REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 155/2014

In the matter between:

QE CONSTRUCTION CC **APPLICANT**

And

AIR COOL CC **RESPONDENT**

Neutral citation: *QE Construction CC v Air Cool CC* (A 155/2014) [2014] NAHCMD 208 (02 July 2014)

Coram: HOFF J

Heard: **01 July 2014**
Delivered: **02 July 2014**
Reasons: **08 July 2014**

Summary: Urgent applications should be brought as far as is practical in terms of the provisions of the Rules in order to facilitate procedural fairness – Rule 65(4) applicable to urgent applications – Applicants in urgent applications must responsibly strike a balance between the duty to obey Rule 65(4) and the entitlement to deviate from the Rules.

Rules 65(5)*(a)* and *(b)* are peremptory except in extremely urgent circumstances. Applicants should be conscious that their conduct, in an application which is rushed to court on a ill-perceived urgent basis, may be construed as a misuse or an abuse of process and that a court in exercising its discretion may for that reason strike the urgent application from the roll.

ORDER

The application is struck with costs.

JUDGMENT

HOFF J:

[1] This court heard this urgent application on 1 July 2014 and on 2 July 2014 struck the application with costs. These are the reasons.

[2] The applicant in this urgent application sought the following relief:

'1. Condoning the Applicant's non-compliance with the forms and service as contemplated for in the rules authorising the Applicant to bring this application on an urgent basis as contemplated in Rule 6(12) of the rules of the above Honourable Court.

2. That a Rule Nisi is hereby issued calling upon the respondent and all interested parties to show cause, if any, to the above Honourable Court, on **FRIDAY** the **8TH** day of **AUGUST 2014** at **10H00** why an order in the following terms should not be made:

2.1 That the Respondent be directed or ordered to restore the peaceful and undisturbed possession of the Applicant of:

2.1.1 two air conditioner condenser units;

2.1.2. two air conditioner booster units, and;

2.1.3 boxes with equipment.

2.2 That the Respondent be ordered to pay the costs of the Applicant.

2.3 Further and/or alternative relief.

3. That the relief set out in prayer 2.1 above shall operate as a temporary interim interdict, with immediate effect upon service of this order, and pending the interim date thereof.'

[3] The relief sought by the applicant is a spoliation order on the basis that the respondent resorted to self-help. At the inception of the hearing of this urgent application Ms Campbell, who appeared on behalf of the respondent, handed up a notice to oppose the application and indicated that she held instructions at that stage to argue the issue of urgency. No answering papers had been filed.

[4] This court was referred to the provisions of the present Rule 73(4) (similarly worded as the previous Rule 6(12)) which require that an applicant in an urgent application must set out explicitly the circumstances which the applicant avers render the matter urgent and the reasons why the applicant claims he or she could not be afforded substantial redress at a hearing in due course. It was submitted that the founding affidavit dealt only with the second leg of the requirement referred to in Rule 6(12) and nowhere did the applicant explicitly set out why this matter is so urgent that it had to be brought on less than 24 hours notice to the respondent, whilst the applicant had given itself about six days to prepare and bring this application.

[5] Rule 65(4) provides that every application, other than brought *ex parte,* must be brought on notice of motion on Form 17 and must be served on every party to whom notice of the application is to be given. It is apparent from the notice of motion before me that this was not complied with. There is no indication *ex facie* the notice of motion that it was served on the respondent.

[6] It does not appear *ex facie* the notice of motion that the applicant has appointed an 'address within flexible radius of the court at which the applicant will accept notice and service of all documents in the proceedings' as prescribed by Rule 65(5)*(a).*

[7] *Ex facie* the notice of motion, no date is set out 'on or before which the respondent is required to notify the applicant in writing whether the respondent intends to oppose the application, . . .' as prescribed by Rule 65(5)*(b).*

[8] In *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 WLD, referred to by Ms Campbell, the following was said in respect of important aspects of 'urgency' at 136H:

'Urgency involved mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court.'

and continues at p137E-F as follows:

'Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)*(b)* will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'

[9] My understanding of counsel's submissions in this regard is that the applicant's application for urgent relief was being criticised *inter alia* for the lack of procedural fairness.

[10 It is therefore apposite to refer to what was said in *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 at 50H-51B by Maritz J regarding the nature of urgent applications:

'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 procedure in urgent applications, the requirement that the deviated procedure should be "as far as practicable" in accordance with the Rules constitutes a constant 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 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.'

