REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: I 427/2013

In the matter between:

HEWAT SAMUEL JACOBUS BEUKES	**1ST APPLICANT**
ERICA BEUKES	**2ND APPLICANT**

and

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	**1ST RESPONDENT**
MINISTER OF JUSTICE	**2ND RESPONDENT**
ATTORNEY-GENERAL	**3RD RESPONDENT**
THE JUDGE PRESIDENT OF THE HIGH COURT	**4TH RESPONDENT**
THE REGISTRAR OF THE HIGH COURT	**5TH RESPONDENT**
THE DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK	**6TH RESPONDENT**
JOHN BENADE	**7TH RESPONDENT**
LILLY BENADE	**8TH RESPONDENT**

Consolidated with A 83/2014

In the matter between:

HEWAT SAMUEL JACOBUS BEUKES	**1ST APPLICANT**
ERICA BEUKES	**2ND APPLICANT**

and

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	**1ST RESPONDENT**
MINISTER OF JUSTICE	**2ND RESPONDENT**
ATTORNEY-GENERAL	**3RD RESPONDENT**
THE JUDGE PRESIDENT OF THE HIGH COURT	**4TH RESPONDENT**
THE REGISTRAR OF THE HIGH COURT	**5TH RESPONDENT**
THE DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK	**6TH RESPONDENT**
JOHN BENADE	**7TH RESPONDENT**
LILLY BENADE	**8TH RESPONDENT**
PATRICK KAUTA	**9TH RESPONDENT**
LOUIS HERBERT DU PISANI	**10TH RESPONDENT**
NEDBANK NAMIBIA LIMITED	**11TH RESPONDENT**
THE REGISTRAR OF DEEDS	**12TH RESPONDENT**

Neutral Citation: *Beukes v The President of the Republic of Namibia* (A 427/2013 and A 83/2014) [2021] NAHCMD 129 (25 March 2021).

CORAM: MASUKU J

Heard: 6 July 2020
Delivered: 25 March 2021

Flynote: Constitution – application to declare repealed provisions of the High Rules - unconstitutional – decision to declare property specifically executable by the Registrar challenged - Judicial powers of the Registrar conferred by legislation at the time – Delay – unreasonable delay on the part of the applicants to timeously bring the application- the doctrine of *functus officio* – the court bound by the previous decision taken by the high court – The propriety of declaring repealed rules unconstitutional investigated – Propriety of citing legal practitioners as parties in proceedings where they represent clients and its impact on the independence of the legal profession and individual legal practitioners.

Summary: In 2001, the Registrar of the High Court issued a default judgment, followed by an order declaring certain immovable property of the applicants question specially executable. Aggrieved by these decisions, the applicants approached the High Court to have the decisions which were issued in terms of rule 35 of the repealed rules together with the rule to be declared unconstitutional and invalid. The application was dismissed by this court. The applicants approached the Supreme Court in an attempt to overturn this court's judgment. The appeal of the High Court judgment was ultimately abandoned. In the present case the applicants' case rests on the grounds that the Registrar in law had no power in law to have issued the orders because as such powers vest in the Judiciary as per Article 78 of the Constitution. The respondents, in opposition, raised several points of law, which they claim should result in the applicants being non-suited. They raise the unreasonable delay of the applicants in launching these proceedings; that the rules that the applicants seek to be declared unconstitutional are no longer in existence and are incapable of being so declared and that this court is *functus officio,* having finally and fully exercised its jurisdiction in the matter.

Held: that a statute or subordinate legislation which is sought to be declared invalid or unconstitutional should be in existence at the time of filing such application for such *declarator*.

Held that: the court may not question the validity of legislation which no longer exists and that has been repealed by the Legislature. To do so, may be tantamount to engaging in academic gymnastics that waste time and judicial resources.

Held further that: at the time that the Registrar issued the orders complained of, the state of the law allowed the Registrar's office to do so.

Held: that the Registrar, when granting the order challenged, exercised her powers as conferred upon her by law at the time and was thus not unlawful.

Held that: the period taken by the applicants to institute present proceedings, being 9 years, is unreasonable and prejudicial to the third parties. This is exacerbated by

the absence of any explanation detailing the reasons for the egregious delay by the applicants.

