REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 170/2013

In the matter between:

SCHALK WILLEM DU PLESSIS N.O. **APPLICANT**

And

HILDA STRYDOM (previously DU PLESSIS) **FIRST RESPONDENT**

FRANCOIS ERASMUS & PARTNERS **SECOND RESPONDENT**

THE REGISTRAR OF DEEDS **THIRD RESPONDENT**

J C P A COETZEE **FOURTH RESPONDENT**

Neutral citation: *Du Plessis NO vs Strydom* (A 170/2013) NAHCMD 201 (25 June 2014)

Coram: UNENGU, AJ
Heard: 8 April 2014
Delivered: 25 June 2014

Flynote: Practice – Applications – and motions – *Ex parte* urgent application – granted on 31 May 2013 – Respondent in opposing affidavit alleges that application

not urgent and not necessary to approach court on *ex-parte* basis. On extended return date *rule nisi* confirmed by Court.

Summary: The applicant acting in his official capacity as the executor of the estate of his late father sought certain relief on *ex parte* basis which the Court granted him against the respondent. Court held that the matter was urgent and necessary for the applicant to approach the Court on ex parte basis. Held further that the applicant was honest and did not suppress any information or failed to disclose same. The *rule nisi* therefore confirmed.

ORDER

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1. The *rule nisi* is hereby confirmed.
2. The applicant is awarded costs such costs to be taxed on a scale of party and party.

JUDGMENT

UNENGU, AJ

[1] The applicant, Mr Schalk Willem du Plessis, in his official capacity as the executor of his late father's estate, by way of notice of motion, approached the Court on 31 May 2013 on an urgent *ex parte* basis seeking the relief in the notice of motion which relief was granted as follows:

> "1.1 Condoning the applicant's non-compliance with the forms and service as provided for in the Rules of court and authorizing the applicants to bring this application on an urgent ex parte basis as contemplated in Rule 6(12) of the Rules of Court.

2. That a *rule nisi* do hereby issue, calling upon any of the respondents to show cause, if any, on Friday 21 June 2013 at 10h0, why an Order in the following terms should not be made:

2.1 Authorising and directing the Deputy Sheriff for the district of Windhoek to seize and attach the first respondent's right, title and interest in respect of all monies due to her in the sum of N$ 6 800 000-00 to be kept on her behalf in the trust account of the second respondent as well as the sum of N$350 000-00 currently held in trust by the second respondent on behalf of the first respondent, pending the final resolution of the applicant's action instituted by the applicant (as plaintiff) against the first respondent (as defendant) in this Honourable Court under case No: I 2087/2012, alternatively such amount to be attached as the honourable court may deem fit;

2.2 Interdicting and restraining the first and/or second respondents to pay out any monies standing to the credit of the first respondent in any accounts (including the aforesaid account) held by the second respondent including but not limited the sum of N$6 800 000-00 to be kept on her behalf in the trust account of the second respondent referred to in paragraph. 2.1 above as well as the sum of N$350 000-00 currently held in trust by the Second Respondent on behalf of the first respondent, pending the final resolution of the action contemplated in paragraph 2.1 above;

2.3 Interdicting and restraining the first and/or second respondents from transferring, depositing or in any other manner deal with the monies of the first respondent currently being kept and to be kept in future by the second respondent pending the final resolution of the action contemplated in paragraph 2.1 above;

2.4 Alternatively to paragraphs 2.1, 2.1 and 2.3 above, authorizing and directing the Deputy Sheriff for the district of Windhoek to seize and attaché all of the monies to be derived from the sale of the following property to wit:

CERTAIN:	FARM RUSHOF NO 69
REGISTRATION DIVISION:	"B" OSHIKOTO REGION
MEASURING:	3002,6715 HECTARES

HELD BY: DEED OF TRANSFER T685/1999

SUBJECT TO THE CONDITIONS CONTAINED THEREIN

In the respective amounts of N$6 8000 000-00 as well as N$350 000-00 currently kept and to be kept in trust by the second respondent, pending the final resolution of the action contemplated in paragraph 2.1 above;

2.5 Directing that the first respondent pay the costs of this application, alternatively and in the event of any other respondent opposing, directing that such respondent together with the first respondent pay the costs of this application, jointly and severally, the one paying the other to be absolved.

3. That the relief set out in paragraphs 2.1-2.4 above shall serve and operate as an interim order with immediate effect pending the resolution of the action referred to in paragraph 2.1 above.

