HIGH COURT OF NAMIBIA: MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A59/2015

In the matter between:

NAMSOV FISHING ENTERPRISE (PTY) LTD **APPLICANT**

and

MINISTRY OF FISHERIS AND MARINE RESOURCES **1ST RESPONDENT**

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **2ND RESPONDENT**

Neutral citation: *Namsov Fishing Enterprise (Pty) Ltd v Ministry of Fisheries and Marine Resources* (A 59-2015) [2015] NACHMD 246 (15 October 2015)

Coram: **UEITELE, J**

Heard: **24 September 2015**

Delivered: **15 October 2015**

Flynote: *Rules of court* - Rule 65(5) b) – Government being a respondent - time limit may not be less than 15 days to file notice of intention to oppose.

Practice and procedure - application struck from unopposed motion court roll – effect of striking matter from the roll.

Summary: On 18 March 2015 the applicant commenced proceedings in this court seeking certain information from the Minister responsible for Fisheries and Marine Resources. The notice of motion was served on the Government Attorney's offices on 19 March 2015. In the notice of motion, the legal practitioners for respondents were given five day to indicate their intention to oppose the application and fourteen days within which to file their answering affidavit (after they had filed their notice of intention to oppose).

The time limits given to the Government respondents were not in accordance with the rules of court and when the matter was placed on the residual motion court of 10 April 2015 it was struck from the roll for non-compliance with rules of court and because of the applicant or its legal practitioners' no appearance at court.

After the matter was struck from the roll the applicant without reserving the matter requested the Registrar of this court to allocate the matter to a judge for the judge to manage the matter. The applicants thereafter gave notice that it will apply for order set out in its notice of motion because the respondents were allegedly barred in terms of Rule 54 from filling further pleadings.

Held that the applicant's notice of motion was defective because it gave the respondents five days instead of the prescribed fifteen days to indicate their intention to oppose the application and fourteen days instead of twenty one days to file an answering affidavit.

Held further that when the application was struck from the roll on 10 April 2015 the application (i.e. Application No. A 59/2015) was no longer before the court the applicant thus had to take some formal procedural step to bring the matter again before court.

Held furthermore that steps taken by the applicant, to have the matter allocated to a managing judge, were irregular and that the application was still not properly before this court.

Held furthermore that the respondents cannot be in default of the rules of court in respect of a matter which is not before court.

ORDER

1. The application for default judgment is refused.

2. The applicant is ordered to pay the costs of the respondents, such costs to include the costs of one instructing and one instructed counsel

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JUDGMENT

UEITELE J:

Introduction

[1] On the 18th of March 2015 the applicant commenced proceedings in this court by way of a Notice of Motion in which it sought certain information from the Minister responsible for Fisheries and Marine Resources. The notice of motion was served on the Government Attorney's offices on 19 March 2015. In the Notice of Motion the applicant amongst other things informed the respondents as follows:

> '**KINDLY TAKE FURTHER NOTICE** that if you intend opposing this application, you are required:
>
> (a) to notify the applicant's legal practitioners in writing not less than 5 days after services of this application on you :
>
> (b) and within 14 days of the services of the notice of your intention to oppose, to file your answering affidavits if any :'

[2] On 23 March 2015 Mr Ndlovu (who is the legal practitioner of record of the respondents) of the office of the Government Attorney, addressed a letter to the applicant's legal practitioners of record (Messrs Mueller Legal Practitioners). In the

letter of 23 March 2015 Mr Ndlovu writes the following: (I quote verbatim from the letter).

> 'We refer to the matter above and the notice of motion served on us on the 19th March 2015.
>
> Firstly, kindly provides us with the case number of the notice of motion which was filed as our copies do not have the same.
>
> Secondly, we take note that you have chosen to ignore the rules and enjoin us to enter an opposition within 5 days to your application.
>
> In terms of rule 65(5)(b) you will note that the Government has not less than 15 days to oppose any application of this nature. As such please be advised that we shall not comply with the timelines you have set out for us as we have until the 13th April 2015 to decide our cause of action.
>
> Any attempts to set the matter down prematurely will be resisted.'

