REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No.: HC-MD-CIV-MOT-GEN-2022/00434

In the matter between:

SEAWORK FISH PROCESSORS (PTY) LTD	**APPLICANT**

and

GREEN ROSE TRADING (PTY) LTD	**1ST RESPONDENT**
FIMARO FISHING (PTY) LTD	**2ND RESPONDENT**
OVATUE FISHING (PTY) LTD	**3RD RESPONDENT**
QUITO QUANOVALE FISHING (PTY) LTD	**4TH RESPONDENT**
UUYAMBA WO SHIGWANA (PTY) LTD	**5TH RESPONDENT**
INDILA FISHING (PTY) LTD	**6TH RESPONDENT**
OTJOMURU FISHING (PTY) LTD	**7TH RESPONDENT**

Neutral citation: *Seawork Fish Processors (Pty) Ltd v Green Rose Trading (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2022/00434) [2022] NAHCMD 624 (16 November 2022)

Coram: CHRISTIAAN AJ
Heard: **2 November 2022**
Delivered: **16 November 2022**

Flynote: Practice – Applications and motions – Urgent applications – Applicant must satisfy the requirements of rule 73 (4) of the rules of court for the matter to be heard on urgent basis – Furthermore, there can be no urgency when urgency is self-created.

Summary: Practice – Applications and motions – Urgent applications – Applicant must satisfy the requirements of rule 73 (4) for the application to be heard as a matter of urgency – Court finding that applicant knew since December 2021 that the first respondent was no longer the holder of a fishing quota – Applicant waited until 09 September 2022 to institute the proceeding at extremely breakneck speed, praying for the court to hear the matter on the basis of urgency – Court finding that the fact that the relief sought through the arbitration process would not come in time before the allocation of the quota or to prevent the respondents from selling the quota to third parties was not capable of satisfying the requirement in rule 73 (4) – Court finding further that applicant had not set forth explicitly the reasons why he claims he could not be afforded substantial redress in due course – Consequently, court refused the application for lack of urgency.

ORDER

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1. The application is refused for lack of urgency, and is struck from the roll.
2. The applicant is to pay the costs of the application, consequent upon the employment of one instructing counsel and two instructed counsel, where so employed.
3. The matter is considered finalized and is removed from the roll.

JUDGMENT

CHRISTIAAN AJ:

[1] The applicant, represented by Mr Fitzgerald, brought an application by notice of motion, and prays the court to hear the matter on the basis of urgency. The first to seventh respondents oppose the application. The first to seventh respondents were represented by Mr Corbett.

[2] The matter revolves around a Quota Participation Agreement entered into between the applicant and the first respondent whereby the latter gave rights to exploit the quota to the applicant. The first respondent entered into a joint venture regarding the quota with the second to seventh respondents, who are allegedly refusing the applicant the rights to exploit the quota.

[3] The main relief sought by the applicant in this urgent application is to interdict the first to seventh respondents from selling or in any way disposing of the quota described in the Quota Participation Agreement between the applicant and the first respondent. It further seeks to prohibit the respondents jointly and/or severally from selling the quota to any third parties when they are awarded such quota for the 2022/2033 fishing season, which quota will in all likelihood be awarded shortly before 01 November 2022. A further condition is that the interim interdict, if granted, shall endure until such time as the arbitrator has considered the matter and made his final award.

[4] In the instant proceedings the burden of the court is to consider and determine the issue of urgency only. Because of this I need to refer to rule 73 (3) and 73(4) of the High Court Rules. The rule reads as follows:

‘(3) In an urgent application the court may dispense with the forms and service provided in these rules and may dispose of the application at such time and place and in such manner and in accordance with such procedure which must as far as practicable be in terms of these rules or as the court considers fair and appropriate.

(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.'(Underling my emphasis)

[5] To determine the urgency of this matter, one has to establish if the applicants have complied with the provisions of rule 73(3) and 73(4). Fortunate enough guidelines have been set out in our case law to assist courts in the determination of issues of urgency.

