CASE NO.: (P) A 282//2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CONSTANCIA MURUKO	**1st Applicant**
WILFRED KAZEURUA	**2nd Applicant**

and

GODFRIEDINE KAMBATUKU	**1st Respondent**
WILHELMINE KAUNE HENGUA	**2nd Respondent**
KAMUHANGA S HOVEKA	**3rd Respondent**
ROSEN KAUTA KAUNE	**4th Respondent**
UAUNDJA MBAUKUA	**5th Respondent**
TJIRITJA MERORO	**6th Respondent**
KAURE TITEL KAUNE	**7th Respondent**
KAHUI KANDJOU	**8th Respondent**
KANGUU KANANGANDA	**9th Respondent**
KATJAZAPI KAUNE	**10th Respondent**
KAZASU HOVEKA	**11th Respondent**
VATA KAUNE	**12th Respondent**
KANDORE KANDJOU	**13th Respondent**
KAIHUUE KATJIOVA	**14th Respondent**
KUVERI KANDJOU	**15th Respondent**
KAANA KAMBATUKU	**16th Respondent**
JOONI MUNJONE	**17th Respondent**
JOGBETH KAMUHANGA	**18th Respondent**

CORAM: **PARKER, J**
Heard on: 2006 November 28

Delivered on: 2006 December 6

JUDGMENT:

PARKER, J.:

[1] In this application brought on notice of motion, the applicants seek an order in the following terms:

1. That the Court condones the applicants' non-compliance with the Rules of this Court ("the Rules") and the time periods prescribed therein in so far as these have not been complied with, and direct that this matter be heard as one of urgency as envisaged in Rule 6 (12) of the Rules.

2. That a rule *nisi* be issued calling upon the respondents to show cause on a date to be determined by the Honourable Court why the following order should not be made:

    2.1 ordering first, second, third, fourth, seventh and eighth respondents to restore second applicant's possession of the unlawfully dispossessed 130 head of cattle (including any offspring);

    2.2 ordering the respondents to restore first applicant's possession of the following items unlawfully dispossessed:

        2.2.1 two plastic dams;

        2.2.2 176 sheep (including any offspring);

2.2.3 113 goats (including any offspring);

2.2.4 water pipes;

2.2.5 the house situated in the Okoukambe Village;

2.2.6 120 cattle (including any offspring);

2.2.7 the zinc sheets;

2.2.8 five black cooking pots;

2.2.9 a feeding trough;

2.2.10 two water troughs;

2.2.11 three spades;

2.2.12 100 metres of black plastic piping;

2.2.13 one water tap;

2.2.14 the 1972 Ford F pick-up motor vehicle;

2.2.15 the trailer used for the conveyance of livestock;

2.2.16 the axle belonging to the aforementioned trailer.

2.3 ordering respondents to pay the costs of this application on a scale between attorney and client.

3. That the order in terms of subparagraphs 2.1 and 2.2 hereof shall serve as an *interim interdict* with immediate effect pending the finalisation of this application.

4. That the Court grants the applicants such further or alternative relief as the Court may deem fit.

[2] The application, filed on 12 October 2006, was brought on urgent basis but it was heard in due course on 29 November 2006, after it had been postponed twice, on 13 November and 20 November 2006. The respondents

had the opportunity to file answering papers before the hearing.

[3] Before I deal with the main application, I wish to treat the preliminary applications that were brought by the applicants so as to get them out of the way at this stage:

(1) The r. 30 application: The respondents did not oppose the application; they, indeed, tendered costs for the applicants' filing of the r. 30 application.

(2) Wasted costs, 13 November 2006 postponement: I find that the postponement was at the instance of the respondents.

(3) Wasted costs, 20 November 2006 postponement: It is common cause between the parties that the 20 November postponement was not at the instance of any party.

(4) Application to strike out parts of the 2nd respondent's answering affidavit: It is important to note that the respondents did not file any opposing papers. Counsel for the respondents was allowed to argue their opposition from the Bar.

