NOT REPORTABLE

CASE NO: A 25/2012

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

JORGE MANUEL BATISTA NEVES	**1ST APPLICANT**
MARIA ALZIRA ALVES BATISTA NEVES	**2ND APPLICANT**

and

ANDRE FRANCOIS NEETHLING t/a ANDRE NEETHLING CONSULTANCY	**1ST RESPONDENT**
RAINIER ARANGIES	**2ND RESPONDENT**
WATERLILLY INVESTMENTS TEN CC	**3RD RESPONDENT**
COUNCIL FOR THE MUNICIPALITY OF TSUMEB	**4TH RESPONDENT**

CORAM: HOFF, J

Heard on: 14 June 2012

Delivered on: 28 June 2012

JUDGMENT

HOFF, J: [1] The applicants approached this Court on 24 February 2012 at 14h15 for an order in the following terms:

1. Condoning applicant's non-compliance with the forms and service as provided for by Rule 6(12) of the Rules of this above Honourable Court and directing that this matter be heard as one of urgency on an *ex parte* basis.

2 That a *rule nisi* is hereby issued returnable on Friday, the **30th** of **March 2012** at **10:00** calling upon the respondents to show cause, if any, why an order in the following terms should not be granted:

2.1 directing first, second, and third respondents to forthwith and *ante omnia* restore applicants' right of way/way of necessity from the public road Susan Nghidinwa Street and via erf 646 (formally open space) (a portion of erf 56 open space) to erf 71A and to remove all obstacles including the gates erected and undisturbed access to erf 71A;

2.2 interdicting and restraining first, second, and third respondents from in any way interfering with and/or hampering and/or preventing and/or intimidating applicants and/or their tenants and/or their guests to have peaceful and undisturbed access to erf 71A from the public road Susan Nghidinwa Street and via erf 646 (formally open space) (a portion to erf 56 open space); and

2.3 directing first, second, and third respondents to pay the costs of this application on a scale as between attorney-and-own-client, including the costs of one instructing and one instructed counsel, jointly and severally, the one paying the other to be absolved.

3. Ordering that paragraphs 2.1 – 2.3 above shall operate as an interim interdict with immediate effect pending the return date of the *rule nisi.*

4. Granting applicants leave to bring this application on facsimile copies (as far as it is necessary).

5. Granting applicants leave to serve this Court Order and the founding papers by facsimile copy to respondents.

6. Directing that respondents may anticipate the *rule nisi* so issued upon 72 (seventy two) hours' notice to applicants.

7. Directing first, second, and third respondents to pay the costs of this application on a scales as between attorney-and-own-client, including the costs of one instructing and one instructed counsel, jointly and severally, the one paying the other to be absolved

[2] The relief sought was granted on an *ex parte* basis and the *rule nisi* was extended. After the extended date the respondents brought an "urgent counter-application in terms of Rule 44(1) of the Rules of this Court and in anticipation of the *rule nisi*. This prompted the applicants to bring a Rule 30 application subsequent to which this Court on 31 May 2012 *inter alia* gave the following order:

> "… the respondents' supporting affidavit to their urgent counter-application in terms of Rule 44(1) and respondents' anticipation of the Rule *Nisi* in terms of the provisions of paragraph 6 of the Court Order dated 24 February 2012 is struck and set aside in so far as it constitutes a supporting affidavit, but stands in so far as it constitutes respondents' answering affidavit to applicants' urgent application."

[3] This Court ordered that the main application be argued on 14 June 2012. On 14 June 2012 after certain submissions by Mr Barnard, appearing on behalf of the respondents, moving a Rule 44(1) application, and a request for a postponement in response thereto by Mr Wylie appearing on behalf of the applicants, and raising certain points *in limine,* this Court refused the postponement, indicating to counsel that this Court may in terms of Rule 44(1) *mero motu* rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. This Court thereafter invited counsel to present argument whether or not this Court should not *mero motu* rescind the *ex parte* order granted on 24 February 2012.

