REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

In the matter between:

Case no: A 38/2015

STEFANUS NANDE NGHIIMBWASHA **1ST APPLICANT**

SOSTENUS NGHIIMBWASHA **2ND APPLICANT**

And

MINISTER OF JUSTICE **1ST RESPONDENT**

PROSECUTOR-GENERAL OF THE REPUBLIC OF NAMIBIA **2ND RESPONDENT**

INSPECTOR-GENERAL OF THE NAMIBIAN POLICE FORCE **3RD RESPONDENT**

Neutral citation: *Nghiimbwasha v Minister of Justice (A 38/2015) [2015] NAHCMD 67 (20 March 2015)*

CORAM: MASUKU A.J.

Heard: 13 March 2015

Delivered: 20 March 2015

Flynote: The applicants, awaiting trial in-mates, approached the court on the basis of urgency seeking interpretation of certain articles of the Namibian Constitution and a certain declarator. The respondent took points of law in *limine* including that the matter was not urgent or if urgent, the urgency was created by the applicants. The court held that the applicants had not complied with the mandatory provisions of rule 73 (4). The court held further that the fact that the applicants, were unrepresented, should not avail them when they had failed to comply with the mandatory procedural rules relating to urgency and which would result in them "jumping the queue" ahead of litigants who had instituted their cases earlier. The court refused to have the matter enrolled as one of urgency.

ORDER

That the application to have the matter heard as one of urgency is hereby refused. There is no order as to costs.

RULING ON POINTS OF LAW

MASUKU A.J.,

[1] Presently serving before court is an opposed constitutional application in manuscript, brought on an urgent basis. The applicants, who are self-actors, approached the court seeking the following relief:

> '(a) That the application be deemed urgent.
>
> (b) That due to the urgency of this application the form (*sic*) and services (*sic*) provided for in the Rules be dispensed in terms of Rule 6 (12) (a) and 6 (12) (b) of the Rules of the High Court of Namibia.

(c) That interim relief be granted in the form of a declarancy (*sic*) order/mandamus ordering the Respondents to comply with Article 12 (1) (b) and Article 18 of the Namibian Constitution.

(d) That the Respondents should apply the aforementioned order within seven (7) days calendar days of the granting of this order.

(e) Further and/or alternative relief'.

Needless to say, the application is accompanied by a certificate of urgency and the founding affidavit of the second applicant, the contents of which are duly confirmed by the first applicant.

[2] Unusually, also attached to the application is a document titled, "Notice of Intention" and appears to be an additional notice of motion as it sets out or rehashes the prayers the applicants move the court to grant, being to:

(a) interpret Article 12 of the Constitution about fair trial;

(b) interpret Article 12 (1) (b) of the Namibian Constitution;

(c) interpret Article 18 of the Namibian Constitution;

(d) missing bail application proceedings and police docket in terms of CPA 51 of 1977;

(e) that should the Honourable Court agree with the Applicants contention, that the Honourable Court should order the Respondents to acquit or withdraw the matter or grant bail pending the reconstruction of the missing proceedings of the proceedings at Katutura Regional Court.

[3] It is perhaps appropriate, before commenting on some procedural issues that arise, to set the application in perspective by chronicling the facts alleged in the papers. The applicants are Namibian citizens who are presently facing a charge of robbery with aggravating circumstances. They allege that they were arrested on 19 May, 2008 and have remained in custody ever since. They allege further that they have appeared before various magistrates over the years and that certain documents and tapes crucial to their prosecution went missing and that these have hamstrung the commencement of their trial.

[4] It would also appear from their affidavit that they have previously moved some applications for bail which were unsuccessful. They allege that they have previously refused to plead when called upon because of the failure by the prosecution to provide them with the documents and tapes they allege are missing. The prosecution joined issue and filed an affidavit deposed to by the Prosecutor General in which most of the allegations are placed in issue and the blame for the delay in commencing the trial is placed squarely at the door of the applicants, their attorneys and/or their co-accused. None of the other respondents filed any papers. It is not necessary at this juncture, to examine wherein lies the truth of these allegations and counter-allegations; accusations and counter-accusations which have been traded between the two sets of protagonists regarding who is responsible for the delay in commencing the trial. I adopt that position in view of the points of law raised by the second respondent and which form the basis of this ruling and which make it unnecessary at present to examine these allegations.

[5] The second respondent raised the following points of law *in limine,* and which I indicated during the hearing that it would be convenient to determine in the first instance, namely lack of urgency; that the order or relief sought is vague and that a party, being the Regional Court, has not been joined as party yet it is a necessary and relevant party to the proceedings in issue. I reserved my ruling after argument by both parties. I proceed henceforth, to make my ruling on the issues raised or those of them that I consider it appropriate to determine.

