REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2019/00490

In the matter between:

BERNHARDT MARTIN ESAU	**1ST APPLICANT**
SAKEUS EDWARD TWELITYAAMENA SHANGHALA	**2ND APPLICANT**
JAMES NEPENDA NEPENDA HATUIKULIPI	**3RD APPLICANT**
RICARDO JORGE GUSTAVO	**4TH APPLICANT**
TAMSON TANGENI HATUIKULIPI	**5TH APPLICANT**
PIUS NATANGWE MWATELULO	**6TH APPLICANT**

and

MAGISTRATE OF WINDHOEK	**1ST RESPONDENT**
DIRECTOR-GENERAL: ANTI CORRUPTION COMMISSION	**2ND RESPONDENT**
ANTI-CORRUPTION COMMISSION	**3RD RESPONDENT**
ANDREAS NDESHIPANDA KANYANGELA IN HIS CAPACITY AS THE PURPORTED INVESTIGATING OFFICER AND THE APPLICANT FOR THE WARRANT OF ARREST	**4TH RESPONDENT**
PROSECUTOR-GENERAL OF NAMIBIA	**5TH RESPONDENT**
INSPECTOR-GENERAL: NAMIBIAN POLICE	**6TH RESPONDENT**
STATION COMMANDER: SEEIS POLICE STATION	**7TH RESPONDENT**

Neutral citation: *Esau v Magistrate of Windhoek* (HC-MD-CIV-MOT-GEN-2019/00490) [2019] NAHCMD 558 (27 December 2019)

Coram: MILLER AJ
Heard: **19 December 2019**
Delivered: **27 December 2019**

Flynote: Civil Practice – Urgent Applications – Rule 73(1) and (4) of the High Court Rules and the requirements thereof – Rule 73(4) requires of the applicant (a) to set out explicitly the circumstances that he or she renders 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 – Aplicants failed to meet the requirements of the Rule and therefore lack of urgency.

Summary: The applicants filed an urgent application seeking an order for the court to review and set aside warrants of arrests that were issued by the first respondent on grounds that the warrants are unlawful – The application was opposed by the respondents who on the onset raised a point in limine of lack of urgency on the part of the application filed.

The court held that: Rule 73(4) requires of the applicant (a) to set out explicitly the circumstances that he or she renders 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

Held further that: 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', 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.

Held further that: Hearing an application on an urgent basis is not to be had for the mere asking, even in cases where the liberty of the applicant is at stake, the applicant seeks an indulgence from the court, which the court may grant or refuse to

a greater or lesser extent, if at all, in its discretion. This court can only hear the matter on an urgent basis if the requirements in Rule 73(1) and (4) are met.

Held further that: The explanation for the delay and lack of promptness on the part of the applicants in bringing this application before court is vague and leaves open the door for doubt. In as much as the bringing of this application was delayed far beyond what is reasonable, it is evident that such delay was to the large extent caused by the applicants and thus self-created. As a result, the application is removed from the roll for lack of urgency.

ORDER

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1. The matter is removed from the roll.

2. The applicants are ordered to pay the respondents costs, such costs to include the costs of one instructing and two instructed counsel, jointly and severally, the one paying the other to be absolved.

JUDGMENT

MILLER AJ:

Background

[1] Before me is an application brought by the applicants against the respondents, seeking an order to essentially set aside the warrants for the arrest of the applicants on the ground that the warrants are unlawful. The following relief is sought by the applicants in their Notice of Motion:

1. Condoning the Applicant's non-compliance with the Rules of Court relating to service and time periods for exchanging pleadings, and to

hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of the High Court.

2. An order calling upon the respondents to show cause why:

2.1. The first respondent's decision to issue warrants of arrest against the first to the sixth applicants on 26 November 2019 should not be reviewed and set aside, alternatively to be declared unlawful, null and void, and set aside.

2.2. The decision of the second and third respondent, in the alternative the fourth respondent, to apply to the first respondent for warrants of arrest of the applicants should not be reviewed and set aside, alternatively, declared unlawful invalid and set aside.

2.3. The following decisions should not be reviewed and set aside, alternatively declared, unlawful, null and void and set aside:

2.3.1. the decision of the second respondent to refer the matter to the Prosecutor General for prosecution;

2.3.2. the decision of the Prosecutor General to prosecute the applicants;

2.3.3. the decision of the Magistrate to remand the matter for further investigation to 20 February 2020, and to remand the applicants in police custody.

3. Ordering the seventh respondent to release the applicants from detention with immediate effect.

4. That the respondents pay the costs of this application, such costs to include costs of three counsel.

[2] The application is opposed by the respondents.

[3] The first applicant deposed to the founding affidavit supported by the necessary supporting affidavits and annexures.