Held further that: citing lawyers in proceedings in which they represent their clients, has a negative impact on the protection and guaranteeing of human rights and puts the independence of the legal profession in jeopardy, which must be avoided at all costs. It also imperils the right to legal representation by a legal practitioner chosen by the client, which is protected by Art. 12 (*e*) of the Constitution of Namibia.

Held: that the practice of making lawyers one with their clients by suing them for representing their clients, violates the individual lawyer's right to practice his or her profession as guaranteed by Art. 21(j) of the Constitution of Namibia.

Held that: dissatisfied litigants have alternative options open to them if dissatisfied with the work and or conduct of legal practitioners in the course of their representation. Citing lawyers impinges on the rights to fair trial as afforded to litigants by Article 12 of the Constitution.

In the premises the application to have Rule 35(5) declared unconstitutional and to have the Registrar's directive declaring immovable property specifically executable invalid and unlawful, together with the incidental relief sought, was refused with costs.

ORDER

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1. The application to have Rule 35(5) of the repealed Rules of this Court declared unconstitutional is refused.
2. The application for the Registrar's directive declaring immovable property specially executable, invalid and unlawful is hereby refused.
3. The application to declare the ejectment of the Applicants unlawful as a result of the orders sought and refused in prayers 1 and 2 above, is refused.
4. An order declaring that the processes as excursed by the Respondents, is hereby refused.

5. An order restraining the Registrar of Deeds from transferring the property in question into the name of any person, is refused.
6. The Applicants are ordered to pay the costs of the application, jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed counsel, where so employed.
7. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Serving before court for judgment, are two applications, which were, by order of this court consolidated as they largely involve the same parties and the issues submitted for determination are identical. Both applications have, for reasons which are not material to this judgment, been interned in the case management belly of this court for a considerable period of time, with a multiplicity of twists and turns that saw the finalisation of the case management procedures of both matters incur enormous delays.

[2] At the heart of both applications is immovable property, described as Erf 4479, Khomasdal, Windhoek, which was, in terms of the repealed rules of this court, declared specially executable by the Registrar of this court. The applicants, who are husband and wife and apparently married in community of property, were the registered owners of the property in question. They seek orders declaring the sale of the property and related processes declared unconstitutional and that the properties be re-registered, as it were, back into their respective names.

[3] It is the propriety of granting the orders prayed for by the applicants that will occupy the court in this judgment. The applicants take the view that they are eminently entitled to relief sought. The respondents, many as they are and

extracted from different constituencies, stand in unison and oppose the granting of the relief sought as worthy of nothing but a dismissal. Who among these sets of protagonists, is on the correct side of the law?

Background

[4] It is fair to mention that the facts giving rise to this matter are fairly straightforward, raising hardly any real factual controversy. The controversy is the legal colour that must attend to the facts, with both sets of parties along the divide, contending for a legal position in favour of a finding in line with their interests. The relevant facts can be summarised in the following fashion:

(1) In respect of A 83/2014, the South West African Building Society, being owed by the applicants applied for and obtained default judgment in terms of rule 6(5)(a) of the Rules of this court on 8 November 2001;
(2) On 26 November 2001, the Registrar of this Court granted the default judgment as prayed, in pursuance of which notices of sale of the property described as Erf 4479, Khomasdal, Windhoek, Namibia, were issued, resulting in the sale of the property in question;
(3) The property in question was bonded to the said Bank;
(4) The 7th and 8th respondents purchased the property in question at the sale, which purchase was financed by Nedbank Namibia Limited, the 11th respondent;
(5) The 7th and 8th respondents, it is common cause, did not take beneficial possession of the property as the applicants remained in occupation of the property. This resulted in the 11th respondent repossessing the property from the 7th and 8th respondents.
(6) The applicants remain in occupation of the property to date;
(7) The applicants challenged the constitutionality of the procedures that were employed in declaring the property specially executable and this court dismissed their application.
(8) An appeal was lodged with the Supreme Court but it never saw the light of day, as the applicants appeared to have succumbed to some inertia in pursuing the appeal. It was accordingly deemed abandoned.

