REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2021/00263

In the matter between:

HORST BAUMANN	**APPLICANT**
IRMELIEN DOROTHEA MARGARETE BAUMANN	**SECOND APPLICANT**

and

THE CHAIRPERSON OF THE COUNCIL OF THE MUNICIPALITY OF THE CITY OF WINDHOEK	**1ST RESPONDENT**
THE COUNCIL OF THE MUNICIPALITY OF THE CITY OF WINDHOEK	**2ND RESPONDENT**
OKERFONTEIN PROPERTIES (PTY) LTD	**3rd RESPONDENT**
THE MINISTER OF URBAN AND RURAL DEVELOPMENT	**4TH RESPONDENT**

Neutral citation: *Baumann v the Chairperson of the Council of the Municipality of the City of Windhoek (*HC-MD-CIV-MOT-GEN-2021/00263) [2021] NAHCMD 374 (17 August 2021)

Coram: PARKER AJ

Heard: **30 July 2021**
Delivered: **17 August 2021**

Flynote: Applications and motions – Urgent applications – Applicant must satisfy both requirements of r 73(4) of the rules of court together to succeed – Applicant failed to satisfy the two requirements for urgency – Additionally court held, urgency in the application is self-created – Consequently, application refused with costs 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 the basis of urgency – Applicant failed to set out explicitly the circumstances which it avers render the matter urgent – The two administrative decisions sought to be challenged by review were taken in February 2020 and June 2020, respectively – No valid reason satisfactory to the court existed for the blameable remissness and inaction of applicant – Applicant pursued unnecessarily third respondent, a private person persistently, vigorously and protractedly for building plans which formed part of the record of proceedings concerning the two decisions taken by the public authorities – Applicant was entitled to the record in terms of r 76 of the rules of court as it sought to challenge by review the decisions concerned – By pursing third respondent unendingly and unnecessarily blameable remissness and inaction existed – Moreover, court finding applicant failed to set out explicitly the reasons why applicant claims it could not be afforded substantial redress at a hearing in due course – Indeed adequate remedy, that is, 'substantial redress' is available if applicant were successful in due course in the form of damages, for instance – Consequently, application refused with costs for lack of urgency.

ORDER

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1. The application is refused for lack of urgency,
2. The matter is struck from the roll with costs on the scale as between party and party.

3. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] In this matter, the notice of motion filed on 30 June 2021 is dichotomized into two parts, namely, Part A and Part B. Part A seeks to challenge by review in terms of r 76 of the rules of court two *administrative* decisions, namely –

(a) the one made by an *administrative body* (second respondent) ('Decision I'); and

(b) the other made by an administrative official ('Decision II').

I have emphasized 'administrative' in the chapeau, 'administrative body' in para (a) and 'administrative official' in para (b) for a critical purpose. It is to emphasize the crucial point that the decisions that applicant seeks to challenge by review are administrative decisions made by an administrative body and an administrative official, within the meaning of art 18 of the Namibian Constitution. Doubtless, it is for that reason that applicant elected to bring the application under r 76 and not r 65. I make this crucial observation to underline the point that the decisions that are sought to be challenged by review are the aforementioned administrative decisions of the aforementioned public authorities. The court is, therefore, not interested in the acts of third respondent. Third respondent is not a public authority; and so, its decisions are not amenable to review under art 18 of the Namibia Constitution and not subject to r 76 of the rules of court. In any case, as I have said more than once, the decisions sought to be challenged by review are Decision I and Decision II, as set out in the notice of motion, and, as Mr Marcus, counsel for third respondent, reminded the court more than once.

[2] And when were Decision I and Decision II made? Decision I was made on 30 January 2020 and communicated to applicant on 18 February 2020; and Decision II was made on 16 June 2020 and communicated to applicant on 23 June 2020. Applicant took one full year to approach the court to challenge by review the aforementioned Decision I, but unabashedly gave respondents five days to file notice

to oppose the application. And as respects Decision II, applicant took a period of over one good year to approach the court for relief at equally breakneck speed, but also shamelessly gave respondents five days to file notice to oppose the application.

[3] It is important to set out here *in extenso* what I stated regarding urgency under the rules of court in the very recent case of *Christiaan and Others v Chief Regional Officer: //Kharas Regional Council and Others* NAHCMD 309 (30 June 2021):

> '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 accorded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant indulgence sought, that the matter to 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 bear the application on the basis of urgency.'

[4] Granted; after becoming aware of Decision I and being aggrieved by it, applicant was expected by law (see *Four Three Five Development Companies (Pty) Ltd v Namibia Airports Company and Others* 2017 NR (1) 142 (HC)) to exhaust any domestic statutory remedy before bringing a review application. But the Minister's decision (Decision II) was made on 16 June 2020. Applicant took one full year to approach the court to challenge by review the Minister's decision made on appeal, and applicant insensately gave respondents a mere five days to file notice to oppose the application.

[5] That was the time, that is, so soon after 23 June 2020, that applicant, if it was minded to act with speed and promptness to have approached the court for relief.

