

“ANNEXURE 11”  
Practice Directive 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> AFRIKUUMBA CONSTRUCTION (PTY) LTD vs MINISTER OF WORKS AND TRANSPORT	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2019/00270
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE KANGUEEHI, ACTING	<b>Date of hearing:</b> 9 AUGUST 2019
	<b>Delivered on:</b> 16 AUGUST 2019
<b>Neutral citation:</b> <i>Afrikuumba Construction (Pty) Ltd // Minister of Works and Transport</i> (HC-MD-CIV-MOT-GEN-2019/00270) [2019] NAHCMD 290 (16 August 2019)	
<b>The order:</b>  Having heard <b>ADV A. CORBETT, SC</b> assisted by <b>MS. K. KLAZEN</b> , on behalf of the Applicant and <b>MR S. NAMANDJE</b> assisted by <b>MR M. KASHINDI</b> , on behalf of the 1st, 3rd, 4th and 10th Respondents and <b>ADV PHATELA</b> , on behalf of the 2nd Respondent and having read the Application for HC-MD-CIV-MOT-GEN-2019/00270 and other documents filed of record:  <b>IT IS ORDERED THAT:</b>  1. The matter is struck from the roll for lack of urgency.  2. The Applicant is to pay the costs of the Respondents which costs shall include the costs of one instructing and one instructed counsel.	
<b>Reasons for the above order:</b>	
[1] The Applicant brought an urgent application seeking an interim relief. In Part A of the Notice of Motion the Applicant seeks to review a purported decision of the First	

Respondent and communicated to the Applicant by the Second Respondent on 5 July 2019 in which the Second Respondent terminates the Joint Venture Agreement and Lease between the Applicant and the Second Respondent.

[2] In Part B, the applicant sought interim relief on an urgent basis.

[3] It was agreed at the hearing, that this Court shall first decide the question of urgency as the Respondents took the point *in limine* that the matter is not urgent.

[4] Many Urgent Applications go through this Court, and the Applicant must satisfy the requirements of rule 73(4) of the rules of court for the application to be heard as one of urgency. The requirements are: 1. To set forth the circumstances which render the matter urgent and 2. The reasons why the Applicant could not be afforded substantial redress at a hearing in due course.

[5] Urgent applications are not there for the taking and the duty lies with the Applicant to satisfy both requirements.

[6] Counsel for the parties have referred me to various judgments on urgency and I associate myself with the legal principles therein.

[7] In order to succeed in obtaining urgent interim relief the Applicant needed to establish the following:

7.1. A prima facie infringement of the Applicant's rights;

7.2. Urgency or a real loss or disadvantage to be suffered if the applicant is compelled to rely solely on the normal procedures for bringing its dispute to court<sup>1</sup>.

[8] The test for urgency has visited our courts with impunity. In *Nghiimbwasha v Minister of Justice*<sup>2</sup> it was held that:

'The first allegation the applicant must "explicitly" make in the affidavit relates to the

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<sup>1</sup> *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) at 387 D-H. Also see *Esterhuizen v The Chief Registrar of the High Court and Supreme Court and Others* 2011 (1) NR 125 (HC) at paras 19-21.

<sup>2</sup> *Nghiimbwasha v Minister of Justice* (A38/2015) [2015] NAHCMD 67 (20 March 2015) at paragraph 12.

circumstances alleged to render the matter urgent. Second, the applicant must explicitly state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course'. The use of the word 'explicitly', in my view, is not idle nor an inconsequential addition to the text.

[9] The same sentiments were expressed earlier in *Mweb Namibia v Telecom Namibia Ltd and Others*.<sup>3</sup> The court in *hoc casu* went on to hold that:

'The fact that irreparable damages may be suffered is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent.'<sup>4</sup>

[10] It was further held in *Bergmann v Commercial Bank of Namibia*<sup>5</sup> that:

'When an application is brought on the basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen'. The essence hereof is that an applicant should 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.<sup>6</sup>

[11] The question is really one of: what prompted the Applicant to come to court on urgency? Mr. Corbett for the Applicant submitted that the Applicant is aggrieved by the letter of 5 July 2019 and that is what prompted them to come to court. On the contrary, Mr. Namandje for the 1<sup>st</sup>-, 3<sup>rd</sup>-, 4<sup>th</sup>- and 10<sup>th</sup> Respondents submitted that the offending decision (if it can be called such) was taken in 2014 and that the Applicant was not entitled to relief on an urgent basis. Mr. Phatela, for the 2<sup>nd</sup> Respondent aired the same sentiments

[12] The letter of 05 July 2019 is attached to the application as Annexure AKC 39. The pertinent part of that letter is in the second paragraph and reads as follows:

'Pursuant to our previous correspondence, please be advised that on 30 June 2019 our shareholder, the Ministry of Works and Transport, on the basis of the legal opinion provided by the Attorney-General of Namibia regarding TransNamib's PPP agreements dated 14 February

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<sup>3</sup> *Mweb Namibia v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at paragraph 19.

