REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 446/2013

In the matter between:

WITVLEI MEAT (PTY) LTD	**APPLICANT**

and

THE CABINET OF THE REPUBLIC OF NAMIBIA	**FIRST RESPONDENT**
THE MINISTER OF TRADE AND INDUSTRY	**SECOND RESPONDENT**
THE MEAT BOARD OF NAMIBIA	**THIRD RESPONDENT**
THE MINISTER OF AGRICULTURE WATER AND FORESTRY	**FOURTH RESPONDENT**
MEATCO	**FIFTH RESPONDENT**
BRUCARROS (PTY) LTD	**SIXTH RESPONDENT**

Neutral citation: Witvlei Meat (Pty) Ltd *v The Cabinet of the Republic of Namibia* (A 446/20123) [2013] NAHCMD 379 (19 December 2013)

Coram: UEITELE J

Heard: **16 December 2013**

Delivered: **19 December 2013**

Flynote:

Practice - Applications and motions - Urgent applications. Urgency - What it involves-When established filing and sitting times of the Court can be departed from-Practitioners to carefully determine whether greater or lesser degree of relaxation of the Rules and practice of the Court is required - Rule of Court 6 (5) (b), (12).

Practice - Service of process - Service facsimile – Evidence should be placed before court that that the facsimile number belongs to the and the respondent received notice - Sheriff should record this fact in return of service - Failure to do so resulting in service being declared an irregular step.

Summary: In this matter the applicant applied for the following relief in part A of its notice of motion:

> '1. Condoning the applicant's non-compliance with the Rules of this Honourable Court be with regard to service and filling and that this matter be dealt with as one of urgency as contemplated in Rule 6 (12) of the Rules of the above Honourable Court;
>
> 2. That pending the finalization of the review proceedings that has been instituted with this application by Applicant in this Honourable Court against respondents, an order be granted by this Honourable Court in the following terms :
>
> > 2.1 Staying the decision of the first respondent contained in the letter of 09 December 2013 in respect of the Norway Beef Export Quota, with immediate effect pending the final determination of the Review Application simultaneously filed herewith;
> >
> > 2.2 interdicting and restraining First Respondent, Second Respondent, and third Respondent from carrying out or performing any activity in furtherance of the decision referred to in 2.1 above pending the final determination of the Review Application simultaneously filed herewith;
> >
> > 2.3 compelling the third respondent to adjudicate over the application of the applicant for a Norway Beef Export Quota filed in October 2013 pending the final determination of the Review Application simultaneously filed herewith.

3 That prayer 2.1, 2.2 and 2.3 shall operate as an interim interdict with immediate effect pending the return date determined by the Honourable Court.

4 Ordering that the respondents are to pay the costs of this application, the one paying the other to be absolved, in the event of any of the opposing this application.

5. Granting the applicant further and /or alternative relief.'

The applicant applied (the Notice of Motion is dated 13 December 2013) for this relief to be adjudicated by the court on a specific day, namely 16 December 2013, but it did not in its notice of motion provide for specific times when notice to oppose the application, answering and replying affidavits should be filed.

In the answering affidavits respondents make it clear that, they object to lack of urgency of the application and that if any urgency exists, it is caused by the applicant's own conduct. Apart from urgency, respondents also took an objection that Mr Martin Winfried Sydney who deposed to the affidavit on behalf of the applicant did not have the authority to institute action on behalf of the applicant.

At the hearing of the application, the court ordered that it intends to hear arguments only in respect of the points *in limine*.

Held, that the notice of motion is not ‘as far as practicable possible in terms of the rules of this court.

Held, further that there was no service on the sixth respondent ass contemplated in rule 4(1)(a)(v), and the service on the sixth respondent amounts to a nullity.

ORDER

1. The application is struck from the roll.

2. Applicant is ordered to pay respondents' costs, which will include the costs of one instructing and one instructed counsel.

