

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: ACTING DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK & 2 OTHERS // JOHN K-CI HAMUKOTO & ANOTHER	Case No: HC-MD-CIV-MOT-GEN-2023/00396
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Date of hearing: 8 SEPTEMBER 2023
	Delivered on: 20 SEPTEMBER 2023
Neutral citation: <i>Acting Deputy Sheriff for the district of Windhoek v Hamukoto</i> (HC-MD-CIV-MOT-GEN-2023/00396) [2023] NAHCMD 580 (20 September 2023)	
Order:	
<ol style="list-style-type: none">1. The application be heard as a matter of urgency in terms of rule 73 of the rules of court.2. An order is hereby granted ejecting the respondents and all other occupying through them from Erf. No. 2650, House No. 38 Danie Strydom Street, Extension No. 4 Khomasdal, Windhoek, and the respondents must vacate the property on or before 27 September 2023.3. The first applicant, being the Deputy Sheriff for the district of Windhoek is authorized to do all things necessary and required to forthwith provide the second applicant vacant possession of the property known and described as Erf. No. 2650, House No. 38 Danie Strydom Street, Extension No. 4 Khomasdal, Windhoek, on or before 6 October 2023.	

4. The first applicant, being the Deputy Sheriff for the district of Windhoek is authorized and directed to do all things strictly necessary and required to forthwith provide access to an agent of the Council of the Municipality of Windhoek and/or the second applicant necessary access to the property known and described as Erf. No. 2650, House No. 38 Danie Strydom Street Extension No. 4 Khomasdal, Windhoek, Republic of Namibia for the purpose of conducting any and all inspections for the purpose of effecting the transfer of the aforementioned property to the second applicant.
5. The first applicant, being the Deputy Sheriff for the district of Windhoek, is authorized and directed to do all things necessary and required to forthwith provide the second applicant vacant possession of the property known and described as Erf. No. 2650, House No. 38 Danie Strydom Street Extension No. 4 Khomasdal, Windhoek.
6. The respondents shall pay the costs of this application to the first and second applicants.
7. The matter is finalised and removed from the roll.

Reasons:

PARKER AJ:

[1] In this matter, the applicants, represented by Ms Nyashanu, have prayed the court to hear the matter on an urgent basis in terms of rule 73(4) of the rules of court. The respondents, who described themselves as husband and wife, represent themselves. The matter concerns the immovable property situated at Erf No. 2650, House No. 38 Dannie Strydom Street, Extension No. 4, Khomasdal, Windhoek.

[2] The respondents filed an answering affidavit in opposition to the application. At the commencement of the hearing, the court enquired from respondents if they were representing themselves. They answered that they would, and that the second respondent would address the court for both respondents.

[3] The burden of the applicants was to satisfy the two requirements of urgency under paras (a) and (b) of subrule (4) of rule 73 of the rules of court.

[4] The matter started its life as an action under Case No. HC-MD-CIV-ACT-CON-2019/02123. The action was defended by the respondents (ie the defendants then). The court granted summary judgment on 7 August 2019 which stood to be executed. In due course, the property was declared specially executable by the court. Thereafter, a writ of execution was issued on 9 August 2019, and the property was sold by an auction conducted by the first applicant. The second applicant was the successful bidder.

[5] The purpose of the instant application is to seek on an urgent basis the immediate eviction from the said property of the respondents who continue – without any title – to occupy the property. They, therefore, occupy the property wrongfully and unlawfully much to the grave prejudice to the second applicant, as Ms Nyashanu submitted.

[6] As the deeming owner of the property in terms of rule 111(2) of the rules of court, the first applicant is authorized by law to take possession and control of the property without delay as there has been a successful bidder at the aforementioned auction. Indeed, as a matter of law, the first applicant has a real right to the relief sought – all things being equal – in terms of the notice of motion. And what is more, the first applicant has a legal duty to ensure that he took possession of the property to enable the ownership of the property to be transferred to the second applicant as agreed under the contract of sale of the property.¹

[7] On the papers, I am satisfied that the respondents have unjustifiably and blatantly refused and failed to vacate the property, thus, preventing the first applicant to perform his legal duty, despite a series of demand on the respondents to vacate the property.

