REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING URGENT APPLICATION

CASE NO.: HC-MD-CIV-MOT-GEN-2022/00349

In the matter between:

HERMI STRAUSS	**APPLICANT**

and

HERMIAS CORNELIUS STRAUSS	**1st RESPONDENT**
MARIA MAGDALENA STRAUSS	**2nd RESPONDENT**
LESTER VAN ROOYEN	**3rd RESPONDENT**
ANDY HOLLAND	**4th RESPONDENT**
MASTER OF THE HIGH COURT N.O.	**5th RESPONDENT**
ADVANCE WEALTH MANAGEMENT (PTY) LTD	**6th RESPONDENT**

Neutral citation: *Strauss v Strauss* (HC-MD-CIV-MOT-GEN-2022/00349) [2022] NAHCMD 500 (23 September 2022)

Coram: RAKOW J

Heard: **2 September 2022**

Delivered: **23 September 2022**

Flynote: Applications – Urgency – Requirements prescribed by rule 73(4) of the Rules of Court restated – Applicant must set out the circumstances demonstrating the urgency and provide satisfactory reasons why he could not be afforded substantial redress in due course – Applicant must also demonstrate that the urgency was not of his own making – Applicant failed to put forward reasons rendering the matter urgent and why he would not receive substantial redress in due course – Application struck for lack of urgency.

Summary: The applicant is the appointed executor in the deceased estate of the late Mr and Mrs Strauss. The first respondent is the biological son of the deceased couple and the third respondent is his life partner.

Mr and Mrs Strauss passed away on 1 and 2 July 2021, respectively. In November 2021, the first and third respondents took occupation of one of the deceaseds farm, Farm Steinfeld situated in Keetmanshoop. It was the applicant's case that he had not given the respondents permission to reside on Farm Steinfeld.

The applicant launched an application on an urgent basis on 1 August 2021, seeking to interdict the first respondent from interfering in the management and control of the assets of the deceaseds situated on Farm Steinfeld and seeking to evict the respondents from the farm.

Held that, the first hurdle that any applicant in an urgent application must cross, is to satisfy the court that the matter is indeed urgent and meets the requirements in rule 73. In an application for urgent relief the applicant must set out the circumstances demonstrating the urgency and provide satisfactory reasons why he could not be afforded substantial redress in due course. Coupled with this, the applicant must also demonstrate that the urgency was not of his own making.

Held that, no reasons were put forward by the applicant as to why the first and third respondents should be evicted on an urgent basis or why the applicant would not receive substantial redress in due course.

The application was accordingly struck for lack of urgency.

ORDER

1. The application is struck for lack of urgency. The issue of costs to stand over until the finalization of HC-MD-CIV-ACT-OTH-2022/01862.

URGENT APPLICATION JUDGMENT

RAKOW J:

Introduction

[1] The applicant in these proceedings, Mr Hermie Strauss is the Executor appointed by the fifth respondent in the estate of the late Johannes Mattheus Strauss and Martina Daffina Strauss (nee Louw). He is the brother of the deceased Mr Strauss. The first respondent is Hermias Cornelius Strauss, the son of the deceased Strauss couple and the nephew of the applicant. The second respondent is Maria Magdalena Strauss, the ex-wife of the first respondent. She is not opposing the application. The third respondent is Lester van Rooyen, the life partner of the first respondent. The fourth respondent is Andy Hollard, a family friend of the first respondent. The first, third and fourth respondents are opposing this application. The fifth respondent is the Master of the High Court of Namibia and the six respondent is the agent duly authorized by the applicant to deal with the estates of the deceased persons.

Background

[2] The first respondent is the sole biological child of the late Mr and Mrs Strauss who passed away on 1 July 2021 and 2 July 2021, respectively. He stated that he grew up on the Farm Steinfeld and resided there during his childhood. He further farmed together with his father, and helped pay for the farm during the period 1992 - 1997, whereafter he moved to Cape Town. He further indicated that he regularly visited with his parents and during 2021 before his parents passed away, he was planning to return to Farm Steinfeld in January 2022 permanetly, to assist them on the farm and in the workshop. His parents passed away as set out above and in the Wills dated 15 April 2018, both Mr and Mrs Strauss named each other as the

beneficiaries of their respective estates and if they should die within 30 days from each other, they named the first and second respondents as their heirs. These wills also appoint the applicant as executor. These wills were accepted by the Master of the High Court but challenged by the first respondent in that he alleges that they were not signed in the presence of the witnesses and he further attached statements of those witnesses to his answering affidavit. This matter is still pending in this court under case HC-MD-CIV-ACT-OTH-2022/01862.

