REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00376

In the matter between:

A – TEAM STONE CRUSHERS CC **APPLICANT**

and

ARIS STONE PRODUCTS CC **RESPONDENT**

Neutral citation: *A – Team Stone Crushers CC v Aris Stone Products CC* (HC-MD-CIV-MOT-GEN-2022/00376) [2022] NAHCMD 502 (12 September 2022)

Coram: RAKOW J
Heard: **19 August 2022**
Order delivered: 12 September 2022
Reasons released: 23 September 2022

Flynote: Applications – Urgency – Requirements prescribed by rule 73(4) of the Rules of Court restated - a party bringing an application on an urgent basis must set out explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course – Respondent brought a counter-application to the applicant's application also on an urgent basis – At the time of hearing the conduct complained

about by the respondent in respect of the applicant's breach of the sub-lease agreement had already been coming for some time – Counter-application dismissed due to lack of urgency.

Summary: The applicant and respondent are parties to a sub-lease agreement, in terms of whereof the applicant leases a mining quarry from the respondent, who leases the mining quarry from a third party, TransNamib Holdings Ltd.

The applicant brought an urgent application against the respondent seeking certain spoliatory relief, claiming that it had been unlawfully disposed of the leased property by the respondent. In turn, the respondent brought a counter-application – also on an urgent basis – against the applicant seeking, *inter alia* an order confirming cancellation of the agreement between the parties and an eviction order as a result of the applicant's alleged breach of the agreement.

Prior to the hearing of the applications, the applicant abandoned its urgent application. The respondent, however, persisted with its urgent application. The applicant argued that the respondent had not made a case for urgency as required in rule 73 of the Rules of Court.

At the time of hearing the application, the dispute had already been referred to arbitration pursuant to the mandatory arbitration clause in the agreement between the parties.

The court restated the requirements of rule 73(4) namely that a party bringing an application on an urgent basis must set out explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. *Held* that both these averments must be contained in the affidavit of the applicant before a matter can be considered on an urgent basis. This is then also the bridge to cross before the merit of any application will be considered.

The court found that the conduct complained about by the respondent had been coming for some time.

Held that it is trite that a court has discretion to refer a matter to arbitration wherein the agreement between the parties makes provision for such. The respondent is unable to

convince the court that there is any exceptional circumstance or compelling reasons which would cause the court not to give effect to the arbitration clause in the contract and let the matter be determined by the arbitrator as agreed.

The counter-application was accordingly struck due to lack of urgency.

ORDER

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1. Leave is granted to the applicant to withdraw its application.
2. The counter-application by the respondent is struck from the roll due to a lack of urgency.
3. Costs of the application is awarded to the applicant.
4. The matter is regarded finalized and removed from the roll.

JUDGMENT

RAKOW J

Introduction

[1] The applicant in this matter, A-Team Stone Crushers CC, brought an urgent application before this court against the respondent, Aris Stone Products CC. In return, the respondent (applicant in reconvention) responded and filed its own application against the applicant (respondent in reconvention). These applications were set down to be heard on 19 August 2022.

Background

[2] From the papers filed before court, it transpired that the applicant is leasing a quarry from the respondent. This quarry is situated on the remainder of Portion 9 of the Farm Krumhuk, No 30, Aris.

[3] The respondent in turn is leasing the said quarry from TransNamib Holdings Ltd (TransNamib), who is the lawful owner of the property where the quarry is situated. The

respondent has a lease agreement with TransNamib which expires on 31 December 2026. The lease amount is N$30 000 per month excluding VAT, which amount escalates annually with 8 per cent.

[4] In February 2017, TransNamib consented to the respondent to lease the quarry to a third party. The sub-lessee would, however, have to comply with the original agreement in that it is obligated to supply ballast stone to TransNamib, Namibia Rail (Pty) Ltd and/or the Government of Namibia at a reduced price of 20 percent of the prevailing market rate. The allegation is therefore by the respondent that every breach threatens the tendency and sub-tendency of both the respondent and the applicant.

