

## REPUBLIC OF NAMIBIA



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00239

In the matter between:

**CBI EXCHANGE NAMIBIA (PROPRIETARY) LIMITED****APPLICANT**

and

**BANK OF NAMIBIA****1<sup>ST</sup> RESPONDENT****ROMEO NEL N.O.****2<sup>ND</sup> RESPONDENT****BANK WINDHOEK LIMITED****3<sup>RD</sup> RESPONDENT****EMMANUEL MURWIRA****4<sup>TH</sup> RESPONDENT**

**Neutral citation:** *CBI Exchange Namibia (Proprietary) Limited v Bank of Namibia*  
(HC- MD-CIV-MOT-GEN-2022/00239) [2022] NAHCMD 339 (7 July 2022)

**CORAM:** Tommasi J**Heard:** 8 June 2022**Delivered:** 7 July 2022

**Flynote:** Civil Procedure – Compliance with court orders – failure to comply with a court order – respondents aware of court order made as they were party to

the proceedings leading to the order made – Applicant has shown that the respondents have not complied with the court order – Court finding that the order is binding on all parties – further that the Respondents have not complied with the order of 18 March 2022.

Civil Practice — Judgements and orders — Interpretation of - *Communications Regulatory Authority of Namibia (CRAN) v Telecom Namibia & others, Case No: SA37/2021, delivered 4 November 2021* held that the well-known rules relating to the construction of text or documents stress the importance of the context in which a document is drafted which is 'relevant to its construction in all circumstances, not only when the language appears to be ambiguous – The respondents in this matter overstepped their mandate given in terms of the order and same resulted in failure to adhere to court order.

**Summary:** The applicant launched an urgent application which was heard on 18 March 2022 before another court. On 18 March 2022, the first respondent was ordered to *inter alia*, do everything necessary to partially remove the freeze in terms of section 6(2) (f) of the Banking Institutions Act of 2 of 1998, placed on the applicant's account CHK- 802669569 held with the third respondent in order for applicant to meet its necessary day- to-day business expenses.

The applicant then launched another urgent application before this court and was heard on 8 June 2022 on the basis that the compliance officer of the third respondent and authorised officers of the first respondent have been frustrating and obstructing the implementation of the 18 March 2022 court order through their unlawful imposition of unwarranted and impossible conditions to the release of funds. Because of this, the applicant continuously and massively suffers both operationally and financially.

The respondents' case is that they have requested supporting documents from the applicant to substantiate the claims the applicant claims are necessary day-to-day expenses of the business. According to the respondents, the applicant should merely provide the documentation that is required to enable the respondents to determine and be satisfied that the expenses which the applicant claims must be paid are

indeed necessary day-to-day business expenses of the applicant to enable them to pay the expenses.

*Held that;* when courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issued *ex cathrada*, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance.

*Held that;* the order issued on 18 March 2022 has not been varied or rescinded, that said order still stands and is binding on all the parties.

*Held that;* the order merely provide the forth respondent with a supervisory function which should be exercises in concurrence with the second respondent.

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## ORDER

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1. Condonation is granted for the applicant's non-compliance with the rules of the High Court relating to the service and exchange of papers and the matter is heard as one of urgency contemplated in terms of Rule 73 of the Rules of Court.
2. The third and fourth respondents and to the extent necessary, first and second respondents must comply with the court order dated 18 March 2022 with immediate effect and release payments/funds from the applicant's bank account which is necessary for the day-to-day running of the applicant's business from date of the court order to date of this order.
3. The respondents, jointly and severally, the one paying the other to be absolved must pay the applicant's cost, such costs to include the cost of one instructing and one instructed Counsel.

