REPUBLIC OF NAMIBIA **NOT REPORTBALE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO:HC-MD-CIV-MOT-GEN-2017/00227

In the matter between:

BANK OF NAMIBIA	**APPLICANT**

and

SMALL & MEDIUM ENTERPRISES BANK LIMITED	**1ST RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**2NDRESPONDENT**
NAMIBIA FINANCING TRUST (PROPRIETARY) LIMITED	**3RDRESPONDENT**
METROPOLITAN BANK OF ZIMBABWE LIMITED	**4TH RESPONDENT**
WORLD EAGLE PROPERTIES (PROPRIETARY) LIMITED	**5TH RESPONDENT**
THE MINISTER OF INDUSTRIALIZATION,	
TRADE AND SME DEVELOPMENT	**6TH RESPONDENT**
THE MINISTER OF FINANCE	**7TH RESPONDENT**

Neutral citation: *Bank of Namibia v Small & Medium Enterprises Bank Limited & 6 others HC-MD-CIV-MOT-GEN-2017/00227 [2017] NAHCMD 187 (10 July 2017)*

Coram: Prinsloo, J

Heard: 07 JULY 2017
Delivered: 10 JULY 2017

Flynote: Applications and Motions – Urgent applications – Applicant must satisfy both requirements of rule 73(4) of the rules of court for the matter to be heard on basis of urgency – The applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 73(4) of the Rules of Court.

Summary: The applicant has brought an application on Notice of Motion for the relief set out in the notice of motion, and prays the court to hear the matter as an urgent application. The 4th and 5th Respondent opposed the motion whereas the first and third respondents did not oppose the application before court whereas the second, sixth and seventh respondents took up a neutral position.

In the answering affidavits, the fourth and fifth respondents make it clear that, they object the application due to lack of urgency and that if any urgency exists, it is caused by the applicant's own conduct. Mr Namandje maintained that rights to a fair trial/hearing in terms of article 12 of the Constitution of the fourth and fifth respondents were violated by this conduct of the applicant.

Court held: It is a well-established principle that for purposes of deciding urgency, the court's approach is that the court accepts that the applicant's case is a good one. Commercial urgency is well recognised in our courts, provided that the commercial urgency is sufficient to invoke the provisions of rule 73. It does, however, not follow as a matter of course that just because the matter is one of a commercial nature it would entitle the applicant to have its matter treated on an urgent basis. The fact that irreparable damages may be suffered is not enough to make out a case for urgency.

Held further: When the applicant is seeking the court's indulgence and has created the emergency, through culpable remissness or inaction, he cannot succeed on the basis of urgency. In short, the urgency should not be self-created. An applicant

should therefore not delay in approaching the court and wait until a certain event is imminent and then rely on urgency to have his/her matter heard.

Held further: There is no indication that there was inaction on the part of the BoN or any remissness for that matter. It is quite clear that extensive efforts were done to trace the investments that were made reference to in the investigative report and that there was constant negotiations and efforts to repatriate the money to Namibia and to recapitalize the SME Bank.

Held further: This court can also not find that that there was dilatoriness attributable to the applicant in the launching of the application, that is, the "culpable remissness on the part of the applicant in launching the application.

Held further: For reasons argued under the heading of urgency, this court is of the opinion that the case before court is urgent in nature and the court must consider the balance of prejudice to third parties.

ORDER

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1. That the applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 73(4) of the Rules of Court.

2. Cost of this application to be cost in the cause of the application.

JUDGMENT

Prinsloo, J

The Parties:

[1] The applicant in this matter is Bank of Namibia which is the Central Bank of the Republic of Namibia established in terms of the Bank of Namibia Act, 1997[1]. (Hereinafter referred to as "BoN") and is represented by Adv. Corbett SC, with him Adv. D Obbes for purposes of this application.