Urgency

[6] The first point of attack for the second respondent was that the matter is not urgent and that the applicants have failed to aver explicitly grounds upon which it is claimed that the matter is urgent. It was further argued that the applicants had failed to comply with the rules of the High Court of Namibia[1] requiring that they should state reasons why they claim they cannot be afforded substantial redress at a hearing in due course.

[1] 1990, as amended and which came into operation on 24 December, 2013.

[7] I consider it appropriate at this juncture, to make reference to the relevant rules of court which it is claimed by the respondents, have been observed by the in breach by the applicants. The rule that makes provision for urgent applications is rule 73. The relevant part referred to in argument by the respondents is rule 73 (4), which provides as follows:

> 'In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –
> (a) the circumstances which he or she avers render the matter urgent; and
> (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.'

[8] Before examining closely the requirements of this subrule, it is opportune to observe a few issues regarding the applicants' application. First, the applicants, in their notice of motion, have alleged that the application is in terms of rule 6 (12) of the rules of the High Court. It is now common cause that the said rule was repealed and has been renumbered to be rule 73 in the new rules of court. I should hasten to mention though that the relevant part of the rule referred to in this matter and which forms the pivot or axis on which this argument turns, has not been changed. The nomenclature by and large remains the same. I do however take note of the notorious fact that the applicants are unrepresented litigants who are unlettered in law and it would be an exercise in sterile and fastidious formalism to dismiss or refuse the application on no other grounds than that the wrong rule has been cited. The second respondent also did not support that drastic approach.

[9] In the premises, I will consider the application as though the correct rule had been cited, considering in particular, as mentioned earlier, that the substance of the relevant language remains largely undisturbed notwithstanding the repeal. It only remains for me to remind and exhort litigants, including lay litigants that they should ensure that they bring applications or other proceedings in terms of the relevant rules of court or legislation, as the case may be. This is so because courts will not always be charitable and entertain applications brought in terms of laws that have either been

amended or repealed. There may be cases where courts may not be able to come to the assistance of lay litigants in this regard.

[10] Second, the document referred to in the applicants' application as a 'Notice of Intention' is not provided for in the rules of court. It is in fact unnecessary. The relief sought from the court must be clearly and unambiguously stated in the notice of motion. There is no need or requirement to explain or simplify the relief set out in the notice of motion as has been done by the applicants in this case. The filing of the said notice is therefore unnecessary and confusing as it is not identical in every respect to the notice of motion which is required to be filed in terms of the rules of court. I shall have no regard to it for that reason.

[11] I now revert to the relevant subrule. The first thing to note is that the said rule is couched in peremptory language regarding what a litigant who wishes to approach the court on urgency must do. That the language employed is mandatory in nature can be deduced from the use of the word "must" in rule 73 (4). In this regard, two requirements are placed on an applicant regarding necessary allegations to be made in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused.

[12] The first allegation the applicant must "explicitly" make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must "explicitly" state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course. The use of the word "explicitly", it is my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to set out and underscore the level of disclosure that must be made by an applicant in such cases.

[13] In the English dictionary, the word "explicit" connotes something "stated clearly and in detail, leaving no room for confusion or doubt." This therefore means that a

deponent to an affidavit in which urgency is claimed or alleged, must state the reasons alleged for the urgency "clearly and in detail, leaving no room for confusion or doubt". This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency.

[14] In *AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia and 12 Others*[2] this court, per Schimming-Chase A.J., expressed itself thus on the issue under discussion:

> 'This Rule (rule 6 (12) in the repealed Rules of the High Court and rule 73 (4) in the new Rules of the High Court) entails two requirements, namely the circumstances relating to urgency which have to be explicitly set out and, secondly, the reasons why the applicants in this matter could not be afforded substantial redress at a hearing in due course . . . mere lip service to the requirements of Rule 6 (12) (Rule 73 (4) of the new Rules of the High Court) will not do and an applicant must make out a case in the founding affidavit to justify the extent of the departure from the norm, which is involved and in the time of day for which the matter should be set down.' (Emphasis added).

It will be seen from the quotation above that the learned Judge's views coincide with the views I have expressed immediately above. In this regard, an applicant can be chary in the affidavit on issues relating to urgency to its own detriment, thus affecting the court's ability to properly exercise its discretion in that party's favour and may actually render the court unable to properly deal with the case at all or in accordance with the level of dislocation necessary to preserve interest or forestall the harm alleged.

[15] It is now opportune to have regard to the affidavits filed by the applicants in order to determine whether they have complied with the requirements, which as I have said are mandatory. The second respondent has argued that not even lip service was paid to the above requirements by the applicants in their affidavit but that the applicants never even attempted, it was further contended, to comply. The second respondent

[2] [2011] NAHC 184 (1 July 2011 per Schimming-Chase AJ

accordingly prayed that the application for the matter to be enrolled as one of urgency be refused. Is the second respondent correct in that regard?

