

REPUBLIC OF NAMIBIA



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

CASE NO: HC-MD-CIV-MOT-GEN-2020/00089

In the matter between:

STANDARD BANK NAMIBIA LIMITED

APPLICANT

and

SILAS HAFENI NEKWAYA

1ST RESPONDENT

OWEN LOTTERING

(CAPACITY AS TAXING OFFICER)

2ND RESPONDENT

MERIAM CHUKWUNWEOLU (TAXING OFFICER)

3RD RESPONDENT

THE REGISTRAR OF THE HIGH COURT

4TH RESPONDENT

**THE DEPUTY SHERIFF FOR THE DISTRICT OF
WINDHOEK**

5TH RESPONDENT

Neutral Citation: *Standard Bank Namibia Limited v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089) [2020] NAHCMD 122 (26 March 2020).

CORAM: MASUKU J:

Heard: 20 March 2020

Delivered: 26 March 2020

Flynote: Civil Practice – urgent application – Rule 73 – application for stay of warrant of execution by Deputy Sheriff – authority to institute proceedings raised in terms of Rule 66 (1) (c) – deponent to applicant's founding affidavit omitted to state that she had been authorised to lodge the proceedings – effect of failure to state that one is authorised to bring proceedings on behalf of a legal *persona*.

Summary: The applicant launched an application on urgency, seeking to stay the execution of a warrant of execution by the Deputy Sheriff. The application was based on an affidavit by one of the applicant's employees who did not state anywhere in the affidavit that she had been properly authorised to bring the proceedings on behalf of the applicant. Once the 1st respondent raised that issue in his rule 66 notice, the applicant filed a supplementary affidavit dealing with this issue amongst other things.

Held: an applicant who brings proceedings on behalf of a juristic person should, in the founding affidavit, state that he or she is duly authorised to bring the proceedings on that legal persona's behalf, failing which the court will conclude that the proceedings are not authorised and that the deponent is acting on his or her own frolic.

Held that: an applicant is under an obligation to make his or her own case on the founding affidavit and that it is generally impermissible that a party seeks to make out a case in reply. Such allegations, if made in reply, are liable to be struck out.

Held further that: there are three sets of affidavits that are permitted in application matters, namely, the founding, answering and replying affidavits. In this regard, a party may not, as a matter of right file a supplementary affidavit without seeking and obtaining leave of court, in exceptional circumstances.

Held: that the supplementary affidavit filed by the applicant without having sought and obtained leave of court, attempting to deal with the omission

regarding the deponent's authority to bring the proceedings, would not be considered.

Considering that the only affidavit properly filed by the applicant did not make the necessary allegation regarding authority, the court concluded that the application was not properly authorised and the application was struck from the roll therefor, with costs.

RULING

MASUKU J:

[1] Presently serving before court is an application brought on urgency and in which the applicant, Standard Bank Namibia Limited, seeks the following order:

'1. Condoning and dispensing with the non-compliance with the rules of the High Court of Namibia relating to forms and service as is envisaged in the rules of this Court and hearing the matter on an urgent basis as contemplated in rule 73(3) of the rules of this court.

2. Suspending, pending the outcome of the review application, the execution of the writ of execution obtained by the respondent as the execution debtor issued to him on 24 January 2020. I marked (*sic*) **ST1** issued under case number **HC-MD-CIV-ACT-CON-2017/01164**

3. Alternatively, setting aside the warrant of execution issued by the 5th respondent on 24 January 2020 in favour of the first respondent against the applicant, marked **ST1** to the founding affidavit.

4. Further and alternative relief.'

[2] It would appear that there was an action, which the applicant instituted against Mr. Silas Hafeni Nekwaya, the 1st respondent. This action commenced in earnest and ended badly for the applicant when an application for absolution from the instance was granted with costs in the 1st respondent's favour by the trial judge. The 1st respondent will be referred to as the respondent in this judgment, acknowledging that he effectively, is the only respondent opposing the matter.

[3] Naturally, post-judgment processes were set in motion, culminating in a taxation before the Taxing Officer. On the date of the taxation, the applicant's legal practitioner applied for a postponement of the taxation. This application was refused and it appears the taxation proceeded in the absence of the applicant's legal practitioner. An allocator was subsequently issued in the amount of N\$ 880 000, which the applicant seeks to have reviewed and set aside. It would appear that that application for such review has been filed.

[4] The present application is hotly contested by the respondent. He raised points of law in terms of rule 66(1)(c) and sought to draw blood thereby. The following points of law were raised in the respondent's notice, namely, that the deponent to the founding affidavit is not authorised to bring the proceedings; the matter is urgent and that the applicant is not entitled to an interim interdict that it seeks.

[5] I intend, in the first instance, to deal with the first issue – lack of authority. The deponent to the founding affidavit, Ms. Sigrid Tjijorokisa, the Head: Legal Services of the applicant, states as follows in para 1 of the founding affidavit:

'I am the Head: Legal Services of the Respondent with the main place of business at 5th Floor, Standard Bank Centre, Town Square, Windhoek. The contents of this affidavit fall within my personal knowledge or appears from documents in my possession unless the context clearly indicates otherwise. When I make legal submissions, I do so on behalf of the respondent's legal practitioners whose advice I verily believe. I refer to the pleadings in the matter as they appear on e-justice and incorporate it herein.'

[6] I interpose to observe from the contents of the above quoted paragraph, that the deponent makes legal submissions on behalf of the applicant's lawyers on the one hand. On the other, she believes, so she says, the advice that they have given. There is a clear disconnect here but I will not pursue this issue any further, save to mention that it is unusual for clients to make legal submissions on behalf of their legal practitioners.

