REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 224/2015

In the matter between:

WITVLEI MEAT (PTY) LTD **APPLICANT**

And

AGRICULTURAL BANK OF NAMIBIA **RESPONDENT**

Neutral citation: *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia* (A 224/2015) [2016] NAHCMD 97 (7 April 2016)

Coram: PARKER AJ
Heard: **10 February 2016**
Delivered: **7 April 2016**

Flynote: Spoliation – Mandament van spolie – Applicant must prove he or she had peaceful and undisturbed possession of the thing at time of illicit deprivation of such possession – General maintenance of law and order is of infinitely greater importance than mere rights of particular individuals to recover possession of property – Maxim *spoliatus ante omnia restituendus est* is applied.

Summary: Spoliation – Mandament van spolie – Applicant must prove he or she had peaceful and undisturbed possession of the thing at time of illicit deprivation of such possession – Applicant as lessee took possession of property and occupied it – In the course of events while applicant was still in possession applicant and

respondent entered into a 'Deed of Purchase' for sale of property to applicant – As at 26 June 2015 the applicant had failed to satisfy a material suspensive condition but continued to occupy property – On 5 August 2015 a deputy sheriff not armed with an order of the court chased applicant's employees and security guards from property and removed all locks and replaced them with new ones – Court found that deputy sheriff acted as agent of respondent and acted upon the behest and instructions of the respondent – Court concluded that respondent did illicitly deprive the applicant of its peaceful and undisturbed possession of the property – Consequently, court concluded that applicant had established spoliation of the property by the respondent – Accordingly, application succeeded – Spoliation order granted against the respondent.

ORDER

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(1) The respondent shall not later than 12 May 2016 restore forthwith to the respondent possession *ante omnia* of the property, comprising the abattoir facilities situated on Portion 38 of the Farm Okatjirute No. 155, Witvlei Town and Townland, situated in the village of Witvlei (Registration Division "L") ("the property").

(2) If the respondent fails or refuses to comply with the order in paragraph (1), the deputy sheriff for the district of Gobabis, is hereby directed and authorised to do all that is necessary and required, including the breaking of any locks securing the property, to restore possession of the property to the applicant.

(3) The respondent shall pay 80 per cent only of the costs of this application on the scale as between party and party; such costs to include costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] By notice of motion the applicant brought this application and prays for the relief set out in the notice of motion, that is, a spoliation order. It is an order to restore possession of property consisting of abattoir facilities situate on Portion 38 of Farm Okatjirute No. 155, Witvlei Town and Townland, situated in the village of Witvlei, registration division "L" ('the property'). The respondent has moved to reject the application.

[2] It is trite that an applicant for 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 illicitly deprived of such possession. That is all that an applicant must establish in order to succeed. (*Kuiiri and Another v Kandjoze and Others* 2007 (2) NR 747 (HC), para 9) And such possession is not merely 'possession' *simpliciter*: it is 'peaceful and undisturbed possession'. (*Kuiiri* (SC), loc. cit., applying a dictum in *Mbangi and Others v Dobonsville City Council* 1991 (2) SA 330 (W) at 335H-I) And as Maritz JA put it in *Kuiiri* (SC), para 2 -

> 'The mandament, it was held, may be granted –
>
> > "If the claimant has been unlawfully deprived of the possession of a thing. It does not avail the spoliator to assert that he is entitled to be in possession by virtue of, eg, ownership, and that the claimant has no title thereto. This is so because the philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should be discouraged." '

[3] Furthermore, in spoliation proceedings the 'peaceful and undisturbed possession' is 'not just any measure of possession – however technical, remote, tenuous or brief – will suffice: the court must be satisfied, regard being had to the nature of the thing dispossessed, that the despoiled possession of the thing was sufficiently stable and durable to constitute "peaceful and undisturbed possession".' (See *Kuiiri* (SC), para 4, per Maritz JA.) And it should be remembered that '[E]ven though the mandament van spolie is therefore not intended to bring about the

ultimate determination of the competing proprietary or possessory claims of the litigants to the things in contention, it nevertheless constitutes a final determination of the litigants; "immediate right" to possess them for the time being'. (*Kuiiri* SC, para 3)

[4] I now proceed to apply the aforegoing trite principles to the relevant facts of the instant case; that is, facts having probative value in the determination of the present application. Mr Ntinda, counsel for the respondent, contends that there is genuine dispute of facts, and sets out the following queries:

(a) Whether or not by 5 August 2015 the applicant was in undisturbed in possession and occupation of the property.

(b) Whether or not, as alleged by the respondent, the applicant abandoned the property shortly after 26 June 2015.

