REPORTABLE

SUMMARY

CASE NO.: (P) A 301//2006

JOSEPH FRANS KUIIRI AND ANOTHER v BETH MBUYIPAHA KANDJOZE AND OTHERS

PARKER, J

2007 October 30

Application

Spoliation order – Essence of the remedy – What applicant must prove to obtain remedy – Only where applicant is in "peaceful and undisturbed" possession of the thing in question at the time possession was allegedly spoliated – "Peaceful and undisturbed" possession explained – Time at which it is claimed spoliation occurred is crucial in spoliation proceedings – Applicants' failing to discharge *onus* that they were in peaceful and undisturbed possession and also failing to show when they claim possession was despoiled by the respondents – Rule *nisi* discharged – Spoliation order refused.

REPORTABLE

CASE NO.: (P) A 301//2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOSEPH FRANS KUIIRI	**1st Applicant**
ANGELIKA KUIIRI	**2nd Applicant**
and	
OBETH MBUYIPAHA KANDJOZE	**1st Respondent**
KAHOO FRIEDA W. KANDJOZE	**2nd Respondent**
SHAFIMANA UEITELE	**3rd Respondent**

CORAM: **PARKER, J**

Heard on: 2007 October 15

Delivered on: 2007 October 30

JUDGMENT:

PARKER, J.:

[1] In this application, Mr. Coleman represents the applicants, and Mr. Hinda represents the respondents.

[2] On 9 November 2006, the applicants, having approached this Court on an urgent basis, obtained from this Court a rule *nisi* in the following terms:

1. That 1st and 2nd Respondent's application for the postponement of the hearing is hereby refused;

2. That the non-compliance with the rules of this Honourable Court and hearing the application on an urgent basis as is envisaged in Rule 6(12) of the High Court Rules is condoned;

3. That the rule *nisi* is granted calling upon the Respondents to show cause, if any, on Monday, 20 November 2006 at 10h00 why, pending the outcome of this application:

3.1 The 1st and 2nd Respondents should not restore the possession of the premises known as KANAINDO BOTTLE STORE AND BAR to Applicants and authorizing the Applicants to remove any locks that prevent such restoration;

3.2 The 1st and 2nd Respondents should not return all the fridges, tables, chairs, beds, bedding, clothing, cutlery, crockery and any other moveable items removed from the said premises;

3.3 The messenger of the court for the district of Gobabis, alternatively the station commander of the Namibian Police at Buitepos, should not remove 1st and 2nd Respondents and anyone else occupying it, from the said premises;

3.4 The 1st and 2nd Respondents should not be interdicted from interfering with Applicant's possession or any other rights in respect of the said premises;

3.5 The 3rd Respondent should not pay the Applicant's costs *de bonis propriis* on an attorney and own client scale, alternatively ordering 1st and 2nd Respondents, alternatively 1st and 2nd Respondents to pay Applicant's costs on an attorney and own client scale.

4. That the sub-paragraphs 3.1, 3.2, 3.3 and 3.4 of this rule *nisi* serve as an *interim interdict* with immediate effect.

[3] From the papers, I find that the following *relevant* facts are either undisputed or cannot be disputed. (1) The subject matter of the present application, namely, Kanaindo Bottle Store and Bar (the bottle store) is situated on Remaining Extent of Farm Sandfontein No. 468, Gobabis (Farm Sandfontein). (2) Bulk Trade (Proprietary) Ltd (Bulk Trade) acquired ownership of Farm Sandfontein from the 1st applicant through a deed of transfer, dated 5 October 2001 and registered on 14 December 2001. For the purposes of the present application, I assume without deciding, that Bulk Trade's title to Farm Sandfontein is

good. (3) Bulk Trade assigned its ownership of Farm Sandfontein to the 1st and 2nd respondents through a deed of sale, dated 8 July 2003. (4) The applicants lost ownership of Farm Sandfontein in December 2003; and it must be remembered, I have already held it established that the bottle store is situated on Farm Sandfontein.

[4] Those being the undisputed or indubitable facts, it would seem that what remains to be determined centres on the question of possession, i.e. possession of the bottle store. In this connection, I am alive to the principle that a plea of ownership will not necessarily defeat a spoliation claim. (*Ferreira*, *infra*, at 669F; *Greef*, *infra*, at 647B-C)

[5] It is the applicants' case that they had "always" occupied the bottle store and operated it separately from the farm and although they lost possession of Farm Sandfontein in about January 2004 they continued to occupy the bottle store and leased part of it "to a succession of people." The respondents deny that the applicants had possession of the bottle store after January 2004 as the applicants claim. The respondents aver that the applicants of their own volition "finally moved from the Farm Sandfontein in approximately December 2004 with all their belongings." Thus, as far as the respondents are concerned, if the applicants left Farm Sandfontein in December 2004 "with all their belongings," the applicants could not have been in possession of the bottle store after that date since the bottle store is situated on Farm Sandfontein, and since the respondents took possession of Farm Sandfontein from that time.