<sup>4</sup> See *Mweb* case par 20.

<sup>5</sup> See *Bergmann v Commercial Bank of Namibia* 2001 NR 48 (HC) at 50 G-I.

<sup>6</sup> See *Mweb* at par 23.

2013, Section 4 of the National Transport Services Holding Company Act 28 of 1998 and in accordance with exercising the powers vested in the Minister of Works and Transport through Article 40(a) of the Namibian Constitution, confirmed the directive of the Minister of Works and Transport dated 04 June 2014 and approval by Cabinet on 20 May 2014 for the Minister of Works and Transport to direct TransNamib to terminate, if not yet terminated, its various joint venture and/ or long lease agreements'. (My underlining).

[13] This paragraph can be dissected as follows:

- a. What the Minister did on 30 June 2019 was to confirm a directive;
- b. That directive was issued on 04 June 2014 by the Minister and approved by Cabinet on 20 May 2014.

[14] I hasten to add that the next paragraph of AKC39 is cause for confusion. That paragraph says to the Applicant that the 2<sup>nd</sup> Respondent terminates the agreements with immediate effect and that the Applicant must immediately discontinue all operations pertaining to the joint venture through the aforementioned two SPVs. This paragraph creates the impression that the agreements were being terminated there and then on 5 July 2019. The reality is that, on the facts, the agreements were already terminated in 2014 and have not been revived.

[15] Even if am wrong on this aspect, the Applicant does not seek to review the decision of the 2<sup>nd</sup> Respondent but rather that “of the first respondent and communicated by the second respondent to the applicant...”<sup>7</sup>.

[16] On a proper construction of the facts, the Applicant is, in the main, aggrieved by the Ministerial decision of 04 June 2014.

[17] There is no explanation, on the papers, why the Applicant waited for five (5) years to come to court and more so on urgency.

[18] Another reality is that if the agreements were terminated in 2014, what right does the Applicant have to come to court in 2019? For, surely then, the relationship between the Applicant and the second Respondent was terminated. I, however, need not decide

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<sup>7</sup> Paragraph 1.2 of Part A of the Notice of Motion.

this point finally.

[19] In paragraph 40 of the Replying affidavit and in oral argument, it was submitted that the matter was referred to arbitration in terms of the agreement. The Applicant further admits that it has contractual or common law remedies at its disposal in order to enforce its contractual rights.

[20] As a result the Applicant has failed to satisfy the requirements under rule 73(4). The Applicant has failed to set out the circumstances which render this application urgent as well as why the Applicant will not be afforded substantial redress at a hearing in due course.

[21] Applicant was already informed that the second Respondent would terminate the joint venture as early as 2014<sup>8</sup>. The Applicant in paragraph 43 of its replying affidavit submits that the letter of 04 June 2014 (attached as annexure AKC12 to its founding affidavit) and that of 10 September 2014 (attached as annexure AKC 11 to its founding affidavit) were never given to it but that they surfaced recently. At least, the Applicant was aware of these letters at the time it lodged this application.

[22] Thus, the reasons for the order made above.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondents</b>
Adv Corbett, SC assisted by Ms Klazen For the Applicant Instructed by Ellis Shilengudwa Inc.,	Mr Namandje assisted by Mr Kashindi for the 1 <sup>st</sup> , 3 <sup>rd</sup> , 4 <sup>th</sup> , 5 <sup>th</sup> and 10 <sup>th</sup> Respondents, Instructed by Government Attorney, Windhoek

<sup>8</sup> Also see annexure AKC 11 and AKC 12. Annexure AKC 11 dated 10 September 2014 refers to AKC 12 of 04 June 2014. These documents informed the applicant of the termination.

Windhoek

Adv Phatela for the 2<sup>nd</sup> Respondent,  
Instructed by Murorua, Kasper and Kurz,  
Windhoek