REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK REPORTABLE

JUDGMENT

Case no: HC-MD-LAB-MOT-GEN-2021/00085

In the matter between:

ROSSING URANIUM LTD	**APPLICANT**
and	
ALBERTOS HARASEB	**1st RESPONDENTS**
HAFENI NALUSHA	**2nd RESPONDENTS**
GEORGE MARTIN	**3rd RESPONDENTS**
JULIUS ASHIPALA	**4th RESPONDENTS**
SAMUEL SHINDUME	**5th RESPONDENTS**
PAULUS SHIKONGO	**6th RESPONDENTS**
FILLEMON IHUHWA	**7th RESPONDENTS**
KLEOFAS GAINGOB	**8th RESPONDENTS**

Neutral citation: *Rossing Uranium Ltd v Haraseb and Others* (HC-MD-LAB-MOT-GEN-2021/00085) NALCMD 32 (29 June 2021)

Coram: PARKER AJ
Heard: **8 June 2021**
Delivered: **29 June 2021**

Flynote: Labour Court – Applications and motions – Urgency – Requirements for urgency – Requirement of r 6 (26) (a) and (b) of the rules of the Labour Court as to the circumstances to be set out explicitly which applicant avers render the matter urgent and the reasons to be set out explicitly why applicant claims it could not be afforded substantial redress at a hearing in due course – On the return day of order made in the form of rule *nisi* granted ex parte on urgent basis respondents were entitled to show why the rule should not be made final – That will reasonably obviously include showing that the order should not have been granted in the first place on the basis of urgency because there was no proper case made out on the papers for that order – Court held that since application was made ex parte it is on the return day that the respondents could be heard – Court accepted respondents' challenge that the relief of urgency must fail – Court finding that applicant failed to satisfy the requirements of urgency in terms of the rules of court – Consequently the court refused to confirm the rule *nisi* and, accordingly, dismissed the application – Court held that in a rule *nisi* situation removing a matter from the roll because urgency is not proved does not accord with what the court should do on the return date which is to either confirm the rule or discharge it – Court held that if the rule *nisi* is discharged the application stands to be dismissed.

Summary: Applications and motions – Urgency – Application made ex parte – Requirements for urgency – Requirements of r 6 (26) (a) and (b) of the rules of the Labour Court as to reasons why applicant avers the matter is urgent and why applicant claims it could not be afforded substantial redress at a hearing in due course – Such reasons to be explicitly set out in founding affidavit – Ex parte application brought on urgent basis – Respondents could only be heard on the return day of the order made in the form of rule *nisi* to show cause why order should not take effect – Respondents therefore entitled to show that the order should not have been granted in the first place because there was not proper case made out regarding urgency for that order – Court found that applicants did not satisfy the requirements of r 6 (26) (a) and (b) of the rules of court – Court finding that applicant will have substantial redress in due course through judicial remedy in the form of review or appeal – Consequently court discharging rule *nisi* and dismissing the application.

ORDER

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1. The rule nisi issued on 21 April 2021 is discharged, and the application is dismissed.
2. There is no order as to costs.
3. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ

[1] Having heard the application on 21 April 2021 on the basis, as prayed by the applicant employer that it was urgent, the court granted a rule *nisi* returnable on 8 June 2021. On this return date, Mr Muhongo represents applicant, and Ms Ndamanomhata with Ms Vistorina Namene the employee respondents.

[2] Applicant applied for the said interim relief on the basis of urgency for this reason set out in the founding papers:

> '66. The arbitrator, by insisting that the matter shall proceed to arbitration after having allowed Mr Boltman's representation, is now forcing the applicant to participate in arbitration proceedings for which its representative have had no time to prepare and it subjecting the applicant to arbitration proceedings over which he does not have the power or authority to preside.'

[3] The amended notice of motion was filed on 20 April 2021 at 09H00, and the employee respondents, whose addresses are in Swakopmund were called upon to inform the registrar the same day that they intended to oppose the application; and the same day, 20 April 2021, to file answering papers. I say, the speed with which the applicant employer approached the court is super lightning speed that would definitely shame our distinguished Silver medallist Mr Frankie Fredericks. The

question is, did applicant have any intention at all to give the respondents any time to be heard by the court on 21 April 2021? The answer is an emphatic No! This is a classic example of prostitution of the well intentioned rule on urgency by the present applicant. That, with respect, must be said.

[4] Be that as it may, the first respondent has moved to reject the confirmation of the rule *nisi*. It need hardly saying that on the return date, the burden of the court is only to either discharge the rule *nisi* or confirm it. In that regard, it must be emphasized in capitalities that the order that was granted on 21 April 2021 is a rule *nisi*. In that regard, it must be remembered that a rule *nisi* is an order issued by a court at the instance of an applicant and calling on another party (ie the respondent) to show cause before the court on a particularly date (ie the return date) why the relief applied for should not be granted. It is a rule or order made *nisi* where it is not to take effect unless the person affected (the respondent) fails within the stated time to appear and show cause why it should not take effect, and in the meantime to operate as a temporary relief. (*Shoba v OC, Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1 (A))

