

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Practice Direction 61

Case Title:		Case No: HC-MD-CIV-MOT-GEN-2023/00312
Harold Schmidt	1 st Applicant	Division of Court: Main Division
Faces Properties CC	2 nd Applicant	Heard: 28 July 2023
Central Park Investments CC	3 rd Applicant	
Prestige Properties CC	4 th Applicant	
Newton One Eight Nine CC	5 th Applicant	
Shawnee's Investments CC	6 th Applicant	
and		
Jean-Paul Schmidt	1 st Respondent	
Naomi Schmidt	2 nd Respondent	
Nemi Investments 71 CC	3 rd Respondent	
Leo 107B CC	4 th Respondent	
Heard before: Honourable Lady Justice Rakow		Delivered: 18 August 2023
Neutral citation: <i>Schmidt v Schmidt</i> (HC-MD-CIV-MOT-GEN-2023/00312) [2023] NAHCMD 516 (18 August 2023)		
Order:		
<ol style="list-style-type: none">1. The application is struck from the roll for lack of urgency.2. The Applicants are hereby ordered to pay costs such costs to include the costs of one		

instructing and one instructed counsel.

Reasons for order:

RAKOW J:

Introduction and background

[1] The first applicant is a major male businessman and he is the sole member in the second, third, fourth, fifth and sixth applicants. The first and the second respondents are married and the first respondent is the biological son of the first applicant. The third respondent is Nemi Investments 71 CC and the fourth respondent Leo 107B CC, are both close corporations with limited liability with the first respondent being the sole member of the third respondent and the second respondent the sole member of the fourth respondent.

[2] The first and second respondents reside in Northern Namibia but sometimes also reside for periods in Windhoek. They are currently running an accommodation business in Ondangwa in property that are the core issue in dispute in the current urgent application before court.

[3] The second applicant is the registered owner of immovable property described as the hotel and flats for these proceedings. The erf was initially vacant when bought by the second applicant but has been subdivided afterwards and a hotel named Afrika Stadt Haus has been erected on one of these portions. On the other two portions fifteen flats have been erected of which nine are furnished and six are unfurnished. Three mortgage bonds were registered over these erven with Bank Windhoek. The third applicant is the owner of commercial units that were erected on a separate erf which was also vacant at the time that it was purchased.

[4] At the time of the construction of the hotel and the flats and later the commercial units the first applicant took the first respondent under his wing and allowed him to observe the construction of the properties as an apprentice. The first respondent did not contribute financially or otherwise to the construction of the hotel and flats. After the construction of these properties in 2013 the second and third applicants and the first and second respondents came to an oral arrangement where the first and second respondents were to manage the hotel, flats and commercial units on behalf of the second and third applicants.

[5] They were to pay the second applicant N\$45 000 per month in respect of the hotel and

N\$90 000 in respect of the flats. The income in respect of the commercial property were to be paid into an account of the third applicant. They further had to pay the municipal rates and taxes, pay for the maintenance of the hotel and the flats, excluding wear and tear, pay for the security services of the hotel, attend to all required book keeping and financial record keeping of the second, third, fourth, fifth and sixth applicants and also the personal taxes of the first applicant and then return the hotel, flats and commercial property in the same condition as they received it in.

[6] About three months passed in which the first and second defendants failed to make any payments to the second and third applicants as per the arrangement. The parties then entered into a further oral agreement that they will no longer have to pay N\$90 000 for the flats per month but the money generated by the flats and the commercial properties will be paid directly to the second and third applicants but will still be managed by the first and second defendants.

[7] The first applicant travelled to the North and visited the properties on 11 July 2023. He found the flats and hotel very neglected. It also appears that most of the flats are used as hotel accommodation. He was informed by one of the workers that the flats were fully occupied during the weekend 8 – 10 July 2023. One of the permanent lessees informed the applicant that he signed a lease with the third respondent and pays N\$9 500 per month into the bank account of the third respondent. The commercial units are also not being maintained and are mostly empty. He was informed that people are moving out of these units because their complaints are being ignored.

