

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case No.: HC-MD-CIV-MOT-GEN-2023/00308

In the matter between:

RHAPSODY INVESTMENTS CLOSE CORPORATION **APPLICANT**

and

STANDARD BANK NAMIBIA LTD **FIRST RESPONDENT**
INSPECTOR JOHAN NICO GREEN **SECOND RESPONDENT**
NAMIBIA REVENUE AGENCY (NAMRA) **THIRD RESPONDENT**

Neutral citation: *Rhapsody Investments Close Corporation v Standard Bank Namibia Ltd and Others* (HC-MD-CIV-MOT-GEN-2023/00308) [2023] NAHCMD 569 (14 September 2023)

Coram: SIBEYA J

Heard: 10 and 18 August 2023

Delivered: 14 September 2023

Flynote: Applications – Urgent application – Rule 73 of the High Court Rules – Anticipation of a *rule nisi* – Rule 72 – Showing cause against an interim order to return the funds.

Summary: This matter has a long history dating back to 2015. It involves funds that were preserved in terms of the Prevention of Organised Crime Act 29 of 2004 ('POCA'). The court initially refused to confirm the provisional preservation order. The order was appealed against and the appeal was upheld by the Supreme Court. The Supreme Court referred the matter back to this court to hear the forfeiture application. This court dismissed the forfeiture application and an appeal to the Supreme Court was again launched. On 3 May 2023, the Supreme Court dismissed the appeal resulting in the discharge of the preservation order in terms of s 53(2) of POCA.

The applicant (Rhapsody) was then engaged in several correspondences with the first respondent to have its previously preserved funds paid back to it, without success. On 13 July 2023, the applicant launched an application to be heard on urgency seeking a rule *nisi* to direct the first respondent to pay back the funds that were in its bank account. The application was heard and granted on 19 July 2023. Thereafter, the third respondent (NamRA) brought an urgent application of its own. It sought leave to anticipate the order that was granted on 19 July 2023 directing it to pay back the funds and further sought an order to delay the said payment.

Held: that unlike the matter of the *Government of the Republic of Namibia v Sikunda* 2002 NR (SC), where the respondent was only afforded an hour or two to respond to the application, in *casu*, NamRA was afforded five days. This, distinguishes the present matter from the *Sikunda* matter and NamRA cannot be placed in a similar position as the respondent in *Sikunda*. NamRA, in the court's view, cannot be said to have been denied a reasonable hearing as it was served five days prior to the hearing date of the application.

Held that: Rhapsody does not deny that it owes taxes as alleged by NamRA. It is further not denied that NamRA had made several attempts to locate Rhapsody and even went to an extent of contacting the legal practitioners of record for Rhapsody to assist with the contact details of Rhapsody for purposes of further tax assessment without success.

Held further that: the balance of convenience favours NamRA as once the funds are released, they could easily be dissipated in the face of tax liabilities. It is on the basis of the above, that the court found that NamRA succeeded to show cause why the *rule nisi* issued on 19 July 2023 cannot be confirmed.

Held: the court does not find merit in the argument by that the urgent application by NamRA was triggered by the order of 19 July 2023 when NamRA knew or ought to have known that it required the contact details of Rhapsody to conduct a further assessment already by 17 May 2023.

Held that: NamRA's actions of keeping Rhapsody in darkness about the whereabouts of the funds on or before 19 July 2023, justified the approach taken by Rhapsody to seek redress from court. That, together with NamRA's failure to comply with the court order of 19 July 2023 on the basis of the alleged incorrect legal advice favours an adverse cost order against NamRA.

ORDER

1. The *rule nisi* granted on 19 July 2023 and extended on 18 August 2023 is hereby discharged.
2. The third respondent must pay the costs of the applicant for the application up to 3 August 2023.
3. The third respondent's application is struck from the roll for lack of urgency.

