

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REASONS

CASE NO: HC-NLD-CIV-MOT-EXP-2020/00013

In the matter between:

STEFAN VAN WYK

APPLICANT

v

MATRIX MINING (PTY) LTD

FIRST RESPONDENT

HORST MARTIN BREMER

SECOND RESPONDENT

Neutral citation: *Van Wyk v Matrix Mining (Pty) Ltd* (HC-NLD-CIV-MOT-EXP-2020/00013) [2020] NAHCNLD 109 (19 August 2020)

Coram: JANUARY J

Heard: 15 July 2020, 27 July 2020, 3 August 2020

Delivered: 3 August 2020

Released: 19 August 2020

Flynote: Civil – Motion – Rule nisi – Urgent application – interdict – Ex parte – It is trite that good faith is a sine qua non in ex parte applications – Applicant owes a duty of

utmost good faith to the court to make full and proper disclosure – Failure to make full disclosure of all relevant facts to the court should lead to dismissal of the application – Non-compliance with rule 128 of the Rules of the High Court in relation to documents handed up as annexures in support of the urgent application – Submitting inadmissible hearsay evidence – The applicant did not meet the requirements for an application to found or confirm jurisdiction – The applicant applied for incompetent relief.

Summary: The applicant in this matter brought an *ex parte* urgent application for the attachment of property allegedly belonging to the first and second respondent to found jurisdiction, i.e. *ad fundandum jurisdictionem* alternatively to confirm jurisdiction, i.e. *ad confirmandam jurisdictionem*. It turned out that one of the properties' does not belong to the respondents as it is still under a hire-purchase agreement. The applicant did not act with the utmost good faith. There was non-disclosure of certain relevant information, non-compliance with rule 128 of the High Court rules, submitting of hearsay evidence, the applicant did not meet the requirements for an application to found or confirm jurisdiction and applicant applied for incompetent relief.

ORDER

1. The points in *limine* from 1 to 5 are upheld as it is clear that the Applicant did not comply with them; those are:
 - a) Material non-disclosure and applicant not acting in the utmost good faith;
 - b) Non-compliance with rule 128 of the Rules of the High Court in relation to documents handed up as annexures in support of the urgent application;
 - c) Submitting inadmissible hearsay evidence;
 - d) The applicant did not meet the requirement for an application to found or confirm jurisdiction;
 - e) The applicant applied for incompetent relief.

2. The *rule nisi* issued on 16 July 2020 is hereby discharged;

3. The Deputy-sheriff is directed to release the property attached, being 1. A Land Cruiser 200 series motor vehicle with registration number CR4107 and; 2. A Beechcraft Bonanza F33A light aircraft bearing registration number ZS-PJC, the property of the respondents, with immediate effect;
4. The applicant is ordered to pay the respondents' costs on an attorney and client scale which costs should include the costs of 27 July 2020 inclusive of the costs of one instructing and one instructed counsel;
5. The matter is struck from the roll and considered finalized.

REASONS

JANUARY J:

Introduction

[1] The applicant approached this court on 15 July 2020 with an urgent *ex parte* application, seeking for condonation for non-compliance with the rules of court in as far as urgency is concerned and praying for a *rule nisi* against respondents; as follows:

1. That the *rule nisi* be issued calling upon the respondents to show cause on Monday 27 July 2020 at 10h00 why the following order should not be made final;
 - 1.1 That non-compliance of the rules for this court is condoned due to urgency, insofar as it is necessary.
 - 1.2 The deputy sheriff of this honourable court is authorized and directed to attach, to confirm jurisdiction *ad fundandum*, alternatively *ad confirmandam*, all right, the title and interest of Respondents in the following property, to wit;
 - 1.2.1 A Land Cruiser 200 series Motor vehicle bearing registration number CR4107 and;
 - 1.2.2 A Beechcraft Bonanza F33A light aircraft bearing registration number ZS-PJC the property of first respondent.
 - 1.3 That the copy of this Court order is served on the respondents.

