



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case no: A 352/2015

In the matter between:

DAVID KANDOMBO

APPLICANT

And

THE MINISTER OF LAND REFORM

1ST RESPONDENT

THE MINISTER OF SAFETY AND SECURITY

2ND RESPONDENT

Neutral citation: *Kandombo v The Minister of Land Reform* (A 352/2015) [2016]
NAHCMD 3 (18 January 2016)

Coram: ANGULA, DJP

Heard: 15 December 2015

Delivered: 18 January 2016

Flynote: Urgent application for spoliation – principles governing spoliation considered and applied principles and procedure when dealing with an occupier of Government land which has been allocated to a beneficiary under the Government Resettlement Program outlined.

Summary: The applicant occupies a farming piece of land (the Plot) which he alleges was allocated to him during 2000 by an official from the Ministry of Land Reform (the Ministry). He has ever since been farming thereon, initially with cattle, sheep and goats but later only with sheep and goats. During December 2015, officials from the Ministry accompanied by police officers, together with representatives from the beneficiary organization to whom the Plot has been allocated, arrived at the Plot without notice to and in the absence of the applicant and ordered the farmworker of the applicant to vacate the Plot including his animals. The farmworker complied. The applicant then approached the court on urgent basis with, notice to the respondents, seeking for a spoliation order in the form of a *rule nisi*. He alleged that the matter is urgent, because his farmworker is sleeping in the open exposed to elements and his animals are without water and food. He alleges that he has been in peaceful and undisturbed possession of the Plot and has been wrongful dispossessed thereof by the respondents.

The respondents opposed the application disputing that it was urgent; disputing that the Plot had been allocated to the applicant; asserting that the applicant was in unlawful occupation of the Plot; pointing out that the Plot has been allocated to a beneficiary who must take occupation immediately. Finally they denied that they unlawfully deprived the applicant possession of the Plot, because the farmworker voluntarily vacated the Plot taking with him the applicant's animals.

Held; that on the facts of this matter, the matter was sufficiently urgent justifying the court to hear it as urgent;

Held further, that the applicant successfully established that he was in peaceful and undisturbed possession of the Plot and the respondents wrongfully removed him from such possession or occupation without due process of law; and

Held further, that the conducts of the respondents amounted to acts of self-help entitling the court to grant the spoliation order.

ORDER

1. The non-compliance with rules of the High Court of Namibia relating to forms and service is hereby condoned and that the application is heard as a matter of urgency.
2. The respondents are ordered to restore undisturbed possession and occupation to the applicant of the plot referred to and marked as No. 40 on the diagram and plan attached hereto as Annexure "A" and Annexure "A.1", which plot is situated on Farm Otavifontein No.794 in the Otavi District, Namibia.
3. The respondents are interdicted and restrained from unlawfully interfering with the Applicant's possession and occupation of the Plot referred to and marked as No. 40 on the diagram and plan attached hereto as Annexure "A" and Annexure "A.1", which plot is situated on Farm Otavifontein No. 794 in the Otavi District, Namibia.
4. That the First Respondent pays the costs of his application.
5. The reasons for this order will be delivered on **18 January 2016 at 10h00** .

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JUDGMENT

ANGULA, DJP:

Introduction

[1] This is a spoliation application by the applicant, brought on urgent basis for a rule *nisi* calling on the respondents to restore to the applicant undisturbed possession and occupation of Plot 40 of Farm Otavifontein No. 794 Otavi District. For the sake of completeness it would be apposite to quote the prayers as it appear in the notice of motion;

“1. Condoning the Applicant’s non-compliance with the Rules of this Honourable Court and the time periods prescribed therein in so far as these have not been complied with and directing that matter be heard as one of urgency.

2. That a rule *nisi* be issued, returnable on **FRIDAY 22nd JANUARY 2016** at **10h00**, calling upon the Respondents to show cause why:

2.1 the Respondents should not restore undisturbed possession and occupation of Plot 40, *Farm Otavifontein* No. 794 in the Otavi District, Namibia by the Applicant;

2.2 interdicting and restraining the Respondents from unlawfully interfering the Applicant’s possession and occupation of Plot 40, *Farm Otavifontein* No. 794 in the Otavi District, Namibia.

3. Ordering the relief sought in terms of paragraphs 2.1 and 2.2 of the rule *nisi* to operate as interim orders with immediate effect, pending the return day of the rule.
4. That the Respondents pay the costs of this application.
5. Granting the Applicant such further and or alternative relief”.

