

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

URGENT APPLICATION

CASE NO.: HC-MD-CIV-MOT-REV-2019/00411

In the matter between:

HERITAGE HEALTH MEDICAL AID FUND

APPLICANT

and

THE REGISTRAR OF MEDICAL AID FUNDS

FIRST RESPONDENT

MINISTER OF HEALT AND SOCIAL SERVICES

SECOND RESPONDENT

NAMFISA BOARD OF APPEAL

THIRD RESPONDENT

Neutral citation: *Heritage Health Medical Aid Fund v The Registrar of Medical Aid Funds* (HC-MD-CIV-MOT-REV-2019/00411) [2019] NAHCMD 535 (05 December 2019)

Coram: RAKOW, AJ

Heard: 20 November 2019

Delivered: 05 December 2019

Reasons: 06 December 2019

Flynote: Practice – Applications and motions – Urgency – Good cause to be shown why applicant who cannot be afforded substantial redress at the hearing in due course — Clear case of urgency to be made out in founding papers – Court of the view that urgency self-created and not meeting the requirement of rule 73(4)

Summary: The bone of contention between the applicant and the first respondent seems to turn around the interpretation given to annual membership contribution increases and whether it amounts to an amendment of the rules of the fund and as such requires the approval of the Registrar of Medical Aids. This contention stems from the rejection by the Registrar of Medical Aids to approve the application by the applicant to approve the annual contribution increase for 2019.

Held – Applicants seeking an indulgence from court to hear a matter on an urgent basis should “clearly and in detail, leaving no room for confusion or doubt”, set out their case in the affidavits before court.

Held – The urgency in this matter stem from the steps that the Registrar took to enforce his decision and it is clear that the matter was never deemed as urgent prior to the publication in the various newspapers of the notice from the Registrar, on 16 and 20 September 2019. The Applicant therefore would not have taken any steps were it not for the publication of the notice by the Registrar. The court is not convinced that the urgency was not self-created.

ORDER

- a) The urgent application is struck from the roll with costs, which cost includes the costs of one instructing and two instructed counsel.
- b) Part B of the application is referred to for Judicial Case Management and is postponed to 4/2/2020 for a status hearing.

URGENT APPLICATION JUDGMENT

RAKOW, AJ:

Introduction

[1] The applicants approached the court on an urgent basis on 5 November 2019 seeking the following urgent interim interdict:

1. Part A – Urgent interim relief
2. That the applicant's non-compliance with the forms and service provided for by the Rules of this Honourable Court is condoned and that the matter is heard as one of urgency as contemplated by rule 73(3).
 - 2.1. Pending the finalization of an appeal to the second respondent to be instituted in terms of paragraph 3 of this order; alternatively pending the relief sought in Part B of this notice of motion (the "proceedings") the following order shall apply:

The first respondent is ordered to publish the following public notice in one edition of each of the Namibian, the Sun and the Republikein newspapers:

" In the Namibian, the Sun and the Republikein newspapers, notices were published on 16 and 20 September 2019 whereby the public was informed by the Registrar of Medical Aid Funds to the effect that some of the 2019 contribution increases of the Heritage Health Medical Aid Fund had to be approved but were not approved by him. And that the members of the Heritage Health Medical Aid Fund were not obligated to pay those increases.

The public is notified that those notices are hereby retracted and the public is informed that the matter is the subject of pending legal proceedings."

- 2.2. The notification referred to in paragraph 2 above shall be published in the same format and with the same prominence as the aforementioned notices of 16 and 20 September 2019 were published.
- 2.3. The first respondent is interdict from again publishing any public notices regarding the issue until such time as the appeal to be instituted to the second respondent alternatively the proceedings set out in Part B of this notice of motion have been finalised.
3. The applicant is granted leave to institute an appeal to the second respondent in terms of section 7 of the Medical Aid Funds Act 23 of 1995, outside the 30 day period provided for in the said section 7, but within 30 days of the date of this order.
4. Granting to the Applicants such further or alternative relief as this Honourable Court may deem fit.
5. The first respondent shall pay the applicant's costs, such to include the costs of one instructing and two instructed counsel.'

[2] Part B of the application deals with the request of review and declaratory relief sought by the applicant regarding the annual contribution increase and whether such an increase forms part of an amendment of the rules of the applicant and therefor

require approval from the first respondent. It further seeks the reviewing and setting aside of the first respondent's decision regarding the 2019 annual contribution. This relief is however not asked for on an urgent basis.

[3] After service of the application on the representative of the Minister of Health and Social Services, the Government Attorney on behalf of the 2nd defendant raised a point of law of misjoinder of the Minister of Health and Social Services. It was pointed out that the citation of the Minister of Health and Social Services was based on the Medical Aid Fund Act 23 of 1995. This Act was amended by the Medical Aid Fund Amendment Act 11 of 2016, and one in terms of this amendment the Minister of Health and Social Services is not a functionary under the Act and the correct functionary is the Minister of Finance. The relief sought by the applicant against the second respondent is therefore incompetent.