(c) Whether or not the applicant and the respondent had joint possession and occupation up to 26 June 2015.

[5] After submitting that these aspects constitute dispute of facts, Mr Ntinda concluded that 'this court will be unable to determine the matter on affidavits as the material requisites of the relief sought are materially disputed by the respondent'. Counsel continued 'the applicant's perilous position is aggravated by the fact that the applicant itself alleges that the Deputy Sheriff was the person that took possession and occupation of the premises except that there is a dispute as to whether he did that shortly after 26 June 2015 or on 4 or 5 August 2015'.

[6] If there are genuine, that is real, dispute of fact that is material in the determination of the application, the court will have to resolve them by applying the principles and approaches that are now entrenched in our practice for resolving such dispute. In this regard, I cannot do any better than rehearse what the court stated in *Rally for Democracy and Progress v Electoral Commission* 2013 (2) NR 390:

> '[226] It was settled in the *Republican Party* case that in s 109 applications, which are motion proceedings, the *Plascon-Evans* rule applies (*Plascon-Evans Paints Ltd v*

Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)). In *Mostert v The Minister of Justice* 2003 NR 11 (SC) at 21G-I, Strydom ACJ explained the rule thus:

> These allegations are denied by the Permanent Secretary and she explained in detail how it came about that the appellant was transferred from Gobabis to Oshakati. In my opinion a genuine dispute of fact was raised by the denial of the Permanent Secretary and, as the dispute was not referred to evidence, the principles, applied in cases such as *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), must be followed. It follows therefore that once a genuine dispute of fact was raised, which was not referred to evidence, *the Court is bound to accept the version of the respondent and facts admitted by the respondent, contained in the appellant's affidavit*. [Our emphasis]

'[227] It was said by Corbett JA in the *Plascon-Evans* case supra (at 634-635):

> In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact …. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6(5)*(g)*… and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof ….

'[228] How does a genuine dispute of fact arise? In the *Room Hire Co (Pty) Ltd v Feppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163, Murray AJP stated thus:

> It may be desirable to indicate the principal ways in which a dispute of fact arises. The clearest instance is, of course, *(a)* when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed. There are however other cases to consider. The respondent may *(b)* admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Or *(c)* he may concede that

> he has no knowledge of the main facts stated by the applicant, but may deny them, putting the applicant to the proof ….
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> '[229] As the South African Supreme Court of Appeal recently said in *National Director of Public Prosecutions v Zuma* supra:
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> > "[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's … affidavits, which have been admitted by the respondent …, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the [respondent's] version. [Footnotes omitted.]" '

[7] Guided by the aforegoing principles and approaches, I make the following important factual findings and conclusions thereanent. The respondent avers that the applicant abandoned the property on 26 June 2015 because, according to the respondent, a 'Deed of Purchase', which the applicant and the respondent had concluded for the sale of the property to the applicant, 'fell away'; and so, according to the respondent, the respondent 'took over the property which was, at the time abandoned by the applicant and not occupied nor operational at all'. The applicant denies that it abandoned the property.

[8] The respondent admits that 'the applicant was at some point up to 26 June 2015 in possession of the property'. If the property had been abandoned and the applicant had ceased all operations as at 27 June 2015, it is inexplicable, as Mr Jones asked rhetorically, why the respondent, a parastatal, would leave the property unguided and unsecured and unoccupied, and leave it to the mercy of thieves and vandals from 27 June 2015 to 5 August 2015 before seeing the need to secure the

property against theft and vandals? Furthermore, if the applicant had abandoned the property and ceased all its operations and it was unoccupied, why would the respondent need 'to fully took (take) over the occupation and possession during August 2015?' And the respondent in another breadth avers that it was in joint possession of the property with the applicant because the applicant is the lessee of the property and the respondent is the owner of the property. Furthermore, if the applicant had abandoned the property on 26 June 2015 and ceased all operations there and the property was unoccupied, as the respondent avers, why would the respondent, through a deputy sheriff who was not armed with an order of the court, remove all locks and replace them with new ones? And what is more; if, as the respondent avers, the applicant had long abandoned the property and ceased all operations at the property, then as a matter of common sense, the applicant's employees and security guards employed by the applicant to protect the property would not be at the property. But they were. The deputy sheriff had to chase them away from the property, as I have found.

[9] The evidence – which I accept – is that the deputy sheriff, acting under the behest and instructions of the respondent and not by an order of court, as I have said previously, chased the employees and the security guards away from the premises, and removed the locks that the applicant had put in place there and replaced them with new ones. If the applicant had long abandoned the property and ceased all operations at the property why would the deputy sheriff find the need to chase the employees and the security guards away from the property and keep them away by changing the locks there and replacing them with new ones?

