CASE NO. (P) A 327/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CLEAR CHANNEL INDEPENDENT ADVERTISING NAMIBIA (PTY) LTD	**FIRST APPLICANT**
PRIMEDIA OUTDOOR (NAMIBIA) (PTY) LTD	**SECOND APPLICANT**

And

TRANSNAMIB HOLDINGS LIMITED	**FIRST RESPONDENT**
ALLIANCE MEDIA (PTY) LTD	**SECOND RESPONDENT**
MINISTER OF WORKS, TRANSPORT AND COMMUNICATIONS	**THIRD RESPONDENT**

CORAM:	MULLER A J
HEARD ON:	2005/11/08
DELIVERED ON:	2005/11/22

JUDGMENT

MULLER, AJ:

[1] The Applicants approached the Court on an urgent basis by way of Notice of Motion. The relief prayed for in the Notice of Motion are the following;

"**1. That the applicant's non-compliance with the Rules of Court be condoned and that this matter be heard as one of urgency as envisaged in Rule 6(12) of the Rules of Court.**

2. That, pending the outcome of the review application to be instituted by applicants within 10 (ten) days from the date this order is granted, the first and second respondents be interdicted from implementing the provisions of the contract that was entered into between them and in terms of which the second respondent leases property from the first respondent, in order for the second respondent to erect billboards for purposes of advertising on the first respondent's property.

3. That the costs of this application be costs in the cause of the review application.

4. Further and/or alternative relief."

[2] This application was set down for hearing on 7 November 2005, but after the First and Second Respondents filed opposing affidavits, the hearing was postponed to the next day. The

Third Respondent did not oppose the application, but apparently a legal practitioner was in Court on a watching brief.

[3] Counsel of Applicants, as well as of the First and Second Respondents filed Heads of Argument before the hearing commenced on 8 November 2005. In this Court the Applicant was represented by Mr Heathcote, the First Respondent by Mr Coleman and the Third Respondent by Mr Corbett. The three counsel mentioned advanced arguments to this Court.

[4] It is necessary to set out the background of this matter. It concerns a lease agreement in terms whereof the First Applicant leased space on property of the First Respondent for the purpose of installing large billboards, or as the Applicant calls it “hoardings”. For this purpose the First Applicant entered into a lease agreement with First Respondent during 1995, whereafter a new “Memorandum of Lease” was entered into on 17 November 1999. This lease agreement was valid for six years and would transpire by effluxion of time on 31 October 2005. However, in terms of clause 2(b) of the agreement the First Applicant, as lessee, had the option to renew the lease for a further period of six years by giving the First Respondent, as lessor, three months written notice of renewal prior to expiry of the lease. The First Applicant alleged that because the rental provisions of the agreement with escalation thereof had become onerous it decided not to renew the lease agreement

by exercising the said option to renew. This decision of the First Applicant was conveyed to the First Respondent, who accepted it. Letters were written form 6 October 2005 onwards by the deponent on behalf of the First Applicant, namely Mr Russel Stuart, General Manager of First Applicant and thereafter by Mr Francois Erasmus of Van der Merwe-Greeff, legal practitioners of First Applicant. A letter was also written on behalf of Second Applicant on 29 September 2005 to First Respondent. The main purpose of these letters addressed to First Respondent was to indicate the wish of the Applicants to enter into a lease contract for a similar purpose with First Respondent and to enquire the procedure to be followed by First Respondent in entering into a new lease agreement for the same purpose with another party or whether it would be put out on tender with the intention to enter such a new lease agreement. A certain Mr Black on behalf of First Respondent did respond on 21 October 2005 to the letter by the legal practitioner of First Applicant of 17 October 2005, but did not reply to the question of whether First Respondent in fact entered into a new lease agreement or put it out on tender.

[5] The facts set out above are common cause and also forms the basis of the Applicants' urgent application for the relief prayed in the Notice of Motion.

[6] What is not common cause and what is disputed by the First and Second Respondents in their affidavits, and in particular by

Mr Peter Gathuru, the General Manager of Second Respondent, is the allegation by the First Respondent that it was only discovered at a very late stage that First Respondent in fact entered into a lease agreement with Second Respondent, without replying to the various requests made by First Applicant as well as by its legal representative and without invoking a tender process. This then also forms the basis of the second prayer contained in the Applicants' Notice of Motion, namely that an interim order be granted to interdict the implementation of the contract between First and Second Respondents pending the outcome of a review that Applicants intend to institute within 10 days of such an order. There are also other disputes of the facts contained in the Applicant's founding affidavit by the First and Second Respondents in their opposing affidavits. I shall deal with these disputes later herein.

[7] It is on this factual basis that the Applicants approached the Court on an urgent basis for the relief requested by them. It is consequently clear that a Court hearing the Applicants' application on an unopposed basis had to rely on the facts alleged by the Applicants in arriving at a conclusion whether the relief prayed for in the Notice of Motion should be granted or not. I shall refer later herein to the need of full disclosure of all material facts to the Court to enable it to make such a decision and the effect of non-disclosure thereof.

[8] As mentioned before, the First and Second Respondents opposed the application of the Applicants and filed affidavits in this regard. Both Respondents averred that in the light of the short time that they had, full answering affidavits dealing with each and every allegation by the Applicants were not possible. However, both Applicants set out the basis on which the application is opposed and also made certain factual allegations which are in contrast with facts alleged by the Applicants. In particular this appears from the affidavit on behalf of the Second Respondent in the sense it is evident that there are disputes of fact in respect of material issues, to which I shall refer later herein. I shall summarize the main points raised by the respective Respondents hereinafter.

