REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 887/2010

In the matter between:

REINHOLD HASHETU NGHIKOFA **APPLICANT**

and

CLASSIC ENGINES CC **FIRST RESPONDENT**

THE DEPUTY SHERIFF OF TSUMEB **SECOND RESPONDENT**

Neutral citation: *Nghikofa v Classic Engines CC* (I 887/2010) [2013] NAHCMD 27 (30 January 2013)

Coram: PARKER AJ

Heard: **23 January 2013**

Delivered: **30 January 2013**

Flynote: Practice – Applications and motions – Urgent application – Requirements for – Case to be made out in founding affidavit indicating that the requirements under rule 6(12)(b) have been met.

Summary: Practice – Applications and motions – Requirements for in terms of rule 6(12)(b) – Requirements are circumstances relating to urgency which have to be explicitly set out and giving reasons why the applicant could not be afforded substantial redress in due course – Court finding that applicant has not satisfied the two requirements in rule 6(12)(b) – Court could therefore not justify grant of the indulgence sought – Consequently court refusing application – Dicta in *Salt and*

Another v Smith 1990 NR 87 at 88H and in *Labour Supply Chain Namibia (Pty) Ltd v Awaseb* at 323H – 324B applied.

ORDER

The application is refused with costs on the grounds that the requirements in rule 6(12)(b) have not been satisfied; and costs include costs of one instructing counsel and one instructed counsel

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JUDGMENT

PARKER AJ:

[1] This application is brought on notice of motion by the applicant (defendant in the action), and the applicant prays that the matter be heard as one of urgency. The respondent (the plaintiff in the action) has moved to reject the application. For the sake of clarity I shall continue to refer to the parties as the plaintiff and defendant.

[2] Having heard arguments from Mr Grobler, counsel for the defendant, and Mr Van Zyl, counsel for the plaintiff, the application was struck with costs. These are the reasons more fully set out.

[3] Urgent applications are governed by rule 6(12)(a) and (b) of the rules of court. The rule in para (b) of rule 6(12) stipulates two requirements, and for an applicant to succeed, he or she must satisfy both of them together. The two intertwined requirements are the circumstances relating to urgency which have to be explicitly set out and the reasons why the applicant could not be afforded substantial redress in due course. On the interpretation and application of the rule I reiterate what I said in *Labour Supply Chain Namibia (Pty) Ltd v Awaseb* 2010 (1) NR 322 at 323H–324B, which Mr Van Zyl referred to the court in his submission. The passage reads:

'In my opinion, the essence of rule 6(12) of the Rules is, therefore, that in the exercise of his or her discretion, it is only in a deserving case that a Judge may dispense with the forms and service provided in the Rules. In terms of rule 6(12), as I see it, a deserving case is one where the applicant has succeeded – (1) in explicitly setting out the circumstances which the applicant asserts render the matter urgent and (2) in giving reasons why he or she claims he or she could not be afforded substantial redress at the hearing in due course. (*Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd* Case No (P) A 91/2007 (Unreported), where the Court relies on a long line of cases, including the Namibian cases of *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC); *Salt and Another v Smith* 1990 NR 87 (HC).) Thus, in deciding whether the requirements in (1) and (2) of the rule 6(12) have been met, that is, whether it is a deserving case, it is extremely important for the Judge to bear in mind that it is indulgence that the applicant is asking the Court to grant.'

[4] I accept Mr Van Zyl's submission that there is nothing in the applicant's founding affidavit which explicitly sets out the circumstances which the applicant asserts render the matter urgent. As Mr Van Zyl submitted further, the defendant knew or ought to have known on 30 November 2012 that execution of the order was at hand and imminent and yet he waits until 21 January 2013, that is, for about two months, to bring this urgent application; and what is more the defendant does not give sufficient and acceptable reason for the delay of some six weeks. I find that the defendant has not satisfied the aforementioned first requirement for urgency.

[5] I pass to consider the second requirement. Under this head, too, the applicant does not give any reason – that is, sufficient and good – as to why he claims he could not be afforded substantial redress at the hearing in due course. The only statement that attempts to satisfy the second requirement is that 'it will not be just and equitable if the plaintiff should be allowed to execute its Writ of Execution for an amount of N$29 212,88 whilst he owes me an amount of N$78 864,56, which amount he owes me since November 2009'. He states further that 'it is clear from my plea to the particulars of claim of the plaintiff that I have a good chance to succeed on appeal to have the claim of the plaintiff dismissed ….' Mr Van Zyl's response is that the N$29 212,88 arises out of a costs order, and the costs have been taxed; and so, therefore, whether the said appeal succeeds or not, it would not affect the costs

order which still stands. I should add that the order is valid and enforceable and it must be obeyed, because it has not been set aside by a competent court. Besides, the defendant has elected to claim the N$78 864,56, which he says the plaintiff owes him in a counterclaim in the action which is still to be determined in the pending action proceeding. The payment of that amount is disputed by the plaintiff, hence the defendant making a counterclaim in the action proceeding to claim that amount. Thus, in both logic and law, that amount cannot be at this stage be set off against the taxed costs.

[6] I respectfully accordingly reject the applicant's averment that it will not be just and equitable if the plaintiff should be allowed to execute its Writ of Execution for an amount of N$29 212,88 whilst 'he owes me an amount of N$78 864,56, which amount he owes me since November 2009'. Mr Grobler took up this contention in refrain in his submission. It follows that counsel's submission has, with respect, no merit. Furthermore, the fact that the defendant has made a claim for the said N$78 864,56 in the form of a counterclaim in the action proceeding and the proceeding is pending belies any claim that he could not be afforded substantial redress in due course.

[7] The applicant has only put forth lip service to the requirement of rule 6(12)(b); he has not made out a case in the founding affidavit to justify the departure from the norm. (See *Salt and Another v Smith* 1990 NR 87 at 88H.) Accordingly, I find that this is not a deserving case for the court to grant the indulgence sought by the applicant. (See *Labour Supply Chain Namibia (Pty) Ltd v Awaseb* at 324B.)

[8] For these reasons the application was refused with costs on the grounds that the requirements in rule 6(12)(b) have not been satisfied; and costs include costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

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APPEARANCES

APPLICANT: Z J Grobler
Instructed by Grobler & Co., Windhoek

FIRST RESPONDENT: C Van Zyl
Instructed by GF Köpplinger Legal Practitioners, Windhoek

SECOND RESPONDENT: No appearance