REPUBLIC OF NAMIBIA NOT / REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 80/2013

In the matter between:

1.1.1.1. **SCHALK WILLEM BURGER NEL**

APPLICANT

and

HENK CARL BURGER **FIRST RESPONDENT**

WINGS OVER AFRICA CC **SECOND RESPONDENT**

NAMIBIA BASE AVIATION (PTY) LTD **THIRD RESPONDENT**

Neutral citation: *Nel v Burger* (A 80/2013 [2013] NAHCMD 106 (11 April 2013)

Coram: SCHIMMING-CHASE, AJ

Heard: 11 April 2013

Delivered: 11 April 2013 *(ex tempore)*

Flynote: Practice – Applications and Motions – urgent applications – principles relating to urgent applications dealt with. Interdict – Interim interdict – Prerequisites for relief restated – *prima facie* right, danger of irreparable harm, balance of convenience favouring applicant, no alternative remedy.

Summary: Applicant launched an urgent application for an order interdicting

the first and second respondents from proceeding with their actions instituted against the third respondent and from engaging in proceedings in terms of section 228 of the Companies Act, 28 of 2004 to remove the first respondent as a director of the third respondent, pending finalisation of arbitration proceedings scheduled to take place on 14, 15 and 16 May 2013. It was common cause that the applicant had a 40% shareholding and the first respondent a 60% shareholding in the third respondent. It was also clear that the arbitration proceedings would ultimately deal with the rights and interests of the applicant and the first respondent on the third respondent.

Held: The applicant had made out a case for urgency on the papers. The applicant had also proved a clear right as well as the other requisites for interim relief on the papers. The relief sought in the application was accordingly granted.

ORDER

1.1 The applicant's non-compliance with the prescribed requirements relating to forms, service and practice directives of this Court is condoned, and that this matter is heard as one of urgency as contemplated in Rule 6(12) of the Rules of Court.

1.2 Pending the outcome of the arbitration between the applicant and the first respondent relating to the sale of member's interest in the third respondent before the arbitrator Mr At Slabber:

1.2.1 The meeting in terms of section 228 of the Companies Act 2004 called by the first respondent for 15 APRIL 2013 will not proceed;

1.2.2 The applicant remains a director of the third respondent;

1.2.3 The applicant remains in charge of the day to day business of

the third respondent;

1.2.4 All proceedings in case number I 646/13 and case number I 647/13 in the honourable court be held in abeyance or, if default judgment has already been granted by the time this application is heard, that the operation of any judgment or order be suspended and any execution be stayed; and

1.2.5 Neither the applicant nor the first respondent shall take any steps on behalf of the third respondent which is not in the strict ordinary course of business of the third respondent unless by prior written agreement.

1.3 The first respondent pays the costs of this application.

EX TEMPORE JUDGMENT

SCHIMMING-CHASE, AJ

(b) This is an application for the following relief:

1.1 That the non-compliance with the rules and time periods of the Court be condoned and that the matter be heard on an urgent basis.

1.2 That pending the outcome of the arbitration between the applicant and the first respondent relating to the sale of members' interest in the third respondent before the arbitrator, Mr At Slabber:

2.1.1.

1.2.1 the meeting in terms of section 228 of the Companies Act, 2004 called by the first respondent for 15 April 2013 not proceed;

1.2.2 the applicant remains director of the third respondent;

1.2.3 the applicant remains in charge of the day-to-day business of the third respondent;

1.2.4 all proceedings in Case No I 646/13 and I 647/13 be held in abeyance or if judgment default has already been granted by the time the application is heard that the operation of any judgment or order be suspended and any execution be stayed;

1.2.5 that neither the applicant nor the first respondent take any steps on behalf of the third respondent which is not in the strict ordinary course of business of the third respondent unless by prior written agreement; and

1.3 that the first respondent pays the costs of this application, such costs to include the cost of one instructing and one instructed counsel

(c) The relief relates to the third respondent and in particular a dispute between the applicant and first respondent concerning a written agreement in terms of which the applicant sold 60% members' interest in the third respondent to the first respondent. At the time the applicant held 100% members' interest and the third respondent was registered as a close corporation. Subsequent to the agreement, the third respondent was converted to a company with the applicant holding a 40% shareholding and the first respondent holding a 60% shareholding respectively. The first respondent also holds a 100% members' interest in the second respondent.

(d) The applicant instituted a dispute against the first respondent which is set down for arbitration by agreement between the parties on 14, 15 and 16 May 2013 relating to the agreement concluded between the parties mentioned above, and in particular, regarding the terms of the agreement of sale of members' interest from the applicant to the first respondent.

(e) In essence the applicant claims, and the subject matter of the dispute is that the agreement is void due to alleged misrepresentation of the first respondent as a result of which the applicant seeks an order or finding on arbitration that the agreement is void. The applicant also seeks an order that the 60% of the members' interest in the third respondent transferred by him to the first respondent, be retransferred back to the applicant and that the first respondent sign all the necessary documentation to that effect.

(f)

(g) I do not propose to deal with the merits of the dispute between the parties concerning the agreement. This is going to be dealt with at the arbitration proceedings which have already been set down for hearing by agreement between the parties.

