

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: HC-MD-CIV-MOT-GEN-2017/00252

In the matter between:

**ALWYN PETRUS VAN STRATEN N.O**

**APPLICANT**

and

**ISSAKAR KAUNE**

**1<sup>ST</sup> RESPONDENT**

**NDJOURA HOPHNY MUSIRIKA TJOZONGORO**

**2<sup>ND</sup> RESPONDENT**

**MASTER OF THE HIGH COURT OF NAMIBIA**

**3<sup>RD</sup> RESPONDENT**

**REGISTRAR OF DEEDS**

**4<sup>TH</sup> RESPONDENT**

**VICTOR KAUNE**

**5<sup>TH</sup> RESPONDENT**

**KATJIUKIRUE KAUNE**

**6<sup>TH</sup> RESPONDENT**

**TAMAA KAUNE**

**7<sup>TH</sup> RESPONDENT**

**KAKUVEONGARERA KAUNE**

**8<sup>TH</sup> RESPONDENT**

**MBAJOROKA KAUNE**

**9<sup>TH</sup> RESPONDENT**

**KAKUVANJENGUA KAUNE**

**10<sup>TH</sup> RESPONDENT**

**TJIUNATJO KAUNE**

**11<sup>TH</sup> RESPONDENT**

**UASUTUA KAUNE**

**12<sup>TH</sup> RESPONDENT**

**MURAERE KAUNE**

**13<sup>TH</sup> RESPONDENT**

**RASEUATJO KAUNE**

**14<sup>TH</sup> RESPONDNET**

**HIJEE KAUNE**

**15<sup>TH</sup> RESPONDNET**

**RIUNDJUA KAUNE**

**16<sup>TH</sup> RESPONDENT**

**KAMII KAUNE**

**17<sup>TH</sup> RESPONDENT**

NDJIUOO KAUNE	18 <sup>TH</sup> RESPONDENT
KAUNAHANGE KAUNE	19 <sup>TH</sup> RESPONDENT
HIMEEZEMBI KAUNE	20 <sup>TH</sup> RESPONDENT
MUKANDI KAUNE	21 <sup>ST</sup> RESPONDENT
TJAVANGA KAUNE	22 <sup>ND</sup> RESPONDENT
VISTORINE KAUNE	23 <sup>RD</sup> RESPONDENT
MBEUTONA KAUNE	24 <sup>TH</sup> RESPONDENT
GOTTFRIENINE KAUNE KAMBATUKU KAMUHANGA	25 <sup>TH</sup> RESPONDENT
RUTJINDO KAUNE	26 <sup>TH</sup> RESPONDENT
WILLEMINE KAUNEAAPANI KAUNE	27 <sup>TH</sup> RESPONDENT

**Neutral citation:** *Van Straten N.O. v Kaune* (HC-MD-CIV-MOT-GEN-2017/00252)  
[2017] NAHCMD 254 (05 September 2017)

**Coram:** USIKU, J

**Heard on:** 11 August 2017

**Delivered:** 11 August 2017

**Reasons released on:** 05 September 2017

**Flynote:** Practice – Applications and motions – Urgent application – Urgent application for eviction brought by executor in a deceased’s estate – Respondent responding by filing a Rule 61 application to set aside Applicant’s application as irregular, for non-joinder – Application in terms of Rule 61 dismissed – Urgent application granted.

**Summary:** Applicant brought an urgent application for eviction of the 1<sup>st</sup> Respondent from an immoveable property belonging to a deceased’s estate – 1<sup>st</sup> Respondent filed an application in terms of Rule 61 to set aside Applicant’s application as irregular, for non-joinder. Application in terms of Rule 61 dismissed – Urgent application granted.