[9] The affidavit on behalf of First Respondent was deposed to by Mr Danie van Vuuren, the Manager: Procurement of First Respondent and who is charge of First Respondent's procurement department. First Respondent opposes the Application on the following grounds:

"**4.1 The Applicants do not have the requisite interest in, or rights in respect of, the fact that First and Second Respondents entered into an agreement to approach the Court in the way they do. They are not entitled to participate in any tender procedure or other form of competition to enter into this agreement; and**

4.2 The decision by First Respondent to enter into the lease agreement with Second Respondent is not subject to review. Therefore, the interim interdict asked for is not a competent order."

The Deponent of the affidavit on behalf of First Respondent then proceeds to aver that First Respondent does not have any "tender regulations" and that for procurements the First Respondent relies on its Purchasing Policies and Procedures as well as its internal tender procedures. It is also alleged that the Tender Board Act, Act no. 16 of 1996 and regulations promulgated in terms thereof, is not applicable to First Respondent. It is further averred that such policies and procedures are exclusively for the procurement of goods etc. and concerns money to be spent by First Respondent and not income earned by it. Such procurement has to be distinguished from a situation as provided for in the lease agreement that First Applicant had with First Respondent and it is alleged that lease agreement also did not come into being as a result of a tender process. It is further alleged that such a lease agreement is purely a commercial contract and not the type of contract that First Respondent enters into by virtue of any administrative function. Consequently, First Respondent denied that it acted *ultra vires* by entering into the agreement with Second Respondent and avers that even if he did, it is

none of Applicants' business. It is further denied that the entering into the agreement with Second Respondent was unreasonable or unfair towards Applicants.

[10] The basis of opposition to the application by Second Respondent is the following:

"**5.1 The Applicants are not entitled to bring this application as one of urgency.**

5.2 The Applicants do not have the necessary interest in, or rights in respect of, the subject matter of this dispute….

5.3 In any event, the decision taken by the First Respondent to enter into the lease agreement with the Second Respondent is not a decision subject to any review."

Mr Peter Gathuru on behalf of Second Respondent then makes the following allegations, the relevance of which will be considered hereinafter against the facts disclosed by the Applicants. He himself, apparently telephoned Mr Russel Stuart, the General Manager of First Applicant (and Deponent) of the affidavit on behalf of First Applicant, to request a meeting with him, whereupon the reason for the meeting was required by Mr Stuart. Mr Gathuru informed him that "the Second Respondent had signed the lease agreement with the First Respondent for the lease of sites for billboards and I wish to discuss the

possible purchase of the First Applicant's billboards from it." It is further alleged that Mr Stuart agreed to such a meeting, which meeting took place at his offices on 28 September 2005. In respect of this meeting Mr Gathuru says: "At such meeting I specifically discussed with him the purchase by Second Respondent of First Applicant's billboards which have been erected on the premises leased from First Respondent. Mr Stuart advised me that, whilst he was unwilling to sell First Applicant's "City Light" billboards, he was prepared to enter into negotiations for the sale of the remainder of the billboards." It is further alleged that Mr Gathuru also received information from another director of Second Respondent, Mr Greg Benatar, that there was a subsequent meeting between him and Mr Stuart in South Africa at which meeting the purchase by Second Respondent of First Respondent's billboards were again discussed. Finally, Mr Gathuru said the following in his opposing affidavit:

"**12. I submit that these conversations are significant in that:**

12.1 Mr Stuart, acting on behalf of first applicant at that stage, by his conduct indicated that first applicant intended to abide by the first respondent's decision to lease the premises to the second respondent;

12.2 At no stage did Mr Stuart indicate that first applicant was dissatisfied with the decision of first respondent nor that the first applicant intended challenging such decisions;

12.3 This conduct on the part of first applicant manifestly undermines the assertion made in the founding papers by first applicant that the decision was unfair and unreasonable and in conflict with Article 18 with the Constitution; and

12.4 The first applicant was unaware of such decision more than a month before instituting these proceedings, but chose not to disclose this fact to the Court."

In conclusion the First Respondent denied that the Applicants made out a case out for interim relief and *inter alia* averred that the Applicants aggravated the situation by their own conduct in refusing to remove the billboards from First Respondent's premises which they were obliged to do upon termination of the lease agreement. It is also disputed that the balance of convenience rests with the Applicants and alleged that the balance of convenience in fact favours the refusal of the interdictory relief.

[11] Despite the fact that the affidavits on behalf of First and Second Respondents were filed and served on the Applicants already

the previous day, no replying affidavit was filed on behalf of the Applicants before the matter was heard on 8 November 2005. I shall refer to the significance hereof later herein.

[12] The application was brought on an urgent basis and it is trite that the Court has a discretion to condone the non-compliance of the Rules of Court so that the matter can be heard as one of urgency as envisaged in Rule 6(12) of the Rules of Court. This is an indulgence that the Applicants seeks as appears in paragraph 1 of the Notice of Motion. Rule 6(12) reads as follows:

"**12(a) In urgent applications the Court or the Judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.**

(b) In every affidavit or petition filed in support of any application under (a) of this subrule, the Applicant shall set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial redress at the hearing in due course." (My underlining)

This Rule, and in particular Rule 6(12)(a), makes it clear that the Court has a discretion in this regard and in Rule 6(12)(b) such an Applicant is required to comply with both legs contained therein, namely to explicitly set out the circumstances which is relied upon to render the matter urgent and secondly, the reasons upon which it is claimed that the Applicant will not afforded substantial redress at the hearing in due course. That the requirements in respect of both legs have to be complied with, had been emphasized in several decisions by other courts and also this Court.