[3] Messrs Mueller Legal Practitioners replied to the letter of the Government Attorneys on the same day and simply stated that they *'take note of the content of the letter and the case number in the above mentioned matter is A 59/2015.*' On 10 April 2015 the matter was called on the residual motion court roll, but the applicant's legal practitioners or the applicant itself was not in court. The presiding judge on that day (i.e. 10 April 2015) struck the matter from the roll.

[4] On 5 May 2015, Mr Ndlovu of the Government Attorney addressed another letter to Messrs Mueller Legal Practitioners in which he stated the following (I quote verbatim from that letter.):

> 'We take note that you did not attend court on the 10th of April 2015 when your matter was on the motion court roll. On the said date despite our Mr Khupe requesting the removal of the matter due to short service the court was unwilling to do so and struck the matter from the roll due to short services as well as your none appearance.

In the circumstance kindly take not that we shall not be taking any steps towards the filling of any affidavits and as such if you intend to pursue this matter. Kindly take steps to revive the same before we have to take any steps herein.'

[5] The court file indicates that on 24 April 2015 Messrs Mueller Legal Practitioners addressed a letter to the Registrar of this court, in that letter Messrs Mueller Legal Practitioners' simply requested the Registrar to allocate the matter to a managing judge. The letter was received by the Registrar on 28 April 2015. It appears that the Registrar did not react to that letter and as a result Mueller Legal Practitioners, on 20 May 2015 addressed a second letter to the Registrar. In the letter of 20 May 2015 Mueller Legal Practitioners referred to the letter of 24 April 2015 and again requested the registrar to urgently allocate the matter to a managing judge. On 5 June 2015 the registrar allocated the file to me for me to case manage it.

[6] On 8 June 2015, I called for a case planning conference for 8 July 2015, at 8h30. In the notice to the legal practitioners representing the parties I indicated to the legal practitioners that they must, file or submit a case planning report in terms of rule 23 (2) & (3) at least three (3) court days before the date on which the case planning conference is scheduled. The parties did not file a case plan, but filed a joint status report, in the joint status report the parties indicated the following (I quote verbatim from the report):

'1. Respondents have filed a notice to oppose the application on 14 April 2015, have however not delivered any answering affidavits.

2. Applicant contends that the Respondent are in default of delivering answering affidavits and in effect barred from doing so, as a result of which applicants wish to apply for relief as per their Notice of Motion.

3. Respondents dispute that they are barred in any manner having regard to the fact that the application was struck from the roll and this case planning hearing has been called to revive the same and map the way forward. In the circumstances of the matter been revived respondents wish to file affidavits in answer to the claims.

4. Respondents wish the hearing of 8 July 2015 to be postponed to after the 3rd August 2015, being the date on which the application under the case number A 146/2015 is set down for argument as the two matters in essence overlap and similar orders are sought in both matters.

5. Applicant does not agree to such postponement and wishes this application (A 59/2015) to be disposed of on a basis as set out in 2 above.'

[7] On 8 July 2015, when the matter was called, the legal practitioners for the applicant were not in court, I was informed that Mr Mueller was ill and could not attend court on that day. I accordingly postponed the matter for another status hearing to 29 July 2015. On 29 July 2015 Mr Barnard the instructed counsel for the applicant appeared at the status hearing. Mr Barnard indicated that the applicant will not persist with the relief sought in the Notice of Motion under case No. A 146/2015 (except the relief relating to the costs of that application) because the Minister had in his answering affidavit in that matter provided the information sought by the applicant. In respect of this matter (i.e. the March 2015 application) Mr Barnard indicated that he will move for an order in default because, the respondents were according to him barred in terms of rule 54 from delivering an answering affidavit. I did not entertain the addresses by counsel and I postponed the matter to 3 August 2015 in chambers for the parties to explain to me the differences between the two matters. On 29 July 2015 Messrs Mueller Legal Practitioners set down the March 2015 application for a default judgment hearing on 3 August 2015.

