REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A35/2014

In the matter between:

LUKAS JUNIAS **FIRST APPLICANT**

LINEEKELA TUHAFENI NHINDA **SECOND APPLICANT**

and

THE MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK **RESPONDENT**

Neutral citation: *Junias v The Municipal Council of the Municipality of Windhoek (A 35/2014) [2014] NAHCMD 80 (12 March 2014)*

Coram: SMUTS, J

Heard: 28 February, 5-6 March 2014

Delivered: 12 March 2014

Flynote: Application for madament van spolie and two further interdicts. Nature of the remedy restated. It is a possessory remedy to restore the status quo ante and not for the making of reparation. The applicants found to have possessed a structure which was demolished. It ceased to exist and could not be restored. Application refused but applicants granted costs by reason of

unlawful deprivation of possession.

ORDER

The application is dismissed. The respondent is however ordered to pay the applicants' costs.

JUDGMENT

SMUTS, J

[1] This is a spoliation application brought by the applicants on an urgent basis. In addition to seeking a rule *nisi* to be restored in their possession and occupation of a plot at the Goreangab informal settlement, Windhoek, the applicants also sought two interdicts against the respondent, the local authority for the City of Windhoek. The interdicts were sought in the following terms:

- Interdicting and restraining the respondent and its employees from, without first obtaining an order of Court, demolishing and/or removing, together with its contents, any structure or building belonging to the applicants; and

- Interdicting and restraining the respondent and its employees from, without first obtaining an order of Court, evicting the applicants and those who occupy through them, the plot at the Goreangab Settlement Windhoek, Namibia.

[2] The applicants also sought costs on a special scale, as between attorney and own client.

[3] The application was launched on 26 February 2014 and set down for 28 February 2014. When it was then called, Mr Phatela, who appeared for the respondent, sought leave to hand up an answering affidavit which I then received. The matter was briefly adjourned to afford both the applicants' legal representative and the Court the opportunity to consider the answering papers.

[4] It soon became apparent from the respondent's opposition that it disputed that the applicants possessed the property in question. I then enquired from Mr Tjombe, who represented the applicants in these proceedings, whether that aspect should be referred to oral evidence. He then duly orally applied for such an order and Mr Phatela did not oppose the granting of such an order. I then postponed the application for the hearing of oral evidence a few days later on 5 March 2014 and directed that the oral evidence be confined to the question as to whether the applicants were in possession or not of the structure referred to in the affidavits. Evidence on that aspect was then heard on 5 and also on 6 March 2014 whereafter the parties made their submissions. The parties' representatives both accepted that, the issues having been fully ventilated before me, the questions should no longer be determined on an interim basis for a rule *nisi*, but rather as to whether the applicants were entitled to final relief as claimed.

[5] Before dealing with the oral evidence which unfolded before me, I will first refer to the facts as they were set out in the papers.

[6] The first applicant, an employed high school teacher, stated in his founding affidavit that he had resided on the site in question since mid 2012. At that stage he moved in with a certain Mr Rasta Sheya in a residential structure which Mr Sheya had placed there. Mr Sheya, however, subsequently left Windhoek for northern Namibia and the first applicant stated that he took over that structure together with the second applicant who, although he is a cousin, was referred to by him as his brother, as is often the custom.

[7] The first applicant testified that, towards the end of 2013, he and the second applicant had started work on a new structure to replace the existing one. During December 2013, steel poles were put in the ground with the aid of concrete. They had also then commenced welding corrugated iron sheets together. They continued these activities after going away over the festive period. During January and early February 2014, he stated that the applicants proceeded to assemble the welded portions of the structure as walls to the poles and as a roof. The first applicant stated that he resided there and slept in that structure even though it was not entirely complete – in the sense of the construction of flooring, windows and of internal dividers were yet to be done. He said that he slept inside the structure and that the second respondent also resided there although he from time to time also stayed elsewhere, but that his main residence was with the first respondent in the structure at the plot in question.