4. Directing that any respondent intending to anticipate the rule nisi shall do so only upon 48 hours' notice to the applicants."

[2] On 19 June 2013 the first respondent, Ms Hilda Strydom, previously married to the late du Plessis, the father of the applicant, filed her notice of intention to oppose the relief sought by the applicant through the firm Francois Erasmus legal practitioners.

[3] However, on the return date, 21 June 2013, none of the respondents was present before court. The *rule nisi* was extended until 5 July 2013, at 10h00 with costs to be costs in the cause. The *rule nisi*, was thereafter again, on several occasions extended until 8 April 2014 when the applicant applied for the *rule nisi* to be confirmed. The application was opposed by the first respondent only who on her part requested the Court to discharge the rule.

[4] Briefly, the background facts of the application are the following: The first respondent was married out of community of property to Mr Daniel Rudolph du Plessis, who passed away on 6 May 2009 here in Namibia. In 2000, the late Du

Plessis and the first respondent acquired farm Rushof, No 69, situated in the district of Otavi where they lived until the death of Daniel Rudolph du Plessis (the late).

[5] The farm Rushof was registered in the name of the first respondent probably because the late at the time when the farm was acquired, was still a South African national, therefore not eligible to have an immovable property registered in his name. That being the case, the late and the first respondent agreed in writing and the latter under-took and acknowledged that she was indebted to the late in an amount equal to 75% of the value of farm the Rushof as well as 75% of the value of all implements and livestock on the farm. Further to that, the first respondent, undertook to pay an amount equal to 75% to the late against sale of the farm or within 90 days from a written demand for payment of the amount.

[6] In a joint will, the late Du Plessis and the first respondent bequeathed the farm in equal shares to their children and the shares in Brumme Hotel (Pty) Ltd of the first to die, in the event of one of them dying.

[7] Notwithstanding the undertaking, the first respondent, sold the farm to the fourth respondent Mr Coetzee for an amount of N$ 7 300 000-00 of which N$150 000.00 was made directly to her while N$350 000.00 paid into the Trust Account of Mr Francois Erasmus, her legal representative. Meanwhile, and in view of the fact that the first respondent is denying any indebtness to the estate of the late Du Plessis, alleging that she had signed the undertaking under duress, the applicant has issued summons against her (first respondent) on behalf of the estate. It is the reason, therefore, that the applicant is requesting the Court to confirm the *rule nisi* to preserve the order made on 31 May 2013 pending the finalization of the action brought against the first respondent by the applicant. On the other hand, the first respondent is fighting for the discharged of the *rule nisi*.

[8] Appearing on behalf of the applicant is Mr Erasmus SC assisted by Mr Strydom, while Mr Heathcote SC assisted by Mr Dicks, is acting on behalf of the first

respondent. Counsel prepared and filed extensive heads of argument supported by a list of authority, which heads counsel augmented with oral submissions.

[9] I do not intend to repeat each and everything said by Counsel in their written heads or in their oral submissions. However, in my judgment, I shall focus on whether to confirm or discharge the *rule nisi*, and the reasons why I shall confirm or discharge the said *rule nisi*. Before, I do so, I want to deal with the complaint of the respondent as whether it was justified for the application to be brought *ex parte* and on urgent basis.

[10] Mr Heathcote SC, attacked the course followed by the applicant to bring the application before Court. His problem is that the applicant was not open and honest with the Court by failing to disclose the respondent's counter-claim which might have an effect on the discretion of the Court to grant or not to grant the order. Mr Heathcote SC finds support from a decision of the matter between the *Prosecutor-General and Lameck*[1] and other cases.

[11] In the matter of the *Prosecutor-General vs Lameck*, Damaseb, JP said: "It is common cause that the order was obtained *ex parte* against the defendants/ respondents, and for that reason is provisional only". The Judge President quoting from the matter of *Pretoria Portland Cement co. Ltd and Another vs Competition Commission and Others* continued that it must be borne in mind too that an order granted *ex parte* is by its nature provisional, irrespective of the form it takes. The party approaching the Court *ex parte* must make a full and frank disclosure of all the relevant facts, and must act *bona fide*.