[2] The first respondent is Small and Medium Enterprises Bank (Pty) Limited, a banking institution registered in terms of the Banking Institutions Act, 1998[2]. (Hereinafter referred to as "SME Bank")

[3] The second, sixth and seventh respondents are namely; the Government of Namibia, The Minister of Industrialization and Trade and SME Development and The Minister of Finance.

[4] The third respondent is Namibia Financing Trust (Proprietary) Limited, a company with limited liability, registered and incorporated according to the laws of the Republic of Namibia with its principal place of business in Windhoek. The Government of Namibia through the third respondent, holds a 65% shareholding.

[5] The fourth respondent is Metropolitan Bank Of Zimbabwe Limited, a commercial bank registered according to the laws of the Republic of Zimbabwe with it principal place of business and head office situated in Harare, Republic of Zimbabwe, which holds 30% shareholding.

[6] The fifth respondent is World Eagle Properties (Proprietary) Limited, a real estate and property development company, with limited liability registered and incorporated according to the laws of the Republic of Zimbabwe with its registered address in Harare, Republic of Zimbabwe, which holds a 5% shareholding. The

[1]Act No. 15 of 1997.
[2]Act No. 2 of 1998.

fourth and fifth respondents are represented by Mr Namandje (with him, Ms. T. Ileka) for purposes of these proceedings.

The application:

[7] The applicant has brought an application on notice of motion for the relief set out in the notice of motion, and prays the court to hear the matter as an urgent application, in the following terms:

'1. That – in as far as this may be necessary – condoning the applicant's non-compliance with the forms and service provided for by the rules of this Court and hearing this application as one of urgency as contemplated by rule 73.

2. That the first respondent be and is hereby placed under a provisional order of winding-up into the hands of the Master of the High Court of Namibia.

3. A rule nisi hereby issues calling upon all interested persons (including the second to seventh respondents) to show cause, if any, on a date to be determined by this Court, why this Court should not make the following final order –

3.1 that the first respondent be placed under a final order of winding-up; and

3.2 that the costs of this application be costs in the winding-up of the first respondent.

4. That service of this order be effected as follows –

4.1 by the Deputy-Sheriff for the District of Windhoek, by serving a copy of this order on the first respondent's registered address;

4.2 by service, in any manner reasonably possible, on the addresses reflected in paragraphs 5, 6, 7 and 8 of the founding affidavit deposed to by Mr Ipumbu Wendelinus Shiimi;

4.3 by publishing a copy of this order in one edition of The Namibian newspaper and the Government Gazette.

5. Further or alternative relief.'

[8] The Notice of Motion is dated 04 July 2017, for this relief to be adjudicated by the court on 06 July 2017. Respondents were informed that if they wish to oppose the application, then a notice of opposition should be filed by 15:00 on 04 July 2017 and that answering affidavits, if any, should be filed by 08:00 on 05 July 2017.

[9] The fourth and fifth respondents managed to file and serve an answering affidavit with annexures on the applicant by 05 July 2017 at 15:47. In the answering affidavits, the fourth and fifth respondents make it clear that, they object the application due to lack of urgency and that if any urgency exists, it is caused by the applicant's own conduct. Apart from urgency, Mr Namandje also took serious issue with the fact of 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, also bearing in mind that his clients are located in foreign countries. He maintained that rights to a fair trial/hearing in terms of article 12 of the Constitution of the fourth and fifth respondents were violated by this conduct of the applicant. Court will return to the issues raised in this regard.

[10] The first and third respondents did not oppose the application before court whereas the second, sixth and seventh respondents took up a neutral position and indicated that they will abide by the decision of this court.

[11] As the parties did not agree to the procedure to be adopted at the commencement of the application, I ordered that the court will firstly deal with the issue of urgency before the merits of the application will be considered.

Background:

[12] Although the merits of the application were not dealt with, I find it necessary to refer to the background of this application as it is of importance in the determination of the issue of urgency. The background history of this matter was set out in the founding affidavit deposed to by the Governor of BoN, Mr. Ipumbu Wendelinus Shiimi.

