NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

CASE NO. **A 119/2016**

In the matter between:

OCEANS 102 INVESTMENTS CC	**APPLICANT**
And	
STRAUSS GROUP CONSTRUCTION CC	**1ST RESPONDENT**
RUBICON SECURITY SERVICES CC	**2ND RESPONDENT**

Neutral citation: *Oceans 102 Investments CC v Strauss Group Construction CC & Another* (A 119/2016) [2016] NAHCMD 139 (10 May 2016)

CORAM: **ANGULA, DJP**

Heard: 9 May 2016

Delivered: 12 May 2016

ORDER

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1. The point *in limine* is declined. The applicant is ordered to pay the respondents costs occasioned by the point *in limine.*

2. The application is ruled to be urgent. The costs occasioned by the determination of this point shall be costs in the cause.

RULING

ANGULA, DJP:

Background

[1] This is an urgent application for spoliation relief brought by the applicant against the respondents. Since only the first respondent is opposing the application I will only use the term “respondent”.

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[2] The respondent raised a point *in limine* and further contends that the applicant has not made out a case that the matter is urgent. I ruled that two issues should be determined first apart from the merits.

Point *in limine*

[3] The respondent contends that the notice of motion is defective and that it does not comply with Rule 65 (4) and Form 17. The respondent therefore submits that the application should be struck from the roll with costs. The fact that the notice of motion is defective is not disputed by the applicant. In fact the applicant has in the meantime caused an amended notice of motion to be served and filed which is in compliance with the Rule 65 (4) and Form 17. The applicant thus submits that the respondent has not suffered any prejudice. As a matter of fact they filed a notice to oppose and have also prepared an answering affidavit.

The respondent concedes that it has not suffered prejudice as a result of the defective notice of motion.

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[4] The overriding objective of the rules as set out in Rule 1 is to facilitate the resolution of the real issues in dispute justly speedily, efficiently and cost effectively as far as speedily, efficiently and cost affectively as far as practicable taking into account factors such as any prejudice that may be suffered by a party as a consequence of any order proposed to be made or any directive proposed to be made by the court. In order to give effect to the and to achieve the objective overriding objective of the rules to fairly and timely disposed of this matter, I have decided to decline to uphold the point *in limine*.

[5] There is no doubt that the applicant has been remissness on the part of the applicant's legal practitioner which has been demonstrated by the defective notice of motion. The respondent was thus entitled to raise the point *in limine*. As a result it is entitled to a cost order. In the result the applicant is ordered to pay the respondent's costs occasioned by the point *in limine*. For the benefit of the taxing matter the time spent in arguing the point in limine was about 45 minutes, plus about 10 minutes for attending to the noting of ruling on this point.

Matter not urgent

[6] It is submitted on behalf of the respondent that the applicant has created its own urgency due to its in action; and the applicant has failed to set out reasons why it would not be afforded substantial redress at a hearing in due course.

[7] It is trite that the applicant bears the onus to establish urgency as it is seeking an indulgency of the court. It is further trite that for the purpose of deciding urgency the court accepts that the applicant's case is good, in this case that the applicant has been in exclusive undisturbed and peaceful possession of its property and had been unlawfully dispossessed of such possession by the respondent. The applicant's case is based on commercial urgency which is sufficient to invoke the provision of rule 73 (3) of the rules of this court. It is also well settled that this court has a discretion to condone non-compliance with its rules.

[8] In support of the contention that the application is urgent the applicant states that on 30 March 2016 the respondent placed boards on the property on which it indicated that it was exercising a lien over the property. The applicant instructed the security company which was guarding the property to remove the boards. Thereafter on 4 April 2016 the respondent came to the property and tried to re-elect the boards again. He was stopped by the security personnel. Shortly thereafter he returned with security guards from another company in bigger numbers. The situation became threatening to become violent as a result of which the police members were called in to diffuse the situation.