4. The matter is finalised and removed from the roll.
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## JUDGMENT

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TOMMASI J:

### Introduction

[1] The urgent application serving before this court concerns the order of the court made by my brother Justice Coleman on 18 March 2022 wherein he ordered as follows:

- '1. Condonation is granted for the Applicant's non-compliance with the forms and services as provided for in the Rules of the High Court of Namibia and hearing this application as a matter of urgency as contemplated in Rule 73(3);
2. Pending the outcome of the dispute between the parties, First Respondent must do everything necessary to partially remove the freeze in terms of section (6) (2) (f) of the Banking Institutions Act, of 2 of 1998, placed on the Applicant's account held with the 3<sup>rd</sup> Respondent in order for Applicant to meet its necessary day to day business expenses;
3. In pursuance of the partial removal of the freeze referred to in paragraph 2 above, 3<sup>rd</sup> Respondent is ordered to release payments from applicant's account necessary for the day to day running of its business, subject to the supervision of 3<sup>rd</sup> respondent's Compliance officer and in consultation with the 1<sup>st</sup> Respondent's Authorised Officer;
4. Costs to include one instructing and one instructed Counsel, will be costs in cause of any proceedings Applicant institute in respect of this dispute between the parties; and
5. The matter is removed from the roll: Case Finalized.'

[2] As per the Notice of Motion, the applicant before this court now seek for the following:

'1. Condoning the Applicant's non-compliance with the Rules of the High Court relating to service and exchange of papers; and to hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of this Court; and to grant leave to hear the matter outside the normal urgent application Court hour.

2. An order directing the Third and Fourth Respondents, and to the extent necessary First and Second Respondents, to release or cause to be released funds from the Applicant's bank account with the Third Respondent for the payment by the Applicant of its of day-to-day expenses for the period March 2022 to May 2022 listed under Annexure "CBI-03" attached to the Founding Affidavit, within 2 (two) days of the Court Order.

3. An order interdicting and restraining the First and Second Respondents from obstructing in any way the implementation of the Court Order dated 18 March 2022 and from imposing condition upon the release by Bank Windhoek of funds to the Applicant for payment of the necessary day-to- day expenses of CBI as directed by Court.

4. That the Third and Fourth Respondents are directed pending the finalization of the case instituted by the Applicant under case number HC-MD-CIV-ACT-OTH-2022/00097 to release to the Applicant such other monthly amounts constituting its necessary day-to-day expenses as they may be from time to time communicated to it by the Applicant and/or the Applicant's legal practitioner.

5. A cost order at a scale of attorney and own client against any of the Respondents who opposes this application.

6. Further and/or alternative relief.'

Pleadings

*Applicant's case*

[3] The applicant pleads that it is approaching this court to assert its right not only in accordance with the common law principles but also to seek protection by this court under Article 25(3) and (4) of the Namibian Constitution. In essence the applicant's case is that on 18 March 2022, the respondents were directed by the court to do everything necessary in order to partially remove the freeze on its bank account held with third respondent. This was directed by court so that its necessary day-to-day expenses could be released and paid by third respondent without fail.

[4] It is the applicant's case that the compliance officer of the third respondent and authorised officers of the first respondent have been frustrating and obstructing the implementation of the 18 March 2022 court order through their unlawful imposition of unwarranted and impossible conditions to the release of funds. As a result, the applicant continuously and massively suffers both operationally and financially.

[5] The applicant pleads that the third and first respondents and also through the conduct of their respective compliance and authorised officers, refuse to release funds for the applicant's day-to-day expenses, despite being repeatedly provided with requisite expenses details. The deponent on behalf of the applicant states that he explicitly dealt with the variable monthly expenses of the applicant in the urgent application which gave rise to the 18 March 2022 court order. This application was not opposed. This notwithstanding the fact that this court had already considered and was aware of the applicant's day-to-day expenses, ordered payment thereof after the partial opening of the applicant's bank account.

[6] The applicant further pleads that the actions of the second respondent are directed at frustrating the 18 March 2022 court order and with no regard to the requirement of the law to obey court orders. Applicant pleads that the second respondent is not entitled to invite written representations in order to decide whether or not he should partially open the bank account. Applicant further pleads that the release of the day-to-day business expenses is only subject to the supervision of the fourth respondent who acts in consultation with the second respondent. The fourth

respondent's supervision should only be aimed at determining whether or not the day-to-day expenses are those that were set out in the urgent application before Justice Coleman and the further one as may be furnished to him from time to time.