[2] The application was served on the respondents on 11 December 2015, through the Government Attorney. On Monday morning 14 December 2015 the notice to oppose was filed on behalf of both respondents, but only one answering affidavit was filed on behalf of the first respondent. When the matter was called on Monday, 14 December 2015 morning at 9h00, I was requested by the legal representatives for the parties to postpone the matter, by agreement, to the following day being Tuesday, 15 December 2015. The reasons for the postponement were to allow the applicant's legal representative to consider the first respondents answering affidavit (which was delivered to him the Monday morning just before the matter was called) and thereafter to file a replying affidavit, if so wished. The legal representatives further agreed to, file heads of argument. When the matter resumed on 15 December 2015 all the papers had been filed and the matters proceeded as agreed.

[3] A number of points in limine were raised on behalf of the first the respondent. It was submitted by Mr Shipena, for the respondents that these points would dispose the matter without going into the merits, accordingly these points were considered first. However after I have heard the arguments, I dismissed all points *in limine*. I further ruled that, on the facts before me, the matter was urgent and that the matter should be heard as such. The counsel then argued the merits where after I made the order as above. I undertook to furnish my reasons for my order on 18 January 2016. Following below are my reasons.

[4] Instead of first dealing with points in limine I think it is better to first set out the parties' respective merits in order to provide context for the points *in limine* raised. Thereafter I will then deal with the points *in limine*. Next I will provide my reasons for holding that the matter was urgent. I then will provide my reasons for finding in favour

of the applicant on merits; and finally I will give my reasons for ordering the respondents to bear the costs of this application.

The applicant's case

[5] The background to this application is that, according to the applicant, he had been farming on plot No. 40 (the Plot) of Farm Otavifontein No. 794 since the year 2000. The Farm belongs to the Government. The Farm is divided into several plots. He attached to his affidavit a copy of the diagram and plan of the Farm. He points out that his name was jotted on plan at the Plot by an official from the Ministry of Lands Reform (the Ministry) at the time when the Plot was allocated to him by an official from the Ministry. He says that initially farmed with cattle, goats and sheep, however due to drought he sold his cattle and continued to only farm with goats and sheep which are currently 22 in total.

[6] The applicant states further that on Tuesday, 1 December 2015 police officers attached to the Otavi Police Station attended at the Plot and proceeded to cut the padlock on the gate of the entrance to the Plot. After the police officer had entered the Plot they broke the lock to the shed which is partly used as a dwelling for his farmworker as well as a storage place for his farming equipment. When the police officers departed from the Plot, they left behind two persons on the Plot. Later when the applicant enquired from the police officers why they did what they had done, he was informed that the Plot has been allocated to another person; that he should vacate the Plot. He refused to vacate the Plot. Thereafter on Saturday, 5 December 2015 he laid a charge of malicious damage to property at Otavi Police Station.

[7] The applicant states further that on Wednesday, 9 December 2015 police officers and a Deputy Director from the Ministry one Mr Eric arrived at the Plot and evicted his farmworker from the Plot and further drove his animals from the Plot.

[8] The applicant states further that after he received a telephone call from his farmworker who related to him what had transpired, he immediately left for the Plot that same evening (i.e Wednesday, 9 December 2015). On his arrival at the Plot he inspected what has had happened on the Plot. He observed that the fodder and farming equipment and the personal effects of the farmworker had been removed from the shed. He then enquired from the two persons who had been left on the Plot as to what was happening. They informed him that they have been allocated the Plot by Eric from the Ministry and that henceforth they would be conducting farming operation on the Plot.

[9] According to the farmworker, Mr Hafeni Kayambu Johannes, he was pushed off the Plot and in the process the shirt he was wearing was torn. The police officers and the officials drove the animals off the Plot into the corridor of the neighbouring plots of the Farm.

[10] The applicant further states that on Friday, 11 December 2015 he tried to telephone Eric at the Ministry but could not get hold of him. The applicant then consulted his legal representative who also tried to get hold of Eric over the phone without success; on the very same day, his legal representative addressed letters to the Station Commander of Otavi Police Station and to the Ministry respectively, demanding restoration of possession and occupation of the Plot to the applicant. Copies of the letters are attached to the supporting affidavit.

[11] The applicant states further that he was concerned about his animals, which were without water or grazing since driven from the Plot; and that the animals might be stolen. In particular he was concerned about the well-being of his farmworker who had, since evicted from the Plot, been sleeping in the open, exposed to the elements and have nowhere to cook, eat or bath.

