**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA**
**MAIN DIVISION,**
**WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2022/00016

In the matter between:

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| **ISAK MATROOS** | **PLAINTIFF** |

and

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| **PETRONELLA BOOIS** | **1ST RESPONDENT** |
| **ANAKAP INVESTENTS CC** | **2ND RESPONDENT** |
| **TITUS TRADING EMPIRE CC** | **3RD RESPONDENT** |
| **EIB SMALL CONTRACTOR CC** | **4TH RESPONDENT** |
| **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP (PTY) LTD** | **5TH RESPONDENT** |
| **BANK WINDHOEK LIMITED** | **6TH RESPONDENT** |

**Neutral citation:** *Matroos v Boois* (HC-MD-CIV-MOT-GEN-2022/00016) [2022] NAHCMD 329 (1July 2022)

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| **CORAM:** | TOMMASI J |
| **Heard:** | **4 February 2022** |
| **Delivered:** | **1 July 2022** |

**Flynote:** Practice – Applications and motions – application to stay execution pending the outcome of a Rule 103 application premised on argument that the initial proceedings are a nullity – requirement for a temporary interdict restated –

applicant's right to be heard and averment of complete failure by first respondent to notify him, arguable.

**Summary:** The applicant brought an application for a stay of execution on an urgent basis. The applicant averred that the court had previously erroneously granted a final order against him in his absence. He averred a total failure to give notice to him and maintained that the proceedings giving rise to the order amounts to a nullity. The applicant holds 50 % membership in the second respondent and he claims that the order which direct/restrain him from interfering with and/or withholding his consent to authorise payments due and required to be paid out of the second respondent's business account, was overbroad and far-reaching. He claimed that his agency, in relation to the affairs of the second respondent, has been denuded and that he would suffer irreparable harm if the first respondent is permitted to execute the order and he would not be able to "claw back" its execution. The first respondent argued that the urgency is self-created. The first respondent further maintained that the court in the initial application she brought was satisfied with the effectiveness of the service of the notice of motion on the applicant, that the court is *functus officio* and that the applicant approached this court with unclean hands. The court found that the applicant has made out a case for urgency, that the court was not *functus officio* and the applicant satisfied the requirements for the granting of a temporary interdict.

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**ORDER**

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Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

**IT IS ORDERED THAT:**

1. The applicant's non-compliance with the Rule 73(1), (3) and (4) of Court, in so far as it pertains to the form and service of this application is condoned, and this application is heard as one of urgency.
2. The applicant's service of this application in a manner other than contemplated in Rule 8 of the Rules of this Court is condoned.

3. The execution (and all steps taken in pursuance thereof) of this court's order dated 11 January 2022, made under Case Number: HC-MD-CIV-MOT-GEN-2022/00002 is stayed, pending the adjudication and determination of the application launched in Part B of this application.
4. The first respondent is ordered and directed to pay the applicant's costs including the cost of one instructing and one instructed legal practitioner.
5. The reasons for the order will be released on 04 March 2022.
6. The matter is removed from the roll and is regarded as finalised.

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**JUDGMENT**

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TOMMASI J:

Introduction

[1] The applicant is a member of the second respondent, Anakap Investments CC. The second respondent comprises of only two members, namely the applicant and the first respondent, who each hold 50% shares in the second respondent. The other respondents were only joined for a possible interest which they might have in the joint venture agreement between the second respondent and them, or, in the case of the sixth respondent, the interest it might have in the bank account held by it on behalf of the second respondent.

[2] This matter came before this court on an urgent basis and was heard on 1 February 2022. I undertook to give reasons for its ruling on 4 March 2022 but unfortunately was only able to release same on the above given date. I unreservedly apologise to the parties for this oversight. Before I deal with the reasons for the order granted by this court, I will briefly deal with the background of the matter.

[3] The matter initially came before my sister, Justice Rakow on 10 and 11 January 2022 and an order was granted on 11 January 2022. Paragraph 3 of that order reads as follows;

'The court is hereby interdicting and restraining the first respondent from interfering with, and/or withholding his consent to authorise payments due and required to be paid out of the second applicant, a Close Corporation, conducting business, with business account, held at Bank Windhoek Ltd under account no 8021172091, in terms of the fulfilment of its obligations as a subcontractor in a project under tender BMZ-No:2009 65 418 Procurement Reference No: W/OIB/RA-01/2019 for Clearing and Grubbing, which continues on 11 January 2022, until the finalisation of the aforementioned project; and/or pending the institution of and the final determination of proceedings by the first applicant on behalf of second applicant , in terms of the applicable provisions of the Close Corporation Act 26 of 2019, for redress in terms of the first respondent's conduct prejudicial to best interest of the second and or fist applicant.'