3. The second respondent is order to extend the date by which the bids for the allocation of the Norwegian Quota have to be submitted to 27 December 2013.

JUDGMENT

UEITELE J

A INTRODUCTION

[1] The operation of this court is governed by procedural law. Much of this law is contained in the rules of court. The rules were made in terms of s 39 of the High Court Act, 1990[1] and, as delegated legislation, are binding upon the Courts.

[2] Rule 6 of the High Court Rules deals with applications. In terms of Rule 6 (5)(a) every application other than one brought *ex parte must* be brought on notice of motion as near as may be in accordance with Form 2(b) of the First Schedule to the Rules and true copies of the notice, and all annexures thereto, *must be served* upon every party to whom notice of the application is to be given. In terms of Rule 6 (5)(b) the applicant must set forth a day, not less than 5 days after service of the application on the respondent, on or before which that respondent is required to notify the applicant, in writing, whether he or she intends to oppose the application, and must further state that, if no such notification is given the application will be set down for hearing on a stated day, not being less than 7 days after service on the respondent of the notice.

[3] In terms of Rule 6(5)(d)(i) & (ii) any person opposing the grant of an order sought in the notice of motion must within the time stated in the notice of motion, give applicant notice, in writing, that he or she intends to oppose the application, and within 14 days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents. In terms of Rule 6(5)(f) an applicant

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[1] Act 16 of 1990.

upon delivering his or her replying affidavit may apply to the Registrar to allocate a date for the hearing of the application. Since the coming into operation of the case management rules the matter will then be allocated to a managing judge who regulates the proceedings up to date of hearing. It follows that at the moment, an applicant would have to wait between three to nine months before his matter is heard.

[4] The above procedures apply in the ordinary course, more rapid procedures are available to applicants both in review proceedings and in other applications. Rule 27[2] entitles the Court upon application on notice and good cause shown to make an order abridging any time prescribed by the rules. The court may also on good cause shown condone any non-compliance with the Rules. The hearing of applications may furthermore be expedited under Rule 6(12)[3], that rule provides that the Court may dispose of urgent applications at such time and place and in such manner and in accordance with such procedure as to it seems meet. The circumstances that an applicant avers render a matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course must, be set forth explicitly in the supporting affidavit. Should the matter be too urgent for affidavits to be prepared, the Court can condone non-compliance with Rule 6 (12) in terms of its powers under Rule 27. Matters of extreme urgency can thus be brought before the court at any time, day or night.

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[2] Rule 27(1), (2), (3) in material terms provides as follows:

'27. (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) The court may, on good cause shown, condone any non-compliance with these rules.'

[3] Rule 6(12) in material terms provides as follows:

'(12)(a)In urgent applications the court or a 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. (My emphasis)

(b) In every affidavit or petition filed in support of any application under paragraph (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 a hearing in due course.'

B BACKGROUND

[5] In this matter the applicant applied for the following relief in part A of its notice of motion (I quote verbatim from the notice of Motion):

> '1. Condoning the applicant's non-compliance with the Rules of this Honourable Court be with regard to service and filling and that this matter be dealt with as one of urgency as contemplated in Rule 6 (12) of the Rules of the above Honourable Court;
>
> 2. that pending the finalization of the review proceedings that has been instituted with this application by Applicant in this Honourable Court against respondents, an order be granted by this Honourable Court in the following terms :
>
> 2.1 Staying the decision of the first respondent contained in the letter of 09 December 2013 in respect of the Norway Beef Export Quota, with immediate effect pending the final determination of the Review Application simultaneously filed herewith;
>
> 2.2 interdicting and restraining First Respondent, Second Respondent, and third Respondent from carrying out or performing any activity in furtherance of the decision referred to in 2.1 above pending the final determination of the Review Application simultaneously filed herewith;
>
> 2.3 compelling the third respondent to adjudicate over the application of the applicant for a Norway Beef Export Quota filed in October 2013 pending the final determination of the review application simultaneously filed herewith.
>
> 3. That prayer 2.1, 2.2 and 2.3 shall operate as an interim interdict with immediate effect pending the return date determined by the Honourable Court.
>
> 4. Ordering that the respondents are to pay the costs of this application, the one paying the other to be absolved, in the event of any of the opposing this application.
>
> 5. Granting the applicant further and /or alternative relief.'

