

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2020/00315

In the matter between:

STOCKS & STOCKS LEISURE (NAMIBIA) (PTY) LTD

APPLICANT

and

SWAKOPMUND STATION HOTEL (PTY) LTD T/A THE

1ST RESPONDENT

SWAKOPMUND STATION HOTEL AND ENTERTAINMENT CENTRE

TRANSNAMIB HOLDINGS LIMITED

2ND RESPONDENT

MINISTRY OF WORKS AND TRANSPORT

3RD RESPONDENT

MINISTRY OF PUBLIC ENTERPRISES

4TH RESPONDENT

REGISTRAR OF COMPANIES

5TH RESPONDENT

Neutral Citation: *Stocks & Stocks Leisure (Namibia) (Pty) Ltd v Swakopmund Station Hotel (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2020/00315) [2020] NAHCMD 519 (12 November 2020)

Coram: Ndauendapo J et Ueitele J et Masuku J

Heard: 09 October 2020

Delivered: 12 November 2020

Reasons Released 13 November 2020

Flynote: Practice – Urgent applications – Rule 73 (3) of the High Court rules – Court called upon to determine whether urgent applications filed a month in advance qualifies to be heard as urgent in terms of rule 73 (3) of the High Court rules – Head of court appointing a three-judge bench to adjudicate on the matter – Court satisfied that certain circumstances arise that require some urgent matter to have unusual lengthy periods of filing documents necessary to hear the urgent application – Court however sending out a warning that not all urgent matters would be afforded the same leniency.

Summary: The matter at hand dealt with a phenomenon that has been developing, where applications alleged to be urgent are served and filed close to a month in advance, with no reasons set out why that course is adopted. This created a concern with the head of this Court that a possible abuse or circumvention of the case management process was evolved. To address the issue, the decision was taken to appoint a Full Bench of three judges to hear arguments on whether the practice whereby an applicant alleges urgency but files the application long (sometimes up to twenty court days) before the hearing date, qualifies to be heard as an urgent application under Rule 73(3).

The general argument brought forward by instructed counsels were that the facts of each matter will determine the extent to which the time periods described by the rules can be departed from. They continued and argued that in certain instances, there will be a greater degree of relaxation of the rules than in others. They further argued that the procedure to be followed must, however, and as far as practicable, be in accordance with the normal procedure prescribed in the rules, so as to ensure procedural fairness to all parties involved in the matter.

Held – the question of what is ‘as far as possible is practicable’ is a factual rather than a legal question and it is therefore not possible to outline the extent to which time periods described by the rules can be departed from. Each case will, as it has been more than often been said in this Court, depend on the circumstances of the matter.

Held – This judgment must not, however, be regarded as authority or license to litigants and parties that they can approach the court under the pretence of urgency and set

down a matter that they allege is urgent well in advance. Parties and legal practitioners will in each matter still have to satisfy the requirements set out in all the authorities discussed in this judgment or run the risk of their matters being 'chuck out of court' and referred back to the queue for hearing in the normal cause.

REASONS FOR JUDGMENT

Introduction

[1] On 02 September 2020 the applicant, who is Stocks and Stocks Leisure (Namibia) (Pty) Ltd, a private company with limited liability and who is a shareholder of the first respondent, (the Swakopmund Hotel (Pty) Ltd t/a Swakopmund Station Hotel), commenced proceedings by notice of motion against the respondents, in terms of which it amongst other reliefs sought orders in the following terms:

'1 That the forms and service provided for by the rules of this Honourable Court be dispensed with and that this application be heard and determined as one of urgency as contemplated by rule 73(3) of such rules.