See: Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/d Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137 F.__

Salt and Another v Smith 1991 (2) SA 186 (Nm) at 187 A - G.__

[13] The lack of urgency of bringing this application is a specific point of opposition by the Second Respondent and with which the First Respondent also associated itself during argument. The Second Respondent averred urgency fell away as a result of First Applicant's own conduct, because already in September 2005 it knew about First and Second Respondents' new contract. I asked Mr Heathcote whether the approach by the Courts in evaluating affidavits wherein facts are disputed as set out in the well known Stellenvale-rule, should be followed in respect of the urgency of the matter. Mr

Heathcote's reply to this is that he relies on the decision of Bandle Investments (Pty) Ltd v Registrar of Deeds and Others 2001 (2) SA 203 (SECLD) at 213 E – I, where the learned Judge remarked that the Court must assume that the Applicants' case is a good one and that he has a right to the relief which he seeks. He also relied in this regard on the case of Twentieth Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 592 (W) at 586 G. If I understand him correctly, his argument is that where a matter is brought to the Courts on an urgent basis the approach of the Court should be that was set out in the Bandle Investment's case and that the Stellenvale-rule does not apply. If this is a valid argument, it means that despite the facts brought to the attention of the Court by the Second Respondent, which were not disclosed by the Applicants in their affidavits, cannot be treated as set out in the Stellenvale-rule and several other subsequent decisions which approve of that type of approach. Because urgency is a relevant issue for which the Applicants sought the Court's indulgence in order to have the matter heard not in the normal course, but as an urgent matter with all the inconvenience to the Court and the Respondents that it may include, it is necessary to deal with this issue and in particular with the submissions made by Mr Heathcote in this regard.

[14] The Bandle Investment's-case on which Mr Heathcote relies was an exceptional one. Urgent relief was sought in terms of the Sectional Titles Act 66 of 1971. The Sectional Titles Amendment Act 44 of 1997 provided a cut-off date of 3 October 1997. To avoid the cut-off date the Applicants launched an urgent application to obtain an order authorizing the conversion of the right to extend areas referred to in a certificate of registered real rights. To avoid injustice, the Court granted this relief. After referring to the provisions of Rule 6(12)(a) against the peculiar circumstances of that matter, the learned Judge said:

"**Although it could concededly be argued that the Applicant was somewhat dilatory in obtaining the required consent, the explanation furnished by the Applicant for the delay is not unreasonable. The urgency of commercial interest, as *in casu,* may justify the application of Rule 6(12) no less than other interest and, for purposes of deciding upon urgency, I must assume that the Applicant's case is a good one and that it has a right to the relief which it seeks.**" (p. 213 E)

The learned Judge then referred to the Twentieth Century Fox Film-case.

In the Twentieth Century Fox Film-case, an order was granted on an urgent basis in the particular circumstances of that case. The Applicants in that case sought to establish the copyright of

the First Applicant in respect of three films and applied for far reaching relief against the Respondent, who was the seller of video cassettes of the films in South Africa. The Applicants were associate companies and the First Applicant was registered in the United States of America and the Second Applicant in London England. Urgency was opposed. Goldstone J referred to what Trengrove J said in Schweizer Reneke Vleismaatskappy (Edms.) Bpk v Die Minister van Landbou en Andere 1971 (1) PH F11 (T). The passage referred to is in Afrikaans, but loosely translated it says the following:

"**According to particulars before the Court, it appears to me that the Applicant knew for more than a month of the situation against which objection is now made. The matter only became urgent because the Applicant's delay and because the Second Respondent, as the Applicant, knew for quite some time, or should have known, that the business opened in Schweizer Renecke. The Applicant might have waited for information from the First Respondent as requested in the letter, but it was not necessary for the purpose of this application, which was based on the non-compliance with the *audi alteram partem* rule to wait so long before approaching the Court. Taking all these circumstances in consideration, I am not satisfied that Applicant provided sufficient grounds why the Court should at this stage**

interfere as a matter of urgency. In the circumstances I am not prepared to neglect the normal provisions of Rule 6."

Based on this Goldstone J said in the Twentieth Century Fox Film Corporation-case:

"**That principle, in my opinion, would clearly have been applicable in the present case if the Applicants have been South African companies. However, due allowance must clearly be made in the case of a foreign company, or foreign companies, and more especially in a case such as the present, where the Applicants have international interest which must receive attention from its executives. There is no reason to believe that the Applicants have been dilatory in bringing this application, and I was consequently not prepared to refuse to exercise my discretion in favour of the Applicants on that account."** (p. 586 C-D)

Goldstone J then continued:

"**In my opinion the urgency of commercial interest may justify the invocation of Uniform Rule of Court 6(12) no less than any other interest. Each case must depend on its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicants' case was a good one and that**

the Respondent is unlawfully infringing the Applicants copyrights in the films in question." (p. 586 G)

In neither of these cases it had been decided that the Stellenvale-rule is not applicable or cannot be applied in urgent applications. In both cases exceptional circumstances existed.

