REPUBLIC OF NAMIBIA REPPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 147/2013

In the matter between:

DR MATTI KIMBERG PRACTICE **APPLICANT**

and

TUULIKKI MWAFUFYA-SHIKONGO N.O. **1ST RESPONDENT**

SUZETTE BOTES **2ND RESPONDENT**

PENDA L YAOTTO N.O. **3RD RESPONDENT**

DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK **4TH RESPONDENT**

Neutral citation: *Dr Matti Kimberg Practice v Mwafufya-Shikongo N.O.* (LC 147/2013) [2013] NALCMD 32 (04 October 2013)

Coram: HOFF J

Heard: **06 September 2013**
Delivered: **27 September 2013**
Reasons: **04 October 2013**

ORDER

The application is dismissed.

JUDGMENT

HOFF J:

[1] The applicant approached this court on 6 September 2013 for the following relief:

‘1. Dispensing with the forms and service and compliance with the time limits prescribed by the rules of this court, as far as may be necessary, and condoning applicant’s failure to comply therewith and directing that this matter be heard as one of urgency as envisaged in Rule 6(24) of the Rules;

2. Staying the execution of the order of this honourable court in case number LC 17/2013 dated 25 January 2013, which order was made in consequence to an award made by the first respondent on 30 November 2012 under case number CRWK 905-11, pending the outcome of appeal proceedings to be instituted by the applicant within 5 court days of this court’s order;

3. Staying, in consequence to paragraph (2) above the writ of execution issued by this court on 1 February 2013;

4. Such further and/or alternative relief as the court may deem fit.’

This application was opposed by the second respondent.

[2] Dr Matti Kimberg in his founding affidavit in support of the application narrated the sequence of events which necessitated approaching this court on an urgent basis.

[3] It is common cause that the second respondent was employed as a debtors/creditors controller by the applicant. During a disciplinary hearing the second respondent was dismissed by the applicant on 25 April 2011.

[4] The applicant in his founding affidavit stated that on or about 27 October 2011 he received a referral of dispute to conciliation or arbitration. This document he forwarded to LJW Labour Practitioners CC for the attention of Mr Williers in order to represent the applicant during the conciliation and arbitration proceedings at the Office of the Labour Commissioner. A conciliation hearing was set down for 16 November 2011. Dr Kimberg stated that due to numerous reasons relating to *inter alia* a serious motor vehicle collision in which both himself and his wife were involved which necessitated him to undergo medical treatment in South Africa the conciliation meetings were postponed at his behest on several occasions. On 1 August 2012 a conciliation meeting took place but was unsuccessful and the dispute was referred for arbitration.

[5] Dr Kimberg stated that as it was imperative for both himself and his wife to testify at the arbitration hearing it was crucial that the matter be set down for a date when both of them were in town and available. The arbitration hearing was due to the unavailability of himself and his wife postponed on several occasions. The matter was eventually set down for 6 November 2012 and he instructed Mr Williers of ‘LJW’ to apply for a postponement as his wife was out of the country and he himself was involved with patient treatment in hospitals in Windhoek. A certain Mr Kellerman also employed by ‘LJW’ attended the arbitration hearing, applied for a postponement but the application for postponement was refused. Mr Kellermann then opted to leave before the arbitration hearing commenced.

[6] On 30 November 2012 the first respondent granted an arbitration award under case number CRWK 905/2011 in favour of the second respondent ordering the applicant to pay the amount ofN$135 000 to the second respondent.

[7] The applicant in his founding affidavit continued to state that he instructed 'LJW' to appeal the award so granted in favour of second respondent and he was informed that instructions would have to be forwarded to a legal practitioner.

[8] Mr Ruben Philander of the law from Lorentz Angula Inc. was instructed on 12 December 2012 to draft an application 'to stay the arbitration award' and/or attend to the review thereof and/or to institute appeal proceedings.

[9] On 17 December 2012 a draft application for rescission with supporting affidavit was forwarded to the offices of "LJW'. Due to the fact that his practice was already closed they could not timeously depose to the necessary affidavits. On 11 January 2013 Mr Williers addressed e-mail correspondence to the instructed legal practitioner Mr Ruben Philander indicating the necessity of also bringing a condonation application.

[10] On 30 January 2013 applicant received a notice from the third respondent (a labour inspector) to enforce the award granted in favour of second respondent. Mr Williers was informed of this notice. In this notice Dr Kimberg was informed *inter alia* to comply with the award within a period of 10 days of receiving the letter failing which the award would be enforced by means of execution proceedings. On 6 February 2013 Mr Williers forwarded the notice to Mr Philander asking for instructions in that regard.