[8] Significantly, the respondents' sole and naked averment in their answering affidavit to the facts relied on by the applicants in their founding affidavit is this verbatim:

'2.1 From the onset of case. HC-CIV-ACT-CON-2019/02123 that bring about the urgent application is null and void, reason being is that upon the inception of the abovementioned case, there is no resolution has given by Nedbank for the proceeding in that matter.'

[9] Nedbank (the third applicant) was the execution creditor in the action. The court explained its burden in the instant proceedings that this court, not being an appellate court, was not sitting on an appeal against the summary judgment. The burden of the court was

¹ *The Acting Deputy Sheriff for Windhoek v Nghilwamo* [2023] NAHCMD 501 (15 August 2023).

rather to consider whether the applicants have made out a case for the relief sought in the notice of motion.

[10] The oral submission made by the second respondent was that they had a long and sustained discussion with Nedbank as respects the aforesaid action and yet Nedbank did not listen to them. It is important to note that that happened before the court granted the order that the property was specially executable and before the writ of execution was issued. Furthermore, the respondents said that they had no alternative accommodation to move to.

[11] I must say this in capitalities: The court should not be swayed by misplaced sympathy towards a respondent where the applicant has approached the court promptly in the circumstances to vindicate a right that was not disputed. If the right sought to be vindicated has been established, it would be offensive of the rule of law and a negation of due administration of justice for the court to refuse to grant the relief sought by the application. In the instant matter, the first applicant seeks to vindicate his right to gain possession of the property and to ensure that he performed his obligations under the contract of sale of the agreement.

[12] I hold that the applicants have satisfied the requirements of urgency prescribed by rule 73 (4)(a) and (b) of the rules of court.² They approached the court promptly, and they have shown that they could not be afforded substantial redress at a hearing in due course. This is so, considering the fact that the statutory time limits within which all necessary steps required to be taken to transfer ownership of the property to the second applicant are peremptory, and failure to comply with the time limits is fatal.

[13] In sum, the court would be failing in its judicial duty in a deserving case, as the instant one, to uphold article 12(1) of the Namibian Constitution, if it failed to protect the rights of the first applicant and by extension the rights of the second applicant.

[14] Based on these reasons, I conclude that the applicants have made out a case for the relief sought. In the result I order as follows:

1. The application be heard as a matter of urgency in terms of rule 73 of the rules of court.

² *Salt and Another v Smith* 1990 NR 87 (HC).

2. An order is hereby granted ejecting the respondents and all other occupying through them from Erf. No. 2650, House No. 38 Danie Strydom Street, Extension No. 4 Khomasdal, Windhoek, and the respondents must vacate the property on or before 27 September 2023.
3. The first applicant, being the Deputy Sheriff for the district of Windhoek is authorized to do all things necessary and required to forthwith provide the second applicant vacant possession of the property known and described as Erf. No. 2650, House No. 38 Danie Strydom Street, Extension No. 4 Khomasdal, Windhoek, on or before 6 October 2023.
4. The first applicant, being the Deputy Sheriff for the district of Windhoek is authorized and directed to do all things strictly necessary and required to forthwith provide access to an agent of the Council of the Municipality of Windhoek and/or the second applicant necessary access to the property known and described as Erf. No. 2650, House No. 38 Danie Strydom Street Extension No. 4 Khomasdal, Windhoek, Republic of Namibia for the purpose of conducting any and all inspections for the purpose of effecting the transfer of the aforementioned property to the second applicant.
5. The first applicant, being the Deputy Sheriff for the district of Windhoek, is authorized and directed to do all things necessary and required to forthwith provide the second applicant vacant possession of the property known and described as Erf. No. 2650, House No. 38 Danie Strydom Street Extension No. 4 Khomasdal, Windhoek.
6. The respondents shall pay the costs of this application to the first and second applicants.
7. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	

Applicants	Respondents
S Nyashanu of Koep & Partners, Windhoek	J C-CI Hamukoto In Person & V S Hamukoto In Person