[6] The applicant applied (the Notice of Motion is dated 13 December 2013) for this relief to be adjudicated by the court on a specific day, namely 16 December 2013, but it did not in its notice of motion provide for specific times when the notice to oppose, the answering and replying affidavits should be filed. The applicant brought this application as an 'extremely-urgent' one.

[7] The second respondent filed and served an answering affidavit with annexures and the applicant replied thereto. The third and fifth respondents also filed detailed answering affidavits. In the answering affidavits the second third and fifth respondents make it clear that, they object to lack of urgency of the application and that if any urgency exists, it is caused by the applicant's own conduct. Apart from urgency, the third and fifth respondents also took an objection that Mr Martin Winfried Sydney who deposed to the affidavit on behalf of the applicant did not have the authority to institute action on behalf of the applicant.

[8] At the commencement of the application, after the parties could not agree on the procedures to be adopted, I ordered that the court intends to hear arguments only in respect of the points *in limine*, namely the urgency issue, whether Mr Martin had authority to bring the application on behalf of the applicant and whether the first applicant was properly. The applicant was represented by Mr Phatela, the first second and fourth respondent by Mr Namandje, the Third Respondent by Mr Van Vuuren, the fifth respondent by Mr Obbes and there was no representation on behalf of the sixth respondents. I will in the cause of this judgment return to the absence of the sixth respondent. Arguments were then submitted in respect of the issues mentioned, namely urgency and lack of authority, with the respondents commencing with their arguments.

[9] No heads of argument were filed and the legal representatives argued the matter without heads. In his oral arguments Mr Namandje objected to the prejudice that it suffered by being forced to compile an answering affidavit in such short notice caused by the fact that, the applicant brought this application as one of urgency, he further claimed that, the first, second and fourth respondents were severely prejudiced by this conduct of the applicant. At the conclusion of oral arguments by counsel for the respondents and the applicants, the court reserved judgment.

[10] Although the merits of the application were not dealt with, I find it necessary to refer to the background of this application**.** During 2006 the SACU[4] countries of which Namibia is a member, entered into a Free Trade Agreement with certain members of the European Free Trade Association (EFTA), one of which is Norway, with the main objective of that agreement being, *inter alia*, to achieve the liberalisation of trade in conformity with the General Agreement on Tariffs and Trade to increase investment opportunity in the Free

[4]Southern African Customs Union is regional trade block consisting of Namibia, South Africa, Botswana, Swaziland and Lesotho.

Trade Area, promote adequate and effective protection of intellectual property, and establish a framework for the further development of their trade and economic relations with a view to expanding and enhancing the mutual benefits.

[11] Pursuant to the Free Trade Agreements between the SACU and EFTA countries, Namibia entered into an Agricultural Agreement with Norway. In terms of that agreement and the Norwegian Generalised system of Preference (GSP) Namibia was allocated a total beef quota of 1600 tonnes of beef per annum for preferential market access into the Norwegian market.

[12] After Namibia was allocated the right to export 1600 tonnes of beef per annum to Norway (I will in this judgment refer to the quota allocated to Namibia as the 'Norwegian quota') on preferential terms, the Cabinet of the Republic of Namibia made a policy decision as to how the allocated quota will be exploited by the government. The policy decision taken on 03 August 2010 and communicated to the applicant on 10 August 2010 in material terms provided as follows:

> '1. Cabinet, at its meeting held on 3rd August 2010, took note of the 1,600 metric tons total quota allocated to Namibia to export beef to Norway under Norway's Generalised Systems of Preference (GSP) import tariff regime; and
>
> 2. Approved the sharing of the existing quota between Witvlei Meat and Meatco on a 50/50 per cent basis.
>
> 3. The quota sharing mechanism approved by Cabinet has the following conditions and administrative procedures that will apply and must be adhered to by the beneficiaries:
>
> 3.1 The total Namibian share of the beef export quota to Norway (1,600 metric tons) shall be shared between present and **future** registered Namibian meat exporters who have obtained an EU meat export qualification;
>
> 3.2 In light of the above, the Cabinet approved 50/50 sharing of the total country quota between Witvlei Meat and Meatco takes into account that these two entities are currently the only certified exporters. However, the Government will review the quota allocation to the current two approved exporters in order to accommodate new applicants who meet and have been granted Namibian and EU or Norwegian export approvals.

3.3 To ensure that the Norwegian market benefit is available to all qualifying Namibian meat exporters, the Meat Board of Namibia shall, by a notice in the media, invite applications for permits to export beef to Norway three (3) months before the end of a calendar year (on October 1st). This will take effect from 2011 in respect of the quota for 2012 and subsequent years.

3.4 Effective from 2011 onward the Meat Board shall, two (2) months before the end of a calendar year, inform applicants of the quota amount awarded and will issue export permits valid for a year and reflecting the meat export quota awarded to each beneficiary for that year.

3.5 As a condition for the export permit, each permit holder must, by the last day of June of each year, report back to the Meat Board on the total exports achieved.

3.6 If an export permit holder has not fulfilled his export commitment(s), by 30 June of each year, his permit may be revoked and his allocated export quota share re-allocated to other exporters who are meeting their export commitments and are in need of additional market export opportunities.

3.7 Non-compliance with the terms and conditions of the export permit as well as the general beef export quota allocation system stated herein will render an entity ineligible for an export quota in the subsequent year.'

[13] Following the cabinet decision taken on 03 August 2010, the applicant leased and built the necessary infrastructure and acquired the accreditations necessary to enable its products to qualify for export to Norway under the Norwegian quota. Since August 2010, the applicant has been exporting beef products to Norway under the Norwegian quota.

[14] On 4 October 2013 the third respondent invited all interested parties (by way of a press advertisement to apply for a share in the Norwegian quota. From the papers before me it appears that three entities (the applicant, the fifth and the sixth respondents) submitted applications to be granted a quota to export beef and mutton products to Norway under the Norwegian quota.

[15] It furthermore appears that pursuant to the applications received during October 2013, the third respondent entrusted a body named the National Livestock Marketing

Committee to advise it on how to decide on the three applications. The National Livestock Marketing Committee met on 8 October 2013, to amongst others consider the allocation of the Norwegian quota. I will in full quote the discussion and the resolution relating to the allocation of the Norwegian quota taken at the meeting of 8 October 2013. It reads as follows:

> 'Mr P Strydom (MBN) informed the meeting that the MBN has advertised that applicants for the Norwegian Quota should contact the MBN regarding the quota allocation for the next year. Unless there are new applicants, the quota will again be allocated on a 50/50 basis to Meatco and Witvlei.
>
> Meatco Representatives enquired whether the MBN approached the Ministry of Trade and Industry (MTI) regarding the NLMC's request that an industry meeting be convened to discuss the current 50/50 allocation of the Norwegian quota. Mr Strydom indicated that MTI indicated that the Cabinet decision still stands on the 50/50 allocation and they do not foresee that the protocol will be changed at this stage. The Norwegian quota was mentioned at the Implementation and Monitoring Committee meeting but was not discussed.
>
> The meeting noted members of the meeting's objection to the fact that the MBN did not adhere to the NLMC's request for an industry meeting with MTI and furthermore that the MBN did not share MTI's response on the allocation of the Norwegian quota with the rest of the industry members.
>
> The meeting also highlighted their concerns that the protocol allows that if a third party applies for quota to export to Norway, the quota would be shared equally between all the applicants, regardless of whether the newcomer adds value locally, especially in the Northern Communal Areas, or has the production capacity so fill its quota obligations.
>
> **RESOLVED:**
>
> - Noted concerns and objections raised at the meeting;
> - Requested the MBN to convene a special meeting with the industry stakeholders to discuss the industry's concerns with regard to the allocation of the Norway quota for beef and lamb products to establish whether the industry's position is still valid, namely that the allocation of the quota should be based on production/capacity of the export abattoir.'

