NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. **A 34/2016**

In the matter between:

FADI FADEL AYOUB **APPLICANT**

And

TRANSNAMIB HOLDINGS LIMITED **1ST RESPONDENT**

STRUGGLE TUWILIKA IHUHUA **2ND RESPONDENT**

Neutral citation: *Ayoub v Transnamib Holdings Limited & Another* (A 34/2016) [2016] NAHCMD 158 (3 June 2016)

Coram: ANGULA, DJP

Heard: 19 April 2016

Delivered: 3 June 2016

Summary: Spoliation application seeking for an order compelling the respondents to restore peaceful and undisturbed possession *ante omnia* to the water supply. Spoliation is a possessory remedy applicant has to prove he have had possession. Water not capable of being possessed. Applicant is accordingly not entitled to a spoliation order. Application dismissed.

Held on the facts of this matter that the respondent had a functioning padlock affixed to the chain on the door of the pump room on 6 February 2016.

Held on the facts of this matter that the applicant's employee, Goeieman, and other people did not have accesses to the pump room and that the only person who had access to the pump room was the respondent's employee, Kalimbo.

Held on the facts of this matter that it was the applicant and not Goeieman who gave the new padlock to Kalimbo.

Held that spoliation is a possessory remedy. The applicant had never had possession of the water and could therefore not found his claim on loss of physical possession. Water is not capable of being physically possessed. Accordingly, the applicant had not been despoiled or dispossessed of the water. Spoliation is not aimed at the protection of rights in the widest sense but its aim is the restoration of factual possession of a movable or an immovable thing. This protection also extends to incorporeal things.

Held on the facts that the supply of water to the applicant had not been terminated or interfered with by the respondent.

Held that in so far as the applicant attempted to found his claim on his rights arising from the lease agreement between the parties to enforce such right, spoliation cannot be extended so as to compel the performance of contractual right, because to do so would extend the remedy beyond its legitimate application and usefulness. Accordingly, the application was dismissed with costs.

ORDER

1. The rule is discharged.

2. The application is dismissed with costs, such costs to include the costs of one instructing counsel and of one instructed counsel.

JUDGMENT

ANGULA, DJP:

Background

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[1] This application came before me on 16 February 2016 on an urgent basis seeking for an order in the following terms:

> *"1. An order condoning the non-compliance with the Rules of this Honourable Court and hearing this application on an urgent basis as is provided for in Rule 73 (3) of the High Court in particular, but not limited to, condoning the abridgement of time periods and dispensing, as far as may be necessary, with the forms and service provided for by the Rules of the above Honourable Court.*
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> 1. *That a rule nisi be issue, calling upon the respondents to show cause on a date and time to be determined by the Registrar of the above Honourable Court why an order in the following terms should not be made final:*
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> 1.1 *Ordering the respondents to forthwith restore the applicant's peaceful and undisturbed possession ante omnia in and to the water supply at Bahnhof Station in the Rehoboth District, in particular by:*

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1.1.1 *Removing the padlock which the respondents affixed to the pump room at the Bahnhof Station; alternatively,*

1.1.2 *Giving one of the keys to the padlock which the respondents have affixed to the door of the pump room at the Bahnhof Station to the applicant or his employee, Mr Bronvin Goeieman.*

2. *That prayer 2.1 above shall operate as an interim interdict with immediate effect pending the final decision of the above matter by the Honourable Court on the return date of this matter.*

3. *Ordering the respondents to pay jointly and severally, the one paying and the other to be absolved the applicant's costs on a scale as between attorney and client."*

[2] From the papers it appears that the applicant is a businessman. He is hiring a piece of land from the respondent, where he is conducting some horticultural activities. The respondent is a well-known national railway operator which is a State-owed Enterprise. Its head office is situated is Windhoek. It owns railway stations which are situated

alongside the railway line. One of such stations is the Bahnhof Station which is situated about ten kilometers north of the town of Rehoboth. The incident which forms the subject matter of this application took place at Bahnhof Station. The second respondent is merely an employee of the first respondent. The matter is, strictly speaking, only between the applicant and the first respondent; therefore for the sake of brevity I will only refer to "the respondent" in this judgment.

