

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b>  Hans-Wolf Von Schumann  and  Petra Christina Von Schumann Deputy Sheriff - Gobabis District	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2023/00290
Applicant	<b>Division of Court:</b> Main Division
1 <sup>st</sup> Respondent 2 <sup>nd</sup> Respondent	<b>Heard on:</b> 6 July 2023
<b>Heard before:</b> Honourable Lady Justice Rakow	<b>Reasons delivered on:</b> 27 July 2023

**Neutral citation:** *Von Schumann v Von Schumann* (HC-MD-CIV-MOT-GEN-2023/00290)  
[2023] NAHCMD 440 (27 July 2023)

**Order:**

1. The matter is struck from the roll for a lack of urgency
2. The respondent is awarded the costs of this application, such costs to include one instructed and one instructing counsel.

**Reasons for order:**

RAKOW J :

Introduction

[1] The applicant is an adult male farmer and resides, at least partly, on the farm Marigold in the Gobabis district. The first respondent is his ex-wife who resides in Windhoek and the second respondent is the deputy Sheriff for the Gobabis district. The purpose of the application is to

seek an interim interdict, interdicting the second respondent from proceeding with a sale in execution, which sale was set to take place on 7 July 2023. It was to be a sale of movable assets including farm implements and animals.

### Background

[2] The applicant was married to the respondent and they were subsequently divorced by this court under case number HC-MD-CIV-ACT-MAT-2021/03071. On 18 August 2022, the parties entered into a settlement agreement which, was subsequently made an order of court. During the subsistence of their marriage, the first respondent and the applicant managed a farm named Marigold in the Omaheke region. They ran two business operations at the farm namely a livestock business in respect of rearing sheep and cattle and a hunting business, Omupanda Jagd Safari CC. The first respondent was responsible for the administration in respect of both businesses and was the custodian of important documents for both these businesses as well as the accounting records.

[3] In terms of the settlement agreement, the first respondent had to sign all documents which would be necessary to ensure transfer of the first respondent's fifty percent member's interest in the close corporation as well as hand over all documents pertaining to the business interests of the applicant. The applicant on the other hand, had to pay N\$4 900 000 over to the first respondent before 10 May 2023.

[4] This amount was not paid over to the first respondent despite demand which necessitate her to apply for a warrant of execution from court, which attachment of property is the bone of contention in the current application.

[5] The applicant however alleged that he applied for a loan from a commercial bank to pay out the amount but needs a certain original bond documents for a N\$800 000 bond in favour of a certain Mr. Gradi who resides in Germany. This document seems to now have gone missing. The plaintiff was under the impression that the original document was with the respondent's previous legal practitioner, the late Mr. Bugan, but this seems to not have been the case. Although the bank approved the second bond over the property in November 2022, the issue of the original bond which was not forthcoming seems to be the only outstanding issue as per email correspondence from the legal practitioners of the bank to the legal practitioner of the applicant, dated 26 June 2023. This was then also the main reason, according to the applicant, why he

has not paid over the money to the first respondent. The writ was issued on 16 May 2023 and on 31 May 2023 he was served with the writ with the sale set to take place on 7 July 2023.

Notice of motion

[6] The relief is sought in two part, being part A and part B. It reads as follows:

PART A

1. Condoning the Applicant's non-compliance with the rules of this Honourable Court and hearing this application on an urgent basis as envisaged by rule 73(3) of the High Court Rules.
2. Interdicting the Second Respondent from proceeding with the sale in execution that is scheduled for Friday, 07 July 2023 pending the finalisation of the relief sought in PART B of this application.

PART B

3. That the relief set out in paragraph 2 above shall immediately operate as an interim order with effect from the date of the grant of the interim relief effect from the date of the grant of the interim relief.
4. It is hereby declared that the obligation imposed on the Applicant by way of Clause C4 of the settlement agreement dated 18 August 2022 to pay the First Respondent the sum of N\$4 900 000.00 within six (6) months from 10 November 2022 was subject to the First Respondent complying with the reciprocal obligations imposed on the First Respondent by way of Clause C7 and C8 of the settlement agreement.

4.1. It is declared that the First Respondent by failing and or refusing to provide to the Applicant the original private mortgage bond which is registered in favour of Erwin Georg Gradi in respect of Farm Marigold No. 36, Gobabis, Omaheke Region is in breach of Clauses C7 and C8 of the settlement agreement.

5. That the First Respondent is ordered to deliver to the Applicant the original private mortgage bond which is registered in favour of Erwin Georg Gradi in respect of Farm Marigold No. 136, Gobabis, Omaheke Region ('the immovable property') within five (5) days of this order.

6. Costs of one instructing and one instructed counsel on an attorney and own client scale, in the event that this application is opposed.