[4] The court granted a final order although the applicant initially applied for a *rule nisi* to be issued. The order was also granted in the absence of the applicant.

[5] On 20 January 2022, the applicant launched an urgent application wherein he sought amongst others a stay of the execution of the court order dated 11 January 2022 pending the adjudication and determination of the application launched in part B of the application which is an application for the rescission.

Applicant's case

[6] The applicant's contention is that (despite the first respondent's attempts via telephonic and electronic mailing means) he did not have notice of the proceedings instituted by the first respondent. The applicant further argues that the terms of the court order granted on 11 January 2022 are overbroad and far-reaching. Further that his agency, in relation to the affairs of the second respondent, has been denuded.

[7] The applicant submits that the relief he seeks in this application is predicated on the fact that the first respondent (to his prejudice) erroneously sought, and the court, erroneously (and inadvertently) pronounced judgment in his absence. He was not served with the application (affecting his status in the second respondent) nor furnished notice thereof.

[8] The applicant argues that the first respondent in her notice of motion sought the order by way of a *rule nisi*. In addition, it is clear from the court's electronic-justice file that there is no return of service or affidavit of service reflecting service of the first respondent's application on him in any manner. The affidavit of service filed reflects service of the application on his erstwhile legal practitioner, which according to the applicant, is deficient. The applicant argues further that the first respondent when affecting service of the process on his erstwhile legal practitioner could not have known that he was authorised to receive any process on his behalf. The applicant submits that his erstwhile legal practitioner had no such authority. A confirmatory affidavit was filed by the erstwhile legal practitioner confirming that he had no authority to act on behalf of the applicant and that he did not receive the first respondent's urgent application as alleged by the first respondent. The applicant submitted that first respondent's legal practitioner was aware of this fact at the time of moving the urgent application.

[9] The applicant argues that the order flowing from the urgent application proceedings heard on 10 and 11 January 2022 before Justice Rakow came to his attention via the Deputy Sheriff after it was granted.

First Respondent's case

[10] The first respondent submits that the court was satisfied with the effectiveness of the service of the notice of motion on the applicant, that the court is *Functus officio* and that the applicant approached this court with unclean hands.

[11] The court in *Boois v Matroos* (HC-MD-CIV-MOT-GEN-2022/00002) [2022] NAHCMD 187 (12 April 2022) par 12 stated the following:

'The first applicant in a further supplementary affidavit explained to the court on 11 January 2022 how she went about to again serve the urgent application on the first respondent. She explained that the email address Matroosl@namwater.com.na has previously been displayed in emails she received as well as part of documents served on her by Mr. Van Zyl, the previous legal practitioner for the first respondent. The personal contact number 0811405247, of the first respondent is also the only number that the first applicant has used in the past to contact the first respondent. She further explained how the

application was served on all the other respondents. In court the counsel for the applicants further confirmed that he indeed spoke to the legal practitioner, Mr. van Zyl on Monday, who confirmed that he received the application. Considering all the above, the court was satisfied with the service of the application.'

Issue for determination

[12] The issues for determination is whether the applicant has made out a case for urgency and for the stay of the proceedings pending the outcome of the application in terms of Rule 103.

Urgency

[13] In *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (5 February 2015) at para 2, Parker AJ held the following;

'Urgent applications are now governed by rule 73 of the rules of court (i.e. 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.'

[14] Rule 73(3) requires an applicant, in an urgent application to explicitly aver the circumstances that render the matter urgent and state reasons why the applicant alleges it cannot be afforded substantial redress at a hearing in due course.

[15] The applicant stated that the order which was granted affected his rights and status in the second respondent and that the first respondent intends to execute the court order, despite the applicant having protested that the proceedings amount to a nullity. He also submitted that he was not served with the said order before the final order was made. The applicant further submitted that the order infringe on his rights in the second respondent and potentially expose him personally to all manner of liability in future, particularly considering that it grants the first respondent a free hand in the conduct, control and management of the second respondent's affairs. He also indicated that an application to rescind the order would take four to six months to finalise by which time it would not be possible for him to "claw back" its execution.

[16] The first respondent, in her answering affidavit, maintained that the urgency was self-created and that the applicant remained in wilful default and in contempt of the court order dated 11 January 2022. The first respondent submits that the applicant, despite being served with the application, did not oppose it and has failed to explain why he could not have followed the procedure in terms of Rule 121.

[17] The order granted in the aforementioned matter has far reaching implications for the applicant and it would remain in force and effect unless the execution thereof is stayed pending the outcome of the rule 103 application. All indications are that the first respondent intends to act on the order and to bring an application for contempt of court in the event the applicant does not comply with the said order. The actions which the first respondent would be entitled to perform daily in respect of the second respondent in which the applicant holds 50% membership, would be difficult to reverse. Even if the court would be inclined to give an order rescinding the contested order within 30 days, it would not offer the applicant substantial redress. I am of the view, that the requirements in terms of Rule 73(*4)(a)* and *(b)* have been met.

