REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 35/2013

In the matter between:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES **APPLICANT**

And

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY **RESPONDENT**

***In re*:**

In the *ex parte* application of:

IN RE: DECLARATION OF RIGHTS IN CASE NO: 244/2007 (HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & ANOTHER) PURSUANT TO SUPREME COURT JUDGMENT IN CASE NO: SCR1/2008 (HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & 2 OTHERS)

Neutral citation: *Namibia Financial Institutions Supervisory Authority v Hendrik Christian t/a Hope Financial Services* (A 35/2013) [2015] NAHCMD 87 (31 March 2016)

Coram: GEIER J

Heard: **21 May 2014**

Delivered: **21 May 2014**

Released: **31 March 2016**

Flynote: Practice - Applications and motions - Application for condonation for late filing of notice to oppose - Respondent exceeding time line set by court order by a few hours - Court holding that as the history of the matter showed a serious resolve on the respondent's part to oppose the main application and to be heard on the merits thereof and as there were prospects of success and as the delay and the degree of non-compliance was not significant and as the prosecution of the main application was in no manner whatsoever delayed by the late filing of the notice of intention to oppose the court would not shut the doors of the court in the face of the respondent - Application for condonation granted.

Practice — Applications and motions — *Locus standi* — applicant also challenging authority of respondent's legal practitioner to bring the condonation application on behalf of his client in the absence of a confirmatory affidavit from the client – Given the wide ranging powers and authority conferred by resolution passed by the respondent, it became clear that the bringing of any interlocutory application also fell within the ambit of the power and authority granted to the legal practitioner thereby –

Court also held that it was not in respect of all interlocutory applications that a confirmatory affidavit, from a client, confirming the authority, of a legal practitioner, to bring an interlocutory application on behalf of the client, would be required. The necessity for this would be dictated by the facts and circumstances of the case. In this instance, the respondent's legal practitioner had slipped up. He had instructions to oppose the main application. He had filed the requisite notice to oppose late, he thus had to get his house in order and bring a condonation application to rectify this remissness. Surely in such circumstances a confirmatory affidavit by the client was not required.

Summary: The facts appear from the judgment.

ORDER

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1. The points *in limine* of the respondent in the condonation application are dismissed.

2. The late filing of the respondent's notice to oppose the main application in non-compliance with the court order of 28 February 2014 is hereby condoned.

3. The applicant in the condonation application is awarded the costs of the condonation application, such costs to include the costs of one instructed- and one instructing counsel.

4. The matter is postponed to **17 June 2014** at **08h30** for a case management hearing.

5. The parties' attention is drawn to the provisions contained in Part 6 of the Rules of High Court.

JUDGMENT

GEIER J:

[1] The Namibia Financial Institutions Supervisory Authority, the respondent herein and the applicant, in this application for condonation, which currently serves before the court, *(I will continue to refer to the parties herein as in convention)*, was joined *meru motu* by virtue of the court's order, granted on 28 January 2014, as a respondent, to an application originally brought by the applicant, in early 2013, under case number A35/2013, on an *ex parte* basis, despite having failed in its bid to be granted leave to oppose such application in terms of Rule 64(b) of the old Rules of Court, as it had failed to prove that NAMFISA's board had held a properly constituted meeting, at which the resolution to oppose, which it had annexed to its papers, was properly taken.

[2] Given the obvious interest of NAMFISA in the *ex parte* application the court nevertheless, in the exercise of its inherent powers, ordered the joinder of NAMFISA, as a respondent to application A 35/2013.

[3] The court ordered further that NAMFISA was to give notice of its intention to oppose the main application within 5 days of the court's order and then to file its answering affidavits therein, within 14 days of the delivery of its notice of intention to defend, if it so chose.[1]

[4] The respondent failed to deliver its notice of intention to oppose within the 5 days so ordered and filed such notice only on the morning of the 6th day.

[5] Mr Philander the respondent's legal practitioner explained his default as follows:

'In my office I have a computerized diary system. Upon invent such as the order by the honourable Court, my secretary enters the due dates on the computer. The computerized diary then alerts us to all the actions due on the due date.