[7] According to the applicant, it is clear that the fourth respondent was trying to accord himself powers which he does not possess i.e. to determine the validity of the applicant's obligation to pay identified creditors as a day-to-day business expense. Applicant contends that it cannot be afforded substantial redress at a hearing in due course and it is for that very reason that the court ordered on 18 March 2022 that pending the resolution of the dispute between the parties, provision must be made for the necessary day-to-day expenses. No effective alternative remedy other than an interdict is available to the applicant to prevent the second and fourth respondent from unlawful interferences with giving effect to the 18 March 2022. The applicant needs to pay its day-to-day expenses in order to continue to operate and exist. It has a constitutional right to continue to exist and conduct business.

[8] Therefore, if the applicant is refused a hearing on an urgent basis it will be deprived of its right to have its necessary day-to-day expenses released and will in the process not survive financially. The applicant continues to suffer irreparable financial and operational harm as a result of the unlawful interference of the second and fourth respondents. The applicant contends that the order of 18 March 2022 confers the unqualified right upon the applicant to have monies released for its necessary day-to-day expenses and that the order does not confer discretion on any of the respondents to determine what constitutes necessary day-to-day expenses.

#### First and Second Respondents case

[9] Mr Romeo Nel deposed to the answering affidavit on behalf of the first respondent and on his own behalf cited as the second respondent herein. In opposition the applicant's case the first and second respondents plead that they oppose the application on the following grounds<sup>1</sup>:

'5.1. The application is not urgent. If there is any urgency, the urgency is self-

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<sup>1</sup>First and Second Respondents answering affidavit, p. 2-3 at para 5.

created.

The applicant has not satisfied any of the requirements of rule 73(4).

5.2 The relief sought by the applicant is based on a misinterpretation of the court order granted on 18 March 2022 (annexure “CBI-01” to the founding affidavit).

5.3 The applicant has failed to establish that the expenses listed under annexure “CBI-03” to the founding affidavit constitute payments necessary for the day-to-day running of its business as contemplated in this court’s order of 18 March 2022;

5.4 The relief sought is the application is not consistent with what is contemplated in the order of 18 March 2022;

5.5 The applicant has not satisfied the requirements for a final interdict.’

[10] Mr Nel pleads that the applicant has failed to set out explicitly the reasons why it claims that it would not be afforded substantial redress at a hearing in due course. Mr Nel pleads that it is not necessary for the matter to be heard on an urgent basis for the release of payments for the applicant’s necessary day-to-day business expenses. According to him the applicant should merely provide the documentation that is required to enable the respondents to determine and be satisfied that the expenses which the applicant claims must be paid are indeed necessary day-to-day business expenses of the applicant. Mr Nel pleads that this issue could have very well been resolved at the meeting which the parties intended to have in the second week of June 2022.

[11] It is the first and second respondents’ case that the applicant is not entitled to have funds released into its account for it to make payments itself and that the phrase “in consultation with” means that there must be concurrence between the second and fourth respondents. In addition, in order for the respondents to determine whether the expenses are necessary for the day-to-day business of the applicant, they must be provided with substantiating documents. According to them, although it is not expressly stated in the court order, it is implied because there is no other way for respondents to determine whether the expenses listed by the applicant are necessary day-to-day business expenses.

[12] Mr Nel pleads that the order only covers necessary day-to-day expenses as determined by the second and fourth respondents. It is not for the applicant to



determine that aspect. The applicant needs to provide documents which will satisfy the respondents that the expenses are legitimate and necessary day-to-day expenses of the applicant. Therefore, this court cannot issue an interdict restraining the first and second respondents from imposing reasonable conditions for the payments to be released, conditions in this case meaning that the applicant must substantiate the expenses with the required documents.

[13] As a result, this application is therefore premature, wholly unnecessary, a waste of valuable court time, a wasted expense for all the parties and should be struck for lack of urgency with costs, such costs to include the costs of one instructing and one instructed legal practitioner.