[8] On 3 August 2015 when the parties came to see me in chambers they still had divergent views as to the courses the two different matters had to take. The applicant was of the view that in respect of this matter (i.e. the March 2015 application) the respondents failed to file answering affidavits and were therefore *ipso facto* barred from filing any further pleading. Mr Barnard thus indicated that the applicant had set the matter down for default judgement application on that day. Mr Akweenda who appeared for the respondents on the other hand was of the view that since the applicant's application was struck from the roll the respondents were not required to do anything in the sense of filing any further pleadings until when the

applicant had revived the application. I decided to hear full arguments in respect of the different views and I made the following orders on that day (i.e. 3 August 2015):

> ‘1. That the matter is postponed to 02 September 2015 at 08h30 for a status hearing.
>
> 2. That all the pleadings in these matters [i.e. the March application] must be filed by no later than 24 August 2015, and any party wishing to institute a interlocutory application must do so by no later than 24 August 2015.
>
> 3. That the matters are provisionally set down for hearing on the roll of 21-25 September 2015 at 10h00.’

[9] At the status hearing of 2 September 2015 counsel advised me that all the pleadings in both matters have closed and that both matters were ripe for hearing. I on that day (i.e. 2 September 2015) confirmed that I will hear arguments in respect of both the March 2015 application (i.e. Application Number A 59/2015) and the June 2015 application (i.e. Application Number A 146/2015) on 24 September 2015. On that day (i.e. on 24 September 2015) I heard arguments in respect of both the March 2015 and the June 2015 applications. In respect of the June 2015 application the applicant argued that it was entitled to an award of cost in respect of that application. I disposed of the June 2015 application by ordering the respondents to pay the applicant’s costs in respect of the June 2015 application.

[10] In respect of the March 2015 application the applicant argued that the respondents were, in terms of rule 54(3) barred from filling any pleading and requested that I grant it the orders it requested in the Notice of Motion by default. The respondents on the other hand argued that when the March 2015 application was struck from the roll on 10 April 2015 they (the respondents) were not required to take any further steps except where the applicant had revived the application. They accordingly argued that because the applicant did not revive the application they were not in default of the rules of court and rule 54 was therefore not applicable. In the alternative the respondents argued that if I were to find that they were in default of the rules of court they applied for condonation of the default. The applicant opposed the application for condonation.

The issues in dispute in respect of the March 2015 application

[11] As I have indicated above, the applicant approached this court by way of a Notice of Motion during March 2015 seeking certain information from the Minister responsible for Marine Resources. That application was set down (the applicant alleges that it was erroneously so set down) for hearing on 10 April 2015. I am of the view that even if the application was erroneously set down the applicant could not lay back and hope that the court or the respondent would rectify its error. On that day the application was struck from the roll for non-compliance with the rules of court and because the applicant's legal practitioners were not in court.

[12] The issue for determination here is the status of that matter after it was struck from the unopposed motion court roll and whether the respondents were in default of the rules of court when they did not file their answering affidavit on 18 May 2015. Before I deal with the status of this matter and the question of whether or not the respondents were in default of the rules of court I find it appropriate to briefly deal with the procedures that must be followed when a party approaches the court on motion as opposed to commencing proceedings by way of action, under the new rules.

Procedures to be followed when commencing proceedings by application

[13] The procedures which a party must follow when he or she commences proceedings before this court by way of application are set out in Part 8 of the Rules. Rule 65 amongst others require that:

(a) Every application must be brought on notice of motion supported by affidavits as to the facts on which the applicant relies for the relief he or she seeks.

(b) Every application, other than one brought *ex parte* in terms of rule 72, must be brought on notice of motion on Form 17 and true copies of the notice and all annexures thereto must be served, either before or after the application is issued by the registrar, on every party to whom notice of the application is to be given.

(c) In the notice of motion the applicant must –

(i) appoint an address within a flexible radius of the court at which the applicant will accept notice and service of all documents in the proceedings;

(ii) set out a day, not less than five days after service of the notice of motion on the respondent, on or before which the respondent is required to notify the applicant in writing whether the respondent intends to oppose the application, except that where the Government is the respondent, the time limit may not be less than 15 days; and

(iii) state that if no notification to oppose the application is given, the application will be set down for hearing on a stated day not being less than seven days after service of the notice on the respondent.