[1] See Judgment of 28 January 2014

The notice of intention to oppose was due on 4 February 2014. On that day I was extra ordinarily busy and occupied in consultations and in and out the office for the whole day. Upon arrival at home after hours I had a nagging feeling about something I had missed. I realized that it was most probably the notice of intention to oppose in this matter. I phoned my secretary, Clothilda Beurensa De Koe and inquired when a notice of intention to oppose was due. Ms de Koe informed me that if the notice of intention to oppose had been due on that day, the computer diary had not alerted her thereto. The honourable court is referred to her affidavit enclosed.

Early the morning of the next day 5th of February 2014, I determined that the notice of intention to oppose in this matter had indeed been due the previous day. I immediately had a notice of intention to oppose prepared and served on the applicant.

I am embarrassed by this failure and I apologise profusely. Ms de Koe cannot explain why the diary process in my office, by means of the computer diary, had failed. I submit that this failure was not wilful or grossly negligent. The applicant has suffered no prejudice as the answering affidavit was delivered on time.

I submit that the respondent has excellent prospects of successfully defeating the application on the merits thereof. The application is further fatally defective for a number of reasons as stated in the answering affidavit by Mr Phillip Shiimi filed on 24 February 2014. I associate myself fully with the allegations in that affidavit. Full argument will be addressed to the Honourable court in regard to the merits of the hearing of the matter.

I submit the allegations contained herein constitute good cause and the honourable court is humbly requested to condone the late delivery of the notice of intention to oppose.'

[6] Mr Christian, the applicant in the main application, has refused to accept this explanation and vehemently opposes the condonation application.

[7] Again he raised the point of authority and that Mr Philander was not authorised to bring this application on behalf of respondent as no supporting affidavit to that effect was filed.

[8] He points out that Mr Philander and LorenzAngula Incorporated have a history of previous non-compliances with the Practice Directives and the Rules of this Court and that Mr Philander has previously sought condonation by stating:

'… As I was not forewarned of the fact that I will have to attend to the signing of an affidavit on the 6th, my schedule was fully booked and I was engaged in various meetings throughout the day'.

[9] The applicant states in answer to the condonation application:

'I further find it strange that the respondent purportedly discussed and resolved to oppose my application under case number A 35/2013 on 20 February 2014 but failed to decide on the late notice of intention to oppose filed on its behalf on 20 February 2014. Neither the respondent's board nor its chief executive officer delivered confirmedly affidavit given explanation of its own failure to deliver the notice of intention to oppose, as required by the court order of 28 January 2014.

It is respectfully submitted Mr Philander's and his secretary's explanation is so cursory and unconvincing that it should be rejected.

It clearly appears that Mr Philander has not informed both the Respondent's board and the chief executive officer of the Respondent that he has failed to deliver notice of intention to oppose on 4 February 2014 as ordered by the court order of 28 January 2014.

It is also clear that he has not asked the Respondent's board permission and or authorisation to institute this condonation application.'

[10] In reply, Mr Bonifatius Paulino, the Acting Assistant Chief Executive Officer of the respondent then clarified that he was so appointed by the CEO, which instruction included a delegation of all powers:

> ‘ I confirm that the Board of the Respondent has resolved, on a number of occasions, that the application be opposed and that all necessary steps be taken to finally dispose of the matter and all disputes between Hendrick Christiaan and NAMFISA.
>
> I am advised that Mr Christiaan is again questioning the authority of Mr. Ruben Philander of LorenzAngula Incorporated to bring an interlocutory application for condonation. I submit that it is abundantly clear that he is so authorized.
>
> For purposes of clarity I hereby instruct Mr. Ruben Philander of LorenzAngula Incorporated to take whatever steps are necessary in regard to the matter in order to oppose the application and to dispose of the matter. I also hereby rectify all steps taken to date.’

[11] Mr Barnard, who appeared on behalf of NAMFISA, firstly submitted in support of his client’s condonation application that the degree of non-compliance was minimal and not prejudicial to anyone and that the respondent’s legal practitioner had immediately taken steps to rectify his non-compliance. He pointed out that the conduct of proceedings was not delayed, as the answering affidavit, in the main application, had been delivered timeously and to which the applicant had already replied. The reason for the non-compliance had been properly and fully explained. He reminded the court that the relief sought by applicant was far- reaching and of grave consequence to the respondent. The prospects of success were also addressed.

