REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2016/00264

In the matter between:

NICOLAAS JACOBUS KOCH **APPLICANT**

and

WILLEM ALBERTUS KOCH **FIRST RESPONDENT**

HENDRIEKA DE VILLIERS **SECOND RESPONDENT**

Neutral citation: *Koch v Koch* (HC-MD-CIV-MOT-GEN-2016/00264) [2017] NAHCMD 145 (17 May 2017)

Coram: ANGULA DJP
Heard: **6 March 2017**
Delivered: **17 May 2017**

Flynote: Applications and Motions – Spoliation – The applicant must prove on a balance of probabilities that he or she was in peaceful and undisturbed possession of the property; and that he or she was deprived unlawfully of such possession – Application dismissed with costs.

Summary: The applicant and first respondent are blood brothers. The dispute concerns certain immovable property, being a flat. The flat is situated on the first respondent's premises and thus owned by the first respondent. Out of brotherly love,

the first respondent had made the flat available to his brother, the applicant, to use upon when he visits him. The applicant, only stayed in the flat on two occasions over the period of six years. On an occasion he changed the locks of flat and did not give a spare key to the first respondent. The first respondent then gave notice to the applicant that he had moved the second respondent into the flat. The second respondent an elderly aunt of both the applicant and the first respondent. The applicant claimed that the first respondent unlawfully took the law into his own hands by accommodating their aunt into the flat; that the respondent have deprived him of his peaceful and undisturbed possession of the flat. The applicant's claim for possession of the flat is based on the fact that he had keys and therefore exercised control of the flat.

Held that, in order to succeed, the applicant bears the onus to establish on the balance of probabilities that he was in peaceful and undisturbed possession of the property and that he was unlawfully deprived of such possession. Possession consists of both an objective and a subjective element, namely physical control and intention to possess.

Held that, that the applicant has succeeded in proving that he has physical possession and control over the flat through the keys.

Held further that, that the applicant has failed to prove the second requirement of possession, namely *animus possidendi.*

ORDER

The application is dismissed with costs.

JUDGMENT

ANGULA DJP:

Introduction

[1] This matter concerns a sad story of bad blood which developed between two blood brothers. A reader would be pardoned for calling to mind the age-old and well-known rule that that blood is always thicker than water. This case is living proof of the exception to that rule.

[2] The main parties to this sad story are two brothers, the applicant and the first respondent. The second respondent is the aunt of the applicant and the first respondent, who has become, so to speak, a collateral victim of the bitter feud between the two brothers. The dispute concerns access to or possession of a flat situated on the first respondent's yard. It is not clear from the evidence whether the flat is free-standing or detached from the main house. The first respondent is the owner of the flat. Sometime back, out of love then, it would appear, the first respondent made the flat available to his brother (the applicant) to use. The applicant moved into the flat with some of his furniture. He stayed there on two different occasions only. After a long absence by the applicant from occupation of the flat, the first respondent moved his aunt (the second respondent) into the flat. It is that moving-in which is at the centre of this dispute.

[3] The applicant alleges that he was in peaceful and undisturbed possession of the flat and that he has been unlawfully dispossessed of such possession by the respondents. On the other hand, the first respondent contends that the applicant has not occupied the flat for almost six years; that he has abandoned the flat; and therefore that the first respondent was entitled to accommodate the second respondent in the flat.

The applicant's case

[4] As mentioned earlier, the first respondent is the owner of the dwelling house situated at No. 6, Aloe Street in Swakopmund. The house has a flat. The applicant's and the first respondent's versions as to the reason why the applicant came to

occupy the flat differ. What appears to be common cause, is that it happened some time during 2006.

[5] According to the applicant, he entered into an oral agreement with the first applicant in terms of which he would upgrade the flat to a suitable living standard at his own cost; that the first respondent granted him a lifelong and exclusive right of habitation and use of the flat free of charge; that the applicant would furnish the flat with his own furniture and fixtures, which he did; and that the first respondent would not allow any other person to use and/or live in the flat without the applicant's consent. During November 2009 the first respondent breached the agreement by removing the applicant's moveable goods from the flat and refusing him entrance to the flat. Subsequent thereto, the applicant launched a spoliation application to this court. The matter was removed from the roll and the first respondent was ordered to pay the applicant's costs.

