NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 106/2013

In the matter between:

JACQUELINE KURUMENDU NGARUKA	**APPLICANT**

and

ELIPHAS TJIPITUA	**FIRST RESPONDENT**
SEBULON MARENGA	**SECOND RESPONDENT**
VANESSA PACK	**THIRD RESPONDENT**
LAURA PACK	**FOURTH RESPONDENT**
THE MASTER OF THE HIGH COURT	**FIFTH RESPONDENT**
THE MESSENGER OF COURT	**SIXTH RESPONDENT**
REGISTRAR OF THE DEEDS	**SEVENTH RESPONDENT**

Neutral citation: *Ngaruka v Tjipitua and others* (A 106/2013) [2013] NAHCMD 226 (30 July 2013)

Coram: UNENGU, AJ

Heard: 26 April 2013, 11 June 2013

Delivered: 30 July 2013

Flynote: Practice – Applications and motions – Urgent application – *Rule Nisi* with return date sought in notice of motion – instead of *rule nisi* for a temporary interdict.

Summary: The applicant was granted a *rule nisi* returnable on 11 June 2013 for interested parties to show cause why certain relief in the notice of motion should not be granted on the return date. The applicant requested confirmation of *rule nisi* pending the outcome of the main application, whilst the first respondent moving for the discharge of the *rule nisi*. The applicant failed to discharge onus – *Rule Nisi* discharged with costs.

ORDER

The *rule nisi* is discharged with costs including costs of one instructing and one instructed counsel.

JUDGMENT

UNENGU, AJ:

[1] On 26 April 2013, the applicant approached the Court on an urgent basis seeking certain interim relief pending the outcome of application in case no A 19/2013 in the following terms:

'1. An order in terms whereof the non-compliance with the Rules of the High Court of Namibia is condoned as is envisaged in Rule 6(12) of the aforesaid Rules.

2. A *Rule Nisi* is granted calling upon all interested parties to show cause on why:

2.1 The first respondent should not be interdicted and restrained from causing to effected (sic), transfer of Erf 1909, Romeine Street, Katutura, Windhoek, into the name of the fourth

respondent or any other person, pending the final determination of the application launched by the applicant under case number 19/2013 in this Honourable Court.

2.2 The first respondent should not be interdicted and restrained from causing to evict the applicant from Erf 1909, Romeine Street, Katutura, Windhoek, pending the final determination of the application launched by the applicant under case number 19/2013 in this Honourable court.

3. The respondents opposing this application are ordered to pay the costs of this application on a scale as between attorney and client, including one instructed and one instructing counsel.

4. Further and/or alternative relief.

AND THAT THE order in terms of subparagraphs 2.1 and 2.2 thereof shall serve as an *interim interdict* pending the outcome of the application A 19/2013.'

[2] As is clear from the relief sought, the dispute is about a house situated at erf 1909, Romeine Street, Katutura, here in Windhoek. This house is an asset of the estate of the late mother of the applicant and the respondents 1, 2, 3 and 4.

[3] The first respondent is also the executor of the estate, therefore, is responsible for the liquidation of the estate and the distribution of the proceeds of the estate amongst them, as children of their late mother. The mother died intestate.

[4] After arguments from counsel of the applicant and the respondents, I granted the application as an interim order with a return date 11 June 2013, calling upon all interested parties to show cause, if any, why

1. The first respondent should not be interdicted and restrained from causing to effect, transfer of Erf 1909, Romeine Street,

Katutura, Windhoek, into the name of the fourth respondent or any other person, pending the final determination of the application launched by the applicant under case number 19/2013 in this Honourable Court.

2. The first respondent should not be interdicted and restrained from causing to evict the applicant from Erf 1909, Romeine Street, Katutura, Windhoek, pending the final determination of the application launched by the applicant under case number 19/2013 in this Honourable court.

3. That the order in terms of the subparagraphs 2.1 and 2.2 of the Notice of Motion shall serve as an interim interdict pending the outcome of application A 19/2013.

4. That the costs shall stand over.

[5] As already pointed out, the dispute is over the house left by the late Teckla. The applicant and one sister, do not want this house to be sold – they want the house to remain as is for the children of the late Teckla to live in. However, the first respondent, on the other hand wants the house to be sold and the proceeds thereof to be divided amongst all the heirs. The applicant is also accusing the first respondent of bias, favouring the third respondent above all others. It is alleged that the third respondent owes the estate money, but the first respondent is doing nothing to have this money paid back to the estate. Another issue is that the first respondent has conflicting interests for being an heir on one hand and an executor, on the other. He is also accused of filing an incorrect liquidation and distribution account with the Master of the High Court by failing to reflect the money loaned to the third respondent. For the above and other reasons, the applicant, in the main application, wants the first respondent to be removed as executor of the estate. Meanwhile, the applicant also wants to buy the house. But, it would appear though that the first respondent has sold the house to a third party already and what remaining, is only the transfer into the name of the third party, namely, the fourth respondent.

[6] On the 11 June 2013, the return date for the *rule nisi*, Mr Jones, counsel for the applicant, in both written heads of argument and oral submissions, amongst others, submitted that the first respondent, if not interdicted, he will have the house transferred into the name of the third party – rendering the relief sought in the main application, merely academic. He argued that the applicant is willing and able to purchase the property (house), an indication on the part of the applicant, that no harm will be caused to the first respondent if the interdict is granted. He further submitted that the applicant has a right to be heard in the main application. Thus she can only be heard in the main application if the first respondent is interdicted from transferring the house into the name of the third party by confirming the *rule nisi*.