[12] On the point of authority, a point which has been repeatedly raised by applicant over the years, in various cases litigated between the parties, he submitted that these points protracted the litigation, and, given the history of this matter, such point raising was clearly vexatious, particularly as the point taken by the applicant was technical and served no real purpose, save to delay proceedings. He stressed that the current

application for condonation was interlocutory in nature, and, should the court find that *LorenzAngula Incorporated*, in the main application, had proper instructions, to act on behalf of the respondent, in opposing in the main application, it would follow that they had authority to bring the current interlocutory application. He asked the court to take into account the ratio behind the rule that a legal practitioner, acting on behalf of an artificial person, should be duly authorized to do so, so that the court and the opponent could be satisfied that such artificial person cannot avoid potential cost orders.[2]

[13] With reference to the second *Medical Association of Namibia Ltd* judgment[3] he referred the court to the February 2014 resolution passed by the board of the respondent which particularly had also authorised *' … the taking of whatever steps necessary to finally dispose of this matter'*. He submitted further that it should have been clear by now to the applicant that *LorenzAngula Incorporated* had duly been authorised to act on behalf of the respondent and to take whatever steps may be necessary.

[14] During oral argument, he emphasised the spurious nature of the applicant's attack which flew in the face of the seven year history of litigation between the parties, which, incidentally, had been set out, meticulously, in a schedule marked 'A', to the above mentioned February 2014 resolution, spanning some 10 pages, and in respect of which, all actions and steps taken, in all the listed cases, were ratified, in so far as this might have been necessary.

[15] Mr Barnard strongly drove home the point that the applicant's challenge to the respondent's authority was a 'weak one' as it had been made without factual basis. This argument was mounted on what the court had said in *Otjozondu Mining (Pty) Ltd v*

[2]See in this regard *Shoprite Namibia (Pty) Ltd v Paulo and Another* 2010 (2) NR 475 (LC) at [15]
[3]*Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and Others* 2011 (1) NR 272 (HC) at [31] to [38]

Purity Manganese (Pty) Ltd[4]*,* as endorsed by the Supreme Court in *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others*[5].

[16] He then embarked on an interpretational exercise of the provisions of the Namibia Financial Institutions Supervisory Authority Act 3 of 2001, more particularly Sections 4(2) (c), 5(2), 17 and 29 (2), (3) and 5, which argument focused mainly on the powers of the respondent's board to delegate its powers and to authorise the respondents CEO to perform any duties assigned to him or her by the board and the CEO's powers of delegation of his or her powers to another employee of the respondent.

[17] He also questioned the purpose of the opposition to the application where the late filing of the notice to oppose had caused no prejudice and he implored the court to accede to an adverse cost order, inclusive of the costs of one instructed- and one instructing counsel.

[18] Mr Christian on the other hand, firstly took issue with Mr Philander's explanation and that it did not amount to a reasonable explanation. He exposed that Mr Philander had not explained fully what he had done in the five days afforded for the filing of a notice to oppose except to have diarised same. The respondent should have taken the appropriate steps timeously.

[4] 2011 (1) NR 298 (HC) where the court stated at '[52] It is now settled that in order to invoke the principle that a party whose authority is challenged must provide proof of authority, the trigger-challenge must be a strong one. It is not any challenge: Otherwise motion proceedings will become a hotbed for the most spurious challenges to authority that will only protract litigation to no end. This principle is firmly settled in our practice. It was stated as follows in *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1190E – G: 'In cases in which the respondent in motion proceedings has put the authority of the applicant to bring proceedings in issue, the Courts have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the Court, holding in such circumstances that a minimum of evidence will be required from the applicant.This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within the knowledge of the applicant and not his opponent. A fortiori is this approach appropriate in a case where the respondent has equal access to the true facts.' [Own emphasis added and footnotes omitted.]
[53] It is now trite that the applicant need do no more in the founding papers than allege that authorisation has been duly 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: *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228J – 229A.'

[5] 2013 (3) NR 664 (SC) at paragraph [42]

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[19] The past acts of the respondent, which he deemed unconstitutional and unlawful, had necessitated a renewed challenge on the respondent's authority and authorisation of affidavits. It appeared to him that the respondent's perceived good prospects of success were viewed as giving leeway to be in contempt of this court's order of 28 January 2014 and that this was habitual. He denied that his objection was simply technical but that it served public policy and interest.