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**ORDER**

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1. The 1<sup>st</sup> Respondent's application in terms of Rule 61 is dismissed with costs.
2. Applicant's non-compliance with the rules of the High Court relating to forms and service is hereby condoned, and the application is heard as a matter of urgency.
3. The 1<sup>st</sup> Respondent is hereby ordered immediately, and in any event by no later than 7 calendar days from the date of the granting of this order, to vacate the property namely:
  - 3.1 Remaining Extent of the Farm Uithou No. 366 (Omaheke Region),
  - 3.2 Portion 3 (Onheil) of the Farm Uithou No. 366 (Omaheke Region), [both farms being held by the Applicant in his representative capacity under Title T.311/1989].
4. Failing compliance by the 1<sup>st</sup> Respondent with paragraph 3 above, any Deputy-Sheriff is hereby ordered to evict the 1<sup>st</sup> Respondent from the above property.
5. The 1<sup>st</sup> Respondent is ordered to pay the costs of this application, such costs to include costs of one instructing and two instructed counsel.
6. In the event that the 1<sup>st</sup> Respondent appeals this order, Applicant is granted leave on 5 days' notice and on urgent basis, on the same papers, amplified if necessary, to enforce the eviction order, pending such an appeal.

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**REASONS**

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USIKU, J:

## Introduction

[1] On the 11<sup>th</sup> August 2017, I gave the order as set out above, after I heard the arguments in the matter. I undertook to give my reasons on the 5<sup>th</sup> September 2017, at 09h00. Appearing hereunder are my reasons.

[2] The Applicant brought an urgent application, for hearing on the 10 August 2017, in which he sought the following relief:

- '1. That the applicant's non-compliance with the forms and service provided for by the rules of this Honourable Court is condoned and that the matter is heard as one of urgency as contemplated by rule 73(3).
2. That the 1<sup>st</sup> respondent immediately and in any event by not later than 7 calendar days from the date of the granting of this Order, vacate the Farm (being the Remaining Extent of the farm Uithou No. 366 and Portion 3 (Onheil) of the Farm Uithou No. 366, Registration Division "L", Omeheke Region).
3. That failing compliance by the 1<sup>st</sup> respondent with paragraph 2 above, any Deputy-Sheriff is ordered to evict the 1<sup>st</sup> respondent from the Farm (being the Remaining Extent of the Farm Uithou No. 366 and Portion 3 (Onheil) of the Farm Uithou No. 366, Registration Division "L", Omeheke Region).
4. That the 1<sup>st</sup> respondent together with those respondents opposing this application be ordered to pay the costs hereof.
5. That in the event that the 1<sup>st</sup> respondent appeals this order, the applicant is granted leave to apply on 5 days' notice and on an urgent basis, on the same papers, amplified if necessary, to enforce the eviction order, pending such an appeal.
6. Further or alternative relief.'

[3] In response to the aforesaid application the 1<sup>st</sup> Respondent opposed the application and filed an application in terms of Rule 61, for hearing on the 10<sup>th</sup> August 2017, in which he sought the following relief:

- '1. That in terms of Rule 61 the Application filed by the Applicant in Case No: HC-MD-CIV-MOT-GEN-2017/00252 and delivered to the 1<sup>st</sup> Respondent's Legal Practitioner on the 21<sup>st</sup> of July 2017, is declared to be irregular and/or improper, and is hereby struck off the roll and/or dismissed;
2. That the Applicant be ordered to pay the costs of this application on a scale of attorney and own client.
3. Further and/or alternative relief.'

[4] The Applicant opposed the 1<sup>st</sup> Respondent's Rule 61 application.

[5] Because of the method by which the 1<sup>st</sup> Respondent elected to respond to the Applicant's application, the 1<sup>st</sup> Respondent only filed the notice of intention to oppose as well as the Rule 61 application, and did not file an answering affidavit in these proceedings.

[6] There was no opposition to the Applicant's application, by all the other Respondents. I shall therefore make reference to the 1<sup>st</sup> Respondent as the "Respondent" herein, except where the context otherwise indicates.

### Background

[7] The late Mr Phillipus Kaune, the registered owner of certain:

- (a) Remainder of Portion of the Farm Uithou No. 366, Omaheke Region, and
- (b) Portion 3 (Onheil) of the Farm Uithou No.366, Omaheke Region,

herein referred to as "the property", passed away on the 30 June 1988. The above mentioned property is the only asset remaining in the deceased's estate.

