REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

HC-NLD-CIV-MOT-GEN-2023/00031

In the matter between:

DERK HAMUNYELA MHANDA	**APPLICANT**
and	
OLIVIA NGONGO	**1ST RESPONDENT**
THE MAGISTRATE FORTSUMEB MAGISTRATE COURT (COURT B)	**2ND RESPONDENT**
THE MESSENGER OF COURT FOR TSUMEB MAGISTRATE COURT	**3RD RESPONDENT**
PEHOVELO MHANDA	**4TH RESPONDENT**
MAPELE HENDRICK	**5TH RESPONDENT**

Neutral Citation: *Mhanda v Ngongo* (HC-NLD-CIV-MOT-GEN-2023/00031 [2023] NAHCNLD 101 (02 October 2023)

CORAM: SALIONGA J

Heard: **01 September 2023**
Delivered: **01 September 2023**
Reasons: **02 October 2023**

Flynote: Urgent application – Applicant must satisfy the requirements of r 73 (4) of the rules of court for the matter to be heard on urgent basis – Furthermore, there can be no urgency when applicant was responsible for non-action or has himself to blamed.

Summary: The Applicant filed an urgent application in this court seeking for a rule nisi order issued by a magistrate to be set aside pending the determination of another matter filed by the very applicant in this court. The reason for this was that the order sought to be set aside was clouded with various irregularities and was not supposed to be granted by the magistrate initially. This application was unopposed. The court found as follows:

Held: Practice – An Applicant must satisfy the requirements of r 73 (4) for the application to be heard as a matter of urgency.

Held that: the applicant has known since 4 August 2023 that Second respondent did not have power to grant the ex parte order. Applicant waited until 1 September 2023 to launch an application, praying the court to hear the matter on the basis of urgency

Held further that: any rule nisi granted in error or irregularly does not cause the application to be seen as urgent nor does the engagement between the parties and imminent threat of eviction meet the requirements of r 73 (4) (a).

Held: that the applicant did not provide satisfactory reasons as to why he claims he could not be afforded substantial redress in due course, consequently the court refused the application for lack of urgency.

ORDER

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1. The application is struck from the roll due to the lack of urgency.
2. The matter is removed from the roll.

JUDGMENT

SALIONGA J:

Introduction

[1] Serving before court for judgment, is an unopposed application lodged by the applicant, Mr Mhanda. In it, the applicant seeks, on an urgent basis, an order staying the rule nisi granted by a magistrate (the second respondent).

[2] The applicant seeks a further order setting aside the application for the mandament van spolie brought by the first respondent under case number 119/2023, at Tsumeb magistrate Court pending the determination of the case lodged under case number HC-NLD-CIV-MOT-GEN-2023/00014 in this court.

The Parties

[3] The Applicant is Derk Hamunyela Mhanda a major male person who resides in Walvis Bay, Namibia.

[4] The first respondent is Olivia Ngongo**,** a major female communal farmer who resides at Ohalushu village, Ohangwena Region, Republic of Namibia.

[5] The second respondent is Magistrate NB Namushinga, a major male, Magistrate of Court B at Tsumeb Magistrate Court, Tsumeb, Oshikoto Region, Republic of Namibia. He is only cited for the interest he has in the matter.

[6] The third respondent is the Messenger of Court for Tsumeb Magistrate Court, a major male, with his principal place of business at Old Building, Tsumeb, Oshikoto Region, Republic of Namibia. Equally only cited for the interest he may have in the matter.

[7] The fourth respondent is Pehovelo Mhanda, an adult male person, residing at Eenhana, Ohangwena Region, Republic of Namibia. She is cited herein for the interest he may have in the matter.

[8] The fifth respondent is Mapele Hendrick, an adult male person, who resides at Endola, Ohangwena Region, Republic of Namibia and is cited herein for the interest he may have in the matter.

Background and the applicant's case

[9] Briefly stated the background facts pertinent to this application are as follows:

[10] The applicant was born to parents Helena Amunyela and Gabriel Jonathan (now deceased) who were married in 1970. Notwithstanding, the applicant's father had two other children with the first respondent.

[11] In 1975, the parents of the applicant were granted leasehold land rights for what is now referred to as Farm Number S1/1191 at Mangetti, situated under the Ondonga Traditional Authority in the Oshikoto Region, Republic of Namibia. Consequently, the leasehold right over the Farm was exclusively registered in the name the applicant's late father as per the customary law for Oukwanyama Traditional Community, even though the farm had been allocated to both of his parents as a married couple for the purposes of farming and grazing their livestock.