[11] This court in *Petroneft International and Another v The Minister of Mines and Energy and Others* an unreported case, case no. A 24/2011 and delivered on 28 April 2011 (per Smuts J) at par [26] confirmed the objective of procedural fairness and that a respondent should be afforded reasonable time within which to oppose an urgent application.

[12] The requirement of notice as well as the fact that a respondent may find himself or herself in a precarious position was explained as follows by Fagan J in *IL & B Marcow Caterers v Greatermans SA Ltd and Another, Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 WLD at 110E:

'When an applicant believes that his matter is one of urgency, he may himself decide what times to allow affected parties for entering appearance to defend and for delivering answering affidavits. He may without consulting the other parties arrange a date for hearing.'

and at 110G:

'Applicants, by so doing, became obliged to persuade the court that the matters were of such urgency that their non-compliance with the Rules should be condoned and that the matters should be heard forthwith. Respondents had no option; they were compelled by applicants to adhere to the time periods chosen by the applicants and to appear in Court on the day selected by applicants. Then only, save if respondents had anticipated the hearing and made an earlier application to Court, could respondents object to the procedure followed by applicants. See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 A where at 782A-E this course and its implications are discussed by RUMPFF JA as he then was.'

[13] The applicant in its founding affidavit narrated the background which gave rise to this urgent application. The deponent to the founding affidavit, Mr Quintus Erasmus, the sole member of the applicant, stated that at all material time up and until Wednesday 11 June 2014 the applicant was in peaceful and undisturbed possession of two condenser units, boxes with material and two white boosters (air-conditioning equipment) that were at a partially constructed building at the district hospital in Keetmanshoop. This equipment was delivered by the respondent during November/December 2013. On 11 June 2014 three men, employees of the respondent, came to applicant's construction site and started to remove the air-conditioning equipment from the building where it had been previously installed by the respondent.

[14] The applicant then explained the circumstances why he could only consult with legal practitioners on Tuesday 17 June 2014 which resulted in a letter of demand, addressed to the respondent's legal practitioners, for the return of the equipment so removed by the respondent, by 'close of business' on Thursday 19 June 2014', failing which, applicant would approach this court for 'an urgent *ex parte* spoliation interdict'.

[15] The response by respondent's legal practitioners was to ask that the matter be kept in abeyance until Tuesday 24 June 2014 in order to resolve the matter

amicably between the parties. This extention of time was granted. Thereafter in a letter dated 24 June 2014, and addressed to the legal representatives of the applicant, the respondent tried to justify the action of its employers on 11 June 2014 on the basis of ownership of the equipment, and demanded payment in respect of the equipment. This letter came to the attention of the applicant on 25 June 2014. The notice of motion in this application was signed and date stamped by the Registrar on 30 June 2014 and was set down for hearing the next day, on 1 July 2014.

[16] The applicant avers in its founding affidavit that its claim for an extention of time for the completion of the project will be jeopardised by the fact that the equipment had been removed. This according to the applicant will not only impact severely on any future claims for extention of time, but may give the employer a basis on which to cancel the contract. Should this happen the applicant stands to suffer irreparable damage, not only financially but also in its reputation. The applicant further stated that it has been advised that an application for restitution of possession in its normal course will consume many months before it is heard and may take up to a year to be heard.

[17] It is trite law that the protection of a commercial interest can justify urgent relief under Rule 73 (previously Rule 6(12)) as was stated in *Twentieth Century Fox Film Corporation and Another v Antony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586F-G by Goldstone J:

> 'In my opinion the urgency of commercial interests may justify the invocation of Rule 6(12) no less than other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicant's case was a good one and that the respondent was unlawfully infringing the applicant's copyrights in the films in question.'

See also *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (SE) at 213E-F; *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* (unreported case no. (P) A 91/2007 Full Bench decision) delivered on 31 July 2007;

Shetu Trading CC v The Chair of the Tender Board of Namibia and Others (unreported case no A 352/2010 delivered on 4 July 2011; and *Petroneft* (supra).

[18] The applicant in this matter was therefore perfectly entitled to have approached this court on an urgent basis, however in doing so, had to comply with procedural fairness by affording the respondent a reasonable period within which to oppose this application. As indicated (supra) no date was set by which the respondent was required to indicate its intention to oppose and to file an answering affidavit, neither did the applicant, as required by Rule 65(5)*(a),* appoint an address at which the applicant would accept notice and service of all process in this application.