[4] The application was set down to be heard on urgent basis on 19 December 2019 at 9h00. On the date of hearing, the court was informed that the applicants have abandoned paragraphs 2.3.1 and 2.3.2 and no longer wish to seek the relief sought under the said paragraphs.

[5] In effect, it means that no relief was sought against the Prosecutor General. As indicated the respondents opposed the application and to that end filed the necessary answering affidavits.

[6] For the purpose of convenience, I proceeded to hear the aspects of urgency and the merits together.

The Facts

[7] The material facts underlying and giving rise to this application are mainly common cause and amount to the following: The first applicant was arrested on 23 November 2019, whereafter the applicant filed an urgent application before this court to be heard on the 24th of November 2019, seeking an order for the warrant of arrest to be declared unlawful. On the same date the parties entered into a settlement agreement as a result whereof the warrant was set aside. The first applicant was released on the same date.

[8] On 27 November 2019, the first, fourth, fifth and sixth applicants surrendered themselves to the police and were subsequently arrested, whereas the second and third applicants were arrested at Farm Dixie on the 27th of November 2019 in pursuance of fresh warrants of arrest issued by the first respondent on 26 November 2019.

[9] The applicants made their first appearance before the Magistrate, Windhoek on 28 November 2019 and were duly represented by Mr Mike Hellens SC and Mr Dawie Joubert SC and junior counsel. The applicants in their papers do not fully

disclose what transpired before the Magistrate on 28 November 2019. It is apparent from the perusal of the record of that date, that what was foremost in the minds of the applicants at that stage was to bring an application that the applicants be released on bail. It was impossible to hear the bail application on that day, and it was agreed that the matter will stand over until the following day in order to accommodate the bail application, if possible.

[10] It was common cause between the parties that in the interim, the applicants were to be detained in custody at the Seeis Police Station.

[11] On the 29th of November 2019, the applicants once more appeared before the Magistrate, Windhoek for the bail application. However the matter was postponed to 2 December 2019. Mr Chibwana who at that stage appeared for accused three, fourth, five and six in the criminal matter, placed on record that the applicants intended to bring a challenge related to the legality of the arrest as well as the detention. Mr Chibwana also stated that the application would be brought together with the bail application to be heard on 2 December 2019. As is apparent from the facts, no such application was brought on that date.

[12] I pause to mention that 29 November 2019, Mr Hellens and Mr Joubert were arrested by Immigration Officials for apparently working in Namibia without a work permit. This probably explains their absence from the proceedings on 2 December 2019.The applicants nonetheless enjoyed the benefit of legal representation.

[13] The applicants once more appeared before the Magistrate Windhoek on 2 December 2019 for the bail application. By consent, the proceedings were postponed to 20 February 2020. By then the applicants had decided to abandon the bail application at least for the time being.

[14] It remained common cause between the parties that in the interim the applicants will continue to remain in custody.

[15] This application was filed on 14 December 2019, and issued by the Registrar of the High Court on 16th of December 2019. The Registrar then scheduled the matter to be heard on 19 December 2019 at 9h00.

The Case for Urgency

[16] The first ssue which I am required to resolve is that of urgency. The institution and conduct of legal proceedings in the High Court are subject to the provisions of the Rules of the High Court published in the Government Gazette dated 17 January 2014.

[17] The Rules provide for the procedural and other steps which the parties are obliged to take and follow in order to have the dispute between them resolved. Rule 73 however provides an exception to the general application of the Rules and grants the court the discretion to dispense with the forms and service provided for in the Rules and for the court to dispose of the application in such a manner and in accordance with such procedure as the court in those circumstances considers fair and appropriate. The Rule reads as follows:

> '(1) An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, *unless a legal practitioner certifies in a certificate of urgency* that the matter is so urgent that it should be heard at any time or on any other day.
>
> (2) ...
>
> (3) ...
>
> (4) 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.' (Italicized for emphasis).

[18] It follows that this constitutes the first threshold which the applicants must cross in order to have their matter heard. Rule 73(4) thus requires of the applicant (a) to set out explicitly the circumstances that he or she renders 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.

[19] An applicant must thus, in the founding affidavit set out the necessary facts which will bring the application within the ambit of particularly Rule 73(4).

[20] Masuku, J in *Nghiimbwasha and Another v Minister of Justice and Others*[1], remarked on the two requirements set out in Rule 73(4) as follows:

> '[11] . . . 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', in 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.'

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[1] [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

[21] The hearing of an application on an urgent basis is not to be had for the asking, even in cases where the liberty of the applicant is at stake. The applicants seek an indulgence from the court, which the court may grant or refuse to a greater or lesser extent, if at all in its discretion. This court can only hear the matter on an urgent basis if as Masuku J stated in *Nghiimbwasha and Another v Minister of Justice and Others* , the requirements in Rule 73(1) and (4) are met.