[6] I therefore repeat hereunder, relying on the authorities, what Masuku J states in the matter of *Nghiimbwasha and Another v Minister of Justice and Others*[1]. The court dealt with the interpretation of the word 'must' contained in rule 73(4) as well as the responsibility of an applicant in a matter alleged to be urgent, para 11 and further reads:

'The first thing to note is that the said rule is couched in peremptory language regarding what a litigant who wishes to approach the court on urgency must do. That the language employed is mandatory in nature can be deduced from the use of the word "must" in rule 73 (4). 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", 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

[1] *Nghiimbwasha and Another v Minister of Justice and Others [Appeal 38 of 2015]* [2015] NAHCMD 67 (20 March 2015).

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.'

[7] Parker AJ, on the interpretation and application of rule 73(4) said in *Fuller v Shigwele*[2]:

'[2] Urgent applications are now governed by rule 73 of the rules of court (i.e. 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 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 or 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.'

[8] Rule 73(3) provides that a judge, in urgent applications, may dispense with the forms and service provided for in the rules and dispose of the matter as he or she deems fit. An affidavit filed in support of an application, in terms of rule 73(4),must set forth explicitly the circumstances which an applicant avers render the matter urgent also giving the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. The issue of absence of substantial redress in due course, in the main, determines the urgency of the matter.

[9] In determining whether a matter is urgent or not, each case is decided on its own facts.[3]

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[2] *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (15 February 2015), para 2.

[3] *Tjipangandjara v Namibia Water Corporation* (Pty) Ltd (LC 60/2015) [2015] NALCMM 11 (11 May 2015).

[10] The urgency of the matter, according to the applicant, is to be found in paragraphs 87-93 of the founding affidavit. It is, therefore, against the contents of these paragraphs that the issue of whether or not the matter is urgent has to be determined.

[11] In paragraphs 87 - 93, the applicant states that the relief through the arbitration process will not come in time before the allocation of the quota for the 2022/2023 fishing season and the application for the relief sought herein would also not be in time to prevent the respondents from selling the quota to third parties in direct contravention of its obligations contained in the Quota Participation Agreement. Furthermore the applicant does not want to wait until the last moment to determine whether an arbitration award may be made in time or not and then have to bring an application on such shot time periods for the respondents to reply that it encounters the same complaints raised by the respondents in the previous urgent application. The applicant highlighted that although the matter was brought on an urgent basis, reasonable time was afforded to the parties to state their case before the court, as the papers were made available to the respondents and their attorneys on 09 September 2022. The reason for this is that the application was finalized on 08 September 2022, but the authority by the board of directors that was needed to authorise the application was not obtained.

[12] The first to seventh respondents take the point that the application is not urgent and that the requirements for urgency set out in rule 73 of this court's rules have not been complied with.

[13] The high water mark of the urgency of the application seems to be in paragraph 88 and 89 of the applicants founding affidavit which says:

'88. The historical facts of this matter as eluded to above make it clear that:

88.1 Relief through the arbitration process will not come in time before the allocation of the Quota for the 2022/2023 fishing season; and

88.2 an application for the relief sought herein would also not be in time to prevent the Respondents from selling the Quota to third parties in direct contravention of its obligations contained in the QPR.

89. Furthermore, the Applicant does not want to wait until the last moment to determine whether an arbitration award may be made in time or not and then have to bring an application on such short time periods for the Respondents to reply that it encounters the same complaints raised by the Respondents in the previous urgent application.'

[14] There is a question which immediately springs to mind and this is: having regard to what is said in paragraphs 88 and 89 above, can it seriously be said that the applicant has explicitly set forth the circumstances which they aver make their matter urgent? Lastly, can it also be seriously said that they have properly disclosed the reasons why they claim that they will not be afforded substantial redress at a hearing in due course? I fail to see how the questions can be answered in the positive because the provisions of rule 73(3) and 73(4) have clearly not been satisfied. One searches in the applicants papers, in '*a room full of confusion and doubt'*, for the circumstances and reasons referred to in rule 73 (3) and (4).