[12] The applicant contends that both his mother and late father had a desire for him to inherit the farm's title when his father eventually passed away. While they had not officially documented this wish, it was an unspoken understanding between them. In advancing this wish the applicant contends that his late father was actively preparing and mentoring him to become a farmer by consistently involving him in farm-related activities, taking him along on every occasion to the farm.

[13] The applicant alleges that his father assigned and entrusted him with a specific portion of land on the farm which was designated as his farming and grazing area of which he has remained in control and possession of this portion of land from that time up until the present day. He continues to engage in farming and grazing activities. To this end, he alleges that his late father has done this for several other family members.

[14] The applicant states that his mother left her marital home due to his father's adulterous relationship with the first respondent in 2000. His father passed away on 22 July 2004. During all times he alleges that his mother was lawfully married to his father. He then controlled the farm while the first respondent took control of his father's livestock.

[15] On 22 October 2020, the Oshikoto Communal Land Board allocated the farm to the First Respondent. This allocation was based on her marriage to the applicant's late father on 24 April 1996. This was the first time the applicant learned about the marriage between the First Respondent and his father.

[16] On 27 April 2023, the applicant and his mother initiated legal proceedings under case number HC-NLD-CIV-MOT-GEN-2023/00014 against several parties, including the First Respondent, their objective in this legal action is to request an order from the court declaring the marriage between the First Respondent and his late father as unlawful and void ab initio. Additionally, they seek to nullify all the effects and consequences of that marriage, including the decision to allocate the leasehold land right of the farm to the First Respondent and the cancellation of the Certificate of Rights of Leasehold for the farm that was granted to the First Respondent.

[17] On 28 July 2023, the First Respondent applied for a Mandament Van Spolie to the Tsumeb Magistrate Court, under case number 119/2023. In this application, the First Respondent sought a rule nisi order against the Applicant, the Fourth Respondent, and the Fifth Respondent, jointly and severally, on an ex-parte basis. This application was granted by the Second Respondent on 04 August 2023.

[18] The rule nisi issued read as follows:

'The rule nisi is order (sic) to the First, Second, and Third Respondent to show cause on the 8th September 2023, at 10h00, why an order in the following terms should not be made final:

i) The First to Third Respondents must jointly and severally restore all possession ante omnia of parts of farm No.S1/1191, Onalusheshete area, Mangetti, nehale LyaMpingana Constituency, Oshikoto Region forthwith to the Applicant;

ii) An order directing the messanger of the Court for the district of Tsumeb to use all his powers necessary to enforce the aforesaid order in paragraph (i);

iii) costs of suit, if opposed;

iv) Further and alternative relief;

[19] The applicant takes issue with this order. The applicant alleges that at no stage has he ever locked or closed any gate or door to exclude the First Respondent or any other individual from accessing the portion of his land nor has he ever prohibited or prevented the First Respondent or anyone else from entering the area. In the result, he argues that the order, in its current form, is profoundly unfair and detrimental to his interests so much so that if they were to be evicted on such short notice, he has no alternative location for grazing his livestock or accommodating his employees.

[20] The applicant implores this court to exercise its inherent jurisdiction to both set aside the ex parte *rule nisi* order and to stay the Mandament Van Spolie application,

pending the determination of the ongoing legal proceedings initiated him against the First Respondent and others in this court. His request is premised on the following reasons:

(a) The significant irregularity in the proceedings before the Tsumeb Magistrate Court, which has already caused or is likely to cause substantial injustice and severe prejudice to his rights.

(b) The Second Respondent, in granting the ex parte application for a rule nisi to restore a portion of the farm, acted beyond their authority. This is evident for the following reasons:

(i) First Respondent claimed that she was allocated the farm on 22 October 2020 and the applicant’s refusal to vacate the farm only began on 14 January 2021.

ii) The applicant argues that the Mandament Van Spolie remedy is typically utilized in instances where a party is seeking to regain possession of property that has been unlawfully taken from them without the involvement of a court order. This remedy is applicable when the applicant was in peaceful and undisturbed possession of the property.

iii) The applicant contends that it is essential to emphasize that the true intent of the Mandament Van Spolie is not to safeguard general rights but rather to facilitate the restoration of unlawfully taken property.

iv) The applicant further contends that the first respondent's application lacks factual evidence for peaceful and undisturbed possession of the portion of the farm she intends to take from him. Based solely on this aspect, The applicant argues that the first respondent's application should have been unsuccessful and dismissed.

(c) The applicant contends that the application for Mandament Van Spolie is inappropriate as it is a preliminary suit that typically precedes the main underlying suit. However, First Respondent has not initiated any underlying suit. On this point alone, the applicant is of the view that the first respondent's application should have been unsuccessful and dismissed.

