REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 200/2013

In the matter between:

JOHANNES JOSIAS BASSON **APPLICANT**

and

MARIA HELENA BASSON **1ST RESPONDENT**

THE REGISTRAR OF DEEDS **2ND RESPONDENT**

Neutral citation: *Basson v Basson* (A 200/2013) [2013] NAHCMD 189 (27 June 2013)

Coram: MILLER AJ
Heard: 26 June 2013
Delivered: 27 June 2013 [Ex-tempore]

ORDER

I therefore refuse the relief sought in paragraph 1 of the Notice of Motion. In the result the application is struck from the roll with costs.

JUDGMENT

MILLER AJ :

[1] In these proceedings which were argued before me yesterday the applicant seeks urgent interim relief against the first respondent. No relief is sought against the Registrar of Deeds who is cited as second respondent.

[2] The relief being sought is the following:

‘

1. Condoning the applicant’s non-compliance with the Rules, forms and services of this Honourable Court and hearing this application as one of urgency in terms of Rule 6 (12) of the Rules of the above Honourable Court.
2. That a *rule nisi* be issued calling upon the respondents, or any interested party, to show cause, if any, on a date to be determined by the Registrar of this Honourable Court, why an order in the following terms should not be issued:

2.1 ordering and directing the first respondent to deliver to the applicant the original title deed of Erf 480, Grootfontein, held by deed of transfer no. T 3884/2000 within 48 hours of this order of court being granted;

2.2 ordering and directing the first respondent, in the event that she is not in possession of the original title deed, to provide the legal practitioner of record for applicant with an affidavit within 48 hours of this order of court, stating the whereabouts of the title deed, alternatively that it is lost if that is the case;

2.3 ordering and directing the first respondent to sign annexure **“JB4”** within 48 hours from this order of court being granted, and failing therewith, ordering and directing the deputy sheriff for the district of Windhoek or Grootfontein, to sign annexure **“JB4”** on behalf of the first respondent;

2.4 ordering and directing the first respondent to sign all documents necessary and required by First National Bank to enable applicant to obtain a guarantee from First National Bank to secure the tenders in the event that it is awarded to applicant;

2.5 alternatively and in the event that first respondent does not sign the documents as per clause 2.3 and 2.4 of this notice of motion, to order and direct the deputy sheriff or District of Windhoek or Grootfontein to sign whatever documents are required to secure a guarantee to be issued by First National Bank.

3. Ordering that prayers 2.1 to 2.5 *supra* shall operate as an interim interdict with immediate effect pending the return date of this application.

4. Granting applicant leave to serve this application and the *rule nisi* by way of e-mail on first respondent.'

[3] I pause to mention that the relief claimed in paragraph 3 is misplaced in so far as a temporary interdict has been sought. The relief claimed in paragraphs 2.1 to 2.5 is not interdictory in nature. I will assume that what the applicant has in mind is that I should issue interim orders as formulated in paragraphs 2.1 to 2.5 and I will deal with the matter as such.

[4] Erf 840 Grootfontein has as its registered owner a Close Corporation named Steps Properties CC. The first respondent is the sole member of the Close Corporation. She also became married to the applicant on 2 February 1990. Her marriage is one in community of property. That marriage still exists although in name only. I say that because at some stage during the year 2011 the applicant instituted divorce proceedings against the first respondent.

[5] Following protracted negotiations and on 25 November 2012 the applicant and the first respondent concluded a settlement agreement. In so far as it is relevant, clause 5.3 of the agreement provided that the first respondent shall transfer her membership of Steps Properties CC to the applicant. One would have thought that from then on the finalization of the divorce proceedings would be a plain sailing matter of formality. Although a restitution order was granted by this Court, events thereafter took a turn which I can only describe as remarkable.

[6] The applicant tells me that subsequent to the granting of the restitution order he concluded that the settlement agreement was for him a bad deal from which he wanted to resile. To that end he sought the advice of his legal practitioners. Although that explicitly stated to be the case, the inference is inescapable that it was

thought that the most expedient way to achieve that purpose was not to proceed to the finalization of the then pending divorce proceedings. To that end the Court was asked to discharge the restitution order which the Court granted.