[4] The first respondent deposed to an affidavit in support of the *ex parte* application. He stated that his father bought erf 71A, Presidents Avenue, Tsumeb (the property) during 1972, and after his father had passed away during February 1997 himself and second applicant became owners of the property. In front of the property are "storefronts" and

access to the property by motor vehicle is only viable via erf 646 (formerly open space) which is situated at the back of the property. Erf 646 was for many years a public parking area and that it was via this public parking area that access to the garage on the property was possible. The applicants are using the buildings on the property to generate rental income.

[5] On 10 February 2012 first applicant received information that the third and/or second respondent had purchased erf 646 and that a neighbor had been informed that his right of way (via erf 646) would be terminated as from 1 March 2012. Fist applicant managed to contact the second respondent who informed him that applicants' right of way would not be affected in any way. On 20 February 2012 applicants' tenant, Mr Djamel, informed him that he (i.e. Djamel) had been refused right of way to the home and garage via erf 646 and that gates had been erected and a security guard had been placed at the gates. Djamel was able to gain access to the home by walking through the businesses occupying the frontstores, but was unable to use the garage. This resulted in Djamel having to park his motor vehicle in the public road in front of the storefronts. First applicant stated that at some stage the public parking area (erf 646) was secured by way of a fence and the tenants of the applicants received keys for the gates thus allowing them right to access to the property via erf 646.

[6] On 20 February 2012 the first and/or second and/or third respondent(s) changed the locks on the gates thereby denying applicants and their tenants right of way. First applicant contacted the second respondent who confirmed that he (i.e. first applicant) would no longer have a right of way. On 21 February 2012 first applicant ascertained that the first respondent was the owner of erf 646 and was in the process of selling it to second and/or third respondent(s). He contacted first respondent who referred him to second respondent. On 22 February 2012 he wrote a letter to first, second and fourth respondents demanding that applicants' right of way be reinstated on or before 16h00 on

23 February 2012 failing which he would approach this Court for urgent relief. First applicant also requested the fourth respondent to provide him with town planning drawings, the municipal plans for the property, and the council resolution whereby the previously open space was converted into erf 646.

[7] None of the requested documents were forthcoming. First applicant stated that this matter should be dealt with on an urgent *ex parte* basis as contemplated in Rule 6(12) for the following reasons:

(a) since 20 February 2012 no one has access to the home and garage on the property via erf 646. The limited access that is possible by walking through the businesses in front of the property is insufficient;

(b) first, second and third respondents' actions are clearly in contravention of applicants' right of way and use (of the property);

(c) immediate relief is required as applicants will suffer further harm should the application first have to be served; and

(d) that the purpose of the order sought is only to restore the *status quo* and would in no way infringe or restrain any movement insofar as the respondents are concerned.

[8] First applicant stated that the applicants are entitled to an interim interdict since they have a *prima facie*/clear right to use the route in question whereas the respondents have no right whatsoever to enforce any restrictions on either the applicants' movements, the movements of applicants' tenants and/or their guests. According to first applicant the route has been in existence since 1972.

[9] First applicant states that if the interim relief is not granted applicants have a well grounded apprehension of irreparable harm pertaining to the loss of the tenant and the very real possibility that the home and garage will end up being useless property as it cannot be accessed. Furthermore the denial of access to the home and garage is in direct violation of the applicants' right to the immovable property, including but not limited to the benefits of the rental income generated by the home and garage. First applicant stated that the applicants have no other satisfactory remedy available to address their predicament and that the balance of convenience favours the granting of the interim relief since the respondents are in no way prejudiced, as erf 646 is still only a parking lot.

[10] The first respondent deposed to an affidavit in which he in general denied important aspects of first applicant's affidavit. He denied that applicants are owners of the property; he denied that the fourth respondent had approved any plans for "the access by motor vehicle to erf 71A via erf 646"; denied that the only access to the property is via erf 646 since a narrow strip of land on the property, adjacent to erf 70 as well as gates to the back of erf 71 provides access to the residence on the property (erf 71A); denied that erf 646 is a public parking area, stating that it has been in private possession since 30 November 2004 as evidenced by the title deed of such property; denied that the second respondent had at any stage conveyed to either of the applicants that they had a "right of way" over erf 646; denied that he changed the locks on any gates (first respondent did not know whether second respondent was instrumental in doing so); denied that the applicants have a clear right of way and denied that the respondents have no right whatsoever to enforce any restrictions in relation to erf 646; and denied that the route in question has been in existence since 1972. The first respondent further pointed out that the allegation that "gates had been erected" sought to suggest that the erection of gates was a feature and component of the alleged spoliation, which is "patently untruthful". First respondent admitted that erf 646 was "at some stage" used as a *private* parking area

