



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

Case no: HC-MD-CIV-MOT-GEN-2016/00270

In the matter between:

ELIPHAS SHEEFENI IITA

APPLICANT

and

SANLAM LIFE NAMIBIA

1ST RESPONDENT

SANLAM NAMIBIA HOLDINGS (PTY) LIMITED

2ND RESPONDENT

**NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY
AUTHORITY**

3RD RESPONDENT

Neutral citation: *lita v Sanlam Life Namibia* (HC-MD-CIV-MOT-GEN-2016/00270)
[2017] NAHCMD 276 (04 October 2017)

Coram: USIKU, J

Heard on: 05 September 2017

Delivered: 05 September 2017

Reasons released on: 04 October 2017

Flynote: Practice – Applications and motions – Condonation for late filing of replying affidavit – Purported condonation application appended as last paragraph to the replying affidavit – Such application not an application contemplated by the rules of court and accordingly dismissed.

Practice – Applications and motions – Condonation for late filing of heads of argument – No acceptable explanation given for the default – No prospects of success shown on the merits – Court refusing to condone late filing of Applicant's heads of argument – Application dismissed.

Summary: The Applicant brought application claiming payment of N\$ 100 000.00 from his living annuity policy held with the 1st Respondent – 1st Respondent and 2nd Respondent opposed the application – Applicant delayed in filing his replying affidavit and his heads of argument – No acceptable explanation given for the delay – No prospects of success shown – Applicant's application dismissed.

ORDER

1. The Applicant's applications for condonation for the late filing of the Replying Affidavit and for the late filing of heads of argument, are hereby dismissed, as there is no reasonable explanation given for the non-compliance with the Rules, and there being no prospects of success shown, on the merits.
2. The Applicant's main application is therefore dismissed.
3. The Applicant is directed to pay the costs of the 1st Respondent, which costs include costs one instructing and one instructed counsel.
4. The Applicant is directed to pay the costs of the 2nd Respondent in respect of the misjoinder, which costs include the costs of one instructing and one instructed counsel.

JUDGMENT (REASONS)

USIKU, J:

Introduction

[1] On the 5th September 2017 I gave the order as set out above, after I heard arguments in the matter, and I undertook to give my reasons on the 4th October 2017. Appearing below are my reasons.

[2] The Applicant approached this court for an order allowing him to:

(a) redeem an amount of N\$ 100 000.00 from a living annuity policy entered into between himself and the 1st Respondent; alternatively, that he be allowed to,

(b) resile from the said living annuity policy, and that the 1st Respondent be ordered to pay the balance of Applicant's investment within 30 days of this order being made.

[3] The Applicant had initially challenged the constitutionality of the aforesaid living annuity policy, but later elected to abandon that challenge.

[4] On the hearing date, the Applicant addressed the court on two applications which the Applicant made, in regard to his non-compliance with the rules of court. The first application is in respect of Applicant's late filing of his Replying Affidavit. The second application is in regard to Applicant's late filing of his heads of argument. The two condonation applications are opposed by the two Respondents. The court directed the parties to address the court on the two condonation applications as well as on the merits of the main application.

Application for condonation for late filing of the Replying Affidavit

[5] The purported application for condonation for late filing of the Replying Affidavit, is a paragraph appended at the end of the same Replying Affidavit. Virtually the whole content of this paragraph constitutes in admissible hearsay, in that

the Applicant, without basis, attempts to justify the remissness of his legal practitioner in not finishing drafting the Replying Affidavit, on his behalf, on time.

[6] The supposed application does not set out a day, after service thereof on the Respondent, on or before which the Respondent is required to notify the Applicant whether the Respondent intends to oppose the application. All in all, the purported application does not meet the requirements of an application as set out by the rules. That application, therefore, stands to be dismissed, and this court shall treat the non-compliance with the rules as unexplained.

Application for condonation for late filing of the heads of argument

[7] As reasons for his late filing of his heads of argument, the Applicant states that the court did not provide for a specific date on which Applicant should file his heads of argument, but the court rather ordered that the parties must file their heads of argument in accordance with the Rules and Practice Directions.

[8] I quote hereunder the court order of the 28 June 2017, in which the parties were directed to file their heads of argument; namely:

'Having heard Silas-Kishi Shakumu, on behalf of the Applicant and Nicolaas Du Plooy, on behalf of the Respondents and having read the documents filed of record:

It is ordered that:

1. It is recorded that, as set out in the parties joint status report filed on 27/06/2017, the Applicant is no longer pursuing his intended interlocutory application (joinder) and accordingly abandons prayer 3 of the Notice of Motion.
2. The case is postponed to 05/06/2017 at 09:00 for hearing.
3. The parties are directed to file their heads of argument in accordance with the Rules and Practice Directives.
4. The Applicant is directed to attend to the binding, pagination and indexing of the file, in accordance with the Rules and Practice Directives.
5. The parties' attention is drawn to the provisions contained in Part 6 of the Rules of High Court.'

[9] Counsel for the Applicant argued that it was his first time in his practice, to be faced with an order where no specific dates within which to file heads of argument,

are furnished. He further argued that he only realized the effect of Rule 131(9) after he read the Respondent's heads of argument.

