



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: A 302/2013

In the matter between:

JOHANNA GOSES

APPLICANT

and

SUSANNA HOFF

FIRST RESPONDENT

THE COUNCIL OF MUNICIPALITY OF WINDHOEK

SECOND RESPONDENT

Neutral citation: *Goses v Hoff* (A 302-2013) [2013] NAHCMD 318 (6 November 2013)

Coram: UNENGU AJ

Delivered: 6 November 2013

Flynote: Interdict – Spoliation order – what must be proved by the applicant – Application on urgent basis for an order to restore water and electricity to the house where appellant and family live – Order granted previously when application was heard confirmed.

Summary: The applicant and family in possession of a property where they live since the death of their mother and daughter, have their water and electricity cut off by the respondents. The applicant on an urgent basis approached the court for a

spoliation order to order the respondents to restore the peaceful and undisturbed possession supply of the water and electricity to the house they live and to interdict and to restrain first and second respondents from interfering; hampering or preventing the applicant and others from having peaceful and undisturbed possession of Erf 8687 in Shanghai Street, Katutura, Windhoek and for an order of costs. The order of 'Rule confirmed with costs' made on 15 October 2013 confirmed.

REASONS

UNENGU AJ:

[1] The applicant, on Friday, 30th August 2013 at 9h00, came to Court by way of Notice of Motion on an urgent basis as contemplated in Rule 6(24) in the following terms:

1. Condoning the Applicant's non-compliance with the Rules of this Honourable Court and dispensing, as far as need be, with forms and service provided for in these Rules and authorizing the Applicant to bring this application on urgent basis as contemplated in Rule 6(24).

2. That a **Rule Nisi** be issued, calling upon the respondents to show cause, if any, on a date to be determined by this Honourable court, why an order in the following terms should not be granted:

3. That first respondent be directed to forthwith and *ante omnia* restore applicant's peaceful and undisturbed possession of Erf 8687 Shanghai Street, Katutura Windhoek, Republic of Namibia by causing water and electricity to be reconnected to the said erf, failing which second respondent be authorized and directed to forthwith and *ante omnia* restore applicant's peaceful and undisturbed possession of Erf 8687 Shanghai Street, Katutura Windhoek, Republic of Namibia by reconnecting the electricity and water supply to the said erf.

4. Interdicting and restraining First and Second Respondents from in any way interfering and/or hampering and/or preventing applicant and other occupiers from having peaceful and undisturbed possession of erf 8687 Shanghai Street, Katutura Windhoek, Republic of Namibia.

5. Directing first respondent to pay costs of the application on scale as between attorney – own – client.

6. Alternative or other relief.'

[2] I granted the relief sought in the Notice of Motion after hearing counsel for the applicant, and fixed as a return date of the *rule nisi* 2 October 2013 at 09h00, for the respondent to come and show cause, if any, why the *rule nisi* should not be confirmed.

[3] On 2 October 2013, the *rule nisi* was again extended until 15 October 2013 at 09h00 by the Honourable Mr Justice Damaseb, JP, to serve before me.

[4] On 15 October 2013, Ms Schulz of PD Theron & Associates appeared for the respondents and Mr Coetzee of Tjitemisa & Associates acted on behalf of the applicant.

[5] Ms Schulz applied for condonation of the non-compliance with Rule 6(4) of the rules of the court and the late filing of the opposing affidavit by the respondent, which application was not opposed by the applicant because no time limits were given in the Notice of Motion within which the respondent to file notice of intention to defend or oppose the application.

[6] After hearing submissions from both counsel, I confirmed the *rule nisi* and indicated that reasons therefore will only be provided upon a written request. As expected, Ms Schulz has now filed a written request to furnish reasons for the judgment. Therefore, what follows hereunder, are the reasons for the order made on 15 October 2013.

[7] Before giving a brief history of the matter, I wish to point out that the same parties in the application are engaged in another litigation against each other, in Case No. I 3927/2010 where ownership of the house which is currently occupied by the applicant and her family, is the subject matter. In this application, as it is clear from the Notice of Motion, the relief sought by the applicant is the restoration of water and electricity supply to the applicant at Erf 8687, Shanghai Street, Katutura Windhoek which supply was disconnected by the second respondent on the instructions of the first respondent; and an order interdicting and/or restraining first and second respondent from interfering and/or hampering and/or preventing applicant and other occupiers of the house, in any way, from having peaceful and undisturbed possession of the said house as well as the costs of the application.

[8] The applicant is a daughter of the late Elfriede Goses who worked for the respondent, before she passed away on 17 April 2010. The late Goses lived in this house with her children, including the applicant in this matter until the day of her death. As already indicated, ownership of the house is in dispute and is an issue to be resolved in the other case where the respondent is the plaintiff and the applicant and others are the defendants.

