REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 42/2012

In the matter between:

MARK THOMAS WYLIE **APPLICANT**

and

GREG VILLINGER **FIRST RESPONDENT**
FRANK'S PROPERTY HOLDINGS **SECOND RESPONDENT**
ERONGO RED **THIRD RESPONDENT**
THE COUNCIL FOR THE MUNICIPALITY OF SWAKOPMUND **FOURTH RESPONDENT**

Neutral citation: *Wylie v Villinger* (A 42/2012) [2012] NAHCMD 69 (13 February 2013)

CORAM: UEITELE, J
Heard: **12 November 2012**
Delivered: **13 February 2013**

Flynote: Spoliation - Mandament van spolie - Applicant must prove peaceful and undisturbed possession at time of deprivation of possession - Phrase meaning sufficiently stable or durable possession for the law to take cognizance of it.

Counter-spoliation only possible where despoiled possessor acts forthwith (*instanter*) and provided that in so acting he or she does not commit a breach of the peace.

Summary:

The applicant occupied a piece of land (erf 1605, Extension 7, Swakopmund, Republic of Namibia) situated in the municipal area of Swakopmund. The second respondent is the lawful owner of the erf. The second respondent, alleging that the applicant is in unlawful occupation of the erf, instructed the third and fourth respondents to disconnect the water and electricity supply to the erf. The applicant thereafter approached the court on an urgent and *ex parte* basis and obtained a spoliation order in the form of a rule *nisi*. On the return day the first and second respondents opposed the confirmation of the rule on the grounds that the procedure followed by the applicant was irregular, that the matter was not urgent and that the second respondent's action were counter spoliation.

Held, whilst it is correct that the effect of the interim relief provided for in the rule *nisi* had the effect of immediately restoring possession of the items concerned and incorporeal rights to the applicant, this does not mean that a final order of spoliation was granted on an *ex parte* basis. The principles laid down in the cases of *Clegg v Priestley* and *Amalgamated Engineering Union v Minister of Labour* do not find application in this matter.

Held, further that the matter was in fact sufficiently urgent at the time that it was brought to justify the non-compliance with the rules of Court and to have been heard as an urgent one.

Held, further, that all that is required from an applicant in spoliation proceedings is for her or him to 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.

Held, further, that the actions of the second respondent were a clear manifestation of a 'self-help' which the remedy of spoliation is designed to prevent.

ORDER

1 The *rule nisi* granted by this court on 14 March 2012 is confirmed.

2 The first and second respondents are ordered to pay the applicant's costs (the one paying the other to be absolved) on a party and party scale (the cost to include the cost of one instructing and one instructed counsel).

JUDGMENT

UEITELE, J

[1] On 14 March 2012, I granted the applicant a *rule nisi* on an urgent and *ex parte* basis in a *spoliation* application. The rule *nisi* that I granted amongst others read as follows:

> "2. That a rule *nisi* is hereby 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:
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> 2.1 Directing the first and second respondents to forthwith and *ante omnia* restore applicants peaceful and undisturbed possession of erf 1605, Extension 7, Swakopmund, Republic of Namibia by causing the water and electricity supply to be reconnected to the said erf, failing which, third and fourth respondents are hereby authorized and directed to forthwith and *ante omnia* restore applicant's peaceful and undisturbed possession of erf 1605, Extension 7, Swakopmund, Republic of Namibia by reconnecting the electricity and water supply to the said erf;
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> 2.2 Interdicting and restraining first and second respondents from in any way interfering and/or hampering and/or preventing applicant and/or

his staff and/or his clients from having peaceful and undisturbed possession of erf 1605, Extension 7, Swakopmund, Republic of Namibia; and

2.3 Directing first and second respondents to pay the costs of the application on a scale as between attorney-and-own-client, including the costs of one instructing and one instructed counsel.

3. Ordering that paragraphs 2.1, 2.2 and 2.3 supra shall operate as an interim order with immediate effect pending the return date of the rule *nisi*.

4. Granting applicant leave to bring this application on facsimile copies and further directing and authorizing the deputy sheriff of Swakopmund or Windhoek to serve both the order and this application on respondents by way of facsimile copies.

5. Further and/or alternative relief."

[2] The return date of the rule *nisi* was 13 April 2012, but the matter was not heard on that return date. By the return date the first and second respondents had indicated their intention to oppose the confirmation of the rule and the rule was by order of Court extended (the extensions were in all the cases obtained by agreement between the parties) on a number of occasions. The hearing was ultimately set down for 12 November 2012.

