REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Innocent Ngwarati v The Chief of Immigration	**Case No:** HC-MD-CIV-MOT-GEN-2022/00397 **Division of Court:** HIGH COURT(MAIN DIVISION)
Heard before: Honourable Lady Justice Prinsloo	**Date of hearing:** Decided on the papers. **Date of order:** 23 November 2022

Neutral citation: *Ngwarati v The Chief of Immigration* (HC-MD-CIV-MOT-GEN-2022/00397) [2022] NAHCMD 640 (23 November 2022)

Results on merits:
As set out below.

The order:

1. The respondents are liable for the costs of the applicant, jointly and severally, the one paying the others to be absolved.
2. Such costs to include the cost of drafting and filing of the urgent application as well as the court attendances on 30 August 2022 and 5 September 2022.

Reasons for orders:

PRINSLOO J:

Background

[1] The matter before me has a history dating back to May 2021, which I will briefly summarize to set the backdrop against which the applicant brought the application.

[2] The applicant, a Zimbabwean national and medical doctor by profession, applied to the Ministry of Home Affairs, Immigration, Safety and Security for a permanent residence permit. The applicant's application was successful, and the Immigration Selection Board granted the permanent residence permit on 7 May 2021. However, since the approval date, the applicant has yet to be issued with the said permanent resident permit, resulting in the applicant launching the ongoing proceedings under case number HC-MD-CIV-MOT-GEN-2021/00469.

[3] Pursuant to the court's judgment on 15 December 2021[1] the applicant applied for the renewal of his employment permit on 22 February 2022.

[4] After the lapse of six months and no response in respect of the renewal application, the applicant again turned to this court and launched the current application on an urgent basis seeking a mandamus and an interim interdict against the respondents in the following terms:

'1. Condoning the applicant's non-compliance with the forms and services as provided for in the Rules of the High Court of Namibia and hearing this application as a matter of urgency as contemplated in Rule 73(3).
2. Compelling and directing the 3rd Respondent to deal with and make a decision on the Applicant's application for the renewal of his employed permit dated 22 February 2022 in terms of Section 27 of the Immigration Control Act, 1993 (Act 7 of 1993), as amended.
3. Interdicting and/or restraining Respondents from removing and/or deporting the Applicant and his family members from the Republic until the proceedings in the present matter as well as the proceedings under case number: HC-MD-CIV-MOT-GEN-2021/00469 are adjudicated and finalized.
4. Ordering any respondent who opposes this application to be liable for the applicant's costs in these

[1] *Ngwarati v Chief of Immigration* HC-MD-CIV-MOT-GEN-2021/00469 [2021] NAHCMD 592 (15 December 2021)

proceedings, including the costs of one instructing and one instructed counsel, on a punitive scale.

5. Such further and/or alternative relief as the facts may permit.'

[5] The applicant's legal practitioner enrolled the urgent application for a hearing on 30 August 2022 at 09h00. However, at the hearing and before it was necessary to delve into the issue of urgency or the merits of the matter, the respondents' legal representative, Mr Khadila, informed the court that the third respondent was in the process of deliberating on the applicant's employment permit application. Therefore, on even date, Mr Khadila requested the court to grant the respondents the opportunity to file the necessary opposition to the urgent application and a date upon which to file its answering papers in the event that the matter does not become resolved between the parties.

[6] The matter was postponed to 5 September 2022 for the hearing of the urgent application, and the court gave the necessary directions for filing papers.

[7] On 5 September 2022, the parties informed the court that events overtook the urgent application, that the applicant would no longer pursue his application, and that the only remaining issue that the parties could not agree on was the issue of costs.

[8] It is against this background that the court would then determine the cost issue.

[9] Mr Bangamwabo, on behalf of the applicant, submits that the respondent's failure to attend to the applicant's application, enquiries and follow-up's compelled the applicant to seek recourse through litigation.