[3] The first respondent received oral permission from the applicant to move onto and reside on farm Hoas, also a farm belonging to his deceased parents, during August 2021. The house on this farm did not have all the comforts of the house on farm Steinfeld as there was no telecommunication connection, the roads on the farm were badly maintained and it had poor sanitation facilities. The house on the farm Steinfeld on the other hand, stood unoccupied since his parents' passing and was equipped with solar power, functioning telecommunication and sanitation facilities.

[4] There was also some property, to wit a Landrover and a trailer, of the first respondent on farm Steinfeld which he requested back from the applicant in a WhatsApp message on 16 September 2021. This request was refused by the applicant. After he then told the applicant that he will remove his vehicle from farm Steinfeld, he was informed to leave farm Hoas in an email dated 20 September 2021. He had nowhere to go and also felt that the applicant had no valid reason to order him from farm Hoas. The first respondent then proceeds and sets out in detail incidents at farm Steinfeld which gave him grounds for concern about the management of the estate of the deceased. He, for example, followed up on a number of oryx which were hunted on the farm and reported the illegal hunting and slaughtering of 44 oryx at Keetmanshoop by the farm manager, Mr Kotze, who was appointed by the applicant to manage the farm. He also complained that Mr Kotze, on instruction of the applicant, sold certain Landrover parts from the garage that were being operated at Farm Steinfeld, to third parties for far below the market price for these parts. This was during November 2021.

[5] He and the third respondent, his life partner, moved to Farm Steinfeld during November 2021, to stop further deterioration of the farm and everything on it. His intention was to start caring for the items that form part of the estate and which was just standing around without daily care. The first and third respondents left Farm

Steinfeld together on 23 May 2022 for medical care and surgery. This was only a temporary arrangement and the first and third respondents returned to Farm Steinfeld on 17 July 2022. The fourth respondent, who was a family friend, accompanied the other two respondents to the farm on request of the first respondent to assist with mechanical work to the generator on the farm which was overheating. The fourth respondent left the farm after assisting with the generator on 28 July 2022 and returned to South Africa. This was before this application was served.

[6] It further seems that the applicant was informed by Mr Kotze that upon their return from South Africa, the first, third and fourth respondents brought with them three Landrovers and numerous Landrover parts which seems to be destined for mechanical or maintenance repairs at the garage situated at Farm Steinfeld. Two of the Landrovers had since left the farm with one remaining.

[7] In a letter dated 29 June 2022 from the legal representative of the first respondent, the first respondent sought to be allowed 50 percent vegetation for 1 sheep on 5 hectares or 1 cow on 35 hectares from 1 July 2022 to 31 December 2022. He further asked to be allowed 50 percent workspace in the garage to carry on with the business and that he be allowed to manage the livestock on the farm. On 12 July 2022, the sixth respondent informed the legal representative of the first respondent that the request was denied.

[8] On 22 July 2022, the applicant gave instructions to his legal practitioners of record to demand that the first respondent be requested to vacate the farm Steinfeld by no later than 27 July 2022. Despite this, he and the third and fourth respondents remained on the farm.

<u>The content of the various affidavits</u>

[9] The applicant indicated that he never gave the third and fourth respondents permission to reside on the Farm Steinfeld, neither did he give the fourth respondent permission to use the garage, known as Steinfeld Garage and Tools. He further alleged that the first respondent took possession of the keys of the workshop and remains in control of the workshop. The first and fourth respondents conduct business at the workshop and this is without the consent of the applicant. This was

for the two weeks preceding the application. Another concern of the applicant was that the farm manager, Mr Kotze, had no control over the business conducted at the workshop on the farm and that Mr Kotze was authorized to manage the affairs of the farm Steinfeld. Also that Mr Kotze gave the keys to the garage to the first respondent out of fear and that he has no control over the equipment and products utilized by the first respondent over the past two weeks preceding the application.