[16] Following the meeting of 08 October 2013, the third respondent on 14 October 2013 invited stakeholders in the meat industry to attend a meeting, on 17 October 2013, at which

meeting the allocation of the quota will be discussed. The meeting of 17 October 2013, did not take place and it was postponed to 30 October 2013.

[17] The meeting of 30 October 2013 discussed the allocation of the Norwegian quota and made the following recommendations:

> '4.1 That the different interest groups need to submit their position papers to the MBN (i.e. the Meat Board of Namibia, the third respondent) which will be incorporated in a submission to the MTI (i.e. Ministry of Trade and Industry and Cabinet).
>
> 4.2 The MBN will grant a opportunity to interest groups to have a insight in the submission prepared for MTI).'

[18] On 18 November 2013, the third respondent called for a further meeting to be held on 27 November 2013, in order to discuss the allocation of the "Norwegian Quota". The meeting of 27 November 2013 was motivated as follows:

> '**Background:**
> The Meat Board invited (through media publishes on 8th October 2013) applications for the utilization of the GSP and EFTA quota for intended beef exports to Norway during 2014. Applications were received from Meatco, Witvlei and Brukkaros abattoirs, respectively. Since there was a new entrance *(sic)* (Brukkaros) the need arose to re-look at the quota allocation arrangement for the interest of the total industry. Hence, on the 30th October 2013, Meat Board convened and chaired a stakeholder meeting to deliberate on the future allocation formula of the Quota. However, the stakeholders were having different views with regard to the Norwegian allocation formula. Hence the need to deliberate it further to arrive at the mutual beneficial position.
>
> **Way forward**
> The Board, on its meeting (12th November 2013) therefore decided that the issue needs to be discussed with broader stakeholders, ie National Livestock Marketing Committee (NLMC), after which the BOARD will forward an "industry position" to the MTI based on the advice of the NLMC. It is on the backdrop of the above cited matter that my office extends an invitation to you for a "**Special National Livestock Marketing Committee meeting**" scheduled as follows:
>
> Date: 27 November 2013.'

[19] On 19 November 2013, the applicant responded as follows to the invitation by the third respondent:

> 'We fail to see the need of this meeting, however, if you intend to proceed with it, please schedule for the afternoon of the 3rd December 4th or 5th December any time, as we have a conflict in our diaries for the 27th November!'

[20] From the documentation before me it appears that the third respondent did not adhere to the request to postpone the meeting scheduled for 27 November 2013. It also did not provide reasons to the applicant why the postponement cannot be granted. The National Livestock Marketing Committee at its meeting of 27 November 2013 in material terms resolved to make the following recommendations:

'**3.1 Allocation formula**

The Norway quota to be allocated proportionally based on throughput – cattle numbers slaughtered–using three years' slaughtering data. This arrangement will ensure that maximum benefits accrue to all producers nationwide.

3.2 New entrants

In future new applicants will be required to obtain the necessary EU approval certificate for beef exports to Norway and quota will be allocated based on estimated capacity as determined by EU standards/regulations.

3.3 Brukkaros Meat Processors' allocation of quota

BMP to be awarded 50 tons – based on their slaughter estimate for the first year and thereafter the allocation should be based on historical slaughter performance. Should BNP fail to utilize the quota by **31 September 2014**, the quota will be redistributed to the remaining eligible exporters based on the proposed formula.