4. There is no order as to costs for proceedings from 4 August 2023.
 5. The matter is removed from the roll.
-

RULING

SIBEYA J:

Introduction

[1] This matter reveals a long and winded story emanating from 2015 with related litigation in no different position. The matter which involves funds that were preserved in terms of the Prevention of Organised Crime Act 29 of 2004 ('POCA'), was heard in this court (differently constituted) and the court refused to confirm the provisional preservation order. The order was appealed against and the appeal was upheld by the Supreme Court. The Supreme Court referred the matter back to this court to hear the forfeiture application. This court dismissed the forfeiture application and an appeal to the Supreme Court was again launched. On 3 May 2023, the Supreme Court dismissed the appeal which, as a matter of legal consequence, resulted in the discharge of the preservation order in terms of s 53(2) of POCA.

[2] Subsequent to the above-mentioned, the applicant engaged in several correspondences with the first respondent to have its previously preserved funds paid back to it, without success. On 13 July 2023, the applicant launched an application to be heard on urgency seeking a rule *nisi* to direct the first respondent to pay back the funds that were in its bank account, which was heard and granted on 19 July 2023. Thereafter, the third respondent brought an urgent application of its own. It sought leave to anticipate the order that was granted on 19 July 2023 directing it to pay back the funds and further sought an order to delay the said payment.

[3] The applicant's application is opposed by the third respondent while the applicant, in turn, opposed the third respondent's application.

Parties and legal representation

[4] The applicant is Rhapsody Investments CC, a close corporation registered in terms of the Laws of the Republic of Namibia and whose address of service for purposes of this matter is care of Sisa Namandje & Co Inc. The applicant shall be referred to as 'Rhapsody'.

[5] The first respondent is Standard Bank Namibia Limited, a financial institution registered in terms of the Banking Institutions Act 2 of 1998, with its head office situated at Erf 1378, 1 Chasie Street, Kleinne Kuppe, Windhoek. The first respondent shall be referred to as 'the bank'.

[6] The second respondent is Inspector Johan Nico Green, an adult male employed as a police officer holding the rank of an Inspector in the Namibian Police serving in the Commercial Crime Investigation Unit: Anti-Money-Laundering Sub-division, Windhoek. His address of service is care of the Office of the Government Attorney, 2nd Floor Sanlam Centre, Independence Avenue, Windhoek. The second respondent shall be referred to as 'Inspector Green'.

[7] The third respondent is Namibia Revenue Agency (NamRA), established in terms of the Namibia Revenue Agency Act 12 of 2017, with its offices situated at the Ministry of Finance, Oude Voorpost Building, Moltke Street, Windhoek. The third respondent shall be referred to as 'NamRA'. Where reference is made to all the respondents jointly they shall be referred to as 'the respondents' while the respondents and the applicant jointly shall be referred to as 'the parties'.

[8] Mr Namandje appears for the Rhapsody while Mr Phatela assisted by Ms Shifotoka appear for NamRA.

Background

[9] On 13 July 2023, the Rhapsody launched an urgent application which was set down for hearing on 19 July 2023 at 09h00, where it sought a *rule nisi* calling upon the respondents to show cause on 11 August at 10h00 or a date and time determined by the court why the following orders cannot be made final:

- (a) a declaratory order that the first respondent is obliged to carry out the instructions communicated to it on 5 May 2023 by the Rhapsody's legal practitioners to make payment and transfer the Rhapsody's funds as instructed;
- (b) that in the event that the bank is not in possession of the said funds, the bank must on the return date provide the court with a detailed report on the whereabouts of the Rhapsody's funds and the legal basis for the transfer to a third party;
- (c) that if the funds are in the possession of NamRA or any other third party, a declaratory order that the transfer to NamRA or such third party is unlawful, arbitrary, and unreasonable and that the funds be paid back to the Rhapsody's account with the bank within five days of the court order, and for the bank to carry out the Rhapsody's instructions.

