



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2021/00181

In the matter between:

**SHIKONGO MAVARA**  
**EMILIE SHINKEVA**

**FIRST APPLICANT**  
**SECOND APPLICANT**

and

**ALISA SHAPWA**

**RESPONDENT**

**Neutral citation:** *Mavara v Shapwa* (HC-MD-CIV-MOT-GEN-2021-00181) [2021]  
NAHCMD 291 (10 June 2021)

**Coram:** MASUKU, J

**Heard on:** 14 May 2021

**Delivered:** 10 June 2021

**Flynote:** Practice – Applications and motions – Urgent application – Rule 73 - Non  
– Joinder – effect thereof – Spoliation – requirements application thereof – Whether  
noting of defective appeal stays execution.

**Summary:** This is an opposed urgent spoliation application. The applicants, who are husband and wife, approached the court seeking a *mandament van spolie*, claiming that they had been despoiled by the respondent of possession of immovable property, which they had occupied for some time. The respondent claimed that she had obtained a default judgment against the applicants, followed by an eviction order, which the deputy-sheriff enforced. It was the respondent's further contention that when the appellant was evicted by the deputy-sheriff, there was no proper notice of appeal lodged to have the effect of staying the execution of the order.

*Held:* that there was no proper appeal noted in terms of Rule 51(4) of the Rules of the Magistrates Court hence, the execution of the writ of ejectment was not stayed.

*Held:* that the deputy-sheriff is a necessary party to the proceedings and should have been cited as party but because the objects of the rules is to deal with matters on their real merits, it was unnecessary to make an order regarding the non-joinder.

*Held:* that the urgency is self-created as the applicants had not challenged the default judgment and the sale in execution and further did not take timeous steps to note the appeal.

The application was thus dismissed with costs.

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## ORDER

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1. The Applicants' non-compliance with the forms and services as provided for in the Rules of the High Court of Namibia and hearing this application as a matter of urgency as contemplated in Rule 73(3) is hereby refused.
2. The application is dismissed.

3. The Applicants are ordered to pay the costs of the respondent.
  4. The matter is removed from the roll and regarded finalised
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## **JUDGMENT**

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**MASUKU, J:**

### Introduction

[1] This is an opposed urgent spoliation application, wherein the applicants seek an order; (a) condoning their non-compliance with the Rules of this court insofar as they pertain to forms and service and (b) in terms whereof the respondent should restore to them the peaceful and undisturbed possession of Erf 1312, (a portion of erf 205), Khomasdal Extension 5, Windhoek, Republic of Namibia (“the property”).

### Parties

[2] The first applicant is Mr. Shikongo Mavara, a major male, currently residing at erf 1241 Obia Street, Cimbebasia.

[3] The second applicant is Ms. Emilie Shinkeva, a major female married to the first applicant and currently residing at erf 1241 Obia Street, Cimbebasia.

[4] The respondent is Ms. Alisa Shapwa, a major female residing at erf 1312 (portion of erf 205), Khomasdal, Extension 5, Windhoek, Republic of Namibia.

### First applicant's founding affidavit

[5] It is the first applicant's case that the property was registered in his name and that they (the applicants) had been living there since 2016. This was so until Bank Windhoek obtained judgment against him and the property was sold in execution. The new owner of the property, who is the respondent herein, applied for summary judgment, which was granted 'with an order evicting me from the premises'.

[6] The first applicant further deposes that 'on Friday 07 May 2021, at around 08:00 in the morning there was a small lorry parked at the house . . . (the property) with close to seven or eight people . . . I asked these people what they wanted, and a man by the name of Mr. Rickerts from the office of the Deputy Sheriff said he is there to evict me. Alisa attended there later too.'<sup>1</sup>

[7] When Mr. Rickerts was asked by the first applicant, on what basis he was evicting the applicants, the response was that the eviction was on the strength of a court order dated 14 April 2021, which court order was handed to the first applicant. When the first applicant informed Mr. Rickerts that there was an appeal noted and as a result they cannot be evicted, Mr. Rickerts responded by stating that there was no appeal. The applicant further asserts that, he then told Mr. Rickerts to give him a few minutes so that he could go to his lawyers and obtain a copy of the notice of appeal. He left thereafter.