The Facts

[3] As can be gathered from the reliefs quoted above, the applicant is asking for restoration of supply of water to him, as well as access to a small room or building in which a water pump is situated ("*the pump room*"). The pump room is a concrete structure, with no windows but which has vents and a door. The door has a chain to close and secure it. Access to the pump room is controlled by the first respondent's employee, one Kalimbo, who has a key for the padlock affixed to the door of the pump room. The water is pumped from a borehole situated beneath the pump room. The borehole supplies water to about 29 families living in the vicinity of Banhof Station, including the applicant. As mentioned before, the applicant is conducting horticultural

activities. The plantation is irrigated with water pumped from the borehole beneath the pump room. In order to pump the water one has to switch on the electric pump by means of a switch situated in the pump room. The pump is connected to the national electric grid. Kalimbo is responsible for operating the pump.

[4] Besides the applicant, about 18 households are also hiring land from the respondent for agricultural purposes. The applicant has about 8168 meters of land under irrigation. He is growing Brazilian grass. He irrigates the plantation with what is known as a rainfall irrigation system. In order to irrigate the plantation, the system requires about three bars of pressure. A 50 mm pipe is connected to six 10 000 litre tanks. The tanks are connected to a water reservoir. The tanks fill up simultaneously and supply water also simultaneously to the irrigation system in order to maintain the requisite pressure.

[5] The applicant alleged that he also has a dedicated worker, one Bronvin Goeieman, who is responsible for operating the pump according to the needs of the applicant's plantation. This allegation is denied by the first respondent. The applicant further stated that on Monday 8 February 2016 he provided a padlock to Goeieman in order for him to

secure the door of the pump room. Goeieman then gave one of the keys to Kalimbo and retained the other key. According to the applicant it was necessary for Goeieman to have access to the pump room as the reservoir often needed to be replenished, especially during morning hours when the nearby communities used the water in high quantities, which caused the pressure for the system to drop below the required operating pressure. However, according to Kalimbo, it was not Goeieman who gave him the padlock but the applicant, who on 6 February 2016, approached Kalimbo and instructed him to remove the old padlock securing the pump room door. The applicant then removed the respondent's padlock and replaced it with his own padlock and gave Kalimbo a copy of the key for the new padlock. Thereafter Kalimbo reported the incident of replacement of the padlock to a certain Husselman, a security staff member of the respondent, who undertook to report the incident to head office. Husselman reverted to Kalimbo on 11 February 2016 and gave Kalimbo a new padlock and instructed him to unlock the applicant's padlock and replace it with the new padlock of the respondent and provided Kalimbo with a set of keys for the new padlock. Kalimbo then returned the applicant's padlock with the copy of the key that had been given to him by the applicant. The applicant then launched this application alleging that neither had he consented to

being locked out from the pump room nor had he consented to relinquish his right to operate the pump, and that therefore the acts of the respondent and his employee amounted to spoliation. He thus prayed that the status *quo ante* be restored.

[6] When the matter came before me on an urgent basis I was satisfied that the matter was urgent and thus granted the rule *nisi* with a return date of 29 February 2016. On 29 February 2016, by agreement between the parties, I extended the rule to 4 March 2016. Again on 4 March 2016 by agreement between the parties, I extended the rule to 29 March 2016 in order for the parties to subpoena witnesses to resolve a dispute which has arisen on the papers. When the matter was called on 29 March 2016, due to what appeared to be a misunderstanding between the legal representatives of the parties, witnesses had not been subpoenaed. The matter was again postponed to 19 April 2016 for the parties to properly subpoena the desired witnesses.

Issues for determination:

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[7] 1. Whether the respondent had a functioning padlock affixed to the chain on the door of the pump room on 6 February 2016?

2. Whether Goeieman and other people had access to the pump room?

3. Was it the applicant or Goeieman who gave the new padlock to Kalimbo?

4. Whether the applicant had been in peaceful and undisturbed possession of water supply?

5. Whether the applicant the applicant committed an act of spoliation when he instructed the respondent's employee Kalimbo to remove the respondent's padlock and to replace it with his own padlock?

