and interlocutory orders. The second respondent has raised in his answering affidavit preliminary objections, the essence of them is the raising of the issue of *lis alibi*

pendens and the application having been brought *ex parte* and on the basis of urgency, where the application was not served on the respondents. It seems to me that the first respondent makes common cause with the second respondent.

[2] On this return day of 20 November 2015, Ms Petherbridge represents the applicant, Ms Campbell the first respondent, and Mr Van Vuuren the second respondent.

[3] The respondents (that is, for the purposes of these proceedings, the first and second respondents) contend that the applicant did not act in utmost good faith and did not act fairly towards the respondents. It is, therefore, to the challenge that the order should not have been sought and granted on the basis *ex parte* and on the basis of urgency that I now direct the enquiry. I do so at the threshold because a decision upholding that point *in limine* is capable of disposing of the matter.

[4] On the issue of applications brought *ex parte* and as a matter of urgency, I cannot do any better than to rehearse what I said in the following passages in the recent case of *Jacobs v Van Zyl* (A 106/2015) [2015] NAHCMD 254 (29 October 2015):

'[5] It is trite in the practice of the court that '[G]ood faith is *sine qua non* in *ex parte* applications', to adopt the words of H J Erasmus, et al, *Superior Court Practice* (1994), p B1–41-42. I also take counsel from the explanation for, and the raison d'être of, the principle in the passage that follows the principle:

"Good faith is a *sine qua non* in *ex parte* applications. If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, the court may on that ground alone dismiss an *ex parte* application. The court will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. Among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure, the consequences, from the point of doing

justice between the parties, of denying relief to the applicant on the *ex parte* order, and the interest of innocent third parties such as minor children, for whom protection was sought in the *ex parte* application."

[6] Approving the principle, the court (per Damaseb JP) states thus in *Knouwds NO v Josea and Another* 2007 (2) NR 792 (HC), para 18:

"This application was brought *ex parte*, ie without notice to the respondent(s). It is trite that a party who comes to court without notice to a person affected by the relief it seeks must act bona fide and must disclose all relevant facts to the court."

[7] Thus, it is well settled in the practice of the court that an applicant in *ex parte* proceedings is required to make a full and proper disclosure to the court and, indeed, owes a duty of utmost good faith to the court in that regard. See *Standard Bank of Namibia v Potgieter and Another* 2000 NR 120 (HC). The applicant must so act in order to assist the court in deciding carefully and judicially whether to grant the order sought in virtue of the fact that the court is being asked to make the order when the court has not heard the other party which in itself has constitutional implications.

[8] As I said in *Hewat Beukes t/a MC Bouers and Others v Luderitz Town Council and Others* Case No. A 388/2009 (judgment delivered on 3 March 2009) in exercise of its discretion in an *ex parte* application the court should always bear in mind that by granting the indulgence to hear an *ex parte* application brought on urgent basis, the court is in effect taking away the respondent's constitutional right to fair trial (ie the right to be heard), and, therefore, there must be in existence good grounds for the court to exercise its discretion in favour of granting the indulgence. Good grounds exist where, for example, to serve papers on the opposing party would defeat the very object of the application (see *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48) or where grave irreparable harm would occasion the applicant if the application was not heard *ex parte* and on urgent basis.

[9] And an applicant does not act in utmost good faith where he or she does not disclose all material facts; material facts which in the circumstances of the case were more likely to influence the court in refusing to consider the matter on *ex parte* basis and on the basis of urgency, if the material facts had been placed before it when such application was heard. Thus, apart from all else, on the return day of a rule *nisi* a court should decline to confirm the

rule *nisi* where the rule *nisi* was granted in circumstances where the applicant had failed to act in utmost good faith.'

[5] In the instant case, the applicant's failure to act in utmost good faith involves applicant's failure to make a full and proper disclosure to the court of the material fact that there was an application which has been pending since 30 June 2015 (under Case No. A 160/2015) ('the June 2015 application'), raising the issue of *lis alibi pendens*.