[15] The relief prayed for in paragraph 2 of the Notice of Motion is for an interim interdict. The requirements for an interim interdict has been set out in the well known case of Setlogelo v Setlogelo 1914 AD 221 at 227. Summarized, it means that an applicant must have a *prima facie* (clear) right, a well grounded apprehension of irreparable harm, that the balance of convenience favours the applicant and that he/she has no other satisfactory remedy.

[16] The consideration at this time in respect of interdictory relief has been set out in Gool v Minister of Justice and Another 1955 (2) SA 682 (C) at 688 D – E. This approach is based on the views expressed by Clayden J, in Webster v Mitchell 1948 (1) 1186 (W). With reference to what was said in the case of Webster v Mitchell Ogilvie Thompson J (as he then was) said the following in Gool's-case:

"…**in Webster v Mitchell, *supra,* the head-note of which reads as follows:**

"**In an application for a temporary interdict applicant's rights need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* to establish, though open to some doubt. The proper manner of approach is to take the facts as set out by the**

Application together with any facts set out by the Respondent which Applicant cannot dispute and to consider whether, having regard to the inherent probabilities, applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the Respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.

With the greatest respect, I am of the opinion that the criteria prescribed in this statement for the first branch of inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criteria on the applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined by *Webster v Mitchell*, *supra,* is the correct approach for ordinary interdict applications." Gool-case, *supra,* p. 688 D – E

[17] On the other hand when considering a final interdict or a final order, the approach of our courts is based on what is normally called "the Stellenvale-rule". The Stellenvale-rule is of course based on the general rule stated by Van Wyk J in the case of Stellenbosch Farmers Winery v Stellenvale Winery, 1957 (4) 234 C.

This approach was followed by several decisions and qualified in the case of Plascon-Evans Paints Limited v Van Riebeeck

Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 H – 645 C. Corbett JA said in this regard:

"**Secondly, the affidavits reveal certain disputes of facts. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without the resort to oral evidence. In such the general rule as stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmers Winery v Stellenvale Winery (Pty) Ltd, 1957 (4) SA (234) C at 235 E –G, to be**

> **'…where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order … where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.**'

This rule has been referred to several times by this Court. (Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Greenpoint) (Pty) Ltd 1976 (2) SA 930 (A) at 938 A – B; Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd 1982 (1) SA 398 (A) at 430-1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA 893 (A) at 923 G – 924 D). It seems to me, however that this formulation of the general rule, and particularly the second sentence

thereof, requires some clarification and, perhaps, qualification. It is correct that, where proceedings of notice of motion disputes of fact have arisen on affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in applicant's affidavits which have been admitted by respondent, together with the facts that are alleged by the respondent, justify such an order. The power of the Court to give such relief on the papers before it is, however, not confined to such a situation. In certain circumstances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. (See in this regard Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T); Da Mata v Otto NO 1972 (3) SA 858 (A) at 882 B – H)."

See also Tamarillo (Pty) Ltd v B N Aitkin 1982 (1) SA 398 (A) Muller AR said the following on page 430 G to 431 A:

"**A litigant is entitled to seek relief by way of notice of motion. If he has a reason to believe that facts essential to the success of a claim will probably be disputed he chooses that procedural form at his peril, for the Court in exercise of his discretion might decide neither to refer the matter for trial nor to direct that**

oral evidence placed before it, but to dismiss the application. (Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1168.) But if, notwithstanding that there are facts in dispute on the papers before it, the Court is satisfied that on the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, the applicant is entitled to relief (whether in respect of all his claims or one or more of them) it will make an order giving effect to such finding, with an appropriate order as to costs. (Cf Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235; Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Greenpoint) (Pty) Ltd 1976 (2) SA 930 (A) at 928.)"

[18] This approach was also followed by Namibian Courts where there were disputes of fact on the papers in motion applications.

See: Mineworkers Union of Namibia v Rossing Uranium Ltd 1991 NR 299 (HC) at 302 D;

Republican Party of Namibia & Another v Electoral Commission of Namibia and 7 Others an unreported case no. A 387/2005, delivered on 26 April 2005 by Damaseb JP, at p. 70; and

Else Kavendjaa v Kenneth Koo Kaunozondunge NO and 2 Others, an unreported case no. P (A) 62/2003 delivered by Damaseb JP at p. 26 and p. 29 - 30.

It has also been decided by the South African Appeal Court in judgment by Rabie ACJ that the approach by the Courts in applying the Stellenvale-rule is applicable whether the onus is on the Applicant or the Respondent. In that case the learned Acting Chief Justice discussed the Stellenvale-rule and a subsequent decision in that regard with approval.

See: Ngqumba/Damons/Jooste v Staatspresident 1988 (4) SA 224 at 259 C – 263 D

[19] Rule 6(5) of the Rules of Court provide for applications and all applications should comply with the requirements of that Rule. An urgent application remains an application, but in Rule 6(12), the Court is provided with a discretion to allow such application to be brought without complying with the normal requirements, provided that there is compliance with the provisions of Rule 6(12) itself.

See: Erasmus Superior Court Practice B1-55 and the decisions referred to.