[13] During August 2016, the SME Bank's external auditors, BDO Namibia (I will, in this judgment, refer to BDO Namibia as the 'auditors'), informed BoN's Banking Supervision Department, that it intended to disclose certain information regarding investments made by the SME Bank with Mamepe Capital ('Mamepe') seemingly a South African investment company. The auditors raised concerns regarding these investments[3].

[14] It would appear that there was an initial investment of NAD 196 million in Mamepe of which NAD 150 million of the funds invested in Mamepe by the SME Bank was disinvested at Mamepe and invested in VBS Bank of South Africa[4]. In addition to the said investments made with Mamepe and VBS other investments were allegedly invested in South African Institution which amounted to NAD 207.6 million as at 28 February 2017[5].

[15] Statements were obtained from SME Bank's management relating to the purported South African investments but BoN remained dissatisfied.

[16] It also came to the attention of the Governor of the BoN that the SME Bank failed to repay to Namibia Water Corporation Limited an investment, in the amount of N$ 140 Million which had matured.

[17] As a result of the report of the external auditors, BoN decided to undertake a targeted examination. Said examination was conducted during September 2016 by the Banking Supervision Department of BoN, which revealed substantial irregularities and mismanagement[6] of SME Bank.

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[3] Founding Affidavit para 25.
[4] Founding Affidavit para 26
[5] Founding Affidavit para 38-39
[6] Founding Affidavit para 27 -34, BON 5 Executive Summary.

[18] The irregularities reported under the heading “Bank Supervision Department Targeted Examination Report SME Limited 26 September 2016” were issues like:

- Inadequate Cash flow Management;
- No Contingency Funding Plan in place;
- Non adherence to Liquidity Risk Management Policy;
- Accuracy and reliability of Management information system, to name a few.

[19] Following representation by the Board of SME Bank, the Board of BoN made a decision to assume control over SME Bank and on 01 March 2017 BoN issued orders in terms of section 56(2)(b)[7] of the Banking Institutions Act to assume control over SME Bank. A team was appointed on behalf of BoN to take over the day to day running of the SME bank and to determine if there was possibility to rescue the SME Bank.

[20] Inquiries regarding the investments that raised concerns continued throughout and BoN prepared two reports namely an Investment Recoverability and Solvency Assessment Report[8] and Investment Reconciliation Report[9]. The findings of these reports are set out in the Founding affidavit[10]. The conclusion was that “investment losses of this magnitude depleted the current capital levels of SME Bank and result in its liabilities exceeding assets, therefore making the institution insolvent as at 28 March 2017, and which remains the position”.

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[7] **Section 56(2(b):**
(2) The Bank may, in any of the circumstances contemplated in subsection (1), by means of an order in writing addressed and delivered to the banking institution concerned, and in the manner and within the period of time, or before a date, specified in the order-

(a).....; or

(b) if the Bank is satisfied that the banking institution is conducting its business in a manner detrimental to the interest of its customers or the general public, without prejudice to the powers of the Bank under paragraph (a), and in addition to any action taken by the Bank under that paragraph, assume control of the entire property, business and affairs of the banking institution, or any part thereof, and conduct the entire business and affairs of the banking institution, or the part so assumed control of, for and on behalf of the banking institution, or appoint a person to so conduct the business and affairs of the banking institution in the name of the Bank.

[8] Issued on 22 May 2017 BON 34.

[9] Issued on 22 May 2017 BON 35.

[10] Founding Affidavit para 44 to 45.

[21] During the investigation by BoN, it would appear that NAD 174.4 million of the alleged VBS Mutual Bank and Mamepe Investments have been lost and will not be recovered.[11]

[22] It appears from the correspondence filed by the applicant that the Governor of BoN engaged the Minister of Finance as well as Minister of Industrialization, Trade and SME Development to inject funds into SME Bank in an attempt to recapitalize the bank. From said correspondence it would appear that Government was not prepared to spend any further public funds in order to revive SME Bank.[12] In fact Minister of Finance indicated that he was in favour of the winding-up of the SME Bank[13].