[10] Additionally, the respondent avers that 'prior to that (ie 5 August 2015) the respondent always had unhindered right to enter the premises (of the property)'. This adds no weight – none at all – to the respondent's contention. The fact that before 5 August 2015 the respondent exercised its common law right, which 'an owner of property usually enjoys' (see *Kuiiri v Kandjoze* (SC), para 18), does not and cannot detract from the fact that the applicant's version that it had undisturbed and peaceful possession of the property before 5 August 2015 should be accepted. In any case, '[T]he spoliation remedy is available even where (as here) the applicant was not the sole possessor but in joint possession with others. He need not prove exclusive

possession' (see *Oberholster v Wolfaardt and Others* 2010 (1) NR 293 (HC); particularly where the other possessor is, as in the instant case, the owner of the property (ie the lessor) and the applicant is the lessee.

[11] Having applied the principles and approaches for resolving dispute of fact in motion proceedings discussed previously in the light of facts I have found to exist, I reject the respondent's version that applicant was not in peaceful and undisturbed possession of the property as at 5 August 2015 when the respondent illicitly deprived the applicant of such possession – through the judicially unauthorized shrieval act of the deputy sheriff. The deputy sheriff is not a party to the dispute; and so, he has not been cited. There is nothing untoward in that. The deputy sheriff acted as an agent of the respondent. No order is sought against the deputy sheriff. It follows inexorably that an order made in these proceedings cannot be *brutum fulmen* as respects the deputy sheriff, as the respondent appears to suggest.

[12] It, therefore, turns on nothing for the respondent to contend that 'what happened in (on 5) August 2015 was simply the Deputy Sheriff, in his official capacity, taking over the control and occupation of the property for safety from the respondent'. To start with, as I have found previously, the deputy sheriff was not armed with an order of the court, and none was placed before the court. I would therefore conclude that the deputy sheriff was acting as an agent of the respondent, and not as an officer of the court – even if he pretended to be wearing robes of officialdom – when, on the instructions, and at the behest, of the respondent, his principal, he illicitly deprived the applicant of its peaceful and undisturbed possession of the property. The act of the deputy sheriff was that of his principal, the respondent.

[13] In all this; it must be remembered –

'When people commit acts of spoliation by taking the law into their own hands, they must not be disappointed if they find that Courts of law take a serious view of their conduct. The principle of law is: *Spoliatus ante omnia restituendus est*. If this principle means anything it means that before the Court will allow any enquiry into the ultimate rights of the parties the property which is the subject of the act of spoliation must be restored, to the person from whom it was taken, irrespective of the question as to who is in law entitled to be in possession of such property. The reason for this very drastic and firm rule is plain and

obvious. The general maintenance of law and order is of infinitely greater importance than mere rights of particular individuals to recover possession of their property.'

(*Greyling v Estate Pretorius* 1947 (3) SA 514 (W), at 516-517)

[14] Based on these reasons, I conclude that applicant has established spoliation of the property by the respondent. The 'general maintenance of law and order is of infinitely greater important than the mere rights' of the respondent 'to recover possession of their property'. (*Greyling*, loc. cit.) Accordingly, the application succeeds: a spoliation order should be granted against the respondent.

[15] It now remains to consider the issue of costs. The applicant urges the court to award costs on the scale as between attorney and own client. I cannot see that by resisting the application, the respondent acted vexatiously or frivolously. That being the case, I incline to order costs on the scale as between party and party. (See Andries Charl Cilliers, *Law of Costs*, 3rd ed, p 4-14.) The applicant has been successful; and so, it is entitled to its costs – and as between party and party. But because the applicant's legal representatives failed to comply with PD 48 of the Practice Directions respecting 'indexing of papers filed of record, I am prepared to grant 80 per cent only of such costs.

[16] In the result, I make the following order:

(1) The respondent shall not later than 12 May 2016 restore forthwith to the respondent possession *ante omnia* of the property, comprising the abattoir facilities situated on Portion 38 of the Farm Okatjirute No. 155, Witvlei Town and Townland, situated in the village of Witvlei (Registration Division "L") ("the property").

(2) If the respondent fails or refuses to comply with the order in paragraph (1), the deputy sheriff for the district of Gobabis, is hereby directed and authorised to do all that is necessary and required, including the breaking of any locks securing the property, to restore possession of the property to the applicant.

(3) The respondent shall pay 80 per cent only of the costs of this application on the scale as between party and party; such costs to include costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	J P R Jones Instructed by Mueller Legal Practitioners, Windhoek
RESPONDENT:	M Ntinda Of Sisa Namandje & Co. Inc., Windhoek