

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO.: HC-MD-CIV-MOT-REV-2017/00094**

In the matter between:

**TAWANDA JILES MUMVUMA**

**FIRST APPLICANT**

**ENOCK KAMUSHINDA**

**SECOND APPLICANT**

**OZIAS BVUTE**

**THIRD APPLICANT**

**JOSEPH BANDA**

**FOURTH APPLICANT**

**ALEC GORE**

**FIFTH APPLICANT**

**GEORGE SIMATAA**

**SIXTH APPLICANT**

and

**CHAIRPERSON OF THE BOARD OF**

**FIRST RESPONDENT**

**DIRECTORS**

**SECOND RESPONDENT**

**BOARD OF DIRECTORS: BANK OF NAMIBIA**

**SME BANK LIMITED**

**THIRD RESPONDENT**

**DENNIS KHAMA**

**FOURTH RESPONDENT**

**JOHN ALI IPINGE**

**FIFTH RESPONDENT**

**MELANIE TJIJENDA**

**SIXTH RESPONDENT**

**FANUEL KISTING**

**SEVENTH RESPONDENT**

**BENESTUS HERUNGA**

**EIGHT RESPONDENT**

MINISTER OF INDUSTRIALISATION,  
TRADE AND SME DEVELOPMENT  
MINISTER OF FINANCE

NINTH RESPONDENT  
TENTH RESPONDENT

**Neutral citation:** *Mumvuma v Chairperson of the Board of Directors* HC-MD-CIV-MOT-REV-2017/00094 [2017] NAHCMD 125 (25 April 2017).

**Coram:** UEITELE J  
**Heard:** 7 April 2017  
**Delivered:** 25 April 2017

**Flynote:** *Practice* - Applications and motions - Urgent application - Rule 73(4) places two requirements on an applicant regarding the allegations he or she must make in the affidavit filed in support of the urgent application - The first allegation the applicant must “explicitly” make in the affidavit relates to the circumstances alleged to render the matter urgent - The second allegation, the applicant must “explicitly” make in the affidavit relates to the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course.

**Summary:** Six applicants brought an urgent application to interdict first and second respondents from the carrying out or implementation the decision taken by them on 24 February 2017 and announced on 1 March 2017. The applicants also want the court to suspend this decision pending the hearing and finalization of Part B of this application. The first and second respondent took a point that the factors which the applicant relies on do not disclose any urgency for purposes of Rule 73 (4) of the Rules of Court.

*Held* the principles that are to be applied in order to determine whether a matter should be heard as urgent are settled in this Court. Rule 73(4) uses the word ‘must’ in setting out what a litigant who wishes to approach the court on urgent basis must do. The rule places two requirements on an applicant regarding the allegations he or she must make in the affidavit filed in support of the urgent application. Failure to comply with the mandatory nature of the burden cast on a litigant may result in the application for the matter to be enrolled on an urgent basis being refused.

*Held further* that the applicants are required to ‘in detail, leaving no room for confusion or doubt’ state the reasons why they alleged that they cannot be granted substantial relief at a hearing in due course.

*Held further* that the applicants simply resorted to labels and vague statements, they do not in detail set out the reasons why they allege that they cannot be granted substantial relief at a hearing in due course. Accordingly, the court refuses to have this application heard as one of urgency.

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### ORDER

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- 1 The application to have the matter heard as one of urgency is hereby refused and the matter is struck off the roll.
- 2 The applicants must, jointly and severally the one paying the others to be absolved, pay the respondents’ (first to eighth) costs.
- 3 The costs, in respect of the first and second respondents include the costs of one instructing and two instructed counsels.

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### JUDGMENT

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**UEITELE, J**

The Parties

[1] There are six applicants in this application. The first applicant, is Tawanda Jiles Mumvuma who was, until 28 February 2017, the Chief Executive Officer of the Small and Medium Enterprises Bank (Pty) Limited. He also served as a director of that Bank. The

second applicant is Enock Kamushinda a businessman and was, until 28 February 2017, the Vice-Chairperson of the Small and Medium Enterprises Bank (Pty) Limited's board of directors. The third applicant is, Ozias Bvute, a resident of the Republic of Zimbabwe and was, until 28 February 2017, also a director of the Bank.

