REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION
OSHAKATI

JUDGMENT

CASE NO: HC-NLD-CIV-MOT-GEN-2021/00005

In the matter between:

GERSON KEENDJELE **APPLICANT**

and

DARIUS KAMANYA **RESPONDENT**

Neutral Citation: *Keendjele vs Kamanya* (HC-NLD-CIV-MOT-GEN-2021/00005) [2021] NAHCNLD 35 (6 April 2021)

CORAM: SMALL AJ
Heard: 29 March 2021
Delivered: 06 April 2021

ORDER

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1. The application to have the matter heard on an urgent basis in terms of rule 73 is refused.
2. There is no order as to costs.
3. The matter is removed from the roll.

JUDGMENT

SMALL AJ:

Introduction

[1] The mechanism and set requirements for urgent applications show an avenue for specifically defined matters. Rule 73 finds application in urgent issues and when applicants cannot find substantial redress in hearings that will take place in due course.

The parties and their representatives

[2] The applicant is Mr Gerson Keendjele, an adult male businessman residing at Erf 5042, Extension 11, Ongwediva, Namibia. Ms Amupolo appeared for the applicant.

[3] The first respondent is Mr Darius Kamanya, an adult male businessman with business and employment at Langa Construction, situated at main road Ondangwa, Namibia.

[4] The second respondent is the Minister of Safety and Security in the care of the Namibian Police's Inspector General, with its principal place of business at the Namibian Police Headquarters, situated at Ausspannplatz, Windhoek, within the Republic of Namibia.

[5] The first and second respondents where both served with the application on 26 March 2021 and both subsequently failed to enter opposition.

The application

[6] The applicant filed an urgent application in this court seeking an interdict against the first respondent. It was framed as follows:

'That a rule nisi be issued calling upon the respondent (s) to show cause, if any, on a date to be determined by the Registrar of the above Honourable Court why an order in the following terms should not be made final:

"That the Respondent be interdicted from interfering with or obstructi[ng] the construction and development of the applicant's complex at Iinongo Location"

Urgency

[7] In *Bank Windhoek Ltd v Mofuka and Another* [1], he Namibian Supreme Court found that a Court seized with an urgent application must recognise that the basic principle of rule 73(4) of the High Court Rules requires that it first decides whether a case had been made for the matter to be dealt with on an urgent basis before it deals with, or pronounces itself, on the main issue. It commits an irregularity that will be set aside on appeal if it does not follow this sequence. Only after a case of urgency has been made out could it condone the non-compliance with the rules and allow an applicant to jump the queue. Otherwise, the applicant should wait at the end of the queue to be heard.

[8] The founding papers must contain all the essential factual averments upon which the litigant's cause of action is based in sufficiently clear terms so that the respondent may know the case that he must meet. If a litigant must attach documents to the founding affidavit, he must identify the facts in the annexures upon which he relies.[2] As the adage goes, in motion proceedings you stand or fall by your papers.

[9] Rule 73(4) reads as follows:

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[1] 2018 (2) NR 503 (SC) paragraph 15; See also *Amushelelo v The Magistrate, Windhoek* (HC-MD-CIV-MOT-REV-2019/00397) [2019] NAHCMD 475 (08 November 2019) paragraph 13

[2] *Standard Bank Namibia Ltd and Others v Maletzky and others* 2015 (3) NR 753 (SC) paragraph 43; *Nelumbu and others v Hikumwah and Others* 2017 (2) NR 433 (SC) paragraph 41-42; Standard Bank Namibia Ltd and Others v Maletzky and Others 2015 (3) NR 753 (SC) at 771B – C para 43.

'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.'

[10] In the matter of *Nghiimbwasha v Minister of Justice*[3] this court said:

'[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.'