[10] The first respondent denies having the only key to the garage and indicates that Mr Kotze indeed has another key. He further stated that during the two weeks preceding this application, he arrived many times at the workshop after Mr Kotze has already unlocked it. He never intervened with Mr Kotze's duties and Mr Kotze could carry on with his duties in the workshop and on the farm as always. He further stated that where he used the workshop in the garage it was to do maintenance and upkeep on the farm as well as the vehicles of the estate. He further did conversions on Landrovers for farmers and mostly did it out of the back of his own vehicle with his own tools. He would use tools from time to time from the workshop but it would be returned at the end of the day. If he used parts from the garage, he would ask Mr Kotze to record it. The work he has been doing was kept separate from the work Mr Kotze does and to generate an income for the first respondent.

[11] The first respondent maintained that he, as an heir is entitled to maintain the farm as well as reside and maintain the family home while the administration of the estates are being finalized.

The application

[12] The applicant seeks an order as follows:

1. Condoning applicant's non-compliance with the Rules of this Court ("the Rules") insofar as it relates to the forms and service of the application in terms of Rule 73(3) of the Rules and directing that this matter be heard as one of urgency.

2. That an interim interdict be granted in the following terms:

2.1 That the first respondent with immediate effect be interdicted from in any manner whatsoever interfering with the management and control of any of the items constituting assets in the estates of the late Johannes Mattheus Strauss and late Martina Daffina Strauss situated on Farm 117, Steinfeld, Keetmanshoop, Republic of Namibia pending the final determination of HC-MD-CIV-ACT-OTH-2022/01862; and

2.2 That the first, third and fourth respondents be ordered to vacate Farm 117, Steinfeld, Keetmanshoop, Republic of Namibia, together with all their goods and belongings, within 7 days from date of this order, pending the final determination of HC-MD-CIV-ACT-OTH-2022/01862.

2.3 That the costs of this application be borne, jointly and severally, by such respondents who may elect to oppose this application, which costs shall include the costs of one instructing and one instructed counsel.

3. Further and/or alternative relief as the facts may justify.

The arguments

[13] On behalf of the applicant it was argued that the applicant has a duty to both the heirs to protect the assets of the estate. The first respondent as heir, only acquires an enforceable right once the applicant has drawn up a liquidation and distribution account and thereafter compliance with section 35 of the Administration of Estates Act 66 of 1965. It was also argued that the first respondent consented to the order prayed for under 2.1 above.

[14] Regarding the challenge to urgency by the first and third respondents, it was argued that the possible situation rendering this application urgent occurred on 17 July 2022, when the first and third respondents together with the fourth respondent returned to Farm Steinfeld. On 22 July 2022, the applicant through his legal practitioners, informed the first respondent that he and the other respondents should leave the farm by 27 July 2022. Shortly after that, on 1 August 2022, the application was issued. It was further true that the applicant afforded the respondents ample time to file their opposing papers.

[15] In the answering affidavit of the first respondent much is made of the manner in which the applicant conducts the affairs of the Estate Late Strauss but no counter

application to remove the applicant as executor was brought and those allegations should be ignored as they are irrelevant to the current proceedings. It was further argued that if the applicant satisfies the requirements of law for eviction relief then that part of the order must be granted. It was further argued that the third respondent does not begin to assert a right to remain on the estate late property against the will of the executor. The fourth respondent apparently left the country before being served with the application and is no longer on the farm.

[16] On behalf of the respondents it was argued that the applicant basically seeks interim relief to interdict the first respondent from interfering with the management and control of the estate assets and the eviction of the first, second and fourth respondents from the farm Steinfeld. The issues are, therefore, whether the first and third respondents could exercise occupation on Farm Steinfeld and whether the first respondent is interfering with the management of the said farm. The associated issue is therefore whether a case has been made out for urgent relief and whether the requirements of interim relief was met.