[5] In the instant case, the order granted on 21 April 2021 can only take effect either when the respondents fail to so appear in court on the return date or when they appear they fail to show cause why the order should not take effect. Thus, on the return date the respondents were entitled to show cause why the order, which is simply in the form of a rule *nisi*, should not be made final. And that will reasonably obviously include showing that the order should not have been granted at the outset because there was not proper case made out on the papers for that order. (See *Lourenco and Others v Ferela (Pty) Ltd and Others (No. 1)* 1998 (3) SA 281 (T).) In sum, ‘a rule nisi … contemplates that the relief sough will only be granted at some future date after the respondent has had time to show cause (on the return date) that it should not be granted’. (*Shoba* at 19E)

[6] To start with; the order was granted in the absence of the respondents and, therefore, the respondents had not been served with papers and given the opportunity to be heard before the application was heard as an urgent matter. Now that they are being heard, the respondents are saying that the matter should not

have been heard on urgent basis, that is, the court should not have granted the order in respect of the relief sought in para 1 of the notice of motion at the outset because the applicants had not satisfied the requirements of urgency in terms of the rules of court. If the matter was not heard on urgent basis the application would not have been heard on 21 April 2021 at all; and an order granted the same day. Therefore, in my view, para 1 of the notice of motion cannot be placed in the back seat, assigned a secondary importance and divorced from the order that was granted. The question of urgency is, therefore, relevant on the return date. As I have said previously, on the return date the respondents were entitled to show that the order should have not have been granted in the first place because no proper case was made out on the papers for that order, including the order respecting para 1 of the notice of motion respecting urgency.

[7] Our law on the practice of urgent applications in terms of r 6 (26) (a) and (b) of the Labour Court rules is well settled as respects the requirements which an applicant should satisfy in order to succeed where relief was sought as a matter of urgency. It has been well settled since *Salt and Another v Smith* 1990 NR 87, which interpreted and applied rule 6(12) (b) of the rules of court, that rule 6(12) (b) entails two requirements; and for an applicant to succeed in persuading the court to grant the indulgence sought for the matter to be heard on urgent basis the applicant must satisfy both requirements together. The two requirements are that (a) the applicant must set out explicitly the circumstances which applicant avers renders the matter urgent; and (b) the applicant must set out explicitly the reasons why the applicant claims it could not be afforded substantial redress at a hearing in due course. The two requirements are all in r 73 (4) (a) and (b) of the rules of the High Court and rehearsed in r 6 (26) (a) and (b) of the Labour Court rules. It is also well settled that where urgency is self-created the court will refuse to grant the indulgence that the matter be heard on urgent basis (*Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48).

[8] In its replying affidavit, what does the applicant put forth in order to dislodge respondent's challenge that the matter should not have been heard on urgent basis; mind you, respondents bear no onus to prove that the matter is not urgent. Applicant has not set out explicitly anything sufficient and satisfactory to meet respondent's

challenge; and so, I shall look at whatever was placed before the court on the point in the founding papers.

[9] On the papers, I find the following. On 19 April 2021, after applicant's legal representative's abortive attempt to persuade the arbitrator (8th respondent) to postpone the arbitral proceedings since he needed ample time to consult with his client and peruse voluminous documents, the arbitrator adjourned proceedings to 11H00 on 20 April 2021. At 09H00 the same day applicant filed the aforementioned urgent application to be moved the following day at 09H00.

[10] The 21 April 2021 rule *nisi* order essentially and effectively gave applicant what it had failed to get from the arbitrator, that is, the postponement of the arbitration. But can it be said that applicant satisfied the twin requirements of urgency prescribed by r 6 (26) (a) and (b) of the Labour Court rules which must be satisfied together. It is, therefore, to the consideration r 6 (26) (a) and (b) of the Labour Court rules that I now direct the enquiry.

[11] As to subrule (26) (a); I think the applicant did set out explicitly the circumstances that render the matter urgent; and applicant acted with speed and promptitude. I proceed to consider subrule (26) (b). Applicant contends that if the arbitration continued, the arbitrator would be 'forcing the applicant to participate in arbitration proceedings for which its representative (would) have had no time to prepare and it (would be) subjecting the applicant to arbitration proceedings over which he (the arbitrator) does not have the power or authority to preside'. Applicant has not set out explicitly the reasons why applicant claims it could not be afforded substantial redress at a hearing in due course, if the matter was not heard on urgent basis. On the contrary, it seems to be abundantly clear that applicant will have substantial redress in due course through judicial remedy – in the form of review or appeal. Indeed, in Part B of the notice of motion, applicant seeks a review and the setting aside of the arbitrator's decision of 19 April 2021. It would, therefore, be fallacious and self-serving, with respect, for applicant to contend that it could not be afforded substantial redress in due course, if applicant had attempted to so contend.

[12] Based on these reasons, I hold that it has not been established that the court should confirm that the requirements of urgency were satisfied when applicant applied for and obtained the rule *nis*i order on 21 April 2021. It follows inexorably that the order granted on 21 April 2021 cannot take effect. (See *Shoba*.)

[13] The conclusions I have reached are unaffected by Mr Hewat Samuel Jacobus Beukes's notice of motion to be joined in the proceedings. Any decision thereanent way would have no effect either way.

[14] In the result, I order as follows:

1. The rule nisi issued on 21 April 2021 is discharged, and the application is dismissed.
2. There is no order as to costs.
3. The matter is finalized and removed from the roll.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	T MUHONGO Instructed by Köpplinger Boltman, Windhoek
1st-7th RESPONDENTS:	H NDILULA Of Kadhila Amoomo Legal Practitioners, Windhoek

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