REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00305

In the matter between:

POPULAR DEMOCRATIC MOVEMENT NAMIBIA	**1ST APPLICANT**
ALL PEOPLE'S PARTY	**2ND APPLICANT**
RALLY FOR DEMOCRACY AND PROGRESS	**3RD APPLICANT**
REPUBLICAN PARTY OF NAMIBIA	**4TH APPLICANT**
NATIONAL UNITY DEMOCRATIC ORGANISATION	**5TH APPLICANT**
NAMIBIAN ECONOMIC FREEDOM FIGHTERS	**6TH APPLICANT**
SOUTH WEST AFRICA NATIONAL UNION OF NAMIBIA	**7TH APPLICANT**

and

PROFESSOR PETER KATJAVIVI	**1ST RESPONDENT**
PRESIDENT OF THE REPUBLIC OF NAMIBIA	**2ND RESPONDENT**
ATTORNEY-GENERAL	**3RD RESPONDENT**
SWAPO	**4TH RESPONDENT**
LANDLESS PEOPLE'S MOVEMENT	**5TH RESPONDENT**
CHRISTIAN DEMOCRATIC VOICE	**6TH RESPONDENT**
UNITED DEMOCRATIC FRONT OF NAMIBIA	**7TH RESPONDENT**
PAULUS NOAH	**8TH RESPONDENT**
ERNA VAN DER MERWE	**9TH RESPONDENT**
ELSIE TULEINGEPO NGHIKEMBUA	**10TH RESPONDENT**
JORAM RUKAMBE	**11TH RESPONDENT**
DR. EMMERENTIA LEONARD	**12TH RESPONDENT**

Neutral citation: *Popular Democratic Movement Namibia v Katjavivi* (HC-MD-CIV-MOT-GEN-2021/00305) [2021] NAHCMD 385 (31 August 2021)

Coram: PARKER AJ
Heard: **11 August 2021**
Delivered: **31 August 2021**

Flynote: Applications and motions – Urgent applications – Applicants must satisfy all the requirements prescribed by rule 73(4) of the rules of court together in order to succeed – Applicants failed to satisfy requirement prescribed by rule 73(4) *(b)* – Consequently, court concluding applicant failed to satisfy together both requirements of urgency prescribed by rule 73(4) of the rules of court – Court held, the importance of the subject matter of an application, on constitutional grounds or any other grounds, cannot on its own satisfy the requirements of urgency prescribed by rule 73(4)*(a)* and *(b)* of the rules of court – Accordingly, application refused for lack of urgency.

Summary: Applications and motions – Urgent applications – Application for declaration of invalidity of Proclamations issued by the President of the Republic of Namibia under certain constitutional provisions directing the National Assembly to sit in a special session to appoint two nominated administrative officials and members of the Electoral Commission – Applicants seeking consequential relief to set aside the appointments and directory order directed to the President to act in obedience to the Namibian Constitution – Court finding applicant satisfied requirement prescribed by para (a) of rule 73(4) but failed to satisfy the requirement prescribed by para (b) of rule 73(4) – Court concluding in that regard applicant could not succeed in application to hear the matter on urgent basis – Accordingly, application refused 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, including costs of one instructing counsel and two instructed counsel.

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

JUDGMENT

PARKER AJ:

[1] At the root of the instant proceeding are allegations of unlawful conduct placed at the door of His Excellency the President of the Republic of Namibia in His Excellency's issuance of Proclamation No. 38 of 2021, as amended by Proclamation No. 40 of 1921. The Proclamations were issued under powers vested in the President variously by art 62(1)*(c)*, read with art 32(3)*(b)*, of the Namibian Constitution ('the Constitution').

[2] Applicants, represented by Ms Elise M Angula, have moved the court to grant, on the basis that the matter is urgent in terms of rule 73(4)*(a)* and *(b)* of the rules of court, certain orders. The first is a declaratory order, declaring the Proclamations to be inconsistent with named articles of the Constitution. The second is the setting aside of those Proclamations. The third is an order setting aside certain decisions made consequential upon the implementation of the Proclamation. The fourth order sought is a directive order whereby the President is directed to issue a fresh Proclamation (on the same subject matter) that is Constitution compliant.

[3] First to third respondents, represented by Mr Vincent Maleka SC (with him Mr Eliaser Nekwaya), have moved to reject the application. Since there is a dispute whether the court should grant the indulgence applicants crave (see *Hewat Beukes t/a Bouers v Lüderitz TC*, Case No. A 388/2009, para 15) that the mater be heard on

the grounds that it is urgent, as aforesaid, I directed counsel to address the court on the issue of urgency only. It is, therefore, the issue of urgency that I now direct the enquiry.

[4] In the recent cases of *Temptations Fashion CC v Sannamib Investments (Pty) Ltd* NAHCMD 298 (17 June 2021); *Christiaan and Others v Chief Regional Officer: //Kharas Regional Council* NAHCMD 309 (30 June 2021); and *Baumann v The Chairperson of the Council of the Municipality of the City of Windhoek* NAHCMD 374 (17 August 2021), I rehashed what I said on the question of urgency in terms of rule 73(4)*(a)* and *(b)* of the rules of court in *Fuller v Shigwele* (A 336/2014) NAHCMD 15 (5 February 2015) para 2:

> '[2] 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 a hearing in due 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. 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.'