[2] The fourth applicant is Joseph Banda who was, until 28 February 2017, employed by the Bank as its General Manager: Finance. The fifth applicant is Alec Gore who was, until 28 February 2017, employed by the Bank as its General Manager: Treasury and Investments. The last applicant is Mr. George Simataa who was, until 28 February 2017, the Chairperson of the Small and Medium Enterprises Bank (Pty) Limited's Board of Directors.

[3] The first respondent is Mr. Iipumbu Shiimi who is currently the Governor of the Bank of Namibia and also the Chairperson of the Board of Directors of the Bank of Namibia. The second respondent is the Bank of Namibia which is the Central Bank of the Republic of Namibia established in terms of the Bank of Namibia Act, 1997<sup>1</sup>. The third respondent is the Small and Medium Enterprises Bank (Pty) Limited, a banking institution registered in terms of the Banking Institutions Act, 1998<sup>2</sup> (I will in this judgment for ease of reference refer to the first respondent as the Governor, the second respondent as the Bank and to the third respondent as the SME Bank).

[4] The fourth respondent is, Mr. Dennis Khama, a legal practitioner of the High Court of Namibia and who was, on 01 March 2017, appointed as member of an interim Board of Directors of the SME Bank. The fifth respondent is, John Ally Ipinge, currently employed as the Chief Executive Officer of the Roads Authority and who was, on 01 March 2017, appointed as member of an interim Board of Directors of the SME Bank. The sixth respondent is, Melanie Tjijenda, who was, on 01 March 2017, appointed as member of an interim Board of Directors of the SME Bank. The seventh respondent is, Fanuel Kisting, who was, on 01 March 2017, appointed as member of an interim Board of Directors of the SME Bank. The eighth respondent is, Benestus Herunga, who is employed by the SME Bank and was, on 01 March 2017, appointed as the Acting Chief

<sup>1</sup> Act No. 15 of 1997.

<sup>2</sup> Act No. 2 of 1998.

Executive Officer of the SME Bank. The ninth respondent is the Minister of Industrialization, Trade and SME Development and the tenth respondent is the Minister of Finance.

[5] Having introduced the parties to this application I will now proceed to briefly set out the events which led to the applicants approaching this Court for relief.

The events leading to this application.

[6] During August 2016, the SME Bank's external auditors, BDO Namibia (I will, in this judgment, refer to BDO Namibia as the 'auditors'), informed the Bank's Banking Supervision Department, that it intended to disclose certain information regarding investments made by the SME Bank with an institution in South Africa known as Mamepe Capital ('Mamepe') which is allegedly a South African investment company. The external auditors (i.e. BDO Namibia) raised concerns regarding the soundness of the investment by the SME Bank.

[7] In order to facilitate the disclosure of the information, the auditors convened a meeting on 12 August 2016 with the Bank's staff. One of the Bank's staff who was present at the meeting is Romeo Nel the Bank's Director of Banking Supervision. The discussions at the meeting (of 12 August 2016) centred around the lack of persuasive audit evidence that an amount of N\$ 196 Million which the SME Bank invested with Mamepe exists and can be recovered. The auditors called a second meeting which took place on 9 September 2016. At the meeting of 9 September 2016 the discussion centred around the alleged failure by the management (which included the first, fourth and fifth applicants) of the SME Bank to disclose certain 'key information' to the auditors.

[8] Shortly after the auditors disclosed the information to the Bank, the Minister of Finance contacted the Governor of the Bank and revealed to him that the SME Bank failed to repay to the Namibia Water Corporation Limited (I will in this judgment refer to it as Namwater) an investment, in the amount of N\$ 140 Million which had matured.