[23] On 10 May and 30 May 2017 respectively the shareholder's representative was engaged to recapitalize the SME Bank. During the said correspondence the Governor elucidate the precarious position of the SME Bank and also informed the said shareholders that BoN is authorised to proceed in terms of section 57 and 58[14] of the Banking Institutions Act.

[24] Following up on the correspondence, a meeting was arranged with Mr Manasa of MetBank for 16 May 2017 to discuss the pertinent issues, however due to compassionate reasons Mr Manassa could not attend the meeting[15].

[25] In correspondence exchanged between the Governor and Mr Nkhwashu, legal practitioner of the fourth and fifth respondents[16] based in South Africa, the respondents were put on terms to make unconditional injection of capital by 03 July 2017 at 12:00.

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[11]Founding affidavit para 41.
[12] See BON 45 and BON 46.
[13] See BON 46 and Founding Affidavit para 54.
[14]Section 57: Additional powers of Bank to apply for capital reduction or to acquire shares in a banking institution.
Section 58: Winding-up or Judicial Management.
[15]BON 38.
[16]BON 47 and 48.

[26] Failure to adhere to the request of the Governor of BoN, precipitated this application for placing the first respondent under a provisional order of winding-up in the hands of the Master of the High Court of Namibia.

Urgency:

[27] Rule 73(4) stipulates that:

'(4) In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

(a) the circumstances which he or she avers render the matter urgent; and

(b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.

[28] It would be apposite to summarise some of the applicable principles emanating from case law when the court is considering urgency. The applicant bears the onus to satisfy the requirements of rule 73(4) before the court can exercise its discretion in favour of the applicant.

[29] It is a well-established principle that for purposes of deciding urgency, the court's approach is that the court accepts that the applicant's case is a good one.

[30] Commercial urgency is well recognised in our courts, provided that the commercial urgency is sufficient to invoke the provisions of rule 73. It does, however, not follow as a matter of course that just because the matter is one of a commercial nature it would entitle the applicant to have its matter treated on an urgent basis. The fact that irreparable damages may be suffered is not enough to make out a case for urgency.

[31] In the matter of *Petroneft International Glencor Energy UK Ltd and Another v Minster of Mines and Energy and Others*[17]where the issue of urgency in commercial matters was reconfirmed.

[32] When the applicant is seeking the court's indulgence and has created the emergency, through culpable remissness or inaction, he cannot succeed on the basis of urgency. In short, the urgency should not be self-created. An applicant should therefore not delay in approaching the court and wait until a certain event is imminent and then rely on urgency to have his/her matter heard.[18]

[33] Compulsory sequestration is regarded as *sui generis* and it is trite that winding-up of a company by its very nature is urgent[19]. In the matter of *Absa Bank Ltd v De Klerk and Related Cases*[20] Jones J stated the following on p 838 I – D:

'That procedure is different and exceptional in respect of the approach to disputes of fact on the papers as shown by *Kaliland Mecklenberg (Pty) Ltd* cases supra; the need to give notice to the respondent as show by the published Rules of Practice; and the recognition given by the Courts to the inherently urgent nature of sequestration proceedings. Perhaps the main reason for giving sequestration applications special treatment is the need to provide effectively and urgently for the creation of *concursuscreditorum*. There is frequently a large body of creditors whose rights are affected by sequestration, who may wish to be heard on the return day, and who may be prejudice by delay.'

[34] The Governor of the BoN who deposed to the founding affidavit discussed the issue of urgency as follows (also with reference to the preceding paragraphs contained in founding affidavit, which will not be repeated here) -

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[17] (A 24/2011) [2011] NAHC 125 (28 April 2011).