[20] He argued that there was no factual evidence of authority.

[21] He then took issue with Mr Paulino's appointment in disregard of Section 5(2) of the NAMFISA Act[6] and Mr Paulino's power to instruct legal practitioners and, that, apart from his mere say so, he had not provided proof of his authority and that both Mr Paulino and Mr Philander were thus not authorised to depose to any affidavit and that the respondent had also failed in discharging its onus in this regard.

[22] He also raised a second point *in limine*, on his interpretation of Section 5(2) of the NAMFISA Act in terms of which any acting CEO of NAMFISA could only be appointed in consultation with the Minister and that Mr Shiimi, the CEO of the respondent, also had no power to appoint an acting CEO and that, thus, Mr Paulino's appointment was invalid. He submitted further that good cause had not been shown on the merits of the application for condonation as no valid and justifiable reasons for the late filing of the notice to oppose were shown.

[23] During oral argument, he also placed great stress on the court's order of 28 February 2014, which was clear and in terms of which the respondent had to choose whether or not to oppose the main application. This was not a choice that LorenzAngula Incorporated could make and that there was thus no evidence of the respondent's election on the record and accordingly his objection to the respondent's authority was

[6]Namibia Financial Institutions Supervisory Authority Act 3 of 2001

not merely technical. He again focused his argument on the issue of delegation which had to be proved. He also indicated that his interpretation of the NAMFISA Act differed to that as advanced by counsel for respondent during argument.

[24] In reply Mr Barnard submitted that it should be of significance that the respondent had initially only sought a costs order as regards the condonation application in the event of opposition thereto and that, in the circumstances of the transgression, Mr Christiaan could merely have elected not to oppose such application, which he however chose not to do and that the court therefore, in this regard, should further note that the applicant was not a lay person but a person with knowledge of the law and with an in-depth understanding of what he was doing as his references to statutes and case law revealed, and, when he elected to oppose the condonation application, this was a conscious act, deliberately taken, in respect of which he should not now be able to escape the costs order sought by the respondent.

[25] On the issue of authority he argued that the applicant's case on authority was made on the basis that the legal practitioner of the respondent lacked *locus standi* because he was not a party to the main application and the respondent had filed no confirmatory affidavit stating that Mr Philander was authorised to depose to the founding affidavit in the condonation application and that the respondent had countered this challenge with reference to what had been set out in the answering papers filed of record in the main application. In those affidavits Mr Shiimi again alleges that the relevant actions on behalf of NAMFISA were at all times authorised and that, on the 20th of February 2014, the board had again passed a further resolution with the intention to defeat any possible challenge to Mr Shiimi's authority to oppose the main application brought by Mr Christiaan and to give instructions to LorenzAngula Incorporated. In essence the board resolved that application A 35/2013 be opposed and that all steps necessary to finally dispose of this matter and all disputes between Hendrick Christiaan and NAMFISA be taken and that the CEO or his nominee be authorised and instructed to take all necessary steps to give effect to the resolution.

[26] It was expressly resolved that the CEO or his nominee would also have the power to take any decision to institute or defend legal proceedings and to take any decision in regard thereto and to take all steps necessary or expedient to give effect to such decisions. All this was also confirmed by Mr Philander by way of affidavit.

[27] Given the wide ranging powers and authority conferred by this resolution, it can firstly be said that it immediately becomes clear that the bringing of any interlocutory application falls within the ambit of the power and authority granted by this resolution, as confirmed under oath.

[28] Consequent to the further challenge on Mr Philander's authority, as made in the answering affidavit by Mr Christiaan, in the condonation application, Mr Paulino responded as follows:

'The Chief Executive officer of the Respondent Mr Phillip Shiimi, is temporary out of office on official business. He appointed me as Acting Chief Executive Officer in his absence. As usual this instruction and appointment was verbal. The instruction included a delegation of all powers as Chief Executive Officer. I have instructions and authority to attend to all matters including this pending litigation. …

I confirm that the Board of the Respondent has resolved, on a number of occasions, that the application be opposed and that all necessary steps be taken to finally dispose of the matter and all disputes between Hendrick Christiaan and NAMFISA.