- 1.4 That respondents may anticipate this RULE NISI within 72 hours' notice, notice to be given by email; advmostert@gmail.com and telephone 0811294035.
- 1.5 That the order in paragraphs 1.2 above be of immediate effect.

[2] This court granted the *rule nisi* on 16 July 2020 with the return date on 27 July 2020. The rule was subsequently extended, and the matter was heard on 3 August 2020 with reasons to follow in due course. These are the reasons.

[3] The applicant stated in his founding affidavit that he is a businessman with his address at 01 Rua de Missão Catolica, Bairro Sao Pãulo, Cuando Cubango Province, Angola. The first respondent is a South African Company in the Western Cape, Republic of South Africa. The Second respondent is a peregrinus of this court and a South African citizen. The applicant stated that the second respondent was at the time of the *ex parte* application in close proximity of Ruacana within the jurisdiction of this court.

[4] The applicant further stated that the matter was of urgency because to the best of his belief the property was registered in the name of first respondent. Second respondent has right, title and interest in first respondent and due to his position in first respondent he can remove the properties within hours from the jurisdiction of this court within or out of Namibia. The applicant contended that the application was on an *ex parte* basis as notice to the respondents will precipitate the harm applicant wanted to avoid. He further stated that any delays in bringing the application were due to logistical problems experienced as a result of the COVID-19 lockdown in Angola.

[5] I was *prima facie* convinced that it was indeed a matter of urgency as certified by Mr Mostert, counsel for the applicant and that the application was brought in good faith. Accordingly the rule nisi was issued on 16 July 2020.

The background to the ex parte application

[6] The applicant stated in his founding affidavit that he and the second respondent planned a joint venture agreement in Angola for tourism, filming production and related matters. They came into contact with one Mackay, an international lady photographer

involved in the photographic industry and based in the United States of America from where she launches her operations. A document, an e-mail, is attached to the founding affidavit. The e-mail is addressed to one Martin, the first name of the second respondent. It was sent by one Piper from Piper Mackay Photography. The e-mail contains an itinerary and travelling details of 3 clients who were on tour. It turns out that it is from the same lady referred to as Mackay above.

[7] The applicant further states that according to the joint venture agreement Mackay deposited US\$40 000 and US\$30 000 respectively into the bank accounts of first respondent. Copies of two deposit slips of the said amounts paid into the account dated 01 August 2019 and 13 December 2019 of first respondent are attached. The money was allegedly paid for second respondent to arrange for logistical matters etc. The restrictions of the COVID 19 pandemic, however put everything on ice and the venture was placed on hold until 2021.

[8] Mackay in the meantime demanded the money deposited through her legal representative who is Mr Mostert. An amount of US\$14 000 was disbursed and an amount of US\$56 000 is allegedly due and payable.

[9] A copy of a letter of demand dated 03 June 2020 and the response thereto dated 12 June 2020 by Ms W Horn, representing the first and second respondents are attached to the founding affidavit. The first and second respondent deny that any amount is due and payable to the applicant. They claim that second respondent first made contact with Mackay. After numerous discussions and e-mails, Piper Mackay Photography contracted with first respondent via second respondent to act as a ground operator for tours in Angola. This includes obtaining permits for guests and conducting of tours as per their itineraries. First respondent was ready to proceed as per the agreement on 20 April 2020. Due to the COVID 19 pandemic, the operation could not materialize but the respondents are prepared to continue as per dates agreed to in 2021. Other business contacts were already engaged and the permits are in place. The respondents are not prepared to cancel the agreement.

[10] The respondents as per this email also do not consent to the jurisdiction of the Namibian courts as the agreements were made in South Africa and the payments were

made into first respondent's bank in South Africa from Piper Mackay's American bank. Respondents deny the mishandling of funds and claim that the money is in their trust account. It was used and/or is to be used for guests' accommodation, food, airfare, vehicle rental, fuel, guide expenses amongst others as per Piper Mackay's mandate.