[9] Meanwhile, since their mother (Elfriede Goses) passed away in 2010, the house did not have water supply until the end of January 2013. The water was disconnected by the Municipality of Windhoek on the instruction of the respondent.

[10] On 2 February 2013, Ms Thusnelda Gawanas, the grandmother of the applicant made an arrangement with the Municipality to pay off the outstanding balance of N\$9 842.96. The Municipality agreed and reconnected the water to the house.

[11] However, on 2 April 2013, the water and electricity of the house were disconnected on the request of the first respondent who alleged that the applicant and others were occupying her house unlawfully. The disconnection was done

despite the arrangement to pay off the outstanding balance and while payments were being made by the grandmother towards the outstanding balance.

[12] That did not discourage the grandmother. On 17 July 2013 she returned to the Municipality when she signed an acknowledgement of debt for the outstanding balance and as such the water and electricity were reconnected again. However, these services, even though payments of the outstanding balance did not stop, were disconnected by the second respondent again on the instruction of the first respondent. Hence this application for relief to place the applicant in her previous position.

[13] The aforesaid is briefly the background history of the matter.

[14] Ms Schulz argued that the applicant did not establish a clear right in order to be granted a final order; that she is not entitled to perform and to enjoy all the benefits and privileges associated with a lawful owner of the property as the first respondent is the holder of a title deed. Therefore, Ms Schulz further argued, that the applicant cannot compete with the first respondent as far as these rights and powers are concerned.

[15] Meanwhile, Mr Coetzee, counsel for the applicant submitted that the only issue for determination by the Court, is whether in the circumstances of the matter, spoliation has taken place.

[16] I pointed out already that there is a case pending between these parties wherein the first respondent is the plaintiff where ownership of the same property is the subject matter. Therefore, in this application, ownership of the property is not an issue – the issue is whether the respondents have despoiled the application of her peaceful and undisturbed possession of the property by disconnecting the water and electricity supply to the house.

[17] That the applicant and her family are in occupation of the house, is not in dispute. Similarly, it is not in dispute that water and electricity supply were peacefully

and without disturbances used by the applicant and family from 17 July 2013 until 7 August 2013 when the second respondent disconnected the supply of both the water and electricity. In my view, the argument of counsel for the first respondent that the application is not entitled to perform and enjoy all the benefits and privileges that are associated with a lawful owner of property and that applicant cannot compete with the first respondent as far these rights and powers are concerned is irrelevant and is rejected.

[18] Further, what is required of the applicant is to prove possession and that she was unlawfully deprived of such possession. Which is the issue in the matter at hand. The fundamental principle of the remedy (spoliation) is that no one is allowed to take the law into his or her own hands. See *Yeko v Qana*¹ and Willie's Principles of South African Law by Hutchison *et al*² referred to by counsel for the applicant where the following was said: 'If a person has been deprived of possession by violence, fraud stealth or some other illicit method, he may obtain from court a mandament van spolie or a spoliation order, commanding the dispossessor to restore the possession to himself, the applicant. It is a fundamental principle that no man is allowed to take the law into his own hands. Consequently if a person without being authorised by judicial decree dispossess another person, the court, without inquiring into the merits of the dispute, will summarily grant an order for restoration of possession to the appellant, as soon as he has proved two facts, namely that he was in possession, and that he was despoiled of possession by the respondent. The policy of law is neatly summed up in the *maxim, spoliates ante Omnia restituendus est*'.

[19] There is no doubt about it, that it is what happened to the applicant in this application. She has been deprived of her possession of water and electricity by the two respondents by means of some other illicit method, without a judicial decree.

[20] In paragraph 23 of her founding affidavit, the applicant states that she has been unlawfully deprived of the supply of water, basic amenities like drinking water

¹ 1973 (4) SA 735 (A) at 739 E-G

² 8th Edition at page 267

and ablution facilities are unavailable to the property. She states that the family is living under inhumane and unhygienic manner in which is health hazard which can result in serious health problems for her family. I agree. Water is one of the basic needs. To refuse the application will amount to the perpetuation of an injustice to the applicant and her family which they are already experiencing.

[21] That being the case and considering the facts of the matter as well as the decisions of authorities referred to by counsel for the applicant in his written heads of argument which he amplified by oral submission it is my humble view that the applicant has established the requirements for spoliation order for this court to confirm the order granted on 15 October 2013.

Consequently, the aforesaid are the reasons for the order made on 15 October 2013.

PE Unengu
Acting

APPEARANCE:

For applicant:

Mr E Coetzee

Of Tjitemisa & Associates

For respondents:

Ms F Schulz

Of PD Theron & Associates