6. Whether the respondent's actions constituted a counter-spoliation?

[8] On 4 March 2016 the parties, with the consent to the court, reached an agreement to have the dispute of facts with regard to the first issue listed above, referred to oral evidence for solution. The agreement reads as follows:

"AGREEMENT ON ORAL EVIDENCE

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WHEREAS *In terms of Rule 67 (1) (a) the court may make an order it considers suitable or proper with the view to ensuring a just and expeditious decision, which may be a direction that oral evidence be heard on specific issue with the view to resolving any dispute of fact;*

WHEREAS *The court may order any deponent to appear personally or grant leave for him or her to appear and be examined and cross-examined.*

WHEREAS *A dispute of fact has arisen whether the first respondent had a functioning padlock affixed to the chain on the door of the pump room at the Bahnhof Station, Rehoboth, during the period up to 06 February 2016, with a chain that granted it exclusive control of the pump room.*

WHEREAS *The applicant is desirous that the witness, Toivo Kalimbo Stefanus who deposed to a confirmatory affidavit should appear and be cross-examined.*

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WHEREAS *The first respondent is desirous that witnesses, Jan Husselman and Bronvin Goeieman, who also deposed to confirmatory affidavits should appear and be examined and/or cross-examined.*

Now therefore the applicant and first respondent agree as follows:

1. *That the deponent Toivo Kalimbo Stefanus be called on subpoena to be cross-examined on the question whether the first respondent indeed had a functional padlock affixed to the chain of the door to the pump room at Bahnhof Station, Rehoboth, up to 06 February 2016 giving the respondent and in particular the said Mr. Stefanus exclusive control and access to the pump room to operate the pump.*

2. *That the deponents Jan Husselman and Browyn Goeieman be called on subpoena to be examined and/or cross-examined on the question whether the first respondent indeed had a functional padlock affixed to the chain of door to [the] pump room at Bahnhof Station, Rehoboth, up to 06 February 2016 giving the first respondent and in particular the said Mr. Stefanus exclusive control and access to the pump room to operate the pump.*

3. *The parties accordingly agree that the above issue be referred to oral evidence for examination of Mr.Toivo Kalimbo Stefanus, Jan Husselman and Bronwyn Goeieman".*

[9] It is necessary to set out the applicant's position before Kalimbo testifies in order to put the dispute in context. According to the applicant, the door of the pump room was not formerly secured with a padlock. However, there was an old padlock on the chain but the padlock could not be opened because no one had a key; this padlock was not operational due to the fact that the keys for the padlock were lost. On the other hand, according to the respondent, when Kalimbo was employed he was provided with a key to the padlock securing the door of the pump room. He was the only person in possession of the key to the padlock and had been the sole operator of the pump operated pump.

[10] Kalimbo then testified that he has been employed by the respondent for many years. However, he could not say exactly how many years. He estimated that it could be more than 15 years. He cannot read. He reiterated that he was the only person who had

had the key to open and lock the door to the pump room because the padlock had only one key. His duties entailed *inter alia* the switching on the pump to pump the water into the tanks and when the tanks are full, to switch off the pump and to prevent unauthorised access to the pump room by locking the door with the padlock. The padlock was fixed to a chain which was on the door of the pump room. He confirmed that he was the only person who operated the pump and who had access to the pump room.

[11] In the course of his testimony, Kalimbo produced the padlock in dispute, which he said had been on the door of the pump room for many years before it was replaced with the padlock given to him by the applicant. The padlock configuration is shaped like a heart. The hole for the key is on the side and not at the bottom of the padlock like most modern padlocks. It bears the words "*Spoor...*" the rest of letters are illegible. Attached to the padlock is a short but solid-looking chain. Kalimbo then demonstrated in court how the padlock functioned by locking and unlocking it with its key. He mentioned that that type of padlock is commonly used by the respondent in its railway operations.

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[12] Kalimbo testified further that, on a date he did not remember, the applicant came to him and instructed him to remove the old padlock. The applicant then placed his own padlock on the door. The new padlock had two keys. The applicant then handed him one key of his padlock. Kalimbo did not know who Goeieman was. When Goeieman was called into courtroom, and when Kalimbo saw Goeieman, he stated that he did not know Goeieman's name, but he said he had seen him around the applicant's plantation. Kalimbo further testified that it was the first time that the applicant had spoken to him even though he had seen him before around his plantation. He vehemently disputed the applicant's version that it was Goeieman who took the new padlock to him. Kalimbo further testified that after the replacement of the old padlock with the new padlock by the applicant he informed the respondent's security staff member, one Husselman, who informed Kalimbo that he would report the incident to the head office and revert back to him. Kalimbo was asked by Mr Narib for the applicant, why he would replace the old padlock at the applicant's request without verifying with his superiors. Kalimbo responded that he assumed that the applicant had already consulted his superiors at the head office.