[11] The respondents in the meantime filed a notice in anticipation of the *rule nisi* in terms of rule 72(7) of the High Court rules with answering affidavits and heads of argument opposing the *rule nisi* being made final.

[12] On 27 July 2020 Mr Mostert raised a point *in limine* in terms of rule 73(4) of the rules that respondents and their documents are not before court because they did not apply for leave to oppose. Mr Mostert accordingly applied for the *rule nisi* to be made final.

[13] The matter could not proceed on 28 July 2020 as scheduled due to compulsory isolation as a result of the Corona virus pandemic. The *rule nisi* was extended to 30 July 2020 when I dismissed the point *in limine* in chambers. The *rule nisi* was extended to 12 August 2020. Fortunately the compulsory isolation due to COVID 19 was uplifted and I could hear the matter on 03 August 2020.

[14] On the return date for the main argument neither the applicant nor Mr Mostert were present before court. Ms Horn presented arguments and opposed the *rule nisi* being made final. She applied for the discharge of the *rule nisi* with costs on a high scale. The respondent filed comprehensive heads of arguments for which I am grateful.

The respondents' case

[15] The applicant was required to file a replying affidavit on 27 July 2020 on or before 09h00. Nothing was filed. Applicant was absent and with no representation or explanation tendered. The respondents raised five points *in limine* which they submitted should result in the *rule nisi* being discharged. Those are:

- a. Material non-disclosure and applicant not acting in the utmost good faith;
- b. Non-compliance with rule 128 of the Rules of the High Court in relation to documents handed up as annexures in support of the urgent application;
- c. Submitting inadmissible hearsay evidence;

- d. The applicant did not meet the requirement for an application to found or confirm jurisdiction;
- e. The applicant applied for incompetent relief.

It turned out that the Land Cruiser motor vehicle does not belong to the respondents but is still subject to a hire-purchase agreement and remains the property of Toyota Financial Services until paid in full.

The law

[16] It is trite law in that an applicant bringing an *ex parte* application must act in the utmost good faith and if any material facts are not disclosed, whether it be willfully or negligently, the court may on that ground alone dismiss an *ex parte* application or discharge the rule nisi on the return date.

[17] An applicant has to comply with the following two requirements. First, a case for urgency has to be established. Second, applicant has to act in good faith and make a full and proper disclosure to the court or face the prospect of their *ex parte* order being discharged on the basis of non-disclosure if they failed to do so. The court will be entitled to dismiss the application without dealing with the merits as it, in essence, amounts to an abuse of the *ex parte* procedure.¹

[18] In *Prosecutor-General v Lameck and others*², Damaseb JP referred with approval to *Schlesinger v Schlessinger* 1979 (4) SA 342 (W) where it was held:

'A party approaching the court *ex parte* must make a full and frank disclosure of all the relevant facts and must act bona fide. Le Roux J deals with the effect of material non-disclosure in *ex parte* applications in the case of *Schlesinger v Schlessinger* 1979 (4) SA 342 (W) at 349A as follows:

- '(1) in *ex parte* applications all material facts must be disclosed which might influence a Court in coming to a decision;
- (2) the non-disclosure or suppression of facts need not be willful or mala fide to incur the penalty of rescission; and

¹ See: *Beukus v Kubitzausboerdery (Pty) Ltd* (SA18-2019) [2020] NASC (1 July 2020) paragraph 27

² 2010 (1) NR 156 at paragraph 24-26 at 167 I to 168 B

(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.'

B He then adds at 350B:

'It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.'