[7] As indicated, the respondent, in his rule 66 notice, complained that the proceedings launched by the applicant are not authorised by the applicant because there is simply no allegation to that effect in the founding affidavit, and, if I may add, there is no resolution filed in any event.

[8] In an apparent knee-jerk reaction, the applicant then filed a supplementary affidavit in direct response to the attack launched by the 1st respondent on the issue of authority. On a confessional note, the deponent stated on oath that she had filed the supplementary affidavit to 'correct some errors in the main affidavit'.

[9] In para 3 of the latter affidavit, the deponent states, 'It was also brought under my attention that I did not state that I am duly authorised to bring this urgent application. I am clearly authorised to bring this urgent application and the omission was done in error due to the urgency under which the affidavits were prepared.' It appears clearly that the applicant admits that it did not make the important allegation in its founding affidavit, hence the need to file the supplementary affidavit.

[10] The 1st respondent relied for its submission on a few cases, including *JB Cooling and Refrigeration CC v Dean Jacques Willemse t/a Armature Winding and Others*¹ and *Coin Security Namibia (Pty) Ltd v Jacobs and Another*.² These cases are authority for the proposition that a party who brings proceedings on behalf of a legal person must state that he or she is

¹ (A 76/2015) [2016] HAHCMD 8 (20 January 2016).

² 1996 NR 279 (HC).

authorised to bring the said proceedings, which was clearly not done in the founding affidavit in this matter.

[10] In the *JB Cooling* matter, Ueitele J referred to *Purity Manganese (Pty) Ltd v Otjozundu Mining (Pty) Ltd*,³ where Damaseb JP said:

‘It is now trite that the applicant need not do more in the founding affidavit than allege that authorisation has been granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority’.

[11] It is a matter of note that the applicant did not address this issue at all in its founding affidavit and thus could not, in reply, place proof of the authority as no authority whatsoever, was alleged. It is a trite principle of law that a party stands or falls on its founding affidavit. In the instant case, the applicant did not make out a case for the authority in the founding papers, nor did or could it do so in reply as that opportunity never came.

[12] It is also trite that in application proceedings, three sets of affidavits are permitted – the founding, answering and replying affidavits. In this regard, the learned authors, Herbstein & Van Winsen,⁴ say, ‘The ordinary rule is that three sets of affidavits are allowed, i.e. supporting affidavits, answering and replying affidavits. The court may in its discretion permit the filing of further affidavits.’

[13] There may be exceptional cases where a party is required for one reason or the other, to file a further affidavit in addition to the conventional three sets. This may only be done with the leave of court having been sought and obtained.

[14] The applicant, in this case, took the bull by the horns, having been made wise that its application was defective and instead of withdrawing the

³ 2011 NR 289 (HC) para...

⁴ Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed, Vol 1, Juta & Co, 2009, p 433.

proceedings, as they were still-born in the absence of the allegation of authority, filed an extra affidavit without seeking or obtaining the leave of court. This is not permitted and may not be done by a party as of right, as the applicant attempted to do.

[15] The court is accordingly not entitled, in the circumstances, to have regard to this belated supplementary affidavit, filed with the object of undoing and circumventing the very point of law properly raised by the 1st respondent, amongst other things. This must also be so considering that the said affidavit was improperly filed and without leave.

[16] All that remains for the court to consider is whether on the only affidavit properly filed, the applicant has made out a case that the proceedings are authorised and the answer is an obvious and emphatic No! This, I am fortified in saying because it is plain that the applicant readily conceded by attempting to file albeit impermissibly, a supplementary affidavit to 'correct' the anomaly.

[17] In the premises, I am of the considered view that the issue of authority is not a minor issue that may be 'forgotten' by a deponent and this is so regardless of the urgency alleged to attach to the matter. It is elementary but very important in the life of any proceedings. For this reason, it may not be overlooked without serious consequence.

[18] Authorisation of proceedings is a serious matter, and is not just an idle incantation required for fastidious reasons. The court must know, before it lends its processes, that the proceedings before it are properly authorised. This is done by a statement on oath, where applicable, with evidence thereof, that the person who institutes or defends the proceedings is properly authorised and is not on a reckless, self-serving frolic of his or her own.

[19] Once this is not stated in the founding affidavit, the only conclusion that may be reached is that the proceedings are not properly authorised and that inevitably, is the applicant's fate in these proceedings. It is accordingly

unnecessary to consider the other issues raised by the 1st respondent in his notice.

[20] The learned authors Herbstein & Van Winsen⁵ say, 'The necessary allegations must appear in the supporting affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement a case in a replying affidavit and will order any matter appearing in it that should have been in the supporting affidavits to be struck out.' This is the law even in this Republic as propounded in what has become known as the *Stipp* principle.⁶

Conclusion

[21] In view of what has been discussed and concluded above, it appears that the applicant has not made the necessary allegations regarding her authority to launch these proceedings. Because there is no allegation that the proceedings are authorised, the proceedings may not be allowed to continue and there is thus no need to consider the other points of law raised by the respondent.

Order

[22] The proper order, in the premises, is to strike the matter from the roll due to lack of authority to institute the proceedings and I do so accordingly. Resultantly I issue the order below:

1. The application is struck from the roll.
2. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed counsel.

T. S. Masuku
Judge

⁵ *Ibid* at 439-440.

⁶ *Stipp and Another v Shade and Others* Case 2007 (2) NR 627 (SC) at 634, para 29 - 31.

APPEARANCES:

APPLICANT: J. Jacobs

Instructed by: AngulaCo. Inc., Windhoek

RESPONDENT: T. Muhongo

Instructed by: Tjombe-Elago Inc., Windhoek