



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 336/2014

In the matter between:

ALFRED WILLIAM FULLER**APPLICANT**

And

PETRUS RANDY MEGAMENO SHIGWELE**1ST RESPONDENT****OSIANA TRADING ENTERPRISES CC****2ND RESPONDENT****REGISTRAR OF CLOSE CORPORATIONS****3RD RESPONDENT****WALVIS BAY MUNICIPAL COUNCIL****4TH RESPONDENT****MIKE VAN WYK****5TH RESPONDENT****TERRA NOVA PROPERTY AND INSURANCE CC****6TH RESPONDENT**

Neutral citation: *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (5 February 2015)

Coram: PARKER AJ

Heard: 11 December 2014

Delivered: 5 February 2015

Flynote: Practice – Applications and motions – Urgent application – Requirements for in terms of rule 73(4) – Court held that the court cannot grant the indulgence of hearing matter on the basis of urgency where a requirement under rule 73(4) has not been satisfied and where urgency in the application is self-created – Principle in *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 applied – Consequently, application struck from the roll with costs.

Summary: Practice – Applications and motions – Urgent application – Requirements for in terms of rule 73(4) – Dispute between applicant and 1st respondent revolves around sales agreement concluded between the applicant and 1st respondent – 1st Respondent refused to perform under the contract on the basis that contract had lapsed – Applicant informed about 1st respondent’s firm position on 13 October 2014 – Applicant did not carry through his threat to launch an urgent application then to protect applicant’s interest – Applicant launched urgent application on 4 December 2014 and set matter down for hearing on 11 December 2014 – Court found that applicant has failed to satisfy the first requirement for hearing a matter on the basis of urgency in terms of rule 73(4)(a) of the rules – Court concluded that the urgency in the application is self-created – Consequently, court refused to grant the indulgence sought by the applicant and struck the matter from the roll with costs.

ORDER

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

JUDGMENT

PARKER AJ:

[1] In this proceeding the applicant has brought an application by notice of motion, and seeks the relief set out in the notice of motion. The applicant prays the court to hear the matter on the basis of urgency (ie para 1 of the notice of motion). The 1st respondent and the 2nd respondent have moved to reject the application; and in the answering affidavit they raise points *in limine*. The first is that ‘the application

lacks the necessary grounds in order for it to be urgent as contemplated in rule 73(4) of the rules of court'. In short, as Mr Strydom, counsel for the respondents, submitted, the applicant has not satisfied the requirements for hearing a matter on the basis of urgency. Mr Heathcote (with him Mr Jacobs) argued contrariwise on this point.

[2] Urgent applications are now governed by rule 73 of the rules of court (ie rule 6(12) of the repealed rules of court), and subrule (4) provides that in every affidavit filed in support of an application under subrule (1) the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. Indeed, subrule (4) rehearses para (b) of rule 6(12) of the repealed rules. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought, that the matter be heard on the basis of urgency, the applicant must satisfy both requirements. And *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 tells us that where urgency in an application is self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.

[3] The dispute giving rise to the present application revolves around a sales agreement ('the contract') concluded between the 1st respondent and the applicant on 13 June 2014 at Walvis Bay in terms of which the 1st respondent agreed to sell to the applicant the 1st respondent's 100 per cent interest in Osiana Trading Enterprises CC, owner of Erf 4496, Walvis Bay ('the property'). It is the applicant's contention that the 1st respondent has failed to perform under the contract. The 1st respondent's contrary contention is that the contract has lapsed in terms of the contract and is, therefore, of no force and effect. According to the applicant, the purpose of the application 'is to interdict and protect from alienation the *merx*' of the sales agreement.

[4] The following factual findings on the papers are a sure determinant in deciding whether to uphold the point *in limine* respecting urgency. The 1st respondent did not, by himself or his legal practitioners, give a binding undertaking to the applicant that the 1st respondent would not sell the property after the dispute between the 1st respondent and the applicant arose. On the contrary, it is clear on the papers that the 1st respondent consistently and persistently maintained his position that the contract had lapsed and, therefore, he was at liberty to alienate the property to whomever. And the applicant has been aware of the 1st respondent's position as far back as 26 September 2014. And since that time the applicant's legal practitioners have threatened 'to approach competent Court on an urgent basis to protect his (ie the applicant's) interest'. This letter of threat is dated 1 October 2014 and the applicant's legal practitioners put the 1st respondent on notice that the threat would be carried through if the 1st respondent did not reply – ie reply to the applicant's satisfaction – at the 'close of business (17h00) on Friday, 3 October 2014'.

[5] Exchanges of letters between the legal practitioners of the applicant and those of the 1st respondent sounded out the dispute and the threats of legal action by the applicant. The latest categorical refusal by the 1st respondent to play to the applicant's tune was by a letter from the 1st respondent's legal practitioners to the applicant's legal practitioners, dated 13 October 2014. The letter reads 'Your letter of 8th instant refers. We take note of the contents of your letter and wish to (advise) advice that we hold instructions to proceed with the transfer of the Osiana Trading Enterprise CC interest as per our e-mail to Messrs D F Malherbe, dated 2 October 2014'. The 8 October 2014 letter referred to in this letter was a reply to the 1st respondent's legal practitioners' letter that they had written to a Miss Roelien Stander of D F Malherbe & Partners.

[6] It is clear from this flurry of exchanges of letters that, as I have found previously, as at 13 October 2014 the 1st respondent had crossed the Rubicon in his unwavering position that the contract had lapsed. And I do not see any good reason on the papers why the applicant's legal practitioners did not carry their threat through by launching an urgent application then in order to protect the applicant's interest,

but waited until 4 December 2014 to drag the respondents to court on barely four court days' notice. Doubtless, if the applicant had launched the application so soon after 13 October 2014, as he had threatened he would do, he would not have had to rush to the court at breakneck speed to ask the court to hear the matter on the basis of urgency.

[7] On the papers, I find that the applicant has failed to satisfy the requirements, particularly the first requirement explained previously, of rule 73(4)(a) of the rules. And it is my view that the urgency in this application is patently self-created on the part of the applicant. (See *Bergman v Commercial Bank of Namibia Ltd.*) Consequently, I refuse to grant the indulgence sought by the applicant in para 1 of the notice of motion that the matter be heard on the basis of urgency; whereupon the application is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

C Parker
Acting Judge

APPEARANCES

APPLICANT : R Heathcote SC (assisted by S J Jacobs)
Instructed by Van der Merwe-Greeff-Andima Inc.,
Windhoek

FIRST AND SECOND

RESPONDENTS: J A N Strydom
Instructed by Masiza Law Chambers, Windhoek