by its owners and that the applicants were allowed to park their vehicle on erf 646 when they occupied the home on the property, which they no longer do, and for such limited purpose received keys for the gates to the property. The keys to the property were however not provided to in any manner suggest the acknowledgement of any right of way to the property. First applicant denied that any of the contentions or submission made by the applicants sufficiently constitutes a basis for having launched this application on an *ex parte* basis. The second respondent deposed to a confirmatory affidavit.

[11] In terms of Rule 44(1) a court may *mero motu* or upon the application of any party affected rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. Mr Barnard who appeared on behalf of the first, second and third respondents submitted that since the applicants sought a *mandament van spolie* the applicants, not being the occupants of the properly, did not have *locus standi* to bring this application. Mr Wylie who appeared on behalf of the applicant s disagreed and submitted that the relief sought by the applicant Is not by way of *mandement van spolie* but by way of an interim interdict applicants alleging ownership of a right of way.

[12] I am of the view that irrespective of the legal basis upon which the application had been launched two issues need be considered. Firstly, whether the applicants had any basis in law to have approached this Court on an ex parte basis, and secondly the issue of material non-disclosure of facts.

[13] In respect of the first issue I should consider the question whether on the facts in the founding affidavit of first applicant, the applicants were entitled to the relief sought by them.

[14] In *Clegg v Priestley* 1985 (3) SA 950 (WLD) at 954 A – C Le Grange J referred with approval to a decision of the (South African) Appellate Division in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651 in which Fagan AJA stated that the Appellate Division " … has consistently refused to deal with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests …"

[15] Le Grange J continued to state at 954 B – C as follows:

> "The rule is, however, subject to the qualification that, even though other persons may be affected by an order, the Court may grant immediate relief, which is temporary in nature, where this is "essential because of the danger in delay or because notice may precipitate the very harm the applicant is trying to forestall". See Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 34d ed. at 59".

[16] In the founding affidavit first applicant with reference to the fact that only limited access is possible to the property by walking through the businesses in front of the property (which is insufficient) stated that "immediate relief is required as applicants will suffer further harm should the application first have to be served".

[17] It is not clear what further harm the applicants would suffer, obviating the need of service on the respondents. The harm has already been done in the sense that the locks of the gates had been changed, preventing access to the property via erf 646. Notices of the intended application to the respondents would thus in no way have precipitated the very harm the applicants were trying to forestall.

[18] Courts are extremely loath to grant ex parte orders affecting other parties' interests and will only grant such orders when there is good reason for that procedure in preference to motion proceedings – reasons such as urgency, or that the giving of notice would defeat the very object for which the order is sought. Furthermore, an applicant bringing such an application does so at his peril if he does not make out a good and proper case as to why an order should be granted without prior notice to the other party. (See *Office Automation Specialists CC and Another v Lotter* 1997 (3) SA 443 ECD).

[19] I am not convinced that the matter was so extremely urgent as contended, namely that the applicants would suffer further unspecified harm should the application first have to be served. This is not the case where the applicants, or their tenant Mr Djamel, had totally been denied any access to the property. Applicants stated that the alternative access to the property is "insufficient". The applicants in their replying affidavit do not deny that there is an alleyway on the property giving access to the property. The real bone of contention is that the tenant has no access to the property by *motor vehicle*. I am of the view even if a case had been made out to hear this application as a matter of urgency, no case had been made out why this Court had to hear the application on an *ex parte* basis. I conclude therefore that there was no legal basis at which the applicants could have launched an urgent *ex parte* application and that the orders granted on 24 February 2012 were erroneously sought and erroneously granted.

