REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 195/2007

In the matter between:

BEN ALUENDO ENGHALI **FIRST APPLICANT**

JOSEPH SHEFENI ENGHALI **SECOND APPLICANT**

and

ERASTUS LINEEKELA NGHISHOONO **RESPONDENT**

Neutral citation: *Enghali v Nghishoono* (A 195/2007) [2013] NAHCMD 93 (8 April 2013)

Coram: PARKER AJ
Heard: **25 March 2013**
Delivered: **8 April 2013 (Reasons)**

Flynote: Applications and motions – Urgent application – Requirements for in terms of rule 6(12)*(b)* – Explanation of requirements in *Salt and Another v Smith* 1990 NR 87 relied on – In instant case requirements not satisfied by the applicants – Nevertheless the court heard the application on urgent basis because on the papers the application is totally lacking in merits – Court dismissed the application with costs after hearing it.

Summary: Applications and motions – Urgent application – Requirements for in terms of rule 6(12)*(b)* of the rules of court – Explanation of requirements in *Salt and Another v Smith* 1990 NR 87 relied on – Applicants failed to satisfy requirements of

rule 6(12)*(b)* of the rules – Nevertheless the application was heard because on the papers the application is extremely lacking in merits – Relief sought, if granted, has the effect of the court in the instant proceeding setting at naught the previous orders of the court (per Ndauendapo J and Van Niekerk J) and that would be in derogation of due administration of justice when the applicants have willfully refused to comply with the order by the court (per Ndauendapo J) whereupon the applicants were found guilty of civil contempt by the court (per Van Niekerk J) and an order made that they be detained in prison until they comply with the order made by Ndauendapo J – Consequently court dismissed the application with costs after hearing it.

ORDER

The application to compel launched on 20 March 2013 is dismissed with costs on a scale as between party and party; and reasons therefor will be delivered and made available to counsel on or before 12 April 2013.

JUDGMENT

PARKER AJ:

[1] In this matter the applicants, represented by Mr Mbaeva, have brought an application on notice of motion and they pray for an order in the following terms:

> ‘(a) Dispensing with the forms and service provided for in Rule 6(12) of this Honourable Court and treating this matter as one of urgency;
>
> (b) Ordering the Respondent and/or his legal practitioner to instruct the Head of the Gobabis Prison and/or any person in authority to release the Applicants from custody;
>
> (c) Directing Respondent to pay the costs of this application;
>
> (d) Further and alternative relief.’

[2] The respondent, represented by Ms Schulz, have moved to reject the application. It is Ms Schulz's submission that the founding affidavit does not satisfy the requirements of 6(12)*(b)* of the rules of court. Upon the authority of *Salt and Another v Smith* 1990 NR 87 I accept Ms Schulz's argument. Nevertheless, I decided to hear the matter in order to get it out of the way on account of the fact that (a) the application has, with respect, not one iota of merit and (b) the matter has been making its rounds in the court as long ago as 2007 during which time there has been a series of suchlike urgent applications and, of course, judgments and orders thereanent. One such order is that granted by my Brother Ndauendapo J on 19 May 2009 and reasons therefor delivered on 1 March 2013. Another order is the one granted by my Sister Van Niekerk J in a closely related matter in case No. A 88/2010 on 7 May 2010. Indeed, these two orders are the provenance of the present application. After hearing the application, I made the following order:

'The application to compel launched on 20 March 2013 is dismissed with costs on a scale as between party and party; and reasons therefor will be delivered and made available to counsel on or before 12 April 2013.'

These are the reasons.

[3] The terms of the 19 May 2009 order are:

'(a) That the application by the applicants as per prayer 2 of the notice of motion is hereby dismissed with costs.

(b) That the counter application by First, Second and Third Respondents is hereby granted with costs.

(c) That the applicants and all their livestock are ordered to vacate Unit B of farm Schellenberg No. 79 within three (3) months from the end of May 2009.'

And the terms of the 7 May 2010 order are:

(a) That the First and Second Respondents be committed to imprisonment for contempt of court for failing to obey or comply with paragraphs 2 and 3 of the order of the above Honourable Court dated 19 May 2009.

(b) That the First and Second Respondents, after their committal as aforesaid, remain in incarceration until they have complied with paragraphs 2 and 3 of the order of the above Honourable Court dated 19 May 2009 (including that the counter application by respondents (First, Second and Third Respondents) is hereby granted with costs and that the Respondents and all their livestock are ordered to vacate Unit B of farm Schellenberg No. 79 within three (3) months from the end of May 2009).

(c) That the Deputy Sheriff for the District of Gobabis as well as any other Deputy Sheriff of this Honourable Court of the district wherein the First and Second Respondents, may find themselves, be authorized as directed to arrest the First and Second Respondents for the purposes of their aforesaid committal.

(d) That the head of prison, Windhoek, alternatively the head of any other prison of such district wherein the First and Second Respondents may find themselves, be authorized and directed to detain the First and Second Respondents in incarceration for the purposes of the relief as set out in prayers 2, *supra*.

(e) That the First and Second Respondents pay the costs of this application on a scale as between attorney and client.'

The 7 May 2010 order was sought and granted because for almost one good year the applicants wilfully refused to comply with the 19 May 2009 order.

[4] The contempt of court procedure in the proceedings in which the 7 May 2010 order was made is, therefore, a means of enforcing performance of the 19 May 2009 order. (See *The Minister of Education and Another v The Interim Khomas Teachers Strategic Committee and All Persons Forming Part of the Collective Body of the First Respondent and Others* Case No. LC 166/2012 (judgment delivered on 5 December 2012) (Unreported) para 6 et passim. And as matters stand, as I have said previously, the 19 May 2009 order has to date not been obeyed. The only reason for the disobedience – and, with respect, a very bad reason – adverted to by Mr Mbaeva is that the applicants have noted – out of time – an appeal at the Supreme Court. According to Mr Mbaeva the appeal was noted on 28 October 2010. Assuming, for argument's sake, condonation for the late noting of the appeal was granted by the Supreme Court, it would still mean the applicants did wilfully refuse to obey the 19 May 2009 order for close to 17 months; and now they are asking this court in this

proceeding not only to overlook their contumacious conduct but also to reward them for wilfully refusing to comply with the 19 May 2009 order by granting the relief they now seek in the instant proceeding.

[5] The court observed in *The Minister of Education and Another v The Interim Khomas Teachers Strategic Committee and All Persons Forming Part of the Collective Body of the First Respondent and Others*, para 10, 'the court will not allow its process to be set at naught and treated with contempt by any person'. Accordingly, the court in the present proceeding is not competent to, and cannot, grant the relief sought by the applicants. If the court granted the relief sought the court would be setting its own order at naught and that would be in derogation of due administration of justice. The application was accordingly dismissed with costs.

C Parker

Acting Judge

APPEARANCES

APPLICANTS	:	T Mbaeva Of Mbaeva & Associates, Windhoek
RESPONDENT	:	F Schulz Of PD Theron & Associates, Windhoek