#### Third and Fourth Respondents case

[14] Mr Murwira deposed to the answering affidavit on behalf of the third respondent and his own behalf, cited as the fourth respondent. In his affidavit, fourth respondent pleads that to his knowledge there is no instance where upon the applicant's request for payment of monies, the first or second respondent behaved obstructively in his consultation with them. Mr Murwira recorded that they have at no time acted in any manner inconsistent with the terms of the court order.

[15] Mr Murwira pleads that as a consequence of the rule of law, their obligation and fidelity thereto, they are bound by the court order. They have a legal obligation to comply with the terms thereof. Mr Murwira pleads that paragraph 2 of the 18 March 2022 court order is anti-dissipatory in nature. The regulatory hold on the applicant's account is maintained and only lifted to the limited extent of the applicant's necessary day-to-day business expenses.

[16] According to Mr Murwira, they (the third and fourth respondents) understand the court order to mean that<sup>2</sup>:

'15.1 transactions on the applicant's bank account are to be limited to the applicant's necessary day-to-day expenses;

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<sup>2</sup>Third and Fourth Respondents answering affidavit p. 6-7 para 15.

and

15.2 the second respondent must agree and concur (with us) that the transactions on the applicant's bank account are necessary for the applicant's day-to-day expenses.'

[17] In addition according to Mr Murwira, the court order places a dual obligation on the applicant, second respondent and himself.

'The court order:

17.1 mandates a proper and frank disclosure (with reference to source documents/vouchers/agreement etc.) by the applicant to us (and the second respondent) of its necessary day to day expenses;

and

17.2 mandates us (and the second respondent) to apply our mind to which expenses are and are not necessary day to day expenses of the applicant. (Because of the regulatory hold on the applicant's account and the anti-dissipatory nature thereof, we understand the "final call", as it were, to be on the second respondent).'

[18] In essence, Mr Murwira pleads that the basis for their opposition to the applicant's application is that the applicant's application is not urgent, the applicant's founding affidavit is – contrary to the mandatory requirements of rule 74 (4)(a) and (b) of court – absent evidence speaking to the circumstances rendering the matter urgent and why the applicant is unable to be afforded substantial redress at a hearing in due course. The relief sought is over broad and the applicant has not made out a case for the grant of the final interdict. The relief is superfluous and no case has been made out for a case for the grant of costs order on punitive scale or any costs order at all.

[19] Mr Murwira pleads that the applicant's unwillingness to furnish the respondents with sufficient information pertaining to its necessary day-to-day expenses does not ground it a cause of action and/or an entitlement to the relief that it seeks. Therefore, the applicant's application falls to be struck from the roll with costs, being the costs of one instructing and one instructed legal practitioner.

Arguments on behalf of the applicant

[20] I will refer to the words 'submit' and 'argue' and their derivatives during my judgment. It must be understood to encompass both the heads of arguments and the oral submissions made in court.

[21] Counsel for the applicant submits that the applicant is not seeking a contempt order. It is making allegations of continuous non-compliance and disobedience of the court order by the respondents. Counsel submits that it is clear from the order made on 18 March 2022 that the first and second respondents were ordered to partially open the applicant's account. This was for the purpose of ensuring that the necessary day-to-day expenses of the applicant's business are paid until the dispute between the parties is resolved.

[22] Counsel argues that the first and second respondents wasted no time in using their power in a manner incompatible with the text and import of the court order. They demanded representations to be made as to why the applicant's bank account could not remain frozen despite the fact that the court has directed a partial opening of the applicant's account for purposes of defraying day-to-day expenses. According to the applicant, the first and second respondents sought to dispute the fact that the expenses given to them are indeed necessary day-to-day expenses when they have no personal knowledge of that dispute.

[23] Counsel argues that after several engagements between the parties, including the respondents being furnished unnecessarily with detailed information, it became clear that the respondents were determined to frustrate and obstruct the implementation of the court order to the prejudice and harm the applicant.

[24] Counsel argues that the applicant is a creditor to the third respondent and as

such their relationship is contractual. Effectively, there is a contract of *mandatum* between the parties. Therefore, unless prohibited in terms of a particular and specified statutory provision, the third respondent is under obligation to carry out the applicant's instructions including the releasing of funds to pay for the day-to-day expenses.