[8] The first respondent made some changes to the immovable property to suit the targeted image and clientele but the costs of these changes were for the first respondent's own account because he did not have permission to incur the said costs. Through the years the first and second respondents made sporadic payments towards the rental of the hotel. They further makes monthly payments towards the rental of the flats and per the calculations of the first respondent the potential rental income for all the flats is N\$102 500. The monthly payments as from September 2022 differs from N\$23 500 to N\$119 500. Similarly the rental income of the commercial units also differ from month to month but not reaching the potential rental income of N\$133 339.42.

[9] On 2 February 2023, the legal practitioner of the applicants sent the respondents a letter wherein they were given notice to vacate the immovable property on or before 28 April 2023. They were also asked to hand over all active lease agreements with immediate effect and to grant

the applicants or their agents immediate access to view the immovable properties. The legal representative of the respondents responded to this letter and indicated that there was a partnership agreement between the first respondent and the first applicant which is denied by the first applicant.

Relief

[10] The applicants prayed for the following relief:

'The forms and service provided for in the rules of court are dispensed with, the applicants' non-compliance with the forms and service provided for in the rules of court is condoned, the applicants are authorised to bring this application on an urgent basis, and this application is disposed of on an urgent basis as contemplated in rule 73 of the rules of court.

2. The respondents and or any person claiming occupation and or possession and or control through and or under them of the following immovable properties, including all buildings situated thereon ("the immovable properties"), owned by the second and third applicants as follows, are evicted with immediate effect from the immovable properties:

Second applicant:

CERTAIN: Erf no. 3188 Ongwediva (Extention no. 4)
 SITUATE: In the Town of Ongwediva Registration Division "A"
 MEASURING: 6,240 (six thousand two hundred and forty) square metres
 HELD BY: Deed of Transfer T1774/1997

Second applicant:

CERTAIN: Erf no. 8384 (a Portion of Erf 3188) Ongwediva (Extention no. 4)
 SITUATE: In the Town of Ongwediva Registration Division "A" Oshana Region
 MEASURING: 2,324 (two three two four) square metres
 HELD BY: Deed of Transfer no. 8442/2018

Second applicant:

CERTAIN: Erf no. 8385 (a Portion of Erf 3188) Ongwediva (Extention no. 4)
 SITUATE: In the Town of Ongwediva Registration Division "A" Oshana Region
 MEASURING: 1,089 (one nil eight nine) square metres
 HELD BY: Deed of Transfer no. 8443/2018

Third applicant:

CERTAIN: Erf no. 6329 (a Portion of Erf 3304) Ongwediva (Extention no. 5)

SITUATE: In the Town of Ongwediva Registration Division "A" Oshana Region

MEASURING: 8,011 (eight thousand and eleven) square metres

HELD BY: Deed of Transfer no. 6542/2007

Third applicant:

CERTAIN: Erf no. 6330 (a Portion of Erf 3304) Ongwediva (Extention no. 5)

SITUATE: In the Town of Ongwediva Registration Division "A" Oshana Region

MEASURING: 1,1813 (one comma one eight one three) hectares

HELD BY: Deed of Transfer no. 6542/2007

3. The respondents and or any person claiming occupation and or possession and or control of the immovable properties through and or under them are ordered to restore with immediate effect occupation, possession and control of the immovable properties to the second and third applicants respectively.

4. In the event that the respondents and or any person claiming occupation and or possession and or control of the immovable properties through and or under them fail and or refuse and or neglect to vacate and restore the immovable properties as ordered above, the sheriff of the Court or his deputy is authorised and directed to immediately effect their eviction and restore occupation, possession and control of the immovable properties to the second and third applicants respectively.

5. Any and all costs occasioned by the eviction and restoration shall be paid by the respondents and or any person claiming occupation and or possession and or control of the immovable properties through and or under them jointly and severally, the one paying the other to be absolved.