[20] Although the Applicants' second prayer in his Notice of Motion is for an interim interdict, the first prayer is for condonation based on the alleged urgency of the matter. The question arises in determining the issue of urgency, what approach the

Court should follow in these circumstances, the normal approach where an interim interdict is prayed for or the Stellenvale-rule approach. In this application the Applicants used a hybrid form to approach the Court. It is not an *ex parte* application, because the papers were served on the Respondents, which is not the purpose of an *ex parte* application. A Notice of Motion should be used in *ex parte* applications in the form of Form 2 (a) of the First Schedule to the Rules and for applications not brought *ex parte,* Form 2(b) of the First Schedule must be used. Form 2(b) was not used in this instance. However, the purpose of serving the Notice of Motion and founding affidavit on the Respondents, was to bring them before Court and in fact inviting them to reply to the supporting affidavits. Both the First and Second Respondents did respond and both filed answering affidavits. Should I now in considering the issue of urgency ignore important and material allegations contained in such affidavits, which may be in direct contrast of what the Applicants said in respect of urgency? I am mindful of the criterion used in the well-known case of I L & B Macow Caterers (Pty) Ltd Greatermans SA Ltd and Another; Aroma Inn v Hypermarkets and Another 1981 (4) SA 108 (WLD) at 112 H-113A, namely:

"**It is clear from the requirements set out in Rules 27 and 6 (12) that the Court's power to abridge the times prescribed and to accelerate the hearing of the matters**

should be exercised with judicial discretion and upon sufficient and satisfactory grounds being shown by the applicants. The major considerations normally and in these two applications are three in number, viz the prejudice that applicants might suffer by having to wait for a hearing in the ordinary course; the prejudice that other litigants might suffer if the applications were given preference; and the prejudice that respondents might suffer by the abridgment of the prescribed times and early hearing."

That matter comprised of two cases. In the Macow Caterers-matter no answering affidavits were filed by the Second Respondent, but the First Respondent filed an affidavit, *inter alia* denying that the matter was one of urgency. In the Aroma-Inn-matter there was also only an affidavit by the First Respondent. Certain times were given by the Applicant in both matters that the Respondents had to comply with. In the present matter no times were given to the Respondents, because the Applicant wrongly made use of the 2(a) type of form. However, Fagan J, did not indicate in his judgment how he approached the disputed issue of urgency.

[21] In my opinion a Court should not side-step the issue of urgency and on what basis it should be approached if an answering affidavit disputing the allegations of urgency for which the

Court's indulgence is sought, had been filed, which contains facts that contradict those contained in the Applicant's founding affidavit. Simplified the question to be answered is whether the Court should approach it on the Applicant's affidavits or on that of the Respondent.

[22] The Stellenvale-rule was also followed in matters where an application was brought as a matter of urgency.

See: Townsend Productions Ltd v Leech and Others 2001 (4) SA 33 (C) at 38 A, 40 D – E

In the Townsend-case the applicant sought in the first instance a final interdict or in the alternative a *rule nisi* in the event of the Court finding there is a dispute of fact. The learned judge referred to both approaches and then said the following on p. 41D

"**In the application of the rules of procedure set out above I shall adopt the approach set out in Basson v Chilwan and Others 1993 (3) SA 742 (A) at 753 B and decide the matter on the three sets of affidavits before me."**

In the South African Appeal Court case of Basson, Eksteen JA referred to the fact that the Applicant did not apply for the acceptance of further replying affidavits and said:

"He did not, however do so, and I am prepared, for the purposes of this judgment, to accept that the matter must be decided on the three sets of affidavits before

us, and that the ordinary rules of procedure in such a case will apply. These rules have been crystallized in the well-known dictum by Corbett JA in Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 H – 635 C, where he held that …"

[23] In my opinion the answer lies in the nature of the relief that is prayed for in the first prayer of the Notice of Motion. This is a final order or can be a final order in respect of one or either of the Applicants. If the Court should decide that one of the Applicants, or either of them, did not comply with the provisions of Rule 6(12) or the Court is not persuaded to grant the request for condonation, which is in the discretion of the Court, that Applicant is effectively out. This is what has happened in a recent decision in the case of Willem Grobbelaar and Another v The Council of the Municipality of Walvis Bay an unreported judgment of three judges of this Court delivered on 16 April 2004 in case no. (P) A 46/2004. In that application condonation was granted in respect of only the First Applicant and not the Second Applicant, whereafter interim relief was granted. Because of the nature of the relief in respect of the urgency issue, I believe I am entitled to follow the Stellenvale-approach in this regard. In doing so I accept the allegations of fact in the Applicants' affidavits as admitted by the Respondents, together with the facts alleged by the Respondents.

[24] In following this approach, I cannot come to any other conclusion than that the First Applicant, and in particular its Managing Director, Mr Stuart, already knew in September 2005 that the Second Respondent entered into a lease agreement to become operative upon termination of First Applicant's lease agreement with First Respondent, namely from 1 November 2005. Already since the last week of September 2005, but definitely after the meeting between Mr Stuart himself and Mr Peter Gathuru of Second Respondent, the First Applicant knew that an agreement was entered into between First and Second Respondents. Not only did he know, the possible purchase of the billboards were discussed and there are indications that First Applicant might have positively considered selling the billboards (or some of them). There were also further discussions between First Respondent and Mr Stuart in this regard.

[25] Mr Heathcote attempted to explain this serious dispute by referring to the letters written by Mr Stuart and thereafter Mr Erasmus to First Respondent. Mr Heathcote argued that if these allegations by Second Respondent of prior knowledge of the agreement between First and Second Respondent were true, they contradict the underlying reason for the letters, and the request contained therein. Whatever the reasons for these letters are, the letters do not provide an answer under oath to the direct allegations by the Second Respondent in respect of

the meetings, and negotiations contained in the affidavit deposed to by Mr Gathuru which I have to accept. These allegations are in direct contrast with what is alleged by the Applicants and they form the basis of the so-called urgency that Applicants rely on. It is significant that the Applicants did not reply to these allegations, although they had the opportunity to deal with it and one would have expected that they would have done so within a day, particular in the light of the urgent manner in which the Respondents were brought to Court. Although it is trite that an applicant has to make out its case in the founding affidavit and not in a replying affidavit, one would have expected at least a denial of these allegations in particular. The Applicants had a day to do it, but didn't.

