REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (EX TEMPORAE)

Case no: A 231/2013

In the matter between:

CHARLES ALBERTUS CORNELIUS DIERGAARDT **APPLICANT**

and

THE MAGISTRATE:
MAGISTERIAL DISTRICT OF GOBABIS **FIRST RESPONDENT**

VALENTIA ELSABE DIERGAARDT **SECOND RESPONDENT**

Neutral citation: *Diergaardt v The Magistrate: Magisterial District of Gobabis* (A 231/2013) [2013] NAHCMD 231 (1 August 2013)

Coram: PARKER AJ
Heard: **31 July 2013**
Delivered: **1 August 2013**

Flynote: Practice – Applications and motions – Urgent applications – Granting of application to hear matter on urgent basis is an indulgence – To succeed in an application applicant must satisfy the two requirements prescribed by rule 6(12)*(b)* of the rules of court – No urgency where urgency is self-created.

Summary: Practice – Applications and motions – Urgent applications – Applicant sought urgent relief aimed at principally the court staying proceedings in the lower court for discharging or confirming an interim protection order granted by the lower court in terms of the Combating of Domestic Violence Act 4 of 2003 – Court found that the applicant has not given any reason why the applicant could not obtain substantial redress at a hearing in due course and has not set them out explicitly the circumstances the applicant avers makes the matter urgent – Court held that applicant could receive substantial redress in due course in the ongoing enquiry before the lower court and on appeal in terms of s 18(1) of Act No 4 of 2003 – Court finding that the urgency is self-created since applicant waited for some seven months to bring the application when he could have appealed from the decision of the magistrate within 30 days of the giving of the decision – Consequently, the court declined to hear the matter on an urgent basis and the application was struck from the roll.

ORDER

(a) The application is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

(b) I make no order as to costs respecting wasted costs occasioned by the postponement of the hearing on 30 July 2013.

JUDGMENT

PARKER AJ:

[1] In this application brought on notice of motion the applicant seeks the relief set out in the notice of motion. The application concerns the granting of an interim

protection order on 24 January 2013 by the first respondent against the applicant and for the benefit of the second respondent in terms of s 8 of the Combating of Domestic Violence Act 4 of 2003 ('the Act'). The applicant has prayed the court to hear the application on urgent basis. The second respondent has moved to reject the application on the merits and also against the application being heard on urgent basis; and in that behalf, the second respondent did file an opposing affidavit on 29 July 2013. For the sake of convenience, I shall hereinafter refer to the second respondent simply as the respondent because the first respondent has not filed opposing papers.

[2] The application was set down by the applicant to be heard at 09h00 on 30 July 2013. At the commencement of the hearing Mr Denk, counsel for the applicant, applied from the Bar for the hearing of the matter to be postponed to the following day, that is, 31 July 2013, to enable the applicant to file a replying affidavit. Mr Van Zyl, counsel for the respondent, opposed the from-the-Bar application on the ground that the applicant has dragged the respondent to court on a short notice and the respondent was expected to answer to a voluminous bundle of papers replete with a whole host of facts and complex issues of law; and so, the applicant cannot now turn around and ask for a postponement to enable him to file a replying affidavit.

[3] Mr Denk's response is briefly that if the respondent had not waited until a day before the hearing of the application to file her answering affidavit and had rather filed it earlier than that the applicant would have filed his replying affidavit before the hearing, and he would not have asked for a postponement. I understood Mr Van Zyl to soften his stand to the extent that if the court granted the postponement at the behest of the applicant, then the applicant should be ordered to pay wasted costs for the day.

[4] It is worth noting that the application was served on the first respondent on 18 July 2013 and in her answering affidavit she has explained the reasons why she could only file the opposing affidavit on 29 July 2013. I accept as sufficient and reasonable the respondent's explanation as to why she failed to file her answering affidavit before 29 July 2013. This, however, does not detract from the fact that in the

circumstances of this case and considering the nature of the cause or matter, it was reasonable that I gave the applicant a day to file the replying affidavit. I do not think on that score the applicant should be mulcted in wasted costs for the short postponement. In the circumstances; it would, in my opinion, be fair and just that each party pays his or her own costs for the day.

[5] I should at the threshold consider the question of urgency, that is, whether I should grant the order prayed for in para 1 of the notice of motion, bearing in mind that what the applicant seeks is an indulgence. (See *Hewat Beukes t/a MC Bouers and Others v Luderitz Town Council and Others* Case No. A 388/2009 (Unreported).)

[6] It has been well settled since *Salt and Another v Smith* 1990 NR 87, which interpreted and applied rule 6(12)*(b)* of the rules of court, that rule 6(12)*(b)* entails two requirements; and for an applicant to succeed in persuading the court to grant the indulgence sought for the matter to be heard on urgent basis the applicant must satisfy both requirements. The two requirements are (a) the circumstances relating to urgency which have to be explicitly set out, and (b) the reasons why the applicant could not be afforded substantial redress in due course. It is also well settled that where urgency is self-created the court will refuse to grant the indulgence that the matter be heard on urgent basis (*Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48)

[7] In the instant case, it is clear from the papers that the applicant had been aggrieved by the granting of the interim protection order since the granting of the order on 23 January 2013, but he did nothing to seek redress under the Act which the Act afforded him in the form of appeal in terms of s 18 of the Act. He was entitled to seek such redress within one month of the decision of the learned magistrate. He has waited for some seven months to drag the respondents to court on short notice; and now prays the court to hear the matter on urgent basis. It is important to note that at all material times the applicant was represented by legal practitioners.

[8] I do not, with respect, accept Mr Denk's argument that since 23 January 2013 the applicant was of the view that he must exhaust domestic remedies. The remedy,

in the form of appeal, to which he is entitled in terms of s 18(1) of the Act is a domestic remedy; and he did not pursue it. Section 18(1) provides:

> 'Where a court has made or refused to make a protection order, or included or refused to include a particular provision in a protection order, the applicant or the respondent may appeal to the High Court, but, the appeal must be lodged within one month of the decision in question.'

And what is more, s 18(1) applies to both an interim protection order, as in the present proceeding, and a final protection order. I find that the applicant failed or refused to seek redress that was open to him by the very Act under which the order by which he is aggrieved was made. He could have sought redress on or before 22 February 2013. He did not, as I have said previously.

[9] Furthermore, I find that the applicant has not given reasons why the applicant could not be afforded substantial redress in due course. Indeed, the consideration of the interim order during which the lower court will decide whether to confirm the interim order or discharge it is set down for continued hearing in the magistrates' court on 5-7 August 2013, that is, barely two court days away. In this regard, it has been said that the court will not readily intervene in lower court proceedings which have not yet terminated, unless grave injustice may otherwise result or where justice may not be obtained by other means. (*Adonis v Additional Magistrate, Bellville and Others* 2007 (2) SA 149 (c)) In the instant case, the applicant will obtain justice in the lower court in barely two court days away. Besides, the applicant is entitled to lodge an appeal against the protection order in terms of s 18 of the Act. It follows inexorably that the applicant will obtain justice in a few days time in the lower court or on appeal in terms of the Act.

[10] For all these reasons, I decline to condone the applicant's non-compliance with the rules of court or to hear this application as one of urgency. In the result, I make the following order:

(a) The application is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

(b) I make no order as to costs respecting wasted costs occasioned by the postponement of the hearing on 30 July 2013.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	A Denk Instructed by Petherbridge Law Chambers, Windhoek.	
FIRST RESPONDENT:	No appearance	
SECOND RESPONDENT:	C Van Zyl Instructed by Etzold-Duvenhage, Windhoek	