Non-disclosure

[19] The following material facts were not disclosed at the time of the *ex parte* application by the applicant:

13.1 The correspondence that were exchanged between the respective legal practitioners more specifically the letters of Adv. Mostert dated 14 May 2020 and 3 June 2020 respectively;

13.2 The failure to disclose the facts of what transpired between the respective legal practitioners between 14 May 2020 and when the application was launched on 15 July 2020;

13.3 The letter of Ms Wilmarie Horn dated 28 May 2020 in which the Respondents consent to jurisdiction of the High Court of Namibia;

13.4 The fact that the Respondents consented to the jurisdiction of this Honourable Court and provided a *domicilium citandi et executandi* address for service of any and/or all actions and/or applications by Stephan van Wyk against the First and Second Respondents;

13.5 Attaching the power of attorneys together with the resolution confirming the above stated facts in paragraph 13.4 hereof, of which the Applicant was in possession of the aforesaid documents;

13.6 The respective letters of the legal practitioners exchanged between them from 14 May 2020 until the bringing of the application.'

[20] In my view the stated non-disclosed facts are material. They are material to adjudicate on the application of urgency. On perusal of the documents it is evident that the applicant and respondents were already in communication about the matter long before the so-called urgent *ex parte* application. The statement of the applicant that notice to the respondent would precipitate the harm which he wanted to avoid can therefore not be true. Applicant's legal practitioner even forewarned respondents of an anticipated urgent application.

[21] Secondly, it is a notorious fact that Namibia's borders are under lockdown due to the COVID 19 pandemic making it impossible for the respondent to move property out of Namibia. Thirdly, the choice of *domicilium citandi et executandi* more probably meant a consent to jurisdiction than merely an address for service.³ In any event, the respondents consented to jurisdiction rendering it unnecessary to attach property to found or confirm jurisdiction.

The non-authentication of documents

[22] Rule 128 of the High Court Rules provides as follows:

'128 Authentication of documents executed outside Namibia for use within Namibia

(1) In this rule, unless the context otherwise indicates-

"document" means any deed, contract, power of attorney, an affidavit, a solemn or attested declaration or other writing; and "authentication" means, in relation to a document, the verification of any signature thereon.

(2) A document executed in any country outside Namibia is, subject to subrule (3), considered to be sufficiently authenticated for the purpose of use in Namibia if it is duly authenticated in that foreign country by-

(a) a government authority of that country charged with the authentication of documents under the law of that country; or

(b) a person authorised to authenticate documents in that foreign country, and a certificate of authorisation issued by a competent authority in that foreign country to that effect accompanies the document.

(3) Subrule (2) does not apply to an affidavit or a solemn or attested declaration purporting to have been made in Australia, Botswana, Canada, France, Germany, Lesotho, New Zealand, South Africa, Swaziland, the United Kingdom, Zambia or

³ See: *Beverly Building Society v De Courcy* 1964 (4) SA 264 (SR).

Zimbabwe before a commissioner of oaths or by whatever name called appointed as such in terms of any law of that country.’

[23] The applicant claims *locus standi* in the matter referring to a contract of cession, a copy of which is attached to the founding affidavit and reflecting as a cession of debt agreement between Piper Suo Mackay, the cedent and the applicant, the cessionary.

[24] The cession of debt document reflects the following:

“CESSION OF DEBT

Agreement made and entered into by and between:

PIPER SUE MACKAY

Passport Number: 5669701373

(hereinafter referred to as “**the CEDENT**”)

AND

STEFAN VAN WYK

Identity Number 700504 0003 7

of

01 Rua de Missao Catolica

Bairro Sao Paulo

Menongue

Cuando Cubango

Angola

[Tel:+244940888784](tel:+244940888784)

WhatsApp: +264811288510

(hereinafter referred to as ‘**the CESSIONARY**’)

(collectively referred to as ‘**the parties**’)

PREAMBLE

WHEREAS THE CEDENT HAS A CLAIM AGAINST MARTIN HORST BREMER, A SOUTH AFRICAN CITIZEN. (“THE DEBTOR”) FOR AN AMOUNT **56 000 USD (FIFTY SIX THOUSAND US DOLLAR)**

ARISING OUT OF MONEY ADVANCED AND WHICH HAS BECOME REFUNDABLE (HERINAFTER REFERRED TO AS "THE SAID CLAIM")

AND WHEREAS THE CEDENT HAS CEDED TO THE CESSIONARY THE CEDENT'S RIGHT, THE TITLE, INTEREST IN AND TO THE SAID CLAIM:

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. CESSION

In execution of the abovementioned contract of cession, the CEDENT hereby irrevocably cedes, transfers and makes over to the CESSIONARY the CEDENT's right, title and interest in and to the said claim.