Application to stay

[18] In *Shoprite Namibia (Pty) Ltd v Paulo and Another* 2010 (2) NR 475 (LC) at paragraph 27, Hoff J, as he then was, states the following:

'In *LF Boshoff Investments v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd 1969 (2) SA 256 (C*) at 267A – F, Corbett J (as he then was), in considering the requisites of an interdict *pendente lite* expressed himself as follows:

'(C)ounsel for both parties addressed argument to the court on the question as to whether the requisites for the grant of a temporary interdict pending determination of the main action had been established by the Company and I shall now consider this question. Briefly these requisites are that the applicant for such temporary relief must show —

(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.

[19] Rule 103(1)*(a)* provides that the court, in addition to the powers it may have, may of its own initiative or on the application of any party affected, brought within a reasonable time, rescind or vary any order or judgment which was erroneously sought or erroneously granted in the absence of any party affected thereby. In this matter it is not disputed that the order was granted in the absence of the applicant. It is further not disputed that the application was not served by the deputy sheriff on the applicant. The applicant further claimed not to have received notice of the proceedings giving rise to the order. He alleged a complete failure of service. The applicant brought this application in two parts. This application is Part A and the applicant read and incorporated into his affidavit the relief that he is seeking in both parts A and B into the same affidavit.

[20] The respondent avers that the court is *functus officio* and that the applicant may not approach the court in terms of Rule 103. A short answer to this objection can be found in *Spangenberg v Kloppers* 2018 (2) NR 494 (HC) where Prinsloo J stated the following:

'It is trite that once a court has duly pronounced a final judgment or order, it has in itself no authority to correct, alter or supplement such judgment or order and by reason of

that the court thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised. There are however a few exceptions to this general rule where the court may vary or rescind its orders or judgments, which have been codified in rule 103 of the rules of court.'

[21] I find that *ex facie* the pleadings filed by the applicant, a case has made out that he has an arguable case that there was no proper service on him. It would not be prudent for me to deal with the merits thereof as this would be adjudicated by the managing judge who is to hear the application for rescission of judgment. There is sufficient case law to support a finding that proceedings which take place without service is a nullity.[1]

[22] The first respondent herein sought urgent and final relief from the court whereas a *rule nisi* would have addressed all the concerns the applicant now raise with the court. It would not be the first time that the court would frown upon the procedure which the first respondent adopted in opportunistically obtaining a final temporary interdict. In *Central Procurement Board v Nangolo No and Others* 2018 (4) NR 1188 (HC), the court aptly held that the principle of fairness should never be sacrificed on the altar of convenience, particularly concerning issues of notice and the right to be heard.

[23] I have already highlighted above the prejudicial nature of the order for the applicant. The applicant claimed that the interim order violated his right to be heard and submitted that he was left with no alternative remedy but to approach this court for a stay of execution.

[24] This court, having considered the facts, is satisfied that the applicant has met the requirements for a temporary interdict and the court therefore exercised its discretion to grant the applicant the stay of execution.

[25] The general rule, namely that costs follow event, i.e. that the successful party should be awarded his or her costs. I see no reason why this court should deviate from the rule.

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[1] *Knouwds NO v Josea* 2007 (2) NR 792 (HC); *Central Procurement Board v Nangolo NO and others* 2018 (4) NR 1188 (HC) see also *Esterhuizen v Karlsruh Number One Farming CC* 2020 (1) NR 148 (HC)

[26] For these reasons the following order was made:

1. The applicant's non-compliance with the Rule 73(1), (3) and (4) of Court, in so far as it pertains to the form and service of this application is condoned and this application is heard as one of urgency.

2. The applicant's service of this application in a manner other than contemplated in Rule 8 of the Rules of this Court is condoned.

3. The execution (and all steps taken in pursuance thereof) of this Court's order dated 11 January 2022, made under Case Number: HC-MD-CIV-MOT-GEN-2022/00002 is stayed, pending the adjudication and determination of the application launched in Part B of this application.

4. The first respondent is ordered and directed to pay the applicant's costs including the cost of one instructing and one instructed legal practitioner.

5. The reasons for the order will be released on 04 March 2022.

6. The matter is removed from the roll and is regarded as finalise

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M A TOMMASI

Judge

APPEARANCES

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|---|---|
| APPLICANT: | T Muhongo<br>instructed by Ellis Shilengudwa Inc.<br>Windhoek |
| RESPONENT: | P Boois<br>In person<br>Windhoek |