

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: Teichmann Plant Hire (PTY) Ltd and Emgard Coetzee Robert Coetzee The Deputy Sheriff For The District Of Windhoek	Case No: HC-MD-CIV-MOT-GEN-2020/00305
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Mrs Justice Rakow, AJ	Date of hearing: 2 September 2020
	Date of order: 11 September 2020
Neutral citation: <i>Teichmann Plant Hire (Pty) Ltd v Coetzee</i> (HC-MD-CIV-MOT-GEN-2020/00305) [2020] NAHCMD 408 (11 September 2020)	
Having read the record of proceedings as well as submissions made by counsels for the applicants and the respondent:	
IT IS HEREBY ORDERED THAT: 1. The application is struck from the roll for want of compliance with the requirements of Rule 73. 2. The Applicant is ordered to pay the costs of the application.	

Reasons for orders:

Introduction

[1] The application before court in this urgent application originated in another matter that was previously dealt with under case number HC-MD-CIV-ACT-OTH-2016/03173. In the original matter the applicant in this matter (plaintiff in the original matter) brought a summary judgment application against the 1st and 2nd defendants which was unsuccessful. Justice Masuku, in that judgment, ordered the applicant in this matter to pay the costs associated with the summary judgment application. The costs were then taxed and a writ of execution authorized. The legal practitioner of the applicant (plaintiff in the other matter) did not attend the taxation as he was of the opinion that the notice was faulty and further did not react when he received the allocatur. The taxation took place in July 2018. The 1st and 2nd respondent in this application in the mean time acted on the writ of execution that was issued and the 3rd respondent attached the goods of the applicant. The sale of the goods was advertised for Saturday 5 September 2020. The applicant in this matter also does not deny owing the 1st and 2nd respondent costs, what is disputed is the amount of costs that was granted in the allocatur. During the hearing of this matter, the legal representative for the applicant, Mr. Vaatz handed up a notice received on 1 September 2020 via email from the Law Society indicating that there is a notice from the Deputy Sheriff and Messenger of the Court for Windhoek indicating that due to the ban as per Government Notice 7320 of more than 10 people at public gatherings, no further auctions of loose goods will take place until such a stage as the regulations have been relaxed or the ban has been lifted.

[2] The Applicant brought an application on an urgent basis on 2 September 2020, which application reads as follows:

TAKE NOTICE that TEICHMANN PLANT HIRE (PTY) LTD (hereinafter called the applicant) intends to make application to this court for an order:

1. 1st & 2nd Respondents bill of costs in this matter allegedly taxed on the 11th of July 2018 be set aside;
2. That 1st & 2nd Respondents writ of execution dated the 5th of August 2018 and notice of attachment be set aside as it is based on the said bill of costs;
3. That the sale in execution set down for the 5th of September 2020 be set aside;
4. Costs;
5. Further and/or alternative relief; and that the accompanying affidavit of Andreas Vaatz will be used in support thereof.

TAKE NOTICE FURTHER that the applicant has appointed Andreas Vaatz & Partners of 66 Bismark Street , Windhoek , Namibia, Namibia. at which he or she will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend to oppose this application you are required to notify applicant's legal practitioner in writing within 1 day from date of service of this application, of your intention to oppose this application, by service a copy of your intention to oppose on applicant at the address stated herein and filing the original at the registrar and within 14 days of the service of notice of your intention to oppose, to file your answering affidavits, if any and further that you are required to appoint in such notification an address within a flexible radius from the court, referred to in rule 65(5) at which you will accept notice and service of all documents in these proceedings.

If no notice of intention to oppose is given, the application will be moved on the 2nd day of September 2020 at 09:00 AM.

[3] The matter became opposed by the 1st and 2nd respondents and although the notice provided for 14 days to file their documents, the respondents did not take issue with the said time period and filed their documents on time and opposed the matter for when it appears on 2 September 2020. They did however take issue with the fact that the applicant requested no order that the Applicant's non-compliance with the forms and service provided for in the Rules of the High Court of Namibia be condoned and for leave to be granted to the applicant to bring this application on an urgent basis as envisaged by Rule 73(1) read with rule 73(3). They further took issue with the fact that the application does not meet the mandatory requirements for urgency as set out in rule 73. They also raised an objection against the fact that the deponent of the affidavit of the applicant, Mr Vaatz alleges that he is authorized to make the affidavit but not that he is authorized to bring this application.

[4] Rule 73(3) and 73(4) of the High Court rules reads as follows:

‘(3) In an urgent application the court may dispense with the forms and service provided in these rules and may dispose of the application at such time and place and in such manner and in accordance with such procedure which must as far as practicable be in terms of these rules or as the court considers fair and appropriate.

(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.’

[5] The party bringing the application must also seek for an order from the court disposing with the forms and service provided for in the rules.¹ The applicant therefore had to specifically ask for such an order to allow the court to consider disposing with the rules applicable to applications. This is not the case and such prayer did not form part of the application. The court can therefore not grant an order disposing with the rules of court.

[6] A further problem crops up when studying the supporting affidavit of the applicant. The applicant is obligated to provide reasons why he or she or it, as in this case, sets out what renders the application urgent and that the applicant cannot be afforded substantial redress at a hearing in due course. In *Nghiimbwasha and Another v Minister of Justice and Others*² the court dealt with the interpretation of the word ‘must’ contained in rule 73(4) as well as the responsibility of an applicant in a matter alleged to be urgent. Masuku J states at (11) and further:

‘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”, 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.’

¹ Petrus T Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia*, Juta 2020 at page 172.

² [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

[7] It is understood that in general stay of execution matters are inherently urgent, but the obligations created under rule 73(3) and 73(4) are still to be adhered to and complied with. The urgency relied on by the applicant, is the fact that the sale in execution was advertised for 5 September 2020. He however does not deal in any way with the time that lapsed since the allocatur was received by the parties in 2018 till August 2020 when the goods were attached. In this instance no indication is found why no redress will be possible in due course on the papers before court. The compliance with rule 73 is the key to the door through which a litigant will eventually obtain redress.³ This compliance must also be seen in the light of the notice handed up by the applicant's legal practitioner which surely diminishes the aspect of urgency.

[8] As the court is not satisfied that the applicant met the threshold for urgency as set out under rule 73(4) and no prayer was included asking for an order under rule 73(3), the court did not deal with the power of the deponent to bring an application in this matter, or with the merit of the application.

The court therefore makes the following order:

1. The application is struck from the roll for want of compliance with the requirements of Rule 73.
2. The Applicant is ordered to pay the costs of the application.

E Rakow

Acting Judge

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondent

³ Baltic CC v Chairperson of the Review Panel (HC-MD-CIV-MOT-REV-2020/00031 [2020] NAHCMD 69 (7 February 2020).

Mr Vaatz Of Andreas Vaatz and Partners Windhoek	Mr Ntinda Of Sisa Namandje Inc & Co Windhoek