

REPUBLIC OF NAMIBIA



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

Case No.: HC-MD-CIV-MOT-GEN-2023/00136

In the matter between:

KENNETH ROBSON !NARUSEB

APPLICANT

and

**STANDARD BANK OF NAMIBIA LIMITED
DEPUTY SHERIFF OF WINDHOEK**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *!Naruseb v Standard Bank of Namibia Limited and Another* (HC-MD-CIV-MOT-GEN-2023/00136) [2023] NAHCMD 156 (26 March 2023)

Coram: SIBEYA J
Heard: 26 March 2023
Delivered: 26 March 2023
Reasons: 30 March 2023

Flynote: Applications – Urgent application – Rule 73 – Certificate of urgency – Effect of settlement negotiations on pleadings or where a matter is to be launched or where there exists a matter before court – Consequences of allegations not pleaded and submitted from the bar – Negligence of the lawyer to be pleaded and lawyer to be cited for such lawyer to be afforded *audi* – Urgency of the application found to be self-created.

Summary: The matter was enrolled as one of urgency and the court was called upon to adjudicate on whether or not the matter was urgent and whether or not to stay the sale in execution pending the outcome and finalisation of a rescission application due to be filed on or before 3 April 2023.

The applicant claims that service of the combined summons was not effected on him and that he only learnt of the intended sale in execution on 1 February 2023 after he held a meeting with the first respondent's legal practitioners. He further stated that he made settlement proposals to the said lawyers but ultimately received no favourable response. The applicant then approached Siyomunji Law Chambers on 24 February 2023 to assist with staying the sale in execution, from he received no feedback for about a month. The applicant, on 23 March 2023, approached the offices of Loius Karsten Legal Practitioners for urgent relief to be sought resulting in this application.

Held: that the applicant failed to comply with rule 73(1) for failure to certify, in the certificate of urgency, that this matter is so urgent that it should be heard on any day and at any time other than a court day at 09h00.

Held that: negotiations do not suspend the filing of the pleadings unless agreed to by the parties and equally, the urgency of an application is not suspended by negotiations between the parties.

Held further that: an argument made from the bar with no trace in the founding affidavit or evidence of whatsoever nature, has no evidential value as a possibility exists that had such argument been part of the founding affidavit or evidence, the respondents may have responded otherwise.

Held further that: the applicant failed to establish to the satisfaction of the court, that his matter should be heard as one of urgency.

ORDER

1. The applicant's non-compliance with the Rules of this Court pertaining to time periods for service of the application giving notice to parties and exchange of pleadings as contemplated in Rule 73 of the Rules of this Court is refused and the application is struck from the roll for lack of urgency.
2. There is no order as to costs.

RULING

SIBEYA J:

Introduction

[1] The applicant approached this court on an urgent basis to seeking the stay of a sale in execution. The application was launched on Saturday, 25 March 2023 at around 20h00 and was set down for hearing on the same date at 21h00. Upon being assigned, and considering that the sale intended to be stayed is said to be effected on Monday, 27 March 2023, the court ordered that the application be heard on Sunday, 26 March 2023 at 14h00.

[2] The applicant seeks the following orders:

'1 An order in terms whereof the Applicant's non-compliance with the forms and service as provided by the Rules of this Honourable Court is condoned and that this matter be heard on an urgent basis as contemplated by Rule 73(3);

2 An order in terms whereof the sale in execution in respect of: CERTAIN: Erf No. 5540 Khomasdal, Extension No. 16, SITUATE: In the Municipality of Windhoek, Registration Division "K", Khomas Region, MEASURING: 628 (Six Hundred and Twenty Eight) Square Meters, HELD: Deed of Transfer No. T 5370/201, SUBJECT: Conditions contained therein and those set out in Notarial Deed No. K461/2019 is stayed, pending the outcome and finalisation of the Applicant's Rescission Application.

3 Costs of the application if opposed.

4 Further and/or alternative relief.'

[3] The applicant states that he seeks to have the sale in execution stayed pending the outcome and finalisation of the rescission application which is to be filed on or before 3 April 2023.

The parties and legal representation

[4] The applicant is Mr Kenneth Robson !Naruseb, a major male residing in Windhoek.

[5] The first respondent is Standard Bank of Namibia Limited, a duly registered bank with limited liability and carrying on business with its principal place of business situated at No.1, Chasie Street, Kleine Kuppe, Windhoek.

[6] The second respondent is the Deputy Sheriff of Windhoek, with offices situated at 422, Independence Avenue, Windhoek. The Deputy Sheriff is cited for the interest in the matter as the authority tasked to execute the warrant of execution.