[7] For reasons not explained, the applicant then endeavoured to once more blow life into the abandoned action by placing the matter on the case management roll of my Brother Ueitele J on 29 May 2013. Quite understandably Ueitele J removed the matter from the roll.

[8] As matter stand now, a new action for divorce although contemplated has not yet been instituted.

[9] I alluded to the history of the matter at some length because it places in perspective the present dilemma in which the applicant now himself which in turn precipitated this application. The logical consequence of the decision not to finalize the divorce proceedings was that none of the provisions of the settlement agreement was given effect to.

[10] One of these of course was that the membership of Steps Properties CC. remains vested in the first respondent. This fact has now come to haunt the applicant. This is so because the applicant, who trades in the purchase of second hand steel which he then resells, on 31 May 2013 so he says submitted two tenders to purchase second hand steel. One was submitted to an entity styled Orimax Asset Management. That tender concerns the purchase of what is described as a Marian 201M rope shovel and spares. The pro-forma tender documents are attached to the papers. The other one concerns a tender submitted allegedly to Transnamib. No supporting documents or any detail as to what it entailed was provided in the papers before me.

[11] As far as the Orimax tender is concerned there is a somewhat glaring inconsistency *ex facie* the pro forma tender documents and what the applicant says.

Ex facie the pro forma documents the tender was issued on 4 March 2013 and the closing date for the submission of tenders was stated to be 3 May 2013. The applicant's tender was submitted only on 31 May 2013, I would have thought that if it was the applicant's contention that the tender would be entertained nonetheless he would explain to me how that came about which he did not.

[12] The applicant says that in the event any of the tenders being awarded to him, he will be required to provide a guarantee from First National Bank for which in turn he will be required to put up Erf 480 as collateral security. The requirement of a bank guarantee is not to be found in the pro forma documents. Its only requirement is that the successful tenderer shall pay the purchase price upon the rendition of an invoice. Perhaps what the applicant had in mind was that he approached the First National bank for finance, and that it required Erf 480 as collateral security and I will assume that to be the case.

[13] This state of affairs prompted the applicant's legal practitioners to address the letter to the first respondent on 7 June 2013. Paragraph 2 of that letter reads as follows:

'You have informed our client that you are in possession of the title deed of Erf 480 Grootfontein when you made enquiries in this regard. We also made enquiries in order to find the original title Deed. You indicated that it was at the offices of FA Pretorius and Company in Tsumeb with your lawyer. The offices of your lawyer in Tsumeb deny that it was with them and indicated that it might be with their correspondent Dr. Weder, Kauta and Hoveka in Windhoek. We made enquiries at their offices and they denied that it was with them. Our client then instructed us to obtain a duplicate title deed since it seems to be lost. We immediately embarked to applying for the so called lost title. Since his property is registered in the name of Steps Properties CC of which are the sole member we require you to sign certain documentation.

The documentation was emailed to our client who presented it to you for your signature. You however refused to sign the document and indicated that you are in possession of the original title deed. You refused to hand these documents to our client and you refused to sign the document presented to you'.

[14] The letter then continues in the last 3 paragraphs thereof in the following vein.

'Our instructions are further that you leave for South Africa on 11 June 2013 and only return on or about 10 July 2013. This only adds to the dilemma of our client since he shall be informed about the award of the tenders shortly. He is very positive about his chances to be awarded the tenders. He must be therefore be ready to provide the guarantees when called upon to do so within days after such demand.

In the event that he is not awarded the tenders or if awarded and unable to provide the required guarantees, he is out of pocket and will have to turn elsewhere for an income. The industry he is in, is well acquainted to him and he has done this for 7 years.

We trust you find the find the aforesaid in order and a way to reply as a matter of urgency before 9 May and 10 June 2013 when you shall commence to draw the urgent application.'

[15] Dispute the threat to bring an urgent application on 10 June 2013 and in the knowledge that the first respondent will be in South Africa as from 11 June 2013, this application was only filed with the Registrar of the High Court at 15h25 on Friday the 21st of June 2013. There is no explanation in the papers for this delay. Having threatened to bring the application on 10 June 2013, I must assume that the applicant was in the position to do so.