[5] Under Case No. A427/2013, the applicants sought an order in the following terms:

'1. Declaring Rule 31(5)(a) of the Rules of the High Court unconstitutional and setting aside the said Rule 31(5)(a);
2. Declaring the additional directive by the Registrar in granting default judgment by declaring immovable property specifically executable, unlawful and setting aside the said unlawful act;
3. Setting aside the writ of ejectment in this matter as a nullity;
4. Directing that such Respondents electing to oppose the application pay the costs of the Application.
5. Granting Applicants such order or alternative relief as the above Honourable Court may deem fit.'

[6] Under case No. A83/2014, the applicants moved the court to grant the following relief:

'1. Declaring Rule 31(5)(a) of the Rules of the High Court unconstitutional and setting aside the said Rule 31(5)(a).
2. Declaring the additional directive by the Registrar in granting default judgment by declaring immovable property specially executable unlawful and setting aside the said unlawful act.
3. Setting aside the notice of sale in execution in this matter as a nullity.
4. Declaring the collusion of respondents in the said actions to evict applicants and sell the property in question an abuse of both the court and its procedures.
5. Ordering the 12th respondent to desist from transferring the said property and to reverse the transfer of 2005 into the name of the applicants.
6. Declaring the collusion of respondents in the said actions to evict applicants and sell the property in question an abuse of both the court and its procedures.
7. Declaring that 10th respondent in particular undermined the dignity and integrity of the Court.
8. Directing that such Respondents electing to oppose the application pay the costs of this Application.
9. Granting Applicants such order or alternative relief as the above Honourable Court may deem fit.'

[7] It is a matter of comment that the main relief sought by the applicants is, save for the issues referred to as collusion, substantially similar. I may mention that a reading of the founding affidavit in both applications reveals that the same facts are relied on by the applicants for the relief. It is small wonder that the court was inclined, on application by the parties, to consolidate the applications.

[8] It is a matter of regret that the applicants, in their notice of motion under Case No. A83/2013, use the word 'respondents' liberally, without identifying the respondents, in particular, who are alleged to have colluded in the eviction of the applicants. One doubts whether the President of the Republic, the Minister of Justice, the Attorney-General and the Judge President, for instance, would be included in this nefarious scheme alleged.

The applicants' case

[9] The applicants' applications are predicated on the founding affidavit deposed to jointly by the 1st applicant, Mr. Beukes. They allege in the main that after the sale of the property, they launched an application on 25 July 2005 in which an order declaring the default judgment issued by the Registrar, unconstitutional was sought from this court. That application was dismissed, prompting the applicants to approach the Supreme Court. The applicants do not, I interpose to mention, take the court into their confidence about what happened in the Supreme Court. There are no details as when the appeal was lodged and when it was heard, if at all.

[10] It is the applicants' case that the Registrar of this court had no power in law to issue the orders he or she purported to exercise as these powers were vested by the Constitution in the Courts by Article 78 of the Constitution. It was contended therefor that the exercise of judicial powers by the Registrar, as stated above, is in conflict with Art. 78 and is thus unconstitutional.

[11] The applicants further punch holes in the manner in which the property was alienated in favour of the 7th and 8th respondents. They allege that when the property was attached by the Deputy-Sheriff, they were not notified of the

attachment. On 18 November (the year unspecified)[1], Mr. Du Pisani, issued a writ of ejectment of the applicants without a court order.

[12] The applicants further depose that on 27 November 2013, they delivered an application attacking the validity of the ejectment order that had been issued against them. It is their case that on 24 January (again the year not mentioned) the 10th respondent, Mr. Du Pisani and the 7th respondent 'lied under oath to the Court that the latter was in South Africa during the time that he was in Windhoek'. The applicants then pointed out the perjury to the court on 27 January 2014.

[13] The applicants further depose that on the 10th, (with no date specified), the 10th respondent delivered a notice of sale in execution, which was backdated to 24 February 2014. It contained no description of the property for sale nor did it refer to any court order. The applicants state further that the 10th respondent is appointed as an acting Judge from time to time and that his spouse is an estate agent. The final allegation is that the 5th to 11th respondents 'collaborated to have the applicants ejected from the said property'.[2]

[14] I interpose to mention that when one has proper regard, it would appear that the applicants appear to have confused the 10th respondent, Mr. Du Pisani and the 9th respondent, Mr. Patrick Kauta. Nothing has been done to correct the correct reference to the correct respondent. It remains what it is, deposed under oath as the allegations are.

