

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,



MAIN DIVISION, WINDHOEK

PRACTICE DIRECTION 61

<b>Case Title:</b> SERVE INVESTMENTS EIGHT FOUR PTY LTD v AGRICULTURAL PROFESSIONAL SERVICES PTY LTD & OTHERS	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2021/00096
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE MILLER, ACTING	<b>Heard on:</b> 18 July 2022
	<b>Delivered on:</b> 9 September 2022
<b>Neutral citation:</b> <i>Serve Investments Eight Four Pty Ltd v Agricultural Professional Services Pty Ltd</i> (HC-MD-CIV-MOT-GEN-2021/00096) [2022] NAHCMD 471 (9 September 2022)	
<b>ORDER</b>	
<ol style="list-style-type: none"><li>1. The application is dismissed;</li><li>2. The applicant is ordered to pay the cost of this application which will include the costs of one instructing and one instructed counsel where employed;</li><li>3. The matter is finalized and removed from the roll.</li></ol>	
<b>REASONS</b>	
<b>Miller , AJ</b>  [1] What I am required to resolve in this matter is prayer 2.1 of an application at the instance of the applicant. The relief being sought in that prayer reads as follows:  '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] For the sake of completeness, I may add that the remainder of the relief claimed, being spoliatory in nature, was granted and as far as I was made aware, was given effect to.

[3] I do not intend to burden this judgment with a lengthy history of the dispute. Suffice to state that, in terms of an agreement concluded between the applicant and the first respondent, the applicant was engaged in providing services to assist the first respondent in its farming operations. It follows that during the subsistence of that agreement, equipment, machinery and tools were brought to the farm whilst the farming operations were in progress. When the agreement came to an end, disputes arose as to which assets belonged to the applicant or the first respondent as the case may be. Following failed attempts to resolve the existing disputes, the first applicant brought spoliation proceedings in this court on an urgent basis. The matter came before Parker AJ who made the following order:

‘1. The Applicant's non-compliance with the forms and service as contemplated for in the rules of court is hereby condoned and the Applicant is authorised to bring this application on an urgent basis as contemplated in r 73(3) of the rules of court.

2. Until 31 March 2021, the parties are directed to conduct themselves in the manner set out below:

2.1 That the first, second and third respondents are hereby and directed to forthwith to grant the applicant's access and use of the Green Scheme Project known as Shitemo Irrigation Project situated on the banks of the Kavango River approximately 91 km east of Rundu in the Ndonga Constituency in the Kavango East Region (hereinafter referred to as "the farm"), subject to and as per the clocking system so introduced by applicant in respect of all agents and/or employees gaining access to the farm and for all vehicles gaining access to the farm through the main gate subject to a register system being operated by a security guard at the main gate.

2.2 That the parties are hereby directed to prepare a joint inventory list of all movables assets reflecting the ownership in and to same currently being held and/or found to be on the farm which list shall be compiled by an appointed representative of the applicant in the person of Mr. WT Spyron and Mr. Enrico Gonteb, by no later than 28 February 2021.

2.3 That the first, second and third respondents are hereby directed to forthwith grant the applicant's agents and/or employees free, undisturbed possession and use of all its farming

equipment and assets as more fully depicted and described in appendix "X1" as well as the agricultural input assets and equipment more fully depicted and described in appendix "X2" attached hereto and held at the farm provided further that no movables would be removed from the farm prior to 28 February 2021;

2.4 Save for the items in appendixes X1 and X2 and insofar as such items are still on the farm, the parties are precluded from removing any movable property from the farm pending the finalisation of inventory list in paragraph 2.2 hereof.

2.5 Following completion of the joint inventory list in paragraph 2.2 hereof, the respondents are hereby directed to restore undisturbed possession to the applicant's agents and/or employees of the applicant to the movable assets identified in the inventory list.

3. Each party to pay its own costs.

4. The matter is removed from the roll: Case Finalized'.

[4] It soon became apparent that paragraph 2.2 of the order was troublesome. Given the disputes concerning ownership at that stage, the parties were unable to compile a list. Several lists were compiled in the end.

[5] On the papers there are substantial disputes of fact concerning the attempt to comply with the order of the court. As is customary in motion proceedings, three sets of affidavits were filed. An application by the applicant to file a supplementary affidavit was opposed and subsequently dismissed by me. No evidence was adduced and none of the deponents to any of the affidavits were cross-examined.

[6] The applicant bears the onus to prove beyond a reasonable doubt, the occurrence of the following:

- a) the existence of the order;
- b) that the order came to the notice of the respondents;
- c) that the order was not complied with; and
- d) such non-compliance was occasioned by wilfulness.<sup>1</sup>

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<sup>1</sup> *Namibia Teachers Union of Namibia v Namibia National Teachers Union and Others* SA 26/2019 [2020] NSC 42, para 9.

[7] In motion proceedings, such as these, The correct approach was established in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] (3) SA 623 (A), at paras 9 and 10:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T), at pp 1163-5; *Da Mata v Otto, NO*, 1972 (3) SA 585 (A), at p 882 D - H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf. *Petersen v Cuthbert & Co Ltd*, 1945 AD 420, at p 428; Room Hire case, supra, at p 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg. *Rikhoto v East Rand Administration Board*, 1983 (4) SA 278 (W), at p 283 E - H).'

[8] Once that approach is followed, the conclusion I come to is that, it is not possible to resolve the factual disputes on the papers. More particularly I am unable to find on the papers that the applicant has proven to the required degree of proof that there was any willful or intentional disobedience of the order.

[9] It follows that the following order should follow:

1. The application is dismissed;
2. The applicant is ordered to pay the cost of this application which will include the costs of one instructing and one instructed counsel where employed;
3. The matter is finalized and removed from the roll.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
Miller Acting Judge	Not applicable.
<b>Counsel:</b>	

<b>Applicant</b>	<b>Respondents</b>
J Strydom (with him R Lewies, Instructed by Engling, Stritter & Partners, Windhoek	C Phatela, Instructed by Murorua Kurtz Kasper Inc., Windhoek