[17] It was argued that the first and third respondents already moved onto farm Steinfeld in November 2021. They resided there until April 2022, whereafter they returned again in July 2022. It therefore follows that, the first respondent has been residing on Farm Steinfeld for some time without the applicant raising any action. The reason seemingly, why the applicant now raised the matter as one of urgency seems to be that the first respondent was using all the facilities and spare parts belonging to the estate. This allegation, however, arises from speculation and uncertainty and is opposed by the first respondent's factually setting out of what he indeed has done since his return to the farm.

[18] The fourth respondent in his papers further claims that he no longer occupies the farm and that there is no justifying the relief sought against him. This relief should therefore be dismissed from the onset.

Urgency

[19] The first hurdle that any applicant in an urgent application must cross, is to satisfy the court that the matter is indeed urgent and meets the requirements in rule 73. The applicant in his papers, which was then also argued in court, insisted that he

met the requirements for urgency. In an application for urgent relief the applicant must set out the circumstances demonstrating the urgency and provide satisfactory reasons why he could not be afforded substantial redress in due course. Coupled with this, the applicant must also demonstrate that the urgency was not of his own making.

[20] The parties address the matter of urgency in their arguments and heads of argument. Rule 73(4) sets out the requirements for an application to be dealt with on an urgent basis. The applicant '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.'

[21] The understanding is that both these averments must be contained in the affidavit of the applicant before a matter can be considered on an urgent basis. The logical sequence will be that as soon as a case is made out for urgent relief, rule 73(3) comes into play, and the court may then dispense with the forms and service provided in these rules and dispose of the application in such manner and in accordance with such procedure as the court considers fair and appropriate.

[22] The plaintiff should not only pay lip service to these requirements but it should be substantively shown that they were met. In essence, the applicant should show to the court why they should be allowed to 'jump the que'.

The requirements of Rule 73(4)

[23] In *Nghiimbwasha and Another v Minister of Justice and Others,*[1] the court dealt with the interpretation of the word 'must' contained in rule 73(4) as well as the responsibility of an applicant in a matter alleged to be urgent. Masuku J states at para that:

[1] *Nghiimbwasha and Another v Minister of Justice and Others* [2015] NAHCMD 67 (A 38/2015; 20 March 2015).

'[11] The first thing to note is that the said rule is couched in peremptory language regarding what a litigant who wishes to approach the court on urgency must do. That the language employed is mandatory in nature can be deduced from the use of the word "must" in rule 73 (4). In this regard, two requirements are placed on an applicant regarding necessary allegations to be made in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused.

[12] The first allegation the applicant must "explicitly" make in the affidavit relates to the 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", it is my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to set out and underscore the level of disclosure that must be made by an applicant in such cases.

[13] In the English dictionary, the word "explicit" connotes something "stated clearly and in detail, leaving no room for confusion or doubt." This therefore means that a deponent to an affidavit in which urgency is claimed or alleged, must state the reasons alleged for the urgency "clearly and in detail, leaving no room for confusion or doubt". This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency.'

[24] The qualification of rule 73(4) by adding 'explicitly' to the understanding of the case that must be set out in the affidavits supporting the rule 73 application has been supported by our courts in a number of occasions (see *Fuller v Shigwele*[2] and *Bank Windhoek Ltd v Mofuka and another*[3]). Parties are not to underestimate the level of disclosure that must be made by an applicant. The court should be informed frankly and taken into the confidence of the applicant. Applicants seeking an indulgence from court to hear a matter on an urgent basis should 'clearly and in detail, leaving no room for confusion or doubt', set out their case in the affidavits before court.

[25] The second leg of rule 73(4) that needs to be satisfied for a matter to be considered as urgent is that the applicant is to provide under rule 73(4)*(b)* 'the reasons why he or she claims he or she could not be afforded substantial redress at

[2] *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (5 February 2015).
[3] *Bank Windhoek Ltd v Mofuka and another* 2018 (2) NR 503 (SC).

a hearing in due course.' The applicants insisted that there is no other remedy available for them, other than bringing an urgent application.

[26] The argument by the first respondent is that the applicant already chose the process to obtain substantial redress when they filed an appeal application. The fact that they were instructed to bring a condonation application does not negate the 'afforded substantial redress' available to the applicant through the appeal process to the third respondent.