The respondents' case

[15] It is correct to say that the respondents filed their answering affidavits and disputed the applicants' allegations, pound for pound. Though that be the case, the respondents appear not keen to have the matter dealt with on the factual allegations. They raised certain points of law and in pursuance of which they moved the court to dismiss the application in its entirety, with costs. They allege that the applicants' application is nothing but an abuse of the court's processes and procedures that should be thrown out with both hands, so to speak.

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[1] Para 15.6 of the Founding Affidavit, under Case No. A 83/2014.
[2] Para 15.16 of the Founding Affidavit.

[16] Chief, amongst legal the arguments advanced on behalf of the respondents, is that the applicants should be non-suited because they have taken an inordinately long time to launch the present proceedings; that the applicants' application is ill-conceived because the rules that they move should be declared unconstitutional and set aside, were repealed and are not in existence and thus incapable of being so declared; the respondents further argue that this court is *functus officio* in respect of the declarator and that matter is thus rendered *res judicata*. There are other issues that the respondents raise that may or may not be necessary to mention and decide in the instant case.

[17] In view of the respondents' approach, I am of the considered view that it would be prudent, regardless of whatever factual issues may arise, to, in the first instance, deal with the legal issues raised by the respondents because if upheld, they may serve to bring the matter to an abrupt end. I say this also cognisant that both sets of parties appear to agree with the factual background of the matter, as captured above.

[18] I presently proceed to deal with the various legal points of contestation raised on the respondents' behalf. It would appear to me that in this connection, it would be prudent to first deal with what I consider to be the mainstay of the applicants' case, namely the *declarators* mentioned in prayers 1 and 2 of the applicants' notice of motion, namely declaring rule 31(5)(a) of the rules unconstitutional and declaring that the additional directive by the Registrar in granting default judgment and declaring property specially executable unlawful and liable to be set aside.

The *declarators*

[19] The first issue to deal with relates to the question whether the applicants are entitled to the declaration of unconstitutionality of the erstwhile rule 31(5)(*a*) of the rules of the court. It is very significant, in my considered view to consider that the rule in question was repealed when the current rules, which provide for judicial oversight in the declaration of property executable, in terms of rule 108, were promulgated.

[20] The repeal of the said rules was contained in Government Gazette No. 5392, dated 17 January 2014, which came into effect on 16 April 2014. The question that logically follows is the following: can the court properly declare unconstitutional rules that are no longer in existence and which have been repealed in terms of the law? My answer is an emphatic No!

[21] Declarations of invalidity or unconstitutionality apply in matters where the statute or other instrument, sought to be declared invalid or unconstitutional, is in existence at the time the declarator is filed with the court. It would, in my considered view, be improper to attempt to resurrect the repealed rules, and purport to declare them unconstitutional 'posthumously' as it were. No authority was cited to me that suggests that it is proper and permissible for the court to resurrect what the lawgiver has, in exercise of its legislative power, condemned to the grave. It would be queer and certainly improper for the court, in that event, to declare it unconstitutional, and thereafter return it to the same grave as it were.

[22] If the law-giver, in exercise of powers interned in him or her, and for reasons that need not be furnished, repeals legislation, whether primary or subordinate, the court may not, subsequent to the repeal, interrogate the validity of the said legislation and decide on its constitutionality or validity, when it is no longer in the statute books, but has been repealed.

[23] To do so, would be tantamount to the court engaging in fruitless academic gymnastics. It would be a waste of time, resources and abuse of judicial powers and the machinery of the courts. Courts should respect the doctrine of separation of powers, by respecting the lawful steps that will have been taken by the lawgiver to amend or repeal legislation. This is a line that the courts dare not cross.

[24] It is true that from the judgment of this court in *Hiskia v The Body Corporate of Urban Space*[3], the rules complained of were unconstitutional. I say this cognisant the matter related to the rules of the Magistrates Court. The reasoning does, however appeal and apply to the present matter. The only difference is that in *Hiskia* the application for declaration of invalidity was moved during the lifetime of

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[3] *Hiskia v The Body Corporate of Urban Space* HC-MD-CIV-MOT-GEN-2017/00148 (31 August 2018), per Ueitele J.

the relevant legislation. It cannot be moved, as I have said, 'posthumously', as the applicants have done.