[16] In the affidavit filed in support of the application, the only portion I could find, that remotely attempts to deal with the issue of urgency is to be found at paragraphs 38 and 39 and I will quote the said verbatim below:

> '37. Please take note that this is an urgent matter, I am in custody for 6 years and nine months. I humbly pray that this Honourable Court will please treat this matter on urgent basis.
> 38. I further seek for this Honourable Court (*sic*) indulgence to condone my non-compliance with rules as envisages (*sic*) in the rules of this Honourable Court. I am a layman in the field of law and its procedures.'

That is all.

[17] I have no hesitation in agreeing with the second respondent that the applicants did not at all comply with either of the two requirements for the court to jettison the ordinary application of the rules and deal with the matter as one of urgency. No mention is made of the reasons why the application must be dealt with as one of urgency, let alone explicitly. Furthermore, there is no mention of the reasons why the applicants claim that they cannot be afforded substantial redress at a hearing in due course. It must be mentioned in this regard that both these requirements must be fulfilled and that answering to one, even explicitly, will not do. Both must be adequately addressed and fully. All I can say in the applicants' favour is that they appear to have used polite language in the affidavit, pleading with the court. Polite and well-mannered language on its own will not do when there has been no compliance with the requirements of the rules.

[18] The second respondent also argued that not only did the applicants fail to comply with the requirements of the rules aforesaid but regarding the second requirement, the applicants do in fact have an effective alternative remedy, namely applying for instance, for bail. The applicants protested that they had applied for bail but the Magistrate Court

had refused them to be admitted to bail. They conceded however, with the benefit of hindsight that at no stage had they approached this court to apply for a bail application on appeal, having been dissatisfied with the refusal by the Magistrate Courts. I am in full agreement with this argument and there was simply no answer from the applicants.

[19] The second respondent further argued that if there was any urgency in this matter, it was of the applicants' own making. The law has been authoritatively laid down that an applicant who creates the urgency either in bad faith or through his or her culpable remissness or inaction cannot be granted refuge under these provisions.[3] Similar sentiments were stated by Damaseb J.P., in *Mulopo v Minister of Home Affairs.*[4] The learned J.P. stated the following:[5]

> 'The Court has already warned that it will act sternly against those who come to this Court on self-created urgency.'

[20] In similar vein, in *The President of the Court of Appeal (Justice Michael Mathealira Ramodibedi) v The Prime Minister (Dr. Motsoahae Thomas Thabane) And Others*[6] the Constitutional Court of Lesotho held that the applicant in that matter had created the urgency by being inactive and doing nothing until he suddenly approached the court on urgency to try to stop impeachment proceedings initiated against him. Importantly, the court made reference to the Lesotho High Court case of *Marumo v National Executive Committee and* Others[7] where it was held as follows:

> 'Urgency is not a hat that one can put on or off at one's convenience. Urgency is a condition imposed upon by reasons of circumstances beyond his or her control . . .'

The issue could not have been better put. It would appear to me that there are no circumstances pleaded in this case which can be said to be beyond the applicants' control.

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[3] *Bergmann v Commercial Bank of Namibia* [2001] NR 48
[4]]2004] NR 164 (HC) at
[5] *Ibid* at page 169
[6] Constitutional Case No. 11 of 2013
[7] [2011] (LsHC) 92

[21] In the instant case, it would seem to me, there is nothing alleged that has happened in recent days or weeks to suddenly create the urgency alleged. For lack of a better word, there must, in such circumstances be a “trigger” that activates the urgency as it were and signify that although the waters were previously calm, some violent tempest must have intervened to stir the waters and create panic, being the urgency. In this case there appears to be no trigger at all. It is of course a matter of grave concern to this court that the applicants have been in custody for such a long time but the reasons for this state of affairs are the subject of serious disputes with a cross fire of accusations and counter-accusations and which may not, from present indications, be easily resolved on motion proceedings.

[22]The applicants claim and correctly so that they are not trained in law and should not be dealt with by this court at the same level as lawyers and that any deficiencies evident in the papers should be viewed from that perspective. So forceful was this argument that in reply, the applicants cited an excerpt from the case of *Xinwa And Others v Volkswagen SA (Pty) Ltd,*[8] where the Constitutional Court of South Africa said:

> ‘Pleadings prepared by lay persons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy; skill and precision in the presentation of their case required of lawyers. In such pleadings regard must be had to the purpose of the pleading as gathered not only from the context of the pleadings but also from context in which the pleadings is prepared. Form must give was to substance.’

[23] The above judgment has been accurately quoted by the applicants and it states that the court must not hold lay litigants to the same standards required of legal practitioners in the drafting of pleadings. This arose in a situation where the court found that although the applicants had failed to accurately capture the relief they sought in the pleadings, it was otherwise clear from the papers what it is they sought, namely an appeal against an unfavourable decision. The court considered that in those

[8] *[2003] ZACC 7, 2003 (6) BCLR 575 (CC)*

circumstances, it was clear that the applicants were seeking leave to appeal directly to the Constitutional Court.