[8] According to the first applicant, he then left the property and went to his lawyers' offices. He does not say what happened at his lawyers' offices concerning the notice of appeal, but goes on to explain that he left his lawyers office and went to the Magistrates Court so as to obtain a copy of the notice of appeal from the court file. He then was informed that he needed to pay N\$ 5000, which he did and the receipt is attached to the founding affidavit.

[9] It is his further case that his lawyers then wrote a letter to the deputy-sheriff for the district of Windhoek, informing him of the appeal and requested that he does not removed the applicants' belongings from the property.

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<sup>1</sup> Para. 14 of the founding affidavit.

[10] According to the first applicant, upon his return to the property, he found his wife and children outside the house and the property was locked with padlocks. He asserts that the gate was locked with the padlock by the respondent. He states that they were not evicted by the deputy sheriff and that there was no reason for them to be on the street as some of their belongings were still on the property. It would appear that he then forcefully entered the property together with his family.

[11] The respondent opened a criminal case against the first applicant for trespassing and he was arrested and subsequently released on bail. He was arrested on 8 May 2021 and was released on Monday, 10 May 2021. During the time he was in custody, his family remained on the property. On 10 May 2021, the first applicant asserts, the respondent with an unknown number of members of the Namibian Police entered the property and threw out the applicants' movables. The respondent then started occupying the property from 21:00 on 10 May 2021.

[12] In respect of urgency, the first applicant alleges he and his family do not have substantial redress in due course, as they cannot continue staying where they presently reside. Further, that bearing in mind that there is a pending appeal, the respondent cannot take the law into her own hands. He further avers that, as he was in custody until 10 May 2021, he was only able to consult his lawyers after his release on bail. I understand his contention to mean that this application was filed with reasonable promptitude on 12 May 2021.

#### The first respondent's answering affidavit

[13] In answer to the founding affidavit, the respondent addressed three issues. Firstly, she has raised a point *in limine* of non-joinder. Secondly, she challenges the allegation that the matter is urgent and there argues that, if the matter is considered urgent, such urgency is self-created. Thirdly, she also challenges the relief sought. I now turn to set out the position of the respondent on non-joinder.

### *Non-Joinder*

[14] It is the respondent's argument that the deputy-sheriff for the district of Windhoek and the Namibian Police ought to have been joined as parties as the allegations made by the first applicant directly relate to the statutorily prescribed mandate and the exercise of such mandate by both these functionaries. The respective functionaries have a substantial interest in the outcome of this matter, particularly if this court should find that their actions were unlawful as alleged by the first applicant.

### *Urgency*

[15] The respondent concedes that spoliation applications are by nature urgent, but is quick to point out that that in and of itself does not detract from the fact that self-created urgency will count against an applicant in such an application. Further that, if indeed as the first applicant alleges there is a pending appeal, then the applicants have substantial redress in due course. Thereby, further contends the respondent, the applicants fail to satisfy that leg of the test for urgency. The respondent asserts that the applicants are residing at Erf 1241 in Cimbebasia and they have not explained why they will be unable to continue residing at this address.

[16] The respondent also laments the fact that the applicant was aware of the judgment obtained against him/ them in the magistrates' court, which gave rise to the writ of execution against the property. They were also aware of the public auction of the property on 7 July 2020. They were further aware of the summary judgment sought and obtained against them on 13 April 2021, but they did nothing. They did not challenge the default judgment nor did they seek to set aside the writ of execution. I understand the respondent's argument to be that, whilst aware of summary judgment, the applicants did nothing until 7 May 2021 when the first applicant went to pay the security for N\$ 5000.