Self-created urgency

[27] In *Bergmann v Commercial Bank of Namibia Ltd and Another,*[4] Maritz J (as he then was) made the following observations:

'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. That much is clear from the use of the word "may" in Rule 6(12). 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. Examples thereof are to be found in Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) I SA 582 (W) and *Schweizer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T).'

[28] In *Twentieth Century Fox Films Corporation supra;* and *Schweizer-Renecke Vleis Maatskappy (Edms) Bpk v Minister van Landbou en Andere*,[5] the court held the view that:

'. . . when the applicant, who is seeking the indulgence, has created the emergency, either *mala fides* or through her culpable remissness or inaction, he cannot succeed on the basis of urgency.'

Substantial redress at a hearing in due course

[4] *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC).
[5] *Schweizer-Renecke Vleis Maatskappy (Edms) Bpk v Minister van Landbou en Andere* 1971 (1) PH F11 (T).

[29] The second requirement that an applicant in an urgent application must meet, is to show to the satisfaction of the court of the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. This is a substantive requirement and must be specifically addressed in the papers before court. In *Purity Manganese (Pty) Ltd v Maritima Consulting Services CC*[6] Parker J said the following:

'. . .the rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought that the matter be heard on urgent basis the applicant must satisfy both requirements.'

Discussion

[30] The applicant did in fact attempt to put facts before court to show what exactly renders the application urgent. The problem for the court, however, comes with the facts provided to show that substantial redress cannot be obtained in due course. The confirmatory affidavit of Mr Kotze only refers to the use of the workshop at the garage by the fourth respondent, although the first respondent admitted that he used some of the tools of the garage but that it was to assist with the upkeep of the farm infrastructure and vehicles. He further indicated that if he took parts from the garage, he instructed Mr Kotze to make a note of it. The fourth respondent is further no longer at the farm and therefore there is no fear that he will continue working in the workshop of the garage.

[31] The other complaint of Mr Kotze is that the first respondent took the keys of the garage. Although this is admitted by the first respondent, it seems that Mr Kotze has another set of keys, so the fact that the first respondent has the keys of the garage seems not to have any impact on the work Mr. Kotze needs to perform. There is no other indications as to where the first and third respondents interfere with the operations of the farm or caused any damage to the value of the estate. The court presumes that the value of the products and parts used by the first respondent and recorded by Mr Kotze can be determined and eventually be deducted from his

[6] *Purity Manganese (Pty) Ltd v Maritima Consulting Services CC (*A 295/2014) [2014] NAHCMD 350 (20 November 2014)

share of the Late Estate Strauss, in the event that his application to this court is not successful.

[32] It further seems that the first respondent gave an undertaking not to interfere with the management and control of any of the items constituting assets in the estates of the late Johannes Mattheus Strauss and late Martina Daffina Strauss and as such has been conducting his business from outside the garage and from the back of his vehicle. No complaint seems to be forthcoming that Mr Kotze cannot perform his duties as a farm manager, nor is he prevented from performing his duties as mechanic and manager of the garage.

[33] The only complaint that really remains, is that the first third respondent find themselves on the Farm Steinfeld without permission and as such should be evicted. There is no reason put forward why this should happen on an urgent basis, neither why the applicant will not receive substantial redress in due course.

[34] In light of the above, I find that the applicant did not provide sufficient cause for the court to find that the applicant meets the requirements set out for rendering the application urgent.

[35] The parties agreed that the best proposal regarding a cost order will be for the costs to be reserved, pending the finalization of HC-MD-CIV-ACT-OTH-2022/01862 as the costs incurred by the executor is on behalf of the estate and will have to be paid by the estate.

The order:

1. The application is struck for lack of urgency. The issue of costs to stand over until the finalization of HC-MD-CIV-ACT-OTH-2022/01862.

E Rakow

Judge

APPEARANCES:

APPLICANT:	J Diedricks (with him B Viljoen) Instructed by Viljoen & Associates, Windhoek
FIRST, THIRD & FOURTH RESPONDENTS:	J Marais (SC) (with him Van Vuuren) Instructed by Fisher, Quarmby & Pfeifer, Windhoek