Mind you, as Mr Marcus pointed it out to the court, in their appeal to the Minister, applicant had already formed the view that the decision of second respondent (Decision I) was unlawful and that it could be challenged in a court of law. Applicant become aware of the Minster's decision on appeal on 23 June 2020, as I have said more than once, rejecting the appeal. Applicant failed to follow their warning or threat through until after the passing of one full year. As I have demonstrated in para 8 below, applicant's desire to have access to the building plans and their persistent, vigorous and protracted pursuit of third respondent for the building plans was superlatively unnecessary and unreasonable, seeing that applicant had legal advice at the relevant time. As I said in *Inter-Africa Security Services CC v Transnamib Holdings Limited* [2015] NAHCMD 276 para 10, approved by the court in *Nowases v Evangelical Lutheran Church* 2016 (4) NR 985 (HC), 'Parties who make such threats and do not follow their threats through timeously should have their request for the court's indulgence that the matter be heard on the basis of urgency refused.'

[6] In peroration, I find that no valid reason satisfactory to the court existed to explain the blameable remissness and inaction of applicant for one good year.

[7] Thus, in the instant matter, I find that applicant has not set out explicitly the circumstances which it avers render the matter urgent when, as I have said previously, applicant waited for more than one full year to approach the court to review the impugned decisions considering the fact that applicant was entitled, in virtue of r 76, to the record of proceedings concerning the making of Decision I and Decision II.

[8] As a matter of law and logic, I see no point in applicant pursuing third respondent for any documents, when the decisions applicant sought to challenge by review are Decision I and Decision II made by second respondent and fourth respondent respectively (both of them public authorities, ie administrative body and administrative official respectively); and applicant was entitled to the record of proceedings concerning those decisions, whose pursuit applicant was besotted with. And if applicant, I should add, had requested the record in order to pursue a rule-76 review and its request was rejected or applicant was given an incomplete record, because, for instance, certain relevant documents, particularly, the building plans,

were not in the record, applicant had adequate judicial remedy to obtain the completed record. Accordingly, I accept Mr Marcus's submission that in terms r 76, applicant would have access to the building plans in which applicant was so much interested.

[9] Furthermore, applicant has not shown that the proposed factors which a court assessing urgency ought to consider (see *Petroneft International and Another v Minister of Mines and Energy and Other* [2011] NAHCMD 125 para 32) are present in the instant matter.

[10] Besides, applicant cannot be thankful of the dictum on steps which an applicant in the present applicant's position may reasonably take before launching such review proceedings and which was proposed by the court in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) para 471 (referred to the court by Corbett SC, counsel for applicant). In the instant matter, even though it is the decisions of public authorities that were sought to be challenged by review, applicant, who had legal advice at the relevant time, barked at the wrong tree by pursuing persistently, vigorously and protractedly third respondent, a private person, leading to applicant launching the application on 30 June 2021, that is more than one full year after those decisions were made.

[11] For these reasons, the conclusion, is inescapable that applicant has failed to satisfy the requirement of urgency prescribed by r 73 (4) (a) of the rules of court. I proceed to consider the requirement in r 73 (4) (b). Both of them must be satisfied together; see para 3 above.

[12] Similarly, I find that applicant has failed to set out explicitly the reasons why applicant claims it could not be afforded substantial redress at a hearing in due course. Indeed, in my view, at a hearing in due course, if applicant were successful, applicant would have an adequate remedy, that is 'substantial redress', within the meaning of r 73 (4) (b) of the rules court in the form of damages, for instance. And, as I said in *Inter-Africa Security Services CC v Transnamib Holdings Limited* NAHCMD 276 (17 November 2015) para 19, 'the fact that it may be difficult to

quantify damages in such matters does not mean that a redress in the form of damages do not exist or that damages cannot be a substantial redress'.

[13] For the sake completeness, I should say this in capitalities. The fact that in applicant's view the principle of legality is at stake here, as submitted by Mr Corbett, cannot – without more and on its own – satisfy the twin r 73 (4) requirements of urgency. Indeed, on the contrary, that fact was a good enough reason to have propelled applicant to act with speed and promptness; and not for applicant to wait for one good year – unjustifiably, as I have found – before rushing to court at dreadful speed to seek relief on ground that the matter is urgent.

[14] Based on these reasons, I conclude that applicant has failed to satisfy the requirements of urgency prescribed by r 73 (4) of the rules of court. Furthermore, as I have demonstrated, the urgency in the application is self-created. (See para 3 above.)

[15] As respects costs; in my judgement, costs should follow the event; and I think costs should be on the scale as between party and party. I do not think the *Serrao* grounds (see *Namibia Breweries v Serrao* 2007 (1) NR 375 (HC)) are established; neither do I find that the conduct of applicant in the instant matter in bringing the application and moving it can be said to be in the same boat with the conduct of the applicant in bringing the application and moving it in *Lindequest Investment Number Fifteen CC v Bank of Namibia Ltd* NAHCMD 100 (27 April 2015) to justify a punitive costs order prayed by Mr Marcus.

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

1. The application is refused for lack of urgency,
2. The matter is struck from the roll with costs on the scale as between party and party.
3. The matter is considered finalized and is removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

1st & 2nd APPLICANT:	A W CORBERTT SC (with MS Leweis) Fisher, Quarmby & Pfeifer, Windhoek
3rd RESPONDENT:	N MARCUS Nixon Marcus Public Law Office, Windhoek