

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTION 61

Case Title: DIANA DESERY GAOSSES & ANOTHER // REGISTRAR OF DEEDS & 2 OTHERS	Case No: HC-MD-CIV-MOT-GEN-2023/00181
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Heard on: 31 OCTOBER 2023
	Delivered on: 6 DECEMBER 2023
Neutral citation <i>Gaoses // Registrar of Deeds</i> (HC-MD-CIV-MOT-GEN-2023/00181) [2023] NAHCMD 796 (6 December 2023)	
Order:	
<ol style="list-style-type: none">1. The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.2. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ: [1] In their notice of motion, dated 2 May 2023, the applicants, represented by Mr Ikanga, have moved the court to grant the following order: ‘1. Directing the Respondent to forewith ante omnia restore the Applicants’ peaceful and	

undisturbed possession in and to Erf 3019 Bonn Street, Otjomuise, Windhoek, Namibia.

2. Directing the 1st Respondent to give effect to the transfer of the property back to the 1st and 2nd Applicant's names and in the event of refusal, an order authorizing the Deputy Sheriff to sign and and/or all necessary documentation to give effect to the transfer.

3. Costs of suit. (if opposed)'.
[2] The second respondent, represented by Mr Lochner, has moved to reject the application.

[3] In considering the application, I should recall certain foundational principles respecting motion proceedings that are apposite to the instant matter. The cardinal principle is this: 'Since affidavits constitute both pleadings and the evidence in motion proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit.'¹ Arising from that cardinal principle is the principled conclusion, formulated felicitously, that an applicant stands and falls by his or her affidavit.²

[4] In the instant application, the principal order sought in para 1 of the notice of motion concerns the immovable property 'Erf 3019 Bonn Street, Otjomuise, Windhoek, Namibia'. Paragraph 2 of the notice of motion contains a consequential order which would be consequential upon the granting of the principal order in para 1 of the notice of motion. Therefore, as a matter of law and logic, if the court refuses to grant the principal order, the court must decline to grant the order in para 2 of the notice of motion, too.

[5] It is important to note the crucial point that the property in question as described in para 1 of the notice of motion is 'Erf 3019 Bonn Street, Otjomuise, Windhoek, Namibia'. In her answering affidavit, the second respondent states categorically that 'I have no interest in Erf 3019 (as described in the notice of motion)'.
[6] Upon the second respondent's aforesaid averment, Mr Lochner submitted that the court was not competent to grant the order sought in para 1 because Erf 3019 Bonn Street, Otjomuise, Windhoek, does not concern the second respondent. Consequently, any order granted in terms of paras 1 and 2 of the notice of motion would be *brutum fulmen*. I agree.

¹ *Nelumbu v Hikumwa* 2017 (2) NR 433 (SC) para 41.

² *Loc cit*.

On these considerations alone, the application stands to be dismissed.

[7] The application stands to be dismissed on another ground, which I now consider. Acting *ex abundanti cautela*, the second respondent answered the allegations in the founding affidavit inasmuch as the immovable property in question is Erf No 3015, Otjomuise, Extension No. 2, Windhoek. I shall, accordingly, consider the application on the basis that the immovable property in question is Erf No 3015, Otjomuise, Windhoek, to put the matter to bed.

[8] In terms of para 1 of the notice of motion, the case that the respondents have been called upon to meet concerns squarely and indubitably the remedy of *mandament van spolie*. It has been said that *mandament* may be granted:

'If the claimant has been unlawfully deprived of the possession of a thing. It does not avail the spoliator to assert that he is entitled to be in possession by virtue of eg, ownership, and that the claimant has no title thereto. This is so because the philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should be discouraged.'³

[9] It follows that to succeed and to be entitled to *mandament*, the applicant must establish that he or she was in peaceful and undisturbed possession of the thing in question when the respondent illicitly deprived him or her of possession of the thing, albeit the possessor need not be physically present to be in possession.⁴ The applicant has failed to establish the foregoing critical requisites, and so they cannot succeed.

[10] Mr Lochner submitted that the applicants have not made out a case for *mandament*. I agree. Mr Lochner's submission is valid and has force. It follows that the applicants must fall by their affidavit and they fall.⁵

[11] Based on these reasons, I order as follows:

1. The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

³ *Kuiiri and Another v Kandjoze and Others* 2009 (2) NR 447 (SC) para 2.

⁴ *Ibid.*

⁵ *Nelumbu v Hikumwah* footnote 1 loc cit.

2. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	First Respondent
M Ikanga Of M. Ikanga & Associates Inc., Windhoek	L Lochner Instructed by Etzold-Duvenhage, Windhoek