REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 96/2015

In the matter between:

BLAAUW'S TRANSPORT (PTY) LIMITED **APPLICANT**

And

AUTO TRUCK & COACH CC **FIRST RESPONDENT**

THE DEPUTY SHERIFF FOR TSUMEB **SECOND RESPONDENT**

Neutral citation: *Blaauws Transport (Pty) Limited v Auto Truck and Coach CC* (A 96-2015) [2015] NAHCMD 125 (4 June 2015)

Coram: PARKER AJ

Heard: **15 May 2015**

Delivered: **4 June 2015**

Flynote: Practice – Applications and motions – Urgent application – Requisites that applicant must satisfy in order to succeed in terms of rule 73(4) – Court found that applicant failed to satisfy the second requisite provided in rule 73(4) – Court found further that the urgency was self-created – Court therefore refused to grant the indulgence sought that the matter be heard on urgent basis – Consequently, application struck from the roll with costs.

Summary: Practice – Applications and motions – Urgent application – Requisites that applicant must satisfy in order to succeed in terms of rule 73(4) – Applicant decided not to launch an application when it was clear that first respondent would not budge an inch on his position that he would not permit applicant to remove applicant's wrecked vehicles from first respondent's premises until applicant had paid for the amount demanded by first respondent for salvaging and removing applicant's vehicles which had collided on a public road and had posed risk to motorists – Court found that no negotiations were ongoing to give the applicant reason for not launching the application timeously – Court therefore found that urgency was self-created – Besides, court found that applicant has not set out explicitly the reasons why applicant claims it could not be afforded substantial redress in due course – Court therefore refused to hear the matter on the basis of urgency – Consequently, court struck the application from the roll for lack of urgency.

ORDER

The application is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel and a status hearing to determine the further conduct of the matter is to be held today.

JUDGMENT

PARKER AJ:

[1] In the application, the applicant seeks the relief set out in the notice of motion, and the applicant prays the court to hear the matter on the basis of urgency. The respondents have moved to reject the application, and as a preliminary point the respondents say that the purported 'urgency' is self-created. It, therefore, becomes necessary to deal with the issue of urgency at the threshold of the proceedings.

Indeed, both counsel, Mr Jacobs, for the applicant, and Mr Barnard, for the first respondent, agree that such approach is adivseable.

[2] As respects the matter of urgent application, I had the following to say in the recent case of *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (5 February 2015), para 2:

> 'Urgent applications are now governed by rule 73 of the rules of court (ie rule 6(12) of the repealed rules of court), and subrule (4) provides that in every affidavit filed in support of an application under subrule (1) the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. Indeed, subrule (4) rehearses para (b) of rule 6(12) of the repealed rules. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought, that the matter be heard on the basis of urgency, the applicant must satisfy both requirements. And *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 tells us that where urgency in an application is self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.'

That is the manner in which I approach the determination of the issue of urgency in the instant application.

[3] The application revolves around wrecks of damaged vehicles whose salvaging and removal were of grave concern because they posed extreme danger to other users of the road on which the vehicles remained. The applicant is the owner of the vehicles involved. The first respondent is the close corporation that carried out the salvaging and removal of the wrecked vehicles.

[4] On the papers I make the following factual findings that I consider to be of assistance on the determination of the issue of urgency. The motor vehicles mentioned previously are a truck and trailers. It was the collision of the truck and the trailers that resulted in the wrecks of the vehicles. The collision occurred on 6 April 2015. The first respondent was urgently requested to salvage and remove the

wrecks; and it kindly obliged. This happened on 7 April 2015. On 8 April 2015 the first respondent forwarded to the applicant an invoice for the work done in the amount of N$101 200. The same day the first respondent made it abundantly clear to the applicant that until payment was made the applicant would not be permitted to remove the wrecked vehicles from the first respondent's premises.

[5] These pieces of evidence are set out in the applicant's founding affidavit, and they are cogent, as they are relevant, as I shall demonstrate in due course, particularly, if it is considered in conjunction with the following pieces of evidence, which are also stated in the applicant' founding affidavit: Mr Blaauw, a director of the applicant and maker of the founding affidavit states that he tried to call Mr Rainier Arangies, the sole member of the first respondent, 'several times to no avail. I left messages for him (ie Arangies) to return my calls, which he failed to do'. Added to this are these important passages in a letter that the applicant's legal practitioners sent to the first respondent, dated 17 April 2015:

> '(a) You are, since having rendered your invoice, refusing to relinquish possession of the wrecks to our client until such time as your invoice has been paid, despite requests.
>
> (b) Our client requested us to put on record that Mr Andre Blaauw of our client engaged several attempts to contact you Mr Arangies to discuss a reasonable resolve (resolution) of the matter, to no avail.'

And what is more; the applicant's legal practitioners, in the same 17 April 2015 letter, threatened the first respondent with legal action in the following categorical terms:

> '(c) In the event that the wrecks are not released to our client without delay, our client shall institute a High Court action against you for the delivery of wrecks.'

[6] It is particularly significant to note that the applicant's letter, with its threat, were ignored by the first respondent; and so, the threat remained an empty threat for one month. I shall return to this significant observation in due course.

[7] All this evidence debunk Mr Jacobs's submission that the parties were engaged in negotiations to resolve their differences; hence the launching of the application at that late hour. The submission is, with the greatest deference to Mr Jacobs, totally fallacious and self-serving. I, therefore, find no use for the authorities, including those referred to me by Mr Jacobs, respecting the issue of parties' negotiations and urgent applications, because in the instant case there were simply no negotiations between the parties that were ongoing. For this reason, too, I put no currency – none at all – on the applicant's offer of guarantee: It was a unilateral act; unreasonable, unfair and unjustifiable. The offer of guarantee is, therefore, irrelevant in this proceeding, as Mr Barnard appeared to submit. What is relevant is that as at 8 April 2015 the applicant knew too well that the first respondent would not budge an inch on its firm and clear position that it would not allow the applicant to remove the wrecks of the vehicles from his premises without payment of the first respondent's invoice. The applicant did not act expeditiously by launching an application so soon after 8 April 2014; neither did the applicant act expeditiously so soon after 17 April 2015 when it was abundantly clear then that the first respondent had called the applicant's bluff. The applicant rather waited until 15 May 2015 to launch this urgent application wherein they have dragged the respondents to court on barely three days' notice.

[8] Doubtless, had the applicant launched the application so soon after 8 April 2014 when the writing was on the wall that the applicant would not budge an inch on his firm and clear stance, as aforesaid, or, indeed, so soon after 17 April 2014, as it threatened it would do, it would not have been necessary for the applicant to rush to court at such great speed to ask the court to hear the matter on the basis of urgency. I, therefore, find that the urgency in this application is clearly self-created. I accept Mr Barnard's submission in that regard. (See *Bergman v Commercial Bank of Namibia Ltd* 2001 NR 48.) Besides, the applicant has failed to satisfy the second requisite in rule 73(4)*(a)*: it has not set out explicitly, to the satisfaction of the court, the reasons why it claims it could not be afforded substantial redress in due course.

[9] Based on these reasons, I refuse to grant the indulgence sought by the applicant in para 1 of the notice of motion that the matter be heard on the basis of urgency; whereupon, the application is struck from the roll with costs, including costs

of one instructing counsel and one instructed counsel and a status hearing to determine the further conduct of the matter is to be held today.

C Parker

Acting Judge

APPEARANCES

APPLICANT : S J Jacobs
Instructed by Van der Merwe-Greeff Andima Inc., Windhoek

FIRST
RESPONDENT: T A Barnard
Instructed by Mueller Legal Practitioners, Windhoek