2. AUTHORITY

The CEDENT hereby authorizes the CESSIONARY to notify the debtor of this cession.

3. WARRANTY AND LIABILITY FOR DAMAGE

It is understood and agreed that the CEDENT shall not be liable to the CESSIONARY in respect of any fees, costs or charges that may be incurred in prosecuting the said claim or for any damage that may be sustained by the CESSIONARY in the event of the said claim proving irrecoverable for any reason whatsoever.

4. ACCEPTANCE

The CESSIONARY hereby accepts the said cession upon and subject to the terms and conditions of this Agreement.

SIGNED at 829 Pine Ave, Long beach, CA 90813 on this the 1st day of July 2020 in the presence of the undersigned witnesses:

AS WITNESSES:

1. signed_____

2. signed_____

PIPER SUE MACKAY (signed)

CESENT

SIGNED at LUANDA on this the 09th day of July 2020 in the presence of the undersigned witnesses:

AS WITNESSES:

1. _____ signed STEFAN VAN WYK (Signed)
2. _____ signed _____ **CESSIONARY**

[25] I accept that the cession agreement constitutes the cause of action. The cession agreement is a contract between the applicant and Piper Sue Mackay. It was signed in the United States of America by Mackay and in Angola by the applicant respectively. In accordance with rule 128(3) none of the two States fall within the exemption of countries for which no authentication is required. The signatures of both Mackay and the applicant therefore ought to have been authenticated on the cession agreement. Both their signatures have not been authenticated. This court can therefore have no regard to this document.

[26] I respectfully agree with Masuku J where he states:

'It is important to mention that the requirement for authentication, is not an idle or pedantic one. It serves a useful purpose, namely, to verify the identity and signature of the person indicated in the document and which no person in Namibia would be in a position to positively identify and confirm. This is to avoid the possibility of hirelings in foreign countries, signing fraudulent documents and having them placed before our courts for purposes of deciding matters, thus pulling wool over the court's eyes.'⁴

[27] There is therefore no cause of action before the court and the *rule nisi* should be discharged on this ground alone.

Hearsay evidence

[28] The applicant attached to his founding affidavit an e-mail from Piper Mackay to the second respondent about an itinerary of three of her clients, copies of proof of two payments by Piper Mackay Photography, a copy of letter of demand from Adv. Mostert to W Horn Attorneys, an e-mail from W Horn Attorneys in response to the letter of demand and e-mails between Piper Mackay, the second respondent, the applicant and

⁴ See: *Ex Parte Kamwi* (HC-MD-CIV-MOT-EXP-2019/00141) [2020] NAHCMD 152 (7 May 2020).
See also: *Esterhuizen v KarslruH Number One Farming CC* (HC-MD-CIV-ACT-DEL-2016/02394) [2020] NAHCMD 64 (21 February 2020).

a certain Riaan. This last mentioned e-mails were not filed at the time of the urgent application.

[29] Furthermore copies of documents from Piper Mackay Photography reflecting information about tours and itineraries were filed after the application. The correctness of all these documents has not been confirmed by either their authors or by Mr Mostert. It is only in exceptional circumstances that hearsay would be admissible provided that a deponent swears on affidavit of information and belief and stating the source of his/her information.