[10] Counsel for the Applicant did not explain:

- (a) the efforts he made to ascertain the dates within which he ought to file his heads, if he had doubts about the meaning of aforesaid order,
- (b) why the dates within which to file heads of arguments did not pose similar difficulties to counsel for the Respondents,
- (c) why he only realised about the meaning of the Rule 131(9) after he read the Respondent's heads of argument.

The merits

[11] The Applicant was employed by Namdeb, where he was a member of Namdeb Provident Fund. Upon his retirement, the Applicant transferred, on or about October 2011, 2/3 of his pension funds from Namdeb Provident Fund, to be invested in a life annuity with the 1st Respondent. For that purpose the Applicant completed the relevant forms to invest the aforesaid funds into a living annuity.

[12] On or about October 2014, the Applicant requested the 1st Respondent to advance in his favour N\$ 100 000.00 from his living annuity policy. The 1st Respondent refused to do so, on the basis that it is not permitted by law to reduce an annuity by attempting to loan money against it. The 1st Respondent pointed out that the purpose of the living annuity is to provide the life annuitant with an income, and what the Applicant requested was contrary to the very nature of an annuity.

[13] Feeling aggrieved by the decision of the 1st Respondent as aforesaid, the Applicant approached this court seeking the relief as set out hereinbefore.

[14] Counsel for Applicant argued that the 1st Respondent misrepresented to the Applicant on or about January 2012 that the Applicant could access his money and would be entitled to withdraw lump sums as he wished. This alleged misrepresentation occurred after the annuity policy was concluded, and is denied by the 1st Respondent.

[15] Furthermore the Applicant argued to the effect that the agreement between himself and the 1st Respondent was vitiated by mistake on the Applicant's side, as the Applicant believed he was entering into an investment contract which would allow him to have access to his money at all times. The source of this mistake was not canvassed by the Applicant. Furthermore the Applicant did not allege nor prove that such mistake was caused by a misrepresentation made by the Respondents.

[16] The Applicant did not go as far as specifying the particular clause(s) in the agreement which led him to believe that the agreement he entered into was not what the 1st Respondent says it is.

[17] Indeed the policy agreement in question reiterates in various clauses that all that the Applicant is entitled to in terms thereof is a monthly income for life and nothing more.

[18] An Applicant who alleges misrepresentation must prove that the Respondent:

- (a) made a representation, which was false,
- (b) that such representation influenced the Applicant to enter into an agreement,
- (c) the representation was intended to induce the Applicant to enter into the agreement, and
- (d) that the representation in fact induced the Applicant to enter into the agreement.

[19] None of the above elements were proved by the Applicant.

Analysis

[20] Insofar as Applicant's application for condonation is concerned, the Applicant bears the onus to establish good cause for his non-compliance with the rules. In other words, he must present a reasonable and acceptable explanation for his default.

[21] Furthermore, the Applicant must show prospects of success on the merits.

[22] As was set out earlier, Counsel for Applicant argued that his reason for delay in filing the heads of argument in time, was because the court order did not specify the precise date by which he ought to have filed the heads of argument.

[23] An explanation of the nature as given by counsel above is not acceptable. Counsel for the Applicant is expected to know what the Rules say about when he should file his heads of argument. Not knowing what the Rules say, in the circumstances, should operate as a basis for making counsel liable to pay the costs occasioned by his ignorance, *de bonis propriis*. Alternatively, lack of knowledge by counsel, in the circumstances, should constitute a ground for professional negligence, should his client sustain loss owing to want of such knowledge, as he ought to possess, or owing to want of care he ought to exercise.

[24] As was alluded to earlier on, the Applicant's application lacks prospects of success on the merits, as the alleged misrepresentation by the 1st Respondent has not been made out.

[25] For the reasons set out hereinbefore, and for the:

- (a) unexplained disregard of the Rules of court by the Applicant and his counsel, and the,
 - (b) lack of prospects of success of the application on the merits,
- the Applicant's application stands to dismissed, and is hereby dismissed.

[26] The 2nd Respondent has indicated in the Answering Affidavit that it was misjoined in this application, as it is not the holding company of the 1st Respondent. The Applicant has not dealt with this aspect in his Replying Affidavit. In argument, counsel for the Applicant did not advance any plausible explanation why the 2nd Respondent was joined in the present proceedings. For this reason I granted the 2nd Respondent the costs order it prayed for.

[27] As regards the costs, the costs must follow the event and I am satisfied that this matter warrants the costs of one instructing and one instructed counsel.

[28] For the foregoing reasons this court granted the undermentioned order, on the 05 September 2017, namely that:

1. The Applicant's applications for condonation for the late filing of the Replying Affidavit and for the late filing of heads of argument, are hereby dismissed, as there is no reasonable explanation given for the non-compliance with the Rules, and there being no prospects of success shown, on the merits of the matter.
2. The Applicant's main application is therefore dismissed.
3. The Applicant is directed to pay the costs of the 1st Respondent, which costs include costs of one instructing and one instructed counsel.
4. The Applicant is directed to pay the costs of the 2nd Respondent in respect of the misjoinder, which costs include the costs of one instructing and one instructed counsel.

B Usiku
Judge

APPEARANCES:

APPLICANT:

SK Shakumu

Instructed by Kishi Shakumu & Co Inc.

Windhoek

1st and 2nd RESPONDENT: G.Dicks together with N.Du Plooy

Instructed by HD Bossau & Co

Windhoek