[6] Regarding the facts which gave rise to this application, the applicant says that during the year 2016, he received a letter from the first respondent's legal practitioner advising him that due to the deteriorating health of their aunt, the first respondent and second respondent would remove the applicant's goods from the flat in order to accommodate the second respondent in the flat. The letter demanded that the applicant remove his goods from the flat within seven days from the date of receipt of the letter. The applicant responded, through his legal practitioner, pointing out that the first respondent's letter amounted to an acknowledgment of spoliation; that the applicant's possession of the flat is a subject matter of a pending action in the Magistrate Court where the first respondent seeks an eviction order against the applicant from the flat.

[7] The applicant states further that out of caution he caused a letter to be addressed by his legal representative to the second respondent in which he advised the second respondent that her occupation of the flat is unlawful.

The respondents' opposition

[8] The first respondent deposed to the opposing affidavit for both respondents. Initially, the first respondent took a point *in limine* that the application papers were not served on him but were served on his legal practitioner. This point was in the end not persisted with.

[9] The first respondent points out that the second respondent is the youngest sister of the applicant's and first respondent's deceased mother; that she is eighty-four years old; that she is a widow; and that she is unable to look after herself and thus is cared for by the first respondent and his wife.

[10] As to the merits of the application, the first respondent states that during November 2006 the applicant lent him N$23 400 for his relocation from South Africa to Namibia. Thereafter the applicant purchased floor tiles and two window frames for the flat. In exchange of these items, it was agreed that the applicant would use the flat on occasions when he would visit the first respondent. He would not be required to pay rent, water or electricity. According to the first respondent the applicant stayed in the flat on two separate occasions in 2007 only. During 2009 the first respondent requested the applicant to remove his movable goods from the flat as he wanted to use the flat. The applicant did not remove the goods; instead he issued a summons against the first respondent out of the magistrate court in which he claimed repayment of the money he had lent and advanced to the first respondent. Thereafter during 2010 the applicant launched a spoliation application against the first respondent which was subsequently removed from the roll. Shortly thereafter the applicant went to the flat and changed the locks; and that was the applicant's first visit to the flat since 2007. About eight months thereafter, the applicant went to the flat and removed some of his goods from the flat.

[11] The first respondent relates that during April 2016 he and his wife decided to move the second respondent into the flat. When he opened the flat for the first time since 2010, there was a stench of rat and mouse faeces, so the flat had to be fumigated. He took a number of photographs showing the state or condition in which he found the flat. Ten photos marked "WAK 1 to WAK 10" are attached to the answering affidavit. It would suffice to say that they depict the entire flat covered

under a thick layer of dust which had accumulated over the surfaces of the furniture and fixtures in the flat.

[12] It is the first respondent's case that the applicant was not in peaceful and undisturbed possession of the flat. As to the reason why he had not opposed the previous spoliation application instituted against him by the applicant, the first respondent says that he was following the advice of his erstwhile legal representative, who has since passed away. Their expectation was that the dispute could be settled in a more cost-effective manner. Unfortunately, that did not happen.

[13] The first respondent admits that the flat is part of the issue for decision in the partly heard matter before the Magistrate Court; and that in that matter he seeks an eviction order against the applicant. In this connection the first respondent points out that the matter in the Magistrate Court started in 2009 already; that the applicant has not been in possession of the flat since 2007 until 2010. Accordingly the eviction order being sought in the action matter before the Magistrate Court has become academic. The first respondent alleges that the applicant has been delaying the finalisation of the matter in order to frustrate the first respondent. In support of this allegation the first respondent attaches a copy of the application for postponement by the applicant, which application is being opposed by the first respondent.

[14] Finally, the first respondent admits that the second respondent is in occupation of the flat; but he denies that he spoliated the applicant's movables that are in the flat and: in fact he has requested the applicant to collect his movables which were in the flat.

Applicant in reply

[15] In response to the first respondent's affidavit, the applicant admits that he changed the locks of the flat at the beginning of 2010 and kept all the keys to the changed locks and did not give a key to the first respondent. The applicant denies, however, that he is delaying the finalisation of the matter by applying for a postponement. According to the applicant, the trial date was applied for and granted without the availability of his legal representative having been considered or

ascertained. As it turned out, the hearing date allocated to the matter did not suit his legal representative; that is the reason why he seeks a postponement. Finally, the applicant points out that he does not want to collect his movables in the flat but wants the return of possession of the flat with his movables stored therein.