The Governor reported the failure of the SME Bank to repay the matured investment to the Bank's Director: Banking Supervision, who made enquiries with the SME Bank as regards its failure to repay the investment made by Namwater. It also appears that at the juncture when the Namwater investment matured the SME Bank was facing liquidity challenges.

[9] Because of the liquidity challenges faced by the SME Bank, the Governor, on 8 September 2016, convened a meeting with the management of the SME Bank in particular the first and fifth applicants to discuss the liquidity challenges facing the SME Bank. At the meeting of 8 September 2016 the first and fifth applicants informed the Governor that the liquidity challenges which the SME Bank was facing were caused by the delay in the payment of an amount of N\$ 340 Million from the main shareholder namely the Government of the Republic of Namibia. The first and fifth applicants furthermore informed the Governor that the SME Bank had an investment in the amount of N\$ 156 Million in South Africa which would mature in three to sixth months' time. After further discussions between the Governor and the SME Bank the latter paid out N\$ 90 million to Namwater and rolled over the balance of N\$ 50 Million.

[10] As I indicated above the auditors, on 9 September 2016, called a second meeting with the SME Bank and the Bank. At that meeting the auditors reported to the Bank that they would be sending a letter to the directors of the SME Bank informing the directors that the representations made by the management of the SME Bank to the auditors could not be relied upon. The auditors furthermore reported to the Bank that external consultants were appointed to conduct a special investigation into the financials affairs of the SME Bank and that this significant matter was not communicated to or disclosed to the auditors.

[11] The auditors furthermore reported that it had not yet obtained the persuasive audit evidence with respect to the existence and recoverability of the investments made by the SME Bank in South Africa. In view of all these aspects the auditors addressed a letter to the directors of the SME Bank and informed them that no reliance must be

placed on the provisional annual financial statements and the provisional annual financial statements must not be distributed to anybody.

[12] From the documents and affidavits filed of record it appears that during August or September 2016 the Bank requested information from the management of the SME Bank with respect to the investments made by the SME Bank in South Africa. The fourth applicant, Mr Banda, in response to requests from the Bank, reported to the Bank that for the period ending 31 August 2016 the SME Bank invested a total amount of N\$ 185 Million in South Africa (with Mamepe and another institution referred to as VBS Mutual Bank). Mr Banda, however, failed to reply to a follow up request from the Bank to provide the Bank with proof that the investments of the N\$ 185 Million were approved by the SME Bank's board of directors.

[13] Because of the liquidity challenges which the SME Bank was experiencing the Bank decided to conduct a targeted examination at the SME Bank. The targeted examination commenced on 26 September 2016 and was scheduled to be completed on 30 September 2016. Just before the completion of the targeted examination, Mr Banda allegedly verbally informed the Bank's examiners that the SME Bank was expecting an amount of N\$50 Million from VBS Mutual Bank by 30 September 2016, but by 11 October 2016 the N\$ 50 Million had not yet been returned to the SME Bank. On 14 October 2016 Banda by electronic mail informed the Bank that the SME Bank had received N\$ 37 Million instead of the N\$ 50 Million.

[14] Against the backdrop of the events that I have set out in the preceding paragraphs the Governor, on 6 January 2017, addressed a letter to the Chairperson of the SME Bank. The heading of the letter is "NOTICE TO ISSUE ORDERS IN TERMS OF THE BANKING INSTITUTIONS ACT, 1998 (ACT NO. 2 OF 1998)..." In that letter the Governor amongst other things stated that, except where the information and facts at the Bank's disposal changes, in terms of s56 of the Banking Institutions Act, 1998:

- (a) The Bank is, of the view that the SME Bank is likely to become insolvent and is conducting its business in contravention of the Banking Institutions Act, 1998 and in a manner which is detrimental to its customers and to the general public.
- (b) Mr. Tawanda Mumvuma, Joseph Banda and Alec Gore may no longer be fit and proper persons to satisfactorily fill their positions in relation to the SME Bank.