2 That an order be granted in terms of section 260(1) read with 260(3) of the Companies Act, 28 of 2004 and in the following terms:

2.1. That the amounts owing by the first respondent on loan account to the applicant and the second respondent respectively of N\$8,185,632.00 (Eight Million One Hundred and Eighty Five Thousand Six Hundred and Thirty Two Namibia Dollar) each, together with any interest thereon, be converted into share capital of the first respondent;

2.2. That in order to give effect to what is set out in paragraph 2.1 above, one ordinary share be issued by the first respondent to each of the applicant and the second respondent in full and final settlement of their loan accounts referred to in paragraph 2.1 above;

2.3. That after effect is given to what is set out in paragraphs 2.1 and 2.2 above, that the second respondent be ordered to sell and the applicant be ordered to purchase the entire shareholding of the second respondent held in the first respondent and subject to the following terms and conditions:

- 2.3.1 Those shares shall be so sold and purchased for an amount of N\$5,000,000.00 (Five Million Namibia Dollar), payable as follows:
- 2.3.1.1 (a) An immediate payment to the second respondent of N\$1,000,000.00 (One million Namibia Dollar);
- 2.3.1.2 (b) That the balance of N\$4,000,000.00 (Four Million Namibia Dollar) is payable as from the end of 2024 financial year of the first respondent and on the basis that 6.9% of all pre-taxation net earnings of the first respondent after interest and depreciation in respect of such financial year shall be utilised for such purpose;
- 2.3.1.3 (c) If the aforesaid 2024 earnings are not sufficient to settle such amount of N\$4,000,000.00 then any outstanding balance thereof shall be paid from the aforesaid 6,9% profits earned during each subsequent financial year – calculated on the same basis as set out in paragraph (b) above – until the said amount of N\$4,000,000.00 is settled;
- 2.3.2 That the said entire shareholding of the second respondent be transferred to the applicant against payment of N\$1,000,000.00 referred to in paragraph 2.3.1(a) above.
- 2.3.3 That the second respondent be directed to let to the first respondent the parking area in front of the Swakopmund Station Hotel situated at Erf 3651, Swakopmund for a period of 20 (twenty) years and further on the same terms and conditions as set out in the written agreement concluded between those parties on or about 20 February 2004 for that area, save that the parties are given 30 (thirty) days to agree on the monthly rental payable for same, failing which:
- 2.3.3.1 (a) each party is directed to obtain a sworn valuation in respect of the reasonable monthly rental for such parking area within 30 (thirty) days thereafter;
- 2.3.3.2 (b) and in which event the average of the amounts determined by such two valuations shall constitute the monthly rental payable, which shall escalate annually in accordance with the Namibian Consumer Price Index....’

[2] As indicated earlier the first respondent is the Swakopmund Station Hotel (Pty) Ltd t/a Swakopmund Station Hotel and Entertainment Centre. (We will for ease of

reference refer to the first respondent as the *Station Hotel*'). The second respondent is Transnamib Holdings Limited, a public company and which is also a shareholder in the first respondent. (We will for ease of reference refer to the second respondent as *Transnamib*). The second, third and fourth respondents indicated that they will oppose the applicant's application, but the said respondents later withdrew their opposition and only the second respondent continued to oppose the relief sought by applicants.

[3] The third respondent is the Minister of Works and Transport and the Minister responsible for the second respondent. No relief is sought against the third respondent. The fourth respondent is the Minister of Public Enterprise and the Minister responsible for the governance of Transnamib. No relief is sought against the fourth respondent. The fifth respondent is the Registrar of Companies and is joined to these proceedings only in so far as the alternative relief for liquidation of the Station Hotel is concerned and only in so far as it may have an interest in the alternative relief sought. Since the third to the fifth respondents did not oppose or participate in these proceedings, we shall not make any further mention of them.

[4] Despite seeking an order that the forms and service provided for by the rules of Court be dispensed with and that its application be heard and determined as one of urgency as contemplated by rule 73(3) of the rules of court, the applicant applied for this relief to be adjudicated by the court on a specific day, namely 2 October 2020 and also provided in its notice of motion specific times when answering and replying affidavits must be filed, if the application is opposed.