[25] Counsel argues that the respondents appeared to have read too much into the phrase 'necessary day-to-day expenses'. There is nothing extraordinary about it. Necessary day-to-day expenses are determined by the company itself. 'Necessary' does not mean 'absolutely necessary'.

[26] Counsel argues that it appears that the respondents think that the applicant is under some kind of curatorship. It is counsel's argument that the applicant is not under curatorship. The directors of the applicant remain with the fiduciary duty to manage the applicant's business and in particular not to allow its operations to be crippled as Justice Coleman wanted to avoid.

[27] On the issue of urgency, counsel submits that the matter is urgent on the basis of the facts presented by the applicant and will not be able to obtain substantial redress at the hearing in due course. The application pertains to unlawful non-payment of the necessary day-to-day expenses of the applicant's business. Counsel argues that Justice Coleman understood that the applicant's business should not be crippled by investigations hence the order he made. The court has statutory and constitutional interest to ensure that orders are effective. The matter is therefore inherently urgent. In support of the urgency, counsel refers the court to the matter of *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others*<sup>3</sup>.

#### Arguments on behalf of the first and second respondents

[28] Counsel argues that the applicant seeks a final interdict on an urgent basis, the effect of which, if granted, could, on a reasonable suspicion held by the

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<sup>3</sup>*Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (G) at para 64; [2014] 4 All SA 67 (GP).

first respondent, result in the dissipation of funds of members of the public obtained by the applicant in contravention of the Banking Institutions Act of 2 of 1998.

[29] Counsel argues that the applicant does so on the basis of an incorrect interpretation of a court order without satisfying the requirements for an urgent application, or a final interdict. The applicant, based on its incorrect understanding of the court order dated 18 March 2022 also failed to make out a case on the merits that the expenses that it seeks to have paid do in fact constitute necessary day-to-day expenses as contemplated in the court order.

[30] Counsel argues that the applicant's application has not satisfied any of the requirements of rule 73(4) and that the urgency is self-created. Counsel argues that no facts are set out in the affidavit to satisfy the court that the application is urgent or that it is so urgent that it must be heard on 8 June 2022 only on conclusions. Further, Counsel argues that the applicant was informed on 18 March 2022, 1 April 2022 and 11 April 2022 respectively that in order for any payment to be released, it has to substantiate the expenses by providing the necessary documents. In addition, the applicant was also informed that the payments will only be released once the second and fourth respondents (in agreement) have determined that the expense is a necessary day-to-day business expense.

[31] Counsel argues that the applicant did not agree with the stance adopted by the respondents and made it clear already on 18 March 2022 that it refused to provide all documents requested by the second and fourth respondents. Instead, the applicant threatened from 30 March 2022 that it will bring an urgent application. For two whole months, it did not bring the application nor did it provide the documents.

[32] Counsel argues that the relief sought is based on a misinterpretation of the court order granted on 18 March 2022 and is inconsistent with the terms of the order. Counsel argues that in interpreting the court order, one must have regard to the order as a whole and in the context in which it was issued.

[33] Counsel argues that the order does not identify the expenses that must be

paid, instead, the court left it to the second and fourth respondents to determine what the expenses that must be released are. Counsel submits that the phrase 'in consultation with' in this context would mean that the release of the payments require concurrence of the second respondent.

[34] Counsel argues that the applicant has not established a right to have the expenses listed paid indiscriminately and without documents to substantiate those payments. It has not established a right to have those expenses paid unless the second and fourth respondents are satisfied that those are legitimate and necessary day-to-day expenses of the applicant.

#### Arguments on behalf of the third and fourth respondents

[35] Counsel on behalf of the third and fourth respondents argues that the third and fourth respondents' numerous requests for it to disclose information in support of its claim are consistent with an anti-dissipation order. Counsel argues that the basis of the applicant's aforesaid unwillingness is premised on its incorrect interpretation of the anti- dissipation order.