### *Spoliation*

[17] The auction in respect of the property where the respondent was the highest bidder on account of a writ of execution against the property took place on 7 July 2020. Due to delays, the property was only transferred into the respondent's name in February 2021 and she started making payments in respect of the property. As the applicants failed to leave the property despite a judgment against them and a subsequent writ of execution being issued and needless to say, despite the registration of the property into the name of the respondent. This prompted the respondent via a summary judgment, to seek an order of eviction, which was defended by the applicants.

[18] The Magistrates court granted summary judgment in favour of the respondent on 13 April 2021 and a writ of ejectment was issued on 14 April 2021. This writ of ejectment was delivered to the office of the deputy-sheriff for execution. A document titled 'notice of appeal' was served on the respondent on 20 April 2021. However, the applicants had not paid N\$ 5000 security as required by the Magistrate court Rules. Due to the absence of a power of attorney and a receipt for payment of the mandatory N\$ 5000 to accompany the notice of appeal delivered on 20 April 2021, the respondent holds the view that there was no appeal pending at the time the writ was executed by the deputy-sheriff on 7 May 2021.

#### Replying affidavit

[19] In reply, the applicants allege that the argument regarding non-joinder is misplaced. That the appeal is registered in this court. They contend that they are unable to afford payment of N\$ 1000 per day, which they are currently paying for accommodation. They contend that they will be homeless soon.

#### Applicable law and analysis

##### *Non-Joinder*

[20] Non- joinder may be raised where the point is taken that a party who should be before court has not been joined or given judicial notice of the proceedings.<sup>2</sup> The substantial test is whether the party that is alleged to be a necessary party for the purpose of joinder has a legal interest in the subject matter of the litigation, which may be affected by the judgment of the court in the proceedings concerned.

[21] In *Kleynhans v Chairperson of the Municipality of Walvis Bay & Others*<sup>3</sup>, Damaseb, JP said, ‘. . . It is necessary to join as a party to any litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party . . .’<sup>4</sup> provided they do not consent to exclusion from such litigation.

[22] The question to be answered thus is, whether the deputy sheriff for the district of Windhoek and the Namibian Police/ Minister of Home Affairs, Immigration and Safety and Security/ Inspector General of the Namibian police, are necessary parties to this matter. My answer to this is yes and no. Yes, in respect of the deputy-sheriff and no in respect of the Namibian Police.

[23] I say yes in respect of the deputy-sheriff for the district of Windhoek because, the order sought essentially postulates that the deputy-sheriff did not execute the writ of ejectment, but that it was the respondent with the aid of the deputy-sheriff and Namibian police who did so. This is so despite the first applicant asserting in the founding affidavit that at 08:00 on 7 May 2021 the deputy-sheriff attended at the property and informed him that he was there to evict the applicants in terms of the court order of 14 May 2021, which was presented to the applicants.

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<sup>2</sup> *Tobias v Nguvauva* (HC-MD-CIV-ACT-DEL-2019/05249) [2020] NAHCMD 343 (31 July 2020) para. 17.

<sup>3</sup> *Kleynhans v Chairperson of the Municipality of Walvis Bay & Others* 2011 (2) NR 437 at 447.

<sup>4</sup> *Ibid.*



[24] The deputy-sheriff is by law required to execute inter alia writs of ejectment. Therefore, when the first applicant asserts that despite having the court order to evict the applicants, the deputy-sheriff failed to do so has bearing on the statutory mandate of the office of the deputy sheriff. Further, should this court find that the applicants' position holds true insofar as the matter relates to the deputy-sheriff, the deputy-sheriff might be prejudiced in that it could appear to the reader of this judgment that the deputy-sheriff did not do his job.

[25] It might also mean that the deputy-sheriff would in future possibly have to employ further resources to again execute a writ of ejectment, which he had already executed. I am also fortified in my view that, the position of the deputy-sheriff insofar as whether he had indeed evicted the applicants in terms of the court order, would assist the court on that score. As the deputy-sheriff is an independent party with nothing to gain from the whole issue and who would also be able to tell the court, who locked the gate and placed a padlock thereon.