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[13] The other two witnesses who were subpoenaed, Goeieman and Husselman, were not called to testify.

[14] Kalimbo impressed me as an honest witness. I gained the impression that he is a plain, simple and unsophisticated person. It was clear that he was testifying from his own knowledge of his situation and events. I consider it unlikely that he was in position to recall what was contained in the answering affidavit so that he could tailor his oral evidence to what was in the affidavit. Even though Goeieman was present at court, the applicant decided not to call him. I think it is fair to say that if the applicant had confidence in his version that Goeieman had access to the pump room, he would have called him to reiterate his version in oral evidence and to submit his version to be tested in cross examination. This leaves the evidence of Kalimbo uncontradicted and uncontested. Accordingly, I accept Kalimbo's evidence without any reservation. Based on Kalimbo's evidence, the question of whether the first respondent indeed had a functioning padlock affixed to the chain of the pump room must be answered in the affirmative and in favour of the respondent. Kalimbo produced the padlock with its key, which key the applicant alleged was lost. I reject the applicant's evidence that the pump

room was not secured with a padlock and that the padlock was not functioning due to the fact that the keys to the padlock were lost, as a fabrication and false.

Did Goeieman and others have access to the pump room?

[15] The applicant alleged that Goeieman, and other deponents who deposed to confirmatory affidavits to the applicant's founding affidavit, had access to the pump room. In his replying affidavit the applicant said the following "*as I stated in my founding affidavit and all the residents of Banhof Station had access to the pump room*". Kalimbo gave credible reasons why no one else except himself had access to the pump room. Firstly, he said he was employed to operate the pump and in order to ensure equitable supply of water to the applicant and other households in the vicinity. Secondly, that there had been several attempts in the past to break into the pump room and remove the pump from the room; and that this was one of the reasons why the pump room had to be locked at all times. In my view it is highly improbable that the respondent would allow

every Tom, Dick and Harry to have access to the pump room and operate the pump. If such a situation were to be allowed to prevail, and say the pump should break, it would be impossible to hold anybody accountable. Furthermore, if the pump were to be allowed to run continuously it would overheat and burn. Accordingly, I also accept Kalimbo's evidence that nobody else other than Kalimbo had access to the pump room. I reject the applicant's version.

Was it the applicant or Goeieman who gave the new padlock to Kalimbo?

[16] There is a dispute as to who gave the padlock to Kalimbo. Was it Goeieman as per applicant's version or was it the applicant as per Kalimbo's version? The applicant stated in his affidavit that he had noticed that the pump room was not properly secured and that people were gaining access to the pump room and switching the pump on and off. He then provided Goeieman with a padlock to secure the door of the pump room because it was necessary for Goeieman to have access to the pump room as the reservoir often needed to be replenished. I consider it highly improbable that it was

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Goeieman who gave Kalimbo the new padlock and instructed Kalimbo to remove the old padlock and replace it with the applicant's padlock. Why would the applicant relegate such an important task to a mere labourer? Kalimbo testified that he did not know Goeieman, nor had he ever spoken to Goeieman even though he had seen him around the applicant's plantation. I cannot think of any reason why Kalimbo would be deliberately untruthful about who gave him the new padlock and the instructions to replace it with the old padlock. He has nothing to gain from being untruthful. After all he had assumed that the applicant had consent of the respondent for replacing the old padlock with the applicant's new padlock. One can only speculate on the reason why the applicant tried to distance himself from the scene. The inherent probabilities favour Kalimbo's version. I accept his version that it was the applicant and not Goeieman who gave him the new padlock and the instructions to remove the old padlock and replace it with the applicant's new padlock. I reject the applicant's version as false. The only reasonable inference to be drawn as to why the applicant surreptitiously gave Kalimbo his padlock and instructed him to remove the old padlock is that the applicant did not have access to the pump room and wanted to have access to the pump room. It calls into question the ethical behaviour of the applicant for him to exploit the ignorance of

Kalimbo and to impose himself on Kalimbo. It begs the question as to why the applicant did not first take up the matter with Kalimbo‘s superiors. This was much more to be expected because there is an existing lease agreement between the applicant and the respondent which regulates their relationship.