[8] On the 10 July 2010, the Master of the High Court appointed the Applicant in this matter, as the executor in the deceased's estate.

[9] The Respondent issued summons out of this court on the 09 October 2012, in which he, *inter alia*, sought the following relief:

(a) an order declaring him (the Respondent) as the lawful heir of the abovementioned property, in terms of Otjiherero customary law,

(b) an order declaring the appointment of the Applicant as executor in the deceased's estate, to be of no force of law or effect, and,

(c) an order directing and authorizing the Registrar of Deeds, upon Respondent's compliance with relevant legal provisions, to register the property in the name of the Respondent in the Deeds Office.

[10] On the 22 August 2016, the court gave judgment against the Respondent.

[11] The Respondent delivered his notice of appeal on the 19 September 2016, which notice was filed late, as it should have been filed within 21 calendar days after the date of the judgment, which expired on 12 September 2016. The Respondent also failed to give security, or to file the record within three months of the date of judgment.

[12] On the 05 December 2016, the Registrar of the Supreme Court informed all parties that, as a result of the non-compliance with the rules, the appeal lapsed and is regarded as withdrawn.

[13] The Respondent delivered a condonation application on the 06 February 2017, in which he sought condonation for failure to:

(a) give security , and to

(b) file the record in time,

as well as seeking an order reinstating the lapsed appeal. The Respondent did not seek condonation for the late noting of the appeal. The said condonation and reinstatement application is set down for 25 October 2017.

[14] On the 15 May 2017, a public auction to sell the property was held. At the auction, counsel of record for the Respondent, rose and announced that there is an appeal pending in the Supreme Court and warned interested buyers not to buy the property.

[15] The property was nonetheless sold on that day, the 15 May 2017, to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent, (the purchaser) has complied with all the requirements of the sale, the only issues outstanding being payment of the transfer duty, costs and fees. In terms of the conditions of the sale, the 2<sup>nd</sup> Respondent is entitled to the transfer of the property and vacant occupation and possession of the property, upon payment of the purchase price and of all transfer costs.

[16] By letter dated the 23 June 2017, the lawyers for the Applicant requested the Respondent to, among other things, vacate the property.

[17] The Respondent, by letter dated the 29 June 2017, replied, *inter alia*, making it clear that he has no intention to vacate the property, on the strength of his claim that he inherited the property and that the Supreme Court is seized with the matter.

[18] In the founding affidavit, the Applicant states that the Respondent knew about the auction sale of 15 May 2017 since 27 January 2017, yet despite such knowledge the Respondent did not take legal proceedings to protect its perceived rights, but rather resorted to scare-tactics warning potential buyers of a “pending appeal” and resorted to refusing to vacate the property.

#### Respondent's Rule 61 application

[19] As stated earlier, the Respondent, in response to the Applicant's application, applied in terms of Rule 61, for an order declaring the Applicant's application to be irregular and/or improper and that same be struck from the roll and/or be dismissed.

#### Respondent's argument

[20] The irregularity or impropriety complained of by the Respondent are that the Applicant had failed, in its application, to join the:

- (a) Minister of Land Reform and the Attorney-General and
- (b) the Registrar of the Supreme Court,

as parties to the proceedings.

[21] Insofar as non-joinder of the Minister of Land Reform and the Attorney-General are concerned, the Respondent argues that, the remedy that the Applicant seeks, will entail the interpretation of the *Agricultural (Commercial) Land Reform Act (No. 6 of 1995)*. The Respondent further argues that, since the Applicant alleges that he has sold the property to the 2<sup>nd</sup> Respondent, and the Respondent contests the lawfulness of such sale on account that the Respondent has not obtained a Certificate of Waiver from the Minister of Land Reform, the Minister of Land Reform ought to have been joined in these proceedings as he/she has a direct and substantial interest in this matter. Similarly, the Respondent contends that the Attorney-General, as the principal legal advisor to the President and the Government ought to have been joined, since these proceedings will entail the interpretation of the provision of an Act of Parliament.