[26] As regards the police, the allegation that the Namibian police assisted the respondent to throw out the movables of the applicants are serious allegations as they too suggest that the Namibian Police acted outside their powers, they are not necessary to these proceedings. It would be convenient to have them as parties, but the order sought would have no bearing on them. Even if I were wrong on this score, the applicants have a further hurdle, which is the issue of urgency. I now proceed to deal with urgency.

[27] I am of the view that when one has regard to the overriding objectives of the rules of this court, the aim should be for the court to decide the matters on their true merits. This results in matters being dealt with speedily, efficiently and cost effectively. In due compliance with that requirement, and because of the result on the spoliation, I decline to make any firm finding regarding the non-joinder and its possible effect on the proceedings.

### *Urgency*

[28] I accept that spoliation applications are by their very nature urgent. In *Hardap Regional Council v Sankwasa and Another*<sup>5</sup>, Parker, AJ held that a spoliation application is inherently urgent, provided the applicant is not guilty of blameworthy conduct in not bringing the application timeously. That is to say, even in cases of spoliation, for the court to hear the matter on urgent basis, the court must be satisfied that the urgency is not self-created.

[29] It is common cause that default judgment was obtained against the applicant(s) before 7 July 2020 in respect of the property. A writ of execution was then obtained against the property and a public auction took place on 7 July 2020 where different bidders tendered bids in respect of the property. The respondent was the highest bidder and proceeded to take care of the paperwork and the process of transferring the property into the name of the respondent commenced. The property was transferred into the respondents name after some delay in February 2021. Subsequent thereto, the respondent by way of a summary judgment application sought an order of ejectment of the applicants from her property.

[30] Summary judgment, as sought, was granted on 13 April 2021 and the writ of ejectment was issued on 14 April 2021. The applicants caused to be served on the respondent a document titled 'notice of appeal' on 20 April 2021. This notice according to the respondent, did not have attached to it, the applicants' lawyers' power of attorney nor a receipt for the payment of N\$ 5000 security required in terms of Rule 51(4) of the Magistrates Court Rules. On 7 May 2021, at 08:00 in the morning the deputy-sheriff was at the property. When the applicants enquired the reason for his presence there, he informed them that he was there to evict them and showed them the 'court order' dated 14 May 2021.

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<sup>5</sup> *Hardap Regional Council v Sankwasa and Another* (LC 15/2019) [2019] NALC 4 (28 May 2019) para [4].

[31] I am not satisfied that this matter is urgent. The applicants do not deny knowledge of the default judgment or the subsequent writ of execution. There is no mention of a rescission of the default judgment or legal challenge in respect of the writ of execution. Even after summary judgment was granted, the applicants did not act with the requisite promptitude to pay the N\$ 5000 in respect of the document titled 'notice of appeal', which it appears was already drafted by 20 April 2021. Instead, the applicants waited until the morning of 7 May 2021, after the deputy sheriff arrived to execute the writ to pay the said amount.

[32] Furthermore, even if the applicants' position is accepted that there is indeed an appeal before this court, then undoubtedly, the applicants have substantial redress in due course as envisaged in rule 73(4)(b). I say so because this court can, if it upholds the appeal, set aside the summary judgment issued by the court *a quo*. The effect would be to restore the applicants' possession and they could, if so advised, sue for damages, if any.

[33] The explanation about the payment of N\$ 1000 per day for accommodation at the current residence in Cimbebasia appears to be an after-thought as it was not mentioned in the founding affidavit, yet is central to the applicants' case. The applicants did not take the court into confidence in their founding affidavit and state why they could not continue residing at the current place of residence until the appeal is finally determined. The applicant is legally represented and ought to have been advised that his application will stand or fall on his founding affidavit, as prescribed by the *Stipp* principle.<sup>6</sup>

[34] In the result, I am not satisfied that this matter is urgent to justify the abridgment of the rules as prayed for. I will nonetheless proceed to deal with the issue of spoliation for purposes of completeness and more importantly, to comply with the overriding objectives of the rules referred to above.