[15] The Governor proceeded in the letter (of 6 January 2017) and substantiated the basis on which the views were formed. After stating the basis on which the views were formed the Governor said, 'In view of the grounds provided above, the Bank hereby gives notice of the intention to invoke its powers in terms of section 56(2) to issue the following orders to direct the SME Bank to:'

- (a) Return the amount of N\$ 196 Million invested with Mamepe and VBS Mutual Bank to any SME Bank designated account in Namibia on or before 23 January 2017.
- (b) If it is unable to return the money the SME Bank must:
  - (i) Provide a detailed explanation why it cannot return the money;
  - (ii) Provide assurance from an independent auditor confirming the value of the investment transactions made; and
  - (iii) Provide sworn statement by the Chief Executive Officer, Finance Manager and the General Manager: Treasury and Investments confirming the existences of the invested funds.

[16] The Bank's board of directors held a meeting on 24 February 2017. At that meeting the board discussed the situation prevailing at the SME Bank. After the deliberations with regard to the investments made by the SME Bank, the Bank came to the conclusion that:

- (a) The SME Bank is likely to become insolvent.



- (b) The SME Bank is conducting its business in contravention of the Banking Institutions Act, 1998 and in a manner detrimental to its customers or the general public.
- (c) The Executive Officers listed in its letter of 6 January 2017 may no longer be fit and proper persons to satisfactorily fill their positions in relation to SME Bank due to misrepresentations made to both the Bank and its independent auditors.

[17] As a result of the above conclusions at which the Bank arrived, the board of directors resolved to give effect and implement the order as set out in the notice of 6 January 2017. On 1 March 2017 the Governor issued a press release in which he announced that: (I quote verbatim from the media release)

'1. The Board of the Bank of Namibia at its ordinary meeting held on Friday 24 February decided that the Bank of Namibia must intervene into the affairs of and operations of the SME Bank Limited because of certain investments made that have not conformed to sound investment principles and that can potentially pose a risk to the financial stability of the bank ...

4 For this intended process to commence without undue hindrance the following actions have been taken:

- (a) The Bank of Namibia has, as mentioned above assumed control of the assets liabilities and affairs of the SME Bank Limited.
- (b) Accordingly the Directors of SME Bank will be disempowered and must therefore, submit the property business and affairs of the SME Bank to the control of the Bank of Namibia with immediate effect.
- (c) The Chief Executive Officer, the Manager of Finance and the General Manager of Treasury have been removed today.
- (d) In this regard the Bank of Namibia has appointed an interim Board to carry out the fiduciary responsibilities and support the committed staff members of SME Bank in

managing the affairs of the bank on behalf of the Bank of Namibia, until the Order so effected is lifted ...'

[18] On Sunday 12 March 2017 the applicants through their legal practitioners of record addressed a letter to the Governor in which letter the legal practitioners informed the Governor that the actions and decision announced on 1 March 2017 were fundamentally flawed (the letter sets out the basis of that statement) and demanded that the Governor revoke the 'unlawful' decision and actions of 1 March 2017 by close of business on Monday 13 March 2017. The Bank's legal practitioner replied on 13 March 2017 requesting time until 16 March 2017 to reply to the letter of 12 March 2017. The applicants' legal practitioners replied on 13 March 2017 and indicated that due to the urgency of the matter they will institute proceedings in this Court while they are awaiting the Banks reply on 16 March 2017.

[19] The applicants amongst other things alleging that;

- (a) the announcement made by the Governor on 1 March 2017 is in direct contravention of s 56(5) of the Banking Institutions Act, 1998 and the common law;
- (b) the decision announced covers by the Governor on 1 March 2017 matters that were not covered in the letter of 6 January 2017; and
- (c) the, Bank acted unreasonably and unfairly,

on 15 March 2017, instituted proceedings in this court by notice of motion, on an urgent basis for an order, amongst others, in the following terms:

**'PART A**

'1. Condoning the applicant's non-compliance with the Rules of this Court relating to service and time periods for exchanging pleadings and hear the matter as one of urgency as contemplated in in terms of Rule 73 of the Rules of this High Court

2 The first, and second respondents are interdicted from carrying out or implementing the decision taken by them on 24 February 2017 and announced on 1 March 2017.