[3] The applicant is Mark Thomas Wylie and he conducts auctioneering business in Swakopmund, Republic of Namibia.

[4] The first respondent is Mr. Greg Villinger, who is also a businessman and he conducts his business from No 23, Bernabe de La Bat Street, Katutura, Windhoek, Namibia. The first respondent is furthermore the 100% member interest holder in the second respondent.

[5] The applicant seeks no relief against the third and fourth respondents and they have been cited merely for the interest they may have in the outcome of these proceedings.

[6] The applicant alleges that during October 2011, he and the first respondent or the second respondent entered into an oral lease agreement in terms of which he leased erf 1605, Extension 7, Swakopmund, Republic of Namibia, for an indefinite period. {I will, in this judgment refer to this property as the erf}. The applicant further alleges that as soon as he entered into the oral lease agreement he took possession of the erf and conducted his auctioneering business from that erf.

[7] The applicant further alleges that he enjoyed the benefit of water and electricity supply to the erf. He is responsible for payment of the monthly accounts in respect of the availability and consumption of water and electricity at the erf, but the accounts for the water and electricity have remained in the name of the second respondent. He furthermore alleges that he has been in peaceful and undisturbed possession of the erf and has enjoyed the benefit of the water and electricity supplied to the erf since October 2011.

[8] Applicant further more alleges that on 7 March 2012 the first respondent telephonically informed him that he (i.e. first respondent) is cancelling the oral lease agreement with immediate effect. Applicant contested the first respondent's right to cancel the oral lease agreement, and on 12 March 2012 and without any prior warning or without applicant's consent the water and electricity supply to the business premises was disconnected on the instructions of first or second respondents.

[9] At the hearing of the matter, on the extended return date, the first and second respondents raised two preliminary points: the first being that the procedure invoked by the applicant was impermissible. It was contended that the effect of obtaining an interim order with immediate effect in these circumstances was tantamount to granting a *mandament van spolie* as a final order on an *ex parte* basis which was not competent and that the rule should be discharged for that reason alone. The second

point taken by the respondent was that the applicant had not sufficiently established urgency to justify non-compliance with the rules.

[10] As regards the first point, Mr. Mouton who appeared for the respondent, referred me to three different authorities namely; Herbstein & Van Winsen[1] where the learned authors opine that *ex parte* applications are used in the following circumstances,

> "(a) where the applicant is the only person who is interested in the relief that is being claimed;
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> (b) when the relief sought is a preliminary step in the proceedings for example an application to sue by edictal citation or to attach a property;
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> (c) when though other persons may be effected by the Court's order immediate relief (even though it may be temporary in nature) is essential because of the danger in delay or because notice may precipitate the very harm that the applicant is trying to forestall, for example an application for an interdict or an arrest *tanguam suspectus de fuga* under the common law."

[11] The second authority, which Mr. Mouton referred me to, is the case of *Clegg v Priestley*[2] where Le Grange, J said '*It is an essential principle of South African law 'that the Court should not make an order that may prejudice the rights of parties not before it*,' and the third authority is the case of *Amalgamated Engineering Union v Minister of Labour*[3] where Fagan, AJA stated that:

> "The Appellate Division has consistently refused to deal with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests …"

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[1]Herbstein & Van Winsen; *The Civil Practice of the S*upreme Court in South Africa, 4Th ed (1997) at 232

[2] 1985 (3) SA 950 (WLD) at 954A – C

[3] 1949 (3) SA 637 (A) at 651

[12] The above quoted cases have been approved and followed by this Court in a number of cases[4] and I fully accept and endorse those principles. But the question remains whether those principles find application to the case at hand. I am of the view that the principles quoted above do not find application in this matter. The reasons for my view are best articulated by echoing the words of Smuts, AJ (as he then was) when he said:

> "…this Court in granting the *rule nisi,* had not granted a final order on an *ex parte* basis. Whilst it is correct that the effect of the interim relief provided for in the rule *nisi* had the effect of immediately restoring possession of the items concerned and incorporeal rights to the applicant, this does not mean that a final order of spoliation was granted on an *ex parte* basis. The respondent was entitled to come to Court on the return day and to place material before this Court opposing the confirmation of the rule and the grant of a final order. This the respondent has done in this matter."[5]

It follows that this point taken by the first and second respondents contending that the applicant had followed the wrong procedure in this matter is not to be upheld.