[8] The respondent, however, disputed that the applicants possessed the structure. Its main witness was a superintendent in the City Police, Mr Oscar Simataa. He stated that six recent patrols of the area had indicated that the structure was unoccupied. He went as far as to state that it had been abandoned.

[9] It was, however, common cause that the applicants locked the structure with a padlock when they were not there. They said they each had a key to the padlock. The structure had a sliding door which could be locked in this manner.

[10] Attached to the answering affidavit was an affidavit made by the second applicant to Superintendent Simataa on 20 February 2014 in which the second applicant had said that at the time of the incident, the structure was unoccupied because it was incomplete.

[11] There was thus a dispute of fact as to whether the structure was occupied or not and possessed by the applicants.

[12] It was common cause that on the morning of 20 February 2014 and whilst the applicants were at their respective workplaces, the City Police proceeded to dismantle and demolish the structure. Whilst this process was underway, both applicants received texts on their cellphones to this effect and, in the case of the first applicant, missed calls had been received on his cellphone whilst he was giving a class. Both applicants then left their places of work and proceeded to the structure. When they arrived there at about noon, three of the four walls, all comprising corrugated iron sheets, had already been demolished. The roof remained together with one of the walls. They then participated in the removal of the remaining structure because they wanted to ensure that the constituent components would not be damaged and could be re-used.

[13] The first applicant stated in his founding affidavit that they had been effectively evicted from the property by the respondent demolishing the structure. He further stated:

> 'I cannot reside at the property without a roof over my head. It is in the middle of the raining season, and we are exposed to the elements of nature and criminal activities of others. I have been sleeping in my car on the property since the destruction of my property.'

[14] He further testified that only the shower, which had formed part of the previous structure, had remained. He reiterated that he had no other place to reside and that he had been sleeping in his vehicle at those premises since 20 February 2014. He further said that, as a high school teacher, he would also be required to take home work such as the marking of scripts and assignments and that he had nowhere to keep such important material. He further stated that there were several other people residing in that area of the informal settlement, but it would appear that they had not been targeted by the City Police for eviction and demolition of their structures. The second applicant confirmed the correctness of the first applicant's founding affidavit.

[15] But in the affidavit of the second applicant attached to the respondent's

answering affidavit, a different picture emerges. The second applicant states there that his address is at a flat in Okuryangava, Katutura, Windhoek. He explained in his oral evidence that it is a sectional title flat which he had acquired and was registered in his name with the assistance of a subsidy he had obtained by virtue of his employment as a clerk at the Ministry of Health and Social Services. He further stated in the affidavit provided to the City Police that although work had commenced on the structure in December 2013, it was continued on 20 January 2014 by putting the structure together and mounting the walls and the roof. But, he said, the structure was still not yet occupied and the reason for this was that it was not completed and "was not yet suitable for human habitation".

[16] Further in this affidavit, he reiterated that the structure was 'not yet occupied'. He stated that there was a trailer and bags of cement as well as an empty water tank inside the structure. He also stated 'I was not having a problem with the removal of my illegal structure but the manner, the way how the zincs were removed. It was not fine with me and I requested the contractor and the City Police to remove it myself'. (*sic)*

[17] When the matter proceeded to oral evidence, the first applicant confirmed what he had stated in his affidavit that he had slept inside structure the night before and that he resided there together with the second applicant. He could not adequately explain the discrepancy between his evidence and what was stated in the second applicant's affidavit he had given to the City Police on the afternoon after the demolition. In the context of explaining the general absence of household goods inside the structure, he stated that there had been a cupboard and a plastic chair inside the trailer but that he and the second applicant did not eat there. He also confirmed that there were other building materials inside, which were those which had been formed part of the earlier smaller structure which had preceded the structure which he and the second applicant had erected on the plot in question. He stated that internal dividers would have been erected subsequently as well as windows and the floor and that the structure was not as yet complete at the time when the demolition took place.

[18] He also stated that its dimensions were 8 metres x 9 metres. Photographs of the structure which had been included in an annexure to the respondent's answering affidavit were confirmed by him. Two further photographs were subsequently adduced in evidence by the respondent and put to him. These showed the demolition at an initial stage, when side walls were still in place and a subsequent photograph showing a removed wall but with the roof and a side wall still intact. Both photographs depicted a large four wheel trailer inside the structure which looked at that stage like a large shed. There were also wheelbarrows inside the structure in the photograph.

