REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-MOT-GEN-2021/00242

In the matter between:

JOHANNES MARTHINUS ROSSOUW	**1ST APPLICANT**
YOLANDE ROSSOUW	**2ND APPLICANT**
ROSDRIEHOEK GARMING AND SPECULATION CC	**3RD APPLICANT**

and

CATHARINA JACOBA KOTZE	**1STRESPONDENT**
DANIEL WILLEM KOTZE	**2NDRESPONDENT**

Neutral citation: *Rossouw v Kotze* (HC-MD-CIV-MOT-GEN-2021/00242) [2021] NAHCMD 395 (6 September 2021)

Coram:	**PARKER, AJ**
Heard:	**18 August 2021**
Delivered:	**6 September 2021**

Flynote: Practice – Application and motions – Ex parte applications – Court satisfied there had been full disclosure of relevant facts and there had not been a misrepresentation of facts by the applicants – Court satisfied applicants had satisfied the requirements of urgency prescribed by rule 73 (4) (a) and (b) of the

rules of court – Applicants launched application to protect a right granted to them by owner of the farm (second respondent) which first respondent being in control of the farm had acted unlawfully to take away – Having been given the right to access the road through second respondent's farm, applicants' right could not be taken away lawfully by first respondent – Consequently, court confirmed rule *nisi* and made the order final.

Summary: Practice – Applications and motions – Ex parte applications – Applicants launched application to secure a right given to them by owner of farm (second respondent) to use access road through second respondent's farm – First respondent who had possession of the farm decided to take away the applicants' right to the access road – Court finding that first respondent could not lawfully take away that right and had no authority to enter into agreements on behalf of second respondent respecting the farm even if she was in physical control of the farm – First respondent's action sought to prevent applicants to perform their obligation under a Deed of Sale where it is a term of the agreement that purchasers of applicant's farm shall continue to use the access road – Court finding that first respondent has failed to show cause why the rule nisi should not be made final – Accordingly, court confirming rule *nisi* and made the order final.

Held, of all real rights, the right of ownership in its unrestricted form, confers the most comprehensive control over a thing.

Held, court has the duty to ensure observance of the *pacta sunt servanda* principle in deserving cases.

ORDER

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1. The rule *nisi* issued on 18 June 2021 is hereby made final.
2. First respondent shall pay applicants' costs.

3. The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] Before us is a matter concerning an access road through second respondent's farm: Farm Witvlei Number 115, Danielsdam, Mariental District ('the farm'). It is important to note at the threshold that at the hearing of the matter, brought ex parte and heard on urgent basis, both first respondent and second respondent were the opposing parties, and cited as such. But in the course of events, second respondent abandoned his opposition to the application.

[2] First respondent and second respondent are wife and husband, respectively; and they are married out of community of property. As far as the return date proceeding is concerned, only first respondent remains to oppose the application; and Mr Small represents her. Mr Schurz represents the applicants.

[3] The following irrefragable points are crucial in the determination of the instant matter. First, second respondent is the registered owner of the farm, and, therefore, has a claim of a real right to the farm against other persons, including first respondent. In that regard, it should be remembered, of all real rights the right of ownership in its unrestricted form, such as second respondent has to the farm, confers the most comprehensive control over the thing; in the instant proceedings, the farm. (P J Badenhorst et al *Silberberg and Schoemann's The Law of Property* 5th ed (2006) at 47)

[4] The second crucial point is that second respondent has consented to applicant's using the farm road through second respondent's farm, which is the subject matter of the application. Granted, first respondent has physical control (i.e., possession) of the farm and has been conducting farming activities on the farm for

some 10 years. But that could not on any legal account give first respondent the right to lawfully conclude and terminate agreements respecting the farm on behalf of second respondent, who is the owner of the farm, as Mr Schurz submitted. The principle *nemo dat qui non habet* is still part of our law, and first respondent is caught within its force. And, significantly, first respondent does not raise and rely on any of the exceptions known in law to put a brake on the application of the principle, e.g. estoppel (see *Silberberg and Schoemann's The Law of Property*, Chapter 11 *passim.* First respondent rather raises procedural challenges in her attempt to persuade the court not to confirm the rule *nisi* issued by the court on 18 June 2021, namely, lack of urgency, failure to disclose material facts and lack of basis to move this application in an ex parte manner. I shall consider those items of opposition.

[5] Applicants approached the court to protect a right granted to them by second respondent and violation of which by first respondent would prejudice them in the enjoyment of the right. Thus, in the circumstances of the case, the court considered it proper, on the papers, to hear the matter on the grounds that it was urgent, since the relief sought was aimed at protecting a right. The court, in the circumstances, could have turned them away from the seat of the judgement of the court the seat of the judgment of the court, only if applicants had failed to act with speed and promptitude in bringing the application and, only if the court had on the papers found that applicants would be afforded substantial redress at a hearing in due course, within the meaning rule 73 (4) (a) and (b) of the rules of court. (See *Christian v CRO Kharas Regional Council* NAHCMD 309 (30 June 2021) the question whether such applicant could be afforded substantial redress at a hearing in due course should not be determined mechanically and in an all-size-fit-all manner.

[6] Applicants launched the instant application on 17 June 2021, that is, some 12 calendar days after the critical judgement of Masuku J (in the related matter of HC-MD-CIV-MOT-GEN-2021/00174) was given. On the pan of any legal scales, applicants did act with speed and promptitude and, thus, satisfied the requirements of urgency prescribed by rule 73 (4) (a) and (b) of the rules of court. And as regards satisfying rule 73 (4) (b) of the rules of court. I was satisfied that securing the access farm road free from interference by first applicant is critical to applicants performing

their obligation to the purchases of their land under the Deed of Sale. The fact that as of 2 June 2021, applicants' land had been sold would have even strengthened applicants' case rather than weaken it, contrary to what Mr Small submitted during the rule *nisi* hearing because the principle of *pacta sunt servanda* is sacred in a State like Namibia, which respects laws and the rule of law. (See *Erongo Regional Council and Others v Wlotzkasbaken Home Owners Association and Another* 2009 (1) NR 252 (SC) para 61.) The court, therefore, has a duty without delay to ensure that that principle is observed in deserving cases like the present. Furthermore, the court was satisfied that there had been full disclosure of the relevant facts by the applicants and there had not been a misrepresentation of the facts by applicants. (See *Doeseb and Others v Kheib and Others* 2004 NR 81 (HC).)

[7] I fail to see what prejudice first applicant has suffered - and none was pointed out to me – just because the application was brought in an ex parte manner. First respondent could have anticipated the return date. In the return-date proceedings she would have had her day in court. In any case, on the facts and in the circumstances of the matter, the fact that first respondent is acting in a manner she cannot assume – as a matter of law – as mentioned in paragraph 4 above, should trump all other considerations in the instant return-date proceedings.

[8] On the return date, the only burden of the court is to either confirm the rule *nisi* or discharge it. (*Bruyns v Louis Neethling Boerdery (Pty) Ltd* NAHCMD 378 (9 December 2014) Based on the foregoing reasons, I hold that first respondent has failed to show cause why the rule *nisi* should not be confirmed and made final. The court is, therefore, inclined to confirm the rule *nis*i; whereupon I order as follows:

1. The rule *nisi* issued on 18 June 2021 is hereby made final.
2. First respondent shall pay applicants' costs.
3. The matter is finalized and is removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

APPLICANTS:	M. Schurz Instructed by Delport Legal Practitioners Windhoek
RESPONDENTS:	A.J.B Small Instructed by Theunissen, Louw and Partners Windhoek