Issue for determination

[16] Like in many spoliation applications, the issue for determination in this matter is whether the applicant was in peaceful and undisturbed possession of the flat and whether he was unlawfully dispossessed of such possession by the first and second respondents.

Counsel's submissions

[17] The applicant was represented by Mr Jacobs whereas the respondent was represented by Mr. Wylie. Both counsel filed heads of argument for which the court is grateful.

[18] Mr Jacobs for the applicant, relying on the principles enunciated in the matter of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[1] with regard to symbolic possession of keys to a building, submits that the applicant retained possession of the flat to the exclusion of the first respondent. I will later in this judgment refer in detail to the principles outlined in the *Wightman* matter. Furthermore, Mr Jacobs submits that, due to the time period of six years during which the applicant had been in possession of the flat, the applicant's possession of the flat was ensconced. For the benefit of the reader "ensconced" according to the Encarta World English Dictionary means '*to make somebody or yourself comfortably established as though ready to stay a long while*'. In support of this submission counsel referred to the matter of *Wylie v Villinger*[2]*,* where the court said the following:

'[19] After setting out the purpose and object of the spoliation action the learned judge said the following:

[1] *Wightman v Headfour (Pty) Ltd* (66/2007) [2008] ZASCA 6 (10 March 2008).
[2] (A 42/2012) [2013] NAHCMD 69 (13 February 2013) at par 19.

> 'It is my view that the requirement of 'peaceful and undisturbed possession' was recognised to cater for the realities and to prevent the granting of the remedy from working injustice rather than operating in furtherance of a policy designed to discourage self-help. It is probably the obverse of that requirement which is reflected by the view that an own warding-off of spoliation is no longer possible only 'nadat die situasie gestabiliseer het'…The applicant for spoliation requires possession which has become ensconced, as was decided in the Ness case. See also Sonnekus 1986 TSA Rat 247. It would normally be evidenced (but not necessarily so) by a period of time during which the de facto possession has continued without interference.'

[19] Mr Wylie for the respondents, on the other hand, submits that the applicant did not have possession of the flat when the alleged dispossession took place because the applicant had abandoned the flat and left it derelict. Counsel referred to the work by *Silberberg & Schoeman*[3]*,* where it is stated, amongst other things that in addition to physical control of a thing the person must also have the intention to possess the thing.

Applicable legal principles

[20] In addition to the legal principles cited by counsel above, I will refer to some specific principles discussed by Willies[4] relating to spoliation, which I consider are applicable to the present matter.

20.1 In order to succeed, the applicant bears the onus to establish on the balance of probabilities that he was in peaceful and undisturbed possession of the property and that he was unlawfully deprived of such possession.

20.2 Possession consists of both an objective and a subjective element, namely physical control and intention to possess. The physical element entails the physical control or occupation of a thing. The intention to possess entails either the intention to be owner of the thing or the

[3] The Law of Property, 5th Edition p 278.
[4] Willies Principles of South African Law, 8th edition p 264.

intention to exercise the control or occupation of the thing for the occupiers own benefit.

20.3 It has been held that not just any measure of possession, however technical, remote, tenuous or brief will suffice: the court must be satisfied that the despoiled possession of the thing was sufficiently stable and durable to constitute peaceful and undisturbed possession.[5]

20.4 Ownership of the thing does not come into consideration. In other words '*the justice or injustice of the applicants' possession is therefore, irrelevant.*[6]

[21] I have earlier in this judgment mentioned that Mr Jacobs referred to the matter of *Wightman* dealing with legal principles relating to possession of keys to a building. Those principles were also referred to by Maritz JA, with approval in the matter of *Kuiri* (supra) at par 18 of his judgement. The Court in the matter of *Wightman t/a JV Construction v Headfour (Pty) Ltd and Another* 2007 (2) SA 128 at p 134G-J summarised the principles as follows:

'(1) There is no particular magic in the possession of keys to a building as a manifestation of possession of the building; as a mere symbol their possession alone will not per se necessarily suffice to constitute possession of the building; to have that effect they must render the building subject to the immediate power and control of the possessor of the keys: they must be the means by which the latter is enabled to have access to and retain control of the building . . .