The facts to the Law

[22] Of importance particularly is, the stance adopted by the applicants immediately following their arrest. The matter lingered in the Magistrate Court for several days, in pursuit of a bail application which was ultimately abandoned, at least for the time being. The first mention, of what was to be this application was made on 29 November 2019 with an indication that it would be brought on 2 December 2019 together with the bail application. That turned out not to be the case. The matter was allowed to linger on further until at least the 14th of December 2019 when it was filed with this court.

[23] The explanation for this delay and lack of promptness on the part of the applicants is dealt with primarily in paragraphs 59 and 60 of the founding affidavit which reads as follows:

> '59. The applicants were arrested on 27 November 2019. We sought the services of senior counsel from South Africa, Mike Hellens SC and Dawie Joubert SC. Upon their appearance on 29 November 2019 in the Windhoek Magistrate Court, they were arrested by the officials of the Ministry of Home Affairs and Immigration on a count of appearance without a work permit. I am advised that, both senior counsel pleaded guilty to the charges under he Immigration Act.
>
> 60. Unfortunately, we had to seek for the service of another senior counsel to assits. Our legal practitioners of record could not secure services of local senior counsel. Accordingly, our legal practitioner of record sought the service of Adv King SC. The application was submitted on 2 December 2019 but only got approved 11 December 2019 when this application was being prepared. When it became clear that the time is running, we instructed our legal

practitioners of record to also engage the services of Adv Vasoni SC, to settle these papers. This only occurred on Monday, 9 Decedmber 2019. He was also instructed on the same day. I am advised that a draft application was prepared and emailed to Adv Vasoni SC, for settling in Johannesburg on Thursday, 12 december 2019.'

[24] It is immediately apparent that the facts are painted on a wide canvass in broad strokes. It lacks important detail and ramains vague, glossing over material facts and lacking a clear understanding of what led to the ultimate delay. It is not clear from that explanation, for instance, what application was submitted to whom on 2 December 2019. It is not clear who 'approved' the so called application on 11 December 2019. The delay from 2 to 9 December 2019, is not explained at all. It is not clear what draft application was emailed to Adv Vasoni, only on 12 December 2019. Even if I court were to assume that it was this urgent application, why was this done if there had already been an application sent to what I can only assume, was Adv King SC. The period from 12 to 14 December 2019 when the papers were filed on the Ejustice system is also not explained.

[25] It is not for me to read into the papers that which is not there. The lingering impression is that the applicants themselves did not act promptly and with a sense of urgency, despite ample opportunity to do so.

[26] When I put these facts to counsel for the applicants during the course of arguments, their response amount to no more than the fact that the aplicants have been deprived of their liberty.

[27] In as much as the bringing of this application was delayed far beyond what is reasonable, it is evident that such delay was to the large extent caused by the applicants and thus self-created.

[28] It is correct that cases involving personal liberty should be treated with jealous regard to the objectives of the Constitution. However, the right to personal liberty as guaranteed in Article 7 of the Constitution is not an absolute right. Article 7 provides that, 'No person shall be deprived of personal liberty, except according to procedures established in terms of law'. The fact that the issue is one of liberty does not per se

relieve the applicants of the duty to make out a case for urgency as required by Rule 73.

[29] Moreover, an applicant who complains about the lack of depriviation of his or her liberty should act with a sense of urgency according to the circumstances of the case.

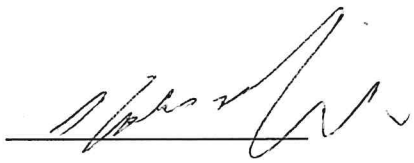
[30] The rather leisurely approach followed by the applicants in approaching this court flies in the face of any sense of urgency on the part of the applicants to secure their release.

[31] I accordingly find that the applicants did not succeed in establishing a case for urgency in accordance with the provisions of Rule 73, with the result that the matter should be removed from the roll.

[32] In the result I make the following orders:

1. The matter is removed from the roll.

2. The applicants are ordered to pay the respondents costs, such costs to include the costs of one instructing and two instructed counsel, jointly and severally, the one paying the other to be absolved.



K Miller

Acting Judge

APPEARANCES:

1ST, 3RD and 4TH APPLICANTS:	T NGCUKAITOBI (with him G NARIB) Instructed by Appolos Shimakeleni Lawyers, Windhoek
2ND, 5TH and 6TH APPLICANTS:	W KING SC (with him T CHIBWANA) Instructed by Appolos Shimakeleni Lawyers, Windhoek
RESPONDENTS:	P A VAN WYK SC (with him S MAKANDO) Instructed by Office of the Government Attorney, Windhoek