[13] As regards the second point (i.e. the point relating to urgency) Mr. Mouton submitted that the applicant has not complied with the requirements for urgency especially because the applicant does not specify the 'amenities' he or both he and his clients/customers have been deprived off and does also not specify in which sense the business premises were rendered unfit for human occupation.

[14] I do not agree with Mr. Motoun. The applicant in his supporting affidavit alleges the following:

> "30 I have unlawfully been deprived of the supply of electricity thus:

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[4]See the unreported case of *Neves and Another v Neethling t/a Andre Neethling Consultancy* High Court case No. 25/2012 delivered on 28 June 2012; *Ruch v Van As* 1996 NR 345 .

[5] In *Ruch v Van As (supra* footnote *5)* at 350-351

30.1 I am unable to activate the security alarm at night, with the result being that I am unable to protect my business assets and the assets of my clients. Clients have deposited various goods on my premises for safe keeping until the goods are auctioned-off.

30.2 Furthermore I have an auction scheduled for Saturday the 17th day of March 2012, at the business premises. Unless water and electricity supply is restored to the premises before then, I will be left with no alternative but to cancel the auction. This will seriously affect the reputation of my business and cause me loss of income.

31 I have unlawfully been deprived of the supply of water, thus, basic amenities like drinking water and ablution facilities are unavailable at the business premises. This is an inhumane and unhygienic manner in which to, not only, run a business, but be employed."

The above allegations are explicit and form the basis on which the applicant relies for urgency. It is now accepted that an application for spoliation is urgent by its very nature. It exists to preserve law and order and to stop and reverse self- help in the resolution of disputes between parties.[6] Apart from the fact that an application for spoliation is urgent by its very nature, I am satisfied that the matter was in fact sufficiently urgent at the time that it was brought to justify the non-compliance with the rules of Court and to have heard the matter as an urgent one.

[15] I now turn to the merits of the matter. There is a plethora of cases on spoliation. In the Zimbabwean case of *Chisveto v Minister of Local Government & Town Planning* [7], Reynolds, J stated that:

"Mr Mafara, for the respondent, argued that an action of spoliation was committed only if a possessor was in lawful possession of the property in question when he was dispossessed of that property. His contention was that as

[6] *Uvhungu-Vhungu Farm Development CC v Minister of Agriculture, Water & Forestry* 2009 (1) NR 89 (HC); *Karori (Private) Limited and Another v Mujaji* an unreported judgment of the High Court of Zimbabwe (sitting at Harare) under case number HC/824/2007 delivered on 05 July 2007.

[7] *1984 (1) ZLR 248* at 250 A-D

> *the applicant in the present case had been served with a proper notice of termination, he was, therefore, in unlawful occupation of the house on 16 March, and his forcible eviction on that date did not amount to an act of spoliation. This seems to me to be a somewhat surprising submission for, as I understand it, it is a well-recognized principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing—that spoliatus ante omnia restituendus est (Beckus v Crous and Another 1975 (4) SA215 (NC). Lawfulness of possession does not enter into it. The purpose of the* mandament van spolie *is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the status quo ante to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property does not fall for consideration at all. In fact the classic generalization is sometimes made that in respect of spoliation actions that even a robber or a thief is entitled to be restored to possession of the stolen property."*

[16] In the matter of *Kuiiri and Another v Kandjoze and Others*[8] Parker, J said: (I must hasten to add that although the order of Parker, J was reversed on appeal the legal principles were confirmed),

> "Thus, according to the authorities, 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* supra at 335H 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."

[17] In *Ness and Another v Greef* [9] the court considered the meaning of the phrase 'peaceful and undisturbed,' Vivier, J who delivered judgment of the full bench said:

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[8] 2007 (2) NR 749 (HC) at 752

[9] 1985 (4) SA 641 (C) at 647

> "By the words "peaceful and undisturbed" is probably meant sufficiently stable or durable possession for the law to take cognizance of it."[10]

[18] In *Mbangi and Others v Dobsonville City Council*[11] Flemming, J first analyzed the purpose of the spoliation action. He said:

> "When a Court becomes involved with the law, it is rarely otherwise than as a matter of enforcing a right or entitlement of a person. The termination of spoliation forms a contrast. A Court interferes even to assist a party who should not have possession and, furthermore, in all cases (except where lawful authority is relied upon by the respondent) without taking any interest at all in what rights do or do not exist. That inverted approach finds its explanation and justification therein that the Court is not protecting a right called 'possession', but that in the interests of protecting society against self-help, the self-service undertaken by a spoliator is stopped as being a justiciable wrong…*'If private persons could right and avenge themselves, the country would not be fit to live in.*' The mandament van spolie finds its immediate and only object in the reversal of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the status *quo ante* is restored." {My underlining}. The mandament van spolie finds its immediate and only object in the reversal of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the status *quo ante* is restored."