[7] The applicant is represented by Mr Karsten while the respondents did not enter appearance to oppose the application.

Urgency

[8] The applicant states, in the founding affidavit, *inter alia*, that his property (Erf 5540, Khomasdal, Windhoek) referred to above was declared executable by order of court and is due to be sold in execution on Monday, 27 March 2023. While not appearing in the applicant's papers filed of record, it was brought to the attention of the court that the sale in execution is scheduled for 15h00 on 27 March 2023. The applicant alleges that he was not afforded an opportunity to defend the action instituted by the first respondent which culminated in the said intended sale in execution.

[9] The applicant claims that service of the combined summons was not effected on him. He proceeds to state that on 1 February 2023, he learnt of the intended sale in execution scheduled for 27 March 2023 after a meeting held with Koep and Partners, the first respondent's legal practitioners. He states further that he was thereafter engaged in settlement negotiations with the said legal practitioners. He approached several financial institutions for a loan in attempt to pay the debt owed to the first respondent without success.

[10] On 15 February 2023, he made settlement proposals to Koep and Partners. By 22 February 2023, a response was received from Koep and Partners which was not favourable to the applicant, as the first respondent was not prepared to cancel the sale in execution.

[11] The applicant states that on 24 February 2023, he approached the offices of Siyomunji Law Chambers for assistance to stay the sale in execution. He states that after numerous engagements with Siyomunji Law Chambers, no cogent update or outcome was received from the said lawyers.

[12] The applicant states further that by 23 March 2023, and considering that the date for the sale in execution was fast-approaching, he contacted the offices of Louis Karsten Legal Practitioners, his legal practitioners of record, for urgent assistance. The said legal practitioners filed this application in the evening of 25 March 2023 for hearing on the same date at 21h00 as alluded to above.

Rule 73

[13] Urgent applications are regulated by rule 73 of the Rules of this Court. Rule 73(1) provides that:

‘An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter is so urgent that it should be heard at any time or on any other day.’¹

[14] The question that immediately begs determination is whether or not the applicant complied with rule 73(1).

[15] Ms Lyana Lardelli-van der Westhuizen, one of the legal practitioners for the applicant filed a certificate of urgency. I find it befitting to quote the certificate of urgency in its entirety. It reads:

‘I, the undersigned, LYANA LARDELLI-VAN DER WESTHUIZEN, do hereby certify that –

1. I am a major female legal practitioner, practicing as such under the name and style of Louis Karsten Legal Practitioners, with its principal place of business situated at units 7 and 15, Hidas Centre, 21 Nelson Mandela Avenue, Klein Windhoek, Windhoek, Republic of Namibia.
2. I am the legal practitioner of record on behalf of the Applicant in this matter.
3. I have perused the papers in this matter which in my opinion disclose circumstances of urgency which are such as to entitle this Honourable Court to hear the matter as one of urgency in terms of Rule 73(3) of the Rules of this Honourable Court.

DATED at WINDHOEK on this 25th day of MARCH 2023.’

¹ This is also required by Practice Directive 27(4) of this court which provides that: “(4) Where an urgent application is brought to court on a court day at a time other than the time determined by the rules or on a day not being a court day, the applicant must in addition to filing 24 the certificate of urgency contemplated in rule 73(1), make out a case that the application be heard at any other time than at 9h00 on a court day.”

[16] What is glaringly missing from the certificate of urgency is the certification by a legal practitioner, expressly required by rule 73(1), that the matter is so urgent that it should be heard at any time or on any other day other than a court day at 09h00. As quoted above for all to see, the certificate of urgency filed in this matter is as silent as a church mouse on the certification of the matter to be heard on a day other than a court day and court time. The applicant scheduled the matter to be heard on a Saturday at 21h00 without certifying that the application is so urgent that it should be heard as scheduled.

[17] I am of the view that the applicant failed to comply with rule 73(1) for failure to certify, in the certificate of urgency, that this matter is so urgent that it should be heard on any day and at any time. I find that the certificate of urgency filed by the applicant is half-baked resulting in essential ingredients missing. On this basis alone, the application does not appear to pass muster in order allow the matter to be heard as one of urgency and should be struck from the roll.

[18] The applicant, on his own version, became aware on 1 February 2023, of the intended sale in execution scheduled for 27 March 2023. From 1 February to 22 February 2023, the applicant was engaged in settlement negotiations with Koep and Partners. When he realised that the negotiations bore no favourable results he approached Siyomunji Law Chambers on 24 February 2023 for assistance to stay the sale in execution.

[19] It appears from the founding affidavit that the applicant obtained no assistance from Siyomunji Law Chambers. On 23 March 2023, he then approached his legal practitioners of record for urgent assistance to stay the sale in execution.