[5] Because of a phenomenon that has been developing, where applications are alleged to be urgent but they are served and filed close to a month in advance, with no reasons set out why that course is adopted, the head of this Court, concerned that a possible abuse or circumvention of the case management process was evolving, appointed a Full Bench of three judges to hear arguments on whether the practice whereby an applicant alleges urgency but files the application long (sometimes up to twenty court days) before the hearing date, qualifies to be heard as an urgent application under Rule 73(3).

[6] On 02 October 2020 when the matter was called, the court consisting of the three judges, indicated to the legal representatives of the parties that the court intends to hear arguments only in respect of question of urgency, particularly the concerns (as outlined in the preceding paragraph) that the head of Court had. The parties, that is applicant represented by Mr Töttemeyer SC, assisted by Ms Van der Westhuizen, the second respondent by Ms Bassingthwaighe, and the third, and fourth respondents by Mr Narib indicated that they were not forewarned about the head of Court's concerns and requested four court days' postponement to address those concerns. We accordingly postponed the matter for hearing to 9 October 2020.

[7] Counsel for both the applicant and the second respondents filed heads of arguments. The second respondent in both its opposing affidavit and in its heads of arguments, conceded that there was some urgency in this matter but opposed the application on a limited basis. It argued that it is entirely inappropriate for the s 260 relief to be sought, and for the court to determine whether or not the applicant has been unfairly prejudiced by the conduct of the second respondent, on an urgent basis.

[8] After we heard arguments from both counsel for the applicant and the second respondent, we made the following Order:

'1 The forms and service provided for by the rules of Court are dispensed with and this application can be heard and determined as one of urgency as contemplated by rule 73(3) of such rules.

2. The matter is postponed to 15 October 2020 for the determination of the application on its merits before Justice Masuku to whom the matter was assigned.'

[9] What follows below are our reasons for the Order that we made on 9 October 2020.

Urgency

[10] The current rules¹ of court deal with the various matters relating to applications and the different types of applications in Part 8 of the rules. Matters that are dealt with in this Part are for instance, requirements in respect of an application;² opposition to applications,³ referral of applications for evidence or to trial;⁴ default of appearance at application hearing,⁵ counter-applications,⁶ miscellaneous matters relating to applications⁷; judicial case management of applications;⁸ *ex parte* applications⁹ and urgent applications.¹⁰

[11] As pointed out Rule 73 deals with urgent applications. It provides in subrules (1), (2), (3) and (4) as follows.

(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) The judge may, in addition to dismissing an application made under subrule (1) for lack of urgency, make a special order of costs against the applicant if the judge is satisfied the matter is not so urgent that it could not be heard on a court day.

(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

¹ Rules of the High Court of Namibia: High Court Act, 1990 promulgated by the Judge President in the *Government Gazette* No. 5392 of 17 January 2014 but which came into operation on 16 April 2014.

² Rule 65.

³ Rule 66.

⁴ Rule 67.

⁵ Rule 68

⁶ Rule 69.

⁷ Rule 70.

⁸ Rule 71.

⁹ Rule 72

¹⁰ Rule 73.

- (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course..' (Emphasis added).

[12] What is clear from Rule 73 is that the court has a discretion whether to hear an application as one of urgency or not. This Court in the matter of *Shetu Trading CC v The Chair of the Tender Board for Namibia and Others* said:¹¹

'It admits of no doubt that it falls within the discretion of the judge to condone non-compliance with the rules or not. In exercising that discretion, all or any of the principles enunciated in *Mweb* may find application; depending on the facts of the case. In turn, the principles explained in *Mweb* are not all-encompassing. Exercising a discretion judicially; "is by no means the same as general intuition" as "a judge who decides merely as he thinks fit without reference to existing legal rules, is to be feared more than dogs and snakes ... the discretion may not be exercised according to the "whim of the judge's own brain".'

[13] It is furthermore clear that an urgent application primarily leads to the abridgment and a departure of time periods which have been prescribed by the Rules for the filing of pleadings, and sitting times of the Court. In *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* the Court said:¹²

'When an applicant believes that his matter is one of urgency he may decide himself what times to allow affected parties for entering appearance to defend and for answering affidavits.'