[36] Counsel submits that the applicant's application is not urgent and refers the court to the matter of *Mumvuma v Chairperson of the Board of Directors*<sup>4</sup>. Counsel submits that the applicant's founding affidavit is entirely absent primary and secondary evidence speaking to the applicant's satisfaction of rule 73(4)(a) and (b) of court. Therefore, the applicant's application falls to be struck from the roll for lack of urgency, together with costs of one instructing and one instructed counsel.

[37] Counsel submits that together with the discipline in motion proceedings as stated in *Director-General of Namibian Central Intelligence Service and another v Haufiku and others*<sup>5</sup>, the inability to adduce evidence in support of the requirements of the final interdict is final. Counsel argues that the applicant has not adduced evidence in support of the conclusion that items contained in annexure "CB1-03" of

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<sup>4</sup>*Mumvuma v Chairperson of the Board of Directors* HC-MD-CIV-MOT-REV-2017/00094 [2017] NAHCMD 125 (25 April 2017), para 21 to 25.

<sup>5</sup>*Director-General of Namibian Central Intelligence Service and another v Haufiku and others* (SA 33 of 2018) [2019] NASC 7 (12 April 2019).

its founding affidavit constitutes necessary day-to-day expenses. As such, counsel argues that there is no basis (evidential and legal) upon which this court – in the absence of the aforesaid – should then step into the fourth respondent's roll and execute its function in terms of paragraph 3 of the anti- dissipation order.

### Legal principles

#### *Urgency*

[38] Rule 73(3) and 73(4) of the High Court Rules reads as follows:

'(3) In an urgent application the court may dispense with the forms and service provided in these rules and may dispose of the application at such time and place and in such manner and in accordance with such procedure which must as far as practicable be in terms of these rules or as the court considers fair and appropriate.

(4) In an affidavit filed in support of an application under subrule(1), the applicant must set out explicitly-

- (a) the circumstances which he or she avers render the matter urgent; and
- (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.'

[39] In *Nghiimbwasha and Another v Minister of Justice and Others*<sup>6</sup>, 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 para 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

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<sup>6</sup>*Nghiimbwasha and Another v Minister of Justice and Others* [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

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 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.’

[40] In determining whether a matter is urgent or not, each case is decided on its own facts.<sup>7</sup>

[41] The applicant submits that it suffers massively both operationally and financially. To ameliorate the devastating effect of a total freeze of the applicant’s account, this court granted an order for the payment of necessary day-to-day business expenses whilst the investigation by the first respondent continues. The applicant states that it needs its day- to-day expenses in order to continue to operate and exist pending the resolution of the dispute between the parties, provision must be made for the necessary day-to-day expenses. At date hereof the first and third respondents have expressed a willingness to pay an amount of N\$13 000 although the court ordered the partial release on 18 March 2022. There has been no payment

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<sup>7</sup>Tjipangandjara v Namibia Water Corporation (Pty) Ltd (LC 60/2015) [2015] NALCMM 11 (11 May 2015).



of the necessary day to day business expenses for the months ending March 2022, April 2022 and May 2022. At the time of handing down this judgment a further month end would have come and gone. According to the applicants, all efforts to resolve the issue came to nought. The applicant avers that it was exactly this dilemma which caused them to approach the court and for the court to order a pending resolution of the dispute between the parties. The applicant avers that a future claim for damages offers no solace against the threat of complete shutdown of the applicant's business. The applicant further submits that if the applicant is refused a hearing on urgent basis it will be deprived of its right to have its necessary day-to-day expenses released and will in the process not survive financially. The applicant continues to suffer irreparable financial and operational harm as a result of the unlawful interference of the second and fourth respondents. The court is satisfied that the applicant has met the requirements as set out in terms of rule 73 in that it gave a blow by blow account of the difficulties they encountered since the granting of the order of 18 March 2022 and all the facts that they rely upon to show that the matter is urgent. The court is further satisfied that the applicant has no other remedy available and that sufficient redress will not be possible in due course.