[22] As regards the non-joinder of the Registrar of the Supreme Court, the Respondent argues that he has filed an application for condonation in respect of the lapsed appeal, as acknowledged by the Applicant, and that such application shall be heard on the 25 October 2017 in the Supreme Court and therefore, insofar as the Supreme Court is seized with the matter, the Registrar of the Supreme Court ought to have been joined in these proceedings. For that non-joinder, the Respondent argues, the Applicant's application should be dismissed or be struck from the roll.

#### Applicant's argument

[23] The Applicant, on the other hand, argues that while the Applicant maintains that the sale to the 2<sup>nd</sup> Respondent is lawful, the lawfulness or otherwise of the sale is irrelevant in determining the claim for eviction.



[24] There is no dispute about the interpretation of *section 17 of Act 6 of 1995* or about interpretation of any section of any statute. The matter in issue, in the present proceedings are whether:

- (a) the deceased estate is the lawful owner of the property in question, and whether
- (b) the Respondent is in unlawful possession and occupation of the property.

[25] The Applicant further submitted that should it be found that the Minister or the Attorney-General or the Registrar of the Supreme Court are necessary parties to the present proceedings, then the failure to join them are cured by an informal notice given by Counsel from the Office of the Attorney-General, on behalf of the aforesaid parties, in court during hearing of the matter on the 11 August 2017, that such parties would abide by the decision of the court.<sup>1</sup>

Whether Applicant's application constitutes an irregular or improper step/proceeding

[26] The irregularity or impropriety complained of by the Respondent, is the failure by the Applicant to join the Minister of Land Reform, the Attorney-General and the Registrar of Supreme Court in the proceedings. The alleged irregularity is based on the notion that those parties have a direct and substantial interest in the outcome of the application.

[27] The first point I should determine on this subject, is whether the Applicant's application requires interpretation of *section 17 of Act 6 of 1995*, (namely, whether or not the Applicant is exempted from obtaining a certificate of waiver in respect of the sale of the property to the 2<sup>nd</sup> Respondent).

[28] The Applicant's application is principally about eviction of the Respondent from the property. For that purpose, the Applicant relies on his ownership of the property, (in his representative capacity), and on the Respondent's alleged unlawful occupation. Neither the Minister of Land Reform, nor the Attorney-General have interest in the outcome of the eviction proceedings. Their joinder is therefore unnecessary and irrelevant.

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<sup>1</sup> See *In Re Boe Trust Ltd and others* NNO 2013 (3) SA 236, where it was held that the failure to join a necessary party may be cured if an informal notice asking it whether it wished to intervene was met by an unequivocal response that it would abide by the decision of the court.

[29] Insofar as the Applicant seeks relief on urgent basis on account that he is required to give vacant possession and occupation of the property to the purchaser, the requirement to give vacant possession/occupation arises from the Deed of Sale and not from the provisions of *section 17 of Act 6 of 1995*. Such requirement remains valid as between the parties to the agreement, till such time that the Deed of Sale is declared as invalid or unenforceable for whatever reason. The present proceedings are not about the validity or otherwise of the Deed of Sale in question. Therefore, the issue of whether or not the sale of the property is exempted under the provisions of *section 17 of Act 6 of 1995* is irrelevant to the present matter.

[30] As regards the non-joinder of the Registrar of the Supreme Court, it is apparent from the uncontradicted evidence on the papers, there is no live appeal being entertained before the Supreme Court. The appeal launched by the Respondent had lapsed. The Respondent's condonation application, presently launched with the Supreme Court does not render the appeal live. Till such time that condonation and reinstatement of the appeal are granted, nothing prevents the Applicant from seeking the relief he prays for. That said, I fail to see where the interest of the Registrar of the Supreme Court lies in the present application. The Respondent's Rule 61 application in this respect is inappropriate, and in my opinion amounts to abuse of the process.

[31] If it were to be found that the non-joinder claimed by the Respondent is warranted, then such non-joinder is cured by the informal notice on behalf of such parties that such parties would abide by the decision of the court. The Respondent's Rule 61 application therefore stands to be dismissed.