[10] The applicant further sought the following interim orders, with immediate effect that, pending the return date:

- (a) that the bank and Inspector Green provide the applicant with written information regarding the whereabouts of its funds within two days of the court order;

- (b) that any of the respondents other than the bank who may be in possession of the applicant's funds, must cause such funds to be transferred, within five days of the court order, to the applicant's account with the bank so as to enable the bank to carry-out the applicant's instructions;
- (c) that in the event of the bank being in possession of the said funds, it be ordered to comply with the applicant's instructions within three days of the court order.

[11] The applicant further sought costs including costs of two legal practitioners on the attorney and own client scale against any respondent who opposes the application.

[12] The bank was served with the application on 13 July 2023 while Inspector Green and NamRA were served on 14 July 2023. By the time of hearing of the application on 19 July 2023, none of the respondents had opposed the application, and it was, therefore, heard unopposed.

[13] After the hearing, the court made the following order:

'1 The Applicant's non-compliance with the Rules of this Court pertaining to time periods for service of the application, mode of service, giving notice to parties and exchange of pleadings is condoned and that the matter is heard as one of urgency.

2 A rule *nisi* is hereby issued calling upon the Respondents to show cause on 17 August 2023 at 10h00 as to why the following orders should not be made:

2.1 It is declared that the First Respondent is obliged to carry out the Applicant's instructions communicated to it on 5 May 2023 by the Applicant's legal practitioners and to make payment and transfer as instructed.

2.2 In the event of the First Respondent not being in possession of the Applicant's funds in the account numbers Standard Bank Namibia, Business banking account number 60001553274 and Standard Bank Namibia, Premium call account number 60001400222 it is ordered to

provide the Applicant with full information and a detailed report on the whereabouts of the Applicant's funds and the legal basis for the transfer of such funds to a third parties within seven (7) days of this Court Order.

2.3 In the event of the Applicant's funds being in possession of the Third Respondent or any other third party, it is declared that the transfer to the Third Respondent or such other third party is unlawful, arbitrary, unfair and unreasonable and must be set aside and reversed within seven (7) days of this Court Order.

3 Pending the return date, it is ordered that:

3.1 The First and Second Respondents provide the Applicant with full information in written form on the current status and whereabouts of the Applicant's funds within three (3) days for this Court Order;

3.2 In the event of the First Respondent still being in possession of the Applicant's funds it is ordered that it, within five (5) days of this Court Order, must comply with Applicant's instructions in the letter addressed to it by Applicant's legal practitioner dated 5 May 2023 and make the transfer of funds;

3.3 An order that any of the Respondents other than the First Respondent who may be in possession of the Applicant's funds, is ordered to cause such funds to be transferred, within seven (7) days of this Court Order, to the Applicant's banking accounts with the First Respondent so as to enable the First Respondent to comply with and carry out the Applicant's instruction in its letter dated 5 May 2023;

3.4 That the orders under paragraphs 3.1, 3.2 and 3.3 serve as an interim interdict with immediate effect.

4 The case is postponed to 17 August 2023 at 10:00 for Rule *Nisi* Return Date hearing'

[14] The above order was served on the respondents on the same day, 19 July 2023.

[15] On 2 August 2023, NamRA filed a notice to oppose the application. On 4 August 2023, it further filed an application that was set down to be heard on urgency on 7 August 2023 at 09h00. Another notice of motion with the same relief sought as the earlier application provided the hearing date for the application as 11 August 2023 at 09h00. NamRA's application was heard on 10 August 2023 and the rule *nisi* was extended to 21 August 2023. On 18 August 2023, however, the court invited the parties to address certain specified issues, after which, the rule was extended further.

