REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 177/2013

In the matter between:

SALOMO BASIE TJIKUNE	**1ST APPLICANT**
HILDE MARTİN	**2ND APPLICANT**
RUTH KATUSUVA	**3RD APPLICANT**
LEA TJIKUNE	**4TH APPLICANT**
CHARLOTTE MUZENGUA	**5TH APPLICANT**

and

JOSHUA JACOBUS MEUWESSEN NO	**1ST RESPONDENT**
THE MASTER OF THE HIGH COURT	**2ND RESPONDENT**
ELFRIEDE KAHIKOPO	**3RD RESPONDENT**
ALMA KARONDEUE TJAZAMO	**4TH RESPONDENT**
SAMUEL TJIJUNE	**5TH RESPONDENT**
STEFANUS TJIKUNE	**6TH RESPONDENT**
EMMA KAPUKARE	**7TH RESPONDENT**
IAN McCLAREN N.O.	**8TH RESPONDENT**
HILARIA TJIKUNE	**9TH RESPONDENT**
GOTHARDT TJIKUNE	**10TH RESPONDENT**
TABITHA TJAMUAHA	**11TH RESPONDENT**
LAURENCIA KAARONDO	**12TH RESPONDENT**
JOHN TJIKUNE	**13TH RESPONDENT**
ADELHEID MBUENDE	**14TH RESPONDENT**
ESRON TJIKUNE	**15TH RESPONDENT**
NIKOLEUS TJIKUNE-TJAZAM0	**16TH RESPONDENT**
FRANS TJAZAMO	**17TH RESPONDENT**

Neutral citation: *Tjikune v Meuwessen NO* (A 177/2013) [2013] NAHCMD 157 (07 June 2013)

Coram: DAMASEB, JP

Heard: 6th June 2013

Delivered: 7th June 2013

Flynote: Practice and Procedure – Motions and Applications – Urgent Applications – Principles of Urgency reiterated – No reasonable explanation as to why the urgent application was brought one full court day before the advertised sale – Urgency not made out on the papers.

ORDER

The application is struck from the roll, with costs against first to fifth applicant, jointly and severally, the one paying the other to be absolved. Such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

Damaseb, JP:

[1] Farm Tugab 21, the remaining Extent of Protion 6 (Rembrandt), has been advertised for sale on 10 June 2013 on public auction. The advertisement was placed by the executor of the estate of the late Rosalia Tjikune ('the mother'). The advertisement was caused on 24 May 2013. The reason for the contemplated sale is to liquidate the estate of the late Rosalia Tjikune and to distribute the proceeds amongst her children. She left behind 12 children. One of these children, Wilson Tjikune has since died leaving behind 23 children. The mother died intestate and the children are entitled to inherit from her in equal shares. A dispute also exists whether the 23 children of late Wilson are entitled to inherit by representation. The applicants think they are not entitled.

[2] The farm that is due for sale is the only asset in the estate of the mother. Of the 12 children, the applicants want the farm not to be sold except to them or to be subdivided. Some of the other children want the farm to be sold on public auction. The applicants who want to continue farming come to this court to stop the sale scheduled for 10 June 2013. They set down the application for hearing on 6 June 2013 at 14H15. The affidavit in support of the urgent relief was deposed to on 4 June 2013. The application runs to 85 paragraphs and 22 pages. It is fairly uncomplicated. The nub of it is a dispute amongst the heirs: some of them want the inheritance (a farm) from their late mother sold and others want it subdivided, and then transferred into a body corporate, so they can have the opportunity to continue farming on it. They are dissatisfied with a decision of the Master authorising the sale and the failure of the executor (first respondent) to consider sub-division.