[4] The Applicant then brought an application for leave to amend the relief as set out in part A of the notice of motion by deleting the words as indicated and inserting subsequent words. Prayer under number 2 and 2.3 deals now with an appeal pending before the third respondent and the applicant no longer seeks an order to be granted leave to institute the appeal to the second respondent within 30 days after the granting of the order.

[5] During the appearance of 5 November 2019, the court was however not satisfied that the third respondent was properly served and ordered that the papers be served at the correct address for the third respondent and that they were to be given an opportunity to oppose the application or not. The costs of the appearance were to stand over to be argued with the main application. The third respondent was granted till 11 November 2019 to oppose the application if they wished to do so and the matter was set down for a status hearing on that day. Eventually the urgent application was heard on 20 November 2019.

Background

[6] Section 30 of the Medical Aid Funds Act 23 of 1995 as amended provides that every fund shall have rules making provision for a number of things that is listed under this section. Section 30(n) provides specifically the following:

'if any membership fee is payable, the amount thereof or the basis on which it is to be calculated.'

Under s 31, which deals with the amendment of rules, provides that the registered fund may amend or rescind any rules or make any additional rule but these rules or changes will only be valid if it has been approved by the Registrar and duly registered.

[7] The bone of contention between the applicant and the first respondent seems to turn around the interpretation given to annual membership contribution increases and whether it amounts to an amendment of the rules of the fund and as such requires the approval of the Registrar of Medical Aids.

[8] The Registrar requires all annual contribution increases to be submitted to him for consideration by 31 October the previous year. This directive forms part of a circular sent out by the Registrar in 2013 in which the Registrar indicates that he is 'required to properly check, and if necessary investigate and resolve issues of concern with the fund before approval of the proposed changes can be granted.'

The annual contribution increase for 2019 was therefore submitted to the Registrar by the applicant on 31 October 2018. The decision of the Registrar, according to the first defendant, was then communicated to the applicant in letters dated 24 January 2019 and again in 26 February 2019. In these letters, the annual contribution increase was rejected.

[9] The applicant then filed an appeal against the decision of the Registrar on 10 May 2019. The contention of the Registrar is that this appeal was filed out of time as it should have been filed by latest 12 March 2019 if it relied on the decision of 26 February 2019. The first respondent insists that the applicant did not file a condonation application together with this appeal. The applicant was requested to file a revised appeal and on 27 August 2019, such revised notice of appeal was filed.

[10] The Registrar then published notices in the Namibian, the Sun and the Republikein newspapers on 16 September and 20 September 2019 with the following heading and content:

'UNAPPROVED 2019 CONTRIBUTION RATES HERITAGE HEALTH MEDICAL AID FUND. The Namibian Financial Institutions Supervisory Authority ("NAMFISA") hereby notifies members of Heritage Health Medical Aid Fund ("Heritage Health"), and the public, that the increase in contributions that were implemented by Heritage Health for the 2019 year have not been approved by the Registrar of Medical Aid Funds.

In terms of section 31(1) of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995) ("the Act"), no alteration, rescission or addition to a registered medical aid fund's rules shall be valid unless it has been approved by the Registrar and registered under section 31(2) of the Act.

In light of the above, members of Heritage Health and the public are not obligated to pay the difference between the 2018 contribution rates and the 2019 contribution rates, as the said difference is not approved by the Registrar. '

[11] This publication by the Registrar of Medical Aids then triggered the current application which was brought on an urgent basis to the High Court.

Urgency

[12] The applicant in its papers, which was then also argued in court, insisted that it met the requirements for urgency. This is opposed by the first respondent and they argue that the urgency is self-created.

[13] The parties address the matter of urgency in their arguments and heads of argument. Rule 73(4) sets out the requirements for an application to be dealt with on an urgent basis. The applicant "in an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

- (a) the circumstances which he or she avers render the matter urgent; and
- (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course."

The understanding is that both these averments must be contained in the affidavit of the applicant before a matter can be considered on an urgent basis. This is then also the bridge to cross before the merit of any application will be considered. The logical sequence will be that as soon as a case is made out for urgent relief, rule 73(3) comes into play, and the court may then dispense with the forms and service

provided in these rules and dispose of the application in such manner and in accordance with such procedure as the court considers fair and appropriate.

[14] The plaintiff should not only pay lip service to these requirements but it should be substantively shown that they were met. In essence, the applicant should show to the court why they should be allowed to 'jump the que'.

The requirements of rule 73(4)

[15] In *Nghiimbwasha and Another v Minister of Justice and Others*,¹ the court dealt with the interpretation of the word 'must' contained in rule 73(4) as well as the responsibility of an applicant in a matter alleged to be urgent. Masuku J states at (11) and further:

'The first thing to note is that the said rule is couched in peremptory language regarding what a litigant who wishes to approach the court on urgency must do. That the language employed is mandatory in nature can be deduced from the use of the word "must" in rule 73 (4). In this regard, two requirements are placed on an applicant regarding necessary allegations to be made in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused.

[12] The first allegation the applicant must "explicitly" make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must "explicitly" state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course. The use of the word "explicitly", in my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to set out and underscore the level of disclosure that must be made by an applicant in such cases.