7. Further/alternative relief.

#### Legal arguments

[7] On behalf of the applicant, it was argued that the respondent did not fulfill her part of the settlement agreement which made it impossible for the applicant to perform on his part of the settlement. It was further indicated that if all his farm implements and animals were to be sold on this auction, he would have no way to earn a livelihood. His legal representative further indicated that she has, for some time now, followed up on the position regarding the original deeds documents but only received a response from the legal practitioners of the respondent. It was further argued that the applicant indeed made out a case for urgency and that it was not self-caused urgency as he at all times, was making attempts to obtain the bond documents.

[8] On behalf of the respondent, it was argued that the applicant failed to meet the requirement of urgency in that the urgency was self-created. The applicant knew that he will have to pay the settlement amount on 10 May 2023, and he knew of this since the parties signed the settlement but he failed to take any steps to make arrangements for the amount to be paid. The applicant further received a letter from the respondent's legal practitioners on 5 May 2023 informing that the amount is payable on 10 May 2023. They again wrote to his instructing attorney on 24 May 2023 reminding them that the amount in terms of the settlement is now due. On 29 May 2023, the warrant was served on him and his property attached. He still did nothing until 6 July 2023, the evening before the auction. He did not advance a reasonable explanation and for that reason the application should be dismissed.

[9] The part B of the application is further not instituted and not competent as it is asking for a final interdict. The applicant should proof that he has a clear right to the relief. At this stage the applicant is in contempt of court and the court should not come to his rescue. There is no guarantee that the respondent will get her money or when she will get her money and the applicant purge his contempt.

#### Legal considerations

[10] The applicant is obligated to provide reasons why he or she or it, as in this case, sets out what renders the application urgent and that the applicant cannot be afforded substantial redress at a hearing in due course. In *Nghiimbwasha and Another v Minister of Justice and Others*<sup>1</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 (11):

'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 mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused.'

[11] 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.

[12] 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.

[13] It is understood that, in general stay of execution matters are inherently urgent, but the obligations created under rule 73(3) and 73(4) are still to be adhered to and complied with. The urgency relied on by the applicant is the fact that the sale in execution was advertised for 5 September 2020. He however does not deal in any way with the time that lapsed since the allocatur was received by the parties in 2018 till August 2020 when the goods were attached. In this instance no indication is found why no redress will be possible in due course on the papers

<sup>1</sup>*Nghiimbwasha and Another v Minister of Justice and Others* [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

before court. The compliance with rule 73 is the key to the door through which a litigant will eventually obtain redress.<sup>2</sup> This compliance must also be seen in the light of the notice handed up by the applicant's legal practitioner which surely diminishes the aspect of urgency.

[14] *JB Cooling and Refrigeration CC v Stefanutti Stocks Construction (Namibia) (Pty) Ltd and Another*<sup>3</sup> Parker AJ concludes that self-created urgency is one of the instances where parties did not comply with rule 73 and such matters should be struck for lack of urgency. Parties should act with speed and promptness to protect their interests.

[15] In *Bergmann v Commercial Bank of Namibia Ltd and Another*<sup>4</sup> Maritz J as he then was said the following:

'When an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. Urgent applications should always be brought "as far as practicable" in terms of the Rules. The procedures contemplated in the Rules are designed, amongst others, to bring about procedural fairness in the ventilation and ultimate resolution of disputes. Whilst rule 6(12) allows a deviation from those prescribed procedures in urgent applications, the requirement that the deviated procedure should be "as far as practicable" in accordance with the Rules constitutes a continuous demand on the Court, parties and practitioners to give effect to the objective of procedural fairness when determining the procedure to be followed in such instances.'

### Conclusion

[16] The applicant does not offer any explanation why he delayed, from at least 29 May 2023 until the evening before the auction to bring the application for the stay of execution except that he was looking for the original bond documents. No steps were taken since the end of 2022 when he was informed by the bank that his application was approved subject to the obtaining of the original bond documents, to request for a duplicate of such a document. He was not only fully informed about the date and conditions of the sale in execution but also had a legal practitioner working on his matter during that period. It is that delay, attributable to the applicant's inaction that has caused the matter to become urgent. For this reason the court finds that the applicant caused his own urgency and the matter is therefore struck from the roll for a lack of urgency.

<sup>2</sup> *Baltic CC v Chairperson of the Review Panel* (HC-MD-CIV-MOT-REV-2020/00031) [2020] NAHCMD 69 (7 February 2020).

<sup>3</sup> *JB Cooling and Refrigeration CC v Stefanutti Stocks Construction (Namibia) (Pty) Ltd and Another* (APPEAL 122 of 2016) [2016] NAHCMD 134 (29 April 2016).

<sup>4</sup> *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48.

[17] I therefore make the following order:

1. The matter is struck from the roll for a lack of urgency.
2. The respondent is awarded the costs of this application, such costs to include one instructed and one instructing counsel.

<b>Judge's signature</b>	<b>Note to the parties:</b>
RAKOW J Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>Respondent:</b>
M Angula Of Monika Angula & Associates Incorporated, Windhoek	H Garbers- Kirsten Instructed by Koep and Partners, Windhoek