[16] In the aforesaid application, NamRA sought the following relief:

- ' (1) Condoning the third respondent's non-compliance with the Rules of this Honourable Court and hearing this application on an urgent basis as envisaged in Rule 73(3) of the Rules of this Honourable Court.
- 2. That the Honourable Court grant leave to the third respondent to anticipate the Order that was granted against the third respondent on 19 July 2023 directing the third respondent to pay back the funds to the account of the applicant held at the first respondent.
- 3. Granting leave to the third respondent to delay the date of payment referred to in paragraph 3.3 of the Order of 19 July 2023 to the Return date contained in the Order of the Honourable Court.
- 4. In any event, for the Honourable Court to also direct the applicant provide its contact details to the third respondent within three (3) days of the Order of the Honourable Court and to that extent arrange a meeting with the third respondent before 11 August 2023 for purposes of facilitating an additional assessment of the tax liability of the applicant by the third respondent.
- 5. That the third respondent, should it determine that some allowance on the tax liability of the applicant, including for legal expenses, that such funds as may be equivalent to such tax the applicant, including for legal expenses, that such funds as may be equivalent to such tax deductible allowance be refunded to the applicant pending finalisation of the full assessment of the applicant's tax liability.

6. No order as to costs for this application unless in the event of the opposition of the application.'

[17] As alluded earlier, the applicant opposed the application brought by NamRA and raised points of law in terms of rule 66(1) (c) of the rules of this court.

Points of law raised

[18] Rhapsody contends that its application was not brought *ex parte* as NamRA was cited as a party and was, prior to the hearing, served with the application on 14 July 2023, therefore, it is not open to NamRA to anticipate the return date. Rhapsody further contends that the orders sought in paragraphs 2 to 5 of the NamRA's notice of motion do not conform to the nature of anticipation under common law or under rule 72, and whether or not the orders sought in paragraphs 3 and 4 are competent in the realm of anticipation of a return date as they appear to be interim relief. Rhapsody further contends that NamRA failed to make out a case for the anticipation of a return date.

[19] Rhapsody, in alternative to the above, raised further points of law for determination, namely:

(a) Whether or not the powers provided for s 91 of the Income Tax Act 24 of 1981 ('the Act') to declare any person an agent of any other person could be exercised directly or by delegation by a Ms Kevi Eises when she authored the letter of 31 March 2023 and whether or not such powers are susceptible to delegation and further whether or not the person declared to be an agent can be so declared when in law he had no concerned funds in his or her possession.

(b) Whether or not the bank could be lawfully declared as an agent when the tax assessment provided for in s 67 of the Act had not occurred.

[20] NamRA contends contrariwise and argued that it is entitled to the relief that it seeks.

Anticipation of the return date

[21] It was argued by Mr Namandje that anticipation of the return date does not apply to this matter for the reason that Rhapsody's application was not brought *ex parte*. NamRA was served with the application five days before the hearing date. It was further argued for Rhapsody that invoking anticipation of the return date in this matter where there was prior service of the application offends rule 72.

[22] Mr Namandje, in support of the argument that anticipation does not find application in this matter cited the following passage from *Peacock Television Co. (Pty) Ltd v Transkei Development Corporation*:¹

'... It seems to me that Rule 6(8) was meant to come to the aid of a litigant who finds himself/herself taken by surprise by an order granted *ex parte*. Once such a litigant becomes aware of the order, he/she should then take steps to avoid and/or ameliorate the effect thereof by anticipating the return day of the rule *nisi*. Rule 6(8) could have never have been meant to cover a situation like the one before me. If respondents, in circumstance like the present, were to be allowed to anticipate a return day as they please, the orderly practice of this court and the purpose thereof would be defeated. Such anticipation would amount to allowing respondents to avoid having to properly set their matters down for hearing on the opposed roll. This would not only result in chaos but it would also prejudice those litigants who have set down their opposed matters properly and have waited their turn on the opposed roll. Of course, it is not inconceivable that, after a rule *nisi* granted *ex parte* has been extended with the acquiescence of the party adversely affected thereby, special circumstances necessitating the urgent determination of the issues relating to such rule *nisi* may suddenly arise. The question then arises as to whether, in that event, the respondent would be entitled to anticipate in terms of Rule 6(8) or to bring an application (call it interlocutory if you will) on notice seeking appropriate relief. I do not find it necessary to decide the appropriate procedure on this because in the instant case no special circumstances have been proffered. Suffice to say that any difference in the two approaches, in my view, would be a matter of formalism rather than substance.'