[14] The rule further makes it clear that the applicant must in his or her founding affidavit explicitly set out the circumstances upon which he or she relies for the allegation 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. In *Esau v Director-General, Anti-Corruption Commission*¹³ Masuku J, referred to *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granit (Pty) Ltd*¹⁴ where the applicable test of urgency was set out in the following terms:

¹¹ *Shetu Trading CC v The Chair of the Tender Board for Namibia and Others* a Case No CASE NO.: A 352/2010 delivered on 23 June 2011.

¹² *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at para 23.

¹³ *Esau v Director-General, Anti-Corruption Commission* (HC-MD-CIV-MOT-GEN-2020/00004) [2020] NAHCMD 59 (20 February 2020).

¹⁴ *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* 2011 JDR 1832 (GSJ) para 6-and 9.

'... The importance thereof is that the procedure set out in rule 6(12) [the predecessor of Rule 73(3)] is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress...'

[15] Some of the legal principles that can be discerned from judgments of our courts with respect to the ambit of Rule 73 are that:

(a) Failure to set out the circumstances upon which a party relies that it is an urgent matter or why he or she claims that he or she could not be afforded substantial redress at the hearing in due course may be fatal to the application and that 'mere lip service' is not enough.¹⁵

(b) 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.

(c) An applicant has to show good cause why the times provided for in the rules must be abridged and why the applicant cannot be afforded substantial redress at the hearing in due course.¹⁶

(d) In exercising its discretion, a court must keep in mind that there are varying degrees of urgency.¹⁷

(e) Although Rule 73 allows a deviation from the prescribed procedures and time periods in urgent applications, parties and legal practitioners must, as far as practicable give effect to the objective of procedural fairness when determining the procedure to be

¹⁵ *Salt and Another v Smith* 1990 NR 87 (HC) at 88, (1991 (2) SA 186 (Nm) at 187D – G).

¹⁶ *(IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Pty Ltd v Hypermarket (Pty) Ltd and Another* 1981 (4) SA 108 (C): supra 110H – 111A.).

¹⁷ *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC).

followed in such instances to afford a respondent reasonable time to oppose the application.¹⁸

Discussion

[16] In *Esau v Director-General, Anti-Corruption Commission*,¹⁹ Masuku J raised his concerns with regard to applications being labelled “urgent, which in fact are not urgent, with the party’s intention to ‘jump the queue’ and thereby skip the case management processes. He said:

‘Having said this, I must mention that the court has, of late, noticed a growing phenomenon, where applications are alleged to be urgent but they are served and filed close to a month in advance, with no plausible reasons for doing so. It must be stressed that the urgency provisions must ordinarily be strictly complied with and resorted to in appropriately urgent matters. Where an applicant alleges urgency but files the application long before the hearing date, may, in appropriate circumstances, be shooting him or herself in the foot because setting the matter down long before the hearing date may be reflection that detracts from the alleged urgency of the matter.’

[17] Both Mr Tötemeyer and Ms Bassingthwaighte replied to the concern raised by Justice Masuku by arguing that what the authorities emphasise is that the facts of each matter will determine the extent to which the time periods described by the rules can be departed from. They continued and argued that in certain instances, there will be a greater degree of relaxation of the rules than in others. They further argued that the procedure to be followed must, however, and as far as practicable, be in accordance with the normal procedure prescribed in the rules, so as to ensure procedural fairness to all parties involved in the matter.

[18] The applicant and the second respondent both referred the court to the matter of *Luna Meubel Vervaardigers (Edms) Bpk v Makin*²⁰ where the varying degrees of urgency are discussed. In that matter the Court said:

¹⁸ *Petroneft International and Others v The Minister of Mines and Energy and Others Case No A 24/2001*,

¹⁹ *Esau v Director-General, Anti-Corruption Commission (HC-MD-CIV-MOT-GEN-2020/00004)* [2020] NAHCMD 59 (20 February 2020).

²⁰ *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin’s Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136H).

'Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith.'