#### Compliance with court orders

[42] In the case of *The Law Society of Namibia v Kamwi*<sup>8</sup>, Miller AJ as he then was concurred with his brother Honourable Justice Masuku on the issue whether parties can decide whether or not to comply with court orders:

'[47] In the case of *Endunde v The Chairperson of the Okavango East Communal Land Board*,<sup>9</sup> Honourable Mr Justice Masuku referred to the remarks regarding the status of court orders that were made in a Kenyan case of *Dr Fred Mutiangi, the Secretary to Cabinet, Ministry of Interior and Coordination of National Government v Miguna Miguna and Others*<sup>10</sup> in which it was held that 'when courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed.

<sup>8</sup>The Law Society of Namibia v Kamwi (HC-MD-CIV-MOT-GEN-2019-00095) [2020] NAHCMD 301 (21 July 2020).

<sup>9</sup>Endunde v The Chairperson of the Okavango East Communal Land Board (HC-MD-CIVMOT-GEN-2016/00384) [2018] NAHCMD 113 (27 April 2018) at para 2.

<sup>10</sup>Civil Application No. 1 of 2017 (UR 1/2018).

Court orders issued *ex cathrada*, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, the upholding of the rule of law are not mere platitudes but present realities’.

[43] In the case of *Teachers Union of Namibia v Namibia National Teachers Union & Others*<sup>11</sup>, the court stated that ‘the following: ‘...in line with the approach in *Fakkie*, the appellant has shown that the order of court the respondents are said to have violated; that such order was known by the first respondent as it was party to its making and that the first respondent did not comply with the order. In that matter the facts were established beyond reasonable doubt. It follows that the respondents bore the evidential burden in relation to the requisites of willfulness and *mala fide*. Should the respondents fail to advance evidence establishing a reasonable doubt as to these elements, contempt of court will have been established beyond reasonable doubt. It is necessary therefore to return to the consideration of how the parties have dealt with the factual matrix of the dispute’. [own emphasis].

[44] The order issued on 18 March 2022 has not been varied or rescinded, therefore the said order still stands and is binding on all the parties. In this matter the simple and undisputed fact is that there has been no partial removal of the freeze to meet the applicant’s necessary day-to-day business expenses. Further, there has also been no release of payments from applicant’s account which would be necessary for the day-to-day running of its business. The reason for the first and second respondents’ failure to facilitate partial removal of the freeze and third and fourth respondents’ failure to release payments from applicant’s account, lies in the respondents’ interpretation of the order dated 18 March 2022.

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<sup>11</sup>Teachers Union of Namibia v Namibia National Teachers Union & Others (SA 26/2019) [2020] NASC 8 (7 May 2020).

[45] In *Communications Regulatory Authority of Namibia (CRAN) v Telecom Namibia & others*, Case No: SA37/2021, delivered 4 November 2021 the court held that: ‘the well- established approach to the interpretation of court judgments and orders is to follow the basic principles applicable to construing documents in order to ascertain the intention of the court. The well-known rules relating to the construction of text or documents stress the importance of the context in which a document is drafted which is ‘relevant to its construction in all circumstances, not only when the language appears to be ambiguous’. This court therefore cannot look at the order in isolation but must look at the context in which the order was granted.

[46] The applicant brought an urgent application for the setting aside of the decision to freeze its account in terms of section 6(2)(f) of the Banking Institutions Act 2 of 1998 which was placed on the applicant’s account. The applicant in this application referred to its founding affidavit in that application where it explicitly sets out the expenses which it has to pay and submitted that, if not paid, it would threaten the very existence of applicant’s business. That court did not grant the initial relief sought but ordered the first respondent to do everything necessary to partially release the freeze pending the outcome of the dispute between the parties. The partial release is clearly aimed at giving the applicant an opportunity to meet its necessary day-to-day business expenses. The further order is that the third respondent must release payments from applicant’s account the necessary for day-to-day running of its business, subject to the supervision of the fourth respondent and in consultation with the second respondent which appears to be the bone of contention.

[47] The phrase which is the root of the discord between the parties is: ‘subject to the supervision of the 3<sup>rd</sup> respondent’s compliance officer and in consultation with 1<sup>st</sup> Respondent’s Authorised Officer’.

