



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-EXP-2018/00461

In the matter between:

DAWID BEUKUS	1ST APPLICANT
MARKUS NOABEB	2ND APPLICANT
ELFRIEDE GAROES	3RD APPLICANT
WILLEM HAAKSEEN	4TH APPLICANT
MARIA TSUSES	5TH APPLICANT
PETRUS KASTOO	6TH APPLICANT
JOHANNES WAMBO	7TH APPLICANT
MARKUS GAUSEB	8TH APPLICANT
TIMOTHEUS GARISEB	9TH APPLICANT
SWARTBOOI TRADITIONAL AUTHORITY	10TH APPLICANT

and

KUBITZAUSBOERDERY (PTY) LTD	RESPONDENT
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Neutral citation: *Beukus v Kubitzausboerdery (Pty) Ltd* (HC-MD-CIV-MOT-EXP-2018/00461) [2019] NAHCMD 110 (17 April 2019).

Coram: PARKER AJ

Heard: 23 January, 12 February, 2 April 2019

Delivered: 17 April 2019

Flynote: Applications and motions – Rule *nisi* – On the extended return day of a rule *nisi* issued on 20 December 2018 the respondent is entitled to show cause why the order which is in the form of a rule *nisi* should not be made final – That reasonably includes showing that the matter should not have been heard on an urgent basis – Court finding that on the facts urgency was self-created – Consequently, Court held that on that ground alone the rule *nisi* stood to be discharged – Furthermore, on the merits the Court finding that on the facts the applicants could not succeed because they failed to establish that they were in peaceful and undisturbed possession of the thing in question, being access through respondent’s farm, at the time they were illicitly deprived of such possession in November 2018 – Accordingly, Court concluded that applicants have not made out a case for the confirmation of the rule *nisi* – Consequently, rule *nisi* discharged and application dismissed with costs.

Summary: Applications and motions – Rule *nisi* – On the extended return day of rule *nisi* issued on 20 December 2018 the respondent is entitled to show cause why the order which is in the form of a rule *nisi* should not be made final – That reasonably includes showing that the matter should not have been heard on an urgent basis – Court finding applicants had been denied access through the respondent’s farm previously in May, August, and September 2018, that is, before November 2018, and applicants only approached the court after the last denial of access – Court finding that on the facts, urgency was self-created – Consequently, Court held that on that ground alone the rule *nisi* stood to be discharged – Furthermore, on the merits court finding that on the facts applicants could not succeed because they failed to establish that they were in peaceful and undisturbed possession of the thing in question, being access through respondent’s farm, at the time they were illicitly deprived of such possession. – Respondent denied applicants access previously in May, August, and September by respondent (a) locking the gates by means of a chain and padlock; (b) failing to give applicants the keys to the padlock; and (c) threatening applicants with violence and threatening to lay trespassing charges against applicants if they were found on the respondent’s farm – Accordingly, Court concluded applicants could not have been in peaceful and undisturbed possession of the thing in question at the time they were illicitly deprived of such possession in November 2018 – Court concluding that applicants have not

made out a case for the confirmation of the rule *nisi* – Consequently, the rule *nisi* is discharged and the application is dismissed with costs.

ORDER

1. The rule *nisi* issued on 20 December 2018 is hereby discharged, and the application is dismissed with costs.
2. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] This matter revolves around access by persons through another person's property to reach outside destinations. On 20 December 2018 the court granted temporary relief in the form of a rule *nisi* to restore applicants' access to their place of residence being the Remainder of Farm Areb North No. 202, Rehoboth, through the respondent's farm being Farm 909, Extent 5370, 7163 hectares, situated in the Registration Division 'M', Rehoboth. The application was brought *ex parte* and was heard on the basis of urgency; and so, papers were not served on the respondent. On this extended return day, Mr Silungwe represented the applicants, and Mr Conradie the respondent.

[2] In respondent's answering affidavit, respondent has put forth averments – some as preliminary challenges and others on the merits. That is the only burden of the court on this return day. (See *Bruyns v Louis Neethling Boerdery (Pty) Ltd* (A 215/2014) [2014] NAHCMD 378 (9 December 2014).) In that regard, it should be remembered that a rule *nisi* ... contemplates that the relief sought will only be granted at some future date after the respondent has had time to show cause (on that return day) that it should not be granted. (*Shoba v OC, Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1 (A)).

[3] On the practice of urgent applications in terms of the rules of Court, I stated, upon the authorities, as follows in *Diergaardt v the Magistrate: The Magisterial District of Gobabis* (A231/2013) [2013] NAHCMD 231 (1 August 2013), para 6:

'[6] It has been well settled since *Salt and Another v Smith* 1990 NR 87, which interpreted and applied rule 6(12) (b) of the rules of court, that rule 6(12) (b) entails two requirements; and for an applicant to succeed in persuading the court to grant the indulgence sought for the matter to be heard on urgent basis the applicant must satisfy both requirements. The two requirements are (a) the circumstances relating to urgency which have to be explicitly set out, and (b) the reasons why the applicant could not be afforded substantial redress in due course. It is also well settled that where urgency is self-created the court will refuse to grant the indulgence that the matter be heard on urgent basis (*Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48).'