[26] The next question that should be raised is why did the Applicants keep silent about material facts, namely those facts alleged by the Second Respondent. If the Court had not been apprised of these facts concerning the prior meetings between and First Applicant and Second Respondent, the Court may very well have been persuaded by the facts disclosed by the Applicants to exercise its discretion in condoning the non-compliance with the Rules of Court as prayed for by the Applicants. The question is whether a Court of law would have granted the first prayer if all the material facts were disclosed as have been done by the First and Second Respondents. I

doubt it would have condoned such non-compliance and would have regarded this as an urgent matter.

See: Adbro Investment Co Ltd v Minister of the Interior 1956 (3) SA 345 (A)

Although, I am mindful of what Smalberger JA said in Trakman NOV Livshitz and Others 1995 (1) SA 282 (A) at 288 F – G, namely that the principle in *ex parte* applications of the utmost good faith should not be extended to motion proceedings and that material non-disclosure of facts should rather be dealt with by making adverse or punitive orders as to costs, the way that the Applicants approached the Court by using Form 2(a) designed for *ex parte* applications, should in my opinion not excuse the Applicants from not at least taking the Court in their confidence by disclosing these facts. Utmost good faith may be too high a requirement in such a matter, but there should at least be some *bona fide* disclosure, which in my mind distinguishes the Trakman-criterion from this matter.

[27] If I accept the allegations by the Second Respondent, as I do, the First Applicant knew about this new contract for more than a month before the lease agreement between First Applicant and First Respondent terminated by effluxion of time. There was consequently no urgency. Any urgency that may have existed is clearly of the First Applicant's own making. In respect of the Second Applicant, the matter of urgency is clearly based on the alleged reasons for urgency averred by the

First Applicant and Second Applicant has no individual basis for requesting the Court's indulgence to condone its non-compliance with the Rules of Court. Thus, in the light of approaching the disputed facts in terms of the Stellenvale-rule, this first prayer should be dismissed with costs in respect of both First and Second Respondents.

[28] Even if the approach that I have applied (the Stellenvale-approach), is not the correct approach in respect of urgency where an interim interdict is applied for, I believe that in applying the Gool-approach, the Applicants failed to establish the necessary requisites for an interim interdict. According to the Gool-approach, I have to take the facts set out by the Applicants, together with any facts set out by the Respondent, which the Applicant cannot dispute, in order to consider whether, having regard to the inherent probabilities, the Applicants should on those facts obtain final relief at the trial. The first hurdle that the Applicants fail to cross is in my opinion the fact that on the deponent Stuart's own affidavit, its lease contract with the First Respondent ran out and the First Applicant informed the First Respondent it will not avail itself of its right of renewal. Second Respondent had no individual right and only confirmed First Respondent's allegations. It is clear that Second Applicant was just riding on the back of the First Applicant in this regard.

[29] The allegations by the Second Respondent in respect of the meetings and discussions with Mr Stuart of First Applicant are not really disputed, because First Applicant did not reply thereto. If the allegations by Second Respondent is then taken into consideration, namely that First Applicant knew of its agreement with First Respondent for more than a month before the application was launched and even discussed and negotiated the purchasing of some of the billboards, I cannot agree that the First Applicant should have obtained final relief. Although I do think that this is the correct approach in respect of urgency, but even if it is applied, the Applicants cannot succeed.

[30] The first prayer should therefore also be dismissed with costs. In any event, I am not prepared to exercise my discretion to condone the Applicants' non-compliance with the Rules of Court.

[31] Consequently, the application for condonation is refused with costs.

[32] Although the application cannot succeed for lack of urgency I shall also consider whether the Applicants would be entitled to approach the Court in due course for the order that they seek in terms of the prayer 2 of their Notice of Motion.

[33] Several interesting arguments were submitted by Mr Heathcote in respect of the non-compliance by the First Respondent with its own Act, the National Transport Services Holding Company

Act, no. 28 of 1998, and in particular section 14(4) thereof, as well as an argument based on Article 18 of the Constitution of Namibia. Mr Heathcote's argument in this regard, as I understand it, is that because First Respondent's Act makes it clear that it is controlled by Government and in several instances has to a report to Government, etc., it has to comply with the provisions of the Constitution and in particular when entering into agreements, to the extent that the process should be fair and reasonable to the public, which, Mr Heathcote submits can only be done by way of a public tender. In this way Mr Heathcote submitted everybody, including the Applicants and Second Respondent would have a fair and reasonable opportunity to be awarded the contract. These arguments were responded to by Mr Coleman and Mr Corbett on behalf of the First and Second Respondents, but although they may be interesting, I agree with the Respondents that the possibility of a review of the contract entered into between the First and Second Respondents is not feasible if the Applicants do not have the necessary interest and/or right to approach the Court for the relief claimed in prayer 2 of their Notice of Motion. In my opinion the Applicants do not have such a right or standing to apply for review. In this regard I shall deal with these aspects hereinafter.

