

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-MOT-REV-2017/00341

In the matter between:

FIS LIFE INSURANCE COMPANY LIMITED

APPLICANT

and

THE REGISTRAR OF LONGTERM INSURANCE

1ST RESPONDENT

CHIEF EXECUTIVE OFFICER OF NAMFISA

2ND RESPONDENT

THE CHAIRPERSON OF THE

BOARD OF APPEAL (NAMFISA)

3RD RESPONDENT

THE BOARD OF APPEAL (NAMFISA)

4TH RESPONDENT

THE SECRETARY TO THE BOARD OF APPEAL

5TH RESPONDENT

THE MINISTER OF FINANCE HON. CALLE SCHLETTWEIN

6TH RESPONDENT

NAMIBIA FINACIAL INSTITUTIONS

SUPERVISORY AUTHORITY

7TH RESPONDENT

THE CHAIRPERSON OF THE BOARD OF NAMFISA

8TH RESPONDENT

THE INSPECTOR-GENERAL OF THE NAMIBIAN POLICE

9TH RESPONDENT

MINISTER OF SAFETY AND

SECURITY HON. CHARLES NAMOLOH

10TH RESPONDENT

Neutral citation: *FIS Life Insurance Company Limited vs The Registrar of Long-Term Insurance* (HC-MD-CIV-MOT-GEN-2017/00341)
[2017] NAHCMD 312 (2 November 2017)

Coram: USIKU, J
Heard on: 12 October 2017
Delivered: 2 November 2017

Flynote: Practice – Applications and Motions – Urgent Application – Urgency self-created – Application struck from the roll with costs.

Summary: Applicant brought an urgent application for interim relief – Applicant delayed bringing the application until it was too late – Court declined to hear the matter on an urgent basis and struck the application from the roll with costs.

ORDER

1. The Applicant's application is struck from the roll, for lack of urgency.
2. The Applicant is ordered to pay the costs of the Respondents, such costs to include costs of one instructing and two instructed counsel.

JUDGMENT

USIKU, J:

Introduction

[1] This is an application launched on urgent basis for interim relief pending an application to review and set aside two decisions, namely:

- (a) the decision of the First Respondent to cancel the registration of the Applicant as an insurer, which decision was taken on 16 June 2015, ("the decision"); and

(b) the finding of the Fourth Respondent, dated 23 June 2017, dismissing the appeal by the Applicant, against the aforesaid decision of 16 June 2015.

[2] The Applicant then brought an application for an order in the following terms:

‘1. Condoning the applicant’s non-compliance with the forms and service as provided for by Rule 73(3) of the Rules of this Honourable Court and directing that this matter be heard as one of urgency.

2. Pending the relief sought in Part B of this application, issuing a rule nisi on a date to be determined the Honourable Court, calling upon any of the respondents who oppose this application to show cause why the following orders should not be made final

2.1 an order declaring the implementation of the first respondent’s decision dated 16 June 2015 to cancel the applicant’s registration as an insurer be stayed, pending the outcome of the applicant’s appeal lodged in terms of Section 10 of the Long-Term Insurance Act, (as amended) alternatively

2.2 an order suspending or staying the fourth respondent’s finding dated 23 June 2017 (“the finding”) alternatively interdicting and restraining the third and fourth respondents from implementing the finding

2.3 an order that the first respondent’s decision dated 16 June 2015 to cancel the applicant’s registration as an insurer is stayed, alternatively not implemented or given effect to alternatively interdicting the first respondent from implementing the decision, pending the outcome of

a) the applicant’s appeal lodged in terms of Section 10 of the Long-Term Insurance Act, (as amended) (“the Insurance Act”); and

b) this application for review as set out on Part B herein below

2.4 costs against such respondents who oppose this application, jointly and severally, including the costs of one instructing and two instructed counsel;

2.5 an order granting such further or alternative relief as the above Honourable Court may deem fit.

3. Ordering that the relief sought in prayer 2.1 alternatively 2.2 and 2.3 hereof operate as an interim order with immediate effect, pending the return day'

[3] The First, Second, Seventh and Eighth Respondent opposed the application and filed answering affidavit. The Fifth Respondent opposed the application but did not file answering papers, however the Fifth Respondent indicated in court that they will abide by the decision of the court. There was no opposition filed by the other Respondents. In view of the foregoing, I shall therefore refer to the First, Second, Seventh and Eighth Respondents as "the Respondents" save where the context indicates otherwise.