[5] The applicant and the respondent entered into an agreement where the applicant assumed these obligations but at this stage has failed to comply with these obligations and is in arrears to the tune of N$5 000 000. This is, according to the applicant's founding affidavit, not listed as a term of the agreement. The applicant further had to pay the respondent an amount of N$15 000 per month. It however still occupies the site and carries on mining activities. It is alleged by the respondent that it is doing so in contravention of the Rule of Law in general, the Minerals Act 33 of 1992 and the Environmental Management Act 7 of 2007.

[6] It seems that the applicant took over these rights by way of cession in an agreement between itself and a certain Mr Campher. The fact that the applicant is in default of paying TransNamib and the arrears amount to about N$5 000 000 lead to TransNamib hardening its position that the respondent can no longer carry on mining activities without complying with the relevant conditions and without paying the outstanding amount or at least a substantial part thereof.

[7] The mining claims registered over the property are then also registered in the respondent's name and as such it is responsible to ensure that it meets all the relevant requirements attached to the granting of these claims. For a number of reasons including those stated above, the respondent gave the applicant notice of the cancellation of the contract on 9 August 2022 with the last day for removing aggregate being 11 August 2022. Since the dispute partly includes a dispute about the applicant breaching the contract, the parties agreed to subject the dispute to an arbitrator and Adv. Maasdorp has been appointed as the arbitrator in the matter.

[8] On 12 August 2022, TransNamib due to the non-payment of the monthly rental, contracted a security company, Amon Security Services, to man the exit and entrance gates to the quarry to ensure that no stones are removed from the quarry as the mining activities should not proceed before all mining claims conditions have been met. It further seemed that vehicles were still moving in and out of the premises on 17 August 2022 but with TransNamib ensuring that no aggregate is removed as it has not received payment of rental for many months.

[9] The claim from the applicant however, is that the respondent caused the entrance/exit gate of the quarry to be locked on instruction of its legal practitioner on 11 August 2022. They therefor brought a spoliation application. The history as set out above, is mainly in relation to the information provided by the respondent in its counter-application as the initial application did not proceed.

The applications

[10] The application of the applicant reads as follows:

'A – TEAM STONE CRUSHERS CC (hereinafter called the applicant) intends to make application to this court for an order:

1. Condoning the applicant's non-compliance with the rules of court relating to service and time periods, and enrolling and hearing the application on the basis of urgency.

2. The respondent shall not later than 17:00 PM on 22 August 2022 restore forthwith to the applicant possession of the Aris Quarry situated on the Remainder of Portion 9 of Farm Krumhuk, Number 30, Aris, Windhoek, Republic of Namibia by permanently removing the padlock or any other locking mechanisms placed on the entrance / exit gate to the aforesaid property leading tothe Aris Quarry.

3. In the event of the respondent failing and/or refusing to comply with the order in paragraph 2 then in that event the Deputy Sheriff for the district of Windhoek is authorised to do all things necessary for the purpose of giving effect to paragraph 2, including breaking any padlock or other locking mechanism.

4. The respondent and Appolos Shimakeleni Lawyers shall pay the costs of this application, jointly and severally, the one paying the other to be absolved.

5. Further and/or alternative relief.'

[11] The counter-application of the respondent reads as follows:

'An order condoning the respondent's non-compliance with the Rules of this Court pertaining to time periods for service of the counter application giving notice to parties and exchange of pleadings as contemplated in Rule 73 of the Rules of this Court; and directing that the counter application be heard on an urgent basis.

2. An order declaring that the applicant has breached the relevant agreements on which basis it occupies the quarry and conducts mining activities thereat.

3. An order declaring the Lease Agreement and all other agreements relating to the Respondent's mining claims as between the applicant and the respondent in relation to the quarry were cancelled on 9 August 2022.