[6] The requisites of *lis alibi pendens* are that (a) there must be litigation pending; (b) the other proceedings must be pending between the same parties or their privies; (c) the pending proceedings must be based on the same cause of action; and (d) the pending proceedings must be in respect of the same subject matter. (LTC Harms, *Ambler's Precedents on Pleadings*, 7th ed, pp 263-264; and the authorities there cited) That *lis alibi pendens* is established is undisputed; neither is it disputable. On the papers it seems to me clear that the applicant did not act in utmost good faith: the applicant, who was at all material times represented by legal representatives, knew, or ought to have known, that in the circumstances of the case, the fact of the pending proceeding, that is, the June 2015 application, would more likely influence the court to refuse to hear the matter on *ex parte* basis and on the basis of urgency *or at all*, if that material fact had been disclosed to the court hearing the ex parte urgent application. (Italicized for emphasis)

[7] In this regard, the following excerpt from a letter from the second respondent's legal representatives to the applicant's legal representatives, dated 2 November 2015 and received the following day, that is, barely three days before the launching of the *ex parte* urgent application, is relevant. It destroys any feeble challenge the applicant may wish to put forth against the cogency of the preliminary objection that the applicant did not act in utmost good faith when he failed to make a full and proper disclosure of the material fact of the pending proceedings (the 15 June 2015 application), a fact which, as I have found previously, would have materially and

greatly influenced the outcome of the *ex parte* application, if the *ex parte* application had been heard at all. The second respondent's legal representatives wrote:

'We record that your offices already a considerable time ago indicated that this fatally defective and flawed application (ie the June 2015 application) will be withdrawn, which has also up to date not materialized. It is further apparent from the contents of the notice of motion paragraph 3, that your client has been aware of the scheduled sale in execution, which was initially scheduled for 4 July 2015 for a considerable period of time.'

[8] I uphold the point *in limine* on the basis of applicant's failure to make a full and proper disclosure of a material fact, coupled with the intertwined basis of *lis alibi pendens*. On these grounds alone, I conclude that the court should refuse to confirm the rule *nisi* and should consequently dismiss the application.

[9] This holding is a warning to parties and legal representatives that such fate awaits he or she who approaches the court to hear an application *ex parte* and on the basis of urgency where such applicant fails to make a full and proper disclosure of all material facts – whether they be wilfully suppressed or negligently omitted. In that event the court may on that ground alone dismiss the *ex parte* application. As I said in *Jacobs v Van Zyl* –

'[12] … It is not up to an applicant who brings an urgent *ex parte* application to decide what facts will make a difference and what facts will not make a difference in the eyes of the court and decide what facts to disclose. All material facts must be disclosed.'

[10] One last point. Ms Petherbridge sought to persuade the court that since a copy of the June 2015 application was annexed to the notice of motion of the *ex parte* application, there has been a disclosure of the pending disclosure. With respect, counsel's rearguard action is so weak that it cannot take the applicant's case anywhere. On the issue of annexures attached to applications, I had this to say in the recent case of *Laicatti Trading Capital Inc v Greencoal (Namibia) (Pty) Ltd (Registration Number: 20/0314)* (A 273/2014) [2015] NAHCMD 240 (8 October 2015):

‘[7] Joffe J put it crisply and clearly thus in *Swissborough Diamond Mines v Government of RSA* 1999 (2) SA 279 (T) at 324F-G:

> “Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed.” ’

[11] In the instant matter, there is not even as much as a whimper of the existence of the pending application (ie the June 2015 application) in the founding affidavit of the present application. It was not enough that it was part of the annexures attached to the notice of motion: there was not *a full and proper disclosure* of the pending proceeding to the court which heard the *ex parte* application. (Italicised for emphasis).

[12] What remains to decide is not so much about whether there should be a costs order; for, generally, costs should follow the event, but about the scale of costs. Counsel for the respondents seek costs on the scale as between attorney (legal practitioners) and client. At first brush that would seem to be an appropriate scale; after all, ‘[o]nce the requisites of *lis alibi pendens* are established a factual presumption arises that the second proceeding is *prima facie* vexatious’. (*Amler’s Precedents of Pleadings*, p 264). In the instant case, the upholding of the respondents’ preliminary objection of *lis alibi pendens* is used to establish applicant’s failure to act in utmost good faith which is ‘*sine qua non in ex parte* applications’; hence, the success of the respondent’s challenge to the confirmation of the rule *nisi*. In any case, the second proceeding is only *prima facie* vexatious. For these reasons, I am of the view that an order of costs on the scale as between party and party meets the justice of the case.

[13] Based on these reasons, I conclude that the applicant has failed to make out a case for the confirmation of the rule *nisi*, and that the respondents have

established that the rule *nisi* should be discharged and the application dismissed; whereupon, I order as follows:

> The rule *nisi* issued on 6 November 2015 is hereby discharged, and the application is dismissed with costs on the scale as between party and party, including costs of one instructing counsel and one instructed counsel in respect of the first respondent and in respect of the second respondent.

C Parker

Acting Judge

APPEARANCES

APPLICANT :	M Petherbridge Of Petherbridge Law Chambers, Windhoek
FIRST RESPONDENT:	Y Campbell Instructed by Erasmus & Associates, Windhoek
SECOND RESPONDENT:	A S Van Vuuren Instructed by Delport Nederlof Attorneys, Windhoek