[11] Notwithstanding the aforesaid clear indications to the contrary, Applicant's affidavit states the following:

'I am also advised by my legal practitioner of record, that in cases were a party seeks interim relief, he or she simply have to allege the four requisites of an interim relief as I have set out above. There is no need to address the questions of urgency separately from those requisites. The four requisites of an interim relief themselves meet the requirements of urgency.'[4]

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[3] An unreported judgment of this Court Case No *(A 38/2015) [2015] NAHCMD 67 (20 March 2015)* per Masuku AJ; See also *Mumvuma v Chairperson of the Board of Directors* HC-MD-CIV-MOT-REV-2017/00094 [2017] NAHCMD 125 (25 April 2017) paragraph 24.

[4] Paragraph 21 of the Founding Affidavit.

> "In any event, I submit that given the fact that my building plan is due to expire in May 2021 which will lead to further financial implications for me as indicated in paragraph 18 of this affidavit and the nature of the case creates inherent urgency. The matter is therefore urgent as contemplated in rule 73 of the rules of the High Court. This is a matter that cannot be heard in the ordinary course as I will suffer irreparable harm if the hearing does not proceed on an urgent basis."[5]

There is also no substantial redress in due course as it will be difficult to assert and succeed in a claim of damages against any of the respondents and as such, I ask the court to grant interim relief as prayed for in my Notice of Motion.'[6]

[12] In *Usakos Town Council v Jantze and Others*[7] it was decided after referring to *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma (Pty) Ltd v Hypermarket (Pty) Ltd and Another* [8] that the fact that irreparable damages may be suffered is not enough to make out a case of urgency. The fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. The loss that applicant in such a case might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public.

[13] In *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*[9] while referring to other well-known authorities[10], the full bench ruled that an applicant must explain why he or she claims that he or she could not be

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[5] Paragraph 22 of the Founding Affidavit.

[6] Paragraph 23 of the Founding Affidavit.

[7] *Usakos Town Council v Jantze and Others* 2016 (1) NR 240 (HC) in paragraph 20.

[8] *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma (Pty) Ltd v Hypermarket (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 113E – 114B.

[9] *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) paragraphs 19 and 20.

[10] *Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *Salt and Another v Smith* 1990 NR 87 (HC) at 88 (1991 (2) SA 186 (Nm) at 187D – G.

afforded substantial address at the hearing in due course. Failure to provide reasons may be fatal to the application, and mere lip service to this requirement is not enough. Furthermore, irreparable damages that an applicant may suffer is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent.

[14] The applicant's allegation that he was advised that the four prerequisites of the interim relief meet the requirements of urgency and that there was no need to address the questions of urgency separately from those needs to be considered now. I will simply consider the facts alleged and the documents attached as annexures by applicant to decide whether applicant through this avenue made out a case for urgency as is required by Rule 73.

[15] The applicant's averment in paragraph 22 of his affidavit that '[t]his is a matter that cannot be heard in the ordinary course as I will suffer irreparable harm if the hearing does not proceed on an urgent basis' is extremely vague. He does not in detail set out the reasons why he alleges that he cannot be granted substantial relief at a hearing in due course. The reasons or circumstances why the applicant alleges he cannot be granted substantial relief at a hearing in due course had to be included in his affidavit. The averment they included is an inference, a "secondary fact", with the primary facts on which it depends being omitted.[11]

[16] The same can be said for the allegation in paragraph 23 that 'it will be difficult to assert and succeed in a claim of damages against any of the respondents and as such, I ask the court to grant interim relief as prayed for in my Notice of Motion'. The mere fact that something might be difficult does not entitle an applicant to bring a matter to court on an urgent basis.

Interim relief

[11] *Mumvuma v Chairperson of the Board of Directors* HC-MD-CIV-MOT-REV-2017/00094 [2017] NAHCMD 125 (25 April 2017) paragraph 31

[17] The requirements for interim relief are well settled and were neatly summarized in *Nakanyala v Inspector-General Namibia and Others*[12] as follows:

'The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:

(a) a prima facie right,

(b) a well-grounded apprehension of irreparable harm if the relief is not granted,

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

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

To these must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion.'

Origins of Applicant's rights

[18] Applicant alleges that he entered into lease agreement on 13 September 2019 (date stamped 30 September 2019) with the Oniipa Town Council for the lease of an immovable property. The description of the property reads:

'CERTAIN **NO TEMPORARY NUMBER** (*Temporary reference No*.) SITUATED **in the proclaimed area of IINONGO**, ONIIPA TOWN, measuring **N/A square meters** and zoned undetermined, (Hereinafter referred to as "the Property").'