¹ *Peacock Television Co. (Pty) Ltd v Transkei Development Corporation* 1998 (2) SA 259 (TK) 262F-263A.

[23] Ms Shifotoka who argued on 10 August 2023, stated that the fact that NamRA did not oppose Rhapsody's application before the rule was granted, does not take away NamRA's right to anticipate the return date. Ms Shifotoka argued further that, at common law, the presence of a provisional order grants the right to anticipate. She referred to Manfred Nathan in his work titled, *The Common Law of South Africa*,² where he remarked that:

‘in any case, where a provisional order for an interdict is granted, the Respondent may anticipate the return day and supply to court or a judge in chambers for an order to setting aside the interdict and notice of such application must be given to the applicant.’

[24] Ms Shifotoka further made reference to the Supreme Court decision of *Government of the Republic of Namibia v Sikunda*,³ where O'Linn AJA stated the following regarding the old rule 6(8) which is similarly worded to rule 72(7):

‘... the rule aforesaid regarding anticipation of the return date was intended to avoid and/or mitigate the prejudice to a litigant who is faced with an interim order, which may be in the form of an interim interdict, even in the form of a mandatory injunction as in this case, without having had a reasonable hearing.’

[25] Rule 72(7) reads that:

‘Any person against whom an order is granted *ex parte* may anticipate the return day on delivery of not less than 24 hours’ notice.’

[26] It is common cause that Rhapsody's application was not brought *ex parte* and, therefore, rule 72(7) which regulates anticipation of the return date in *ex parte* application finds no application. Anticipation of the return date is provided for in rule 72(7) to prevent an affected party from being prejudiced by an interim order, without being heard. The Supreme Court in *Sikunda (supra)*, was faced with a question whether or not the respondent could anticipate the return date of the rule *nisi* where the order

² Manfred Nathan in his work titled, *The Common Law of South Africa*, vol 4, at 2329.

³ *Government of the Republic of Namibia v Sikunda* 2002 NR (SC) 203.

was not granted *ex parte*. The respondent was represented by counsel in the High Court after such counsel was notified of the application at short notice and before the application could be served on the respondent, and made submissions after briefly perusing the papers. The argument before court was, therefore, that because the respondent was represented at the hearing of the application for a rule *nisi*, it could not anticipate the return date, as rule 6(8) only permitted anticipation where the order was granted *ex parte*.

[27] The Supreme Court disagreed with the aforesaid argument and emphasised that the purpose of the rule (rule 6(8)) was to avoid or mitigate the prejudice that a litigant against whom an interim order is made could suffer, without having heard a reasonable hearing. The Supreme Court further remarked that 'To give the attorney for such litigant telephonic advance notice of an urgent application an hour or two later, without the application being properly served on the respondent and then expecting the respondent and/or his attorney to make a proper and sufficient response, is an abrogation of the *audi alteram partem* principle.'⁴

[28] In the present matter, NamRA had five days from the date of service of the application, 14 July 2023 to the date of hearing of the urgent application 19 July 2023, to oppose and file its response to the application. This, it did not do. The reason proffered is that when NamRA was served with the application, its legal practitioners were of the view that the order did not affect NamRA, and therefore did not need to oppose. This view they have come to realise that is incorrect.

[29] Unlike the *Sikunda* matter where the respondent was only afforded an hour or two to respond to the application, in *casu*, NamRA was afforded five days. This is, therefore, distinguishable from the *Sikunda* matter and NamRA cannot be placed in a similar position as the respondent in *Sikunda*. It cannot be said, in my view, that NamRA was denied a reasonable hearing as it was served five days prior to the hearing date of the application. NamRA, in my view, cannot anticipate the return day of the order.