[3] Being dissatisfied with the Master's decision and that of the executor, the applicants say they intend to seek the review and setting aside of the Master's decision authorizing the sale, and to seek the removal of the executor for alleged bias in favour of the heirs who prefer an outright sale. The applicants maintain that the executor has impermissibly failed to consider proposals made by them which will prevent the sale of the farm and allow them the opportunity to continue to carry on farming on the farm, while still making it possible for the heirs who prefer not to farm to derive their lawful benefit from the estate. In particular, they maintain that it is possible (and they proposed as such to the executor) that the farm be subdivided in half so that the one half be transferred into a corporate entity in which the aspirant farmers will own shares, while the other half is sold according to the wishes of the rest of the heirs who will share in the proceeds in equal shares. It is this proposal, the applicants say, the executor is dead set against and which was not even considered by the Master. They had asked the Master to reconsider the decision but the Master refused to do so because, in her words, she has since become *functus officio.* The applicants disagree that the Master is *functus officio* and are also aggrieved by her failure, to this date, to provide them with reasons for her decision. The final decision of the Master authorising the sale was made on 8 April 2013.

[4] The problem is that there is no review of the Master's decision pending before this court since the Master took the decision nor is there any pending *lis* between the applicants and the executor for his removal on the grounds I have set out above. The ambit of a possible review and the possible removal of the executor is rather straightforward, both as regards the factual matrix and the questions of law to be adjudicated. I shall return to the implications of this later.

[5] The applicants filed an urgent application on 4 June 2013 seeking to stop the advertised sale of Farm Tugab, pending a review application to set aside the Master's decision authorizing the sale, and an application seeking the removal of the executor on the grounds, in either case, that I earlier summarized. No review application or application for the removal of the executor was filed together with the urgent application. There is no explanation whatsoever why not and there is also no indication in the supporting affidavits when it will be brought. As an afterthought, counsel for the applicants stated in oral argument that the court could, is it wishes, direct that the two-pronged proceedings be brought at a time directed by the court. The executor and the heirs who prefer sale of the farm on public auction have opposed the urgent relief. Some of the heirs have not been served by the applicants.

[6] As for those heirs who have not been served, the applicants' explanation therefor is:

> 'An attempt will be made to serve the application on all the respondents but because they are soo many, it may not be possible to serve on all of them before the matter is to be heard. Should that be the case, we will move that the sale of the farm initially be postponed for a month to enable us to serve the application and to give all respondents an opportunity to respond on a return date to be determined by this Honourable Court where the interim relief can be considered pending our main application.[1]'

[7] The applicants' timing of the urgent application only one full court day before the advertised sale is contained in two paragraphs as follows:

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[1] Vide para 83.

'On or about 14 May 2013, my current legal representative of record received a letter forwarded to her by Mr Elago in which he was notified that the auctioneers intent to sell the farm by public auction on 10 June 2013. The sale was advertised in the Namibian newspaper of 24 May 2013. . . . I had by then approached my current legal representative for advice on what options I have in order to prevent the farm from being sold. She instructed counsel to provide us with the necessary advice. We consulted with counsel on 8 May 2013 and she requested us to provide her with all the facts in writing and undertook to provide us with advice as soon as possible. Whilst she was in the process of considering the matter, the advertisement came out. I m informed by my legal representative that carousel could only finalise the application by the week of 27 May 2013 because she was engaged in other urgent matter as well during the same time. We consulted with counsel on 3 June 2013 to finalise the application.'

[8] As far as the employment of instructed counsel is concerned, this court had the following to say in *Hailulu v Anti - Corruption Commission*[2]:

'The statutorily sanctioned bifurcation of the practising profession no longer exists in Namibia. In fact where there is a legal practitioner of record, the court has to specifically sanction costs in respect of disbursements to (additional) instructed counsel. The rules of court do however recognise that there is a place for forensic trial specialisation. But whether or not its deployment is justified in a particular case is a matter for the court and parties must satisfy the court of the need therefor. Therefore, Kaaronda's assertion that no counsel could be found to conduct the trial for the trade union defendants does not satisfactorily explain why no one from the legal practitioners of record were not able to.'

