



'Reportable'

SUMMARY

CASE NO.: A 78/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANTON KAZARONDA KANDJIMA AND ANOTHER v DAVID KAKERO

PARKER J

2011 August 9

Spoliation - Mandament van spolie – Possession – What constitutes – Applicants being members of Church of which respondent is Archbishop – Applicants seeking restoration of their right to access to, and use of, church (building) – Court finding that applicants being members of the Church have the Article 21(1)(c) (of the Namibian Constitution) right to use the church for legitimate Church activities as they had been doing before being unlawfully deprived of possession thereof by conduct of the respondent – On the facts Court finding that the nature of access to, and use of, the church by the applicants in the present proceedings are incomparable on any legal plane to the mere right to access to, and use of, property described in *Paula de Beer v The Zimbali Estate Management Association (Pty) Ltd and Zimbali Development Company (Pty) Ltd* Case No. 6711/2005 (Natal Provisional Division) (Unreported) and in *Shoprite Checkers Ltd v Pangbourne Properties* 1994 (1) SA 616 (W) – Court concluding that the applicant's access to,

and use of, the church amounted to incorporeal rights and give rise to 'possession' – Court finding that applicants have established that they were in undisturbed and peaceable possession of the church and the respondent unlawfully deprived them of possession thereof – Consequently Court concluding applicants are entitled to relief of the mandament van spolie.

Held, that whether one's right to access to, and use of, property could give rise to 'possession' depends upon the facts to the particular case, including whether such right to access to, and use of, the property has been in pursuit of one's enjoyment of one's constitutional right, and such 'right to use' the property cannot be described as 'mere right to use the property'.

CASE NO.: A 78/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANTON KAZARONDA KANDJIMA
IMMANUEL HEKEMO

First Applicant
Second Applicant

and

DAVID KAKERO

Respondent

CORAM: **PARKER J**
Heard on: 2011 July 19
Delivered on: 2011 August 9

JUDGMENT

PARKER J: [1] In respect of an application the Court granted an order on 7 April 2011 in the following terms:

- (1) That a *Rule Nisi* be issued calling upon the respondent to show cause, if any, on a 14 April 2011, why the following order should not be granted:

- 1.1 That the respondent be ordered to restore to the applicants their right of access to and use of the Church building of the St Stephen Romanna Apostolic Church of Africa, situated at Erf 2386, Ferdinand Menjengua Street, Katutura, Windhoek;

- (2) That prayer 2.1 shall operate as an interim interdict pending the return date of the said *Rule Nisi*.'

[2] At the beginning of the hearing on 19 July 2011, as the returned date, an application was before this Court by the legal representative of the respondents, Mr Kaumbi, for the late filing of counsel's heads of argument. Mr Van Vuuren, counsel for the applicants, informed the Court that he was not objecting to the granting of the application: he did not want the application to stand in the way of the expeditious adjudication of the matter. In any case, I have perused counsel's explanation for the late filing of the heads of argument, and having done so, I have no difficulty in accepting the explanation as good and *bona fide*, and so I condone the late filing of the heads of argument.

[3] It seems to me that this case, despite the fact that it has been argued extensively and I have been referred to quite a number of authorities on the principle of spoliation, which is trite anyway, falls within an extremely short, narrow and simple compass. The essence of the issue at play in this matter is, to my mind, this: Was there undisturbed and peaceable possession of the church (building) by the applicants for legitimate worship-related and other church activities until and up to 4 March 2011 ('the critical date'), that is, the date on which unlawful dispossession allegedly took place? In this regard, *pace* Mr Phatela, as Greenberg JA stated in *Nienaber v Stuckey* 1945 AD 1021 at 1056, 'apart from authority (there is) no reason why the relief should not be available merely because the person who has been despoiled does not hold exclusive possession.'