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

> "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 TSAR

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[10] Also See Professor A J van der Walt's article in (1983) 102 *SALJ* 172 at 177

[11] 1991 (2) SA 330 (W) at 336

at 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."[12]

[20] Having set out the principle relating to the remedy of spoliation I now proceed to apply those principles to the facts of this matter. In the present matter the applicant alleges that;

(a) he took occupation, pursuant to an oral lease agreement with the first or second respondents, of erf 1605, Extension 7, Swakopmund, Republic of Namibia {I will, in this judgment, for ease of reference refer to this property as the 'erf'} during October 2011;

(b) he brought the electricity and sewerage system into operation, that on 12 March 2012 the second respondent instructed the third and fourth respondents to disconnect the water and electricity supply to the erf;

(c) he enjoyed the benefit of water and electricity supply to the erf; and

(d) he has been in peaceful and undisturbed possession of the business premises.

[21] The first respondent deposed to the answering affidavit on his own behalf and also on behalf of the second respondent, in that answering affidavit the first respondent denied that:

(a) he or the first respondent entered into a lease agreement with the applicant;

(b) the applicant has been in peaceful and undisturbed possession of the property or any services to the property.

(c) that he cancelled any lease agreement. He (first respondent) alleges that what he did was simply contra spoliation.

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[12] Supra at 338

[22] I am of view that the most of the denials by the first and second respondents will not assist me to resolve the real issue before me namely whether or not the applicant was in peaceful and undisturbed possession of the erf. The question as to whether or not the applicant was in peaceful and undisturbed possession of erf is a conclusion which this Court can reach after it has evaluated all the evidence before it. I thus hold that the denials by the first and second respondents do not create a real, genuine or *bona fide* dispute of fact between the applicant and the first and second respondents.

[23] The first and second respondents do not deny the allegation by the applicant that he (i.e. applicant) has been in possession of the erf since October 2011. What the second respondent vehemently denies is that he has concluded an oral lease agreement with the applicant. I am of the view that for the purposes of spoliation proceedings it is irrelevant for me to resolve the dispute as to whether there was an oral lease agreement or not. I say so because, it is now a firmly entrenched principle of our law that for the grant of a *mandament van spolie* and the fundamental principle of the remedy of *mandament van spolie* is that no one is allowed to take the law into his own hands. All that the *spoliatus* has to prove is possession of a kind which warrants the protection afforded by the remedy and that he was unlawfully dispossessed. If he does so the Court will summarily restore the status *quo ante* and will do so as a preliminary to any enquiry or investigation into the merits of the dispute[13].

[24] The first respondent's version is that during January 2012 he visited Swakopmund and drove past the erf and to his surprise the walls were painted a different colour and new gates were affixed. He states that it became evident that someone was operating a business from the erf. The first respondent further states that when he realized that someone was operating a business on his erf he made enquiries as to who was conducting business on his erf, his enquiries led him to the applicant. After discussions with the applicant he (i.e. first respondent) agreed to give

[13] *Tjerije v Kaanjuka* 1994 NR 17 (HC); *Kuiiri and Another v Kandjoze and Others (supra foot note 8; Nino Bonino v De Lange 1906 TS 120 at 122; Yeko v Quana 1973 (4) SA 735 (A) at 739. H*

the applicant reasonable time to vacate the erf. He alleges that he gave the applicant until end of February 2012 to vacate the erf.

[25] The first respondent admits that on 06 March 2012 he spoke to the applicant and enquired whether the applicant had vacated the erf (as he allegedly promised to do). When the applicant confirmed that did not vacate the erf or that he refuses to vacate the erf he (first respondent) instructed the third and fourth respondent to disconnect the water and electricity supply to the erf. He (i.e. first respondent) states that he was entitled to act as he did because his actions 'amount to no more than contra-spoliation'. I disagree with the first respondent, his actions are, in my view, a clear manifestation of a 'self-help' which the remedy spoliation is designed to prevent.

