REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 297/2015

In the matter between:

KEN INVESTMENTS CLOSE CORPORATION **APPLICANT**

And

ROUWANS INVESTMENTS CC **FIRST RESPONDENT**

ERNST GAWANAB **SECOND RESPONDENT**

THE TOWN COUNCIL FOR THE MUNICIPALITY OF NKURENKURU **THIRD RESPONDENT**

BANK WINDHOEK LTD **FOURTH RESPONDENT**

NEDBANK NAMIBIA LTD **FIFTH RESPONDENT**

Neutral citation: *Ken Investments Close Corporation v Rouwans Investments CC* (A 297/2015) [2016] NAHCMD 51 (3 March 2016)

Coram: PARKER AJ

Heard: **18 November 2015**

Delivered: **3 March 2016**

Flynote: Applications and motions – Urgency – Application brought *ex parte* and on urgent basis – Court held that it is trite that good faith is sine qua non in *ex parte* applications – Applicant owes a duty of utmost good faith to the court to make full and proper disclosure to the court – Failure to disclose all relevant facts to the court

should lead to dismissal of application – The court does not hold itself bound by the order obtained in the rule *nisi* under the consequent misapprehension of the true position – A respondent is entitled to anticipate the return day of a rule *nisi* so long as he or she delivers the requisite 24 hours' notice – Court held that the only limitation on that entitlement is the delivery of a 24 hours' notice in terms of rule 72(7) of the rules of court.

Summary: Applications and motions – Urgency – Application brought *ex parte* and on urgent basis – Court held that it is trite that good faith is *sine qua non* in *ex parte* applications – Applicant owes a duty of utmost good faith to the court to make full and proper disclosure to the court – Failure to disclose all relevant facts to the court should lead to dismissal of application – In instant case applicant had failed to disclose certain relevant facts to the court when it brought the urgent *ex parte* application – Applicant did not disclose to the court the fact that it was the applicant, in terms of the Project Finance Agreement entered into between applicant and the first respondent, who was responsible for managing the finances in respect of the project awarded to the first respondent, particularly the fact that in that behalf, applicant did have control over first respondent's bank account – Applicant, furthermore, did not disclose to the court the fact that applicant, in breach of the agreement, made transfers of substantial sum of money to third parties, including applicant's family members – Court found that in the result applicant acted in material breach of his bounden duty to act in utmost good faith in the urgent *ex parte* application proceeding – Court concluded therefore that the applicant has failed to make out a case for the confirmation of the rule *nisi* – Consequently the rule *nisi* was discharged and the application dismissed with costs.

ORDER

The rule *nisi* issued on 29 October 2015 is hereby discharged, and the application is dismissed with costs on the scale as between party and party.

JUDGMENT

PARKER AJ:

[1] This matter revolves around the phenomenon that has now become a quotidian practice in the supply of goods and services in the process of tender and implementation of tender. After the successful tenderers have been appointed, it becomes apparent that the successful tenderers do not have the necessary financial ability or technical capability required to supply the goods or services under the tender; and yet in their tender documents they paint rosy pictures of their financial ability and technical capability to perform the works or supply the goods in terms of the tender contract. The result is that third parties are drawn into situations which more often than not result in proceedings such as the present. In most cases, the third parties are the financial or technical backers of the not so capable successful tenderers.

[2] In the instant case, on 29 October 2015 the court granted interim relief in the form of an anti-dissipation interdict whereby a rule *nisi* was issued, returnable on 3 December 2015 but which could be anticipated by any respondent on not less than 24 hours' notice to the applicant. The application was brought *ex parte* and was heard on the basis of urgency; and so, papers were not served on the respondents. On this anticipated return day, Ms Campbell represents the applicant, and Ms Katjipuka-Sibolile represents the first and second respondents.

[3] The first and second respondents have moved to reject the grant of the interim interdict and confirmation of the rule *nisi*. They predicate their opposition on three main grounds.

[4] The first ground is that the applicant did not act in utmost good faith when it brought the urgent *ex parte* application because it failed to disclose material facts to the court. The second is that on the papers the applicant did not establish that the first and second respondents engaged in 'dissipation or squandering of funds in their effort to frustrate or defeat applicant's claim against them'. The third ground is that the applicant failed to meet the requirements for an interim interdict.

[5] For good reason, which will become apparent in due course, I shall consider the first ground first. On the principle of the duty of an applicant who brings an urgent *ex parte* application to act in utmost good faith by, for example, disclosing all relevant facts to the court, I rehearse here *in extenso* what I said in *Jacobs v Van Zyl* (A 106/2015) 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.'

[6] In the instant case, I make the following factual findings that are relevant to a consideration of the aforegoing principles and considerations respecting the instituting of urgent *ex parte* applications. There is nowhere in the founding affidavit

that the applicant discloses this material fact, namely, that it is, indeed, the applicant, in terms of the Project Finance Agreement ('the agreement') entered into between the applicant and the first respondent, who is responsible for managing the finances in respect of the project awarded to first respondent by third respondent, particularly, the fact that all expenses arising from the implementation of the project are paid promptly and in that behalf applicant did have control over first respondent's bank account. The applicant did not disclose the relevant fact that it is the applicant who, in breach of the terms of the agreement, made transfers to the tune of N$530,000 to third parties, including family members. On the probabilities, I reject applicant's reply that those transfers were authorized and agreed between the parties. The applicant does not reply on any agreement other than the Project Finance Agreement in the founding affidavit; and there is no term in that agreement which authorized such transfers.