3. The decision of the first and second respondents embodied in the second respondents Governor's press release of 1 March 2017 and as communicated to each of the applicants as per the attached annexures (Annexure TM 5(1) to Annexure TM 5(6)) be suspended pending the hearing and finalization of Part B of this application.

4. Reinstating the applicants in their respective positions with immediate effect as they were on 1 March 2017 pending the finalization of Part B of the application.

5. Ordering that the orders under paragraph 2, 3, and 4 serve as an interim interdict.'

[20] With the exception of the ninth and tenth respondents all the other respondents (I will in this judgment refer to fourth to eight respondents collectively as the respondents) opposed the application. In their opposition to the application the Governor and the Bank raised a point *in limine* challenging the urgency of the application. They submit that the factors which the applicant relies on do not disclose any urgency. I therefore first deal with the preliminary point relating to urgency.

### Urgency

[21] Urgent applications are not new in this Court. Once again, the principles that are to be applied in order to determine whether a matter should be heard as urgent have been set out in numerous cases before this court<sup>3</sup>. Masuku AJ (as he then was) eloquently put it as follows:

"[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

<sup>3</sup> *Tjipangandjara v Namibia Water Corporation (Pty) Ltd* 2015 (4) NR 1116 (LC); *Habenicht v Chairman of the Board of Namwater Limited and Others* NLLP 2004 (4) 18 NHC at 20; *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137; *Salt and Another v Smith* 1991 (2) SA 186 (Nm) at 187; *Shetu Trading CC v The Chair of the Tender Board for Namibia & Others*, High Court of Namibia, case number A 352/2010, delivered on 22 June 2011, para [7].

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.”<sup>4</sup>

[22] The requirements for determining whether a matter can be heard on an urgent basis have been stated by this Court many a times. The relevant rule governing urgent application is Rule 73<sup>5</sup>. Rule 73 (1) and (4) provides the following:

‘(1) An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter is so urgent that it should be heard at any time or on any other day.

(2) ...

(4) 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.’ (Italicized and underlined for emphasis).

[23] I find my remarks<sup>6</sup> that;

‘It is worthy to note that Rule 73(4) uses the word ‘must’ in setting out what a litigant who wishes to approach the court on urgent basis must do. The rule places two requirements on an applicant regarding the allegations he or she must make in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of

<sup>4</sup> *Nghiimbwasha v Minister of Justice and Others* (A 38/2015) [2015] NAHCMD 67 (20 March 2015).

<sup>5</sup> Rules of the High Court of Namibia: High Court Act, 1990 promulgated by the Judge President in the Government Gazette No. No. 5392 of 17 January 2014 but which came into operation on 16 April 2014.

<sup>6</sup> Made in the unreported judgment of *Namibia National Students Organization v National Youth Council of Namibia* (A 169-2015) [2015] NAHCMD 201 (delivered on 7 August 2015).

the burden cast on a litigant may result in the application for the matter to be enrolled on an urgent basis being refused,'

applicable to this matter.

[24] In the matter of *Nghiimbwasha v Minister of Justice*<sup>7</sup> this court said:

[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”, in 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.’

[25] One of the authoritative cases emanating from this court, on the interpretation of rule 6(12)(a) and (b) (now rule 73(4)(a) and (b)) is the matter of *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*<sup>8</sup> where the full bench said the following:

[19] ... Rule 6(12)(b)<sup>9</sup> makes it clear that the applicant must in his founding affidavit *explicitly* set out the circumstances upon which he or she relies that it is an urgent matter. Furthermore, the applicant has to provide reasons why he or she claims that he or she could not be afforded substantial address at the hearing in due course.

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<sup>7</sup> An unreported judgment of this Court Case No.(A 38/2015) [2015] NAHCMD 67 (20 March 2015) per Masuku AJ.

<sup>8</sup> 2012 (1) NR 331 (HC).

<sup>9</sup> The equivalent of this rule is rule 73(4)(b).