[4] The following facts are either common cause or not disputed:

- (a) the Applicant is a registered insurer in terms of the provisions of the Long-Term Insurance Act, Act 5 of 1998;
- (b) on the 16th of June 2015 the First Respondent notified the Applicant by letter that the First Respondent has decided to cancel the Applicant's registration as insurer, with effect from 30 September 2015;
- (c) the Applicant, later appealed against the decision to, among other parties, the Fourth Respondent; in terms of the provisions of the Namibia Financial Institutions Supervisory Act, Act 3 of 2001;
- (d) on the 23rd of June 2017, the Fourth Respondent delivered its finding in which the Fourth Respondent dismissed the appeal by the Applicant. In its finding the Fourth Respondent made the effective date for the cancellation of the registration of Applicant, to be the 30th of September 2017;
- (e) on Friday, the 22nd of September 2017, at 16:38, the Applicant filed the present urgent application with the Registrar of this Court, launching the present proceedings;

- (f) in its application, the Applicant required the Respondents to file their answering affidavit(s) on or before Tuesday, 26 September 2017, and specified that in such event the Applicant shall file its replying affidavit by Thursday, 28 September 2017. The Applicant further indicated that it shall proceed to set the matter down for Friday, 29 September 2017 for hearing.

[5] The Respondents raised a point in line, that the urgency in this matter is self-created; and applied that the issue of urgency be determined first at the outset of the proceedings. This court ruled that the issues of urgency together with the merits be argued and this court shall deliver its decision thereon thereafter.

[6] I shall now deal with the issue of urgency first herein.

Urgency

The Respondents' position

[7] With regard to the point of urgency, the Respondents contend that the Applicant has known since 16 June 2015 that the First respondent has cancelled its registration as an insurer and that should the appeal not be successful it would have to close its business soon thereafter. This, the Respondents argue, has a bearing on the type of expedition with which the Applicant should have moved when finding was handed down by the Fourth Respondent on 23 June 2017, more than 3 months ago.

[8] The Applicant waited for three months before taking action and then on 22 September 2017 and giving the Respondents less than five days' notice, the Applicant launched the present application to be heard on 29 September 2017, less than a day just before the 30th of September 2017, the date set by the Fourth Respondent, as effective date for the cancellation of its registration as a registered insurer.

[9] The Respondents argue further that due to the Applicant's self-created urgency, the Respondents had to deal with this complex matter on an urgent basis,

with very truncated timeframes, when the Applicant could and should have brought this application three months ago.

[10] In the same vein, the Respondents contend further that the conduct of the Applicant in bringing its application in such a manner, was also grossly inconvenient to the Court, insofar as the Court would have had to hear the matter on Friday, 29 September 2017 and hand down a judgment on a very complex matter before 30 September 2017 cancellation deadline.

[11] In support of their submissions, the Respondents relied on various authorities, including *Bergmann v Commercial Bank of Namibia Ltd and Another*¹ and *MWEB Namibia (pty) Ltd v Telecom Namibia Limited and Other*.²

The Applicant's position

[12] The Applicant, on the other hand, states that it was informed by its attorney of record on 26 June 2017 that the Fourth Respondent had issued its finding in terms of which Applicant's appeal was dismissed.³ The Board of Directors of the Applicant received the written copy of the Fourth Respondent's finding during the week of 3 July 2017, deliberated thereon and resolved to address the situation with the Seventh Respondent, mindful of its opinion that the legal route should be the last resort.

[13] The Applicant referred to various informal meetings held by its board members during the month of July 2017, the outcome of which is not specifically stated.⁴

[14] On 9 August 2017 the Applicant addressed a letter to the Fourth Respondent requesting urgent audience with the Fourth Respondent to discuss if the matter could be resolved amicably. The Applicant was later advised by its legal practitioner that such course was not advisable.

¹ 2007 NR 48 (HC).

² 2012 (1) NR 331 (HC).

³ Paragraph 88 of Applicant's Founding Affidavit.

⁴ Paragraph 91 of Applicant's Founding Affidavit.

[15] In sum, the Applicant engaged counsel to commence drafting the necessary papers in this matter during the week of 19 September 2017.

[16] The Applicant further contends that it has not delayed in bringing the present application before court, and in the event the court finds that it has so delayed, Applicant seeks condonation for such delay.

[17] The Applicant also contends that should the interim relief not be granted, the Applicant would not be able to conduct business without a license.

[18] That briefly summarizes the evidence presented by the parties on the issue of urgency.

Analysis

[19] The basis of the Applicant's prayer for condonation of non-compliance with the prescribed forms and service, as well as for the urgent relief in general, is in essence based on the effective date set by the Fourth Respondent for the cancellation of its registration as a registered insurer, being the 30th of September 2017.

[20] Dealing with a similar matter where the court was called upon to decide whether or not an application to stay a sale in execution should be allowed to proceed on a basis of urgency, Maritz J had the following to say: -

'The Court's power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one. That much is clear from the use of the word "may" in Rule 6(12). 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.'⁵

[21] The learned judge further remarked that:

⁵ *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC), at p.49.

'Obviously, each case is to be decided upon its own facts and circumstances, although I find it difficult to envisage that a Court would come to the assistance of an informed applicant who *mala fide* abuses the Rules of Court by delaying the institution of urgent application proceedings to score an advantage over his or her opponent.