[24] It is worth considering that having said so, the court noted however that the applicants had failed to comply with what it referred to as a "procedural requirement" i.e. to obtain a certificate in terms of rule 18. The court noted that no explanation had been tendered for that failure. By asking this question and commenting on it, it is clear that the court was not of the view that lay litigants were excused from complying with procedural requirements. The court however found it unnecessary to deal with the failure to comply with the said procedural requirement considering the view it took of the matter. It dismissed the application as it found there were no prospects of success.

[25] In the instant case, it is clear that the allegations relating to urgency are procedural in nature and need to be complied with by parties who seek to have the urgency procedures invoked. If it were otherwise, namely that lay litigants do not have to comply with procedural requirements, then there would be chaos, inconsistency and confusion in the conduct of litigation. There would be two sets of rules in operation i.e. for those with lawyers and those without. In this instance, the wording in the rules has been simplified and made user-friendly by excising intimidating legal jargon. I am satisfied, having seen the applicants and heard them argue that this is not a case of them not knowing or understanding what was required of them rather than them neglecting to comply with the requirements of a rule they had cited albeit wrongly.

[26] This is not to say that the court may not, in appropriate cases overlook minor procedural oversights and deficiencies where lay litigants have fallen short of the requirements of the rules. The issue of urgency is an important safety valve in the rules and should only be invoked where a clear case has been made out. This is particularly so because part of the object of judicial case management is to facilitate the resolution of real disputes speedily, efficiently, cost effectively and in a practicable way[9]. As a result, even if a constitutional matter is not alleged to be urgent, it will still be accorded

[9] Rule 1 (3) of the Rules of the High Court

priority and be set down and determined in line with the objectives of judicial case management mentioned before.

[27] For that reason, it becomes clear that the court should be circumspect and allow for urgency to be invoked only in cases where the circumstances alleged in the papers dictate and where an applicant has complied with the rules relating to urgency. This is not a case where the applicants have attempted to comply with the rule but have, due to being unlettered in law, failed to fully and accurately put their case across in acceptable legal language. They have simply not complied at all with what are clearly mandatory requirements of the rules and this should not, in my view be condoned.

[28] It must also be remembered that an applicant who seeks to invoke the urgency procedure essentially asks the court to allow him or her to "jump the queue" as it were and have his or her case heard before others that were launched earlier. The reasons why the court is requested to allow the jumping of the queue must be motivated and others whose cases have been overtaken by the applicant's case, must be able to attest that from the papers filed, the fast-tracking of the case was indeed called for. To do otherwise would bring the administration of justice into disrepute.

[29] In *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (In Liquidation)*[10] the Supreme Court dealt with an application in which a lay litigant had not complied with certain rules of that Court. In dealing with the argument also raised in this case that the appellant was a lay person in law, O' Regan AJA said the following:[11]

> 'In reaching this conclusion, it has been borne in mind that appellant is a lay person who represents himself before the court. The appellant implored the court to overlook his procedural non-compliance and determine the substantive issues that he asserts underlie the appeals, namely the satisfaction of the judgments of the district labour court mentioned above. However, we cannot overlook the rules which are designed to control the procedures of the court. Although a court should be understanding of the difficulties

[10] 2014 (1) NR 234 (SC)
[11] Page 240 para 17 of the judgment

> lay litigants experience and seek to assist them where possible, a court may not forget that court rules are adopted in order to ensure the fair and expeditious resolution of disputes in the interest of all litigants and the administration of justice generally. Accordingly, a court may not condone non- compliance with the rules even by lay litigants where non-compliance with the rules would render the proceedings unfairly or unduly prolonged.'

[30] I am, in view of the authoritative pronouncement on this issue by the Supreme Court, of the view that the applicants' status as lay litigants should not avail them in so far as non-compliance with the rules relating to urgency is concerned. It would be certainly unfair to other litigants if the court were to willy- nilly allow unrepresented litigants to gain an advantage in having their cases heard on urgency where they have not met the threshold in terms of complying with the urgency requirements of the rules.

[31] In the premises, it appears to me that the second respondent's point is well taken. I accordingly refuse to have this application heard as one of urgency. In the circumstances, I do not find it necessary to deal with the balance of the legal contentions raised *in limine* by the second respondent.

[32] In the premises, the application to have the matter heard as one of urgency is hereby refused. There is no order as to costs.

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TS Masuku, AJ

APPEARANCES

APPLICANTS:	Messrs Nghiimbwasha
	The first and second applicants In Person
RESPONDENTS:	H. Harker
	Instructed by Government Attorney