[6] From the papers it is clear that the relief sought is a spoliation order to restore possession of the bottle store to the applicants.

[7] The legal principles applicable to *mandament van spolie* are trite and have time and time again been stated by the Courts. (See e.g. *Nino Bonino v de Lange* 1906 TS 120; *Sillo v Naude* 1929 AD 21; *Nienaber v Stuckey* 1946 AD 1049; *Yeko v Qana* 1973 (4) SA 735 (A); *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E); *Mbuku v Mdinwa* 1982 (1) SA 219 (Tk); *Ness and Another v Greef* 1985 (4) SA 641; *Kgosana and Another v Otto* 1991 (2) SA 113 (W); *Mbangi and Others v Dobsonville City Council* 1991 (2) SA 30 (W); *Shoprite Checkers Ltd v Panbourne Properties Ltd* 1994 (1) SA 616 (W); *Runsin Properties (Pty) Ltd v Ferreira* 1982 (1) SA 658 (E); *Willowvale Estates CC and Another v Bryanmore Estates Ltd* 1990 (3) SA 954 (W). See also Badenhorst, *et al., Silberberg and Schoeman's The Law of Property*, 4th ed., 2003: pp 273-296.

[8] From the authorities, it is clear that the central principle of the remedy is simply that no person is allowed to take the law into his or her own hands and thereby cause a breach of the peace. Thus, the remedy is aimed at every unlawful and involuntary loss of possession by a possessor. Consequently, its single object is the restoration of the *status quo ante* as a prelude to any inquiry into the merits of the respective claims of the parties to the thing in question. (*Greef, supra,* at 647B-C) Thus, in the present case, the justice or injustice of the applicants' possession is, therefore, irrelevant. (*Greef, loc. cit.* at F) And possession is an amalgam of a physical situation (i.e. the physical detention of a corporeal thing by a person) and a mental state (i.e. the intention of holding the thing as that person's own). Thus, "it is essential to the existence of possession that there should at one time or another have been both such detention or occupation and such intention present together at one and the same time." (Classen, *Dictionary of Legal Words and Phrases*, 2nd ed. Vol. 3: p. 67) That much both Mr. Coleman and Mr. Hinda agree.

[9] Thus, according to the authorities, some of which I have adumbrated above, an applicant for a spoliation order must first and foremost establish that he or she was in "peaceful and undisturbed" possession of the thing in question *at the time* he or she was deprived of possession. As Flemming, J said in *Mbangi and Others*, *supra*, at 335H, "The authorities show a certain consistency in requiring not merely 'possession' as a prerequisite for granting of a spoliation order, but 'peaceful and undisturbed' possession". Consequently, if I find that at the time the applicants claim the respondent deprived them of possession of the bottle store, the applicants were not in peaceful and undisturbed possession of the bottle store, the application must fail. It follows that the single question I must answer is, therefore, whether the applicants were in "peaceful and undisturbed" possession of the bottle store *at the time* the applicants claim the respondents illicitly deprived them of possession thereof. For this reason, it seems to me that the determination of this application falls within an extremely narrow and simple compass.

[10] In *Greef*, *supra*, at 647D, Vivier, J stated that the words "peaceful and undisturbed" possession probably mean "sufficiently stable or durable possession for the law to take cognizance of it." And in *Jenkins v Jackson* 40 Ch D 71 at 74, Kekewich, J said that the words "peaceful and quietly" in relation to enjoyment of possession mean without interference, i.e. without interruption of possession. Relying on the foregoing definitions, I come to the conclusion that "peaceful and undisturbed" possession in the context of spoliation means without interference with, or interruption of, possession. The result is that, in my opinion, the applicant for a spoliation order must show that the possession he or she wishes the Court to protect must have become ensconced, i.e. sufficiently stable or durable (*Mbangi and Others*, *supra*, at 338A) for the law to take cognizance of it. (*Greef*, *supra*, at 647D)

[11] Van Blerk, J put it succinctly thus in *Yeko v Qana, supra*, at 739E: "The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established." In sum, in the present application, the applicants must, on a balance of probabilities, prove that, *at the time* they claim they were unlawfully ousted, they were in possession of a kind which warrants the protection accorded by the remedy. (*Yeko v Qana*, *supra*, at 739G) In other words, the applicants bear the *onus* to prove on a balance of probabilities that at a clearly definable point in time they were in peaceful and undisturbed possession of the bottle store and at a clearly definable point in time an act of spoliation was committed by the respondents. (See *Runsin*, *supra*, at 670A) As I have said, these two facts must be proved on a preponderance of probability; and a prima facie case will not suffice: *mandament van spolie* being a final order. (*Nienaber*, *supra*, at 1053; *Bennett Pringle (Pty) Ltd*, *supra*, at 232F-G) It is, in my opinion, for these considerations and requirements that, as I will demonstrate shortly, time at which an applicant claims spoliation was committed is a supremely critical item in the context of spoliation.