(d) Thirdly, the applicant contends that the supporting affidavit for the ex parte application is flawed because the person who made the deposition in the affidavit is not the same person who appeared before the Commissioner of Oaths for certification and signed the affidavit.

[21] The application was heard on 1 September 2023. I struck the application from the roll for lack of urgency. The applicant requested for reasons and here are reasons provided.

Urgency

[22] On the aspect of urgency, the applicant argued that the rule nisi that was issued was immediately enforceable and as a result is faced with imminent threat of eviction from the farm, along with the dismantling of his structures on the property.

[23] He further contends that on 30 August 2023, he was informed by the clerk of Tsumeb Magistrate Court, Mrs. Patricia Mbumbo, that the Second Respondent is unavailable to hear this matter on the return date of 08 September 2023. The Second Respondent will be attending to partially heard matters in Katima Mulilo from 04 September 2023 to 22 September 2023 and will be participating in a training workshop from 25 September 2023, to 29 September 2023. The Second Respondent is only expected to return to the office in October 2023. By that time, the ex parte order may have already been executed, resulting in his unlawful eviction, the removal of his livestock and employees, and the dismantling of my structures on the farm. This situation underscores the urgency of this matter. He argues.

[24] The Applicant contends that if the rule nisi order is not set aside and the entire application stayed on an urgent basis, pending the determination of the legal

proceedings that he has instituted he shall not have any other proper redress in due course. The applicant submits that he is the rightful heir to the estate of his late father, and he is entitled to inherit from his father, including to succeed his father to the title of the farm, which is now unlawfully allocated to First Respondent.

[25] The Applicant contends that he possesses the right to occupy the portion of land that was entrusted to him by his late father, who was the rightful owner of the farm until a lawful eviction from that specific portion of land.

[26] I hereby reiterate what Parker J had said in *Fuller v Shiwele* (A 336/2014) [2015] NAHCMD 15 (15 February 2015), paragraph 2 that:

'Urgent applications are now governed by rule 73 of the rules of court (i.e. rule 6 (12) of the repealed rules of court), and sub rule (4) provides that in every affidavit filed in support of an application under sub rule (1), the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. Indeed, sub rule (4) rehearses para (b) of rule 6(12) of the repealed rules. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought, that the matter be heard on the basis or urgency, the applicant must satisfy both requirements. And *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 tells us that where urgency in an application is self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.' I associate myself to the sentiments expressed.'

Discussion

[27] The rule nisi granted by the magistrate did not come as a surprise to the applicant. The applicant has, known since 4 August 2023 that Second Respondent did not have power to grant the ex-parte order. He had ample time to bring a review application and had the gross and irregular order set aside. To date no review application in terms of r 76 of the High court Rules has been launched. This court

cannot review and set aside an order without such application being presented before it.

[28] With that knowledge, the applicant waited until 1 September 2023 to bring an urgent application for this court to grant a rule nisi and also to set aside the mandament van spolie order. It appears this urgent application was only launched after the engagement for an amicable resolution to the imminent eviction failed. The engagement that happened around the 28 August 2023 but respondent declined the proposal. The application was enrolled at 9:00 but stood down for hearing at 14:00 because there were no return of service.

[29] It should be noted that this application was brought against an interim order way before the return date. On the basis that applicant was advised by the clerk of Tsumeb Magistrate Court Mrs Patricia Mbumbo that second respondent will be unavailable to hear the matter on the return date. But there is no confirmatory affidavit attached. Applicant could not anticipate what to happen to a rule nisi issued in the absence of the issuing magistrate as another magistrate could instead attend to the said matter.

[30] In my view, the fact that the (immediately enforceable) rule nisi was granted in error or irregular does not cause the application to be urgent. Nor was the fact that the applicant was engaged in an amicable resolution which did not materialise and that applicant is faced with an imminent threat of eviction from the farm, do meet the requirement in r 73 (4) (a). The applicant has himself to blame for non-action and I disagreed with the applicant's submission.

[31] On the second leg of rule 73(4) the applicant has to provide under 73 (4) (b) 'the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.' After reading the founding affidavit, it is clear that the applicant did not provide satisfactory reasons why he claims he could not be able to obtain substantial redress at a hearing in due course.

Conclusion

[32] Based on the aforesaid reasons, I concluded that applicant has not satisfied the dual requirements of r 73 (4), and declined granting the indulgence he prays for, namely, to hear the matter on urgent basis.

[33] In the result I made the following order:

1. The application is struck from the roll due to the lack of urgency.
2. The matter is removed from the roll.

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J. Salionga

Judge

APPEARANCES

APPLICANT:	S Matheus Of Slogan Matheus & Associates Inc, Ongwediva
RESPONDENTS	No Appearance