ALEXANDER RICHARD BERGMANN
and
COMMERCIAL BANK OF NAMIBIA LTD.
DEPUTY-SHERIFF, WINDHOEK

CASE NO. (P) A 336/2000

2000/11/06

Maritz, J.

CILVIL PROCEDURE
URGENT APPLICATIONS

Civil procedure – Rules of court – urgent applications – Court may decline to condone non-compliance when applicant has created urgency either *mala fides* or through culpable remissness or inaction.

Civil procedure – Rules of Court – urgent applications – Rules designed, amongst others, to bring about procedural fairness in the ventilation and resolution of disputes – requirement that procedure in urgent applications should be "as far as practicable be in terms of the rules" constitute a continuous demand on the parties to give effect tot the objective of procedural fairness in urgent applications – urgent applications should be instituted as soon as the cause thereof has arisen and the respondent should be afforded tie to oppose the application, unless it would frustrate the objective of the application or it would be impractical or unreasonable to do so – applicant may not delay launching of urgent application to snatch a procedural advantage over adversary.

CASE NO. (P) A 336/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALEXANDER RICHARD BERGMANN APPLICANT

versus

COMMERCIAL BANK OF NAMIBIA LTD. FIRST RESPONDENT

DEPUTY-SHERIFF, WINDHOEK SECOND RESPONDENT

CORAM: MARITZ, J.

Heard on: 2000.11.06

Delivered on: 2000.11.06 (*extempore*)

JUDGMENT

MARITZ, J.: This is an urgent application brought on Notice of Motion to stay a sale in execution. The applicant, Alexander Richard Bergmann, is the owner of a certain flat no. 14, Tal Valley Apartments, No. 7 Wecke Street, Windhoek. The first respondent is his judgment creditor. The second respondent is the Deputy Sheriff for the district of Windhoek, who is charged with the sale of the flat in execution of the judgment entered against the applicant.

The issue that the Court is called upon to decide at this point in the proceedings is whether or not the application should be allowed to proceed as one of urgency. Mr Bloch contends on behalf of the applicant that it is urgent. He submits that the urgency is apparent from the fact that the sale of the flat in execution of the judgment is scheduled to take place tomorrow at 09:30.

On the other hand, Mr Strydom, on behalf of the first respondent, contends that the application is not urgent and, if it is, the urgency has been created by the applicant's failure to take steps to stay the execution at an earlier point in time. He points out that the "Notice of Sale in Execution" and the "Conditions of the Sale in Execution" were served by the Deputy Sheriff on the applicant at the offices of his legal representative on 18 October 2000 (more than 2 weeks ago). That

much is evident from the return of service, Exhibit “C”, which was handed up in the course of the oral evidence of the first respondent’s instructing counsel. Given the late service of the application on the first respondent, it was not afforded sufficient time to answer to the allegations made in the founding affidavit. That, and because the relief prayed for is of a final nature as far as tomorrow’s execution sale is concerned, persuaded me to allow oral evidence in support of the first respondent’s opposition to the application and the claimed urgency thereof.

In reply to the first respondent’s argument, Mr Bloch contends that the application has not been brought at an earlier point in time because the applicant was trying to negotiate some or other agreement with the first respondent about the payment of the judgment debt and to establish the extent to which other securities, which the first respondent held, were utilized in reduction of that debt. Furthermore, the applicant endeavoured to obtain permission from the first respondent to sell the property by private treaty. All these attempts came to nothing. The first respondent continued with the execution process.

In the course of argument I enquired from counsel whether there was anything on the papers or in the evidence to suggest that there had been an agreement that, pending the outcome of the negotiations for payment of the judgment debt in installments or the sale by private treaty, the procedures relating to the sale in execution would be stayed or that the sale would be postponed. I was not referred to any such agreement and there appears to be none.

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. Examples thereof are to be found in the *Twentieth Century Fox Film Corporation* and *Schweizer Reneke* - cases* (**Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd,* 1982 (3) SA 582 (W) and *Schweizer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en Andere,* 1971 (1) PH F11 (T)). It is more so, when the relief being sought is

essentially of a final nature and no or very little opportunity has been afforded to the respondent to properly present his or her defence. 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 fides* 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.

It happens, in my experience all too frequently, that this Court is being inconvenienced by last minute applications to stay sales in execution. Judges of in this Court heave heard several applications of this nature after ordinary Court hours - thus not only inconveniencing the Court itself but also the Court's staff (such as the Court's orderlies, clerks and stenographers). I appreciate that this application was called about an hour and a half later than the time mentioned in the Notice of Motion because of other urgent business the Court had to attend to. But even if it had been called on time, its hearing would still have extended beyond the ordinary Court hours.

When an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. Urgent applications should always be brought "as far as practicable" in terms of the Rules. The procedures contemplated in the Rules are designed, amongst others, to bring about procedural fairness in the ventilation and ultimate resolution of

disputes. Whilst rule 6(12) allows a deviation from those prescribed procedures in urgent applications, the requirement that the deviated procedure should be "as far as practicable" in accordance with the Rules constitutes a continuous demand on the Court, parties and practitioners to give effect to the objective of procedural fairness when determining the procedure to be followed in such instances. The benefits of procedural fairness in urgent applications are not only for an applicant to enjoy, but should also extend and be afforded to a respondent. Unless it would defeat the object of the application or, due to the degree of urgency or other exigencies of the case, it is impractical or unreasonable, an applicant should effect service of an urgent application as soon as reasonably possible on a respondent and afford him or her, within reason, time to oppose the application. It is required of an applicant to act fairly and not to delay the application to snatch a procedural advantage over his or her adversary.

Had the applicant so acted in this application, the matter could have been dealt with on a semi-urgency basis. The respondent would have had enough time to file a notice of opposition and answering affidavits. It could have been placed on the semi-urgent opposed motion roll, the issues would have been properly ventilated, the parties would have had an opportunity to reconsider their respective positions and the

Court could have had the benefit of considered argument before ruling on the matter. In this case, and because the application was only served earlier this morning on the first respondent, the Court had to allow an application of the respondent to adduce oral evidence in support of its opposition to the application – a time consuming procedure that would have been unnecessary had it not been for the applicant's dilatory conduct.

I am of the view that the urgency in this application is self-created by culpable remissness on the part of the applicant. Hence, I decline to condone his non-compliance with the Rules of Court or to hear this application as one of urgency.

In the result, the following order is made:

The application is struck from the roll with costs.

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MARITZ, J.

ON BEHALF OF THE APPLICANT:	MR BASIL BLOCH
Instructed by:	Attorney Basil Bloch
ON BEHALF OF FIRST RESPONDENT:	ADV J. A. N. STRYDOM
Instructed by:	Engling, Stritter & Partners