I am advised that Mr Christiaan is again questioning the authority of Mr. Ruben Philander of LorenzAngula Incorporated to bring an interlocutory application for condonation. I submit that it is abundantly clear that he is so authorized.

For purposes of clarity I hereby instruct Mr. Ruben Philander of LorenzAngula Incorporated to take whatever steps are necessary in regard to the matter in order to oppose the application and to dispose of the matter. I also hereby ratify all steps taken to date.'

[29] It appears that the Acting Assistant CEO covers all bases. Not only does he confirm Mr Philander's original authority to bring the application for condonation, he also ratifies the bringing of such application.

[30] In addition it should be taken into account that it is not in respect of all interlocutory applications that a confirmatory affidavit from a client, confirming the authority of a legal practitioner to bring an interlocutory application on behalf of the client, would be required. The necessity for this would be dictated by the facts and circumstances of the case. In this instance, Mr Philander had slipped up. He had instructions to oppose the main application. He had filed the requisite notice to oppose late. He thus had to get his house in order and bring a condonation application to rectify his remissness. Surely in such circumstances a confirmatory affidavit by the client was not required.

[31] The arguments exchanged on the competency of the delegation of powers to Mr Paulino were not raised by Mr Christian in his answering affidavit filed in opposition to the condonation application and in any event the challenge, mounted in this regard, was not underscored by any evidence. In such circumstances, and although some argument was contained in the heads of argument and raised during oral argument, I will refrain from deciding this issue and thereby the second point *in limine* raised by Mr Christiaan.

[32] All in all I find myself in agreement with Mr Barnard's submission that the applicant's challenge of Mr Philander's authority and the respondent's authority, to oppose the main application, and, coincidentally thereto, to also bring a condonation application, was a 'weak one'.

[33] In such circumstances, if I understand the authorities correctly, the respondent's response only required a minimum of evidence. The respondent has done more than that and accordingly I find that it has discharged its onus in this regard.

THE ASPECT OF CONDONATION

[34] The criticisms in regard to the explanation proferred by Mr Philander and his secretary cannot be swept under the carpet. This is not the first time that Mr Philander has to seek the court's indulgence. He had to do so previously in regard to the late filing of a replying affidavit as the record will reveal. What aggravates his remissness is that he did not comply with the court's order in terms of which the timelines for the filing of further papers had been set. Also in view of the past acrimonious history of this litigation between the parties, one would have expected him to be more vigilant particularly also, as I have observed before in my previous judgement, as it is to be noted that he was in court personally when the timelines, pertaining to the filing of the particular notice in question, were issued.

[35] It is however also clear from the history of all the steps taken by NAMFISA to oppose this application, since its inception, that there is a serious resolve on NAMFISA's part to oppose the main application and to be heard on the merits thereof. It also cannot be said that there are no prospects of success. This I have already found in my judgment of 28 January 2014. It is so that the delay and the degree of non-compliance was not significant. What is however of significance is the fact that the prosecution of the main application was in no manner whatsoever delayed by the late filing of the notice of intention to oppose the main application. I also cannot imagine any court shutting the doors of the court in the face of any litigant simply because of the late filing by a few hours of a notice to oppose and I will not do so by way of this judgment.

COSTS

[36] The respondent is seeking a punitive cost order on various bases as is reflected above. I might have entertained such request where it not for the fact that this is not the first time that the respondent's legal practitioner had to seek the court's indulgence. Also

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the fact that he has failed to comply with the timeline embodied in the court's order, of which he was acutely aware, weighs with me. I will thus mark my disapproval of this conduct by not acceding to the punitive costs order sought.

[37] In the result the following orders are made:

1. The points *in limine* of the respondent in the condonation application are dismissed.

2. The late filing of the respondent's notice to oppose the main application in non-compliance with the court order of 28 February 2014 is hereby condoned.

3. The applicant in the condonation application is awarded the costs of the condonation application, such costs to include the costs of one instructed- and one instructing counsel.

4. The matter is postponed to **17 June 2014** at **08h30** for a case management hearing.

H GEIER

Judge

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APPEARANCES

FOR THE APPLICANT:	IN PERSON
FOR THE RESPONDENT:	PCI Barnard Instructed by LorentzAngula Inc., Windhoek