REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: A 15/2012

In the matter between:

PETRUS ENKALI	**1ST APPLICANT**
SILAS NDAPUKA	**2ND APPLICANT**
SAKARIA FIINDJE KALIMO	**3RD APPLICANT**
ASSER KIIGA	**4TH APPLICANT**

And

ONDANGWA TOWN COUNCIL	**1ST RESPONDENT**
ALL THE STREET VENDORS IN ONDANGWA AND ALL THE ONDANGWA BUS AND MINI-BUS OPERATORS FOR PUBLIC TRANSPORT IN THE ONDANGWA TOWN	**2ND RESPONDENT**

Neutral citation: *Enkali v Ondangwa Town Council* (A 15-2012) [2015] NAHCNLD 52 (12 November 2015)

Coram: CHEDA J

Heard: **19 October 2015**

Delivered: **12 November 2015**

Flynote: Any party that has a direct and substantial interest in a matter should be served with court process. A default judgment that affects parties which were not

served with court process or where there was no proper service is a nullity. As it is a nullity it follows that everything that flows from it is a nullity. The said judgement / order was set aside.

Summary: Respondents issued out process against 1st applicant. The relief sought affected 2-4th applicants who were however not cited as parties. A party that has a direct and substantial interest in a matter should be served with court process. The said party should be joined as a party. The order was not properly served on all the affected parties. Applicants in addition argued that the said order was not properly sought and not properly obtained. The court was misled, that being the case the order was a nullity and everything that flows from it is a nullity. The judgement was rescinded in terms of Rule 44 of the High Court Rules.

ORDER

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1. The order of the 06 May 2013 granted by this court is nullified.
2. Respondents are ordered to join the 2nd to 4th applicants in these proceedings.
3. Respondents' counter application for correction be and is hereby dismissed.
4. Respondents be and are hereby ordered to pay costs.

JUDGMENT

CHEDA J:

[1] This is an application for recession of judgment which respondents sought to rely on against applicants.

[2] The genesis and historical background of this matter is briefly outlined hereinunder. On the 04 March 2013 1st respondent sought and obtained an eviction order from this court with the following relief:

> "1. Authorizing the Applicant to serve the Notice of Motion as amended annexed hereto and marked as "A" by the way of substituted services.
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> 2. Authorizing the Deputy-Sheriff to serve one copy of the Notice of Motion on the offices of Namibia Bus and Taxi Association (NABTA) before 15 March 2013.
>
> 3. Authorizing the Deputy-Sheriff to display one copy of the Notice of Motion at every site/location as reflected in the tale under paragraph 1.4 of the founding affidavit before 15 March 2013.
>
> 4. Authorizing the applicants to display the notice of motion in the two (2) local circulating newspaper to wit The Namibian and Namibian Sun before 15 March 2013.
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> 5. Authorizing the applicants to cause the contents of the notice of motion (sic) to be translated and read through the Oshiwambo Radio Service (Namibian Broadcasting Corporation) and Omulunga Radio station at least three times a day on two (2) different days before 15 March 2013."

[3] On the 06 May 2013 this court issued a further order couched as follows:

> "1.The respondents must vacate, within five (5) days of this order, the informal markets, loading and offloading places, which are listed in annexure "A" hereto which areas are in Ondangwa Police Station be hereby authorized to ensure compliance with this (sic) these orders.
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> 2. The respondents to remove their structures (if any) and goods within five (5) days of this order failing which the Deputy-Sheriff for the district or Ondangwa and the Namibian Police are hereby authorized to demolish and remove any illegal vendoring structure or the respondents' goods or mini buses from the said sites.

1. After the informal markets, loading and offloading zones have been vacated in accordance with this order, the Applicant and/or any of its agent(s) are hereby authorized to demolish, remove and dispose of structures on the site erected or occupied by the respondents and to do all things necessary to restore the place to its original form.

2. Once the respondents have been evicted, that they hereby interdicted from returning to the said sites of eviction or form re-settling at any other place)s) within the boundaries of Ondangwa Town Council for purposes of trading other than at the formally established street market by the applicant and on the relocation directions of the applicant.

3. The Station Commander of Ondangwa Police Station is hereby authorized to ensure compliance with the orders contained under paragraphs (a) to (d) hereof."

The order of the 04 March 2013 was for substituted service.

[4] Applicants have applied for a joinder and the setting aside the order of 06 May 2013 as it flows from the order which was erroneously issued by this court. It is their contention that:

a) it was not proper for respondents to serve Namibia Bus and Taxi Association as it was not party to the application;

b) despite the court's authorization of the display (sic) publication of the notice of motion in the Namibian and The Namibia Sun on the 15 March 2013, this was not done and was not seen by the 2nd to 4th applicants as the citation in that court application is as follows:

   "Ondangwa Town Council v All the Street Vendors in Ondangwa and All the Ondangwa Bus and Mini-Bus Operators for Public Transport in the Ondangwa Town."

c) the respondent (Ondangwa Town Council) was authorized to cause the contents of the notice of motion (not the whole application) to be translated and read through the Oshiwambo Radio Service and Omulunga Radio Station

at least three (3) times a day on two (2) different days before the 15 March 2013. They argued that none of the applicants heard the contents of the publication being read on the radio. They went further and stated that even if they had heard, the message was vague and insufficient in detail to an extent that they would not have taken any steps as it appeared not to have been directed at them;

d) that (respondent) Ondangwa Town Council referred to Erf 1269 Ondangwa instead of Erf 1267 Ondangwa.

e) Respondents off-load their passengers at Erf 1267 and not Erf 1269.