[48] In *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another*<sup>12</sup> the Supreme Court, quoting with approval the sentiments

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<sup>12</sup>Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another 2012 (2) NR 566 (SC) at 591C – E.

stated in *Van Rooyen and Others v The State and Others*<sup>13</sup> stated:

'The meaning of the phrases in consultation with and after consultation with are now well established. In consultation with requires the concurrence of the other functionary (or person) and if a body of persons, that concurrence must be expressed in accordance with its own decision-making procedures'.

In the former case the person making the decision cannot do so without the concurrence of the other functionary (or person). In the latter case he or she can.'<sup>14</sup>

[49] The word 'supervision' is a verb and is defined in the Oxford English Dictionary<sup>15</sup> as: 'observe and direct the execution of (a task or activity) or the work of (a person)'.<sup>16</sup> The Cambridge Dictionary defines it as: 'the act of watching a person or activity and making certain that everything is done correctly, safely, etc.' It would appear from the use of this phrase that the applicant was to execute the payments under the watchful supervision of the fourth respondent and in concurrence with the respondent.

[50] The court could easily have used other phrases like 'subject to authorisation' and 'subject to the discretion' if it was intended that fourth and second respondents were to have those powers. It is for this reason that I conclude that the respondents have overstepped their mandate given by the court in their interpretation of the third prayer of the concerned order by assuming that the court granted them the discretion to decide which payments to make. The fourth respondent was merely given a supervisory function and such function is to be performed in consultation with the second respondent. The respondents must comply with the court order and release the payments from applicant's account necessary for the day to day running of its business, with immediate effect.

[51] The applicant in this application, sought and order for the payment of such other amounts constituting its necessary day-to-day expenses. The order forming the subject matter of dispute is quite clear. It indicates that the third respondent must release payment from applicant's account necessary for the day-to-day running of its

<sup>13</sup>2001 (4) SA 396 (T) (2001 (2) SACR 376; 2001 (9) BCLR 915) at 453.

<sup>14</sup>(See *Central Procurement Board v Nangolo NO and Others* 2018 (4) NR 1188 (HC). page para 79

<sup>15</sup>The eleventh edition revised

<sup>16</sup>

business. The third respondent's bank statements of the applicant would give a history of what those payments are and as such would be a helpful guide for the third and fourth respondents to supervise such payments. The court in its order did not define what payments are necessary for the 'day-to-day running of the business' and neither will this court endeavour to do so.

[52] There is no evidence that the conduct of the respondents are wilful or mala fides but their conduct resulted in considerable discomfort for the applicant. It is most likely the reason why the applicant did not bring an application for contempt of court. However, no further failure to give effect to the order of this court would be justified. It is also for this reason that the court do not deem it necessary to impose a punitive cost order.

#### Costs

[53] The general rule, namely that costs follow the event, is that, the successful party should be awarded his or her costs. I see no reason why this court must deviate from the rule, such cost to include the cost of one instructing and one instructed counsel.

[54] In the result the following order is made:

1. Condonation is granted for the applicant's non-compliance with the rules of the High Court relating to the service and exchange of papers and the matter is heard as one of urgency contemplated in terms of Rule 73 of the Rules of Court.
2. The third and fourth respondents and to the extent necessary, first and second respondents must comply with the court order dated 18 March 2022 with immediate effect and release payments/funds from the applicant's bank account which is necessary for the day-to-day running of the applicant's business from date of the court order to date of this order.
3. The respondents, jointly and severally, the one paying the other to be absolved must pay the applicant's cost, such costs to include the cost of one

instructing and one instructed Counsel.

4. The matter is finalised and removed from the roll.

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M A TOMMASI  
Judge

#### APPEARANCES

FOR THE APPLICANT: S Namandje (assisted by Mr Diedericks) Instructed by  
Afrika Jantjies and Associates, Windhoek

FOR THE RESPONDENT: Adv. Bassingthwaighte

Instructed by LorentzAngula Inc, Windhoek

Adv. Muhonga

Instructed by Fisher, Quarmby & Pfeiffer, Windhoek