4. An order declaring that the applicant has no right to continue mining without the consent of the respondent and in, without compliance with mandatory mining claims conditions and contravention of sections 45 and 52 of the Minerals Act;

5. An order evicting the applicant and all its employees/representatives from the quarry within 7 (seven) days of the court order and interdicting it from carrying out any mining activities at the quarry failing which the Deputy Sheriff of Windhoek is authorized to evict and remove the Applicant from the quarry and stop all mining activities.

6. Costs against the applicant in the event of opposition.'

The Status report of the Applicant

[12] On 18 August 2022, the applicant filed a status report stating the following:

'1. Pursuant to issuance and service of the application, and on 16 August 2020, the complaint forming the subject matter of the urgent spoliation application has been addressed, i.e. there is no longer a security guard; the padlock has been removed and the applicant's possession and control of the Aris Quarry has been restored.

2. Accordingly, the applicant has no basis to persist with the urgent application set for 19 August 2020 at 09:00 AM, and in the result shall not seek any relief. The applicant shall at the

commencement of the hearing accordingly request that the matter be regarded as finalized and removed from the roll.'

The arbitration clause

[13] The initial agreement between A-Team Stone Crushers CC, the applicant and Mr Campher signed on 20 April 2016 provides under clause 13.1 the following:

' Any dispute between any of the parties in regards to any matter arising out of or the interpretation of, or their respective rights and liabilities under, or the cancellation of or any matter arising out of this agreement, shall be submitted to and decided by arbitration.'

[14] Subsequently Mr Campher ceded his rights, titles, obligations and interest in the above agreement to Aris Stone Products CC with an effective date of 21 February 2019.

The arguments

[15] For the applicants, it was argued that the respondent pleads one case but argues another. They further argue that the assignment of mining rights is not lawful unless sanctioned by the relevant statue, which the applicant agrees with and its acquisition of the rights by way of cession from Mr Campher was not sanctioned as required. They further pointed out that jurisdiction is raised as a point in *limine* and needs to be determined first. In this instance the parties agreed that disputes must be resolved by way of arbitration. The court was referred to the 20 April 2016 agreement and the 10 November 2017 agreement, which was, as they accepted, ceded to the respondents by Mr Campher. Clause 13 of the 20 April 2016 agreement makes it mandatory that disputes arising out of or in connection with the agreement must be referred to arbitration. They further argued that there is no room to suggest that the dispute in the current matter did not arise in connection of the agreement.

[16] They further raised the issue that the respondent, although allowed to bring a counter-application in terms of rule 69, when it is brought on an urgent basis the respondent, just like to applicant, should comply with rule 73 and as such, should be accompanied by a certificate of urgency. The complaints the respondent now wants to raise as a matter of urgency arose many moons ago and the matter as such, is currently being dealt with in arbitration.

[17] For the respondent it was argued that the one sided status report filed by the applicant indicated that the matter was no longer proceeding but did not make a tender for costs. In its reply, the respondent denied that it committed any unlawful dispossession as alleged by the applicant and it further alleged that the relationship was terminated on 9 August 2022. It was further argued that, for all intents and purposes the applicant was undertaking mining activities not as a mining claims holder but as a contractor of the respondent and there was no cession of rights and therefor it cannot continue mining if the mining claims holder has directed that mining activities must stop.

[18] It was further argued that, the respondent has a right to have its counter-application heard because the applicant elected to bring suit in this court. Further arguments were put forward that the agreement was indeed cancelled by the respondent when the unilateral notice of cancellation was delivered to the applicant. The applicant therefor no longer has the permission to use the mining license of the respondent.

Considerations by the court

The arbitration clause in the initial contract

[19] Wessels CJ said the following in respect of the interpretation of contracts in *Scottish Union & National Insurance Company Ltd v Native Recruiting Corporation Ltd*:[1]

'We must gather the intention of the parties from the language of the contract itself, and if that language is clear, we must give effect to what the parties themselves have said; and we must presume that they knew the meaning of the words they use. It has been repeatedly decided in our courts that in construing every kind of written contract the court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and proper meaning, unless it appears clearly from the contract that both parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more . . . .'

[1] *Scottish Union & National Insurance Company Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465.