[11] On 7 March 2013 an assistant Deputy Sheriff attended applicant's practice consulting rooms with a warrant of execution and attached certain movable assets even though it was explained that none of the attached assets belonged to the applicant. On 12 March 2013 Mr Williers received e-mail correspondence from a candidate legal practitioner, a certain Mr Quinton Hoaseb, employed by Lorentz

Angula Inc. requesting information from Dr Kimberg to enable them to finalise the ‘application’. The e-mail was forwarded to Mr Williers on the same day. On 13 March 2013 the wife of Dr Kimberg, Dr Pedro Kimberg replied to Mr Williers explaining that she would have to peruse the file to obtain the required information. Mr Hoaseb was likewise informed. Later the same day both Mr Williers and Mr Hoaseb were provided with all the information requested.

[12] On 18 March 2013 another e-mail was received from Mr Hoaseb requesting, certain documents. Dr Kimberg was further informed that the application was ‘complete’ but for the documents he then and there requested. Those documents were forwarded to Mr Hoaseb on the same day.

[13] On 23 March 2013 when no further communication was received from the offices of Lorentz Angula Inc. Mr Williers addressed an e-mail to Mr Ruben Philander in which Mr Philander was requested to urgently furnish a ‘progress report’.

[14] On 4 April 2013 an e-mail was received from Mr Philander informing Dr Kimberg that he has had telephone conversations with the Deputy Sheriff regarding an auction of the attached movables which sale was scheduled to be held on 6 April 2013. Dr Kimberg stated that he was informed by Mr Philander that he ie, Mr Philander, was preparing an urgent application to seek an order to stay the execution proceedings pending the outcome of the application for the rescission of the reward.

[15] On the same day the wife of Dr Kimberg addressed a letter to Mr Philander informing him that the Deputy Sheriff had threatened to remove the attached moveable assets on 27 March 2013. She contacted Mr Williers who then handled the matter further with Mr Philander’s offices.

[16] On 5 April 2013 Dr Kimberg stated that he had been informed that Mr Philander had reached an agreement with Ms Dausab of the Legal Aid Clinic, acting on behalf of the second respondent, to postpone the sale in execution and that the application to stay would proceed in the normal course. Dr Kimberg stated

that he was not aware that the application to stay the execution ever did proceed in normal course.

[17] On 7 April 2013 a copy of this agreement was received and the wife of Dr Kimberg addressed a letter to Mr Williers stating that it was necessary to discuss the further process in that regard.

[18] On 30 April 2013 Messrs Lorentz Angula received urgent correspondence from Ms Dausab on behalf of second respondent informing that the Office of the Labour Commissioner confirmed that no application for rescission was filed and further informing them that the instructions from second respondent were to have the Deputy Sheriff proceed with the sale in execution.

[19] It appears that the 'application' had been served on the Labour Commissioner Office on 1 February 2013.

[20] On 27 June 2013 Mr Williers received e-mail correspondence from Mr Philander to follow up on the rescission application.

[21] Dr Kimberg in his founding affidavit then dealt with what is referred to as 'recent events'.

[22] On 17 July 2013 Mr Williers received correspondence from the first respondent dated 16 July 2013 rejecting the application for rescission of the award granted in favour of the second respondent.

[23] On 29 July 2013 Adv Steve Rukoro acting on instructions of the second respondent, addressed letters to Mr Philander and the messenger of court instructing the messenger to proceed with the execution of the arbitration award 'soonest'.

[24] Dr Kimberg further stated that as seemingly no progress was made in the matter and the Deputy Sheriff attended his practice almost every day to remove the

attached assets his wife and himself decided to instruct another legal practitioner to assist them and instructions were given to Messrs Neves Legal Practitioners on or about the 19th day of August 2013. He, ie Dr Kimberg, stated that he realized that the matter could not go on like that and had to be dealt with urgently especially as one of the attached moveable assets is a highly specialized sonar machine which is worth in excess of N$1,000,000 and may only be removed and handled by specialist technicians.

[25] Ms Wylie of Neves Legal Practitioners immediately proceeded to address correspondence to the Deputy Sherifff and to Ms Dausab in an attempt to stay the pending sale in execution without having to bring an urgent application.

[26] Ms Dausab eventually responded on 22 August 203 informing Ms Wylie that the Legal Aid Clinic was no longer representing the second respondent.