It has often been said in previous judgments of our courts that failure to provide reasons may be fatal to the application and that mere lip service is not enough. (*Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *Salt and Another v Smith* 1990 NR 87 (HC) at 88 (1991 (2) SA 186 (Nm) at 187D – G.)

[20] The fact that irreparable damages may be suffered is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent.'

Have the applicants met the requirements set by Rule 73(4)?

[26] In the affidavit filed in support of the application, the applicants deal with the matters which they allege render the matter as urgent as follows; (I quote verbatim from the founding affidavit):

'20 Because of the continuous illegality and the continuous adverse effects and harm to the applicants, the public and the third respondent the matter is extremely urgent as illegality, apart from the direct and immediate irreparable harm being suffered by the applicants is also incompatible with the requirements of the rule of law.

The third respondent is currently being run unlawfully by a purported interim board of directors appointed by the first and second respondents when they do not have such power.

22 The third respondent's directors and three officers were removed unlawfully by the first and second respondents when they do not have such power to remove directors and officers except to make an order in terms of section 56(2) of the Banking Institutions Act as amended ... **to require** the third respondent to take action which may include removal or appointment of directors and officers. This did not happen. The first and second respondents further totally misconstrued their power under section 56 (2) (a) and (b) of the Act.

23 The members of the public are therefore on a daily basis made to transact with the third respondent while being run by an unlawful Board and unlawfully appointed Acting Chief Executive Officer. These are exceptional grounds for urgency the banking transaction

being undertaken are at the risk of being successfully impugned in future on the above legal grounds.'

[27] Mr. Maleka on behalf of the applicants argued that the unlawful acts committed by the Governor and the Bank are the basis for urgency. As authority for this statement he referred me to the case of *Sheehama v Inspector-General, Namibian Police*<sup>10</sup> where Silungwe AJ said:

'It seems to me that the principal ground relied upon by the applicant on the question of urgency is the alleged violation of his fundamental and common-law right to be heard, which purportedly renders his suspension invalid. In my view, a claim that a fundamental right or freedom has been infringed or threatened may justify the invocation of Rule 6(12) of the Rules of Court. I am satisfied that there is present, *in casu*, a sufficient degree of urgency to warrant the application (which was brought without delay) being heard on a semi-urgent basis. Accordingly, I hold that the case for urgency has been made.'

[28] I have no difficulty in accepting as a general principle that an unlawful activity may create a basis for urgency. The applicants say that the circumstances which render the matter urgent are the unlawful actions of the Governor and the Bank. I have no difficulties to accept that the applicants have in their founding affidavit stated clearly and 'in detail, leaving no room for confusion or doubt' the circumstances which they allege render the matter urgent. But that is not the end of the matter. The applicants are in addition required to 'in detail, leaving no room for confusion or doubt' state the reasons why they alleged that they cannot be granted substantial relief at a hearing in due course.

[29] Mr. Maleka argued that that the applicants have met the second requirement set out in Rule 73(4)(b). He also based his contention that the applicants have met the second requirement with reference to the authority of *Sheehama*<sup>11</sup> and *Nakanyala*<sup>12</sup>. In response to a question by the Court for him to indicate where in the founding affidavit the applicants 'in detail, leaving no room for confusion or doubt' state the reasons why

<sup>10</sup> 2006 (1) NR 106 (HC).

<sup>11</sup> *Supra*.

<sup>12</sup> *Nakanyala v Inspector-General Namibia and Others* 2012 (1) NR 200 (HC).

they alleged that they cannot be granted substantial relief at a hearing in due course, Mr. Maleka referred me to paragraphs 45, 46, 47, 49, 51 and 53 of the founding affidavit. Those paragraphs read as follows ( I quote these paragraphs verbatim):

'45 The applicants further submit that in relation to interim relief a case has been made out (in fact, more than required) to prove the requisite *prima facie* right before applicants obtain interim relief. There is a strong case in this respect. We will suffer irreparable harm on our reputation and dignity. Financial harm shall ensue and the public will suffer because of continuous illegality. On the other hand stigmatization of the applicants which is immensurable continues every day.