[7] On the authorities, there are indubitably material facts which applicant owed a duty of utmost good faith to disclose to the court. An applicant does not act in utmost good faith where he or she does not disclose all material facts, that is, 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. It has been said that 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 in which the applicant had failed to act in utmost good faith. See *Jacobs v Van Zyl*, para 9.

[8] I hold that the applicant, having failed to disclose the aforementioned relevant and material facts to the court, acted in material breach of his bounden duty to act in utmost good faith in instituting the urgent *ex parte* application. On this ground, as Ms Katjipuka-Sibolile submitted, the application stands to be dismissed. This court does 'not hold itself bound by the order obtained under the consequent misapprehension of the true position'. (*Jacobs v Van Zyl*, para 13)

[9] In virtue of the view I take of the case, it serves no useful purpose to consider the respondents' application to strike certain matters from the applicant's replying

affidavit on the basis that they are new matters. The preponderance of the conclusion I have reached on the application is unaffected by any old or 'new' matter in the replying affidavit.

[10] For completeness, it behoves me to consider the tussle between counsel on both sides of the suit relating to respondents' anticipation of the return date. It was raised as a point *in limine* in applicant's counsel's heads of argument. In her heads or argument, Ms Campbell submits rhetorically 'whether a litigant can simply anticipate a return date at any time'. Ms Katjipuka-Sibolile's answer is that the respondents were entitled to anticipate the return day, as they did, in terms of rule 72(7) of the rules of court. I agree with Ms Katjipuka-Sibolile. In my opinion a 'person' mentioned in rule 72(7) is entitled to anticipate the return day 'on delivery of not than 24 hours' notice'. 'On delivery of not more than 24 hours' notice' is the only limitation on such entitlement.

[11] In the instant case, the order granting the rule *nisi* confirmed such statutory entitlement. The issue is, therefore, this. The respondents were as a matter of law either entitled to anticipate the return day on delivery of not less than 24 hours' notice or they were not. If they were, and they did pursue their entitlement upon delivery of not less than 24 hours' notice, their conduct cannot be faulted on any legal basis.

[12] With respect, I do not see how *Peacock Television Co. (Pty) Ltd v Transkei Development Corporation* 1998 (2) SA 259 (Tk), referred to the court by Ms Campbell, can dislodge the clear and unambiguous words of rule 72(7) of the rules. In our rule, a respondent is not allowed 'to anticipate the return day as he or she pleases' without more (See *Peacock Television Co. (Pty) Ltd*): A respondent desirous of anticipating the return day must do so 'on delivery of not less than 24 hours' notice'. If he or she satisfies this peremptory requirement, the anticipation of the return day cannot be said to be defective by any legal imagination.

[13] I do not see any requirement in rule 72(7) other than or in addition to the 'on-delivery-of-not-less-than-24-hours'-notice requirement. I should say; any attempt to

add any other requirement would be *per incuriam* because it would be outwit rule 72(7) of the rules. In any case, *Peacock Television Co. (Pty) Ltd* is of no assistance on the point under consideration because unlike in the instant case, in that case the rule *nisi* granted *ex parte* had been extended with acquiescence of the party affected by the rule *nisi*.

[14] Furthermore, in the instant case, the respondent did not agree extension of the return day as was the case in *Namibia Banker Services (Pty) Ltd v Ets Katanga Futur and Another* 2015 (2) NR 461 (HC), referred to the court by Ms Campbell; and so, *Namibia Banker Services (Pty) Ltd*, too, is of no assistance on the point under consideration.

[15] It follows inexorably that the point *in limine* has, with respect, no merit; and so, it is rejected.

[16] It remains to consider the matter of costs. Ms Katjipuka-Sibolile asked the court to grant costs on a scale as between attorney (legal practitioner) and client on the basis that the applicant did not act in utmost good faith by failing to disclose material facts. I decline to grant such punitive costs. It is because the applicant failed to so act when he brought the urgent *ex parte* application that is why the application has been dismissed. The applicant cannot be punished further on the same basis by the granting of punitive costs. In any case, it has not been established that the applicant acted vexatiously or frivolously in bringing the application, or that the applicant is guilty of some reprehensible behaviour. See Andries Charl Cilliers, *Law of Costs*, 3rd ed, p 4-14.

[17] Based on these reasons, I hold that the applicant has failed to make out a case for confirmation of the rule *nisi*; and the respondents have established that the rule *nisi* should be discharged and the application dismissed; whereupon, I make the following order:

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The rule *nisi* issued on 29 October 2015 is hereby discharged, and the application is dismissed with costs on the scale as between party and party.

C Parker

Acting Judge

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APPEARANCES

APPLICANT :	Y Campbell
	Instructed by Koep & Partners, Windhoek
FIRST AND SECOND RESPONDENTS:	U Katjipuka-Sibolile
	Instructed by Sisa Namandje & Co. Inc., Windhoek