[12] Keeping the foregoing principles requirements in view, I move on to apply them to the facts of this case, as I have found them to exist.

[13] It is, as I have alluded to above, the applicants' contention that they were illegally evicted from Farm Sandfontein; the respondents say the applicants left on their own volition. What is important for my present purposes is that I find it sufficiently established that the applicants vacated Farm Sandfontein in December 2004; but they contend that

although they left Farm Sandfontein in December 2004, they had always maintained "undisputed possession" of the bottle store.

[14] Therefore, as I see it, I think the applicants base their claim for a spoliation order on these central planks, which in their view constitute pieces of evidence that evince possession:

(1) The 2nd applicant "at all material times hereto" conducted the business of the bar, bottle store and a restaurant in the bottle store.

(2) In December 2005 the 2nd respondent entered into a lease agreement with Uno Hengari in respect of the bottle store. The period of the lease was from December 2005 to 31 August 2006.

(3) Andreas Guim also entered into a lease agreement with the applicants in respect of the bottle store. The period of the lease was for about six months in 2005 (Guim does not remember the exact dates).

(4) The 1st applicant's son, Alfons Tjizoo, remained in the bottle store to take care of it.

(5) The last plank relates to the letters that were exchanged between the 3rd respondent and the applicants' legal practitioners.

[15] I now proceed to examine the above-stated grounds on which the applicants stand to claim the spoliation order. As I have stated previously in this judgment, in my opinion, the time at which an applicant claims he or she was unlawfully disposed of possession by

the respondent is crucial in spoliation proceedings. After all "[t]he *mandament van spolie* finds its immediate and only object in the *reversal* of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the *status quo ante* is restored." (*Mbangi and Others*, *supra*, at 336F) (Emphasis added). In other words, as in the present case, if upon the return day the applicant proves his *previous possession* and his *dispossession* by the respondent, the rule will be made absolute. (Classen, *supra*, p. S-90) (Emphasis added).

[16] It is my view that the use of such words as "previous possession", "reversal of" and "status quo ante" indicate strongly and indubitably that the applicant must satisfy the Court on a balance of probability that on such-and-such a date or time he or she was in peaceful and undisturbed possession, and that on such-and-such a date or time he or she was despoiled of possession by the respondent; otherwise, how is the Court able to determine judicially when peaceful and undisturbed possession ceased through the illicit deprivation of possession (spoliation) by the respondent, if, indeed, such is the case. In sum, in my opinion, the Court cannot reasonably order a restoration of the *status quo* through a spoliation order if it has not been shown to the satisfaction of the Court when the *status quo* ceased to exist through the alleged illicit deprivation of possession by the respondent.

[17] In the present case, the applicants have failed to prove when they claim their "previous possession" was dispossessed by the respondents. Mr. Coleman's answer to my question on the point did not, with respect, take the matter any further; if as I understand him, he appeared to have said that there were a series of spoliation and counter-spoliation. As Mr. Hinda submitted – and correctly, in my opinion – there must be a date on which the alleged spoliation, upon which the applicants have approached this Court for relief, occurred; and, therefore, such a date is quite crucial in these proceedings. But, as I have

said, the applicants have been unable, or have failed, to prove when the spoliation complained of was committed. The 'legalese' cliché "at all material times" relied on by the applicants and discussed in the next succeeding paragraph of this judgment is, to my mind, too amorphous, meaningless and purposeless in spoliation proceedings to show when applicants claim they were in peaceful and undisturbed possession of the bottle store and also to show when an act of spoliation was committed by the respondents.

[18] The applicants contend that, "at all material times", they conducted the business of the bar, bottle store and a restaurant in the bottle store. The applicants have not put forth any credible evidence in support of their contention. In my view, this claim is not well founded. For instance, there is only one liquor licence for a one year-period filed of record, i.e. in respect of 16 March 2006-31 March 2007: there are no licences for previous years.