[19] These two photographs however showed that there was no cupboard or plastic chair in the trailer as had been stated by the first applicant. This also accorded with the evidence of Superintendent Simataa, who was called by the respondent. He stated that he had been present throughout the demolition exercise and that there had not been a cupboard and plastic chair inside the trailer. Both applicants stated in their evidence that they had not raised this issue (the cupboard and chair) with Superintendent Simataa when they arrived at the scene during the process of demolition or even later that day. They indicated that the cupboard and chair were of lesser value to them than the sheets of corrugated iron which comprised the walls and the roof. They said that their attention was focussed on salvaging those items. Neither applicant raised this issue subsequently until the proceedings had been launched some six days later.

[20] The first applicant stated that all other household effects had been stored pending the completion of the structure.

[21] The second applicant was unable to explain the fundamental contradiction between the affidavit which he deposed to on the afternoon of 20 February 2014, stating that the structure was unoccupied at the time and what was confirmed in his own affidavits that the first applicant had slept there the night before and that he had also resided there. He confirmed that he had co-operated with the City Police after arriving at the scene and had borrowed an

electronic screwdriver from a nearby resident in order to facilitate the removal of the remaining sheets of corrugated iron after his arrival – to be achieved with minimal damage to those items.

[22] Superintendent Simataa was the only witness called by the respondent. He testified that there had been at least six recent patrols in the days before the demolition which had indicated that the structure was unoccupied. He stated that he himself had on the night before (19 February 2014) at 22h43 attended upon the structure. He found the shed in complete darkness without any sign of human habitation. He stated that there was a gap below the wall structure of corrugated iron and the ground, as was also evident from the photographs, and had shone a torch inside there as well as through the hole in the door where the padlock was to be found on the inside. Through both these apertures, he had inspected the interior and stated that there was not only no person inside the structure but that there did not seem to be any indication of any person staying there. He noted wheelbarrows and bags of cement and other building debris, together with the trailer inside the structure. He however confirmed that the structure was locked. He said that there had been five other patrols of the area which had also indicated that it was unoccupied and that no one was staying there. He accordingly decided that the structure would be removed and demolished on the following morning as it was unoccupied and appeared to him to be abandoned and proceeded there with other members of the City Police together with a contractor who had been engaged to demolish the structure on the following morning.

[23] Superintendent Simataa said that they arrived at the site between 08h00 and 09h00 on 20 February 2014 to commence with the demolition. He said that their work was interrupted on several occasions by members of the community who are unhappy with their actions and had become rowdy and unruly. He confirmed that the first applicant was also the first of the two applicants to arrive on the scene at about 12h00 noon. He stated that the first applicant had not engaged him in any discussion and stated that he should wait for the arrival of the second applicant who would answer questions and speak on their behalf. Superintendent Simataa confirmed that the second applicant had indicated that

he would borrow an electric screwdriver from a nearby resident in order to cause less damage to the corrugated iron sheets which were being dismantled. Superintendent Simataa stated that the second applicant had co-operated fully with the City Police and that he even assisted in trying to placate the unruly crowd which had gathered there and sought to disrupt the police action.

[24] Superintendent Simataa also doubted that the structure was intended for residential purposes and said it closely resembled a structure next door to it which was used as a shebeen or store.

[25] At the conclusion of the oral evidence on 6 March 2014, both counsel made their submissions whereafter judgment was reserved.