The cause of action thus arose on 4 April 2016 and this application was launched on 26 April 2016 that was 22 days from the date the cause of action arose. Mr Jones who appeared for the applicant at the hearing of the application and who was not involved in the preparation of the application submits that the application was launched within a reasonable time.

[9] Mr Jacobs who appeared in support of his point that the urgency is self-created points out that for the period between 4 April 2016 and 14 April 2016 the applicant provides no explanation what it did during that period. That is not quite correct. The deponent to the applicant's supporting affidavit (for brevity "the applicant") states that after he received the report of the incident he telephoned the Regional Commander for the area of Walvis Bay and informed him of the situation; that the Regional Commander undertook to talk to the respondent and to revert to the applicant. Unfortunately the Regional Commander did not revert to the applicant. He then sought for advice and was advised to obtain a court order. Unfortunately he does not say from who he sought advice. However the inference is clear that he sought the advice from his current legal representative. The inference is further that he arranged for an appointment with his legal representative and she was not immediately available. The inference is based on what he states: *"I travelled to Windhoek and consulted with counsel on 14 April 2016 which was the first available date for consultation with her".* The fact that the affidavit lacks specificities cannot be blamed on the applicant, but rather on what appears to be

the lack of experience on the part of the legal practitioner which is clearly demonstrated even by the defective notice of motion which is standard. Applicant went on to say "*She consulted telephonically with the witnesses who are based in Swakopmund on 15 and 19 April 2016 to obtain all the facts as I did not witness the events myself*".

[10] Mr Jacobs points out that the founding affidavit is commissioned in Oshakati on Wednesday the 20th of April 2016. This appears to me to mean that after the legal practitioner had consulted with the witness on 19 April 2016 she finalised the affidavit and was sent to the applicant at Oshakati the following day,that is 20 April 2016 where it was commissioned. According to the applicant he resides at Outapi not Oshakati. This means he had to travel from Outapi to Oshakati to sign the affidavit before a commissioner of oath, thus a further logistics challenge was involved.

[11] Mr Jacobs further points out that for the period Wednesday the 20th of April 2016 to Monday the 25th of April 2016, the applicant similarly provides no explanation as it simply does not set out explicitly what it did during this period, as required by the rule 73 (4). Again from a mere logical point of view and by inference something happened but was not simply put to paper by the drafter of the affidavit. Two of the confirmatory affidavits were commissioned at Walvis Bay on 25 April 2016 and one confirmatory affidavit was commissioned at Windhoek on 26 April 2016. This means that after the main affidavit was commissioned at Oshakati on 20 April 2016 it must have been

couriered to Windhoek. The copies were forwarded to Walvis Bay either by email or faxed to be read by the deponents of the confirmatory affidavits before they could sign their affidavits. The confirmatory affidavit must then have been dispatched to Windhoek and were in Windhoek either on 26 or 27 April 2016 for the papers to be filed on 27 April 2016.

[12] Finally Mr Jacobs points out that in total the applicant spent 20 court days since the alleged act of spoliation to prepare an affidavit comprising a meagre 8 pages; that the first respondent has 5 court days to respond before the hearing and in this period prepares a 37 paged answering affidavit; and that the first respondent faces the same logistics difficulties as the applicant, as its deponent is situated in Swakopmund, its attorney in Walvis Bay, and its advocate in Windhoek.

[3] In any event, with reference to the calculation of days, the so called 'delay rule' this regard Heathcote AJ in the matter of *Shetu Trading CC v The Chair of the Tender Board for Namibia* Case No A 352/2010 delivered on 22 June 2011 pointed out that one cannot simply calculate the days from when the cause of action arose and when the application was launched and if there are many days to say that there have been culpable 'remissness or inaction' that such calculations cannot by itself be the basis for exercising a discretion against an applicant. This is exactly what counsel is trying to convince the court to do in this matter. I decline to adopt that approach.