[25] The declaration of invalidity or unconstitutionality, is confined to 'living laws' and may not be declared upon those that have since exited the statute books via the door of no return, provided by repeal of legislation. Time is accordingly of the essence in moving applications for declarations of invalidity or unconstitutionality. It would appear to me that the applicants' remedy, if exists, does not lie with them seeking the declaration of unconstitutionality as they do in this case. The time to do so passed with the repeal of the impugned rules.

[26] For the above reasons, it would seem to me that the applicants, aggrieved as they may be, may not get solace in the relief they seek. It is impermissible for this court to declare unconstitutional what is no longer in existence as law, whether subordinate or primary. The declaration of unconstitutionality must therefore be refused as I hereby do.

[27] I now turn to deal with the application relating to the declaration of the Registrar's granting the default judgment and declaring the property specially executable, invalid. In this regard, it would appear that the applicants attempted to have the orders issued by the Registrar set aside by this court but without success. It is also clear from the applicants' papers that they appealed to the Supreme Court but they are not forthcoming with the fate of their appeal. According to the respondents, and which is not denied by the applicants, the appeal never saw the light of day.

[28] The result and upshot of this is that the judgment of this court stands as it has not been set aside.[4] This court is thus *functus officio,* having fully and finally exercised its jurisdiction in this matter. It cannot, even if it, with the benefit of hindsight, finds that it erred, alter or correct its order. If the applicants were dissatisfied with a judgment of this court, as they evidently are, they cannot come to this very court for relief that was refused by this court in previous proceedings.

[29] It would, in my considered view, be incorrect to allow them to have a second bite to the cherry, as it were. Their remedy, subject to applicable time limits, lies

[4] See Case No. A233/2005 per Muller J.

somewhere up the proverbial hill, with the Supreme Court and where it appears they did not see the matter through the entire gauntlet of the Supreme Court procedures for reasons that are unexplained.

[30] A similar application served before this court in *Maletzky v The Government of the Republic of Namibia*[5]. In that case, the court reasoned that when the Registrar in those matters granted the relief sought, including the default judgments, that office was authorised by law to do so at the time. 'Their actions were lawful at the time and this court is of the view that unless the conduct of either the registrar or the clerk in granting the default judgments complained of was questionable in the sense of being capricious, *mala fide* or malicious, their actions were valid and in keeping with the state of the law at the time.'[6]

[31] At paragraph 25, the court expressed itself in the following manner:

> 'Courts will generally frown upon retrospective application of any statute and this court is not an exception. In *casu,* there is no doubt that there can be only be prospective application of the law, especially considering the effect that any retrospective application of the new enactments would have on innocent third parties, as well as taking into account the fact that there is no allegation nor evidence that the claims against the applicants were not legitimate claims nor that the default judgments were maliciously granted, *mala fide* or erroneously at the time.'

The court finally noted that the amendment of this court's rules did not in any shape or form, intimate any retrospective application of the rules.

[32] I am of the considered view that the instant case is on all fours with the *Maletzky* case, which has not, as far as I am aware, been set aside on appeal. It thus constitutes good and sound law and the doctrine of judicial precedent calls that I walk in its contours, considering that the issues at play are similar.

[33] In the premises, I am of the considered view that it is not appropriate nor legally correct for the court to grant the declarator to the effect that the registrar of

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[5] *Maletzky v The Government of the Republic of Namibia* (HC-MD-VIC-MOT-GEN-2017/00148) [2019] HAHCMD 142 (2 May 2019).
[6] *Ibid* para 24.

this court acted in an invalid manner when granting the orders complained of. This is because the law at the time of the exercise of the powers allowed the registrar to do just that. It would be incomprehensible for this court to declare those actions unlawful retrospectively. Again, time is of the essence in these matters. I accordingly refuse to grant the *declarator* that the granting of default judgments by the registrar and declaring property specially executable, was unlawful and must be set aside.