⁴ *Sikunda (supra)* at 208-209.

[30] The position of NamRA is not easily conceivable, as on the one hand it seeks to anticipate the return date, while on the other, it seeks interim orders of its own and further presents a case in attempt to show cause that the rule *nisi* should not be confirmed. I will return to the prayers that NamRA seeks.

Did NamRA show cause?

[31] It is apparent from the interim order of 19 July 2023, that the respondents (NamRA included) were afforded the opportunity to show cause why certain orders should not be made.

[32] At the return date, the court upon hearing the respondents, can either confirm, discharge or vary the rule *nisi*. NamRA, in paragraphs two to five of its application, seeks to vary the rule in so far as it relates to the payment of the funds, the date of payments and the amount to be paid. The primary relief sought by NamRA is to delay the payment pending further tax assessment of Rhapsody to be carried out.

[33] NamRA further states through its employees, Ms Haidula and Ms Kevi Eises, that Rhapsody's tax liability was already determined on 31 March 2023, with the tax liability standing at N\$3,1 million for the capital amount.

[34] The amounts of N\$1.7 million and N\$99 thousand respectively, were remitted from the bank to the State Revenue Account. NamRA further states that once the money is remitted to the State Revenue Account it becomes state money and can only be withdrawn or transferred from there with the approval of Treasury established in terms of the State Finance Act 31 of 1991. NamRA further contend that tax liabilities must be settled whereafter any remaining funds can be paid back to Rhapsody.

[35] Mr Namandje argued that the determination of the bank as an agent under s 91 of the Income Tax Act 24 of 1981 requires that NamRA should first obtain a certified

statement by the Registrar of the High Court under s 83 of the Income Tax Act in order to give the assessment the nature and effect of a civil judgment. Mr Namandje further argued that s 91 further provides that only the Minister alternatively the Commissioner of NamRA is empowered to appoint an agent.

[36] Ms Eises, a senior manager at NamRA deposed to an affidavit that she is the officer that deals with Rhapsody's matter at NamRA and she is the author of the 31 March 2023 letter to the bank appointing it as an agent in terms of s 91 of the Income Tax Act and to pay over the total tax liability amount of N\$9,9 million comprising of the capital, penalty and interest. The purpose of the s 91 letter was for NamRA to obtain funds in order to satisfy Rhapsody's tax liability.

[37] It is correct that in order to invoke the powers set out on s 91 certain facts must be present. The South African High Court in *Mpande Foodliner CC v Commissioner for South African Revenue Services*,⁵ remarked as follows on a similar provision:

'[33] ... the jurisdictional facts that are vital in invoking s 47 are: (1) it must be reasonably necessary to declare a person an agent of the taxpaying vendor; (2) who can only be declared an errant or a recalcitrant taxpayer if an amount of tax, additional tax, penalty or interest is due and payable; (3) only of the agent is required to make payments of such moneys held by him or her for or due to the taxpaying vendor; and (4) only declare the person as an agent if he, she or it is the taxpaying vendor's debtor. Each of the jurisdictional facts must be present and objectively determined before the first respondent is competent in issuing a s 47 notice.'

[38] It was argued by Mr Namandje that the bank did not have the funds in its custody as such funds were strictly in the custody of Inspector Green on account of a preservation order. I find this argument to be overly technical as even if the custodian is accorded to Inspector Green the funds were in an account controlled by the bank. In my view, when properly appointed as an agent in terms of s 91, the bank can accordingly comply.

⁵ *Mpande Foodliner CC v Commissioner for South African Revenue Services* 2000 94) SA 1047 (T) para 33.

[39] On the argument by Mr Namandje that it was not established Ms Eises had the authority to appoint the bank as an agent in terms of s 91 of the Income Tax Act, it was contended by Ms Shifotoka that Rhapsody was not only liable for income tax but also for value added tax (VAT). Rhapsody is registered for VAT and further that NamRA has been trying to locate Rhapsody to carry-out a detailed assessment.