4. WAY FORWARD

The meeting supported the following route:

- MBN to formulate the industry position for submission to the Ministry of Trade and Industry for Cabinet's consideration. Timeframe: Submission on 29 November 2013;
- MBN to attach the Attendance List to the Industry's Position Paper;
- MBN to follow up with MTI on progress and inform the industry accordingly.'

[21] On 9 December 2013, the Minister of Trade and Industry communicated the following to the applicant. I, again in full quote verbatim the communication to the applicant:

'We are writing to you in response to your application for a beef export quota to Norway, which we have received through the Meat Board.

The Ministry of Trade and Industry has received applications for beef export quotas to Norway from three export abattoirs. In order to enable us to allocate such quotas in a transparent manner and in conformity with existing policies Cabinet was approached to approve that such quotas are allocated through a bidding process.

Please be informed that Cabinet agreed that the beef export quotas for Norway for the year 2014 be allocated through a bidding process. The criteria that will be considered for allocating the quotas are as follows:

1. The price paid to producers (north and south of the veterinary cordon fence);
2. The total additional employment that will result from the quota amount applied for;

3. Detailed outline of current value addition activities;

4. Binding offer for additional value addition and processing capacity improvement;

5. Outlook towards secondary industry development both for inputs and output products; and

6. The reinvestment of proceeds from quotas allocated.'

[22] The letter of 09 December 2013, is the source of the applicant's grieve and the catalyst to this application. I will now proceed to evaluate the objections raised by the respondents.

C THE POINTS *IN LIMINE*

Urgency

[23] As I have indicated above applications are dealt with in rule 6 of the rules of the High Court of Namibia. This rule is applicable to each and every application brought by way of notice of motion. Because this application was not brought *ex parte,* rule 6(4) is ignored for the purpose of this application. Rule 6(5) sets out what is required in respect of an application such as this. This rule has been subjected to interpretation by this Court in a

number of decisions. In the case of *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*[5] Muller J with Mainga J and Damaseb JP concurring remarked as follows:

> 'Rule 6(12) deals with urgent applications. It is trite that the court has a discretion in this regard, which also clearly appears from the wording of rule 6(12)…Rule 6(12)(b) makes it clear that the applicant must in his founding affidavit *explicitly set out the circumstances upon which he or she relies that it is an urgent matter***.** Furthermore, the applicant has to provide reasons why he or she claims that he or she could not be afforded substantial address at the hearing in due course.'

[24] In the matter of *Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers)*[6] Coetzee, J remarked as follows:

> 'Undoubtedly the most abused Rule in this Division is Rule 6(12) … Far too many attorneys and advocates treat the phrase "*which shall as far as practicable be in terms of these rules*", in sub-rule (a) simply *pro non scripto* ... Once an application is believed to contain some element of urgency, they seem to ignore (1) the general scheme for presentation of applications as provided for in Rule 6 … These practitioners then feel at large to select any day of the week and any time of the day (or night) to demand a hearing. This is quite intolerable and is calculated to reduce the good order which is necessary for the dignified functioning of the Courts to shamble … Urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court. Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down'.[7]

[25] In the case of *Bergmann v Commercial Bank of Namibia Ltd and Another*[8] Maritz, J had the following to say:

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5 2012 (1) NR 331 (HC).

6 1977 (4) SA 135 (W).

7 The case of *Luna Meubels* was approved by this court in the matter of *Salt and Another v Smith* 1990 NR 87 (HC) at 88.

8 2001 NR 48 (HC).