Whether the applicant had been in peaceful and undisturbed possession of water supply?

[17] The next issue for determination is whether the applicant is entitled to the first part of the order he is seeking: that “*the respondents forthwith restore to the applicant the peaceful and undisturbed possession ante omnia in and to the water supply”.* In this regard the applicant stated that he had been in peaceful and undisturbed possession of water supply since the inception of the lease agreement between the parties and the subsequent settlement agreement which was made an order of court. In terms of the settlement agreement the applicant had undertaken to “*only use the water [supplied] for irrigation purpose from 10 am to 7 pm per day*.” There is a distinct thread in the applicant’s

approach which indicates that apart from relying on spoliation as a remedy, the applicant is also basing his claim for the supply of water on his contractual right in terms of the lease agreement. This is more apparent from his replying affidavit when he stated: "*The first respondent well knew that I would need water for irrigation purpose when it entered into the lease agreement with me. Nowhere in the lease agreement is any limit of the water I have to use [is] stated."*

[18] The facts in this matter are almost similar to the facts in the matter of *Zulu v Minister of Works, Kwazulu and Others*[1]. I will relate the facts as outlined in the headnote of the judgment. The applicant in that matter had a pipeline connected to the piping system which supplied water to the Zulu royal household, which was situated at some distance from the applicant's home. The water had been supplied for a number of years in pursuance of an arrangement with the KwaZulu Government under which the applicant was allowed to draw water surplus to the requirements of the royal household free of charge. The decision to terminate the supply of water to the applicant was made because the surplus was no longer available. It was submitted on behalf of the applicant

[1] 1992 (1) SA 181.

that the termination of the water supply was an act of spoliation and that the respondents should be placed in the status *ante omnia,* and before the merits of the dispute could be entered into, be ordered to restore the applicant's water supply.

[19] The court held *inter alia* that:

> *"what the applicant was seeking was in essence an order compelling the respondents to supply water to his house, and not one which ordered the respondents to restore the applicant's physical control over corporeal property to the extent that he had been deprived thereof (for example, by reconnecting his pipeline)."*

[20] The principles laid down in Zulu matters were referred to with approval by our Supreme Court in the matter of *Koch t/a Ndhovu Safari Lodge v Walter t/a Mahangu Safari Lodge and Others*[2] where Langa AJA said the following;

> "*Thus in Zulu supra, where the applicant had sought an order* for the respondent to supply him with water, *the court held that the applicant had never had possession of the water and could not therefore found his claim on loss of physical possession.*

[2] 2011 (1) NR 10 (SC) at p 14 A-C.

> *Mandament van spolie had no role there. As a concept or a form of relief, it is not concerned with the protection of rights 'in the widest sense' but with the restoration of factual possession of a movable or an immovable. This extends to incorporeals such as the use of a servitudal right. It is the limited nature of the scope of the mandament van spolie that excludes, for instance, the right to performance of a contractual obligation from its operation. (See C also Plaatjie and Another v Olivier NO and Others 1993 (2) SA 156 (O) at 159F.) These principles, with which I respectfully agree…"*

[21] Applying the principles outlined above to the present application, as in the Zulu matter, the applicant in this matter is seeking for an order that the respondent be ordered or compelled to supply water to him. Spoliation is a possessory remedy. The applicant has never had peaceful and undisturbed possession of the water; he had not been despoiled or dispossessed of water. The applicant could not find his claim on loss of possession. His claim is misconceived. For those reasons the applicant is not entitled to a spoliation order. In any event, according to the respondent, the factual situation which prevails on the ground is that the water supply to the applicant has not been terminated.

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[22] Mr Narib referred me to the judgements of this court in the matters of *Naruseb v The Government of the Republic of Namibia*[3] and *Goses v Hoff*[4] where the court ordered the respondent to restore the supply of water and electricity to applicants' premises. In my view the facts of those cases are distinguishable from the facts in the present matter in that in both those cases the respondents had interfered with the flow of or supply of water or electricity to the premises of the applicant. In the present matter, the applicant is seeking for an order compelling the respondent to supply water to his plantation in the quantity needed to irrigate his plantation because the lease agreement did not contain any limit of the pipeline to his plantation. The applicant is not seeking for an order that the respondent be ordered to restore physical control over an incorporeal property he has been deprived of, such as an order to reconnect his water pipeline.