[19] A consequence of the failure to comply with Rule 65(5)*(a)* was that the notice to oppose was handed up at the hearing of this application. A further consequence of the non compliance of Rule 65(5)*(b)* was that even in the event of respondent being successful in drafting an answering affidavit, the respondent would not have known where to serve such a document.

[20] Had the respondent been afforded a reasonable time within which to file a notice of opposition and an answering affidavit 'the issues would have been properly ventilated, the parties would have had an opportunity to reconsider their respective positions and the court could have had the benefit of considered argument before ruling on the matter'.
(See *Bergmann* (supra) at p 51C-D).

[21] In as far back as 1976, Coetzee J in the *Luna Meubel* matter (supra), stated the following at p 136D-E:

'Far too many attorneys and advocates treat the phrase "*which shall as far as practicable be in terms of these rules"*, in sub-rule (a) simply *pro non scripto*. That this phrase deserves emphasis is apparent also from the judgment of RUMPFF J.A. (as he then was), in *Republikeinse Publikasies (Edms) Bpk*., 1972 (1) SA 773 (A.D.) at p. 782 B. Once

an application is believed to contain some element of urgency, they seem to ignore (1) the general scheme for presentation of applications as provided for in Rule 6; . . . '
(See also *Bergmann* (supra) p 50I).

[22] The first prayer in the notice of motion of the applicant is for an order condoning applicant's non compliance with the forms and service as contemplated for in the rules and authorising applicant to bring this application on an urgent basis. As was stated in *Bergmann* (supra) 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.

[23] In the *Mweb* matter it was held that the fact that irreparable damages may be suffered is not enough to make out a case of urgency. It may be a ground for an interdict, but does not make the application urgent.

[24] Rule 65(5)*(b)* requires from an applicant to set out a day on or before which the respondent is required to notify the applicant in writing whether or not the respondent intends to oppose the application. In urgent applications a truncated period for the filing of a notice of opposition may obviously be stipulated by an applicant, but the provisions of this subrule may not simply be ignored, except in extremely urgent circumstances and on good cause shown. The present application was not brought as an *ex parte* application where initially no notice is required to be given to a respondent.

[25] My interpretation, with due regard to the word 'must' in Rule 65(5), is that an applicant is obliged to give effect to the provisions of ss 65(5)*(a)* and *(b)*, also in urgent applications.

[26] In this regard Flemming DJP in *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA (WLD) at 502E expressed himself as follows (with reference to Rule 6(5)*(a)* which is similarly worded as our present rule 65(4) which requires notice of motion on Form 17:

‘Rule 6(5)*(a)* of the Uniform Rules of Court is peremptory.’

and on 502F:

‘No Rule says that any of the said obligations do not apply to an urgent application. Such an application is an “application” in terms of Rule 6(5). The only qualification is that in an urgent matter an applicant may amend “the rules of the game” without asking prior permission of the Court.’

and further at 502I-503A:

‘The applicant must, in all respects, responsibly strike a balance between the duty to obey Rule 6(5) and the entitlement to deviate, remembering that that entitlement is dependent upon and thus limited according to the urgency which prevails.’

[27] I agree with such a balanced approach and wish to emphasise that though a litigant is required to comply with Rules of Court especially rules which are peremptory, courts should eschew inflexible formalism, since Rules of Court ‘are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right’.
(See *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at 301G).

[28] Applicants should be conscious that their conduct, in an application which is rushed to court on an ill-perceived urgent basis without complying with the mandatory provisions of ss 65(5)*(a)* and *(b)*, may be construed as a misuse or an abuse of process and that a court in the exercising its discretion may for that reason strike the ‘urgent application’ from the roll.

[29] I am of the view that the applicant in this matter, with due regard to the circumstances of this case, has misconstrued the degree of urgency. This application was not so urgent which could have justified the applicant to simply ignore the

provisions of ss 65(5)(*a)* and *(b)* and to launch this application on such a short notice to the respondent.

E P B HOFF

Judge

APPEARANCES

APPLICANT : J Schickerling
Instructed by Van der Merwe-Greeff Andima Inc., Windhoek

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RESPONDENT: Y Campbell

Instructed by Behrens & Pfeiffer, Windhoek