(h)

(i) In the meantime, on 4 March 2013, the first respondent in his personal capacity issued summons against the third respondent (in which the first respondent holds 60% shareholding), for payment of the amount of N$363,689.53 in respect of monies lent and advanced to the third respondent.

(j)

(k) The summons was served on 14 March 2013 and it is common cause that this action has been stayed by agreement between the representatives of the applicant and the first respondent. I point out that it would be highly unlikely if not impossible for the third respondent to at this stage resolve to defend the above action as the first respondent who is the plaintiff in that action, also owns a 60% shareholding in the third respondent. There is also considerable acrimony between the parties, and the applicant would need the co-operation of the first respondent in order for the third respondent to resolve to defend the action. As such, I believe that the agreement between the parties' representatives to stay the aforesaid action was a wise one.

(l) On the same date, the second respondent, solely owned by the first respondent also issued summons against the third respondent for payment of the amount of N$293,835.89 for the rental by the second respondent to the third respondent of a Gulfstream Jack. There is a dispute between the parties as to

whether or not this was a rental agreement, but I also do not propose to deal with this aspect at this stage in view of the order that I make; but it is apparent that again the third respondent cannot resolve to defend these proceedings simply because the first respondent who wholly owns the second respondent also owns 60% of the shareholding in the third respondent which the second respondent has sued.

(m) On 15 March 2013 the applicant also received a telefax of a notice in terms of section 228 of the Companies Act, 28 of 2004, of a meeting called by the first respondent to be held on 15 April 2013 for purposes of removing the applicant as a director of the third respondent. After receiving the above process as well as the notice in terms of section 228 of the Companies Act, the applicant sent the documents to his legal practitioners on 15 March 2013 which was a Friday morning. According to the founding papers instructions were sent to counsel who had already been briefed for purposes of the arbitration on 19 March 2013.

(n) On 22 March 2013 after the public holiday, instructed counsel consulted with the applicant via telephone. The applicant was in Swakopmund at the time. Advice was provided by instructed counsel to the applicant, in particular to decide whether an urgent application should be launched in the circumstances.

(o) On 25 March 2013 the applicant, after discussing the matter with his father in law, gave instructions to counsel to proceed with the urgent application. Counsel also required further information for purposes of drafting papers.

(p) On 26 March 2013 the applicant's legal practitioners contacted the first and second respondents' legal practitioners requesting an undertaking that pending finalisation of the arbitration, the section 228 meeting scheduled for 15 April 2013 not proceed, that the applicant would remain a director of the third respondent and that neither the applicant nor the first respondent would take any steps on behalf of the third respondent unless by private agreement. Furthermore a request was made that the action proceedings mentioned above instituted by the first and second respondents remain in abeyance.

(q) In this letter it was specifically mentioned on behalf of the applicant that "we look forward to receiving your confirmation in this regard as soon as possible failing which we have to continue with the urgent application which we are in the process of preparing".

(r) On the same day the first and second respondents' legal representative advised by email that the action in respect of the Gulf string jet instituted by the second respondent against the third respondent would not be stayed but that the action instituted by the first respondent in his personal capacity would be stayed.

(s) It was further confirmed that different legal practitioners were representing the first respondent in the upcoming section 228 meeting. The applicant was advised to contact that legal practitioner and the first respondent in this application is represented by two separate firms as well as one instructed counsel in respect of section 228 meeting.

(t) The notice of motion and founding affidavit were signed on 28 March 2013, and the application was instituted on 28 March 2013. In the notice of motion the respondents were given time albeit truncated periods, to oppose the application and file answering papers. The application was set down for hearing for 11 April 2013. The first respondent filed two sets of answering papers as different legal practitioners represented him in the two issues already mentioned above.

(u) As regards the question of urgency, both counsel appearing on behalf of the first and second respondents argue in the main that the application was not urgent and that if it was urgent, the urgency was self-created. They rely on the decisions of this court in Mweb Namibia (Pty) Ltd v Telecom Ltd [1] and Bergmann v Commercial Bank of Namibia. [2] The principles relating to what must be advanced in order to obtain condonation for non-compliance with Rule 6(12)

[1]Case No A91/2007 unreported.

[2]2001 NR 48 (HC).

were well established in *inter alia* the aforementioned decisions of this court, and I do not propose to restate those principles, rather to apply them to the facts of this matter.

(v) Counsel for the first and second respondents rely in the main for their contentions on the period between 15 and 26 March 2013 where it is argued that the applicant did nothing to safeguard its rights. I find this submission somewhat artificial. The period amounts to six court days. Even if there was a delay or the lack of an explanation for what happened during this particular period, it is a matter of days, and not weeks or months, and the cases involving self-created urgency or failure to explicitly set out the circumstances that render the matter urgent deal with more extended periods, namely weeks or months in which there were inexplicable and lengthy delays. In any event, in my opinion, there was no unreasonable delay in the institution of these proceedings.