Delay in launching the proceedings

[34] This is another legal issue that was raised by the respondents, especially the 9th and 11th respondents. They contend that there has been an inordinate delay period between the time when the actions giving rise to the application arose in connection and the time when the applicants decided to lodge this application.

[35] From the applicants' affidavit, it is clear that the matter, which brings them before court, now occurred in 2005. At the time when the application was lodged in 2014, the matter giving rise to the application had taken place a good 9 years previously. In the light of this delay, the 9th and 11th respondents implore the court to non-suit the applicants on that ground alone. Are they correct?

[36] Why should matters be brought to court for adjudication without undue delay? In *Keya v Chief of the Defence Force,*[7] the Supreme Court pronounced itself in the following language:

'[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time it took the litigant to institute the proceedings was unreasonable, then the question arises whether the court should, in exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the High Court held that each case must be judged on its own facts and circumstances. So what may be reasonable in one case may not be so in another. Moreover, the enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.

[7] *Keya v Chief of the Defence Force* 2018 (1) NR 1 SC.

[22] The reason for requiring applicants not to delay unreasonably in judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish the prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.' See also *China State Engineering Construction Corporation v Namibia Airports Company*[8]

[37] It appears to me that although this is not, strictly speaking, an application for review, the sentiments stated in *Keya* resonate with full force to the instant matter, in light of the prejudice. Parties, even in ordinary applications, are entitled to know, after the lapse of a reasonable time, that the last word on the matter has been spoken and that they proceed with their lives, knowing that the matter is at rest. In this case, the applicants rested on their laurels for a period of 9 years before they brought the present proceedings.

[38] I pause to observe by parity of reasoning that in civil debts, the Prescription Act, No. 68 of 1969, prescribes a period of three years for lodging proceedings. This period must be regarded as an acceptable and reasonable standard for institution of proceedings generally speaking. To multiply the period of three years by three, as is the case in this matter, suggests inexorably that the delay by the applicants in launching these proceedings is egregious, prejudicial and therefor improper to condone.

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[8] *China State Engineering Construction Corporation v Namibia Airports Company* (SA-20/2019) [2020] NASC (7 May 2020).

[39] I find for a fact that the period taken by the applicants before launching this application is unreasonable. The prejudice that attends to this matter is manifest. The case involves innocent third parties who would have purchased the property at an auction. The Bank is unable, as this application remains undetermined, to deal with the property. Their rights would certainly be negatively affected if the legal knot that was tied by the judgment of the court, which remains unaffected for 9 years, were to be untied in these proceedings.

[40] It is for that reason that court rules provide time limits within which matters may be brought to court, including appeals. A party that delays lodging proceedings before court would only have him or herself to blame if the matter is not entertained because of the unreasonable delay.

[41] What compounds matters is that the applicants do not, anywhere in their papers, explain the reasons for the delay, nor do they apply for condonation in that regard. As such, the court would, even if it was persuaded that the time taken to launch these proceedings, is not inordinate, it would be hamstrung in attempting to exercise its discretion, as the applicants have not provided the court with the material ingredients to deal with this aspect.

[42] I am of the considered view that the applicants should not, in the interest of finality, be allowed to bark this tree after such an inordinately long period of time. It is a matter of comment that the applicants remain in the property without any valid legal right. Orders evicting them from the property have been treated by them with disdain and this resulted in the 7th and 8th respondents unable to occupy the property they had acquired from the judicial sale.

[43] The applicants have known about their grievance for the longest time and they have not, however, taken the necessary steps to prosecute their matter within a reasonable time. This finding is made in addition to and appreciation of the issue of *functus officio* discussed above. The point of the unreasonable delay by the applicants is, in my considered view, correctly raised and must be upheld.

[44] In view of the conclusion reached above, it appears to me that it would, in the circumstances, be improper to grant the relief prayed for by the applicants. They have, in their notice of motion, also prayed for prayer orders relating to what they

claim are cases of collusion amongst some of the respondents against them. Unfortunately, on a proper and close reading of their founding affidavit, they do not make a proper case for the findings relating to the collusion alleged.

