REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 122/2016

In the matter between:

JB COOLING AND REFRIGERATION CC **APPLICANT**

And

STEFANUTTI STOCKS CONSTRUCTION (NAMIBIA) (PTY) LTD **FIRST RESPONDENT**

BANK WINDHOEK LIMITED **SECOND RESPONDENT**

Neutral citation: *JB Cooling and Refrigeration CC v Stefanutti Stocks Construction (Namibia) (Pty) Ltd* (A 122/2016) [2016] NAHCMD 134 (29 April 2016)

Coram: PARKER AJ
Heard: **28 April 2016**
Delivered: **29 April 2016**

Flynote: Practice – Applications and motions – Urgent applications – Applicant must satisfy the requirements of rule 73(4) of the rules of court for the matter to be heard on urgent basis – Furthermore, no urgency where urgency is self-created. *Salt v Smith* 1990 NR 87; and *Bergman v Commercial Bank of Namibia and Another* 2001 NR 48 applied.

Summary: Practice – Applications and motions – Urgent applications – Applicant must satisfy the requirements of rule 73(4) of the rules of court for the application to be heard as one of urgency – In instant case court found that applicant ought to have taken the necessary steps with speed and promptness to protect its interests so soon after 21 November 2015 but it did not – Court concluded urgency was self-created – Court finding that applicant has failed to satisfy the rule 73(4) requirements – Consequently, application struck from the roll with costs.

ORDER

JUDGMENT

PARKER AJ:

[1] The applicant, represented by Mr Jones, has brought an application by notice of motion, and prays the court to hear the matter on the basis of urgency. The first respondent rejects the application, and is represented by Mr Barnard. The second respondent does not oppose the application.

[2] The matter revolves around a partly written and partly oral agreement entered into between the applicant (sub-contractor) and the first respondent (contractor) whereby the applicant would supply and install certain HVAC mechanical equipment to and for the first respondent. In terms of the construction agreement the applicant was required to provide a written guarantee to the first respondent. Such guarantee was issued by the second respondent. The second respondent's liability in terms of the guarantee would be limited to payment of N$1, 575,010.08. The relief sought is

to interdict the first respondent from demanding from the second respondent payment in terms of the aforementioned guarantee or any other amount and to interdict the second respondent from paying the first respondent the aforementioned guarantee amount or any other amount in terms of the guarantee.

[3] In the instant proceedings the burden of the court is to consider and determine the issue of urgency only. I therefore repeat hereunder what, relying on the authorities, I said in *Fuller v Shiwele* (A 336/2014) [2015] NAHCMD 15 (15 February 2015), para 2, which Mr Barnard referred to the court:

> '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.'

[4] In dealing with the two requirements, Mr Jones submitted that the cause of action arose on 25 April 2016 because that was when the second respondent was to 'honour the guarantee in favour of the first respondent and further … intends to pay out the first respondent the full guaranteed amount on Thursday, 28 April 2016 (ie today), and the applicant has come to court today, that is, barely two court days from 25 April 2016. That being the case, so concluded Mr Jones, the applicant has not delayed in bringing the application.

[5] Mr Barnard's contrary argument centred around an interpretation and application of para 4 of a letter, dated 15 April 2016, which the applicant's legal representatives wrote to the first respondent's legal representatives, and which reads:

'Clause 14.3.3 of the agreement states that the contractor shall return the construction guarantee to the subcontractor within fourteen (14) calendar days after its expiry. The payment guarantee upon which your client relies has therefore expired, of which expiry we have already informed the bank. Your client was therefore obliged to provide our client with the original guarantee document 44 days after the date of practical completion. ie 9 October 2015.'

[6] From the fourth paragraph of that letter it seems to me clear that upon the expiration 44 days from 9 October 2015, ie 21 November 2015, applicant was aware that first respondent had flatly refused to accede to the applicant's request that first respondent provided applicant 'with the original guarantee document', which is crucial in this proceeding. Doubtless, if first respondent had acceded to the applicant's request, the instant proceedings would not have come about because the applicant would have had in its custody and control the original guarantee document, which the first respondent would need in order to demand from second respondent payment under the terms of the guarantee and which the second respondent would want to have in its hands before it could pay the aforementioned amount of N$1, 575, 010.08.

[7] And so; with respect, I can see no merit in Mr Jones's argument that the cause of action arose on 25 April 2016 when, according to counsel, there was a real threat that the second respondent would make payment to first respondent under the guarantee. Such threat had existed as from 21 November 2015. It follows that in my judgment applicant should have taken the necessary steps with speed and promptness so soon after 21 November 2015 in order to protect the interests that applicant now at this late hour seeks to protect by an urgent applicant; and applicant does not say why it did not act with speed and promptness so soon after 21 November 2015.

[8] I find therefore that applicant has not set forth explicitly the circumstances which it avers render the matter urgent.

[9] Based on the foregoing reasoning and conclusions and upon the authority of *Bergman v Commercial Bank of Namibia Ltd and Another* 2001 NR 48, I find that the urgency was self-created; and *Bergman* 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 and hear the application on the basis of urgency.

[10] It follows that the applicant has failed to satisfy the first requirement under rule 73(4). On this ground alone the application stands to be struck from the roll. Be that as it may, on the second requirement; I have searched in vain in my quest to find anything that has been placed before the court to satisfy the second element of the urgency requirements in rule 73(4) of the rules, namely, setting forth explicitly the reasons why the applicant claims it could not be afforded substantial redress in due course. All that the applicant says is that the first respondent is in a dire financial position. But that is not enough to satisfy the second requirement. In response to a question for clarification from the Bench, Mr Jones agreed that the primary target of the interdictory relief is the second respondent. First respondent has already demanded payment. Indeed, that is the position of the applicant, too. In the founding affidavit, applicant states, 'I do however reiterate that should the guarantee amount be paid out (that is paid out by the first respondent), the applicant will have little or no chance of recovering the guarantee amount which (it) will ultimately be wrongfully paid to the first respondent (by second respondent) ….'

[11] I accept Mr Barnard's argument that even if the second respondent shall have 'wrongfully paid to the first respondent', it has not been established that the second respondent, the primary target of the interdictory relief, could not make good any amounts second respondent might have paid wrongfully under the guarantee to the first respondent.

[12] In sum, I find that applicant has not set forth explicitly reasons why applicant claims it could not be afforded substantial redress in due course, particularly seeing that any redress will be monetary relief.

[13] Based on these reasons, I hold that applicant has not satisfied the dual requirements of rule 73(4); and so the court should refuse to grant the indulgence applicant prays for. Consequently, I decline to condone the applicant's non-compliance with the rules of court and hear this application as one or urgency.

[14] In the result, the application is refused for lack of urgency, and is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT :	JP Ravenscroft-Jones
	Instructed by Fisher, Quarmby & Pfeifer, Windhoek
FIRST RESPONDENT:	P C I Barnard
	Instructed by Cronjé & Co., Windhoek