(d) Where the respondent does not, on or before the day mentioned for that purpose in the notice, notify the applicant of his or her intention to oppose the application the applicant must inform the registrar who must place the matter on the residual court roll.

[14] Rule 66 deals with the opposition of applications brought in terms of Rule 65, it amongst others provides that:

(a) A person opposing the grant of an order sought in an application must -

(i) within the time stated in the notice give the applicant notice in writing that he or she intends to oppose the application and in that notice appoint an address within a flexible radius of the court at which he or she will accept notice and service of all documents;

(ii) within 14 days of notifying the applicant of his or her intention to oppose the application deliver his or her answering affidavit, if any, together with any relevant documents, except that where the Government is the respondent, the time limit may not be less than 21 days; and

(iii) if he or she intends to raise a question of law only, he or she must deliver notice of his or her intention to do so within the time stated in paragraph (b), setting out such question.

(b) The applicant may, within 14 days of the service on him or her of the affidavit and documents referred to in rule 66(1)(b), deliver a replying affidavit and the court may in its discretion permit the filing of further affidavits.

(c) Where the respondent fails to file an answering affidavit or notice to raise a point of law as contemplated in Rule 66(1)(c) within the 14 or 21 days (in the case of Government) period the applicant must within four days of the expiry of that period give notice to the registrar to place the application before a judge in residual court for determination.

(d) Where pleadings have closed or pleadings are considered to be closed because the last day allowed for delivery of a replying affidavit or further affidavits has lapsed and the replying affidavit or further affidavits have not been delivered, the registrar must allocate the file to a managing judge and provide the managing judge who must case manage the matter.

The facts of the present matter

[15] I now return to the facts of this matter. In the present matter the applicant served a Notice of Motion on the Minister responsible for Marine Resources through the office of the Government Attorney. In the notice of motion the applicant gave the Minister and the Government (I will in this judgment refer to them as the respondents) five days, within which to indicate whether they intend to oppose the applicant's application and fourteen days to file their answering affidavits after they had indicated their notice to oppose the application. It is clear that the notice of motion in this case was defective because it gave the respondents five days instead of the prescribed[1] fifteen days to indicate their intention to oppose the application and fourteen days instead of the prescribed[2] twenty one days to file their answering affidavits after they had indicated their notice to oppose the application. On 10 April

[1] See Rule 65(5)(b).
[2] See Rule 66(1)(b).

2015 the application was struck from the roll. Despite the fact that the application was struck from the roll the respondents, on 14 April 2014, filed their notice to oppose the application. It follows that the respondents would have had until 18 May 2015 to file their answering affidavits.[3]

[16] On 24 April 2015 and again on 20 May 2015 Mr Mueller of Mueller Legal Practitioners wrote to the registrar of this court requesting the Registrar to allocate the matter to a managing judge. When Mr Mueller requested the Registrar to allocate the matter to a managing judge he erred or embarked on an irregular step. I say Mr Mueller erred or embarked on an irregular step for the following reasons. As I indicated above the respondents in this matter is Government as such they had until 14 April 2015 to file their notice of intention to oppose the application and until 18 May 2015 to file their answering affidavits. Rule 66(4) requires the Registrar to allocate the matter to a managing judge after the pleadings have closed or pleadings are considered to have closed. The pleadings are considered to have closed because that last day allowed for delivery of a replying affidavit or further affidavits has lapsed and the replying affidavit or further affidavits have not been delivered. The last day by which the applicant had to deliver its replying affidavit (if any) in this matter was thus 5 June 2015. By the time the file was allocated to me to case manage it, the pleadings had not closed or could not have been considered closed.

[17] Rule 66(3) provides that where no answering affidavit or notice to oppose as contemplated in Rule 66(1)(c) is delivered within the period referred to in Rule 66(1)(b), the applicant must within four days of the expiry of that period give notice to the Registrar to place the application before a judge in residual court for determination. I am thus of the view that that the file was also erroneously allocated to me for me to case managing it. As I indicated above I, on 08 June 2015, called for a Case Planning Conference in terms of rule 23(2) & (3) of this court's rules. The calling of the case planning conference was another irregularity. The rules do not provide for the calling of a case planning conference in respect of applications. These irregular steps thus contributed to the delay of determining the status of this matter. I now turn to consider what the status of this application is.