[20] This court, in *Nkinda v The Municipal Council of the Municipality of Windhoek*,² had occasion to consider the veracity of the application brought on urgency and remarked as follows at para 10 – 11:

² *Nkinda v The Municipal Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-GEN-2019/00400) [2019] NAHCMD 446 (31 October 2023).

[10] Urgent applications are not a given as they interfere with the normal orderly arrangement of court rolls and get prioritized over already scheduled matters. It was accentuated in *Luna Meubel Vervaardigers v Makin and Another*³ that:

“Urgency involved mainly the abridgement of times prescribed by the rules and secondarily, the departure from established filing and sitting times of court.”

[11] Urgent applications therefore enjoy an unfair advantage which requires closer scrutiny by the court for the application to be sanctioned as one of urgency and to be accorded precedence over other cases.’

[21] It is worth mentioning that in order to convince the court that an application should be heard on an urgent basis, the applicant, in compliance with rule 73(4), must explicitly set out, in the founding affidavit,⁴ the circumstances that render the matter urgent and further provide reasons why the applicant cannot be afforded substantial redress in due course. Where urgency is self-created, the court will refuse to grant the indulgence to the applicant that the matter be heard on an urgent basis (*Bergmann v Commercial Bank of Namibia Ltd*⁵).

[22] Maritz J in a celebrated decision of *Bergmann*,⁶ a matter that is relatively similar to the present application, where the court was also seized with an urgent application for stay of a sale in execution where parties were engaged in settlement negotiations prior to launching the application, said the following at p. 49:

‘The Court's power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one. That much is clear from the use of the word ‘may’ in Rule 6(12). One of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fides* or through his or her culpable

³ *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) 136H.

⁴ *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC).

⁵ *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 (HC).

⁶ *Bergmann v Commercial Bank of Namibia Ltd* (*supra*) at page 49.

remissness or inaction. Examples thereof are to be found in *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) and *Schwiezer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T)).’

[23] At page 50 of *Bergmann (supra)*, Maritz J further remarked that:

‘It often happens that, whilst pleadings are being exchanged or whilst execution procedures are under way, the litigating parties attempt to negotiate a settlement of their disputes or some arrangement regarding payment of the judgment debt in instalments. The existence of such negotiations does not *ipso facto* suspend the further exchange of pleadings or stay the execution proceedings. That will only be the effect if there is an express or implied agreement between the parties to that effect.’

[24] It is settled law that settlement negotiations do not stay the filing of pleadings or stay the sale in execution unless there is an express or implied agreement between the parties. The rationale behind this principle is, in my view, the uncertainty of the outcome of negotiations. Rhetorically, one may ask, what is to remain of an application sought to be launched on urgency if it is put on ice pending settlement negotiations for whatever period? Such application may inevitably well lose its urgency.

[25] It should, by now, be clear to all and sundry that negotiations do not suspend the filing of the pleadings unless agreed to by the parties. Equally, the urgency of an application is not suspended by negotiations between the parties. I find, therefore, that the applicant had a duty to launch his application soon after becoming aware of the sale in execution scheduled for 27 March 2023.

Period: 1 to 22 February 2023

[26] The applicant appears to have done nothing to advance his cause during the period of 1 to 22 February 2023, except for sourcing funds from the financial institutions and engage in settlement negotiations. He does not mention any step taken in attempt

to seek the rescission of the default judgment or seek an order to stay the sale in execution scheduled for 27 March 2023.

[27] During oral arguments and to a question posed by the court as to the reasons why the applicant did not launch an urgent application to stay the sale in execution during the negotiations period of 1 to 22 February 2023, Mr Karsten submitted that the applicant lacked funds to instruct a legal practitioner to bring such application. The alleged lack of funds may be true, but such allegation features nowhere in the founding papers before court.

[28] The litigants must be reminded that it is the founding papers that are served on the respondents that form the backbone of such applications. It is further on the basis of the founding papers that the respondents make an election whether or not to oppose the application. I find that the absence of evidence in the founding affidavit or in oral evidence or any other form of evidence, that the applicant failed to launch the urgent application due to lack of funds, as suggested by Mr Karsten, leads to one conclusion, that no weight should be attached to the mere submission from the bar regarding the said lack of funds.

[29] I find it plain that, the applicant's failure to launch the urgent application between 1 and 22 February 2023 was due to settlement negotiations with Koep and Partners and nothing more. That much is what is deduced from the founding affidavit.

[30] I further find, at the backdrop of the *Bergmann* decision, that the applicant, in my view, cannot be exonerated for failure to launch his application soon after 1 February 2023.