[18] Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd Case No (P) A91/2007 (Unreported) ; Bergmann v Commercial Bank of Namibia Ltd 2001 NR 48; Shetu Trading CC v The Chairperson of the Tender Board for Namibia and Others (Unreported) Case No A352/2010, delivered on 22 June 2011;Bandle Investments Ltd v Registrar of Deeds and Others, 2001 (2) SA 203 at 213 E-I; Wal-Mart Stores Inc. v The Chairperson of the Namibian Competition Commission & Others (Unreported judgment of the High Court of Namibia Case No A61/2011 delivered on 28 April 2011;and Petroneft International and Another v Minister of Mines and Energy (Unreported judgment of the High Court of Namibia) Case No A24/2011 delivered on 28 April 2011.

[19] Absa Bank LTD v De Klerk and Related Cases 1999 (4) SA 835 (ECD).

[20] Supra.

‘83. I am advised and respectfully submit that applications of this nature are, by their very nature, urgent. The applicant respectfully submits that, for reasons addressed herein (and to which I refer), the applicant cannot be afforded substantial redress at a hearing in due course. Simply put, the applicant is left with no option but to launch this application on an urgent basis, particularly given what is stated above. A hearing in due course which could take months, if not longer to finalize) would defeat the very purpose of this application and allow the occasioning of the vey harm which the applicant avoid by launching this application now (and as one of urgency).

84. I refer to what is stated in the preceding paragraphs, particularly those under the heading Advantage to Creditors. Civil proceedings by creditors may well be imminent and, for reasons already addressed above (to which I refer), it is important for a winding-up order to be granted for a liquidator to be be appointed as a matter of urgency. Such a liquidator will then be in a position to take charge of SME Bank’s business and assets and to realise the business and/or the assets for teh benefit of SME Bank’s general body of creditors.

85. In addition, certain significant investments made at SME Bank on call and as a result may be called up on short notice (24 hours). I include a list of these call funds (“BON 56”). Should this happen, SME Bank would in the absence of provisional order of liquidation, be required to pay such amounts out, to the detriment of the general body of creditors. SME Bank, at present, only has a buffer of approximately NAD 25 million to meet such calls.’

[35] The list of creditors whose deposit withdrawals on demand as on 03 July 2017 was as follows[21]:

TOP 5 CUSTOMERS	
Customer 1	117,648,755
Customer 2	19,465,933
Customer 3	14,908,472
Customer 4	7,883,771
Customer 5	6,500,000

[21]BON 56

Self - created Urgency?

[36] On behalf of the fourth and fifth respondents, it was argued that the urgency, if any was self-created as BoN knew as far back as September 2016 that SME Bank was unable to honour its financial commitments when it was unable to repay to the Namibia Water Corporation Limited an investment, in the amount of N$ 140 Million which had matured.

[37] It was further argued that the Governor of BoN in March 2017, shortly after BoN assumed control over SME Bank, deposed to an affidavit in the matter of *Mumvuma v Chairperson of the Board of Directors*[22]where he indicated the following:

> 'As far as the Bank is concerned the investment is still under investigation, which funds remain in doubt and has not been returned to the respondent. Further, it is likely that those amounts are lost (based on information at hand, presently and times material hereto), and the Bank is and was at all times material hereto, satisfied that the third respondent is insolvent or likely to become insolvent since the capital funds would –in the event – be depleted and the liabilities will excess the assets of the third respondent. (My underlining).

[38] In other words, the BoN knew as far back as March 2017 that the SME Bank was either insolvent or likely to become insolvent. It was further argued that BoN delayed the application for months at the backdrop of this information to their disposal. Mr. Namandje referred to a decision of the Full Bench of this Court in *Mweb Namibia (Pty) Ltd v Telecom Namibia and Others*[23] and submitted that any urgency was self-created.