[12] Regarding the urgency of the matter the applicant asserts that the matter is urgent. He points out that his farmworker is without accommodation and is living in the open field; that his animals are without water or grazing; and that had he launched the application in the normal course, by the time the application would be heard, his livestock would be dead and he would suffer financial loss. Finally the applicant points out that he did not delay in bringing the application; that the balance of convenience favoured the granting of the orders (which at that time of launching of the application were sought on an interim basis); and that he would suffer irreparable loss if the orders were not granted.

The Respondents' opposition

[13] As mentioned earlier the Government Attorney filed a notice to oppose on behalf of both respondents, however only one opposing affidavit was filed on behalf of the first respondent.

[14] The opposing affidavit on behalf of the first respondent is deposed to by a Mr Erick Sedney !Goaseb, who says he is employed as Chief Development Planner at Otjiwarongo and current acting as officer in charge of Otjozondjupa region responsible for taking care of Government's properties particularly commercial farms.

[15] Apart from opposing the merits of the application, the first respondent has raised a number of points *in limine*. As indicated earlier I will first outline the first respondent's case on merits. I will consider the points *in limine* later in the judgment.

[16] It is denied on behalf of the first respondent that the applicant have had a lawful and undisturbed possession and occupation of the farming plot. According to the first respondent the Plot in question is "Portion 14 (a portion of portion 5) (Broken Hill) of farm

Otavifontein No. 794” . It is pointed out that that portion was only acquired by the Government in 2005 and was allocated to a certain Mr Thobias Benjamin Berro (Mr Thobias) on 13 June 2006 . A copy of the allocation letter from the Ministry is attached. It is then argued that it is impossible for the farm to have been allocated to the applicant in the year 2000 . It is further denied that the farm is divided in several plots. It is pointed out that the farm was part of the bigger farm but the Government only bought that particular portion; and that the copy of the diagram and plan of the farm, attached to the applicant’s affidavit are not an official ones as the Ministry uses Demarcation Plans when allocating farming plots.

[17] The deponent further points out that the farm in question is meant for crop farming and not for livestock. He concedes however that he saw the applicant’s farmworker Mr Kayimbu on the farm with about 20 to 25 livestock when he visited the farm on 26 November 2015. He states that the first communication received from the applicant was a letter dated 24th August 2015 addressed to the Governor of Otjozondjupa region which was received by his officer on 28th September 2015 in which the applicant was “requesting a possible consideration at Otavifontein plot number 40 farm No. 794 Otjozondjupa region”. With reference to this letter he argues that if the plot was already allocated to the applicant, why would he request a ‘possible consideration’ in respect of the same farm.

[18] The deponent further states that on 26 November 2015 he was part of an investigation team from the Ministry that visited the Plot; that they found the applicant’s farmworker on the Plot as well as small livestock. The farmworker informed the team that he arrived on the farm earlier in the year. The farmworker then provided the team with the cellphone number of the applicant. During the telephone conversation with the applicant, the applicant informed the deponent that he was allocated the farm by Mr

Kanyemba, who was the Head of Lands: Central Region based at Otjiwarongo; that the applicant informed him that he was in possession of documents to prove his allocation for the plot and undertook to deliver such documents to the Ministry's office in Windhoek. The deponent further states that while on the Plot the team noted that the applicant had instructed contractors to remove pipes and pumps from the Plot.

[19] The deponent went on to say that on 2 December 2015 a team consisting of officials from the Ministry, officials from the National Youth Services and members of the Namibia Police went to the Plot to request the farmworker to leave the Plot. He further states that initially the farmworker declined to co-operate, however after the team explained to the farmworker that the applicant failed to deliver the documents as proof of the allocation of the Plot to the Ministry as promised. However after it was pointed out to the farmworker that he may be obstructing justice, the farmworker opened the padlock of the farm gate; that he packed his belonging and was assisted by members of the team to carry his belongings to the farm gate. According to the deponent the two persons who had been brought on the Plot on the previous visit and left there, were from the National Youth Services.

[20] The deponent reiterates that the farm in question was allocated to Mr Tobias in 2006, but that at Mr Tobias requested in a letter to the Ministry dated 25 June 2014 to relinquish the farm. He then attached a copy of undated letter from the Ministry to Mr Tobias confirming his request has been approved. The deponent further states that the farm plot in question, together with other plots, was advertised for allocation on application in the newspapers on 14 August 2015; thereafter the farm was allocated to Wisdom Youth Organization on 20 November 2015 and was officially handed over to them on 4 December 2015 .

