NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No**: A 170/2012**

In the matter between:

KHOMAS INVESTMENTS THREE SEVEN CC	**1ST APPLICANT**
VILLA INVESTMENTS THREE SEVEN CC	**2ND APPLICANT**
and	
MAIVHA CONSTRUCTION CC	**RESPONDENT**

Neutral citation:	*Khomas Investments Three Seven CC v Maivha Construction CC* (A 170/2012) [2012] NAHCMD (30 August 2012)
Coram:	SMUTS, J
Heard on:	15 August 2012
Delivered on:	30 August 2012

ORDER

The application is struck from the roll, with costs, which include the costs of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

[1] The first applicant, a property developer, entered into a construction contract with the respondent, the building contractor, to develop 22 townhouses on property in Khomasdal owned by the second applicant. The parties signed a building contract and the construction works started soon afterwards in September 2011.

[2] Although it is common cause between the parties that they had entered into the agreement, the respondent states that it does not set out its full extent and that the further terms agreed upon between the parties. Most importantly for purposes of the respondent's case is its assertion that it only agreed to construct the superstructure for the 22 sectional title units and not completed entities as is contended by the applicants. Disputes between the parties started soon after the commencement of the construction work. The project also ran behind schedule. Despite an

addendum to the agreement to extend time limits, the project was not completed in time. The parties then made accusations concerning the other as to the cause of the difficulties. On 5 June 2012, the respondent's legal practitioners declared a dispute in the matter. The applicants' legal practitioners soon afterwards on 15 June 2012 served a notice of cancellation of the building contract upon the respondent, alleging breaches of that agreement.

[3] The respondent's legal practitioners responded to the letter of cancellation on the same day, 15 June 2012 and asserted that monies were due to it by the first applicant and further asserted that it would exercise its builder's lien over the building works.

[4] The applicants however contend that the respondent is not validly exercising a builder's lien. Their principal argument rests upon the value of the works done by the respondent in denying that the first applicant owes any money to the respondent. The applicants refers to a report by quantity surveyors engaged by them to the effect that the value of the completed work at that stage was N$1,035,883.77, constituting less than 35% of the total value of the building price of just over N$3 million.

[5] The respondent on the other hand approached a different firm of quantity surveyors who valued the work performed by the respondent in a sum in excess of N$4 million.

[6] It soon became clear that the applicants disputed the respondent's entitlement to exercise a builder's lien and also in the founding papers disputed the validity of the lien itself.

[7]

[8] The applicants have brought this application as a matter of urgency seeking to interdict the respondent and its employees from interfering or obstructing or preventing the applicants' building operations on the building site.

[9] This application was dated 2 August 2012 but served on the respondent at its legal practitioners on the afternoon of the following day. It was set down for 9 August 2012. Shortly before the set down, the parties agreed to a short postponement to enable the respondent to file an answering affidavit which was done on 10 August 2012.

[10] The applicants' replying affidavit was however filed late on 13 August 2012 and only made available to the respondent's instructed counsel on the date of hearing, 14 August 2012. The respondent's counsel requested time to read and consider the relatively lengthy replying affidavit (in excess of 40 pages with several annexures). The matter then stood down for argument on 15 August 2012.

[11] Mr Dicks who represented the respondent argued that the matter had not been properly brought as one of urgency and that any urgency was self-created on the part of the applicants and that the application should be struck from the roll for this reason alone. The respondent also opposed the application on other

grounds and contended that, given that the relief would be final in nature as it would bring about the end of the builder's lien, disputed facts should be approached in accordance with what has become known as the Stellenvale-rule [1] thus on the basis of what is contained in the respondent's answering affidavit where the facts are disputed.

[12] Mr Corbett on the other hand who appeared for the applicants submitted that the application was properly brought as one of urgency and that the delay in bringing the application was fully explained, particularly in the replying affidavit after this aspect had been challenged by the respondent.

[13] Mr Dicks referred to the fact that the respondent had already on 15 June 2012 made known that it asserted its builder's lien and that it soon appeared that the applicants took issue with this. Yet, he pointed out, that the application was only brought more than 6 weeks later and served with very short notice upon the respondent. He referred to the incident on 17 July 2012 canvassed in the papers in which the applicants' legal practitioner had attended at the site together with his client in a bid to evict the respondent from the site. On this occasion there was an exchange between the parties' legal practitioners telephonically, culminating in the applicants' legal practitioner threatening the bringing of an urgent application the following afternoon. This was confirmed in writing on the following day by the respondent's legal practitioner. A few days later and on 20 July 2012 the applicants' legal practitioner of record again

[1] As set out in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 as followed and explained in Plascon-Evans Paints v Van Riebeek Paints 1984 (3) SA 623 (A) at 634 and consistently applied in this Court.

complained about the respondent's occupation of the building site and again threatened to lodge an urgent application. These developments were referred to in the founding affidavit. The next development referred to in that affidavit in the context of urgency was the further statement that counsel was instructed on 30 July 2012 to prepare papers, after further documentation was sought, the papers were settled by 2 August 2012 and the application launched on the following day, 3 August 2012.