[5] As Mr Maleka drew the court's attention to, the provisions of rule 73(4)*(a)* and *(b)* of the present rules of court are a rehearsal of the provisions of rule 6(12)*(b)* of the repealed rules. *Fuller v Shigwele* was decided in terms of the repealed rules.

[6] I note that in the instant matter, allegations of unconstitutional conduct are made seriously and, therefore, concerns of rule of law are raised and further that applicants approached the court with speed and promptitude, considering the prevailing circumstances at the relevant time. Consequently, it could be said that applicants have satisfied the requirements of urgency prescribed by rule 73(4)*(a)*.

But I do not find one iota of reason why applicants claim they could not be afforded substantial redress at a hearing in due course.

[7] In words of one syllable, applicants have not set out explicitly the reason why they claim they could not be afforded substantial redress at a hearing in due course. The clause 'set out explicitly' means stating the reason 'in detail and expressly, leaving nothing merely implied'. (See *Hewat Beukes t/a MC Bouers v Lüderitz TC*, para 8).

[8] In the founding affidavit, the deponent, under (5) thereof, which is entitled 'Urgency (events leading of lodging of this application)', gives in 14 paragraphs a chronology of events that occurred before the bringing of the application. It is a consideration of those events and other matters that led me to hold that it could be said that applicants have satisfied the requirement prescribed by rule 73(4)*(a)*. To satisfy the requirements of para (b) of rule 73(4), applicants set out this lone and naked paragraph:

> 'If this matter is not heard on an urgent basis but in due course, the process of finalizing the dispute would take some time, and the decisions would continue to be vitiated by illegality and is not effective remedy for a continued wrong.'

[9] With that paragraph, I should say, applicants do not even begin to get off the starting blocks in their inconsequential attempt to satisfy para (b) of rule 73(4) of the rules of court. The mentioning of 'illegality' cannot on its own on any pan of legal scales satisfy the requirement of urgency prescribed by para (b) or rule 73(4) of the rules of court. The decisions complained of have been made already; hence, the applicants' prayer for a declaration. Indeed, as a matter of law and logic, it would be plainly fatuous for a party to pray for a declaration to challenge the validity of a decision, if that decision has not been made already. And whether that decision is unlawful and invalid ('tainted with illegality', to use the words of the applicants) matters tuppence.

[10] In my view, considering the principal relief sought in the form of a declaration and the consequential relief thereto, I fail to see how one can seriously claim that one cannot be afforded a substantial redress at a hearing in due course, if the matter

was heard in due course. Doubtless, in our law, it is superlatively trite that there is 'real and tangible' (see *Concise Oxford English Dictionary* 12th ed) remedy, that is, 'substantial redress' (to use the words of rule 73(4)), to deal adequately with unlawful decisions or acts of public authorities: The Law Reports are replete with instances of judicial remedies available in suchlike situations in deserving cases. In any case, *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 para 20 tells us, 'The fact that irreparable (damage) damages may be suffered is not enough to make out a case of urgency.'

[11] As I have found, applicants have failed to satisfy in the founding papers (see *Mweb v TELECOM*) the requirements of urgency prescribed by para (b) of rule 73(4) of the rules of court. But applicants must satisfy the requirements prescribed by both para (a) and para (b) of rule 73(4) together in order to succeed, as I have said previously. (*Fuller v Shigwele*, para 2) Having failed to satisfy all the requirements of urgency prescribed by rule 73(4)*(a)* and *(b)* together, applicants cannot succeed. (*Fuller v Shigwele* loc cit) The court cannot, therefore, grant the indulgence craved by applicants that the matter be heard on the basis that it is urgent without offending the principle on urgency, within the meaning of rule 73(4)*(a)* and *(b)* of the rules of court, enunciated by Masuku J in *Nghiimbwasha v Minister of Justice and Others* NAHCMD 67 (20 March 2015) para 28.

[12] One last general point: In the face of the flurry of urgent applications flowing unceasingly to the seat of judgment of the court at every turn nowadays, it is important to say this in capitalities. I cannot overstress that the importance – real or assumed – of a matter on constitutional grounds or on any other grounds cannot on its own satisfy the requirements of urgency prescribed by rule 73(4)*(a)* and *(b)*, as many a party are wont to think. Irrespective of the importance – real or assumed – of the subject matter of an application, the applicant can only succeed to have his or her application heard on the grounds that it is urgent only, and only if, applicant satisfied together both requirements of urgency prescribed by rule 73(4)*(a) and (b)* of the rules of court.

[13] As to costs; I find that it has not been established that the *Serrao* factors (*Namibia Breweries Limited v Serrao* 2007 (1) NR 49 (HC)) exist in the instant matter, and I find further that the conduct of the present applicants in bringing the instant application and moving it cannot be said to stands in the same boat with the conduct of the applicant in *Lindequest Investment Number Fifteen CC v Bank Windhoek Ltd* (A 80/2015) [2015] NAHCMD 100 (27 April 2015) in bringing the application there and moving it to justify an award of costs on the scale as between attorney (legal practitioner) and client, which Mr Maleka urged the court to award. In the circumstances, it is fair and reasonable to grant party-and-party costs.

[14] Based on these reasons, 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, including costs of one instructing counsel and two instructed counsel.

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

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C Parker

Acting Judge

APPEARANCES:

APPLICANTS:	E M ANGULA (with her C OMALU)
	Of AngulaCo. Inc., Windhoek
FIRST, SECOND AND	
THIRD RESPONDENT:	V MALEKA SC (with him E NEKWAYA)
Instructed by:	Office of the Government Attorney, Windhoek