[34] In order to determine whether the Applicants have any standing to approach the Court for the relief contained in the

second prayer of the Notice of Motion, it is necessary to consider the contract between First Applicant and First Respondent. When I discussed the background of this application, I have already indicated that the Memorandum of Lease between First Applicant and First Respondent would have expired on 31 October 2005, namely after a period of 6 years. In his authoritive work, A J Kerr makes the following remarks in respect of the termination of the contract:

"When all obligations resting on both parties have been performed or otherwise ceased to exist the whole contract is at an end, it terminates, it passes into history."

See: Kerr: The Principles of the Law of Contract – 4h edition, p. 379.

In respect of a lease for a fixed period the lease is complete when that period ends. The lease terminates automatically. No notice is necessary.

See: Tiopaizi v Bulawayo Municipality 1923 AD 317 at 325

This is similar to the situation that we have here. First Applicant and First Respondent had a lease which terminated after the expiry of six years. Thereafter it ends and passes into history.

[35] In another authorative work by the same author it is said that renewal after termination may bring a new lease into being, but it cannot extend the old lease.

Kerr: The Law of Sale and Lease – Second edition, p. 402.

There is an exception, namely where an option to renew is contained in the lease agreement. In this regard Kerr says on page 403 than an option is a contract to keep the offer open for a period and that such an option normally gives the lessee the power to renew the lease i.e. to accept the offer to extend the lease for a further period or periods.

[36] In this instance First Applicant clearly had such an option to accept the offer made by the First Respondent in the agreement of lease. That offer was contained in clause 2(b) of the Memorandum of Lease.

"**(b) The Lessee shall have the option to renew this lease for a further period of six (6) years by giving the lessor three (3) months written notice of renewal prior to the expiry of this lease."**

[37] Such an opinion, the author Kerr says, must be exercised **before** the termination of the lease. In this regard he relies on several cases:

Bowhay v Ward 1903 TS 772 at 777 to 778;

Buys v South Rand Exploration Co. Ltd 1910 TS 1058 at 1062;

Hitzroth v Brooks 1965 (3) SA 444 (A) at 449 F – G;

Mittermeier v Skema Engineering (Pty) Ltd 1984 (1) SA 121 (A) at 126 D – E;

Kerr: The Law of Lease and Sale, p. 404; and

Rhoodie v Curitz 1983 (2) SA 431 (C) at 437 F – H, 438H – 439G

In respect of when such option should be exercised, Kerr says that the period stipulated must be before termination of the lease. Consequently, notice before the first day of the period is effective, but notice thereafter is of no effect.

Mayor and Councillors of Borough of Durban v Ellen Serridge (1904) NLR 303 at 305-6.

In this instance the First Applicant had an option to renew the lease, but it had to exercise that option not later than three months before the expiry of the lease, in other words before the 31st July 2005.

[38] The onus of proving fulfillment of the condition which entitles the Lessee to exercise the option rests on the lessee.

Naiker v Pensil 1967 (1) SA 198 (N) at 200 B – C; and

OK Bazaars (1929) Ltd v Cash-In CC 1994 (2) SA 347 (A) at 360 I

[39] There is only one other possibility in respect of renewal of leases, namely where a conditional right to renew a lease is contained in a contract, giving a lessee the right to renew the lease if a certain condition is satisfied. If a lease does contain such a clause, the lessee has preference if the lessor decides or desires or proposes to let the property for a further period. However, such a clause is not contained in the Memorandum of Lease between the First Applicant and the First Respondent.

[40] In its own supporting affidavit the First Applicant says that it considered the lease to be onerous and for that reason it

informed First Respondent in writing that it will not exercise its option to renew the lease. This was accepted by First Respondent according to the First Applicant. Unfortunately the First Applicant did not consider it necessary to provide the Court with that letter and the response by the First Respondent. Consequently, I have to assume that it was a clear and unambiguous conveyance of the First Applicant's intention not to exercise an option provided to it in terms of clause 2(b) of the Memorandum of Lease. I also have to assume that the acceptance by First Respondent leaves no room for any misunderstanding, namely that it accepted the First Applicant's election not to review the lease.

[41] Of course the First Applicant still had the obligation to remove its billboards from the First Respondent's property upon termination or cancellation of the agreement of the agreement. These are the billboards which the Second Respondent, according to the affidavit of Mr Gathuru, offered to purchase from First Applicant and which would of course have released First Applicant of this obligation. The fact that such negotiations took place is a further indication that the lease agreement between the First Applicant and the First Respondent came to an end.

[42] The lease agreement between the First Applicant and First Respondent expired by effluxion of time. The only possible way to extend it, was for the First Applicant to exercise its

option in terms of clause 2(b) thereof not less than three months before the end of October 2005. Not only did the First Applicant not do this, it decided not to avail itself of this option and made this intention clear in writing to First Respondent, who accepted it. With that action any right that the First Applicant might have had in respect of the lease of the property belonging to First Respondent came to an end and passed into history. First Respondent does not even have a *prima facie* right and did not establish or showed a clear right to obtain an interim interdict.

[43] The Second Applicant had no such lease with the First Respondent and its involvement in this application seems to be purely supportive of First Applicant by conveying its intention to enter into a similar contract with First Respondent. The Second Respondent never had any right to expect the First Respondent to enter into an agreement with it and did not show a *prima facie* right which is a prerequisite for an interim interdict.

[44] A Court is usually requested to determine the *locus standi* of a person or party to bring a review application. Even if it has to be determined whether First Applicant, and to an extent, Second Applicant, had an interest in future contracts for the lease of the premises of First Respondent for the purpose of erecting billboards thereon, and I have to consider what is being regarded mainly in administrative law as *locus standi in judicio,* the Applicants do not have the required interest.