(a) With the greatest respect, I fail to see on what basis the applicants contend that subparagraph 3.7 and a certain portion of paragraph 32 introduce inadmissible and

irrelevant opinion evidence. From the papers filed of record, I find that the deponent of the answering affidavit, Wilhelmine Kaune Hengua, the 2nd Respondent, is an adult sister of the late Erwin Kaune (whose estate is the subject of these proceedings) and they are of Otjiherero descent. I accept that she is stating in subparagraph 3.7 and in the portion of paragraph 32 what, according to her, are matters of her personal knowledge, and she swears that what she states is true: she does not put herself out as an expert. I am not satisfied that the applicants will be prejudiced within the meaning of r. 6 (15) of the Rules of the Court if the application to strike out is not granted. If during the hearing of the main application (the spoliation application) in due course subparagraph 3.7 and the portion of paragraph 32 are found to be not capable of assisting the Court in making a determination, the Court will not take cognizance of them. That being the case, the application to strike out subparagraph 3.7 and the portion of paragraph 32 cannot succeed.

(b) Mr. Obbes's submission is that the confirmatory affidavits

of the 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th and 18th Respondents (the 11 affidavits) predate the 2nd Respondent's answering affidavit (settled on 9 November 2006), which the 11 affidavits (settled on 8 November 2006) sought to confirm. Consequently, he submitted, the 11 affidavits are irrelevant and a nullity, and so they should be struck out. Mr. Corbett concedes that the 11 affidavits do predate the answering affidavits, but he prayed from the Bar that the Court should condone the irregularity and accept the 11 affidavits. It is Mr. Obbes's contention that a proper application ought to have been made in the circumstances. I agree with Mr. Obbes in that regard. But he does not persuade me in the least as to what prejudice the applicants would suffer if the application to strike out was not granted. Each of the 11 affidavits consists of two paragraphs – and they are all substantially identical in material respects: the first paragraph deals with the details of the person of the deponent, and the second the fact that the deponent confirms the answering affidavit of the 2nd Respondent. In a rearguard action, Mr Obbes argued that if the 11 affidavits had been filed properly the Applicants

> would have responded in greater detail in their replying affidavit, and the applicants' counsel's heads of argument would have been formulated differently. The argument, with the greatest deference, is not only weak but also not well founded. None of the 11 affidavits deals with any substantial matter, and there is nothing – nothing at all – that adds anything – even a modicum – to the facts deposed to by the 2nd Respondent in her answering affidavit. For the above reasons, the application to strike out the 11 affidavits must also fail.

[4] I pass to deal with the main application. Mr. Corbett, who appeared for the respondents, argued that the matter was not urgent within the meaning of the Rules of Court because the urgency was self-created. Mr. Obbes, for the applicants submitted contrariwise. In my view, it is in the interests of all parties to the application that it be resolved without further delay. In the circumstances and having regard to the papers filed of record and all the *conspectus* of the case, I condone the applicants' non-compliance with the Rules of Court.

[5] Mr. Obbes strongly pressed on me that the application is for a *mandament van spolie* and, therefore, it must be determined solely on that

basis. That is not in doubt, and I understand Mr. Corbett not to contest that point.

[6]`The surrounding circumstances of the present application have their genesis in the application launched in this Court on 27 October 2005 (the October 2005 application). In that application the parties were Wilhelmine Kaune Hengua: the 1st Applicant; Jogbgeth Kaune Kamuhanga: the 2nd Applicant; Godfriedine Kaune Kambatuku: the 3rd Applicant; and Antonia Kazongominja: the 4th Applicant. The opposing party consisted of Constancia Muruko: the 1st Respondent; Headman Karumendu for the Aminius Traditional Authority: the 2nd Respondent; and the Magistrate for the District of Gobabis: the 3rd Respondent. The 2nd and 3rd Respondents were joined as parties *nomine oficii*.