46 There is a patent illegality on the part of the first and second respondents. It is not in the interest of justice that any litigant relies on a perpetuation of an illegality which continuously and irreparably harms others. The first and second respondents stated that their actions were taken so that they carry out certain investigations. It is clear from such statement that the action may have been triggered by interest in verifying certain facts that they are not sure of. Before the applicants' removal the first and second respondents were assured that the concerned investment is safe and would be returned upon maturity. There is no basis to doubt this. But even if there were grounds for concern, that in itself does not give the second respondent the right to take action contrary to the law.

47 At this stage the third respondent is solvent but is likely to become insolvent if, as it is happening now, depositors continue to withdraw their deposits. IF the actions of the first and second respondents were only to be suspended in the interim, the applicants and the public shall suffer permanent harm because of many consequences of the unlawful action on the part of the first and second respondents. There is no irreparable hardship that may be caused to the first and second respondents if the interim relief is granted ....

49 It will be difficult to reverse the damages that may be caused by the unlawful actions of the first and second respondents if the third respondent's customers continue to withdraw their money because of the uncertainty and the illegal actions brought about by the first and second respondents ....

51 Further, the applicants, particularly myself and the eighth and ninth respondents, do not have any alternative remedy regarding non-payment of our remuneration as



contemplated in terms of section 56(4) of the Act. I have demanded revocation of the decision and the demand was not heeded. Given the excellent prospects of success this Court is entitled to grant interim relief. Further submissions in this respect shall be made at the hearing.

53 Be that as it may, I submit that if the matter is not heard on an urgent basis as contemplated in terms of Rule 73 of the Rules of the High Court, the applicants and the public shall suffer irreparable harm.'

[30] Mr. Töttemeyer, who appeared for the Governor, and the Bank, denied that the applicants have met the requirement set by Rule 73(4)(b). He argued that the applicants content themselves with vagueness, labels, descriptions, conclusions and unfounded allegations. Critical and required factual underpinning is absent; that the applicants' papers simply contain bald and bare (and unfounded) allegation such as where the applicants simply states "There is in any event no substantial redress that the applicants could avail themselves to if this matter is not heard on an urgent basis" said Mr Töttemeyer.

[31] I agree with Mr. Töttemeyer that the applicants simply resorted to labels and vague statements, they do not in detail set out the reasons why they allege that they cannot be granted substantial relief at a hearing in due course. I say so for the following reasons. As regards the reasons or circumstances which the applicants allege they cannot be granted substantial relief at a hearing in due course, they had to put those reasons and circumstances to court in their affidavit, they failed to do so, at best for the applicants their statement (that '*if the matter is not heard on an urgent basis as contemplated in terms of Rule 73 of the Rules of the High Court, the applicants and the public shall suffer irreparable harm*') is an inference, a "secondary fact", with the primary facts on which it depends are omitted.

[32] In the matter of *Willcox and Others v Commissioner for Inland Revenue*<sup>13</sup> Schreiner JA explained the concept of '*primary*' and '*secondary*' facts as follows:

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<sup>13</sup> 1960 (4) SA 599 (A) at 602.

'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

[33] In my view the case of *Sheehama* does not assist the applicants in this matter I say so for the following reasons. In deciding whether to exercise his discretion and hear the matter as one of urgency or not Silungwe J said the following:

'I now return to the issue of urgency. Urgency does not only relate to a threat to life or to liberty but also to commercial interests ... This is not to mention other interests that may justify the invocation of Rule 6(12) of the Rules of Court, such as an infringement or threatened infringement of a fundamental right. There are, of course, degrees of urgency ranging from extreme urgency to semi-urgency...

"In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6(12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicants' case was a good one and that the respondent was unlawfully infringing the applicants' copyright in the films in question."