[45] The requirements for a person to have *locus standi* to have his matter heard by the Court have been dealt with in numerous decisions. Such a party has to show that it has "*a direct and substantial interest*" in the subject matter and outcome of the application.

United Watch and Diamond Company (Pty) Ltd and Others v Disa Hotels and Another 1972 (4] SA 409 (C) at 415 B.

This interest has been described as a "*legal interest*" in the case of Henri Viljoen (Pty) Ltd v Awerbach Brothers 1953 (2) SA 151 (O) at 166 A.

[46] Even in a liquidation application the question of an adequate interest had been considered by the South African Appeal Court. In Nieuwoudt v The Master and Others NNO 1988 (4) 513 (A) at 522 C – D van Heerden JA said that such an interest can have a wide meaning and can be interpreted only in compliance within the relation that it appears. The learned Judge further referred to the meaning of interest as defined in the Oxford English dictionary as:

"**the relation of being objectively concerned in something, by having the right or title to, claim upon, or share in";**

"the relation of being concerned or affected in respect of advantage or detriment", and

"the feeling of one who is concerned or has a personal concern in any thing."

[47] Even a derivative right is not enough. In Wistyn Enterprises v Levy Strauss and Company and Another 1986 796 (T) at 803 H – 804 E, it was decided that a subtenant only has a derivative right in the lease agreement that a tenant has and that such a derivative right is one which depends on the validity and continued existence of a right by another person.

See: Kerry McNamara Inc. and Others v Minister of Works, Transport and Communication and Others 2000 NR 1.

[48] In Milani and Another v South African Medical and Dental Council and Another 1990 (1) SA 899 (T) on p. 303 A – B it was said that a person should have at least the same interest as a person desiring to intervene in litigation to the Supreme Court. Even if such a person can be financially effected by a decision or even deprived of a defence, he does not have a strong enough interest.

See: Standard General Insurance Co. v Gutmann 1981 (2) SA 426 (C) at 434 C - G

P E Bosman Transport Wks Con v Piet Bosman Transport 1980 (4) SA 801 T at 804 B.

[49] It has also been decided by Brand J in the case of Plettenberg Bay Entertainment v Minister van Wet en Orde 1993 (2) SA 396 (C) at 401 E that a Court has no discretion to grant an interdict to protect a right that does not exist anymore.

[50] I have come to the conclusion that the only possible interest that First Applicant could have had to provide it with any standing came to an end with a termination of its lease agreement with First Respondent, which was effectively three months before the end of October 2005. Consequently, the First Respondent did not have an adequate interest to apply for the review in terms of the second prayer of the Notice of Motion. The Second Respondent never had any such interest to apply for any review of a decision by First Respondent to enter into a new contract with anybody else, including Second Respondent.

[51] Finally, there are certain allegations contained in the Respondents' affidavits which do not seem to establish factual disputes, but which tend to support the Respondents' attitude that First Respondent is not prohibited to enter into commercial agreements without complying with tender procedures. These allegations by the Respondents support my finding that the Applicants did not show sufficient interest to apply for the relief in prayer 2 of the Notice of Motion. The allegations that I refer to are the following:

The Tender Board Act no. 16 of 1996 does not apply to First Respondent. Furthermore, First Respondent only possesses provisions for tenders with regard to the procurement of goods or services in terms of purchasing policies and procedures and internal tender procedures. This is set out in the affidavit on

behalf of First Respondent and copies thereof had been provided to me for perusal. It is clear that these documents provide for the purchase of goods and services and not for commercial contracts in terms whereof the First Respondent can earn income. It is in fact alleged by First Respondent that commercial contracts such as the lease agreement that existed between First Applicant and First Respondent and the new lease agreement entered into between First Respondent and Second Respondent are such commercial contracts, which do not come into being by way of any administrative function. It is alleged that the lease agreement between First Applicant and First Respondent was not subject to a tender process in 1995. These allegations supports my finding that the Applicants had no interest to apply for the relief in prayer 2 of the Notice of Motion.

[52] It has also been decided if an applicant has no *locus standi* to bring the application, urgency is not shown.

See: Moleko v Min. of Plural Relations and Development 1979 (1) SA 125 (T) at 129 H – 130 A; and

Nathan, Barnett and Brink – Uniform Rules of Court – Third Ed., p. 52.

I have found that the Applicants did not have *locus standi* to bring the application. This decision consequently also proves that there was no urgency to bring the application on that basis.

[53] In the light of my conclusion it is not necessary to consider whether the Applicants complied with all the requirements for an interim interdict, nor to deal with any of the other arguments advanced.

[54] I have come to the conclusion that

(a) there is no urgency in this matter, nor am I prepared to exercise my discretion in this regard and

(b) that First and Second Applicants do not have any right or interest to approach this Court for the relief claimed in the second prayer of the their Notice of Motion.

[55] The application is dismissed with costs.

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MULLER A J

ON BEHALF OF THE APPLICANTS **Adv Heathcote**

Instructed By: **Van Der Merwe-Greeff**

ON BEHALF OF THE FIRST RESPONDENT **Adv Coleman**

Instructed By: **Shikongo Law Chambers**

ON BEHALF OF THE SECOND RESPONDENT **Adv Corbertt**

Instructed By: **Kauta, Basson & Kamuhanga Inc.**