[40] Section 91 provides that:

'The Minister may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax due from any moneys, including pensions, salary wages or any other remuneration, which may be held by him for or due by him to the person whose agent he has been declared to be.'

[41] No express delegation was produced by NamRA even after Rhapsody challenged the authority on which Ms Eises appointed the bank in the letter of 31 March 2023. Ms Eises did not state her authority for issuing the said letter. Section 91 confers the decision to appoint an agent on the Minister, if he thinks necessary. It is not established that Ms Eises was duly delegated to exercise the powers set out in s 91.

[42] The difficulty that the court finds itself in is that Rhapsody does not deny that it owes taxes as alleged by NamRA. It is further not denied that NamRA had made several attempts to locate Rhapsody and even went to an extent of contacting the legal practitioners of record for Rhapsody to assist with the contact details of Rhapsody for purposes of further tax assessment without success. It should further be pointed out that in the present proceedings, the address provided by Rhapsody is care of the address of its legal practitioners of record. In my view, the balance of convenience favours NamRA as once the funds are released, they could easily be dissipated in the face of tax liabilities.

[43] In view of the above, I find that even if s 91 is not complied with to the latter, the fact remains that Rhapsody has determined tax liabilities, which NamRA intends to further assess, recoup the tax and refund the remainder. On the basis of the above findings, I hold the view that NamRA succeeded to show cause why the rule *nisi* issued on 19 July 2023 should not be confirmed. It must be noted that it is still open to Rhapsody to raise objections against the assessment made, and to appeal.

NamRA's application

[44] There is still NamRA's application to be addressed. In its application, NamRA seeks leave on urgency to delay the payment of the funds, including delaying the interdict granted on 19 July 2023; to direct Rhapsody to provide its contact details to NamRA and to arrange a meeting with NamRA in order to carry-out an additional tax assessment; and that should it be determined that there are tax liabilities, such should be deducted from the funds.

[45] It is settled law that if a party seeks relief on urgency, it must satisfy rule 73(4) of the rules of this court. The said rule provides that:

- '(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.'⁶

⁶ In *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15, para 2. *JB Cooling and Refrigeration CC v Stefnutti Stocks Construction (Namibia) (Pty) Ltd* (A 122/2016) [2016] NAHCMD 135 (29 April 2016). *Nkinda v The Municipal Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-GEN-2019/00400) [2019] NAHCMD 446 (31 October 2019).

[46] When a question was posed to Mr Phatela at the hearing of 18 August 2023, to point out the portions of the affidavits filed by NamRA that deals with urgency, he referred to paragraphs 54 to 57 of Ms Mahnaem Haidula's affidavit.

[47] Paragraphs 54 to 57 reads:

'54. As matters stand today NamRA does not have in its possession the money collected by it as that money has since been deposited into the State Revenue Fund at the Bank of Namibia.

55. In any event in regard to the question as to whether NamRA is able to comply with the Court Order to pay to Standard Bank the money paid over to the State Revenue Account by the representative taxpayer, I point out that as matters stand the answer is that NamRA will not be able to return the funds to the account of Rhapsody held at Standard Bank. Thus, NamRA will not be able to comply with such an order.

56. ...

57. ... NamRA is empowered in terms of the law to collect and pay over the money to the State Revenue Account, which account is controlled by a totally different state functionary, the Minister of Finance. Despite, the State Revenue Account being controlled by the Minister of Finance, there has to also be authorisation by Treasury to be paid from the State Revenue account.'

[48] It is apparent from reading the above paragraphs that despite from setting out the role that NamRA plays in the process of collecting tax, the affidavit is silent on the urgency of the application. Mr Phatela further argued that the urgency of NamRA's application was triggered by the court order of 19 July 2023 while in the same breath conceding that the relief sought in prayer four that that Rhapsody provides its contact details for further tax assessment could have been made as early as 17 May 2023 when Rhapsody's amounts were remitted to the State Revenue Account.