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<sup>6</sup> *Stipp and Another v Shade Centre and Others* SA 29/2006

## *Spoliation*

[35] In *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality*<sup>7</sup> the court remarked that spoliation is aimed restoration of possession. A spoliation order then does not concern itself with the lawfulness of competing claims to the object or property.

[36] Spoliation is aimed at preventing persons from resorting to self-help measures and thereby taking the law into their own hands without following the due process of the law. 'The fundamental le of the remedy is that no one is allowed to take the law into his own hands. All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'<sup>8</sup>

[37] I am of the considered view that the applicants have proven possession. They were in possession of the property until they were dispossessed on 10 May 2021. The question is, was such dispossession lawful? According to the applicant the deputy-sheriff came with a writ of ejectment issued on 14 April 2021 and informed them that he was there to evict them. When the applicant returned after leaving the property to pay the N\$ 5000 in respect of the notice of appeal in terms of Rule 15 (4) of the Magistrates court, the house was locked and padlocks placed on the gate and his family was waiting for him outside the yard.

[38] The respondent denies the allegation that she was the one who locked the gate and holds firm the position that it was the deputy sheriff who evicted the applicants on 7 May 2021. Despite making the allegations pertaining to the deputy sheriff, the applicant has not cited him as a party and as such, I am not convinced on the balance of probabilities that the eviction was unlawful. It was executed by the deputy sheriff in the

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<sup>7</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* CCT 23/12 [2012] ZACC 26, delivered on 9 October 2012.

<sup>8</sup> *Yeko v Qana* 1973(4) SA 735 (A) at 739G.

enforcement of a summary judgment and the subsequent writ of ejectment duly issued by a court of law.

[39] Rule 51(4) of the Rules of the Magistrates Court provides that –

‘(4) An appeal shall be noted by the delivery of notice, **and**, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of N\$5000. Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board’. (Emphasis added).

[40] In the absence of the payment of the N\$ 5000, at the time the deputy-sheriff approached the applicants at the property to evict them, no proper appeal in terms of the relevant rules had been noted, that would have served to stay the execution of the order of the court *a quo*. There was thus no pending appeal to stay the operation of the writ of ejectment at the time the eviction took place. Therefore, even though the respondent was served with a document titled ‘notice of appeal’ on 20 April 2021, there was no valid appeal noted in terms of the above rule, which could have the requisite force of law.

[41] It can only be said that an appeal was properly noted after the eviction, because upon his return to the property the deputy sheriff was gone, the property locked and his family was waiting for him outside the yard. The eviction was lawful. In the premises, the stables were locked after the horses had already bolted. This was within the applicants’ powers to countermand but they did not do so timeously.

### Conclusion

[42] In the premises, I am of the considered view that the applicants have failed on urgency as they have not met the requirements of rule 73. Furthermore, although I make no firm finding, which I need not, because of the conclusion on the main relief sought, it would appear that the deputy-sheriff should have been joined. This is

rendered unnecessary to order because on the merits, the court is of the firm view that the application for spoliation should fail for reasons mentioned above.

Order

[43] In the result, and for the reasons mentioned above, I make the following order-

1. The Applicants' non-compliance with the forms and services as provided for in the Rules of the High Court of Namibia and hearing this application as a matter of urgency as contemplated in Rule 73(3) is hereby refused.
2. The application is dismissed.
3. The Applicants are ordered to pay the costs of the respondent.
4. The matter is removed from the roll and regarded finalised

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T. S. MASUKU  
Judge

**APPEARANCES****FOR THE APPLICANT**

J Diedericks

Instructed by Sisa Namandje & Co. Inc, Windhoek

**FOR THE RESPONDENTS**

V Namene

Of Kadhila Amoomo Legal Practitioners, Windhoek