[15] Mr Corbett, for the respondents, submitted that the applicant failed to explicitly set forth the circumstances which make their case urgent as well as the reasons which demonstrate that they will not be afforded substantial redress at a hearing in due course. It is further argued that the applicant's urgency is not only self-created, but also self-serving in that the applicant wants to gain an advantage over the respondents to which it is not entitled.

[16] Mr Corbett, for the respondents, submitted that the applicant did not show why he could not be afforded substantial redress at a hearing in due course. It is argued that the applicant seeks to protect a financial benefit to be derived from the fishing quotas sought to be interdicted, and this brings this application under the caption of commercial urgency. That the threshold to persuade the court that it cannot be afforded substantial redress at a hearing in the ordinary course, is higher.

[17] The applicant has not set forth explicitly (1) the circumstances which he avers render the matter urgent, and (2) the reasons why he claims he could not be afforded substantial redress at a hearing in due course within the meaning of rule 73 (4) (a) and (b) of the rules of court.

[18] As to rule 73 (4) (a), applicant submitted that the relief through the arbitration process will not come in time and that they do not want to wait until the last moment to determine whether an arbitration award may be made in time or not. The aim of the application is to prevent the respondents from selling the quota to third parties. But such submission does not answer the requirement in rule 73 (4) (*a*). The fact that the relief through arbitration process will not come in time and that the applicant does not want to wait for the arbitration award, cannot be used as a ground to approach the court to seek the relief he now seeks at extremely breakneck speed. The applicant has, as I have said previously, known since December 2021 that the first respondent was no longer the holder of a fishing quota. The applicant waited until 09 September 2022 to institute the proceeding at extremely breakneck speed, praying the court to hear the matter on the basis of urgency. The conclusion is reasonable and inescapable that the urgency is self-created. [4](*Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC)).

[19] As respects satisfying the requirement in rule 73 (4) (*b*), the applicant has not set forth explicitly reasons why applicant claims he could not be afforded substantial redress in due course. All that is said 'the relief in the arbitration process will not come in time and that the applicant does not want to wait, but to prevent the respondents from selling the quota to third parties'. But this statement cannot satisfy the requirement of rule 73 (4) (*b*). Besides, there is an ongoing arbitration process, where the issues between the parties are being ventilated. This clearly demonstrates that the applicants cannot, therefore, be heard to say that they cannot and will not be afforded substantial redress at a hearing in due course.

[20] I cannot agree more with the submissions made by counsel for the first to seventh respondent's, that applicant failed to explicitly set forth the circumstances which make their case urgent as well as the reasons which demonstrate that they will not be afforded substantial redress at a hearing in due course. I therefore take the view that the applicant's urgency is not only self-created, but also self-serving in that the applicant seeks to protect a financial benefit to be derived from the fishing quotas sought to be interdicted, and this brings this application under the caption of

[4] *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC.

commercial urgency. This court is replete with authority that the possibility of financial hardship or financial losses does not constitute a ground for urgency.

Based on these reasons, I conclude that applicant has not satisfied the dual requirements of rule 73 (4), and so the court ought to decline granting the indulgence he prays the court for, namely, to hear the matter on urgent basis.

[21] In the result, it is ordered as follows:

1. The application is refused for lack of urgency, and is struck from the roll.
2. The applicant is to pay the costs of the application, consequent upon the employment of one instructing counsel and two instructed counsel, where so employed.
3. The matter is considered finalized and is removed from the roll.

P CHRISTIAAN

Acting Judge

APPEARANCES

APPELLANT:	M Fitzgerald SC, (assisted by G Dicks) Instructed by Ellis & Partners Legal Practitioners, Windhoek
FIRST TO SEVENTH RESPONDENT:	A Corbett (assisted by J Strydom) Instructed by Theunissen, Louw and Partners Legal Practitioners, Windhoek