(2) To be effective in conferring possession of the building on or retaining it for the possessor of the keys, the keys must have the effect of enabling their possessor to deal with the building as he likes (in the sense of affording him access thereto) to the exclusion of others. After all, that is the primary purpose which locks and keys are designed to achieve.

(3) Where possession of the building is sought to be retained adversely to its owner, possession of the keys must, subject to what follows, have the effect of

[5] *Kuiri & Another v Kandjoze and Others* 2009 (2) NR 447 SC.
[6] *Ness and Another v Greef*, 1985(4) SA 641 (C)

excluding the owner, in the sense of precluding him from exercising the right of possession which an owner of property usually enjoys.'

Application of the legal principles to the facts

[22] I now proceed to consider the facts against the foregoing legal principles in conjunction with counsel submissions. I will first consider whether on the facts the applicant met the requirement of physical control or occupation of the flat. Thereafter I will proceed to consider the question of whether the applicant has proved the necessary intention to possess the flat.

[23] The main question is whether, on the facts, the applicant has proved that he was in possession of the flat. It is only once that hurdle has, so to speak been crossed that the court can consider whether he was deprived of such possession.

[24] It would appear to me that it is not in dispute that the applicant obtained possession of the flat during 2006. Since then over the years the applicant started storing his movables in the flat and stayed in the flat on two separate occasions. It is further common cause that during 2009 the first respondent requested the applicant to remove his movables from the flat as the first respondent wanted to use the flat. Thereafter the applicant issued summons against the first respondent out of the Magistrate Court, claiming payment of money he had lent and advanced to the latter. It is further common cause that during November 2009 the applicant launched a spoliation application against the first respondent after the latter had removed the applicant's movables form the flat. The application was removed from the roll after a settlement had been reached between the parties and possession of the flat with the movables was restored to the applicant.

[25] In February 2010, in response to the claim instituted during 2009 by the applicant against the first respondent for money lent and advanced, the first respondent filed a counter-claim for ejectment of the applicant from the flat; and that that claim is still before the Magistrate Court. It is further common cause that during January 2010 the applicant changed the locks to the flat and did not give the first respondent a key to the flat. Thereafter the flat remained locked and unoccupied for six years.

[26] What emerges from the foregoing undisputed facts, considered against the legal principles referred to earlier, in particular the legal effect of possession of keys of the flat by the applicant, summarised in the *Wightman* matter and adopted by the Supreme Court in the *Kuiri* matter, in my view there is no doubt that the applicant has succeeded in proving that he has physical possession and control over the flat. I do not think anything more needs to be said about that requirement of possession.

[27] I now proceed to consider whether on the facts, the applicant has proved the second requirement of possession, namely the intention to possess.

[28] Apart from the physical control of the thing, a person must also have the intention to possess or *animus possidendi*. A person who merely wants to protect his detention or occupation of a thing must show an intention to derive some benefit from the thing. Possession is lost when the possessor abandons the thing.[7] It has been held that possession of an immovable thing may be lost through physical absence from the immovable thing or if the mental requirements necessary to sustain the possession are no longer present. The extent of use and occupation are some of the factors to be taken into consideration to determine physical or mental control.[8]

[29] In the present matter, with regard to the beneficial use requirement of the flat, there is a dispute as to the purpose of the use of the flat by the applicant. On the applicant's version he was granted by the first respondent a lifelong and exclusive use of the flat for habitation by himself and his family or friends. The first respondent's version, however, is that in exchange for the applicant buying tiles for the flat, he granted the applicant the right of use of the flat on occasions when the applicant would visit the first respondent.

[30] On the principle of *Plascon-Evans*, with regard to the approach to be adopted by the court to a dispute of facts, the version of the first respondent is to be accepted. In my view, the applicant lost physical possession of the flat through his long period of six years of absence of occupation of the flat. On his own admission,

[7] Willies Principles of South African Law (supra) p264
[8] *Kuiri* para 34.

he did not occupy the flat for a good six years consecutively. It is also not the applicant's case that at any stage since he took occupation of the flat he had accommodated any family member or friend in the flat. In my view his possession of the flat did not amount to the applicant becoming ensconced as described above.