(w) I also find that the degree of urgency alleged by the applicant to exist on the papers was commensurate with the time periods provided to the respondents to oppose the application and file answering papers. It is true that the respondents were afforded a shorter period of time but they have answered the applicant's allegations in full as far as my understanding of the papers are concerned, and no request for a postponement was made. Had such a request been made, it would have been granted.

(x) I find that the convenience of the court was also taken into consideration and that the papers were properly paginated providing the court sufficient time to prepare for the adjudication of this matter. I therefore find that the applicant has complied with the first parts of Rule 6 and that he has set forth explicitly the circumstances that rendered the matter urgent and the reasons why substantial redress could not be afforded at a hearing in due course. [3] In this regard I am mindful of the fact that in deciding urgency, the court must assume that the

[3]See also Congress of Democrats and others v Electoral Commission 2005 NR 44 (HC) at 48 H; Luna Meubelvervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135 (W); Bergmann v Commercial Bank of Namibia *supra;* Salt v Smith 1990 NR 87 (HC).

applicant has a right to the relief which it seeks. [4]

(y) It is also well established that factors such as the time taken to take reasonable steps preceding an application of this nature including steps taken toward of the institution of an urgent application, the distance between a litigant and his legal representative, attempts to obtain instructions and copies of relevant documentation, taking advice and obtaining and preparing affidavits should be taken into account if these are fully and satisfactorily explained. Taking the facts raised by the applicant in his founding affidavit in support of urgency which are largely undisputed, I cannot fault the applicant for taking time to marshall his forces. [5]

(z) Having dealt with the question of urgency, I now proceed to deal with the merits.

(aa) In this regard I reiterate that it is common cause that the applicant and first respondent own 40% and 60% shareholding respectively in the third respondent. It is also common cause that a dispute regarding ownership in the third respondent or the future ownership in the third respondent is set down for an arbitration hearing on 14, 15 and 16 May 2013.

(bb) It is clear to me that whatever issues exist between the parties (who have an extremely acrimonious relationship) as regards the ownership and future of the third respondent will be finally determined at the aforesaid arbitration hearing. It is on this basis that I set out at the outset that I did not propose to deal with the dispute of the parties that has been referred to arbitration.

(cc) The two actions instituted by the first and second respondents respectively against the third respondent (one of which has been stayed), as well as the section 228 proceedings, though valid and acceptable in law are in

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[4]Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd 1992(3) SA 582 W at 586 G.

[5]Petroneft International and one other v Ministry of Mines and Energy and six others, unreported judgment of Smuts, J in Case No A 24/2011 delivered on 28 April 2011.

my opinion premature, because of the upcoming arbitration. In fact, I hold the view that these proceedings undertaken by the first and second respondents, in particular the first respondent, are an attempt to harass the applicant and to create a state of affairs that hampers and encroaches not only on the arbitration proceedings, but on the functions of the arbitrator who is to hear and determine the matter. There is in essence a request (as I understand the argument on behalf of the first respondent) that the court at this stage interfere in the arbitrator's functions by deciding whether or not the applicant has made out a case for the relief sought to be determined at those proceedings. This is declined.

(dd) There is no reason why all these proceedings cannot not wait until the finalisation of the arbitration proceedings.

(ee) I therefore find that the applicant has made out a clear right for the purposes of the interdictory relief sought as the arbitration proceedings will directly affect the applicant's rights and for that matter the first respondent's rights. The requirements to be met for an interim interdict have been cogently set out in *inter alia* Sheehama v Inspector General, Namibian Police. [6] This court has also accepted that the stronger the right established by the applicant "… the less important the other matters become." [7]

(ff) I also find that if these proceedings are not stayed pending finalisation of the arbitration proceedings, that the applicant will suffer irreparable harm. There is still a possibility that he may be removed as a director by a majority shareholder in the third respondent when there are pending proceedings which will determine whether or not the applicant will become the sole owner or retain a minority shareholding in the third respondent. The third respondent can in the meantime not defend the second respondent's action until a resolution is taken.

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[6] 2006(1) NR 106 (HC) at 117 A-B.

[7] Alpine Caterers Namibia (Pty) Ltd v Owen and Others 1991 NR 310 HC at 313 H. See also PS Booksellers (Pty) Ltd and another v Harrison and others 2008(3) SA 633 C and Glaxo Welcome (Pty) Ltd and others v Terblanche and others (No 2) 2001(4) SA 91 (CAC) at 906 H-I.

(gg) I also find that the balance of convenience favours the applicant for the above reasons, and that the applicant has shown that he has no other satisfactory remedy. There is in my view no prejudice to the first respondent if the first and second respondents wait until finalisation of the arbitration proceedings before they take the actions they have taken so far which they can clearly continue should they succeed and the applicant fail at those proceedings.

(hh) In light of the above I find that the applicant has made out a case for the relief sought and I exercise my discretion in favour of the applicant. I accordingly grant the relief sought in the notice of motion set out above. As the applicant was successful, the first respondent is ordered to pay the costs of the application, such costs to include the cost of one instructing and one instructed counsel.

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E SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPLICANT:	P Barnard Instructed by Francois Erasmus & Partners
FIRST RESPONDENT:	A Botes Instructed by Koep & Partners
	W Boesak Instructed by Nambahu Associates