



**Order:**

1. The application is dismissed.
2. The applicant must pay the respondents costs limited to N\$25 000.
3. The rule nisi is extended to 3 November 2021 at 15h15.

**Reasons for order:**

MILLER, AJ:

[1] In what I will refer to as the main application, the applicant in the matter seeks an order that the first to fourth respondents be committed for contempt of court. In substance the applicant alleges that there was willful disobedience of an order issued by Parker AJ, on 19 February 2021.

[2] The matter come before me on 3 March 2021. After hearing the parties I made the following order:

'Having heard MS LEWIES, on behalf of the Applicant(s) and MR MURORUA, on behalf of the Respondent(s) and having read the application for HC-MD-CIV-MOT-GEN-2021/00096 and other documents filed of record:

IT IS HEREBY ORDERED THAT:

1 The rule nisi is issued, calling upon the first to the fourth respondents to show cause, if any on a date as the honourable court may determine why an order in the following terms should not be made:

1.1 Declaring the 1st, 2nd, 3rd and 4th respondents to be in contempt of the order of this Honourable Court dated 19 February 2021, so given by Honourable Justice Parker under case number: HC-MD-CIV-MOT-GEN-2021/00032.

2 The following final relief is granted with immediate effect:

2.1 Directing and ordering the first, second, third and fourth respondents to forthwith and ante omnia restore the applicant's free and undisturbed access and occupation to the farm, as well as to remove all obstacles including locks etc. whereby the applicant and/or its employees and/or its agents have been denied access, alternatively by virtue of which the applicant and/or its employees' access have become restricted, to the aforementioned farm immediately, failing which the Deputy Sheriff for the district of Rundu be authorized and directed to take such steps necessary in order to restore the applicant's possession of the farm as aforesaid;

2.2 Further directing and ordering the first, second, third and fourth respondents to forthwith and ante omnia restore the applicant's free and undisturbed possession of all its farming equipment and assets as more fully depicted and described in "SP2" to the founding affidavit under the headings "Serve Investments" and "Johan", failing which the Deputy Sheriff for the district of Rundu be authorized and

directed to take such steps necessary in order to restore the applicant's possession of these items and assets;

2.3 Interdicting and restraining the first, second, third and fourth respondents from in any way interfering and/or hampering and/or preventing and/or intimidating the applicant and/or its employees and/or agents:

2.3.1 from accessing the farm;

2.3.2 taking possession of and removing the farming equipment and assets as more fully depicted and described in "SP2" to the founding affidavit under the headings "Serve Investments" and "Johan";

2.3.3 Directing and authorizing the applicant to remove all its farming equipment and assets as more fully depicted and described in "SP2" to the founding affidavit under the headings "Serve Investments" and "Johan", from the farm, and further thereto, that:

2.3.3.1 Notwithstanding the termination of the contract between the parties on 31 March 2021, the applicant may continue to access the farm for a period of 14 days after the termination date, for the sole purposes of removing its farming equipment and assets as more fully depicted and described in "SP2" to the founding affidavit under the headings "Serve Investments" and "Johan";

2.4 Further directing and authorizing the Deputy Sheriff of Rundu to break any lock, cut any fence, and remove any obstacle which obstructs the applicant's access to the farm and to the farming equipment and assets as more fully depicted and described in "SP2" to the founding affidavit under the headings "Serve Investments" and "Johan", and further that the Deputy Sheriff be authorized to employ the services of a locksmith, tow-in service, or any other third party, to enforce this order, the costs of which will be borne by the Respondents;

2.5 Further directing and authorizing the Commanding Officer of Ndiyona Police Station to assist the Deputy Sheriff of Rundu to enforce this order of court, which includes to arrest and detain any person who obstructs the ends of justice by attempting to obstruct the execution of this order;

2.6 Interdicting the third and/or fourth respondents from being personally and physically present on the farm, until such time as the orders in terms of paragraphs 2.1 to 2.3.3.1 above have been executed;

2.7 Interdicting and restraining the third and/or fourth respondents from threatening, verbally

2.7 Interdicting and restraining the third and/or fourth respondents from threatening, verbally assaulting, or intimidating the applicant's employees and agents in any way;

2.8 Directing that the 1st, 2nd, 3rd and 4th respondents pay the costs of this application on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved which costs shall include the costs consequent upon the employment of one instructing and one instructed counsel.