[10] Mr Bangamwabo submits further that had the respondents responded or attended to the communication by the applicant and his legal practitioner of record, there would have been no need to approach this court to seek a mandamus and an interim interdict against the respondents. Mr Bangamwabo contended that the respondents' urgency to attend to the application of the applicant was brought about by the filing of the urgent application by the applicant, so much so that on 30 August 2022, the respondents attended to the application and on 31 August 2022 the applicant's

legal practitioner of record was notified of the third respondent's decision or resolution thereto. Mr Bangamwabo also drew my attention to the judgment of *Du Toit v Government of the Republic of Namibia*[2], which appears to be on all fours with the current matter.

[11] Mr Bangamwabo is of the view that the applicant had to incur unnecessary expenses by having to bring the application to enforce its rights and further contends that the conduct of the respondents and its subordinates within the Ministry was unreasonable, unjustifiable and oppressive and, therefore, the applicant would be entitled to a punitive cost order against the respondents.

[12] Mr Khadila, on behalf of the respondents, submits that the applicant, before launching the urgent application, wrote a letter to the respondents on 23 August 2022, wherein the applicant demanded that his work permit application be attended to within two days from the date of the letter. Mr Khadila submits that that meant that the applicant demanded that the Ministry's application process, departmental background checks, system process, as well as other administrative processes be fast-tracked for him and be completed within two days of receipt of the letter and when the respondents failed to heed the applicant's demands he rushed to court and filed an urgent application.

[13] Mr Khadila raised the question of whether the applicant's urgent application was bona fide as he (the applicant) knew that the Immigration Selection Board only sits once a week, on a Tuesday. The Ministry received the letter of demand from the applicant on Wednesday. The applicant then launched his application without giving the respondents a reasonable opportunity to heed the demand.

[14] Mr Khadila contends that the applicant's argument that he had no choice but to approach the court for relief is without merit as the applicant failed to plead any facts to substantiate a real or perceived threat of deportation. In this regard the court was referred to *Patrick Inkono v The Council of the Municipality of Windhoek* (A55/2013) [2013] NAHCMD 140 (28 May 2013) wherein Shimming-Chase AJ (as she then was), on the issue of urgency commented that an applicant could

[2] *Du Toit v Government of the Republic of Namibia* HC-MD-CIV-MOT-GEN-2020/00501/ [2021] NAHCMD 18 (28 January 2021)

not jump the queue on 24 hours' notice without there being any pending threat of eviction, irrespective of whether or not the applicant has a right to reside in the property or not.

[15] Mr Khadila, in applying the *Inkono* matter to the current facts, argues that the applicant decided, without any trigger event, to abuse the court procedure under rule 73 to jump the queue.

[16] Mr Khadila concluded by submitting that the applicant should be liable to pay the respondents' costs on the basis that the applicant failed to withdraw the respondents a reasonable opportunity to respond to his demand, and because there was no trigger event to approach this court on an urgent basis.

The general principles of cost

[17] As a general rule, the successful party is entitled to his costs, and this rule should not be departed from except upon good grounds[3]. It is further a general rule that a party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps[4].

[18] The urgent application scheduled for 30 August 2022 was essentially overtaken by events as the respondents proceeded to consider the applicant's work permit application and took a resolution in respect of the applicant's application, and it was no longer necessary to pursue the application. Accordingly, in his status report dated 2 September 2022, Mr Bangamwabo reported as follows to the court:

'4. It is submitted that, regards being had to this new turn of events and Respondents' quick reaction to deal with and consider the Applicant's application for renewal of his work permit, the main relief of mandamus has been obtained. It is further submitted that the second relied (sic) of interim interdict was dependent and ancillary to the *mandamus*.

[3] Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 477-8 and the authorities cited.
[4] Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South* Africa 3rd ed at 483; *De Villiers v Union Government* (Minister of Agriculture) 1931 AD 206 at 214.

5. It follows that urgent application has become moot academic. In the premises, Applicant submits that the dispute between the parties has been resolved and/or overtaken by events. It shall therefore be removed from the roll by agreement between the parties; alternatively Applicant will withdraw the application in terms of Rule 97.'