[19] It is thus clear from the authorities that the question of what is 'as far as possible is practicable' is a factual rather than a legal question and it is therefore not possible to outline the extent to which time periods described by the rules can be departed from. Each case will, as it has been more than often been said in this Court, depend on the circumstances of the matter.

[20] In the present matter, Mr Töttemeyer argued that this application was brought with reasonable promptitude and that the circumstances that render the matter urgent have been set out in the founding affidavit, the most pertinent of these being the imminent and ongoing threat of liquidation and the devastating effects thereof (which, by necessary implication, renders the s 260 relief urgent, because, if such relief is not granted on an urgent basis, a liquidation is unavoidable).

[21] Mr Töttemeyer further argued that it took 20 days for the applicant to prepare the launching of this application and the founding affidavit in support of this application was deposed to on 1 September 2020. The application was issued on 2 September 2020 and was served on all parties by 3 September 2020. Despite the above circumstances, this application has been brought on the basis that it also accorded the respondents as much time (also twenty days just like the applicant had) to deal with this application as the exigencies allow, by giving the respondents until close of business on Monday, 21 September 2020 to deliver answering papers. This had to be done in order to safeguard the respondents' procedural and Constitutional rights and to afford them sufficient time to answer to voluminous papers. (The founding affidavit alone consists of 54 pages and with annexures, more than 530 pages altogether.) This is particularly so given the fact that it took the applicant some 20 days to prepare these papers. As it happened, the time that was afforded to the respondents was not sufficient and they requested (and were given) more time to answer.

[22] We are satisfied that the applicant in this matter has persuaded the Court that this matter was of such urgency that its non-compliance with the Rules must be condoned and heard as one of urgency, despite the fact that it was set down for hearing twenty days after it was issued and served. It is for the reasons set out in this judgment that we condoned the applicant non-compliance with the Rules of Court, relating to service and time periods and ordered that the matter be heard as one of urgency in terms of Rule 73 of this Court's Rules.

[23] During arguments, Ms Bassingthwaighe argued that may be the time has arrived for this court to consider whether it can introduce what is termed a '*semi urgent*' roll in some jurisdictions, notably the Cape Provincial Division of South Africa. The nature of the semi urgent roll was explained as follows in the South African matter of *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another*²¹.

'There are degrees of urgency. In an attempt to deal with this diversity, a semi-urgent roll is in terms of a Court Notice operated in this Division alongside the ordinary roll. Opposed matters which are not of extreme urgency but are nevertheless too urgent to await hearing in the ordinary course on the continuous roll, are placed on the semi-urgent roll.

When an applicant believes his matter to be semi-urgent, he can apply, after notice to all other parties, through the Chamber Book for an appropriate order. If such application is opposed a Judge may direct that argument should be heard in order to determine whether the matter should be placed on the semi-urgent roll. Matters on this roll are heard more expeditiously than opposed matters on the continuous roll. At present the waiting period is about two to eight weeks, depending upon whether a Court vacation intervenes.'

[24] It is common cause that in our jurisdiction, there is no provision made for a semi-urgent roll. Whether a semi-urgent roll must be introduced in our jurisdiction or not is a matter that falls outside the scope of this judgement and we leave that to the legal practitioners to address it with the head of court.

²¹ *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and another* 1981 (4) SA 108 (C).

[25] In conclusion, we consider it necessary to sound a word of caution. This judgment must not, however, be regarded as authority or license to litigants and parties that they can approach the court under the pretence of urgency and set down a matter that they allege is urgent well in advance. Parties and legal practitioners will in each matter still have to satisfy the requirements set out in all the authorities discussed in this judgment or run the risk of their matters being 'chucked out of court' and referred back to the queue for hearing in the normal cause.

[26] For the reasons that we set out in this judgement we made the order set out in paragraph [8] of this judgment.

N Ndauendapo
Judge

S.F. I Ueitele
Judge

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: Reinhard Töttemeyer (assisted by C van der Westhuizen)

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2nd RESPONDENT: N Bassingthwaighe

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