[9] The delay boils down to two simple propositions: Firstly, they had to change counsel of record. Secondly, instructed counsel was busy with other matters. It is clear on the founding affidavit that during January and February 2013, the applicants were still represented by Tjombe-Elago Law firm. When that law firm ceased to act for them and when the current practitioners of record began to act for them is not explained. What we know is that instructed counsel then became seized with the matter on 8 May 2013. On the papers I find no explanation whatsoever why the services of another instructed counsel could not be sought. There is also no explanation why counsel of record, also an admitted practitioner, could not assist the applicants in bringing the application earlier. It is now trite in this jurisdiction that a

[2]2001 (1) NR 363 (HC) para 43.

litigant has no right to insist on or rely only on a particular lawyer. If one counsel is unavailable, an effort must be made to secure the services of another. This is not an inflexible rule though, but if there are reasons why that was not possible it must be explained on the papers.

[10] Since *Ecker v Dean in 1939*,[3] Namibian courts have been reluctant to accept that a litigant is entitled to insist on being represented by a particular counsel. The ratio for the rule was recently restated by O'Regan AJA in *Da Cunha do Rego v Beerwinkel*[4] where the learned judge observed as follows:

'The principle that a litigant is not entitled to delay the process of justice by insisting on being represented by a particular legal representative is an important one. Underlying it are two concerns. The fist is that the convenience of one party cannot be put above the convenience of the other parties. The second concern, as important as the first, if not more important, is the need to protect the general public interest in the timely and efficient administration of justice. The principle that a litigant may not cause delays by insisting on a particular legal representative is one that will not ordinarily be relaxed simply because there have already been delays in the conduct of a dispute. Nor will it be departed from because the other party is not prejudiced. For the principles protects not only the interest of the other parties to the litigation but also the public interest in the efficient administration of justice'.

Urgency

[11] When an applicant approaches the court in application proceedings on an urgent basis, the applicant is required to show good cause why the time periods provided for in Rule 6(5) should be abridged and why the applicant cannot be afforded substantial redress at a hearing in due course. The applicant should make out a case of clear urgency in the founding papers.

[12] In *Salt and Another v Smith* [5] Muller AJ (as he then was) held that rule 6(5) obliges an applicant in an urgent application to provide reasons why he cannot be afforded substantial redress at the hearing in due course, and that mere lip service to

[3] 1939 SWA 22.
[4] 2012 (2) NR 769 at 774I-775B para 20.
[5] 1990 NR 87 (HC)

the requirements of the rule will not be allowed. The applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the normal procedure. The applicant must also show direct and substantial interest in the relief prayed. This court stated the following in *Bergman v Commercial Bank of Namibia and Another* [6]*:*

'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. 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 fide abuses the Rules of Court by delaying the institution of urgent application proceedings to score an advantage over his or her opponent.

[13] And the judge also said:

'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

[6] 2001 NR 48 (HC) at 49H-50A, footnotes omitted.

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 any applicant to act fairly and not to delay the application to snatch a procedural advantage over his or her adversary.'

[14] Although, standing alone, each is not decisive, the following circumstances demonstrate to me that the applicants do not appreciate the urgency in the finalization of the liquidation of their late mother's estate. The first is the inexplicable delay in bringing the review application and for the removal of the executor. I cannot conceive that such applications could raise complex factual or legal issues. An executor has a duty to liquidate an estate: Creditors must be paid, the asset requires maintenance before it is alienated and heirs need to know what is due to them and to enjoy the benefit of that. If there is disagreement amongst heirs, ultimately the Master must determine the question. Anyone unhappy with her decision must have recourse to court and resolve it, but that must be done with some sense of urgency.
It is common cause that Wilson , who is also an heir to the estate has passed away, leaving behind 23 children. The executor in his estate and the Master take the view that Wilson's children are entitled to inherit from the mother by representation. That view is not shared by the applicants. It appears to me that most of the heirs are pensioners who are advanced in age. All kinds of other disputes are therefore likely to arise if they die without the estate being finalised. I mention this not as a factor militating against the urgent application but simply to demonstrate that time appears to be of the essence in the estate being finalised. I have no explanation at all why the two-pronged relief has not been sought to this day. The second is the reason why the application has not been served on some of the respondents. It must have been obvious that the relief such as the one sought now is undesirable without affected persons being given notice of it. What is troubling is the lack of urgency by the applicants in properly establishing the whereabouts of the individuals from the moment the court challenge was anticipated. Lastly, there is simply no satisfactory or reasonable explanation for the delay in coming to court one full court day before the advertised public auction.