[49] Prayer five of NamRA's application flows as a consequence to prayer four. While prayer three seeks to delay the payment.

[50] No reasons were advanced by NamRA why the aforesaid prayers were not earlier after becoming necessary by or if they could have been sought 17 May 2023. The silence from NamRA on this subject, in my view, renders no assistance to prove the urgency of its application. I do not find merit in the argument by Mr Phatela that the urgent application by NamRA was triggered by the order of 19 July 2023 when they knew that they required the contact details of Rhapsody to conduct a further assessment already by 17 May 2023.

[51] Based on the above findings, I find that NamRA failed to establish the urgency of its application. It, therefore, follows that the application by NamRA falls to be struck from the roll for failure to establish urgency.

Conclusion

[52] It is on the basis of the above findings and conclusions that I opine that it has not be established that the rule *nisi* issued on 19 July 2023 should be confirmed, to the contrary, it was established NamRA succeeded to show cause that the rule *nisi* should be discharged. NamRA, however, failed to establish that it is entitled to the other relief sought in its application, particularly that the application should be heard as one of urgency. As a result, this court declines to exercise its discretion to hear NamRA's application on urgency.

Costs

[53] It is an established principle of law that costs follow the result. Ordinarily, NamRA would have been awarded costs for successfully opposing the application. The position adopted by NamRA, can, however, not be left unscratched.

[54] NamRA despite being served with the application four days prior to the date of hearing, opted not to oppose the application resulting in an unopposed hearing. It was only 14 days after the initial hearing and the interim order granted that NamRA filed papers to show cause why the interim orders could not be confirmed. By adopting a lay in wait approach, NamRA deprived the court of sufficient information that could possibly have an effect on the interim order sought to be made at the initial hearing. It is also possible that had NamRA filed its papers before the initial hearing, the applicant may have reconsidered its position, alternatively, reconsider its approach to the application. This opportunity, the applicant was denied given the option chosen by NamRA.

[55] Court orders must be obeyed to the core by all and sundry, whether such orders are considered as correct or not, until such time that the said orders are set aside on appeal or review or varied. Having found that NamRA caused the funds to be transferred from the account of the applicant held at the bank to the State Account, NamRa was obliged to comply with the order of 19 July 2023. If there was doubt about the applicability of the order to NamRA, NamRA ought to have *ex abundanti cautela*, provided information relating the movement of the funds from the bank to the State Account in which process it had a hand. NamRA, therefore, has to carry the blame for the manner in which the application progressed up to the stage that it filed its papers on 4 August 2023.

[56] As a result, and in the exercise of my discretion, due to NamRA's failure to provide the court with the necessary information on or before 19 July 2023, regarding the relief sought by Rhapsody and the transfer of the funds from the bank to the State Account, NamRA do not deserve to be awarded costs despite its success to ward off the application. NamRA will, therefore, not be awarded costs.

[57] NamRA's actions, however, of keeping Rhapsody in darkness about the whereabouts of the funds, justified the approach taken by Rhapsody to seek redress from court. In my view, notwithstanding the failure to succeed with the application,

Rhapsody deserves to be awarded costs of the application up to the time that NamRA filed its papers. I will order accordingly.

Order

[58] In view of the above, it is ordered that:

1. The *rule nisi* granted on 19 July 2023 and extended on 18 August 2023 is hereby discharged.
2. The third respondent must pay the costs of the applicant for the application up to 3 August 2023.
3. The third respondent's application is struck from the roll for lack of urgency.
4. There is no order as to costs for proceedings from 4 August 2023.
5. The matter is removed from the roll.

O S Sibeya
Judge

APPEARANCES:

APPLICANT: S Namandje
Of Sisa Namandje & Co Inc
Windhoek

THIRD RESPONDENT: T Phatela
Assisted by E Shifotoka
Instructed by the Government Attorney
Windhoek