[27] Dr Kimberg stated that as the second respondent could also not be reached he was left with no alternative but to bring an application to stay the execution proceedings. He explained that in support of such an application the amount of N$135 000 has been paid into the trust account of Messrs Neves Legal Practitioners and a bond of security was issued by Ms Wylie and provided to the Deputy Sheriff. Dr Kimberg stated that he also instructed Ms Wylie to attend to the necessary documents to note his appeal against the award issued by the first respondent on 30 November 2012 as soon as possible.

[28] Mr Rukoro who appeared on behalf of the second respondent pointed out that the application was served only during the afternoon of 4 September 2013 on second respondent. It was also submitted that on the facts set out in the founding affidavit no case for urgency was been made out.

[29] It was submitted by Mr Rukoro that the moveable assets to be sold in execution had been attached as early as 7 March 2013 almost 5 months earlier and

that since that date the applicant has not brought an application to stay, has not noted an appeal against the award or has not instituted review proceedings.

[30] Mr van Zyl who appeared on behalf of the applicant submitted that the applicant only came to know about the sale in execution at the end of August and thereafter did not do nothing but attempted to get an agreement to stay the sale in execution once again. It was submitted after the application for rescission was refused by the arbitrator that there was no date for the sale in execution and that it would have been premature to bring an application to stay the sale in execution because there would have been no imminent execution.

[31] Mr van Zyl further submitted that even though there are dates and periods of time which are not fully explained to the court in the founding affidavit, it shows that the applicant had relied on its legal representatives to take the necessary steps as he gave the necessary instructions to do so. It was submitted that should this court find that there was indeed remissness or inaction that it was not blameable conduct on the part of the applicant.

[32] Rule 6(24) of the Labour Court Rules provides that ‘in urgent applications the court may dispense with the forms and service provided for in these rules and may dispose of the matter at such time and place and in accordance with such procedure (which must as far as practicable be in terms of these rules) as it considers just and equitable in the circumstances’.

[33] Rule 6(26) of the Labour Court Rules provides that in ‘every affidavit filed in support of an application brought under subrule (24), the applicant must set forth explicitly –

(a) the circumstances which he or she avers renders the matter urgent;

(b) the reasons why he or she could not be afforded substantial redress at a hearing in due course;

[34] An applicant must comply with both these requirements set out in Rule 6(26) *(a)* and *(b).* (See *Salt and Another v Smith* 1990 NR 87 HC, 1991 (2) SA 186 (Nm).

[35] In *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC) it was held that when an application is brought on the basis of urgency the institution of proceedings should take place as soon as reasonably possible after the cause thereof has arisen.

[36] It is trite law that in application procedure all the essential averments must appear in the founding affidavit and the court will not allow an applicant to make or supplement his case or his replying affidavit. (See *Coin Security Namibia (Pty) Ltd v Jacobs and Another* 1996 NR 279 (HC) at 288A-B).

[37] The applicant approached this court for an order staying the sale in execution (which was due to take place the next day) pending the outcome of appeal proceedings to be instituted by the applicant within 5 days of this court's order. The appeal to be instituted will be against the award given in favour of the second respondent by the arbitrator on 30 November 2012.

[38] It is evident from the founding affidavit after the award was given in favour of the second respondent, that the applicant gave instructions to the law firm Lorentz Angula Inc. to draft an application to stay the execution or to institute review 'and/or' appeal proceedings.

[39] On 18 March 2013 the applicant was informed by his legal representative (Mr Hoabeb of Lorentz Angula Inc.) that the application was complete but for certain documents which were requested and provided on the same date.

[40] It is apparent from the founding affidavit that the applicant was able to avert a sale in execution of movable assets due to take place on 6 April 2013 by agreement between the parties. A condition was that the applicant would proceed with an application to stay the sale in execution in the normal course.

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[41] The applicant in its founding affidavits stated that he was not aware that the application to stay the execution ever did proceed in the normal course. Why the application to stay the execution did not proceed in the normal course is not explained by the applicant at all.

[42] It is further common cause that an application to the arbitrator to have the award rescinded was rejected by the arbitrator and that Mr Williers was so informed on 17 July 2013.

[43] The applicant stated (in paragraph 53) that as seemingly no progress was made in the matter and the Deputy Sheriff attended his practice almost every day he decided to instruct another legal practitioner on or about 19 August 2013 since he realised that the matter had to be dealt with urgently.