[39] On the issue of the delay argued on behalf of the respondent, the matter of *Oceans 102 Investments CC v Strauss Group Construction CC & Another*[24] is very apposite where Angula DJP stated the following in this regard:

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[22]HC-MD-CIV-MOT-REV-2017/00094 [2017] NAHCMD 125 (25 April 2017).
[23]Case number A 91/2007, unreported 31. 07. 2007.
[24] (A 119/2016) [2016] NAHCMD 139 (10 May 2016).

'[3] In any event, with reference to the calculation of days, the so called 'delay rule' this regard Heathcote AJ in the matter of *Shetu Trading CC v The Chair of the Tender Board for Namibia* Case No A 352/2010 delivered on 22 June 2011 pointed out that one cannot simply calculate the days from when the cause of action arose and when the application was launched and if there are many days to say that there have been culpable 'remissness or inaction' that such calculations cannot by itself be the basis for exercising a discretion against an applicant. This is exactly what counsel is trying to convince the court to do in this matter. I decline to adopt that approach.'

[40] Furthermore, this type of simplistic approach by equating delay with remissness or inaction was cautioned by Smuts J in the matter of *The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and Others* [25]

'I agree that the factors listed, such as a reasonable time to be taken to take all reasonable steps preceding an application including considering and taking advice, attempts to negotiate, obtaining copies of relevant documents and obtaining and preparing affidavits, should also be taken into account, if these are fully and satisfactorily explained, in considering whether an application should be heard as one of urgency.'

[41] This court is of the opinion that in the matter *in casu* the court should adapt a broader view regarding the time that lapsed before the application was brought to court. One should not lose sight of the fact that SME Bank is a financial institution, that together with other financial institutions in Namibia forms the backbone of the economy of this country and that the winding-up of a banking institution of this nature is not a decision to be taken lightly.

[42] There is no indication that there was inaction on the part of the BoN or any remissness for that matter. It is quite clear that extensive efforts were done to trace the investments that were made reference to in the investigative report and that there was constant negotiations and efforts to repatriate the money to Namibia and to recapitalize the SME Bank. That much is clear from multiple correspondence filed of record and referred to earlier in my judgment.

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[25] (SA3/2007) [2008] NASC 15 (28 October 2008). Referred to in *Oceans 102 Investments CC v Strauss Group Construction CC & Another* Supra.

[43] This court can also not find that that there was dilatoriness attributable to the applicant in the launching of the application, that is, the "culpable remissness on the part of the applicant in launching the application"[26].

[44] The Governor of BoN engaged all the shareholders to recapitalize the SME Bank and restore its liquidity, which was not successful.

Substantial redress at a hearing in due course:

[45] BoN as the regulatory body placed an obligation on the Governor to step in, in an attempt to minimize the losses suffered by the SME bank. It must be noted that financial assets, as opposed to material assets such as merchandise, can be dissipated secretly and very quickly.

[46] Depositors are not generally in a position to monitor and assess the financial condition of their bank accounts on a continuous basis. Thus, any suggestion, even a rumour, that a particular bank is no longer in a position to meet its liabilities is likely to lead to a "bank run". Depositors will withdraw their deposits as quickly as possible because they believe that those who do so will sustain the least loss.

[47] The "bank run" appears to have started already. It is quite clear that when that happens, the applicant will not be able to get redress in the ordinary course.

[48] Banks are most vulnerable to the loss of public confidence. This court is convinced that the Banking industry as a whole will also suffer consequences as a result of the difficulty that SME Bank found itself in as any suggestion that one bank is in trouble may be taken (reasonably or unreasonably) as evidence that other banks are likely to face similar problems.