[20] Regarding the issue of material non-disclosure of facts, the first applicant in his replying affidavit pointed out a discrepancy between paragraphs 30 and 34 of his founding affidavit. In paragraph 30 first applicant stated that applicants had been refused right of way to the property via erf 646 since "gates had been erected and a security guard had been placed at the gates". In paragraph 34 he stated that the public parking area (erf 646) "was secured by way of a fence and gates for security reasons were erected". First applicant explained that such "discrepancy arose due to the fact that the

affidavit was drafted and signed in great haste due to the urgency of the matter". I will not go as far as Mr Barnard to describe this explanation as "untruthful" and "almost farcical", nevertheless the court order sought by the applicants and granted by this Court *inter alia* directed the respondents "to remove all *obstacles including the gates erected*". This was an error since the gates had been erected on erf 646 a considerable time prior to the launching of this application.

[21] The first applicant in his replying affidavit stated that the changing of the locks is the essential element of the deprivation of the right of way – not the erection of the gates

[22] In *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC) Strydom AJA stated the following at 634 paragraphs 29 – 30:

> "In a long line of cases the courts have stated as a general rule that an applicant in motion proceedings must set out his cause of action and supporting evidence in his founding affidavit. It is only in exceptional circumstances that the court will allow an applicant to supplement its allegations in a replying affidavit in order to establish its case. How the court should approach this issue was set out in the case of *Titty's Bar and Bottlestore (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T). At 369 the following was stated by the learned judge:
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> 'It lies, of course, in the discretion of the court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit."

[23] The order directing the respondents to remove the gates erected is clearly an order erroneously granted.

[24] The *ex parte* order obtained against the respondents interdicted and restrained respondents from "intimidating applicants and/or their tenants and/or their guests". There is no evidence in the founding affidavit supporting the alleged intimidation. The applicants

in their replying affidavit tried to remedy this failure by stating that the changing of the locks and that a security guard had constantly followed Mr Djamel around amounted to the intimidation referred to in prayer 2.2 of the *ex parte* order against the respondents. It is trite law that an applicant must make out his or her case in the founding affidavit. This was not done in respect of the allegation of intimidation. This part of the order lacking any evidentiary basis was erroneously sought and erroneously granted.

[25] The applicants moved and obtained a final cost order on a punitive scale in terms of paragraph 7 of the order of 24 February 2012 against the first, second and third respondents. The applicants had now formally abandoned this order. There is however no explanation why this order was sought in the first instance. This once again demonstrates the inherent danger of granting *ex parte* orders and why courts are in general reluctant, save in certain exceptions, to grant such orders and why applicants in *ex parte* applications must act *bona fide*.

[26] The fact that there is an alleyway on the property giving access to the property from the main street (President's Avenue) was not disclosed in applicants' founding affidavit. The revelation of this fact in the replying affidavit compels one to conclude that it is not necessary for Mr Djamel to access the property via the businesses at the storefronts.

[27] In this regard it is apposite to repeat and endorse what was said by Van Niekerk J in *Shali v Prosecutor-General* 2012 NaHC 112 at paragraph 24:

> "A party approaching the court *ex parte* must make a full and frank disclosure of all the relevant facts and must act bona fide. Le Roux J deals with the effect of material non-disclosure in *ex parte* applications in the case of *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349 A as follows: '(1) in *ex parte* applications all material facts must be disclosed which might influence a Court in coming to a

> decision; (2) the non-disclosure or suppression of facts need not be willful or *mala fide* to incur the penalty of rescission; and (3) the Court, appraised of the true facts, has a discretion to set aside the former order or to preserve it.' He then adds at 350 B: 'It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."

[28] I am of the view that for the aforementioned reasons that the court orders granted on 24 February 2012 were erroneously sought and erroneously granted.

[29] In the result the *rule nisi* is hereby discharged and applicants' *ex parte* urgent application is dismissed with costs.

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HOFF J

ON BEHALF OF THE 1ST & 2ND APPLICANTS PLAINTIFF: **ADV. WYLIE**

Instructed by: **NEVES LEGAL PRACTITIONERS**

ON BEHALF OF THE 1ST, 2ND & 3RD RESPONDENTS **ADV. BARNARD**

Instructed by: **MUELLER LEGAL PRACTITIONERS**

ON BEHALF OF THE 4TH RESPONDENT: **NO APPEARANCE**