

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA,
MAIN DIVISION, WINDHOEK
RULING

Case Title: DEVIN FAZZLY JANSEN V GE-NEIL RANDY QUINDINE BEUKES, MINISTER OF GENDER EQUALITY, POVERTY ERADICATION AND SOCIAL WELFARE AND BRENDINE CLOETE	Case No: HC-MD-CIV-MOT-GEN-2021/00002
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Rakow, J	Date of hearing: 13 January 2021
	Date of order: 15 January 2021
	Date of reasons 29 January 2021
Neutral citation: <i>Jansen v Beukes</i> (HC-MD-CIV-MOT-GEN-2021/00002) [2021] NAHCMD 20 (29 January 2021)	
Having read the record of proceedings as well as submissions made by counsels for the applicants and the respondent: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. The application is struck from the roll;2. The applicant is ordered to pay the costs of these proceedings.3. The matter is removed from the roll and is regarded as finalized.	

Reasons for orders:Introduction

[1] The application before court was initially filed as an ex-parte application on an urgent basis and was heard on the afternoon of 13 January 2021. The documents were however served on the first respondent as well as the second and third respondents and the respondents's legal practitioners. The legal representative of the first respondent filed a notice to oppose as well as affidavits opposing the application. As a result, the matter was no longer partly ex parte as the first defendant was represented and made submissions at the hearing of the matter. Taking into account that the papers for the first respondent were only filed on the morning of 13 January 2021 the court gave the applicant the opportunity to indicate whether they wish to respond to these or not and they elected to proceed to argue the matter and not to file any further papers.

[2] The applicant initially sought the following relief:

‘1. Condoning the applicant's non-compliance with the Rules of this Court pertaining to time periods and service of the application, as well as giving notice to parties, as contemplated in terms of Rule 73 of the Rules of this Court; and directing the application to be heard on an urgent basis; and should there be one of the respondents that is not served by the date of the hearing, that such respondent be served with the interim order together with copies of the application.

2. That a rule nisi be issued calling upon the 1st Respondent to show cause (if any) on a day to be determined by the Honorable Court why an order in the following terms should not be made final:

2.1 Ordering that the Court Order of the Children's Court of Rehoboth with case number 14/1/3 – 02/2018 is varied and that custody of the female minor child born between the parties one Leah Chloe Beukes born 30 December 2011 be awarded to the Applicant subject the respondents right of reasonable access.

3. That the relief sought under paragraph 2.1 serve as an interim order with immediate effect, pending the return date of the above rule nisi.

4. That the 3rd Respondent be ordered to provide the Applicant and the 1st Respondent with a written report on the circumstances of the minor child (as per the interview with the child conducted on the 30th December 2020) by no later than Friday the 15th January 2021.

5. That the 2nd Respondent be ordered to ensure that the 3rd Respondent or any Social worker in the employ of the Ministry of Gender Equality, Poverty Eradication and Social Welfare provide the Applicant and the 1st Respondent with

a report on the circumstances of the minor child by no later than Friday the 15th January 2021.

6. That the Applicant file the social workers report by no later than Monday the 18th January 2021.

7. That the Applicant be directed to cause this application to be served on the 2nd and 3rd Respondent by the Deputy Sheriff and on the 1st Respondent via email and/or Whatsapp Messenger on or before a date to be determined by this Honourable Court.

8. That any of the respondents who may to oppose this application be ordered to pay the costs of this application.

9. Further and or alternative Relief.¹

[3] Points in limine

[4] Two points *in limine* were raised by the respondents. The first one dealt with the urgency of the matter and the second, although not necessarily raised as a point *in limine*, the applicant's *locus standi in judicio*.

[5] Urgency

[6] In order for the applicant to succeed against the first point in limine, the applicant must make out a case that the application is indeed urgent. In *Nghiimbwasha and Another v Minister of Justice and Others*¹ 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

¹ *Nghiimbwasha and Another v Minister of Justice and Others* [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

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.’

[7] The reason put forward by the applicant for not returning to the Children’s court in Rehoboth and rather opting to approach the High Court on an urgent basis, was that during the previous proceedings before the said court (the proceedings which resulted in the making of a court order of the agreement entered into by the parties during May 2018), it took more than five months to finalize the matter. He was further advised that it could take between 3 to 6 months and that it will take too long to return to the said court. Although the previous matter could have taken some time, it is clearly differentiated from the current matter and the court is not convinced that the applicant will not be granted substantial relief at a hearing in the Children’s court in due course.

[8] The Court was further not made to understand as to what the exact of relief sought was. The applicant on the one hand sought an order to have the Court Order of the Children’s Court of Rehoboth with case number 14/1/3 – 02/2018 varied and that custody of the female minor child born between the parties one Leah Chloe Beukes born 30 December 2011 be awarded to the applicant subject the respondents right of reasonable access, which would then mean that the terms that they initially agreed to, are no longer applicable. On the other hand the applicant also sought an order for the third respondent to provide the applicant and the first respondent with a written report on the circumstances of the minor child (as per the interview with the child conducted on the 30th December 2020) as well as that the second respondent be ordered to ensure that the third respondent or any Social Worker in the employ of the Ministry of Gender Equality, Poverty Eradication and Social Welfare provide the applicant and the first respondent with a report on the circumstances of the minor child by no later than Friday the 15th January 2021. To what end these reports should be provided is not clear as there are no proceedings pending in terms of the Child Care and Protection Act.²

[9] The court is of the opinion that there is other options for redress available which would be suited than to approach this court on an urgent basis and therefore redress in due course is available. The court further

² Child Care and Protection Act 3 of 2015.

did not address the issue of *locus standi in judicio* in light of the finding regarding urgency.

[10] In the result,

1. The application is struck from the roll;
2. The applicant is ordered to pay the costs of these proceedings.
3. The matter is removed from the roll and is regarded as finalized.

Judge's signature	Note to the parties:
E RAKOW JUDGE	Not applicable.
Counsel:	
Applicants	Respondent
R Beukes of Henry Shimutwikeni & Co Inc Windhoek	<i>W Christiaans</i> of <i>WT Christians Legal Practitioners</i> <i>Rehoboth</i>