[4] In response to Mr Conradie's argument that the matter was not urgent, Mr Silungwe submitted that, on the authority of *Oceans 102 Investment CC v Strauss Group Construction CC & Another* (A119/2016) [2016] NAHCMD 139 (10 May 2016), para 16, it is generally accepted that an application for spoliation is by its very nature urgent on the basis that the spoliation relief exists to preserve law and order and to stop and reverse self-help in the resolution of disputes between parties. I accept the proposition of law, but this does not prevent a Court from determining whether the urgency has not been self-created (see *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48).

[5] In the instant proceeding, from the applicants' own papers, the alleged illicit deprivation of access through the defendant's land did not occur for the first time in November 2018. Respondent has been locking the gates against applicants' access on several occasions, the first being May 2018 when applicants' access was denied them by the respondent by (a) locking the gates by means of a chain and padlock; (b) failing to give applicants the keys to the padlock; and (c) threatening applicants with violence and threatening to lay trespassing charges against applicants if they were found on the respondent's farm.

[6] Applicants did not approach the Court for relief in May 2018 or so soon thereafter. They did not approach the Court in August 2018, or so soon thereafter,

when the respondent closed the gates again by similar means. Applicants did not approach the Court for relief towards the end of September 2018, or so soon thereafter, when respondent denied applicants access through its farm by similar means as in May 2018. Thereafter, despite applicants' meeting with a Arnold Anthony Olivier of the respondent's, I suppose, to enable them to gain access through the respondent's farm, respondent once more denied applicants' access through respondent's farm by like means as before. That was in November last. That was when applicants woke up from their slumber to institute the present *ex parte* application to be heard on an urgent basis.

[7] Thus, from the applicants' own papers, I hold that the urgency was self-created (see *Bergmann v Commercial Bank of Namibia Ltd*). I accept Mr Conradie's submission that the matter should not have been heard on an urgent basis and *ex parte*. On this ground alone, in my judgment the rule *nisi* stands to be discharged.

[8] Apart from this ground, there is also this ground – and this is critical. It concerns the relief of mandament van spolie. As Mr Silungwe correctly submitted, this is a spoliation application. In that event, the Court should consider the applicable law and approaches developed by the courts to see whether this court is entitled to confirm the rule *nisi*. In *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia* 2016 (2) NR 547 (HC), I stated as follows about mandament van spolie and what applicant for a spoliation order should establish in order to succeed:

'[2] It is trite that an applicant for a spoliation order must first and foremost establish that he or she was in peaceful and undisturbed possession of the thing in question at the time he or she was illicitly deprived of such possession. That is all that an applicant must establish in order to succeed. (*Kuiiri and Another v Kandjoze and Others* 2007 (2) NR 747 (HC) para 9.) And such possession is not merely 'possession' simpliciter: it is 'peaceful and undisturbed possession'. (*Kuiiri* loc cit, applying a dictum in *Mbangi and Others v Dobsonville City Council* 1991 (2) (SA) 330 (W) at 335H-I.)'

[9] In the instant matter, on the facts as I have set them out previously in paras 6 and 7 above, I conclude that applicants have not established that they were in peaceful and undisturbed possession of the thing in question, being access through

respondent's farm, at the time they were illicitly deprived of such possession. Consequently, they cannot succeed (see *Witvlei Meat (Pty) Ltd*).

[10] Based on these reasons, I hold that respondent has established that urgency was self-created when applicants applied for and obtained the order on 20 December 2018. Furthermore, applicants have not established that they were in peaceful and undisturbed possession of the thing in question, being access through respondent's farm, when they were illicitly deprived of such possession; and so, they cannot succeed (see *Witvlei Meat (Pty) Ltd*). It follows that the rule *nisi* stands to be discharged. Applicants have not made out a case for the confirmation of the rule *nisi*. In that event, the application stands to be dismissed (see *Bruyns v Louis Neethling Boerdery (Pty) Ltd*).

[11] In the result I order as follows:

11.1 The rule *nisi* issued on 20 December 2018 is hereby discharged, and the application is dismissed with costs.

11.2 The matter is considered finalized and is removed from the roll.

C Parker
Acting Judge

APPEARANCES:

APPLICANTS:

Mr R Silungwe

Of Nixon Marcus Public Law Office, Windhoek

RESPONDENT:

Mr D. Conradie

Of Conradie & Damaseb, Windhoek