[19] Mr Khadila submitted that the 'applicant has withdrawn its claim without tendering costs, leaving the respondents with no option but to apply to this honourable court for costs rightly owed to it.'[5]

[20] The question is whether the respondents are the successful party and whether the general rule above applies to the facts before me.

[21] AC Cilliers in Law of Costs[6] indicates that 'where a disputed application is settled on a basis which disposes of the merits except in so far as costs are concerned, the court should not have to hear evidence to decide the disputed facts to decide who is liable for costs, but the court has, with the material at its disposal, to make a proper allocation as to costs'[7].

[22] Having regard to the papers before me, it is clear that the facts set out by the applicant in his founding affidavit are unchallenged. The enquiries, the follow-ups and further attempts by the applicant to have a result from his application for renewal of his work permit were not gainsaid by the respondents as they did not file answering papers, despite having been allowed to do so. Instead, Mr Khadila filed a notice to raising two points in limine, i.e. a) urgency, and b) no objective threat of harm, and no response to the allegations by the applicant.

[23] Mr Khadila made much of the fact that the applicant's renewal application was fast-tracked, and a resolution was obtained by 31 August 2022. However, although the fast-tracking eventually caused the relief sought in the urgent application to become moot, it does not mean that the respondents are the successful party. The contrary is true, as the urgent application obtained the result that the applicant was aiming for, i.e. a decision or resolution on his application for the

[5] Para 4 of the Respondents' heads of argument.
[6] AC Cilliers et al *Law of Costs* 3rd Ed at para 2.20.
[7] *Gamlan Investments (Pty) Ltd and Another V Trilion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C).

renewal of his work permit. However, to get to the result and get the wheels of bureaucracy turning, the applicant had no choice but to litigate.

[24] In the *Du Toit* matter, which is similar to the matter before me, Masuku J considered not only the issue of costs but also the critical role of the respondents, and I can do no better but to quote what my Brother said in this regard:

'[9] In my view, the Ministry of Home Affairs and Immigration plays a crucial constitutional function in an open and democratic society and more so in a young and developing democracy such as the Republic of Namibia. The regulating and enforcing of immigration laws and policies require the highest degree of diligence and standards as the decisions taken affect all levels of society. In addition, access to redress and a line of communication should not be discriminated between those who cannot afford the costs to institute legal proceedings and those who can. In other words, the argument presented for the respondents that the plaintiff is not entitled to wasted costs as the applicants would in any event have been taken to court, is not, in my considered view, compelling.

[10] Where a less expensive and less cumbersome route to solving the applicant's issue existed, the route should have been explored. All government ministries and agencies should strive to uphold their constitutional duties in serving the people of Namibia. Certainly, it would be a sad day where redress can only be received through litigation, as this would simply shut the door to all who cannot afford the costs associated with it, which are normally enormous. In my view, the relief sought in part A objectively viewed, was fairly simple and could have been easily avoided with a modicum of diligence from the respondents, in light of the fact that a real attempt was made by the applicants to establish communication with the respondents.'

[25] The applicant, as in the *Du Toit* matter, was compelled to move an application to seek redress. For the respondents to argue that there was no trigger event to cause the applicant to bring the urgent application is just irrational. At the time of launching the urgent application, the applicant was for almost seven months already without an income as he could not risk working without a work permit, and no decision was forthcoming from the respondents. If I understand the respondents' argument correctly the applicant literally had to wait for a notice of deportation before he approached the court, but it would be too late.

[26] I agree with Mr Bangamwabo that the respondents should be held liable for the applicant's costs brought about by the inaction of the respondents in considering the application for renewal of his work permit, compelling him to litigate. I am however not prepared to grant costs on a punitive scale.

[27] The order is as above.

Judge's signature	**Note to the parties:**
Prinsloo Judge	Not applicable.
Counsel:	
Applicant	**Respondent**
F Bangamwabo of FB Law Chambers, Windhoek	F Kadhila of Office of the Government Attorney