[7] The October 2005 application was heard by my brother Mtambanengwe, AJ on 21 August 2006. Both the relevant papers of the October 2005 application and the judgement and orders by the learned Judge (the Mtambanengwe Orders) form a part of the papers filed of record in the present application. It is, therefore, extremely vital for the determination of the present application that I set out in whole the Mtambanengwe Orders:

1. The appointment of the first respondent by the third respondent purportedly in terms of s 2 (a) of Government Notice 70 of 1994 is hereby declared *null and void.*

2. Consequently the purported division of the deceased's estate by first respondent is se aside.

3. The estate of the late Erwin Kaune shall devolve and be administered in terms of the Otjiherero culture and shall be supervised by the second respondent;

4. First respondent is ordered to pay the costs of this application.

[8] It must be mentioned that the 2nd Applicant in the present application was not a party to the 25 October application. In the present case he has filed a confirmatory affidavit to the founding affidavit by the 1st Applicant, which means he makes common cause with the 1st Applicant on the evidence that concerns him.

[9] Following upon the granting of the Mtambanengwe Orders, the respondents in the present application – working in small groups – collected what, in their view, was the property that formed part of the estate of the late Erwin Kaune, who was the husband of the 1st Applicant (the 1st Respondent in the October 2005 application). And according to them, what they did was in line with "Otjiherero culture (i.e. Otjiherero customary law)". Indeed, Mr. Corbett submitted that the respondents' action was in pursuance of the order of this Court (i.e. the Mtambanengwe Orders). The respondents state that they

took possession of the said property in the period 15-17 September 2006. It is the applicants' contention that the property was taken possession of in the period 11-17 September 2006. What is significant for the purposes of the determination of the present application is that, from the papers, I find that the taking of possession of the said property by the Respondents was completed on Sunday, 17 September 2006.

[10] I must say that I agree with Mr. Obbes that in this application, the Court is not asked to make an order as to the extent of the estate. I have, therefore, advisedly used the term "property" in this judgment, and it must be understood to mean "property" referred to in the judgment by Mtambanengwe, AJ and the ensuing Mtambanengwe Orders.

[11] It is not in dispute that the 1st Applicant, who was the 1st Respondent in the October 2005 application in which the Mtambanengwe Orders were granted, noted an appeal on Tuesday, 19 September 2006, against the judgment and the resultant Mtambanengwe Orders. That being the case, I hold that when the appeal was noted, the respondents had already taken possession of the property in question. Indeed, it is the taking of possession of the property that has resulted in the present application for a spoliation order.

[12] The legal principles applicable to spoliation proceedings are trite and have time and time again been stated by the Courts.[1] The central and

[1] *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); *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). See also Kleyn, *et al.*, *Silberbeg and Schoeman's The Law of Property*, 3rd ed., 1992: pp 128-

fundamental 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 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.[2] The justice or injustice of the applicants' possession is, therefore, irrelevant.[3]

[13] Thus, according to the authorities,[4] 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*, "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".[5] Consequently, if I find that at the time the respondent deprived the applicants of possession of the property in question the applicants were not in peaceful and undisturbed possession of the property, the application must fail.

156.
[2] *Greef* , *supra*, at 647 B-C.
[3] *Loc cit* ., at F.
[4] See, e.g. Fn. 1, above.
[5] *Mbangi and Others* , *Supra*, at 335H.

[14] The single question I must first of all answer is, therefore, whether the applicants were in "peaceful and undisturbed" possession of the property at the time the respondents deprived them of possession thereof. As Mr. Corbett put it in his submission, the question is whether the applicants were in peaceful and undisturbed control of the property before they were disturbed in their possession thereof by the respondents. For this reason, it seems to me that this application, despite the fact that the papers filed are voluminous and I have been referred to quite a number of authorities, falls within an extremely short and simple compass.