[44] Mr van Zyl submitted that the first time the date of 7 September 2013 was mentioned as the date on which the sale in execution was due to take place, was in a letter dated 22 August 2013 addressed to the Deputy Sheriff by Neves Legal Practitioners in which it was stated *inter alia* that the application to stay the sale in execution 'will be brought . . . well in time before the next sale in execution scheduled for the 07th day of September 2013'.

[45] I agree that the time an applicant first became aware of the date when a sale in execution will proceed is a factor to consider in deciding whether or not such an applicant has made out a case for urgency. However in my view a court must decide the issue of urgency in view of the circumstances of each application.

[46] Given the fact that the applicant narrowly averted the sale in execution on 5 April 2013 on the understanding that the application to stay would proceed in the normal course and that an 'application' had already been completed during March 2013, the applicant is silent as to what further steps had been taken by himself to prosecute such an application to its natural conclusion. This court must

accept, in view of applicants statement that he was not aware that the application to stay the execution ever did proceed, that no such application was ever filed by the applicant.

[47] This court must also accept, in the absence of applicant stating in the founding affidavit when he was so informed by Mr Williers, that he must have been informed on the 17th day of July 2013 or soon thereafter that the rescission application was rejected by the arbitrator on 16 July 2013. The applicant stated that on 19 August 2013 instructions were given to Messrs Neves Legal Practitioners as he realised that the matter had to be dealt with urgently.

[48] The applicant failed to inform this court what had transpired between 17 July 2013 and 19 August 2013 (a period of more than a month) when he realised the matter had to be dealt with urgently. No explanation was given why instructions were given only on 19 August 2013.

[49] In *Bergmann* (supra) it was explained that it 'often happens that, whilst pleadings are being exchanged, or whilst execution procedures are under way, the litigating parties attempt to negotiate a settlement of their disputes or some arrangement regarding payment of the judgment debt instalment. The existence of such negotiations does not *ipso facto* suspend the further exchange of pleadings or stay the execution proceedings. That will only be the effect if there is an express or implied agreement between the parties to that effect'.

[50] On 5 April 2013 an agreement to stay the sale in execution was reached between the parties on a certain condition. That condition, as admitted by the applicant, was never complied with. This inaction on the part of the applicant resulted in the scheduling of the second sale in execution. This time no agreement could be reached and in my view it cannot now be argued because there was no imminent sale in execution at that stage that there was no need for the applicant to bring an application to stay the sale in execution.

[51] The cause of this application has arisen, at the earliest already during December 2012 and at the latest on 17 July2013 or soon thereafter when the rescission application was refused. In both instances applicant has not as soon as reasonably possible acted, prior to launching this application.

[52] In B*ergmann* it was held that one of the 'circumstances under which a court, in the exercise of its judicial discretion may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fides* or through his or her culpable remissness or inaction'.

[53] I can comprehend that the applicant who has a busy medical practice would seek the assistance of a labour consultant in dealing with labour related queries or disciplinary proceedings however there comes a stage beyond which a litigant may not hide behind the conduct of his or her legal representative.

[54] In *Immelmann v Loubser en 'n Ander* 1974 (3) SA 816 (A) at 824A-B the Appellate Division referred with approval to the case of *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) where Steyn CJ stated the following at 141C-E:

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad *misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in respect to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are'.

(See also *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (AD) at 799F; *Namhila v Johannes* case no. I 3301/2011 unreported judgment of this court delivered on 25 January 2013 at paras [94] - [96].

[55] Even though the afore-mentioned quotation relates to an instance where there was non-compliance with the Rules of Court, in my view it is of equal application in the present matter where lack of diligence or inaction is blamed (albeit impliedly) on someone else, ie either on Mr Williers of the law firm Lorentz Angula Inc.

[56] In my view the applicant cannot, in view of his personal knowledge of lack of progress referred to (supra) be said to be blameless in respect of bringing this application on an urgent basis, an urgency which in my view has been self-created.

[57] In these circumstances, ie due to the failure by applicant to show that this court should exercise its discretion in favour of hearing this application as one of urgency, the application was dismissed, and no cost order made.

[58] Although other points in limine were raised by the second respondent I do not deem it necessary to consider them in view of my finding on the issue of urgency.

E P B HOFF

Judge

APPEARANCES

APPLICANT: C van Zyl

Instructed by Neves Legal Practitioners, Windhoek

SECOND RESPONDENT: S Rukoro

Instructed by Directorate of Legal Aid, Windhoek