3 The case is postponed to 21 April 2021 at 08:30 for Status hearing.

BY ORDER OF THE COURT'

[3] It is now common cause that the order in paragraphs 2.1 and 2.5 were complied with.

[4] The only issue that is still alive is the *rule nisi* I issued in the terms mentioned in para 1 of the order. As far as that aspect is concerned, answering and replying papers were filed.

[5] The applicant now seeks leave to file yet another affidavit. That application was launched in June 2021, supported by an affidavit deposed to by Eric de Klerk.

[6] There is ample authority for the proposition that in Motion proceedings, generally speaking, three sets of affidavits may be filed. The court however retained a discretion permit the filing of further affidavits.

[7] The position was best summarized in the matter of *Fischer v Seelenbinder*. I have in mind the following portion of the judgment:

'[17] It is trite that in motion proceedings the ordinary rule is that three sets of affidavits are allowed, i.e. the supporting affidavits, the answering affidavits and the replying affidavit. In the matter of Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd, [4] this court stated that it may in its discretion permit the filing of a further affidavit. Quoting from the South African G case of Juntgen t/a Paul Juntgen Real Estate v Nottbusch, [5] it said:

'Generally, a Court has a discretion, which is inherent to the just performance of its decision-reaching process, to grant that relief which is necessary to enable a party to make a full representation of his true case.'

[18] In the matter of Maritima Consulting Services CC v Northgate Distribution Services Ltd, [6] the court held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. Thus, the filing of further answering affidavits will be permitted where, for instance, 'there is a possibility of prejudice to the respondent if further information is not allowed'.

[19] In the instant case the applicant is seeking leave to supplement his founding affidavit; the basis on which the applicant seeks to file a supplementary founding affidavit is that a substantial period of time has lapsed between the initial period (that is September 2015) upon which the urgent application was launched and the date (that is on 5 July 2016) upon which the application will be heard. The applicant states that during that intervening period new developments, which have an impact on the relief sought, occurred.

[21] The justification for the relief sought by the applicant must be evaluated against the evidence as it existed at the time when he approached court. If evidence which did not exist at the time the applicant launched his application, came into existence after the application is launched the best approach would be to withdraw the initial application, tender the respondent's costs and relaunch the application incorporating the new evidence that has come into existence in the intervening period. In the instant case the applicant deposed to a supplementary replying affidavit during October 2015. I am of the view that giving him leave to file a further supplementary founding affidavit will be to give him not a second, but a 'third bite at the cherry' and that will be prejudicial to the first respondent and for that reason I will refuse the application to

file a supplementary founding affidavit. I now proceed to consider the relief sought by the applicant.'

[8] In applying these principles to the matter before me, I decline to grant the application. The matter raised in the supplementary affidavit, which the applicant now seeks to have introduced, relating to the proceedings before me, are not germane to what is an issue in relation to the alleged non-compliance with the order issued in February 2021. It may well be argued that there could be some corroborative element in those facts, however that is in my view insufficient to exercise my discretion in favour of the applicant.

[9] In essence to allow the supplementary affidavit, opens the door for further factual disputes in matter which are strictly speaking not relevant.

[10] I therefore make the following order:

1. The application is dismissed.
2. The applicant must pay the respondents costs limited to N\$25 000.
3. The *rule nisi* is extended to 3 November 2021 at 15h15.

<b>Judge's signature</b>	<b>Note to the parties:</b>
K Miller Acting Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> &amp; 4<sup>th</sup> Defendant:</b>
Adv. Strydom (assisted by Adv. Lewies) Engling, Stritter & Partners Windhoek	Adv. Phatela Murorua Kurtz Kasper Incorporated Windhoek