[21] The deponent denies that the farmworker was asked to leave the farm on 9

December 2015 but that he was asked to leave the farm on 2 December 2015 . The deponent further denies that he was on the Plot on 9 December 2015 . According to the deponent he spoke to the applicant's legal practitioner on 11 December 2015 and explained to him the events leading to the farmworker leaving the Plot.

[22] The respondent admits that the letter of 11 December 2000 by the applicant legal practitioner was received by the Ministry but it was not possible to respond thereto due to time constrain, however he denies the facts set out therein.

[23] In response to the merits in the answering affidavit, the applicant denies that Mr Thobias was previously allocated the Plot. He states that he has never seen Mr Thobias nor does he not know him; and that if the said Mr Thobias was allocated the Plot, he has never took occupation thereof.

[24] The applicant points out that on the first respondent's own version the plot that was allocated to Mr Thobias was plot 14, and that it is also referred to in the correspondence between Mr Thobias and the Ministry "Portion 14 (a portion of portion 5) (Brokenhill) of Farm Otavifontein No 794 Groetfontein District". The applicant reiterated that the farm is divided into several small plots of about 25 hectre; and that the copy of diagram and plan of the farm indicating the different plots attached to his founding affidavit was provided to him at the time when the Plot was allocated to him by the Ministry.

[25] The applicant denies that he gave instructions to contractors to remove pipes and pumps from the plot; and explains that what transpired, was that during November 2015 he caused the pipes in the borehole to be replaced with new pipes; and that the old pipes from the borehole are still on the Plot. The applicant disputes that the team consisting of officials from the Ministry, persons from the National Youth Service and police officers attended at the plot on 2 December 2015 and asserts that they were at

the Plot on 1 December 2015 . He denies further that his farmworker vacated the plot on 1 December 2015 or 2 December 2015 and states that the farmworker was evicted from the Plot on 9 December 2015. According to the applicant on Saturday, 12 December 2015 and Sunday, 13 December 2015 he made arrangement with an owner of a neighbouring plot to water his animals, however the animals are not grazing on a neighbouring farm.

[26] The applicant's farmworker, Mr Johannes disposed to an affidavit which was attached to the applicant replying affidavit. He states that he has been employed as a farmworker for the applicant since 2009; that ever since he has been residing on the Plot, looking after the applicant's animals. He confirms that on Tuesday, 1 December 2015 police officers together with officials from the Ministry attended at the Plot; that they requested entrance to the Plot which he refused whereupon they broke the padlock to the gate of the Plot and further broke the padlock to the door of the shed. Thereafter they left leaving behind two persons on the Plot. On 9 December 2015 officials from the Ministry arrived at the Plot again and forcibly evicted him from the Plot; that they drove the animal from the Plot into the corridor of the neighbouring plots on the same farm; that during the afternoon of 9 December 2015 after he had been evicted from the Plot it rained and he remained in the open with the animals during the rain; that he has been sleeping in the open since 9 December 2015 until 14 December 2015 when he travelled to Windhoek to dispose to the affidavit. Finally he states that he was unable to travel to Windhoek to depose to his affidavit as he could not leave the animals and his personal belongings without supervision.

First respondent's points *in limine*

[27] I now deal with the first respondent's points *in limine*. I should mention that the

points are not properly motivated and as such pose some challenges to properly deal with it to the extent I understand it.

[28] The first point is that of non- joinder. It is alleged that a certain entity Wisdom Youth Organisation which, is currently occupying the Plot, should have been joined as a party proceedings. It is then stated that Wisdom Youth Organisation is an interested party and failing to join it would prejudice it if the orders sought by the applicant are granted without Wisdom Youth Organisation being a party to the proceedings. In his replying affidavit the applicant, denies that the Plot is occupied by Wisdom Youth Organisation; that there are no other person or entity who or which is currently occupying the Plot except the two persons who are stationed there since Wednesday, 9 December 2015. The applicant points out that on the first respondent's own version, the plot allocated to Wisdom Youth Organisation is plot 14 of Farm Otavifontein and not Plot 40. The applicant further points out that his legal representative requested to be provided with the names of the persons who have been allocated the Plot but was refused such information. In his heads of arguments Mr Shipena for the first respondent referred to some known case law to support his point in this respect. But having considered those cases I am of the view that the principles set out there are not applicable to facts of this case. I agree with the applicant that it was not possible to join Wisdom Youth Organisation, because its identity was not known to the applicant at the time when the application was launched. Furthermore it would appear on the facts before me that Wisdom Youth Organisation has been allocated a different Plot from that which is the subject matter of this application. Finally the legal representative for the respondent refused or failed to provide the legal representative for the applicant with particulars of the person who had allegedly been allocated the Plot.

