

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 / INT-HC-OTH-2023/00391
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Date of hearing: 16 OCTOBER 2023
	Delivered on: 1 NOVEMBER 2023
Neutral citation: <i>Acting Deputy Sheriff for the district of Windhoek v Hamukoto</i> (HC-MD-CIV-MOT-GEN-2023/00396) [2023] NAHCMD 693 (1 November 2023)	
Order:	
<ol style="list-style-type: none">1. The matter is urgent and is heard on urgent basis.2. Paragraphs 2 to 5 of the order granted by the court on 20 September 2023 shall be executed with immediate effect, despite the appeal noted by the respondents.3. The respondents shall, the one paying the other to be absolved, pay to the first and second applicants the costs of the instant application on the scale as between party and party.4. The matter is finalised and removed from the roll.	
Reasons:	

PARKER AJ:

[1] This is a special application brought in terms of rule 121 of the rules of court and the applicant has prayed the court to hear it on the basis of urgency. Ms Nyashanu represents the second and third applicants ('the applicants'). The respondents appeared in person and they moved to reject the application. The relief sought by the applicants is set out in the notice of motion.

[2] The onus proper rests on the applicant, irrespective of the nature of the judgment in question, to satisfy the court that there are special circumstances which justify the court to order execution forthwith despite the noting of the appeal. In the instant case the special circumstances that I have found to exist are as follows.

[3] First, 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.

[4] Second, the respondents continue – without any title – to occupy the property. They, therefore, occupy the property wrongfully and unlawfully much to the grave prejudice of the second applicant.

[5] Third, 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

[6] The respondents have unjustifiably and blatantly refused and failed to vacate the

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

property, thus, preventing the first applicant to perform his legal and statutory duty, despite a series of demands on the respondents to vacate the property.

[7] In *Leask v French & Others*,² leave was granted to execute an order for ejection from a ship pending appeal. The reason was that the respondents had no rights whatsoever to accommodation on the ship. Any inconvenience or prejudice that they might suffer as a direct result of being put ashore was quite insignificant in comparison with the equitable and legal considerations in favour of allowing execution forthwith.

[8] As it was in *Leask v French and Others* in the instant matter, too, the respondents have no rights whatsoever to occupation of the property. Any inconvenience or prejudice that they might suffer if they were ejected from the property would be quite insignificant in comparison with the legal and equitable considerations in favour of allowing execution.

[9] In *Tuckers Land & Development Corporation (Pty) Ltd v Soja (Pty) Ltd*, Goldstone AJ held that the question before the court has to be resolved on the potentiality of irreparable harm or prejudice being sustained by the applicant and the respondent, respectively.³ I accept the principle as good law. Indeed, it was applied by the court in *Schütte v Schütte*.⁴

[10] In the instant matter, I find that if leave to execute was not granted, the first applicant would be unable to fulfil his legal and statutory obligation towards the second applicant in terms of the contract of sale of the property, as aforesaid. The first applicant's obligation is 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 in terms of the aforesaid contract of sale of the property. Second, the second applicant has been unable to take possession of the property, although she is continuously carrying all financial burden in respect of the property. Thus, as Ms Nyashanu submitted, grave irreparable harm and severe prejudice would occasion the applicants, if leave to execute was not granted.

[11] The respondents have not placed before the court even a phantom of evidence, tending to establish any irreparable harm or prejudice that would occasion them if execution was levied. Not one iota of evidence respecting irreparable harm or prejudice has been

² *Leask v French & Others* 1949 (4) SA 887 (C).

³ *Tuckers Land & Development Corporation (Pty) Ltd v Soja (Pty) Ltd* 1980 (1) SA 691 (W) at 696 E-F.

⁴ *Schütte v Schütte* [2022] NAHCMD 428 (23 August 2022).

placed before the court by the respondents, requiring consideration by this court.⁵

[12] In my view, the respondents have opposed the instant application merely to frustrate unjustifiably – as a matter of law – the levying of execution of the order granted by the court on 20 September 2020. Their conduct offends the rule of law upon which Namibia’s constitutional democracy is based.⁶

[13] On the facts and having applied the aforementioned authorities, I am satisfied that the applicants have made out a case for the relief sought and are, therefore, entitled to judgment.

[14] Additionally, I am satisfied that in the circumstances, the applicants approached the court with speed and promptitude, and have set out explicitly the circumstances which they aver render the matter urgent. Furthermore, they have set out explicitly reasons why they claim they cannot be afforded substantial redress at a hearing in due course. The applicants have, therefore, established urgency, within the meaning of rule 73(4)(a) and (b) of the rules of court.

[15] *A fortiori*, the second applicant in particular has approached the seat of the judgment of the court promptly to vindicate a constitutional right under articles 12(1) and 16(1) of the Namibian Constitution. She cannot be afforded substantial redress at a hearing in due course, and the respondents have no rights to continue to occupy the property, as aforesaid. The court has no good reason to turn them away, as I have demonstrated previously.

[16] One last point. On the facts, and considering the relief sought, subrule (3) of rule 121 does not apply in the instant proceedings.

[17] In the result, I order as follows:

1. The matter is urgent and is heard on urgent basis.
2. Paragraphs 2 to 5 of the order granted by the court on 20 September 2023 shall be executed with immediate effect, despite the appeal noted by the respondents.
3. The respondents shall, the one paying the other to be absolved, pay to the first and

⁵ *Leask v French & Others* footnote 2.

⁶ *President of Namibia v Anhui Corp* 2017 (2) NR 340 (SC) para 55.

second applicants the costs of the instant application on the scale as between party and party.

4. 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