[49] Globalization and technological progress have increased access to information and the speed by which it spreads. Hence, news of a bank's problem can spread faster than ever. This may not only precipitate an overreaction on the part of

[26] *Mpasi v Kudumo*(A 235/2015) [2015] NAHCMD 252 (22 October 2015); *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48.

a bank's customers, but also - and more significantly - trigger a market reaction that will make it even more difficult and costly for the affected bank to obtain funding in the markets[27]. Due to this dependence on public confidence, a bank's failure involves the potential for damaging repercussions on the economic system as a whole.[28] The risk of contagion is further increased by inter-bank exposures arising from any one bank's role in the payment system[29].

[50] In light of my preceding discussion and having regards to all the issues that were dealt in the founding affidavit of the Governor of the BoN, I am thus satisfied that the applicant has explicitly set forth the reasons why it will not obtain substantial redress in due course as required by Rule 73(4)(b).

Respondents unable to have a fair hearing in terms of Article 12 of the Constitution:

[51] Mr Namandje took issue with the short notice in this matter and bringing the application on urgent basis, in spite of the history in this matter. He further took issue with the fact that the applicant only alluded that an application in terms of section 57 and 58 of the Banking Institutions Act, 1998 might be brought but at no stage did the applicant pertinently made its intentions clear in this regard. He argued further that, within one day after a date on which the shareholders were to recapitalize, (being 03 July 2017 at 12:00), this voluminous application was filed on two days notice, in a possible attempt to gain an advantage over the fourth and fifth respondents.

[52] Adv. Corbett argued to the contrary stating that the position of the SME Bank is not static in nature but ever changing and that it is in a downward spiral at this stage. He argued due to the failure of the shareholders to recapitalize, the position of the bank became so dire that the matter had to be attended to as a matter of urgency and that notice was given, albeit short. He further stated that in all the correspondence to the fourth and fifth respondents, they were informed of the

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[27] Hupkes, Eva. (2003). "*Insolvency-Why a Special Regime for Banks" in Current Developments in Monetary and Financial Law*, Vol. 3. Washington, DC: International Monetary Fund.

[28] On contagion among banks, see Benton E. Gup, Bank Failures in the Major Trading Countries 6 (1998).

[29] See E.A. J. George, *Are Banks still special?, in* Banking Soundness and Monetary Policy 253 (Charles Enoch, John H. Green, eds., 1997).

possible winding-up of the SME Bank if there is no recapitalization done by the shareholders and they were thus forewarned.

[53] In this regard the court take note that it was found in the *Petroneft* matter[30] that whether or not the applicant has forewarned the decision-maker of a possible application, is according to ***Radebe's*** case, is a factor which weighs in the applicant's favour. It is clear that the fourth and fifth respondents were indeed put on alert as to the solvency problems of the SME Bank and also what consequence would be that would follow if the position persists.

[54] Whilst it is clear in this matter that application was brought on short notice and that the respondents were afforded a short period of time to provide answering papers, they have not sought any postponement and have in fact filed the answering affidavit and supporting documents within a day. This was done in spite of the logistical difficulties faced by the fourth and fifth respondents, who are foreign litigants.

[55] This court has considered the circumstances and cannot find that the applicant in this matter acted with *mala fides* or with the intention of securing a tactical advantage[31] over the respondents in this matter by filing this matter on an urgent basis. This court is of the opinion that this matter is urgent and of such nature that the court must consider the balance of prejudice to third parties.

[56] One should also not lose sight of the fact that the relief sought by the applicant is not final in nature and respondents will be able to oppose a final order in due course.

[57] I thus make the following order:

1. That the applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 73(4) of the Rules of Court.

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[30] Supra (A 24/2011) [2011] NAHC 125 (28 April 2011).
[31] *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC).

2. Cost of this application to be cost in the cause.

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JS Prinsloo

APPEARANCES:

THE APPLICANT:	Adv. A Corbett SC (with him D. Obbes)
Instructed by:	ENSafrica Namibia (inc.LorentzAngulaInc), Windhoek
4TH AND 5TH RESPONDENTS:	SisaNamandje (with him T. Iileka)
Of:	SisaNamandje& Co Inc, Windhoek