[15] In *Greef*, Vivier, J stated that the words "peaceful and undisturbed" probably mean "sufficiently stable or durable possession for the law to take cognizance of it."[6] In *Jenkins v Jackson*, it was said that the words "peaceful and quietly" in relation to enjoyment of possession mean without interference – without interruption of possession.[7] Relying on the foregoing definitions, I come to the conclusion that "peaceful and undisturbed" possession means without interference with, or interruption of, possession. The result is that the applicant for a spoliation order requires that the possession he or she wishes to be protected must have become ensconced[8] for the law to take cognizance of it.[9]

[16] Having considered the language of the Mtambanengwe Orders as a whole, and having considered the entire contextual framework of the judgment and the objects of the Orders, I have come to the inescapable conclusion that

[6] *Greef* , s*upra*, at 647D.
[7] 40 Ch D 71 at 74, *per* Kekewich, J.
[8] *Mbangi and Others* , *supra*, at 338 A.
[9] See *Greef*, supra, *at 647 D.*

the meaning of the Orders is clear and unambiguous.[10] Having so concluded, it is my view that the irrefragable legal reality in this case is that the applicants could not have been in "peaceful and undisturbed" possession after the granting of the Mtambanengwe Orders, for their possession of the property was disturbed by the lawful order of this Court, i.e. by the Mtambanengwe Orders. Consequently, the applicants' possession of the property did not continue without disturbance up to the date on which the appeal was noted. That being the case, I hold that the applicants were not in "peaceful and undisturbed" possession of the property at the time the respondents deprived them of possession thereof for the law to take cognizance of it.

[17] In coming to this conclusion I have not lost sight of Mr. Obbes's submission that in the respondents' counsel's heads of argument, the respondents appear to concede that at the time they took possession of the property, the applicants were in peaceful and undisturbed possession of the property. Paragraph 9 of Counsel's heads of argument reads:

> It is conceded that the applicants were indeed in peaceful and undisturbed control of the property (albeit without lawful authority) prior to the respondents taking possession thereof during the period 15 to 17 September 2006.

[18] I do not think paragraph 9 is a clear, unambiguous and unequivocal concession from which the applicants can derive a benefit, if regard is had to the parenthetical words in the said paragraph, namely, "albeit without lawful authority". But, more important, in subparagraph 3.3 of the same heads of argument, counsel submits that one of the issues to be determined by the Court, as aforesaid, is whether the applicants were in peaceful and undisturbed control

[10] See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-G; *Simon NO and Others v Mitsui and Co Ltd and Others* 1997 (2) SA 475 (A) at 493A.

of the property before their possession of it was disturbed by the respondents. Thus, if paragraph 9 is juxtaposed with subparagraph 3.3 and the two passages are read contextually, the inescapable result is that as far as the respondent's are concerned, the Court must determine the issue of whether the applicants were in peaceful and undisturbed possession of the property when the respondents took possession of it. The upshot is that the so-called concession on the issue that may be gleaned from paragraph 9, therefore, falls away. In sum, in my judgment, if paragraph 9 is read with subparagraph 3.3 – and it must be read with it – there is no concession on the question of the critical issue of whether the applicants were in "peaceful and undisturbed" possession of the property at the time the respondents took possession thereof.

[19] For all the above, I have come to the inexorable conclusion that the applicants are not entitled to the relief sought.

[20] In the result, the application for a spoliation order is dismissed with costs. I also make the following further orders as to costs:

(1) The respondents must pay costs for the applicants' filing of the r. 30 application.

(2) The respondents must pay wasted costs for the 13 November 2006 postponement.

(3) There shall be no order as to costs for the 20 November 2006 postponement.

(4) There shall be no order as to costs in respect of the application to strike out.

_____

Parker, J

ON BEHALF OF THE APPLICANTS:	**Adv. D. Obbes**
Instructed by:	Metcalfe Legal Practitioners
ON BEHALF OF THE RESPONDENT:	Adv. A.W. Corbett
Instructed by:	Dr. Weder, Kauta & Hoveka Inc.