[26] Before I deal with their submissions, it will be apposite at this juncture to set out the applicable legal principles. The remedy invoked by the applicants is that of spoliation, known as *mandament van spolie* in the common law. It is a possessory remedy to address spoliation which is the wrongful deprivation of the right to possession, whether with regard to movable or immovable property.[1] A *mandament van spolie* is an order of Court which is granted to restore the *status quo* of spoliation. The underlying rationale for the remedy, dating back to Roman Law is that no one should resort to self-help or taking the law into their own hands to obtain or regain possession.[2] A *mandament van spolie* is in the form of a final order determining the right to immediate possession once an applicant can establish the requisites for that relief. These are possession and the wrongful deprivation of possession.[3]

[27] It has not been contested in these proceedings that there was a form of deprivation. The parties were in agreement that the applicants had the onus to establish their possession. They were also in agreement that the *causa* of the possession is irrelevant as even an illegal occupant's possession is protected if

---

[1] Joubert (ed) *The Law of South Africa* (2 d) vol 11 at p 436.

[2] Joubert (ed) *The Law of South Africa supra* at 437 and the authorities usefully collected there.

[3] Joubert (ed) *The Law of South Africa supra* at 437 (par 432).

that possession was peaceful and undisturbed.[4] The authorities, however, have established that it would be sufficient for an applicant to establish factually holding (*detentio*) the thing with the intention of securing some benefit for himself.[5]

[28] Given the unsatisfactory evidence of the applicants, with the second applicant providing two fundamentally conflicting versions, both under oath in relatively close succession and without satisfactorily explaining those contradictions, they have not in my view established that they were resident in or occupied the structure at the time when it was demolished. In this regard, I found the evidence of Superintendent Simataa to be reliable. His evidence of patrols immediately before and preceding the demolition indicated that there was no occupation of the shed. This was also borne out by his evidence, backed up by the photographs, that the interior of the shed showed no indication of human habitation.

[29] The second applicant's explanation for his unequivocal statement under oath on 20 February 2014 that the structure was unoccupied, which was itself repeated within that affidavit, was singularly unconvincing. He stated that he was emotionally caught up by the events and gave this as a reason for making what would otherwise be an entirely false statement under oath and purgering himself. When asked about the timing of his affidavit, it was confirmed that it was only taken down by Superintendent Simataa at about 17h00. It was taken down at his offices and not at the scene.

[30] Furthermore, the evidence of Superintendent Simataa, which had not been contested, was that the second applicant had co-operated with him. Whilst this did not amount to the consent on the part of the applicants to the demolition and dismantling of their structure which had started earlier, as was indicated in the answering affidavit, it would not support the second applicant's

---

[4] Joubert (ed) *The Law of South Africa supra* at 438.

[5] Joubert (ed) *The Law of South Africa supra* at 438; *Nienaber v Stuckey* 1946 1049 at 1055-1056.

explanation for his statement that the premises were not occupied (which he repeated in that affidavit) because he was under emotional strain. On the contrary, it would rather seem that he calmly dealt with the situation which had unfolded in a practical and commonsense manner by ensuring that parts of the structure which were still to be dismantled should be done so in a manner which would not unduly damage the components. But he also assisted in seeking to placate the unruly crowd which had gathered. There was also no suggestion of coercion in respect of the sworn statement he provided to Superintendent Simataa. His explanation that he was 'emotional' is also questionable in view of the fact that he made that affidavit at about 17h00, away from the scene and at Superintendent Simataa's office. This was also not supported by Superintendent Simataa's evidence.

[31] Given the diametrically conflicting versions, given by the applicants for which an entirely unconvincing explanation was given, I am inclined to reject the versions of the applicants in stating that they had resided at the premises. A further factor I take into account, is the reason provided by the second applicant in his affidavit for his statement as to why the structure was not occupied. He said the structure was not yet complete and that it was not fit for human habitation. That was also corroborated by Superintendent Simataa and the photographs.

[32] But this is not the end of the enquiry. Mr Tjombe argued that even if the applicants' evidence with regard to occupation in the sense of residing at the premises were to be rejected, then they did possess the structure because they had locked it and had stored valuable items inside it such as the trailer. There is much force to this argument. It has been held that possession need not be physical or personal, provided that it is effective.[6] In this instance, the applicants had locked the shed, even though it was not yet complete, with a padlock. They did so to exclude others from having access to it and in so doing possessed the

---

[6] Joubert (ed) *The Law of South Africa supra* at 438 and the authorities collected in footnotes 7, 8 and 9 on p 438.

shed. They retained a valuable item such as the trailer inside the shed.

