NOT REPORTABLE

CASE NO: A 25/2012

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

JORGE MANUEL BATISTA NEVES	**1ST APPLICANT**
MARIA ALZIRA ALVES BATISTA NEVES	**2ND APPLICANT**

and

ANDRE FRANCOIS NEETHLING t/a ANDRE NEETHLING CONSULTANCY	**1ST RESPONDENT**
RAINIER ARANGIES	**2ND RESPONDENT**
WATERLILLY INVESTMENTS TEN CC	**3RD RESPONDENT**
COUNCIL FOR THE MUNICIPALITY OF TSUMEB	**4TH RESPONDENT**

CORAM: HOFF, J

Heard on: 24 May 2012

Delivered on: 31 May 2012

JUDGMENT

Rule 30 Application

HOFF, J: [1] This Rule 30 application was brought on two grounds. The first ground was that respondents' urgent counter-application in terms of Rule 44(1) and the

respondents' anticipation of the Rule *nisi* against them is irregular, or improper and/or impermissible in that Rule 6(8) does not apply where the return date of a rule *nisi* obtained *ex parte* has been extended with the knowledge and/or consent and/or presence of the respondents affected thereby.

[2] On 24 February 2012 this Court granted on an *ex parte* basis an urgent rule *nisi* against the respondents with a return date being 30 March 2012. On 30 March 2012 the rule *nisi* was extended (since the matter became opposed) to 27 April 2012 in order for respondents to file their opposing papers and applicants to file their replying papers. On 11 April 2012 the respondents launched an urgent counter-application titled "Respondents' urgent counter-application in terms of Rule 44(1) and respondents' anticipation of the Rule *nisi* issued against them, in terms of the provisions of paragraph 6 of the Court Order dated 24 February 2012".

[3] The applicants field their Rule 30 application on 19 April 2012. On the extended return date the rule *nisi* was further extended until 24 May 2012 and both the Rule 44 and Rule 30 applications were postponed to 24 May 2012.

[4] Mr Wylie who appeared on behalf of the applicants submitted the respondents could not have anticipated an extended return date since the rule *nisi* has been extended in their presence and that the purpose of Rule 6(8) is to come to the aid of a litigant who has been taken by surprise by an order granted *ex parte* and referred this Court to the case of *Peacock Television Co (Pty) Ltd v Transkei Development Corporation* 1998 (2) SA 259 (TK).

[5] In *Peacock (supra)* Madlanga J at 262 F said "…it cannot be that persons adversely affected by a rule *nisi* obtained *ex parte* are free, as of right, to anticipate the extended return day thereof despite an extension or extensions of the rule *nisi* in their

presence. It seems to me that Rule 6(8) was meant to come to the aid of a litigant who finds himself/herself *taken by surprise* by an order granted *ex parte*".

and continues at 262 G – H:

> "If respondents, in circumstances like the present, were to be allowed to anticipate a return day as they please, the orderly practice of this Court and the purpose thereof would be defeated. Such anticipation would amount to allowing respondents to avoid having to properly set their matters down for hearing on the opposed roll. This would not only result in chaos but would also prejudice those litigants who have set down their opposed matters properly and have waited their turn on the opposed roll."

[6] I agree with this reasoning. The prejudice lies in the fact that the applicants had to deal with a Rule 44 application that had been set down irregularly as well as the fact that the applicants are unable to answer the application where no grounds for urgency were set out in the urgent Rule 44 application.

[7] Mr Barnard who appeared on behalf of the respondents submitted that respondents no longer consider the application to be urgent and therefore the issue of urgency need not be considered. This however does not assist the respondents since on the papers filed this Court is required to consider the Rule 44 application as one of urgency.

[8] I am of the view that the applicants should succeed on this ground alone.

[9] The second ground is a variation on the first ground to the effect the respondents have not complied with (in their supporting affidavit to the Rule 44 application) the requisites in terms of Rule 6(12((b) and in particular the failure to set out the grounds of urgency. In view of my conclusion regarding the first ground I do not deem it necessary to

consider the second ground because of the repetitive nature of the ground raised by the applicants.

[10] I am therefore of the view that the applicants' Rule 30 application should succeed with costs.

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

1. The respondents' urgent counter-application in terms of Rule 44(1) and respondents' anticipation of the Rule *nisi* in terms of the provisions of paragraph 6 of the Court Order dated 24 February 2012 are hereby struck and set aside.

2. The respondents' supporting affidavit to their urgent counter-application in terms of Rule 44(1) and respondents' anticipation of the Rule *nis*i in terms of the provisions of paragraph 6 of the Court Order dated 24 February 2012 is struck and set aside in so far as it constitutes a supporting affidavit, but stands in so far as it constitutes respondents' answering affidavit to applicants' urgent application.

3. The respondents to pay the costs of this Rule 30 application.

4. The applicants file their replying affidavit (if any) in the main urgent application not later than 16h00 on 7 June 2012.

5. The applicants file their heads of argument in respect of the main urgent application not later than 16h00 on 7 June 2012.

6. The main urgent application be argued on and the rule *nisi* be extended until 14 June 2012 at 09h00.

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HOFF J

ON BEHALF OF THE 1ST & 2ND APPLICANTS PLAINTIFF: **ADV. WYLIE**

Instructed by: **NEVES LEGAL PRACTITIONERS**

ON BEHALF OF THE 1ST, 2ND & 3RD RESPONDENTS **ADV. BARNARD**

Instructed by: **MUELLER LEGAL PRACTITIONERS**

ON BEHALF OF THE 4TH RESPONDENT: **NO APPEARANCE**