6. The respondents and or any person claiming occupation and or possession and or control of the immovable properties through and or under them are interdicted and restrained from:

6.1 dealing with the immovable properties in any way whatsoever;

6.2 interfering, in any way whatsoever, with the second and third applicants' respective ownership, occupation, possession and control of the immovable properties.

7. The respondents and or any corresponding contracting person claiming occupation and or possession and or control of the immovable properties through and or under them are ordered to immediately provide the second and third applicants with any and all lease agreements concluded in respect of the immovable properties.

8. The respondents and or any person who holds same on their behalf are ordered to immediately provide the applicants with all of the applicants' respective book keeping and financial records, including all of the applicants' respective financial information and documentation, in their possession and or control.

9. In the event that the respondents and or any other person referred to in the two preceding

paragraphs fail and or refuse and or neglect to provide the lease agreements, the book keeping and financial records, and or the financial information and documentation as ordered above, the sheriff of the Court or his deputy is authorised and directed to search and seize same from them in any way necessary for handover to the applicants respectively.

10. Any and all costs occasioned by the search and seizure shall be paid by the respondents and or such other person referred to in the preceding paragraph jointly and severally, the one paying the other to be absolved.

11. In the alternative to paragraphs 2 to 10 above:

11.1 The relief set out in paragraphs 2 to 10 above are granted, effective immediately, operative as an interim interdict, pending finalisation of action proceedings to be instituted by the applicants against the respondents within 30 days.

12. The respondents and or any other person who opposes this application shall pay the costs of this application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed legal practitioner.

13. Further and or alternative relief.'

Urgency

[11] The arrangement was that the first and second respondents will pay N\$45 000 per month for the rental for the hotel which they are currently not doing. The applicants are also not receiving the potential monthly income for the flats and the commercial units. The Ongwediva Town Council monthly statement in respect of the hotel and flats dated 23 June 2023 shows an outstanding balance of N\$436 892.23 and for the commercial units is N\$34 371.14.

[12] In a letter dated 19 June 2023, the applicants' legal practitioners informed the respondents' legal practitioner that in mitigation of the second and third applicants' damages, they will appoint an estate agent with immediate effect to obtain new lease agreements with the lessees of the commercial property and the flats in favour of the second and third applicants. After a number of email correspondences exchanged hands, the estate agent indicated that they will rather not take up the mandate until the first respondent and the applicant had sort out their differences.

[13] The first applicant further alleges that the first and second respondents are keeping the applicants hostage from mitigating their financial damages. The second, third and fourth applicants have outstanding loan amounts at Bank Windhoek that needs to be settled with instalments monthly. The first applicant's monthly shortfall amounts to N\$142 300.77 which

shortfall was meant to be complemented from the income received in respect of the rental income of the second and third applicants. In order to survive the first respondent needs to sell a property and he had interest in the hotel and flats but during December 2022 representatives of a potential buyer were threatened and chased away by the first respondent. It is clear that if the applicants does not get assistance from the court, the immovable properties will eventually be repossessed.

[14] Due to all the facts set out in the founding affidavit the applicants believe they cannot be afforded substantial redress at a hearing in due course.

The requirements an urgent application must meet.

[15] 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*¹ 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) 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 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”, it is 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.’

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

[16] In this instance the applicants did not satisfactorily address the fact that there is no redress in due course. There are in fact sufficient processes available in due course to assist the applicant with his predicament and there is no reason why this matter cannot follow the normal court route without jumping the queue. Both the requirements setting out what makes the matter urgent and setting out why the matter cannot be dealt with in due course is necessary to be present to render a matter urgent, both these should be fully addressed. And I find that the second requirement was not fully addressed and that there are indeed prospects of substantial relief to be granted in due course.

[17] For that reason, I make the following order:

1. The application is struck from the roll for lack of urgency.
2. The Applicants are hereby ordered to pay costs such costs to include the costs of one instructing and one instructed counsel.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Applicant(s):	Respondent(s):
B De Jager (with S Horn) Instructed by Theunissen, Louw & Partners, Windhoek	PCI Barnard (with T Rieth) Instructed by Rieth Legal Practitioners, Windhoek