[33] It would follow in my view that the applicants established that they possessed the shed at the time it was demolished and dismantled. I accordingly find that the applicants established possession of the structure sufficient for the purposes of the *mandament van spolie*.

[34] The question, however, arises as to the applicants' remedy. Mr Phatela submitted that possession could not be restored by ordering erecting the structure as it had previously existed there. He made this submission with reference to *Rikhotso v Northcliff Ceramics (Pty) Ltd and others.*[7] In that matter, Nugent, J (as he then was) after a thorough survey of authorities on the issue, found that a spoliation order could not be granted if the property in issue has ceased to exist. This was because it was a remedy for the restoration of possession and not for the making of reparation. This approach received the endorsement of the (South African) Supreme Court of Appeal in *Tswelopele Non-Profit Organisation and others v City of Tshwane Metropolitan Municipality and others*[8] where the court (per Cameron, JA) approved of the approach in Rikhotso by stressing the possessory nature of the remedy in a *mandament van spolie,* namely that it was for the restoration of possession and not a general remedy against unlawfulness. It was also pointed out that it is a preliminary and provisional order (on the assumption that the property in question exists) and may be awarded in due course to the properly entitled party thus excluding restoration by substitution. This was further explained in *Tswelopelo* in the following way:

> '[24] The doctrinal analysis in Rikhotso is in my view undoubtedly correct. While the mandament clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property - not its reconstituted equivalent. To insist that the mandament be extended to mandatory substitution of the property in

---

[7] 1997(1) SA 526 (W) at 532-534.

[8] 2007(6) SA 511 (Supreme Court of Appeal in South Africa).

> dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function).'

[35] Mr Tjombe accepted this position and did not argue for the substitution of the structure. He stated that the order sought by the applicants was merely with reference to possession of the plot of land upon which this structure had been erected. He also did not argue that the mandement remedy should be expanded or a new constitutional remedy provided in the light of the Constitution which is emphatically founded upon the rule of law, as is stated in Article 1.

[36] The court in the *Tswelopele* – matter however, given limitation of the mandament remedy, when restoration was not possible, found that there should be a new constitutional remedy in order to vindicate the constitution and realise the constitutional promise and address further infringement of rights of that nature. The court in that matter found that a constitutional remedy should be accorded to the occupiers in that matter to vindicate the constitution and ordered that the shelters should be restored to the applicants in that matter. This was however neither sought nor argued in this case. This may have been possibly because of the applicants' employment status and the fact that the second applicant himself was the owner of immovable property (a sectional title) which he had decided rather to utilise to house his sister and children. It was also clearly established in the *Twelopele* matter that the structures were dwellings which were put to the torch and destroyed in that way. But whatever the reason, such a remedy was not sought or argued. It is thus not necessary to express a view in this case as to whether it should be granted or not in Namibia.

[37] The question arises as to whether this Court should order the respondent to restore the applicants' possession of the plot in question. Mr Tjombe submitted that this was the appropriate course once it had been found that there had been an unlawful deprivation of possession which has been established. He argued that it would follow from such a finding. But the nature of the mandament as a remedy, as explained by the court in *Rikhotso*, and endorsed in *Tswelopele,* would militate against such an order.

[38] The remedy is after all to restore the *status quo ante* and possession of the spoliated thing. In this instance, the spoliated thing is the structure or shed which the applicants had erected upon that plot. That was the nature of their possession of the plot. The possession unlawfully deprived to them was in respect of the structure. That is what the remedy of mandament would require to be restored. That is not possible as has been rightly accepted by Mr Tjombe. Once that is the case, a mandament to restore the status quo ante cannot thus be granted. The first applicant testified that he had both in his affidavit and also when giving his oral evidence that he had returned to the site at night and had slept at the plot in his motor vehicle. His possession of the plot itself had not been disturbed. He did not indicate that he had in any sense been deprived of that possession but rather the possession of the structure which he had erected upon it. The applicants have thus not established an injury or an apprehension of injury in respect of that possession.