[45] It must be pertinently mentioned that relief sought in a notice of motion is not willy-nilly granted by the court *in vacuo* and merely for the asking. Relief granted must find its life and being and therefor its grant, in appropriate supporting allegations made in the founding affidavit. It is for that reason that it is stated in law that a party stands or falls on the allegations made in the founding affidavit. In the instant case, no sufficient allegations are made for the court to grant the relief related to the allegations of collusion. They appear to hang in the air!

Citation of lawyers in proceedings

[46] At the hearing of the matter, I requested counsel on all sides to prepare additional heads of argument regarding the propriety of litigants citing legal practitioners in litigation in which they represented their clients. This is what has happened in the instant case. Mr. Patrick Kauta and Mr. Loius Herbert Du Pisani, are legal practitioners representing the 11th on the one hand, and the 7th and 8th respondents on the other.

[47] There is no reason given in this matter as to why the applicants found it fit to cite them and make them parties to this litigation. Whatever allegations are made against them, seem to stem from nothing else than them dutifully carrying out instructions on behalf of their respective clients. Who are their clients?

[48] Mr. Kauta's client, is Nedbank, the financial institution which is the bondholder in respect of the property forming the subject matter of this application. As stated, the property is occupied by the applicants for nothing. It appears common cause that no rent or any other form of payment has been made or tendered to the 11th respondent.

[49] The 7th and 8th respondents are the couple who purchased the property in the sale in execution but who failed, with the law on their side, to have the applicants evicted from the property to allow them beneficial occupation of the property

registered in their name. I sympathise with them as the registration of the property in their name yielded them nothing and could they continue servicing the bond with no occupation in sight? I am of the view that the law has failed them dismally. They had a right but were afforded no effective remedy.

[50] This is the involvement of the parties' lawyers that has seen them personally cited in these proceedings, with some less than complimentary remarks showered on them, and in Mr Kauta's case, on his wife as well. Should lawyers be identified with the causes of their clients?

[51] The International Bar Association (IBA) Standards on the Independence of the Legal Profession deals with these matters. In its preamble, the IBA states the following:

> ''The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate access to legal services:
> An equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restrictions, pressure or interference, direct or indirect is imperative for the establishment and maintenance of the rule of law.'

[52] What is implicit is that the independence of the legal profession and the independence of lawyers, as individuals, is critical and key to the protection and guaranteeing of human rights. In other words, absent the independence of the legal profession and individual lawyers, then human rights and their beneficial exercise stand in serious jeopardy. The independence of the legal profession and individual lawyers, is one of the cardinal foundations on which the observance and protection of human rights securely rest.

[53] The minute a person or institution interferes with or places improper restrictions or applies pressure on the legal profession or individual lawyers, then the independence of the profession or the particular lawyer, is placed in jeopardy, possibly to the detriment of clients and potential clients and ultimately, the principle of the rule of law. This must be avoided at all costs if the human rights project is to be the success that it was envisaged to be by the forebears of this great country.

[54] In dealing with the rights and duties of lawyers, the IBA at para 6 and 7 states that:

'6. Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public.

7. The lawyer is not to be identified by the authorities or the public with the client's cause'

[55] It is my considered view, that the standards stated above speak to the inviolability of the lawyers' duty at all times to fully and properly represent their clients, subject to the governing legislation and ethical obligations. The standards guarantee that lawyers shall be allowed to freely, diligently and fearlessly represent their clients. There should be no impediments, fear of reprisals, threats or inducements offered to influence the manner in which lawyers render services to their clients.

[56] I see no reason why these standards, which are internationally acclaimed and respected, should not be called in aid and observed in Namibia. I say so quite cognisant of the good standing and respect that this country enjoys in the Community of Nations. This standing should not be watered down or diminished by incidents like the present one, which may not be specifically provided for in our written laws.

[57] Where litigants, against whom a legal practitioner acts in the interests of his or her client, sue that legal practitioner and makes him or her one with the client's cause, that becomes a breeding ground for invoking fear of reprisals as the lawyer will, in future hesitate and not act independently and fearlessly in pursuing the client's cause. This directly affects the independence and effectiveness of the lawyer as much as it affects the protection of that individual litigant's rights to legal representation and thus to fully and properly exercise their human rights.