> ‘The Court's power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one. One of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fides* or through his or her culpable remissness or inaction … *It is more so when the relief being sought is essentially of a final nature and no or very little opportunity has been afforded to the respondent to properly present his or her defence*. Obviously, each case is to be decided upon its own facts and circumstances, although I find it difficult to envisage that a Court would come to the assistance of an informed applicant who *mala fide* abuses the Rules of Court by delaying the institution of urgent application proceedings to score an advantage over his or her opponent. … It happens, in my experience all too frequently, that this Court is being inconvenienced by last minute applications to stay sales in execution. Judges of this Court have heard several applications of this nature after ordinary Court hours - thus not only inconveniencing the Court itself but also the Court's staff (such as the Court's orderlies, clerks and stenographers). … When an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. *Urgent applications should always be brought as far as practicable in terms of the Rules. The procedures contemplated in the Rules are designed, amongst others, to bring about procedural fairness in the ventilation and ultimate resolution of disputes.* Whilst Rule 6(12) allows a deviation from those prescribed procedures in urgent applications, the requirement that the deviated procedure should be *'as far as practicable'* in accordance with the Rules constitutes a continuous demand on the Court, parties and practitioners to give effect to the objective of procedural fairness when determining the procedure to be followed in such instances. The benefits of procedural fairness in urgent applications are not only for an applicant to enjoy, but should also extend and be afforded to a respondent. Unless it would defeat the object of the application or, due to the degree of urgency or other exigencies of the case, it is impractical or unreasonable, an applicant should effect ***service*** *of an urgent application as soon as reasonably possible on a respondent and afford him or her, within reason, time to oppose the application.* It is required of any applicant to act fairly and not to delay the application to snatch a procedural advantage over his or her adversary.’ (My Emphasis)

[26] Having set out the legal principles which guide the court as to how to exercise its discretion, I will now proceed to evaluate whether the applicant has satisfied the requirements of Rule 6 (12).

[27] I have already pointed out the Notice of Motion is dated 13 December 2013 (which is a Friday). The notice of motion did not inform the respondents as to when they must give

notice of their intention to oppose the application, it also did not inform the respondents as to when they must file their answering affidavits. Can it in the circumstances be said that the notice of motion is *'as far as practicable in terms of these rules.* I am of the view that the answer is in the negative.

[28] The matter was set down for hearing on Monday morning 16 December 2013 at 09H00. The Deputy Sherriff's return of services indicate that the Notice of Motion was served on the Government Attorney (who is by statute authorised to receive service on behalf any Government Agency, Ministry or Department) at 14H56 on the 13th December 2013, on the Third Respondent at 14H47 also on the 13th December 2013, on the Fifth Respondent at 15H09 also on the 13th December 2013. As regard the sixth respondent the Deputy Sherriff's return of service simply indicates the following:

> 'Address where served:
> Fax: 2[…]
>
> RETURN OF SERVICE
> ON 13 Dec 2013 AT 14:35DOCUMENT SEVED PER FAX'

[29] I have above quoted Coetzee, J who in the matter of *Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers*[9] held that urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court. Urgency does not mean the disregard of the rules. Rule 6(5)(a) in material term provides as follows:

> '(5)(a) Every application other than one brought *ex parte* shall be brought on notice of motion as near as may be in accordance with Form 2(b) of the First Schedule and true copies of the notice, and all annexures thereto, *shall be served upon every party to whom notice thereof is to be given*.' (My Emphasis).

[30] Although there is no notice to oppose and no affidavit filed on behalf of the sixth respondent before me, it cannot be disputed that it has a substantial interest in this application. Had the sixth respondent not been joined in the application, it would certainly have been considered to be a mis-joinder, which would cause the application to fail. However, the fact is that the sixth respondent had been joined and the application had to be served on it in compliance with of the rules of court and the High Court Act. Rule 4(1)(a)(v) of the High Court Rules in material terms provides as follows:

[9]Supra footnote 6 at 136.