[13] In the English dictionary, the word "explicit" connotes something "stated clearly and in detail, leaving no room for confusion or doubt." This therefore means that a deponent to an affidavit in which urgency is claimed or alleged, must state the reasons alleged for the urgency "clearly and in detail, leaving no room for confusion or doubt". This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency.'

[16] The qualification of rule 73(4) by adding 'explicitly' to the understanding of the case that must be set out in the affidavits supporting the rule 73 application has been

¹ [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

supported by our courts in a number of occasions. (See *Fuller v Shigwele*² and *Bank Windhoek Ltd v Mofuka and another*³). Parties are not to underestimate the level of disclosure that must be made by an applicant. The court should be informed frankly and taken into the confidence of the applicant. Applicants seeking an indulgence from court to hear a matter on an urgent basis should “clearly and in detail, leaving no room for confusion or doubt”, set out their case in the affidavits before court.

[17] In the current application, the deponent of the affidavit supporting the application indicated that there is a substantial risk for potential loss if the members are not paying the new membership contribution as well as alleging that they were approached by some members in this regard. There is however no averments dealing with actual losses or any mentioning of names of specific members who wish to cancel their policies or who are currently paying the membership rate that was applicable during 2018.

[18] The second leg of rule 73(4) that needs to be satisfied for a matter to be considered as urgent is that the applicant is to provide under rule 73(4)(b) ‘the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.’ The applicants insisted that there is no other remedy available for them, other than bringing an urgent application.

[19] The argument by the first respondent is that the applicant already chose the process to obtain substantial redress when they filed an appeal application. The fact that they were instructed to bring a condonation application does not negate the ‘afforded substantial redress’ available to the applicant through the appeal process to the third respondent.

Self-created urgency

[20] In *Bergmann v Commercial Bank of Namibia Ltd and Another*,⁴ Maritz J (as he then was) made the following observations:

“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

² (A 336/2014) [2015] NAHCMD 15 (5 February 2015).

³ 2018 (2) NR 503 (SC).

⁴ 2001 NR 48 (HC).

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. Examples thereof are to be found in *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) I SA 582 (W) and *Schweizer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T)."

The court went on further to hold 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 in instalments. 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."

[21] In *Twentieth Century Fox Films Corporation supra; and Schweizer-Renecke Vleis Maatskappy (Edms) Bpk v Minister van Landbou en Andere*,⁵ the court held the view that:

"when the applicant, who is seeking the indulgence, has created the emergency, either mala fides or through her culpable remissness or inaction, he cannot succeed on the basis of urgency."

[22] From the history of this matter, it seems clear that the Applicant already knew their application for annual membership contribution increases were not granted in February 2019 with the letter from the Registrar, and on their own papers at least as of April 2019. They instituted an appeal against this decision and it is understood that Namfisa's Appeals Board is still ceased with the matter as it was now accompanied by a condonation application. The Applicant however went ahead and introduced the annual membership contribution increase although this increase was never approved by the Registrar and they were informed to that effect already in April 2019, on their own version. The First Respondent, the Registrar of Medical Aids, is arguing that the Registrar had no other option but to inform the members that

⁵ 1971 (1) PH F11 (T).

the Applicant is charging an unauthorized annual membership contribution which they are not obligated to pay.

[23] The First Respondent made it clear in a letter dated 27 February 2019 that the Applicant's request for an annual membership contribution increase was not granted and that they were to proceed with the tariffs as approved for 2018. The Registrar wrote:

'Please be informed that the 2019 contribution and benefit charges are not approved and registered in terms of section 31(2) of the Act. Accordingly, the implementation of the 2019 contribution and benefit changes is in contravention of section 31(1) of the Act and consequently unlawful. On this basis, I cannot set aside the order made thereby condoning an activity that contravenes the law. '

[24] The urgency in this matter stem from the steps that the Registrar took to enforce his decision and it is clear that the matter was never deemed as urgent prior to the publication in the various newspapers of the notice from the Registrar, on 16 and 20 September 2019. The Applicant therefore would not have taken any steps were it not for the publication of the notice by the Registrar. The court is not convinced that the urgency was not self-created. The declaratory order sought by the Applicant is also with regard to an issue that was already known in April 2019 and should have been taken up in the normal stream of the courts.

[25] As the requirements for rendering circumstances and the subsequent relief urgent, were in my opinion not met, the applicants did not pass the first hurdle, the hurdle of rule 73(4) and the court did not subsequently deal with the other issues raised in these papers.

[26] For the above mentioned reasons, I am not satisfied that there is present, a sufficient degree of urgency made out to warrant the granting of the application for interim relief and the application is therefore struck from the roll.

The order:

- a) The urgent application is struck from the roll with costs, which cost includes the costs of one instructing and two instructed counsel.

b) Part B of the application is referred to for Judicial Case Management and is postponed to 4/2/2020 for a status hearing.

E Rakow
Acting Judge

APPEARANCES

APPLICANT
INSTRUCTED BY:

Mr. Töttemeyer assisted by Mr. Jacobs
Van der Merwe-Greeff Andima Inc

RESPONDENT:
INSTRUCTED BY:

Mr. Corbett assisted by Ms. Bassingthwaighte
Sisa Namandje & Co