[29] Having considered the facts before me on this point I cannot, but agree with the

applicant's submission that there is not merits in this point and thus stands to be dismissed.

[30] The second point *in limine* is that a dispute of facts exists, which the applicant ought to have foreseen when he decided to launch this application. It is then submitted on behalf the first respondent that the applicant adopted a wrong procedure. In response to this point *in limine* the applicant points out that an urgent application can only be brought by way of application and not by action; that if a dispute of fact arises the rule is well established that in that case that specific dispute is referred to oral evidence on application for resolution. I agree with applicant's submission. In the absence of an application for referral to oral evidence the dispute is to be resolved in accordance with well-established rules in motion proceedings on the basis of what is contained in the respondent's affidavit where the facts are in dispute. Stated differently, take the facts set out by the applicant, together with the facts set out by the respondent which the applicant cannot dispute. There are similarly no merits in this point and it has been wrongly taken and as such stands to be dismissed.

[31] The third point *in limine* is that the requirements for spoliation have not been met, in that the applicant has not had undisturbed possession of the plot since the year 2000; that the farmworker moved off the plot without any force asserted on him; and that the applicant resides in Windhoek although he need not be in physical possession, he appears to be 'out of touch with the property'. In view, this is not a point *in limine*, it goes to the merits of the application. The fact that the applicant resides in Windhoek does not mean that he is not in possession or occupation of the plot. It is trite law that a person is not required to be in physical possession of the thing like an immovable property to be said that he is exercising possession of such property. It is considered in law to be sufficient if the person has some degree of control over the thing or property.

In the instant matter the applicant is conducting on going farming activities on the plot and has been doing so for some years and he has a full-time employee on the plot. Similarly this point lacks merit and stands to be dismissed.

[32] The fourth point *in limine* is that the applicant has tendered in admissible hearsay evidence is that the applicant does not have first-hand knowledge of all the facts as to what happened on the Plot and because several facts he has deposed to have not been verified by a confirmatory affidavit by the farm worker. The applicant has stated in his founding affidavit that due to the urgency of the matter, he has been unable to secure a confirmatory affidavit from his farmworker; that he had no reason to doubt the veracity and accuracy of what his farmworker had reported to him. It is to be noted that the applicant says that he proceeded to the plot during the same evening of Wednesday 9 December 2015 immediately after he received the report from his farmworker as to what have had happened. He relates what he found on the Plot. In any event the farmworker's affidavit have been filed in reply which wiped out this point. Accordingly in my view there are no merits in this point and must equally be dismissed.

[33] The fifth point *in limine* is that the requirements for an interim interdict have not been met in that the applicant does not have a *prima facie* right, because at no stage since the year 2000 was the plot allocated to him, that the applicant does not have a well-grounded apprehension of irreparable harm, because his goats and sheep are not in the open they are not likely to die as they are grazing within privately owned neighbouring farm and the farmworker is also residing on that neighbouring farm; that the balance of convenience does not favour the granting of an interim order. Furthermore the person who had been allocated the plot have already moved onto that plot and have commenced with farming activities and would therefore suffer inconvenience; and finally that the applicant has alternative remedy in that he could

bring the application in the normal course. In my view this is not a point *in limine*; the issues raised by this point again go to the merits of the application. The point is accordingly dismissed.

Urgency

[34] I now proceed to deal with the issue of urgency. One of the most important requirements to be satisfied by the applicant before the court grants condonation for the matter to be heard on urgent basis is that, the court must be satisfied on the alleged facts that, the applicant cannot be afforded substantial redress in due course. The facts upon which the applicant relies for urgency in this matter are incontrovertible both as it relates to the farmworker's situation and to the applicants animals. The situation becomes even worse if viewed against the conducts of the respondents, which conducts are *prima facie* unlawful in a society based on the rule of law. On the facts before me I am satisfied that the applicant cannot be afforded substantial redress at the hearing in due course. The deponent to the first respondent affidavit points out that the applicant has delayed to bring this application is that the farmworker was requested to leave the farm on 2 December 2015 and he only brought the application on 11 December 2015. He concedes however that the applicant was not provided with eviction papers, but argues that the applicant was not evicted from the plot. According to the applicant, the events leading immediately up to the spoliation started unfolding on 1 December 2016 when police officers attended at the Plot and broke the padlocks on the gate to the farm and when the applicant enquired from the police officers why they forcefully entered the Plot he was informed that the farm has been allocated to another person. In response to this allegation it is simply stated in the respondent's answering affidavit that "the contents of this paragraph is placed in dispute". It is not clear what specific allegation is disputed. However in the next paragraph when the applicant mentioned the names of the police officers the deponent to the first respondent's