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 in installments. 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.

The applicant does not offer any explanation why he delayed from the 18th of October 2000 until today to bring the application for the stay of execution. He was not only fully informed about the date and conditions of the sale in execution but also had the benefit of legal advice throughout that period. In the absence of any agreement to stay the sale or suspend the proceedings pending negotiations, the applicant had no right or reason to delay the application until the afternoon before the advertised sale. It is that delay, attributable to the applicant's inaction, that has caused the matter to become urgent.⁶

[22] I am in full agreement with the statement of law as outlined above and I am of the opinion such statement applies with equal force to the matter at hand.

[23] In the present matter the applicant claims that it could not comply strictly with the rules of court relating to service and notice periods, because its application is so urgent that the same could not be complied with. I am of the view that the urgency of the matter ought to have started when the Applicant got notice of the finding of the Fourth Respondent, on the 26 June 2017. As from that date the Applicant could and should have taken decisive action to challenge, if it so wished, the finding of the Fourth Respondent, on urgent basis and giving notice to the Respondents as required by the rules or giving such notice reasonably shortened as circumstances may require.

⁶ *Bergmann case supra* at p.50.

[24] By its own version, the Applicant became aware of the finding of the Fourth Respondent on the 26th of June 2017, however, as earlier stated it only engaged counsel to commence drafting the necessary papers during the week of 19 September 2017. I did not hear the Applicant say that it wanted to instruct counsel earlier but none was available, nor did I hear other reasonable explanation why counsel was not instructed in good time soon after 26 June 2017.

[25] The Applicant argued that after it was informed of the Fourth Respondent's finding, it got focussed on attempting to resolve the matter amicably. The nature of the amicable resolution that the Applicant had in mind was not stated.

[26] From the time Applicant was informed of the finding of the Fourth Respondent, the actions taken by the Applicant included:

- (a) taking a decision to address the situation directly with the Seventh Respondent⁷, (Applicant did not set out what it hoped to achieve by that effort);
- (b) attempting to solve the matter amicably with the Fourth and Seventh Respondents⁸, (The nature of the amicable solution to the result of an appeal was not stated);
- (c) Applicant's Board of Directors meeting but not making final decision⁹,
- (d) Applicant engaging counsel to commence drafting the necessary papers, during the week of 19 September 2017.¹⁰

[27] In the end, the Applicant gave the Respondents one court day (namely Monday the 25th of September 2017) to prepare their answering papers for filing by Tuesday, the 26th of September 2017. And then the Applicant set the matter down for hearing on Friday, 29 September 2017, just before the Saturday 30 September 2017 deadline, by which Applicant's license as insurer was due to be cancelled.

⁷ Paragraph 90 of the Applicant's Founding Affidavit.

⁸ Paragraph 92 of the Applicant's Founding Affidavit.

⁹ Paragraph 95 of the Applicant's Founding Affidavit.

¹⁰ Paragraph 110 of the Applicant's Found Affidavit.

[28] The actions taken by the Applicant as outlined above do not reflect actions expected to be taken by a person confronted with an urgent matter. Had Applicant taken decisive action to challenge the finding of the Fourth Respondent soon after it was informed thereof, Applicant would have been in the position to give the Respondents sufficient time as required by the rules to file their papers.

[29] I am in agreement with the contention of the Respondents that in the circumstances of this matter, the Applicant could and should have complied with the full notice requirements. Instead, through lack of decisive action or culpable remissness, the Applicant delayed taking action until it was too late and expect all affected parties, including the Court, to respond to the “urgent application”.

[30] I am further in agreement with the contention of the Respondents that the Applicant in this matter created its own urgency through its culpable remissness and inaction.

[31] I have considered the application made from the bar by the Applicant that should the court find Applicant to have created its own urgency, Applicant applies for condonation thereof. I am not satisfied that Applicant has furnished any reasonable explanation for such delay, and for that reason, the request for condonation is rejected.

[32] For the foregoing reasons, I decline to condone Applicant’s non-compliance with the rules of court or to hear its application as one of urgency.

[33] In the result, I make the following order:

1. The Applicant’s application is struck from the roll, for lack of urgency.
2. The Applicant is ordered to pay the costs of the Respondents, such costs to include costs of one instructing and two instructed counsel.

B Usiku
Judge

APPEARANCES

APPLICANT RWF Macwilliam SC (assisted by AS Van Vuuren)

Instructed by Metcalfe Attorneys, Windhoek

1st, 2nd, 7th, & 8th RESPONDENTS: AW Corbett SC (assisted by T Phatela)

Instructed by Shikongo Law Chambers, Windhoek

3rd, 4th, 5th RESPONDENTS: G Dicks

Instructed by ENS Africa|LorentzAngula Inc, Windhoek