[23] In so far as the applicant seeks to base his claim on his contractual right, the legal position was again reaffirmed by the Supreme Court in the *Kock* matter, namely, that the protection given by *mandament van spolie* cannot be extended to the exercise of rights in the widest sense such as a right to the performance of a contractual obligation

[3] (A12/2014) [2014] NAHCMD 74 (19 February 2014)
[4] (A302-2013 [2013] NAHCMD 318 (6 November 2013).

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because to do so would extend the remedy beyond its legitimate field and usefulness. It follows therefore that the applicant cannot rely on his contractual right under the guise of a spoliation.

[24] What the applicant in essence is asking is the right to operate the pump "*for the purpose of keeping the water levels sufficient to operate the irrigation system".* According to the respondent it had been supplying water to the applicant as previously agreed, namely, between 10 am and 7 pm. It would appear that the applicant's situation was self-created because the applicant had installed five water tanks, each with a capacity of 10 000 litres, after the agreement had been concluded. According to the respondent, the installation of additional tanks was done without consultation with the respondent and without the respondent's prior consent. Initially there was one tank with 10 000-litre capacity which supplied about 29 households, as well as the applicant. What then happened was that the applicant increased his own water requirement which could not be met by the borehole supply capacity. The applicant's so-called "*peaceful and undisturbed possession and to the supply of water"* has in fact not been disturbed, but the applicant's water requirement or demand increased beyond the borehole supply

capacity, which drove the applicant to adopt a desperate measure to change the padlock so that he could have access to the pump room to pump the water at sufficient level to operate the irrigation system. The right to water supply must be distinguished from the right of access to the pump room. I have already found that the applicant never had a right of access to the key of the old padlock, nor by extension to the pump room. On the applicant's own version, the keys for the padlock to the pump room were lost. The applicant had never had peaceful and undisturbed possession of the pump room.

Whether the applicant committed on act of spoliation when he instructed the respondent's employee Kalimbo to remove the respondents padlock and replaced it with his own padlock?

[25] The next issue for determination is whether the applicant committed an act of spoliation when he ordered Kalimbo to remove the padlock the respondent had caused to be affixed to the door of the pump room. It is clear from the facts that up to 8 February 2016 the respondent had been in peaceful and undisturbed possession of the

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pump room when the applicant instructed Kalimbo to remove the old padlock and handed him his (the applicant's) padlock and further instructed him to affix his padlock to the door of the pump room. Mr Narib submitted that Kalimbo's conduct was consensual. I disagree. For the consent to be valid it must be an informed consent. The applicant simply tricked Kalimbo to hand over the control and possession of the pump room. The legal position is well settled:

> "*It is trite law that violence, stealth, fraud or force is no longer necessary for an act of spoliation. All that is required is unlawful spoliation, that is, disturbance of possession without the consent and against the will of the possessor*. *A person who gains possession of a thing by trickery commits an act of spoliation, just as a person who fraudulently induces a servant to hand over the property of the master"* LAWSA Vol. 27 par 79.

[26] It is not in dispute that the applicant instructed Kalimbo without first informing the respondent or securing the respondent's consent. Kalimbo was oblivious of what was going on. Kalimbo testified that he assumed the applicant had permission from his

superiors. On the authority referred to above, Kalimbo's ostensible consent was invalid because it was obtained by trickery or deceit. It follows therefore that the respondent had been in peaceful and undisturbed possession of the pump room until 8 February 2016 when the applicant took the law in his own hands and instructed Kalimbo to change the padlock to the door of the pump room and replaced it with his own padlock. In my view the applicant committed an act of spoliation on that day.[5]

Did the respondent's conduct constitute a counter-spoliation?

[27] The next question is whether the respondent's conduct amounted to a counter-spoliation when the respondent removed the applicant's padlock and replaced it with its own new padlock. It is settled law that counter-spoliation is a plea admitting the spoliation but alleging that the respondent's act was merely to counter the applicant's wrongful spoliation. The requirement for counter-spoliation is that it must take place "*instanter"* meaning "forthwith".[6]

[5]See *Ludik v Keeve & Another* (A316/2015) [2016] NAHCMD 4 (20 January 2016).
[6] LAWSA Vol 27 par 83.