[19] The lease commenced on 01 November 2017 and it is to continue for an indefinite period of time, subject to the lessor's rights of cancellation upon notice to the lessee. The agreement was submitted as annexure "GK3" to the founding affidavit and clause 16 of the lease agreement reads as follows:

'16. WHOLE AGREEMENT

16.1 This Agreement, Council Resolution No.: OTC/26/07/2017-6 and any Annexure to the Agreement and Documents constitute the entire Agreement between the parties.

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[12] *Nakanyala v Inspector-General Namibia and Others* 2012 (1) NR 200 (HC) para 36, quoting from *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) ([1996] 4 All SA 675) at 398 – 399 and *Sheehama v Inspector-General, Namibian Police* 2006 (1) NR 106 (HC) at 117.

16.2 Neither party relies in entering into this Agreement on any warranty, representation or expression of opinion which have not been incorporated into this Agreement as a warranty or undertaking.'

[20] Although Clause 16 states that the agreement and annexures constitute the whole agreement between the parties, annexure "GK3" was, however, placed before the court without annexures. This is important to note considering that the plaintiff is alleging that annexure "GK1" was the land surveyor's map that he had to obtain and provide to the Council to confirm the coordinates of "the property" in respect of which he is alleging his rights are being infringed. It is not clear whether the annexure "GK1" ever formed an attachment to the lease agreement. The property in question still has no description.

[21] Clause 8.1 of the Lease Agreement GK3 provides: 'No variation, alteration or amendment shall be of any force unless reduced to writing and signed by the Parties' This means that if GK3 was obtained afterwards it had to be incorporated into the agreement complying with Clause 8.1.

[22] The map "GK1" is undated and contains no visible co-ordinates. Applicant indicates the following in paragraph 8 of his affidavit: 'I was advised by the said town Council that before they can enter into a lease agreement with myself, I should engage the services a land surveyor to verify the co-ordinates of the plot in question as well as provide a map to the second respondent. I attach hereto the map from the quantity surveyor marked annexure "GK1" There is no explanation why council would have required the plan to be handed to the second respondent being the Minister of Safety and Security.

[23] Nowhere in his affidavit does applicant aver that Annexure "GK'1" was handed to the Council prior to the lease agreement being signed. The said annexure contains a plot number and what appears to be an indication of its size. If GK1 was handed to the council prior to the signature of the lease agreement there seems to be no reason why the plot number and its size would not had been entered into the agreement and the parties' signatures to have been affixed upon it.

[24] Applicant alleges that his building plans will expire in May 2021. It is not clear where applicant gets this date from as the approval, he attaches is the undated GK4. The undated letter from the council indicates that the building plans are valid for 12 months but contains no erf number and no date when plans were handed in. There therefore seem to be no starting date to the 12-month period of validity.

[25] It therefore seems as if applicant is approaching this court on a lease agreement that does not properly identify the plot on which he purports to erect his buildings. Nor is the extent of the property properly part of the lease agreement. Without resorting to clause 14 of the lease agreement and by either agreement or arbitration properly incorporating the number of the plot and its size, applicant cannot even cross the hurdle of proving that he has a prima facie right that is being infringed upon. [13]

[26] By no stretch of the imagination can applicant's attempt to substantiate his right to interim relief be seen as simultaneously providing evidence to make out a case for urgency as is required by Rule 73.

Order

[27] In the circumstances I make the following order:

1. The application to have the matter heard on an urgent basis in terms of rule 73 is refused.
2. There is no order as to costs.
3. The matter is removed from the roll.

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D F Small

Acting Judge

[13] Applying the test as alluded to in *Nakanyala v Inspector-General Namibia and Others* 2012 (1) NR 200 (HC) paragraph 50.

APPEARANCES:

APPLICANT: Ms M Amupolo
Of Jacobs Amupolo, Lawyers & Conveyancers, Ongwediva.