[4] Furthermore, it must be remembered that the content, scope and signification of 'possession' are not fixed or immutable. For instance, 'possession' in *Nienaber v Stuckey* supra concerns the appellant's right to plough lands; and there, the Court found that when the respondent locked the gate he effectively despoiled the appellant's possession. Thus, in *Nienaber v Stuckey* the signification of 'possession' is the right to use land and the nature of the right is incorporeal (at 1055). In this regard it has been held that incorporeal rights are protected against spoliation (*Nienaber v Stuckey* at 1056). *Paula de Beer v The Zimbali Estate Management Association (Pty) Ltd and Zimbali Development Company (Pty) Ltd* Case No. 6711/2005 (Natal Provincial Division) (Unreported) concerns the applicant (an estate agent) complaining that she has been despoiled because she was denied access to the whole Zimbali Estate, including the Beach Estate, which access was gained through a boom-gate and the access was restricted and controlled by the first respondent. Thus, in *Paula de Beer* 'possession' was grounded on a right of access to land. The Court found that the applicant was entitled to access to the Beach Estate but not to the two other parts.

[5] Thus, as I understand the *ratio decidendi* of that case, access to land or premises may give rise to possession – but not always so. In *Paula de Beer* supra Nicholson J gave the following examples where access does not give rise to 'possession'. A visitor to premises could not seek a spoliation order in respect of those premises. The milkman, the insurance salesman and the estate agent have access to, but not possession of, the units of buildings and communal property or, indeed, any buildings where they supply goods and services to the residents or occupiers of the buildings and property involved.

[6] Accordingly, in my opinion, whether access to, and use of, property could give rise to 'possession' depends upon the facts of the particular case. For instance, in *Shoprite Checkers Ltd v Pangbourne Properties* 1994 (1) SA 616 (W) at 622 B-C Zulman J stated that the applicant might or might not have had a right, derived from a contract which it entered into with the respondent, to make use of the parking area and that 'did not ... amount to a "possession" as envisaged in the authorities, of such designated area for the purposes of establishing an entitlement to the mandament van spolie'. Zulman J then held (at 623G) that the 'mere right to use property' does not amount to possession of property. It follows that on the facts in *Shoprite Checkers Ltd v Pangbourne Properties* supra, the fact that the applicant had access to the parking areas, that is, their 'mere right to use' the parking areas – without more – did not amount to the applicant's possession of the parking area which customers of both the applicant and Shoprite Cape, as also its employees, made use of in the normal course of their business.

[7] On the facts and circumstances of the instant case, the following irrefragable aspects appear clearly, as put in para 11 of the founding affidavit -

Before the dispute, an elder in the Church would keep the key. He would open the Church in the morning and close it again after about 22h00 in the evening depending on when the last activity for the day is finished. All the members of the Church thus had access to the church to conduct religious activities ranging from prayer; worship, bible study, offering services, to receive blessing and choir practice. The members would normally conduct these activities under the leadership of a pastor, elder or bishop. This does not mean that members are not allowed to use the church without such leadership. Individual members are free to come to the church for prayer and other religious activities. The respondent is aware of this and had admitted as much in previous proceedings'

[8] Significantly, in his answering affidavit (para 6.1), the respondent admits the contents of the said para 11 subject to the qualification in his para 6.2:

‘6.1 Subject to the qualification set out in sub-paragraph 6.2 below, the content is admitted.

6.2 By decision of the executive committee as referred to in sub-paragraph 4.5 above (i.e. of the affidavit), I, as Archbishop, keep the keys to the church building in my possession unless I am directed otherwise by the executive committee.’

[9] What emerges clearly from these statements is that the respondent does not dispute that members of the Church have the right to access to, and use of, the church for the activities mentioned in the said para 11. In any case, in my opinion, the nature of the right to access to, and use of, the church is incomparable on any legal plane to the nature of the right to ‘access’ or ‘use’ found to exist in *Shoprite Checkers Ltd* supra, or the nature of the right to access to, or use of, ‘the other parts’ of the Estate found to exist in *Paula de Beer* supra or the nature of the right to ‘access’ or ‘use’ by the ‘the visitor, the milkman, the insurance salesman and the estate agent’ mentioned in *Paula de Beer* supra. The nature of the right to ‘access’ or ‘use’ in the instant case is in the nature of incorporeal rights as in *Nienaber v Stuckey* supra; and, in my opinion, the right to access to, or use of, the church is capable of giving rise to possession, entitling the applicants to the relief of the mandament van spolie. The applicants *qua* Church members in the instant case, as submitted by Mr Van Vuuren, who have the constitutional right to practise their religion, must have their right to possession of the church for that purpose protected by spoliation. The Church members are not customers or employees who ‘use the parking area in the