[5] It is also their argument that the notice of motion which was purportedly read in Oshiwambo reads thus:

> "BE PLEASED TO TAKE NOTICE that an application will be made on behalf of the above named applicant on Monday the 6th day of May 2013, at 10h00 or soon thereafter as the matter may be heard, for an order in the following terms:
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> a) Ordering the respondents to vacate, within five (5) days of this order, the informal markets, loading and offloading places…"

[6] Applicants have also argued that the order affects them in a material way as they are contracted to 1st applicant by way of loading and off-loading their buses at his premises which they wrongly cited. In light of their relationship with 1st applicant, they are of the view that they should have been joined as part to the proceedings as they have material and direct interest in the proceedings.

[7] Mr. Shakumu for the respondents submitted that there has been substantial compliance with the rules in this matter as all applicants through 1st applicant were aware of that advertisements and radio messages referred to them. He, however, admits that there was an error of description as far as the Erf numbers were concerned. This to him is a minor error.

[8] The issues which fall for determination in my view are that of joinder and service. The law is quite clear with regards to joinder. It is basically, that, parties are often joined for reasons of convenience and equity, and to avoid oppression or a multiplicity of actions, see *BHT Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47 (W) at 50 G-H* where Marais J remarked:

> "In passing I emphasise that the rationale of the practice in regard to joinder is convenience and equity, and to avoid oppression or a multiplicity of actions."

[9] It should be not, however be noted that there are circumstances where it is a necessity to join a party because of the interest that party has in the matter. The interest referred to is not only an ordinary interest neither will a monetary interest suffice, but, it has to be a direct and substantial interest, see ex parte Body Corporate of Coroline Court 2001 (4) SA 1230 and Pretorius v Slabbert 2000 (4) SA 935 at 939 C-F. In this jurisdiction the same principle has been applied with equal force as was in *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board & Others 2011 (2) NR 726 (SC) 732* where O'Regan AJA stated:

> "The ordinary common-law principle is that a litigant must have a direct and substantial legal interest in the outcome of the proceedings. A financial interest will not suffice. There are exceptions to this rule to prevent the injustice that might arise where people who have been wrongfully deprived of their liberty are unable to approach a court for relief."

[10] This is the current legal position in this jurisdiction. The applicants' buses use 1st applicant's premises whom they have a contractual agreement with, therefore, evicting them without according them a chance to be heard is against the well-established principles of natural justice laid down by the authorities above. To allow this will be to offend the *audi alteram pattern* rule, which requires that the other side should be heard.

[11] Consequently, where an order has been made in the absence of the affected parties and the resultant prejudice is clear as is in this case, the court has an

inherent duty to intervene as its duty is to do justice between the warring parties and its intervention therefore flows naturally. The intervention can be made at any stage of the proceedings. To demonstrate, how strict the courts are, see *Jacks Trading CC v Minister of Finance and Another (Ohoronge Cement (Pty) Ltd 2013 (2) NR 491 (HC).*

[12] Mr. Namandje submitted that the order was erroneously sought and erroneously granted and therefore it is a nullity. It is clear that respondents were aware of the involvement of 1st applicant and other applicants in this matter. It, however, deliberately chose to refrain from making them party to the proceedings, but, proceeded to seek an order which for all intents and purposes affects them. This, therefore, was indeed erroneous and infact was their undoing. I do not think the court would have granted this order if it had been properly appraised of the factual position of the parties in this matter.

[13] The withholding of such vital and extremely necessary information from the court does not augur well for our legal system which thrives for the attainment of fairness and justice. The proceedings were accordingly null and void, see *Sliom v Wallach's Printing & Publishing Company Ltd 1925 TPD 650 and Lewis & Marks v Middel 1904 TS 291 at 303* where Bristowe remarked:

> "It was maintained that the only remedy was to appeal against the decision of the land commission; but we think that the authorities are quite clear that <u>where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside</u>." (my emphasis)

[14] It has been argued further that the notice of service was not properly served. Mr. Namandje referred me to the matter of Barnett & Co v Barmester & Co. [1903] TH 30 regarding nullity.

[15] I am indeed persuaded by that argument being that the order granted was a nullity and as such was of no force or effect. It, therefore, stands to reason that any order and /or action which flows from that order is a nullity. The said order being void *ab initio,* therefore, is not an order of the court. This is to say the least, is a fundamental defect which manifested itself in the issue of the proceedings so that in effect the proceedings have never started. I therefore do not agree with Mr. Shakumu's argument and his partial admission of an error materially affects the whole process.

[16] It is trite that a void order is incurably void and all proceedings based on the invalid claim or void act are also void. The reasoning being that, something cannot be founded on nothing. Further that you cannot put something on nothing, it will fall. These were the sentiments expressed by Lord Denning, that doyen of the English legal system in Mc Foy v United Africa Co. Ltd [1961] 3 ALL ER.

[17] I find it unnecessary, therefore, to consider the validity or otherwise of the service of the said order which I find to have been a nullity in the first place. This application therefore qualifies for rescission under Rule 44 (1) which reads:

> "44. (1). The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –
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> a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
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> b) …
>
> c) …
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> 2. any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.
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> 3. the court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

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[18] Respondents further made an application for correction. This application being made at the eleventh hour is made too late in the day lacks merit and is not worthy of consideration and is accordingly dismissed.

[19] In the result the following is the order.

1. The order of the 06 May 2013 granted by this court is nullified.
2. Respondents are ordered to join the 2nd to 4th applicants in these proceedings.
3. Respondents' counter application for correction be and is hereby dismissed.
4. Respondents be and are hereby ordered to pay costs.

M Cheda

Judge

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APPEARANCES

APPLICANTS: S. Namandje
Of Sisa Namandje & Co., Windhoek

1st RESPONDENT: S. Shakumu
Of Shakumu & Associates Inc., Windhoek