[19] Besides, in December 2005-31 August 2006, i.e. more than a half of the licence period, the bottle store was leased to Hengari; for about six months in 2005 it was leased to Guim; and for almost three months in 2005 it was leased to Kapenda. The liquor licence filed of record does not say that Hengari was a manager for the licensed business appointed by the 2nd applicant for the licence period, which the 2nd applicant *qua* licensee could have done lawfully in terms of s. 18 of the Liquor Act, 1998 (Act No.6 of 1998). Neither have the applicants shown that Hengari, Guim and Kapenda were their agents or representatives. With the greatest deference, I cannot accept Mr. Coleman's submission that there is no substance in the respondent's argument that the applicants lost possession when they leased the bottle store to others. Being leasees, Hengari, Guim and Kapenda were, in law, in possession of the bottle store during the periods that their leases subsisted. They were in physical occupation of the bottle store and they had the necessary intention to hold it as

their own and to derive some benefit from it for themselves. (Badenhorst, *et al.*, *supra*, pp. 254-5; p. 406) Particularly, in Hengari's case, as a lessee of the bottle store, he further sublet part of the premises to Uvangapi Mutirua and Tangee Mbasuva for the payment of rent to him.

[20] I proceed to deal with the applicants' next evidence on the point, which in their contention, is proof of their possession of the bottle store. This relates to their averment that the 1st applicant's son, Alfons Tjizoo, remained in the bottle store to look after it. The respondents' evidence to counter the applicants' argument is that of Hengari. In Hengari's confirmatory affidavit, he states that Tangee Mbasuva, Uvangapi Mutirua (I have referred to them above) and Alfons Tjizoo asked him to give them a place to stay in the bottle store because there was a shortage of accommodation in Buitepos. Hengari states that he gave them accommodation in the bottle store, and Tangee and Uvangapi contributed towards rent; but it appears that Alfons did not pay any rent because he assisted Hengari to run the bottle store after hours. Alfons's confirmatory affidavit supporting the applicants' position does not assist the applicants. I have already held it established that during the periods that Hengari, Guim and Kapenda leased the bottle store, the applicants were not and could not have been in possession – peaceful and undisturbed possession – of the bottle store. There is also no credible evidence to support their rearguard assertion that at the time the bottle store was leased, they kept some of their belongings in the bottle store.

[21] Now to the letters exchanged between the 3rd respondent and the applicants' legal practitioners: I must say that, with respect, this is an extremely flimsy strand on which to hang an application for a spoliation order without breaking. I have carefully perused eight letters filed of record that were exchanged between the 3rd respondent and the applicants' legal practitioners from 31 January 2006 to 31 October 2006. In my opinion, the letters

emanating from the former (three in all) dwell primarily on the question of ownership of Farm Sandfontein; see, e.g., the following paraphrases of excerpts of those letters: Farm Sandfontein is registered in my client's name; the land on which the bottle store is situated is a part of Farm Sandfontein; and we demand proof of ownership of the land under dispute. Five letters issued from the applicants' legal practitioners: three of them – like the 3rd respondent's – deal substantially with the question of ownership; see, e.g., the following paraphrases of excerpts of those letters: bottle store does not form a part of Farm Sandfontein; and bottle store is situated on land, which is not a part of Farm Sandfontein. Only two of the five letters discuss the question of possession.

[22] Considering the letters contextually and purposely and not parochially, it seems to me clear that the question of ownership was uppermost in the mind of the 3rd respondent, even if it can be said that the concern of the applicants' legal practitioners was the issue of possession – and even that comes through only in their last two letters, as I have said above. That being the case, I cannot see how, with respect, one can stand on those letters and argue seriously that the respondents considered the applicants to be in possession of the bottle store. The full, holistic import of those letters does, in my opinion, indicate that the 3rd respondent and the applicants' legal practitioners were not of one mind on that critical issue, to wit, possession.

[23] All the above considerations and reasoning propel me to this ineluctable conclusion, namely, that the applicants have failed, on a balance of probabilities, to discharge the *onus* that they were in peaceful and undisturbed possession of the bottle store – possession that was sufficiently established, stable or durable – and that they have been illicitly deprived of possession of the bottle store by the respondents. It follows that the applicants are not entitled to the relief sought, and the rule *nisi* stands to be discharged.

[24] I pass to deal with the matter of costs. In his submission, Mr. Hinda pressed me into ordering costs in favour of the respondents, including costs of an instructing and instructed counsel. I do not think, in my discretion, I should grant costs with such qualification, taking into account the nature of the case. In my opinion, it is just and fair to simply award costs to the respondents without any embellishment.

[25] In the result I make the following order:

> The application to make final the rule *nisi* granted by this Court on 9 November 2006 is dismissed with costs.

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PARKER, J

ON BEHALF OF THE APPLICANTS:	Adv. G. Coleman
Instructed by:	LorentzAngula Inc.
ON BEHALF OF THE RESPONDENTS:	Adv. G. Hinda
Instructed by:	Ueitele & Hans Legal Practitioners