[39] There was no evidence before me that the respondent would in the future disturb or interfere with that possession on the part of the applicants. Nor was this put to Superintendent Simataa. There can thus be no question of an apprehension and thus any entitlement to the interdictory relief sought in paragraphs 2.2 and 2.3 of the notice of motion. Given the failure to establish injury or the apprehension of it in that sense as is required for an interdict, I do not need to address the question of considering whether a clear right to the relief was established because, as was freely acknowledged by Mr Tjombe, the applicants were in illegal occupation of the premises. But I can indicate that I would in any event in the exercise of my discretion been inclined to refuse the interdicts sought, lest it be understood that the court in any way condoned illegal occupation of land – just as the court cannot condone any illegal deprivation of possession. Any resort to self help is inimical to the rule of law upon which the constitutional order in this country is founded.

[40] I stress that what the applicants had been deprived of was the possession of a structure. That deprivation was in my view unlawful, given the fact that it was not preceded by any order of court in circumstances where it was

the subject of possession by persons, being locked and with items contained in it, even if it was not permanently or even temporarily occupied in the sense of human habitation. In order for such a structure to be removed, a court order would need to be obtained and it would not be open to the respondent to remove a structure possessed in that way in the absence of such an order. It has been made clear by the Supreme Court in *Shaanika and others v Windhoek City Police and others,*[9] in striking down offending provisions of the Squatters Proclamation[10] as being in conflict with the Constitution, that the respondent and its employees should not demolish or remove structures without first obtaining an order of court, although in that case the structures were dwellings occupied by people.[11]

[41] In the founding affidavit, this judgment was referred to and the applicants sought a special order of costs on the scale as between attorney and own client given the fact that the Supreme Court had made an order in those terms involving the same respondent. Mr Tjombe however did not persist in seeking an order on that scale after the evidence of Superintendent Simataa. It was clear from his evidence that he had considered that the shed was not a dwelling and had been unoccupied and even considered that it was abandoned and for that reason considered that the respondent was entitled to demolish and dismantle it. This entitlement has turned out to be misplaced. It is clear that it was not done in defiance of the Supreme Court judgment and the rule of law, but rather upon a misplaced premise as to the possession of structure and in good faith on the part of the City Police in seeking to stem the problem encountered by the respondent with regard to land invasions or the illegal occupation of municipal land on a large scale, as testified by Superintendent Simataa.

[42] It follows in my view that an order in the form sought by Mr Tjombe on

---

[9] 2013(4) NR 1106 (SC).

[10] 21 of 1985 – s 4(1) and 4(3).

[11] Supra at par [50] and elsewhere in the judgment where the court refers to homes or dwellings being demolished or removed.

behalf of the applicants for restoration of possession on the plot cannot be granted. It was not deprived to them and not currently being denied. But more importantly it does not follow from the unlawful deprivation of the possession in question which would give rise to the restoration of the *status quo ante* being the structure as contemplated by the *mandament van spolie*.

[43] It also follows that the applicants would not be entitled to the interdicts sought given the lack of any evidence of an apprehension of an interference with that possession sought to be protected. Furthermore, the first interdict sought could be construed to preclude any act of counter spoliation on behalf of the respondent which Mr Tjombe correctly conceded would be open to it. But given the unlawful deprivation of possession of the shed which gave rise to the launching of this application, it would seem to me that this would be in the exercise of my discretion be one of those rare cases where unsuccessful litigants may be entitled to their costs because of the unlawful deprivation. Given the rule of law foundation to the *mandament van spolie* which is strongly underpinned by the Constitution, it would seem to me that the respondent, in the exercise of my discretion, should pay the applicants' costs because of the unlawful deprivation of the applicants' possession of their structure.

[44] I accordingly make the following order:

The application is dismissed. The respondent is however ordered to pay the applicants' costs.

_____

D F Smuts

Judge

APPEARANCES

APPLICANTS:	N Tjombe Instructed by Tjombe-Elago Law Firm Inc.
RESPONDENT:	T.C. Phatela Instructed by Dr Weder, Kauta & Hoveka Inc.