'As a general rule hearsay evidence is not permitted in affidavits, and it may accordingly be necessary to file affidavits of persons other than the applicant who can depose to the facts. In fact, this is very often done in interlocutory matters (as distinct from matters in which the rights of parties concerned are finally decided). Where urgency or other special circumstances appear to justify it doing so the Court has allowed the deponent to state that he is informed and verily believes certain facts on which he relies for relief.' (Herbstein and Van Winsen Civil Practice of the Superior Courts in South Africa 3rd ed (81N4).⁵

[30] The applicant in his founding affidavit refers to legal principles i.e. that he has *locus standi*; that the purpose of the application is to attach property *ad confirmandam jurisdictionem*, alternatively *ad fundandum jurisdictionem*; the property may be removed from the jurisdiction of this court; the application is based on urgency and on *ex parte* basis. He stated that he is a businessman. It is highly unlikely that as a businessman the applicant will have knowledge of these legal principles. The logical inference is that Mr Mostert advised the applicant of these legal principles. There is no confirmatory or supporting affidavit by Mr Mostert or whoever advised the applicant on these legal principles. The reference to the legal principles is therefore inadmissible hearsay.

[31] 'The authors of the well-known handbook on civil procedure Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa vol 1 5ed E at 444 reiterate the general rule that hearsay is not permissible in affidavits without an affidavit by the person who can depose to the particular facts. Hearsay will only be permitted in certain specified and exceptional circumstances, e.g. urgency, but then the person relying on it has to state: why he could not obtain firsthand knowledge, who the source of such knowledge is and why he or she believes that knowledge to be true. If these requirements are not complied with, hearsay

⁵ See: *Mahamat v First National Bank of Namibia Ltd* 1995 NR 199 (HC) headnote.

evidence will not be permitted. (*Wiese v Joubert en Andere* 1983 (4) SA 182 (O) at 195A - B.) As indicated before, in respect of inadmissible evidence (hearsay), prejudice is irrelevant.⁶

[32] The applicant did not comply with any of the requirements for the exception to the hearsay rule to apply. The content of his founding affidavit in this regard thus has no evidentiary value.

Requirements to found or confirm jurisdiction

[33] An applicant seeking an order of attachment ad fundandam jurisdictionem or ad confirmandam jurisdictionem has to satisfy the following requirements:

1. That he has a *prima facie* cause of action against the proposed defendant;
2. That the proposed defendant is a peregrinus;
3. That the proposed defendant is within the area of jurisdiction of the court or that property in which the proposed defendant has a beneficial interest is within that area.⁷

I have already found that the court cannot have regard to the cession agreement which purports to be the cause of action. There is therefore no cause of action. Furthermore the perigrini respondents' have consented to jurisdiction, thus doing away with the necessity of an application founding or confirming jurisdiction. However, it is only where the plaintiff/applicant is an incola and if the peregrinus defendant/respondent consents that the court will be vested with jurisdiction.

'Thus, a submission to the jurisdiction by a *peregrinus* is sufficient to give the court jurisdiction without attachment of property ad *fundandam jurisdictionem*.⁸

[34] Where both plaintiff/applicant and respondent are peregrinii, consent will not automatically confer jurisdiction unless one of the usual *rationes jurisdictionis* is present. It was held in *Briscoe v Marais* 1992 (2) SA 413 at 416 E-G:

⁶ See: *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232 (HC) at 239 D-F.

⁷ See: *Augusto v Socieda De Angolana De Commercio International Limitada (Sacilda)* 1997 NR 213 (HC).

⁸ See: *Cinemark (Pty) Ltd v Transkei Hotel* 1984 (2) SA 332 (W).

'By prorogation a defendant subjects his person to the jurisdiction of the Court, but that is not enough. One or more of the traditional grounds of jurisdiction must also be present.'

It follows that, in the case of an attachment ad fundandam jurisdictionem of assets of a peregrinus defendant, the attachment, being the sole ground upon which the Court can exercise jurisdiction, cannot be replaced by a consent to jurisdiction as such consent in itself cannot confer jurisdiction on the Court. Only where a causa jurisdictionis, apart from an attachment, exists, i.e. only in the case of an attachment ad confirmandam jurisdictionem, can the attachment become unnecessary as a result of a consent to jurisdiction.'