[20] In *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*[2] O'Regan AJA (Shivute CJ and Chomba AJA concurring) said the following regarding the importance of context when interpreting contracts:

'[19] . . . What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered'.

And the honourable judge continued:

[23] Again this approach seems to comport with our understanding of the construction of meaning, that context is an important determinant of meaning. It also makes plain that interpretation is 'essentially one unitary exercise' in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract.'

[21] In *Fiona Trust & Holding Corp and Others v Privalov and Others Fiona Trust & Holding Corp and Others v Privalov and Others*,[3] Lord Hoffmann stated the following:

'In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.'

[22] It is trite that a court has discretion to refer a matter to arbitration wherein the agreement between the parties makes provision for such. In *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd,*[4] the following was stated at para 7 of the judgment:

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[2] *Total Namibia (Pty) LTD v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC).
[3] *Fiona Trust & Holding Corp and Others v Privalov and Others Fiona Trust & Holding Corp and Others v Privalov and Others* [2007] 4 All ER 951 (HL) ([2007] UKHL 40) para 13.
[4] *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd* (5541/2011) [2012] ZAFSHC 141 (10 August 2012).

'The onus is on the respondent to satisfy the court that it should not in its discretion refer the matter to arbitration - . . . A court will only refuse to refer the matter to arbitration where a very strong case has been made out - . . .'

[23] In *Opuwo Town Council v Dolly Investments CC,*[5] Prinsloo J said the following:

'This court has a discretion whether to call a halt to the proceedings to permit arbitration to take place or to tackle the disputes itself. I am however satisfied that the defendant has proven the underlying jurisdictional fact in that the arbitration clause exists in the agreement between the parties and that the arbitration clause relates to the dispute between the parties, i.e. the completion of work as set out in the agreement.'

Urgency

[24] 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.'

[25] 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. This is then also the bridge to cross before the merit of any application will be considered. 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.

[26] The applicant, and in this case the respondent who also brings its counter-application as an urgent one, should not only pay lip service to these requirements but it should be substantively shown that they were met. In essence, the respondent should show to the court why they should be allowed to 'jump the queue'.

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[5] *Opuwo Town Council v Dolly Investments CC* (HC-MD-CIV-ACT-CON-2017/03148) [2018] NAHCMD 309 (24 September 2018) para 24.

[27] In *Nghiimbwasha and Another v Minister of Justice and Others,*[6] 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 11 and further:

'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", is in 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.'

[28] For the same reason, it is important to explicitly deal with the requirement of rule 73(4)*(b)* namely 'the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.' The conduct complained about by the respondent has been coming for some time now. The N$5 000 000 debt to TransNamib did not occur over night as well as the other environmental infringements that are being complained about. In essence the matter has already been referred to another process as an arbitration is pending before Adv Maasdorp.

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

[29] The respondent in this matter has, however, not shown why the court should exercise its discretion in its favour and in fact has not said anything about the arbitration proceedings that were already started. The respondent is unable to convince the court that there is any exceptional circumstance or compelling reasons which would cause the court not to give effect to the arbitration clause in the contract and let the matter be determined by the arbitrator as agreed.

Costs

[30] One of the complaints of the respondent was that the applicant did not tender costs in its unilateral status report when it indicated that it did not intend to proceed with the urgent application. The respondent is however entitled to ask for costs where it is not tendered and as a rule, the court would have granted such costs. In this instance, the respondent however proceeded with its own application and as such, costs should follow the outcome of this application.

[31] In the result, I make the following order:

1. Leave is granted to the applicant to withdraw its application.
2. The counter-application by the respondent is struck from the roll due to a lack of urgency.
3. Costs of the application is awarded to the applicant.
4. The matter is regarded finalized and removed from the roll.

E RAKOW

Judge

APPEARANCES:

Applicant:	S Namandje (with him A Shimakeleni) Instructed by Appolos Shimakeleni Lawyers, Windhoek
Respondent:	J Diedricks (with him B Basson) Instructed by BD Basson Inc., Windhoek