[26] I say, the first respondent's actions are a clear manifestation of a 'self-help' for the following reasons. My understanding of the authorities is that counter-spoliation is only possible where the despoiled possessor recovers the article or property of which he or she has been despoiled provided he or she acts forthwith (*instanter*) and provided that in so doing he or she does not commit a breach of the peace. A classic example of counter-spoliation would be where a bag-snatcher grabs a handbag from a lady and she promptly grabs it back. Another example of counter spoliation is given by Fleminng, J[14] where he said: 'If a housebreaker should occupy a bed in the spare room at 09:00 and if the first opportunity for reaction is the owner's arrival at 12:00 when he insists, perhaps with the use of physical means, upon the criminal's departure, the granting of a spoliation order against the owner would confirm him who is truly the spoliator in possession.'

[27] In the case of *Mans v Loxton Municipality and Another*[15] the facts are briefly as follows. Sheep which belonged to the plaintiff (Mans) were found trespassing on land which belonged to the first defendant (Loxton Municipality). The employees of the first defendant decided to drive the sheep to the first defendant's pound. While the employees were driving the sheep to the first defendant's pound the plaintiff rescued and drove them to a camp hired by him. The second defendant {an employee of first

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[14] In the matter of *Mbangi and Others v Dobsonville City Council supra* footnote 11 at 337

[15] 1948 (1) SA 966 (C) at 977 - 978

defendant}, together with certain other employees, then proceeded to the plaintiff's camp, opened the gates thereof, collected the sheep, drove them to the pound and there impounded them. After a full review of the authorities dealing with the right of counter-spoliation Steyn J concluded as follows:

> "From the authorities cited above, and more especially Savigny, and Huber, it seems to me that the principle of *spoliatus ante omnia restituendus est* has been developed and become engrafted on to our legal system so as to preserve peace in the community … Breaches of the peace are punishable offences and to prevent potential breaches the law enjoins the person who has been despoiled of his possession, even though he be the true owner with all rights of ownership vested in him, not to take the law into his own hands to recover his possession, he must first invoke the aid of the law, if the recovery is *instanter* in the sense of being still a part of the *res gestae* of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery, but if the dispossession has been completed, as in this case where the spoliator, the plaintiff, had completed his rescue and placed his sheep in his lands, then the effort at recovery is, in my opinion, not done *instanter* or forthwith but is a new act of spoliation which the law condemns".

[28] In the present matter it is not disputed that the applicant took occupation of the erf during October 2011, the first respondent became aware of the occupation during January 2012 (i.e. approximately three months later), the first respondent did not act '*instanter or forthwith'* to wrestle possession from the applicant, he instead granted the applicant more than one month to vacate the erf. It is only more than five months, after the applicant had taken occupation that the first respondent acted to cause the water and electricity supply to the erf to be disconnected. I am thus of the view that the first respondent acted wrongfully and despoiled the applicant when he ordered the water and electricity supply to the erf to be disconnected. The first second should have invoked the aid of the law and instituted a civil action for the ejectment of the applicant from the erf, he elected, however, to take the law into his own hands to assert his authority. It follows in my view that the applicant was entitled to the relief claimed and granted in the rule and that the rule should be confirmed.

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[29] There remains the question as to costs. The first and first respondents were called upon to show cause why an order as to costs on attorney and client scale should not be granted. No reasons were advanced in argument or on the papers why a punitive order of cost is warranted. I thus do not think that, in my discretion, and taking into account the nature of the case, I should make such an order of cost. In my opinion, it is just and fair to follow the general rule and to simply award costs to the applicant on the normal scale.

[30] In the result I make the following order:

1 The *rule nisi* granted by this court on 14 March 2012 is confirmed.

2 The first and second respondents are ordered to pay the applicant's costs (the one paying the other to be absolved) on a party and party scale (the cost to include the cost of one instructing and one instructed counsel).

SFI UEITELE
Judge

APPEARANCES

APPLICANT:	MT Wylie Instructed by Neves Legal Practitioners
FIRST AND SECOND RESPONDENTS:	C J Mouton Instructed by Mueller Legal Practitioners
THIRD RESPONDENT:	No Appearance
FOURTH RESPONDENT	No Appearance