Period: 24 February to 22 March 2023

[31] On 24 February 2023, the applicant approached Siyomunji Law Chambers for assistance to stay the sale in execution. He alleges that after numerous engagements

with Siyomunji Law Chambers, he did not receive feedback or progress on the matter. This allegation has adverse effect on Siyomunji Law Chambers, yet the founding papers were not served on Siyomunji Law Chambers. No *audi* was afforded to Siyomunji Law Chambers. This court has in the past discouraged the approach where erstwhile legal practitioners are thrown under the bus for their alleged remissness, so to speak, while not affording them an opportunity to respond to the adverse allegations.⁷

[32] It appears, from the founding affidavit, that the applicant resigned himself to Siyomunji Law Chambers when he sought their assistance. He laid back and did nothing despite there being no feedback or update from the said lawyers. Even if it is accepted that Siyomunji Law Chambers did not provide feedback and updates on the matter to the applicant, can the applicant be excused for sitting idle? Mr Karsten argued that the applicant handed his matter to the lawyers, suggesting that there is nothing else he could have done.

[33] Van Niekerk J in *Primedia Outdoor Namibia (Pty) Ltd v Kauluma*,⁸ while discussing condonation remarked that:

‘There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court).’

[34] Although the above remarks were made in respect to an application for condonation, I hold the view, that they find application to the present matter. Where the legal practitioner fails to carry out an instruction from the client and time passes by, it would be wrong for the client to sit idle and wait for a month for feedback which is not forthcoming, especially where there is an imminent sale in execution. After all, it is the applicant’s property that is due to be sold.

⁷ *Maestro Design v Microlending Association of Namibia* (HC-MD-CIV-MOT-GEN-2018/00414) [2020] NAHCMD 140 (7 May 2020) at para 60 – 61. See also: *Joseph v Ministry of Education, Arts and Culture* (HC-NLD-LAB-APP-AAA-2021/00005) [2021] NALCNLD 4 (17 December 2021) at para 57 – 58.

⁸ *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* 2015 (1) NR 283 (LC) at para 12.

[35] In my view, the applicant does not explain what reasonable steps he took to stay the sale in execution between 24 February and 22 March 2023. I find that this is such a matter where the alleged negligence of the legal practitioner will not avail the applicant.

[36] I find, in the premises that the applicant failed to account for the period of 1 February to 22 March 2023. The fact that the sale in execution is due on 27 March 2023, may be said to render the matter urgent. But, such urgency is, in my view, self-created. This is premised on the finding that the applicant, despite being made aware on 1 February 2023 of the sale in execution scheduled for 27 March 2023, he did not launch an application to stay the sale in execution until Saturday, 25 March 2023.

[37] As I draw this ruling to a close, I observe that Mr Kartsen argued from the bar that contact was made with the second respondent on whether rule 110(3), regarding the circulation of the intended sale in execution in two newspapers and the *Government Gazette*, was complied with. The second respondent is said to have responded that he could not confirm compliance with rule 110(3). This is but one of the bases on which the application should succeed, argued Mr Karsten.

[38] The difficulty that I have with this argument is that it is an argument made from the bar with no trace of it in the founding affidavit or admissible evidence of whatsoever nature, neither is there confirmation of the allegation from the second respondent. In my view, it remains an argument with no evidential basis. A possibility exists that had it been part of the affidavit or evidence, the respondents may have responded otherwise. I, therefore, attach no weight to the said argument.

[39] The applicant argues that the service of the combined summons was defective as there were two different returns of service and there was further no proper service of the rule 108 application. This forms part of the merits of the application which I am not prepared to traverse in the absence of the applicant first satisfying the court that the matter deserves to be heard as one of urgency.

Conclusion

[40] In view of the foregoing findings and conclusions, this court opines that the applicant has not set out explicitly the circumstances regarding urgency. If there is any urgency at all, it is self-created. The applicant has, therefore, failed to establish to the satisfaction of the court, that his matter should be heard as one of urgency.

[41] For the above reasons, this court refuses to exercise its discretion to grant the indulgence sought by the applicant to hear this matter as one of urgency.

Order

[42] In the result, I deem the following order to meet the justice of this matter:

1. The applicant's non-compliance with the Rules of this Court pertaining to time periods for service of the application, giving notice to parties and exchange of pleadings as contemplated in Rule 73 of the Rules of this Court is refused and the application is struck from the roll for lack of urgency.
2. There is no order as to costs.

O S Sibeya

Judge

APPEARANCES:

APPLICANT: L Karsten
Of Louis Karsten Legal Practitioners, Windhoek

1st and 2nd RESPONDENTS: No appearance