On the basis of the papers before me and the ensuing argument thereon, it is quite clear that the applicant is firmly of the view that he had a right to a hearing in terms of s 23(3) of the Act; that he was denied such right; that such denial was a violation of his fundamental right, with the result that his suspension from duty was/is invalid; that, as such, it is unnecessary for him to invoke the provisions of s 24 of the Act, as amended; that his case is a good one; and that he is entitled to approach this Court for relief on a semi-urgent basis.

It seems to me that the principal ground relied upon by the applicant on the question of urgency is the alleged violation of his fundamental and common-law right to be heard, which purportedly renders his suspension invalid. In my view, a claim that a fundamental right or freedom has been infringed or threatened may justify the invocation of Rule 6(12) of the Rules of Court. I am satisfied that there is present, *in casu*, a sufficient degree of urgency to warrant the application (which was brought without delay) being heard on a semi-urgent basis. Accordingly, I hold that the case for urgency has been made.'

[34] What is clear from the above extract is that Silungwe J simply considered the circumstances which rendered the matter urgent. He did not mention or consider the second requirement set out in the now repealed Rule 6(12)(b) namely the requirement that the applicants must explicitly set out the reasons why they allege that they cannot be granted substantial relief at a hearing in due course.

[35] As regards the *Nakanyala* matter Justice Smuts amongst other things said the following under the heading "Urgency":

[24] In the course of the argument, Mr. Narib also complained about the short time period within which the Inspector-General was required to file his answering affidavit. I enquired as to whether he sought further time within which to amplify his affidavit. I did so in order to establish the extent to which *there was prejudice on the part of the respondents, given the tight time periods, and to address that prejudice, if need be*. Mr. Narib however responded that the Inspector-General did not seek any further time. It would follow that there was not any real prejudice as a consequence of the short time periods.

[25] I then enquired from Mr. Narib, seeing that the Inspector-General did not seek further time to file any further papers or time for preparation, *whether he contended that the application for interim relief was not urgent in the sense that the applicant would be able to receive redress in the ordinary course*. He submitted that this was the case. I also pointed out to Mr. Narib in determining the question of urgency, this court would assume for that purpose that the applicant's case is a good one and that the decision to transfer would fall to be set aside, in accordance with the authorities accepted by this court.

[26] Applying this test to the facts of this case, it is abundantly clear to me that the *applicant would not be afforded redress in the normal course if the application for interim relief were to be brought in that way.*' (Italicized and underlined for emphasis).

[36] In my view the *Nakanyala* case is no authority for the proposition that once the applicant has made out a case that an illegality has been committed that, without more, entitles an applicant to have his or its case heard on an urgent basis. In my view, even if the court is to assume that an applicant's case is a good one, the applicant still has to

set out the reasons why he or she or it alleges that it will not be afforded redress in the normal course if the application for interim relief were to be brought in the normal course, that much is clear from Justice Smuts' conclusion that he was satisfied that Nakanyala 'would not be afforded redress in the normal course if the application for interim relief were to be brought in that way.'

[37] In the premises, it appears to me that the Governor and the Bank's point is well taken. I accordingly refuse to have this application heard as one of urgency. As to costs both Mr. Maleka and Mr. Tötemeyer were of the view that costs must follow the course and the magnitude of the matter warrants costs of one instructing and two instructed counsel.

[38] I accordingly make the following order.

- 1 The application to have the matter heard as one of urgency is hereby refused and the matter is struck off the roll.
- 2 The applicants must, jointly and severally the one paying the others to be absolved, pay the respondents' (first to eighth) costs.
- 3 The costs, in respect of the first and second respondents include the costs of one instructing and two instructed counsels.

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SFI Ueitele  
Judge

**APPEARANCES:**

**APPLICANT:**

Mr. V Maleka (Assisted by S Namandje)  
Instructed by Sisa Namandje & Co Inc,  
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**FIRST TO THIRD RESPONDENTS:**

Mr. Töttemeyer (Assisted by D Obbes)  
Instructed by ENSafrica, Windhoek.

**FOURTH TO EIGHT RESPONDENTS**

Mr P Kauta of Dr Weder Kauta & Hoveka  
Inc, Windhoek.