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[3] See Rule 66(1)(b).

[18] This application was struck from the roll on 10 April 2015. What is the effect of the matter having been struck from the roll? In the matter of *Shetu Trading CC v Chair, Tender Board of Namibia and Others*[4], (although stated in the context of urgent applications) the Supreme Court said the following:

> '[34] What is clear now that we have the benefit of the reasons of Ndauendapo J is that he did indeed not decide the merits but concluded that the applicant had failed to establish urgency. In such circumstances, a judge will ordinarily not dismiss the application, *but will strike it from the roll*. The reason for this is that the first prayer in a notice of motion where an applicant seeks to proceed by way of urgency is a prayer that the court condone the non-compliance with the rules of court and permit the applicant to proceed by way of urgency. If a court concludes that an applicant has not made out a case to proceed by way of urgency, that prayer is not granted and the rest of the application is not considered at all. The effect, therefore, is that the application is improperly before the court because the rules have not been complied with, and the court will therefore strike the application from the roll. *When a matter is struck from the roll in this fashion, it is clear that there has been no ruling on the merits at all*. As Cameron JA helpfully explained in a recent judgment of the South African Supreme Court of Appeal:
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> > 'Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and it is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of court permit a court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (rule 6(12)(a)). This, in effect, permits an urgent applicant, subject to the court's control, to forge its own rules (which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can, for that reason, decline to exercise its powers under Rule 6(12)(a). *The matter is then not properly on the court's roll and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance*…'[5] {Italicized and underlined for emphasis}.

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4 2012 (1) NR 162 (SC)

5 Per O'Reagan at p 174.

[19] In the matter of *Cargo Dynamics Pharmaceuticals (Pty) Ltd v Minister of Health and Social Services and Another*[6] the Supreme Court repeated the view that the effect of striking a matter from the roll is that such striking from the roll does not dispose of the merits of the application and that the applicant is entitled to re-enroll the application. In the matter of *Swakopmund Airfield CC v Council of the Municipality of Swakopmund* [7] the Supreme Court said the following:

> '[30] In general, it seems to me that a process will only be pending either when it was issued by the registrar or when it was served on the other party. *Once the application was struck from the roll it was no longer before the court and some formal act to again bring it before the court was necessary either by issuing it or serving it*…'

[20] In view of the authorities that I have referred to in the preceding paragraphs I have come to the conclusion that when the application was struck from the roll on 10 April 2015 the application (i.e. Application No. A 59/2015) was no longer before the court the applicant thus had to take some formal procedural step to bring the matter again before court the request to the Registrar to allocate the matter to managing judge is not such formal procedural step. In view of my finding that the steps taken by the applicant, to have the matter allocated to a managing judge, were irregular it follows that the application is still not properly before this court. I have furthermore come to the conclusion that the respondents cannot be in default of the rules of court in respect of a defective Notice of Motion and a matter which is not before court. I therefore decline to grant the default orders sought by the applicant.

Costs

[21] The respondents have incurred costs in opposing this application. The general rule is that costs follow the course, except where circumstances dictate otherwise. I see no reason and none has been provided to me why the general rule should not apply. It is appropriate, therefore, to order the applicant to pay the costs of the respondents, such costs to include the costs of one instructed and one instructing counsel.

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6 2013 (2) NR 552 (SC) at p 559.
7 2013 (1) NR 205 (SC) at p 213.

Order

[22] I therefore make the following order:

1. The application for default judgment is refused.

2. The appellant is ordered to pay the costs of the respondents, such costs to include the costs of one instructed and one instructing counsel.

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Ueitele SFI, Judge

APPEARANCES

APPLICANT	Advocate T Barnard Instructed by Mueller Legal Practitioners
1ST & 2ND RESPONDENTS	Advocate S Akweenda Instructed by Government Attorneys