[7] Furthermore, Mr Jones pointed out that the fourth respondent, who purchased the house, has elected not to oppose both this application and the main application – in so doing, the fourth respondent does not challenge the applicant's version and the relief that she seeks.

[8] In conclusion, he submitted that a case for an interim interdict has been made out by the applicant if regard is had to the requirements thereof being a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; the balance of convenience favours the granting of the interim interdict ; and that the applicant has no other satisfactory remedy.

[9] Mr Boesak, counsel for the defendant submitted that the issue between the parties can be resolved now on the basis of this application as they are exhaustively covered in this application, thus obviating the need to adjudicate upon case No. A 19/2013. He submitted that the applicant only has a right to claim the legacy or inheritance. He argued that the office of the executor should not be used in order to pursue a private agenda. He argued that the applicant is in possession of the property, is living in the property and the executor in fact wants to dispose of it in order to put the proceeds thereof in the estate for the division of all the heirs. He argued that objectively, the applicant is not acting in the best interest of the estate and that she is clinging on to the property which is not hers. He argued further that

the executor made an offer to all the heirs and no one came up with it. Furthermore, he argued that there was an offer made and that the applicant did not come up with an offer before there was a purchase agreement signed with the fourth respondent during May 2012. Prior to that, the applicant did not come up with and offer and to inform the executor how much her offer was. He further argued that the applicant has not furnished an iota of evidence or factual basis in support of the allegation that the first respondent has acted, (in his capacity as executor), dishonestly or in an untrustworthy manner. He argued that the applicant is acting in her own best interest and to the disadvantage of the remainder of the heirs. The applicant has not accepted nor rejected the offer from the executor in her founding paper to the main application. The applicant submits in her founding paper that there was a deadlock, however, she does not say clearly how she is prejudiced, she does not venture out on what basis she alleges that the executor is not acting in the best interest, that she is not dealing with it in a fair and proper manner. Mr Boesak also argued, contrary to the submission of Mr Jones, that on the return date of a *rule nisi* the Court either confirms or discharges the rule. He disagreed with Mr Jones that on the return date, the Court still can grant an interim relief pending the outcome of the main application. He said that once the *rule nisi* is confirmed, the order is made final.

[10] I agree with Mr Boesak. The *rule nisi*, if confirmed or discharged, will be final. In *Development Bank of Southern Africa Ltd v Van Rensburg NNO*[1], Nienaber, JA when dealing with a *rule nisi* said the following: 'An interim order is by its very nature both temporary and provisional; its purpose is to preserve the *status quo* pending the return date'. On the return date, normally the practice is, that the applicant will move to have the rule made final or absolute, and the matter, if opposed, is then argued and the Court after arguments, may, either make the rule absolute or discharge it. See also *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*[2] where it is stated that the procedure of *rule nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order to adequately protect his <u>immediate interests</u>. (emphasis supplied)

[1] 2002(5) SA 425 (SCA) at 442I
[2] 1982 (3) 654 (A) at 674H-675A

[11] It is an interim relief the applicant sought in this matter, as the following was said in paragraph 2 of the Notice of Motion: ' A *Rule Nisi* is granted calling upon all interested parties to show cause on why….'. However, the applicant could have applied for an interdict in which case the court could have granted as interim relief by ordering that the *rule nisi* would operate as a temporary interdict. See *Clegg v Priestley*[3]. An order for a temporary interdict pending the outcome of the main application was the correct order in the circumstances of this matter – not the interim relief sought whereby notice was given to all interest parties and called on them to show cause on a return date, why the relief sought in the Notice of Motion should not be ordered to serve as an interim interdict pending the outcome of the main application.

[12] If a temporary interdict, without a return date, was sought and granted, that order would have operated until the outcome of the main application, which is not the case in this matter. Alternatively, the applicant should have moved for a postponement of the rule *sine die* pending the outcome in the main application.

[13] The issue now for determination by me, is whether to confirm or to discharge the *rule nisi*. If the *rule nisi* is discharged, the first respondent will transfer the house into the name of the fourth respondent or any other person; the applicant will, as a result, be evicted from the house and her main application will be rendered academic. Because, according to Mr Jones, there will be nothing to fight about, and is irrelevant whether the executor is there or not for purpose of the main application

[14] That might be the position as Mr Jones puts it. The question is what harm will the applicant suffer, apart from being evicted, if the house is transferred into the name of the purchaser? In my view, nothing. The house is not her property. It is an asset of an estate of which she is just an heir as other respondents. She was given more than enough time by the executor (the first respondent) to come up with a better offer to buy the house, but has not done so. She can also not tell the court when the main application will be adjudicated upon, because, according to Mr Jones, her counsel, the file of the main application has still not been allocated to a managing judge.

[3] 1985(3) SA 650 (W) at 695 H-I

[15] That being the case, the balance of probabilities favours the first respondent who is also the executor of the estate to liquidate and distribute the estate amongst the heirs expeditiously. The liquidation and the distribution of the estate has already been delayed and if the *rule nisi* is confirmed, it will result in a further unnecessary delay.

[16] As pointed out, the house is an asset of the estate, it does not belong to the applicant. Therefore, it is in the best interest of the estate to have the house sold as soon as possible to liquidate it.

[17] Consequently, I am of the view that the applicant did not make out a case for the *rule nisi* to be confirmed and as such, I make the following order:

The *rule nisi* is discharged with costs including cost of one instructing and one instructed counsel.

____

EP Unengu

Acting Judge

APPEARANCE

PLAINTIFF:	JP Jones Instructed by Ueitele & Hans Inc Windhoek
DEFENDANT:	AW Boesak Instructed by Dr Weder, Kauta & Hoveka Inc Windhoek