[31] In making the foregoing finding, I am mindful of the legal principle which says that once possession has been acquired, continuous physical possession or use is not necessary for retention of such possession. In my view, six years of continuous absence or non-beneficial use of the flat goes beyond reasonable tolerance of the requirement of continuous possession principle. I think that my view finds support in what was stated by Murray J in the matter of *Welgemoed v Coetzer 1946 TPD 701* at 720, cited by Maritz JA in the *Kuiri* matter (supra), at par 30 of his judgment. In that case the learned judge said:

'I am prepared to accept as correct certain principles for which authority was cited - viz. the required continuity of occupation need not be absolute continuity, for it is enough if the right is exercised from time to time as occasion requires and with reasonable continuity (*Mocke v. Beaufort West Municipality* (1939, CPD at p. 142)).' (My underlining for emphasis)

[32] In the present matter, there has been an absolute absence of exercise of right of use or occupation of the flat for a continuous period of six years; during that time the flat was not used nor was it occupied 'from time to time'. In my view, the only reasonable inference to be drawn from that admitted fact is that the applicant abandoned and lost the intention to possess or to continue occupying the flat. This inference is, in my view, further supported by the undisputed evidence of the first respondent, namely that the applicant left the flat in a state of dereliction; resulting in it's being covered in a thick layer of dust and of rodent faeces which had accumulated over the period of six years. From that evidence, it is clear to me that the flat was not habitable. In my view, the cumulative effect of all those facts demonstrates an absence of a mental state necessary to sustain possession of the flat. I have therefore arrived at the ineluctable conclusion that the applicant has failed to prove the second requirement of possession, namely *animus possidendi*. It is further my considered view that the facts as they stand, even without the aid of inference, clearly show that the applicant has no intention to possess the flat for any use to him or to derive any benefit from such possession.

[33] Furthermore, even if the applicant were to be found to have the intention to possess the flat, such intention to possess does not relate to the usage of the flat or having as its aim the deriving of or benefit for himself or others sufficiently connected to him from such possession. I am saying this for the following reasons: On the facts of this matter, the applicant appears to be utilising the physical possession of the flat as a bargaining chip or as a tool to settle scores or harass the first respondent. On the first occasion in 2009 when the first respondent requested him to remove his movables from the flat, the applicant caused summons to be issued against the first respondent, in which he claimed refund of the money he had lent and advanced to the first respondent. Then he unilaterally changed the locks of the flat without giving a spare key to the first respondent who is the owner of the premises. I pause here to observe that plain decency dictates that the applicant should have left a spare key with the first respondent in consideration of an emergency such as a geyser burst or fire on the premises, for that matter. I accordingly consider the applicant's conduct rather mean if not just plainly vindictive.

[34] Thereafter he stayed away for eight months just to reappear to collect some movables from the flat. The last straw was when the applicant was requested by the respondent to remove his movables from the flat in order for the first respondent to accommodate their aunt in the flat. The applicant refused to collect his movables and shortly thereafter launched the present application. In my view the applicant's assertion in his replying affidavit that he did not want to collect his movables from the flat but that he wanted to return to the flat, rings hollow. Given the rather sour relationship between him and the first respondent, it is in my view highly improbable that he honestly wishes to return to the flat. If he had any genuine intention to use the flat beneficially he would not have stayed away from the flat for six consecutive years.

[35] For the foregoing reasons I am of the further considered view that the applicant failed to prove that he had the requisite intention to possess the flat in order to derive a benefit from such possession.

[36] The foregoing conclusion, in my view, makes it unnecessary to consider the applicant's argument that by instituting a counter-claim of eviction against the applicant the first respondent thereby admits the applicant's possession of the flat. I have found that the applicant has the physical possession of the flat through the key but lacks the requisite intention to possess same. In that context, in my view, the counter-claim of eviction only admits physical possession.

[37] Regarding the issue of the movables in the flat, I am of the view that no useful purpose would be served to treat the possession of the movables separately from the flat. In so far as it may be necessary to make a finding about possession of the movables, I hold the view that my findings in respect of possession of the flat applies with equal effect to possession of the movables. Put differently, in my view, the applicant has equally failed to prove that he has the requisite intention to possess the movables; and that he has abandoned such movables together with the flat.

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

The application is dismissed with costs.

H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	Mr J Jacobs Instructed by Francois Erasmus & Partners, Windhoek
FIRST AND SECOND RESPONDENTS:	T M Wylie Instructed by Engling, Stritter & Partners, Windhoek