Peregrinus applicant/respondents

[35] The applicant on his own admission is residing in Cuando Cubango Province, Angola. The first respondent is a South African Company having its place of business in Myburghpark, Langebaan, Western Cape, Republic of South Africa. The second respondent is resident at Beachwood Estate, Rosetta, Kwazulu Natal.

[36] The applicant and respondents are therefore all peregrini of this court because they are neither domiciled nor resident within the area of this court's jurisdiction. A court will exercise jurisdiction over an incola, referring to a person who is either domiciled or resident within the area of its territorial jurisdiction provided that his/her residence is of some permanent or settled nature.

[37] Herbstein and Van Winsen⁹ state the law where both applicant and respondent are peregrinii that a person who is not resident within South Africa may apply for the attachment of the property of another person who is also not resident within South Africa if the cause of action arose in South Africa. In other words before the Courts will attach property of one peregrinus at the instance of another, they must have jurisdiction over the contemplated suit between the parties i.e. either *re sitae*, *loci contractus*, *loci solutionis* or on the ground of a delict committed within the jurisdiction of the court.¹⁰ I find this authority persuasive and approve it. In this case before court the purported cause of action, the cession agreement, did not arise in Namibia nor is it to be executed in Namibia. Furthermore both the applicant and respondents are peregrine. In view of

⁹ The *Civil Practice of the High Courts of South Africa* 5th Ed 2009 at p 102 paragraph B Peregrine applicants.

¹⁰ See: *Slabber v Blanco and Others* 1991 NR 404 (HC)

my decision of incompetent relief, I do not find it necessary to decide if the applicant is entitled to the relief claimed.

Costs

[38] The general rule is that the party in whose favour a judgement is given should get costs. The court has a discretion to be exercised judicially in this regard. This general rule is not departed from without good grounds. The party in whose favour the judgement is given is not necessarily the successful party in relation to costs.¹¹ In this application, the respondents were successful in raising points *in limine* that the applicant did not comply with. Respondents were successful in their opposition to the rule *nisi*. It turned out that the applicant and his legal representative did not act with the utmost good faith. In my view, the respondents were substantially successful and it will be reasonable and fair that they are to be awarded costs. The applicant abused this court's process and non-disclosure of material facts justify punitive costs.¹²

[39] In the result the following order was made:

1. The points in *limine* from 1 to 5 are upheld as it is clear that the Applicant did not comply with them; those are:
 - a) Material non-disclosure and applicant not acting in the utmost good faith;
 - b) Non-compliance with rule 128 of the Rules of the High Court in relation to documents handed up as annexures in support of the urgent application;
 - c) Submitting inadmissible hearsay evidence;
 - d) The applicant did not meet the requirement for an application to found or confirm jurisdiction;
 - e) The applicant applied for incompetent relief.
2. The *rule nisi* issued on 16 July 2020 is hereby discharged;

¹¹ See: *The Civil Practice in the Superior Court of South Africa*, Herbstein and Van Winson, 3rd Edition at p 478. Who is the successful paragraph B

¹² See: *Alexander v Minister of Justice and Others* 2009 (2) NR 712 (HC) at 737 paragraph 80 to 737 paragraph 82

3. The Deputy-sheriff is directed to release the property attached, being 1. A Land Cruiser 200 series motor vehicle with registration number CR4107 and; 2. A Beechcraft Bonanza F33A light aircraft bearing registration number ZS-PJC, the property of the respondents, with immediate effect;
4. The applicant is ordered to pay the respondents' costs on an attorney and client scale which costs should include the costs of 27 July 2020 inclusive of the costs of one instructing and one instructed counsel;
5. The matter is struck from the roll and considered finalized

H C JANUARY

JUDGE

Appearances:

For the Applicant:

Mr C Mostert

Of Suite 3, 3rd Floor, Namlex Chambers
Independence Avenue, Windhoek

For the Respondents:

Mr M Boonzaaier (with him Ms W Horn

Instructed by W Horn Attorneys

Of Erf 0496 Immanuel Shifidi Street, Oshakati