[58] Furthermore, that conduct serves to interfere with the right of a legal practitioner to practise his or her profession. It must be recalled that Art. 21(*j*) of the

Namibian Constitution protects the right to 'practise any profession, or carry on any occupation, trade or business.' Where lawyers are sued for representing their clients, their right to freely practise their profession is violated as they may become lily-livered in the performance of their profession.

[59] Where litigants are allowed to sue lawyers personally for representing their clients or as a result of doing so, the independence of the legal profession and of the particular lawyer, is imperilled. Lawyers should not sit in consultation with a client, trembling as a result of them apprehending that they may be personally sued for representing their client properly, diligently and fearlessly. This phenomenon is one that we can ill-afford in this jurisdiction as it fundamentally affects the right 'to be defended by a legal practitioner of their choice'.[9] It should not be allowed to take root, let alone to bear fruit. It must simply be nipped in the bud.

[60] This is not to say there is no accountability for lawyers in Namibia. Where a lawyer has breached the ethical rules or has in any way violated his or her oath of office in the course of representing a client, there are avenues open by law to such an aggrieved party. They may report the conduct to the Law Society for appropriate measures to be taken after investigations. It is, for that reason unseemly that persons in the applicants' position should be allowed to sue their protagonists' lawyers, as that may detrimentally affect the proper operation and administration of justice and upholding of the rule of law.

[61] The independence and fearlessness of lawyers in the discharge of their professional duties is critical and is key as lawyers are an indispensable cog in the administration of justice and the protection and guaranteeing of human rights.

[62] In addition, it appears to me that the citing of the lawyers as has happened in this matter, must be frowned upon as an unwanted aberration for other reasons. I say so because this practice impinges on the fair trial rights afforded to litigants by Article 12 of the Constitution. Once you interfere with right to legal representation, you interfere with the proper course of justice and the reign of the rule of law. This should not be allowed or tolerated in a democratic society such as we have in

[9] Article 12(*e*) of the Namibian Constitution.

Namibia. As is evident from the Constitution, the rule of law is a foundational pillar of the Nation.[10]

[63] Those who continue with or copy this vile practice in future, must know that they may be called to account for that transgression. It may be regarded as an abuse of the court processes and the court's officers. It may, in appropriate cases require the court to reach deep into its arsenal and unleash therefrom an order for punitive costs. This would be done to mark the court's disapproval of this cancerous practice. Let all and sundry, litigants, both lay and represented alike, be warned.

Conclusion

[64] In view of the conclusions that have been recorded above, it is the court's considered opinion that the applicants' application must accordingly fail. I find it unnecessary, in the premises, to consider all the other legal bases raised by the respondents for dismissing the application.

Costs

[65] The principles of the law applicable to costs are trite and the applicants, who are not strangers to litigation, are well aware of these. Costs ordinarily follow the event. There is no reason advanced by the applicants to the court and the court finds none that would require a departure from that well-trodden path. No case for deviation is alleged or apparent in the instant case.

Order

[66] Having regard to what has been discussed and concluded above, the following order commends itself as being appropriate in the instant case:

1. The application to have Rule 35(5) of the repealed Rules of this Court declared unconstitutional is refused.
2. The application for the Registrar's directive declaring immovable property specially executable, invalid and unlawful is hereby refused.

[10] Article 1(1) of the Constitution of the Republic of Namibia.

3. The application to declare the ejectment of the Applicants unlawful as a result of the orders sought and refused in prayers 1 and 2 above, is refused.
4. An order declaring that the processes as excursed by the Respondents, is hereby refused.
5. An order restraining the Registrar of Deeds from transferring the property in question into the name of any person, is refused.
6. The Applicants are ordered to pay the costs of the application, jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed counsel, where so employed.
7. The matter is removed from the roll and is regarded as finalised.

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T. S. MASUKU

Judge

APPEARANCES:

APPLICANT:	S. RUKORO Instructed by: Legal Aid
1TH TO 6TH RESPONDENTS:	M. C. KHUPE Of Government Attorney
7TH TO 8TH	L. DUPISANI Of Dupisani Legal Practitioners
9TH AND 11TH RESPONDENTS:	T. C. PHATELA Instructed by: Dr. Weder, Kauta & Hoveka Inc.