[16] To delay the application in the knowledge that the first respondent will be in South Africa and will inevitably be to her prejudice must have been realised by the applicant. Absent any explanation for the delay the wish to prejudice the first respondent is the only probable inference. It has been stated before in this Court that to the same extent that compliance with the Rules of Court are relaxed, the effect is that proportionally it imposes upon the constitutional fair trial provisions.

[17] In the matter of ***Rochelle (Pty) Ltd and others v Nathaniel Koch and others*** 2010 (1) Namibian Reports 260 (HC) and 262 B - D, this Court had the following to say:

'thus in deciding whether the requirements in (1) and (2) of Rule 6(12) have been met, that is whether it is a deserving case, it is extremely important for the Judge to bear in mind that the indulgence-and indulgence it is that the applicant is asking the Court to grant, if

the Court grants it, would whittle away the second respondent's rights to fair trial guaranteed to him or her by the Namibian Constitution.'

[18] "I for one do not wish to have anything to do with the perversion of the 6(12) of the Rules of this Court as has occurred in the instant case, because such misuse of the rule puts the respondent beyond the pale of constitution protection of Article 12 (1) of the Namibian Constitution."

[19] At the risk of citing my own judgments in the matter of ***Mega Power Center CC trading as Talisman Plants and Tool Hire and Talisman Franchiser Operations Pty Ltd and Others*** Case No. A 171/2013 the following passage appears from that judgment:

'It is a fundamental cornerstone of our law endorsed by the Constitution that the proceedings in our Courts must be fair to all the parties involved in them. To that end the Rules of this Court determine time periods in which the steps in the process of litigation must be taken and responded to. A case launched on an urgent basis fundamentally seeks to truncate limits which in the result raises the possibility that the proceedings become unfair to particularly the respondent. The fundamental principle is that an applicant who approached the Court should afford his opponent the time and space required by the Rules to make a measured and consider response to the claims made against him. A *spatium deliberandi* and is essential for justice to be done in the end.'

[20] The facts that I mentioned concerning the delays in themselves are sufficient to persuade me not to grant the applicant the indulgence he seeks not to comply with the Rules of this Court.

[21] In addition to that there are further obstacles in the applicant's way. None of the tenders has as yet been awarded to the applicant. There is uncertainty, objectively speaking, whether they will be and if so by what date.

[22] I am mindful of the fact that the applicant is confident that his tenders will be successful. I would have been surprised if he was not. Rather than of assistance to the applicant it works to his disadvantage.

[23] He would evitably have been as confident when he submitted the tenders on 31 May 2013. Nothing stopped him from putting his hand to the plough then to get his house in order so to speak. The delay is of his own making. The following dictum in ***Bergman v Commercial Bank of Namibia Ltd and Another*** 2001 NR 48 (HC) at page 49 - 50 find application.

> 'the Court's power to dispense of the forms and service provided for in the rules in an urgent application is a discretionary one. That much is clear from the use of the word "may" that is in rule 6(12). One of the circumstances under which a Court in the exercise of this 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 culpable remissness or inaction.'

[24] I also bear in mind that the applicant seeks the relief in order to present to First National Bank the title deed of a property he is not the owner of.

[25] The fact that he contrived to avoid the consequences of the settlement agreement has the effect that he cannot rely on its terms and conditions. I find the argument by Ms. Petherbridge that because of the marriage in community of property the applicant is in a sense the owner of Erf 480 fanciful and in any event not sustainable.

[26] The Close Corporation is a separate entity apart from the joint estate of the spouses.

[27] I make it plain that these are my own *prima facie* views, and it remains open to the applicant in the event that the issue is raised in the future to persuade me or another Court that the contrary is good law.

[28] I therefore refuse the relief sought in paragraph 1 of the Notice of Motion.

[29] In the result the application is struck from the roll with costs.

P J MILLER

Judge

APPEARANCES

APPLICANT:	M PETHERBRIDGE Of Petherbridge Law Chambers
FIRST, SECOND, THIRD RESPONDENTS:	A A J NAUDE Of Dr. Weder, Kauta & Hoveka Incorporated