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[28] Mr Boesak for the respondent submitted that respondent's conduct was a counter-spoliation. He conceded that the defence was not pleaded on papers; instead a denial was pleaded but he submitted further that based on the facts and what happened, it was evident that a counter-spoliation took place. Mr Narib on the other hand, relying on the principle laid down in the matter of *Mans v Loxton Municipality and Another,*[7] submitted that for an action to qualify as counter-spoliation it must take place *instanter* in the sense that it is part of the *res gestae.* Mr Narib thus submitted that the respondent's action was not *instanter* or forthwith. It was a fresh act of spoliation. He pointed out that the applicant was in possession of the property for about three days. Therefore the respondent should have applied to court for a spoliation order against the applicant.

[29] In the matter of *The Three Musketeers Properties (Pty) Ltd v Ongopolo Mining & Others*.[8] Smuts AJ said the following:

[7] 1948 (1) SA 966(C) 978.
[8]Case No (P) A 298/2006 delivered on 30 November 2006 (unreported).

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> "The requirement of counter-spoliation being *instanter* had been liberally interpreted in *De Beer v First Investments Limited supra* where the court cautioned against an overly detached armchair view of matter *ex post facto.* This approach was subsequently approved in *Ness and Another v Greeff supra* at p 648 where a full bench further approved a statement by Van der Merwe in Sakereg at 93 that a court has a wide discretion to approve of an act of counter-spoliation and to refuse the original spoliator against the original spoliator against the original possessor. In that matter even though a period of 11 days had elapsed between the appellant's occupation until he was locked out by the respondent, the court held that the respondent's conduct amounted to an *instanter* recovery of the premises."

[30] Smuts AJ view was confirmed by the Supreme Court on appeal.[9]

[31] The applicant was deprived of his possession for a period of three days, from 8 February to 11 February 2016. What action was taken on behalf of the respondent to

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[9]See; *The Three Musketeer Properties v Ongopolo Mining and Processing Ltd and Others* (SA3/2007) [2008] SASC 15 (28 October 2008).

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restore possession? According to the respondent, after the removal and replacement of the padlock by the applicant, Kalimbo reported the incident to Husselman, who is a security staff member of the respondent, who then advised Kalimbo that he would report the matter to the head office and revert back to him. Thereafter on 11 February Husselman came back with a new padlock and instructed Kalimbo to remove the applicant's padlock and replace it with the new padlock. Mr Boesak submitted that it was common cause that the respondent is a State-Owned Enterprise, a big corporate entity. He submitted that it is within the court discretion to determine a reasonable time within which such an entity could have taken action. In the exercising of my discretion, I take into account that the head office of the respondent is situated in Windhoek, which is about 80 kilometres from Rehoboth where the incident took place. I further take into account the usual bureaucracy involved in such big corporations; the hierarchy or line of reporting and then the process of decision making which would be involved in the respondent's situation. Taking into account that Husselman was a security officer, he would have reported the incident to his immediate supervisor, who would in turn report it to his/her superiors. I further take into account the fact that there had been a court case with the applicant which was settled as recently as last December 2015 which would be

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at the forefront of the staff members of the respondent who were involved in decision and which compel such staff member to consult widely and to be cautious not to rush into taking the decision. The decision would be communicated downward until it reached the implementer. In this case the implementers were Husselman and Kalimbo. I am accordingly of the view that under the circumstances, the period of three days was not unreasonable and did not 'exceed permissible limits'[10]. In the exercise of my discretion and in accordance with the liberal approach propounded and encouraged by the courts in both *The Three Musketeers* matters, I consider the removal by respondent of the applicant's padlock and replacing it with the respondent's padlock as part of the *res gesta*e of the applicant's removing the respondent's padlock and replacing it with his own padlock. I have therefore arrived at the conclusion that the respondent's conduct constituted a justifiable counter-spoliation. For those reasons the application stands to be dismissed.

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

[10]*Supreme Court in The Three Musketeers*.

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1. The rule is discharged.

2. The application is dismissed with costs, such costs to include the costs of one instructing counsel and one instructed counsel.

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Angula, DJP

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APPEARANCE:

APPLICANT	**Mr Narib** Instructed by MURORUA & ASSOCIATES
RESPONDENTS	**Mr Boesak** Instructed by KANGUEEHI & KAVENDJII INC

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