[15] The applicants' stated purpose for seeking the stay of the sale is to have the Master's authorisation thereof set aside and to compel the present executor, or his

replacement, to properly consider all viable options in the finalisation of the estate of their late mother and ensuring as fair and equitable a distribution of the proceeds from the estate amongst all heirs. On careful examination though, what the applicants seek is to have their preferred option of subdivision or private sale to them take precedence over the wishes of the other heirs who prefer sale on public auction. Their unexplained failure to date to have brought any proceedings adds credence to that conclusion. In fact in paragraph 84 of first applicant's founding affidavit he sates as follows:

> 'As indicated above, we intent to bring an application in which we will apply for the first respondent to be removed as executor. We will also apply for the decision of the second respondent to be reviewed, set aside and corrected, that first respondent (if not removed) be ordered to apply for a subdivision of the farm, alternatively, to sell Wilson and third to seventeenth respondents' share of the estate to us out of hand, and that he requires all heirs to collate'.

[16] Although I do not share respondents' counsel's argument that the fact of non-service of the application on some respondents in essence amounts to the present being an Ex parte application, I find it significant (in the exercise of my discretion whether or not to condone non-compliance with the rules of court) that the applicants have gone about effectively straight-jacketing the court in granting them the urgent relief they seek. That much is clear from the applicants' explanation of their anticipated non-service already quoted above.

[17] The applicants no doubt knew the logistical difficulties that would be associated with service of their papers given the multitude of persons with an interest in this matter. All persons with an interest in this matter have just as much interest in whether or not the sale proceeds on 10 June as the applicants have in it not proceeding. They have the right to be heard by this court as the order this court makes affects their interests. The manner in which the applicants have gone about bringing this application is such that it is impossible for the court (if it were minded to do so in exercise of its inherent jurisdiction to regulate its own procedure in order to do justice) to stand the matter down and to require the applicants to serve on the un-

served respondents to give them *audi.* To make it possible for the un-served respondents to be served, the sale cannot materialize; and if the sale does not proceed on 10 June the applicants succeed in staying the sale on 10 June. That is not a path that leads to justice. I am compelled by the applicants' conduct to exercise my discretion against granting condonation for non-compliance with the rules of court and to hear this application as one of urgency.

[18] Counsel for the respondents asked me to dismiss the application for lack of urgency. Recently, the Supreme Court (Per O 'Regan AJA) stated in *Cargo Dynamics Pharmaceutical (Pty) Ltd v Minister of health and Social Services* as follows[7]:

> '[25] In urgent application, a judge will ordinarily decide the question of urgency on the assumed basis that the applicant has a case on the merits before deciding the merits. If the court decides that an applicant has not made out a case for the application to be heard as a matter of urgency even assuming that the applicant has a case on the merits, the application will ordinarily be struck from the roll. The effect of striking the matter from the roll doe not dispose of the merits of the application. The applicant is entitled to enroll the application either in the ordinary course not by way of urgency, or again as a matter of urgency if the circumstances change. Accordingly, a decision that a matter does not disclose urgency is not ordinarily appealable, whereas a decision that an application has been dismissed in its entirety is appealable.'

[19] I make the following order:

The application is struck from the roll, with costs against first to fifth applicants, jointly and severally, the one paying the other to be absolved. Such costs to include the costs of one instructing and one instructed counsel.

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[7] 2012, unreported judgment, para 26-28.

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P T Damaseb

Judge-President

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APPEARANCES

APPLICANTS:	N Bassingthwaigthe
Instructed by	Ueitele & Hans Inc, Windhoek.

RESPONDENTS:	TM Wylie
Instructed by	Dr Weder, Kauta and Hoveka Inc. Windhoek