[14]

[15] No explanation was provided in the founding affidavit for the delay from the commencement of the exercising of the lien on 15 June 2012 to the date of bringing the application except for the events stated. More importantly, no explanation is provided for the failure to bring an application after it was threatened already on 16 July 2012 by the applicants' legal practitioner who said that it would be brought overnight. The threat of an urgent application was reiterated a few days later on 20 July 2012 but no explanation is given in the founding papers for the delay between 20 July 2012 and 30 July 2012.

[16]

[17] In the respondent's answering affidavit this aspect was addressed in some detail with the respondent's squarely taking issue with the urgency with which the application was brought. In the replying affidavit, it is explained that instructed counsel had been briefed already on 11 July 2012 but had only on 25 July 2012 indicated that he was not available. There was an attempt to brief other identified instructed counsel following this although no date was stated as

to when the second counsel was approached. But it is stated that on 27 July 2012 he indicated that he was not available to assist with the urgent application. It was then stated that the current counsel was approached on 27 July 2012 and a consultation arranged for 30 July 2012.

[18] Mr Dicks submitted that the explanation provided was inadequate and that it should in any event have been set out in the founding affidavit.

[19] Whilst this Court has recognised that there are varying degrees of urgency including in commercial matters, it has been repeatedly emphasised that it is incumbent upon applicants to demonstrate with reference to the facts of the specific matter that they are unable to receive redress in the normal course and that the facts of their matter would justify the urgency with which the application has been brought. It has also been repeatedly stressed that applicants would need to show that they have not created their own urgency and that the respondents have been afforded sufficient opportunity to deal with the matters raised. [2]

[20]

[21] It has also been stressed that a Court could also take into account logistical difficulties in the bringing of an application, provided that these are fully

---

[2] Petroneft International and Another v Minister of Mines and Energy and Others, unreported, 28 April 2011, case no A 24/2011; Bergmann v Commercial Bank of Namibia and Another 2001 NR 48 (HC); Mweb Namibia (Pty) Ltd v Telecom Namibia and Others 2012 (1) NR 331 (HC)

and satisfactorily explained. [3]

[22] The applicants however did not adequately or properly explain their delay in the founding affidavit. There was no explanation at all for the period between 20 and 30 July 2012. The fact that this is then dealt with in the replying affidavit does not in view avail the applicants. They were required to have set out their explanation in their founding affidavit so that it could be investigated, challenged and dealt with fully by the respondent.

[23] The explanation itself eventually provided in reply is in my view by no means adequate either. It is in my view entirely unacceptable for an instructing practitioner to wait for 2 weeks before receiving a reply from instructed counsel that the latter is not available to assist in an urgent application. It is incumbent upon an instructing practitioner to establish from instructed counsel forthwith or preferably before even forwarding a brief, whether the instructed counsel in question would be able to assist in a matter. To wait for a period for some 2 weeks before establishing this is in my view entirely unreasonable and unacceptable. Whether or not instructed counsel can assist in the matter is in my view a matter which is to be established at the outset and can and should be done immediately. There is no reason why this should take so long. If counsel is not available then other counsel should likewise be approached immediately and their availability ascertained immediately. Where there has been remissness or inaction, a party cannot not proceed on the basis of urgency as

[3] Petroneft International and Another v Minister of Mines and Energy and Others *supra* at 14; The Three Musketeers (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and Others, unreported, 30 November 2006

was made clear in the Bergmann matter. [4]

[24] It is well settled that this Court has a discretion to condone non-compliance with its Rules and that an applicant has the onus in establishing urgency in seeking the indulgence of the Court to hear the matter as one of urgency.

[25] Having carefully considered the submissions made by the parties in respect of urgency I find myself unable to exercise my discretion in favour of the applicant. I accordingly refuse to condone the non-compliance with the Rules of this Court on the basis of urgency. It follows that it is not necessary for me to address and canvass the further arguments made by the parties.

[26]

[27] I accordingly make the following order:

1. The application is struck from the roll, with costs, which include the costs of one instructed and one instructing counsel.

_____

D Smuts

Judge

[4] *Supra* at 49-50

APPLICANTS	AW Corbett
	Instructed by BD Basson Incorporated, Windhoek
RESPONDENT	G Dicks
	Instructed by AngulaColeman, Windhoek