[12] Mr Heathcote SC further referred the Court to the matter of *De Jager v Hailbron and Others*[2] with regard the duty of an applicant who brings an application *ex parte*, to place all material facts before Court. However, it would appear though that Mr Heathcote SC does not have any quarrel with the urgency of the application as he

[1] 2010 (1) NR 156 (HC) at 167 J-168 B
[2] 1947(2) SA 415

had conceded that any judge hearing the application would have granted it as urgent. The concession is in my view, correctly made.

[13] The law regulating urgent applications at the time this application was launched, was Rule 6(12) which has been substitued with Rule 73 in the new rules which came into operation on 16 April 2014. The provisions of rule 6 (12) authorised a Court or judge a discretion to dispense with the forms and service provided for in the rules to dispose of an application in such time and place and manner and in accordance with such procedure as the Court or such judge seems meet, provided the requirements of sub rules (a) and (b) thereof were complied with.

[14] In the instant matter the requirements in both sub rules (a) and (b) of rule 6 (12) were complied with. The legal principles applicable to urgent applications have also been collated in the matter of *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*[3] where Muller, J amongst others said that Rule 6 (12) (b) makes it clear that the applicant must in his founding affidavit explicitly set out the circumstances upon which he or she relies that it is an urgent matter. Furthermore, the applicant has to provide reasons why he or she claims that he or she could not be afforded substantial address at the hearing in due course. I agree.

[15] The evidence in the founding affidavit is that the first respondent sold the farm for N$ 7 300 000.00 (seven million three hundred thousand Namibian dollars) of which the initial payments were made by the buyer, one directly to the first respondent and N$350 000 00 (Three hundred and fifty thousand Namibian Dollars) into a Trust Account of first respondent's legal practitioner.

[16] Similarly, an attempt to have a *caveat* registered against the farm at the Deeds Office for the amount owed or which the first respondent undertook to pay to the deceased upon sale of the farm, by the applicant, was unsuccessful. These events, in my opinion created the circumstances and the reasons prompting the applicant to approach the court on urgent basis. With that, if the applicant gave the first

[3] 2012 (1) NR 331 (HC) at 338-339

respondent notice about his intention to approach the court on an urgent basis, the money in the trust account could have been dispose of rendering the application nugatory.

[17] With regard the issue of the applicant coming to Court on an *ex parte* basis and the failure to disclose the counterclaim by the first respondent, I am not persuaded by submissions of first respondent's counsel to discharge the rule. As a result of that. I respectfully agree with the submissions by Mr Erasmus SC that the counter-claim is for un-liquidated claims. The claims have first to be proved by the first respondent a trial. of the main action. In any event the Court would have granted the interim relief even if such counterclaim was disclosed.

[18] The facts in the Lameck and others matter and cases cited therein are distinguishable from the facts of the matter at hand. It is my view that the applicant in this matter disclosed all facts which influenced this Court to grant interim relief claimed. Further, the applicant was honest and *bona fide* about the facts he had put in his founding affidavit. He did not, in my view, suppress facts or information in his founding affidavit.

[19] The opposite is not the same. The respondent was and still not honest with the Court. She says that the farm was registered in her name because she paid the bulk of the purchase price, meaning that the deceased also paid part of the purchase price. Even if a small part of it, I fail therefore, to understand why the respondent is now resisting the claim of the executor on behalf of the deceased's estate. Or does it mean that the deceased was one who paid the whole purchase price of the farm and the first respondent does not want to admit it for fear that she may lose all the money of the farm?

[20] In view of the above facts, nature and circumstances of the matter together with submissions and authorities referred to buy counsel, it is just reasonable and fair that I should confirm the *rule nisi* for the court hearing the main action is placed in a

position to deal with the disputes between the applicant, and the first respondent. Discharging the *rule nisi* will grossly prejudice the applicant should he be successful in the main action which is pending against the first respondent. Meanwhile, the first respondent will loose nothing should she be successful in due course in the pending action as the money is kept in the trust account of her own legal representative pending the outcome of the matter instituted by the applicant.

[21] With regard costs, it is trite that the successful party should be awarded costs as prayed for. In the absence of compelling reasons to deviate from the general rule, I shall also not deviate from the said rule.

[22] Consequently, I made the following order:

1. The rule nisi is hereby confirmed.
2. The applicant is awarded costs such costs to include costs of one instructing and two instructed counsel to be taxed on a scale of party and party.

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E P Unengu

Acting Judge

Apearances:

For plaintiff: THEUNISSEN, LOUW & PARTNERS

For defendant: FRANCOIS ERASMUS & PARTNERS