‘Service

4. (1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (b) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners, namely –

(i) …

(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within Namibia, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law;’

[31] In the matter of *Knouwds NO v Josea and Another*[10] the Judge-President, Damaseb, said[11]:

‘'Service' of process is the all-important first step which sets a legal proceeding in train. Without service, can there really be any argument that proceedings are extant against a party? Speaking of 'short service', the learned authors Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa 4 ed comment at 283:

> If the defendant or respondent has not been allowed sufficient time, the service will be bad and fresh service will have to be made. In two cases*, Brussels & Co v Barnard & another and Cole & others v Wilmot*, the courts condoned short service but no reasons are given in the reports. If these cases lay down the principle that it is in the discretion of the court to condone short service, they are, with respect, wrongly decided. It has been suggested that the test the court should apply is whether the defendant has suffered any prejudice through the short service. In later cases, however, the courts have not accepted that it is necessary for the defendant to show either that he has been prejudiced or that he has a good defence to the action, and in *Salkinder v Magistrate of De Aar & another* short service was held to be a fatal irregularity. In another case the court granted provisional sentence but reserved leave to the defendant to move the court to set aside the order on the ground of short service. (Footnotes omitted.)
>
> *If short service is fatal, a fortiori, non-service cannot be otherwise. Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding which has taken place without service is a nullity and it is not competent for a court to condone it*.’ (My Emphasis)

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[10] 2007 (2) NR 792 (HC).

[11] At 798A [22].

[32] In the case of *Beauhomes Real Estates (Pty) Ltd v Namibia Estate Agents Board*[12] Hoff, J said the following:

> 'It has been held that the issue of a summons is the initiation process of an action and has certain specific consequences, one of which is that it must be served in terms of the methods of service prescribed by the rules and that mere knowledge of the issue of a summons is not service which could relieve a plaintiff of his or her obligation to follow the prescribed rules. (*See First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and Others*; *First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another* 1998 (4) SA 565 (NC) at 568B - C).
>
> Where proper service had not been effected, such service may be regarded as a nullity. In *SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D) at 706E - F it was held that where there was no service on the defendant company in terms of the provisions of rule 4(1)(a)(v) such a service was a nullity and that the court could under the particular circumstances of that case not condone the improper service.'

[33] In the present instance there was no service at all on the sixth respondent in terms of the provisions of rule 4(1)(a)(v). The service on it was purportedly done by way of a facsimile. There is no proof and no evidence was led that the fax number to which the Notice of Motion and the attached documents were send belongs to the sixth respondent. There was equally no proof or evidence that the sixth respondent received the Notice of Motion and the documents attached to it. This may explain why the sixth respondent is not before court. In my view the service on the sixth respondent amounts to a nullity which is fatal to this application. In the light of my finding that, the application was not properly served on the sixth respondent I find it unnecessary to deal with the other points *in limine* raised by the respondents or with the merits of the matter.

Costs

[34] The only issue that remains to be determined is the question of cost. The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court.[13] It is trite that, the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one[14]. There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule

[12] 2008 (2) NR 427 (HC) at 43.

[13] Hailulu v Anti-Corruption Commission and Others and China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC 2007 (2) NR 674.

[14] Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045.

applies unless there are special circumstances present.[15] In the present matter, I have no special circumstances have been placed before me as to why, I should not follow the general rule.

[35] Before, I make my order, I pause here to observe that, the second respondent has set the date of 20 December 2013, as the date on which the bids for the allocation of the Norwegian quota had to be submitted as 20 December 2013. I am of the view that, the applicant's challenge of the decision of the first respondent was not vexatious and unreasonable. I, therefore direct that the second respondent must extend the date for the submission of the tenders to 27 December 2013.

[36] In the result I make the following order:

1. The application is struck from the roll.

2. Applicant is ordered to pay respondents' costs, which will include the costs of one instructing and one instructed counsel.

3. The second respondent is order to extend the date by which the bids for the allocation of the Norwegian Quota to 27 December 2013.

SFI Ueitele
Judge

[15]China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC 2007 (2) NR 674.

APPEARANCES:

APPLICANT:	T PHATELA Instructed by Mueller Legal Practitioners
FIRST, SECOND & FOURTH RESPONDENT:	S Namandje Instructed by Government Attorney
THIRD RESPONDENT:	A Van Vuuren Instructed by Engling, Stritter & Partners
FIFTH RESPONDENT:	D Obbes Instructed by Lorentzangula Inc