#### Applicant's application

[32] As sated earlier, the Respondent elected to respond to the Applicant's application by filing a Rule 61 application. The Respondent's application was set-down for hearing at the same time as the hearing of the Applicant's application. After dismissing the Respondent's application, the court proceeded to hear the Applicant's application. The Respondent has not filed an answering affidavit in these

proceedings, therefore this court is entitled to infer that every allegation made in the founding affidavit is true.

### Urgency

[33] In support of the urgency claim, the Applicant submitted that the Deed of Sale signed with the 2<sup>nd</sup> Respondent (the purchaser) entitles the purchaser to vacant possession and occupation of the property. The envisaged transfer of the property is imminent.

[34] If vacant occupation is not given on the date of transfer, the Applicant is at risk of being sued for damages for breach of contract. Such scenario would prejudice the finalization of the deceased's estate, as well as delay payments to heirs.

[35] On the basis of the evidence set out in the founding affidavit, the Applicant submits he would not be able to recover any compensatory amount from the Respondent, should the estate be sued for breach of contract. In such event, the estate will be severely prejudiced, as it will decrease in value and the Applicant is unlikely to be afforded substantial redress at a hearing in due course.

### Eviction

[36] The Applicant submitted that the property is the only remaining asset owned by the deceased's estate. The Respondent has no legal right to occupy the property. Despite demand, the Respondent refuses to vacate the property.

[37] The Applicant further submitted that the Respondent is likely to file an appeal should he be unsuccessful in the present matter, in order to suspend the eviction order; and to perpetuate the illegal state of affairs that currently exists. For that reason, the Applicant prays for an appropriate order as set out in the notice of motion.

### Analysis

[38] In the present matter, I am satisfied that the Applicant has met the requirements of *Rule 73* and his application must therefore be heard on the basis of urgency.

[39] The Applicant seeks eviction of the Respondent from the property based on Applicant's ownership thereof, and the Respondent's possession of the property. The Respondent has not shown any legal basis to stay in possession of the property. For that reason the Applicant is entitled to the relief he seeks.

[40] As regards the question of costs, the costs must follow the event and I am satisfied that this matter warrants costs of one instructing and two instructed counsel.

[41] For the foregoing reasons, this court granted the undermentioned order, on the 11 August 2017, namely that:

1. The 1<sup>st</sup> Respondent's application in terms of Rule 61 is dismissed with costs.
2. Applicant's non-compliance with the rules of the High Court relating to forms and service is hereby condoned, and the application is heard as a matter of urgency.
3. The 1<sup>st</sup> Respondent is hereby ordered immediately, and in any event by no later than 7 calendar days from the date of the granting of this order, to vacate the property namely:
  - 3.1 Remaining Extent of the Farm Uithou No. 366 (Omaheke Region),
  - 3.2 Portion 3 (Onheil) of the Farm Uithou No. 366 (Omaheke Region), [both farms being held by the Applicant in his representative capacity under Title T.311/1989].
4. Failing compliance by the 1<sup>st</sup> Respondent with paragraph 3 above, any Deputy-Sheriff is hereby ordered to evict the 1<sup>st</sup> Respondent from the above property.

5. The 1<sup>st</sup> Respondent is ordered to pay the costs of this application, such costs to include costs of one instructing and two instructed counsel.
6. In the event that the 1<sup>st</sup> Respondent appeals this order, Applicant is granted leave on 5 days' notice and on urgent basis, on the same papers, amplified if necessary, to enforce the eviction order, pending such an appeal.

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B Usiku  
Judge

APPEARANCES:

APPLICANT: R Heathcote (together with SJ Jacobs)  
Instructed by Van Der Merwe-Greeff Andima Inc.  
Windhoek

1<sup>st</sup> RESPONDENT: TK Kamuhanga  
Instructed by AngulaCo. Inc  
Windhoek

2<sup>nd</sup> RESPONDENT: No appearance

3<sup>rd</sup> - 4<sup>th</sup> RESPONDENTS: MC Khupe  
Office of the Government-Attorney  
Windhoek

5<sup>th</sup> – 27<sup>th</sup> RESPONDENTS: No appearance