normal course of their businesses' as described in *Shoprite Checkers Ltd* supra at 622A. Additionally, the Church members are not the visitor, the milkman, the insurance salesman and the estate agent mentioned in *Paula de Beer* supra at para 55. In these proceedings, as members of the Church, the applicants have the right to use the church for the legitimate activities aforementioned. The applicants joined the particular denomination or religious community in order to exercise their Article 21(1)(c) right to practise their religion and to manifest such practice; and so, 'mere' is not an epithet I will use to characterize the applicants' right to access to, or use of, the church for Church activities in pursuit of their constitutional right, as aforesaid, before being unlawfully deprived thereof by the respondent who now wishes to hide behind the Executive Committee for so unlawfully depriving them.

[10] With the greatest deference to Mr Phatela, I do not pay any heed to the Settlement Agreement that Mr Phatela was so much enamoured with for the following reasons. The respondent has not come to Court to enforce the so-called Settlement Agreement; but more importantly, it is clear on the papers that the ongoing tussle within the community of the Church has not abated despite the so-called Settlement Agreement, 'numerous court proceedings', and the judicial counsel by my brother Smuts J in his judgment delivered on 1 April 2011 in *David Kakero and Another v Immanuel Hekemo and Others* Case No. A 20/2011 (Unreported), a related matter. All these efforts have not brought an end to the infighting in the Church or any respite at all.

[11] What is relevant in these proceedings is rather that, as I have said previously, the respondent does not dispute the applicants' incorporeal right to use the church by the Church members. His only qualification which adds no

weight in his favour but adds a great deal of weight to the applicant's case is that he kept the keys to the church for and on behalf of the Executive Committee of the Church 'unless I am directed otherwise by the executive committee'. As Mr Van Vuuren submitted, what the respondent does not say is 'where the decision of the Executive Committee, telling the respondent to stop giving access to the church to the church members, is'.

[12] From all the above, I conclude that the respondent's position is that he has unlawfully deprived the members of their undisturbed and peaceable possession of the church, but that he has done so on the authority of the Executive Committee and he would have restored that right if he had been told to do so by the Executive Committee. But the respondent has not produced any grain of evidence to establish that the Executive Committee authorized him to despoil the applicants of possession of the church on the critical date (4 March 2011); and neither would any such authorization have rescued the respondent's case from falling flat on its face.

[13] For the foregoing reasoning and conclusions, I am satisfied that the applicants have established that they were in undisturbed and peaceable possession of the church and that the respondent has, through his conduct, unlawfully deprived the applicants of such possession; and so the applicants are entitled to the relief of the mandament van spolie. I, therefore, hold that a case has been made out for the confirmation of the *rule nisi*. As to costs; I think costs should follow the event; but I am not persuaded that, in the nature of the matter, costs should be on the scale as between attorney (legal practitioner) and client.

[14] In the result:

- (1) the *rule nisi* is confirmed.
- (2) the respondent must restore to the applicants their right of access to, and use of, the church building of the St Stephen Romanna Apostolic Church of Africa, situated at Erf 2386, Ferdinand Menjengua Street, Katutura, Windhoek.
- (3) the respondent must pay the applicants' costs of this application on a scale as to party and party; such costs to include costs attendant upon the employment of one instructing counsel and one instructed counsel.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANTS:

Adv. A Van Vuuren

Instructed by:

LorentzAngula Inc.

COUNSEL ON BEHALF OF THE RESPONDENT:

Adv. T C Phatela

Instructed by:

JR Kaumbi Inc.