



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-- 2021/00231

In the matter between:

TEMPTATION FASHION CC

1st APPLICANT

OLIVIA NDAHAFI KANYEMBA USIKU

2nd APPLICANT

and

SANNAMIB INVESTMENTS (PTY) LTD

1st RESPONDENT

DEPUTY SHERIFF

2nd RESPONDENT

Neutral citation: *Temptation Fashion CC v Sannamib Investments (Pty) Ltd*
(HC-MD-CIV-MOT-GEN-- 2021/00231) [2021] NAHCMD 298
(17 June 2021)

Coram: PARKER AJ

Heard: 14 June 2021

Delivered: 17 June 2021

Flynote: Applications and motions – Urgent applications – Applicant must satisfy both requirements of rule 73(4) of the rules of court together for the matter to be

heard on basis of urgency – Applicant failed to satisfy the two requirements for urgency – Application refused for lack of urgency.

Summary: Practice – Applications and motions – Urgent applications – Applicant must satisfy the requirements of r 73 (4) of the rules of court together for the matter to be heard on basis of urgency – Applicant has not set out explicitly why she could not be afforded substantial redress in due course if matter was heard in the ordinary course and the attached goods had been sold in the auction – Consequently, court concluded court cannot grant the indulgence the applicant craves – Application is therefore refused with costs on the basis the requirements in rule 73(4) have not been satisfied.

ORDER

1. The application is refused on the basis that the requirements of r 73(4) have not been satisfied.
2. The matter is struck from roll with costs, including costs of one instructing counsel and one instructed counsel.
3. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] The applicant, who represents herself, has brought the instant application and prayed the court to hear it on the basis that it is urgent. The first respondent, represented by Mr Muhongo, has moved to reject the application on the basis that it is not urgent, among other issues on the merits, upon which respondent rejects the application on the merits; and so, to it is to the issue of urgency that I direct the enquiry.

[2] As respects the question of urgency, I had the following to say in the case of *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (5 February 2015), para 2, relying on *Salt and Another v Smith* 1990 NR 87 at 88A-C:

' Urgent applications are now governed by rule 73 of the rules of court (ie rule 6(12) of the repealed rules of court), and subrule (4) provides that in every affidavit filed in support of an application under subrule (1) the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course, indeed, subrule (4) rehearses para (b) of rule 6 (12) of the repealed rules. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in die course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought, that the matter be heard on the basis of urgency, the applicant must satisfy both requirements together. And *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 tells us that where urgency in an application is self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.'

[3] Thus, the issue in the instant proceeding is not that the commercial interests cannot be subject of an urgent application. The issue is critically the question as to whether the application as it stands justifies the matter being heard on the basis of urgency.

[4] I have carefully considered the papers filed of record and submissions by the applicant and Mr Muhongo. For applicant, the only reason why the matter should be heard on the basis of urgency is that the impending auction is scheduled to take place on 18 June 2021; and so, for applicant those are the circumstances which render the matter to be heard on the basis of urgency. Indeed, applicant filed the application on 9 June 2021. But the applicant has not set out explicitly on the papers the reasons why the applicant could not be afforded substantial redress in due course. (See *Salt and Another v Smith* loc. cit.) For instance, the applicant has not given any reason why in her view, she could not be afforded substantial redress in due course if the matter was heard in the ordinary course and the attached goods were sold in the auction.

[5] As I have found, applicant has satisfied the first element of urgency, that is, r 73 (4) (a), but has failed to satisfy the second element, that is, r 73 (4) (b); but both

elements must be satisfied together for applicant to succeed. In any case, seeing that these are commercial interests, applicant seeks to protect, I hold that applicant could be afforded substantial redress in due course, e.g. by pursuing judicial remedy, if the default judgment obtained against her by first respondent in the Magistrates' court was upset by a competent court and the goods have been sold already in the auction; and *a fortiori*, the first respondents' legal representatives wrote a letter, dated 10 June 2021, to applicant informing her that 'our client furnishes you with a written undertaking that the amount generated from the sale in execution (of the attached goods) shall be paid to you in the event that you are able to upset the judgment of the Magistrates Court'. This is an undertaking communicated to applicant by the legal representatives of first respondent; and applicant is aware of it.

[6] I should say this because, as applicant acts in person. Applicant is not being denied her right to approach the seat of judgment of the court. The applicant who has dragged first respondent (and others) to court must satisfy the requirements prescribed by the rules of court. If she failed to do so, as she has, she is out of court. It follows inevitably that since applicant has not satisfied all the requirements of urgency, she cannot be granted the indulgence she craves. Accordingly, this court refuses the application for lack of urgency.

[7] In the result, I order as follows:

1. The application is refused on the basis that the requirements of r 73(4) have not been satisfied.
2. The matter is struck from roll with costs, including costs of one instructing counsel and one instructed counsel.
3. The matter is considered finalized and is removed from the roll.

C Parker
Acting Judge

APPEARANCES:

APPELLANT:

O N Kanyemba-Usiku
In person

RESPONDENT:

T Muhongo
Instructed by Etzold-Duvenhage