[14] Furthermore this type of simplistic approach was cautioned by Smut J in the matter of *The Three Musketeers Properties (Pty) Ltd And Another v Ongopolo Mining and Processing Ltd And Others* (SA3/2007) [2008] NASC 15 (28 October 2008)

> "I agree that the factors listed, such as a reasonable time to be taken to take all reasonable steps preceding an application including considering and taking advice, attempts to negotiate, obtaining copies of relevant documents and obtaining and preparing affidavits, should also be taken into account, if these are fully and satisfactorily explained, in considering whether an application should be heard as one of urgency. In addition, I agree that in considering the time taken to prepare the necessary papers, allowances should be made for differences in skill and ability between practitioners practising as attorneys and advocates, and that a party cannot be expected to act over hastily, particularly in complex matters. In addition, in this matter, both sets of parties are based in Tsumeb, some distance from this court".

[15] What the learned judge postulated is exactly what happened in this matter. On the one hand one has a less experienced legal practitioner for the applicant who consulted and drafted the papers on her own and only instructed counsel to argue the matter. On the other hand one has the respondent who was fortunate enough to have the services on one instructing counsel and one instructed counsel who consulted, drafted the papers overnight and argued the matter. Furthermore the logistic challenges were not

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evenly balanced on both sides. The applicant was faced with more logistic challenges stretching over four towns Outapi, Oshakati, Walvis Bay and Windhoek stretching over long distances whereas the respondents logistics was confined to three towns over shorter distances.

[16] It is accepted that an application for spoliation relief is by its very nature urgent. The underlying fundamental principle of the remedy is that no one is allowed to take the law into his own hands in breach of peace. It is well established that the remedy is designed to restore possession of the property to a person who has unlawfully been deprived thereof before the issue of ownership or who is entitled to possession is determined.

[17] I am satisfied that the application was brought without delay and as soon as it was reasonably possible.

[18] Regarding the issue whether the applicant will be afforded redress at a hearing in due course, Mr Jones for the applicant submits that spoliation applications are by their very nature *sui generis*. There is no alternative remedy to the *mandament van spolie* other than a *mandament van spolie;* that the application is by its very nature urgent and that there is no other redress in the normal course to achieve the same result as a *mandament van spolie vis a vis* restoring the applicant's possession and as such the *status quo ante ominia*.

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[19] Mr Jacobs on the other hand submits *inter alia* that the applicant has redress in due course in that he can provide security whereupon the respondent would relinquish possession of the property. This sounds to me like a demand for ransom viewed in the context that the applicant's case is considered to be a good one namely that the respondent has unlawfully taken possession of the property. It would have been perfectly in order and in accordance with the law if the respondent was lawfully in possession of the property. That is exactly the objective of the remedy: first restore the property which you unlawfully grabbed then the applicant can furnish you with security. In other words restore the status *quo ante* before the merits of the case, including security, can be considered.

[19] I am persuaded that the applicant would not be afforded substantial redress at a hearing in due course; and that the *mandament van spolie* is the only remedy available to the applicant.

[20] Finally it would appear to be common cause between parties that the merits are already being determined in court. On the assumption that the applicant's case is a good one in determining urgency, it appears to me that it is a contradiction for the respondent to contend that the applicant should institute his claim in due course by following lawful procedure while the respondent is in the meantime allowed to continue

possession of the property which it acquired unlawfully by taking the law in its own hands. Furthermore it is untenable for the respondent to take the law into its own hands on one hand whilst on the other hand it is using the law to seek redress from the court of law. This, the law cannot countenance.

[21] I have carefully considered the submissions advanced by the parties with regard to urgency. I am satisfied that the applicant has discharged the *onus* that the matter is sufficiently urgent.

[22] In the result I make the following orders:

1. The point *in limine* is declined. The applicant is ordered to pay the respondents costs occasioned by the point *in limine*.

2. The application is ruled to be urgent. The costs occasioned by the determination of this point shall be costs in the cause.

H Angula

Deputy Judge President

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APPEARANCES

APPLICANT:	Mr Jones Instructed by Sisa Namandje & Co. Inc.
1st RESPONDENTS:	Mr Jacob Instructed by Du Pisani Legal Practitioners