affidavit admits the presence of the police officers on the Plot except that he cannot confirm their identities. He further confirms that two persons were left on the Plot by the police officers as caretakers from the National Youth Services. The deponent insists that the eviction took place on 2 December 2015. In this respect he states the following is stated 'On 2 December 2015 a team consisting of Ministry of Land Reform officials went to the farming plot to request the farmworker to leave the plot'. He does not say that he was part of the team. He does not state the source of his knowledge of the date when he alleged the eviction took place. He says however that he was not on the farm on the 9 December 2015. It is not clear on what facts does he deny that the eviction took place on 9 December 2015. Against the vague and unsubstantiated bald statement on behalf of the first respondent one has a detailed and direct facts from the applicant and his farmworker that the eviction took place on 9 December 2015. The farmworker was present when the eviction took place. He informed the applicant immediately after the eviction had taken place. The applicant says he left for the farm the same evening after he received the report from the farmworker. In my view the probabilities favour the applicant's version on this point. I thus accept that the eviction took place on 9 December 2015. In the light of this finding and taking into account that Thursday, 10 December 2015 was a public holiday and the application was prepared and finalised and served in one day, Friday 11 December 2015, I am satisfied that the application was brought as soon as it was possible. In my view there was no undue delay in launching the application. I am further reinforced in my view by following pronouncement the court cited with approval in the Wylie matter:

"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 reverse self-help in the resolution of dispute between parties"¹

¹ *Wylie v Villinger* (A42/2012 [2012] NAMHCCMD 69 (13 February 2013).

[35] It is denied that the balance of convenience favour the granting of the orders. In motivation of its denial it is stated on behalf of the first respondent that Wisdom Youth Organisation who have been allocated the plot have already moved onto the Plot on 4 December 2015, as they were required to do so within 30 days from the date of allocation. Finally it is pointed out that the plot is for designated for crop farming; that production (perhaps meant planting) begins in November/December if the new occupants were ordered to vacate the Plot it would delay 'production' for the rest of the year. In my view the dire situation in which the applicant found himself far out weight the temporary inconvenience to be suffered by the beneficiary, however they would be able to receive redress in due course. In my view, the balance on convenience favours the granting of the orders in favour of the applicant.

[36] It was for those reasons that I ruled that the matter was urgent and condoned non-compliance with the Rules and the time periods prescribed by the Rules.

[37] I now proceed to consider the merits. There are many Namibian judgments dealing with spoliation matters such as *Ruch v Van As*²; *Kuiiri and Another v Kandjoze and Others*³; *Horst Kock trading as Ndhovu Safari Lodge v R Walter trading as Mahangu Safari Lodge and Others*⁴; *Anton Kazaronda Kandjima and Another v David Kakeru*⁵; and *Junias v The Municipal Council of the Municipality of Windhoek*⁶, which all have

²*Ruch v Van As* 1996 NR 345 (HC)

³*Kuiiri and another v Kandjezo and Others* 2007 (2) NR 749 .

⁴*Horst Kock trading as Ndhovu Safari Lodge v R Walter trading as Mahangu Safari Lodge and Others* 2011 (1) NR 10 SC.

⁵*Anton Kazaronda Kandjima and Another v David Kakeru* (unreported judgement of the High Court of Namibia of 9 August 2011).

⁶*Junias v The Municipal Council of the Municipality of Windhoek* (A 35/2014) [2014] NAHCMD 80 (12 March 2014).

reference to the South African case of *Nino Bonino v De Lange*⁷ which all have accepted as sources of authority on the topic of spoliation.

[38] I will try to summarise, not necessarily in any order of priority or importance, the principles emanating from those judgements:

1. In spoliation proceedings it is only necessary to prove that the applicant was in possession of a thing (movable, immovable or incorporeal) and that there was a forcible or wrongful interference with his or her possession of that thing;
2. The purpose of the remedy is to preserve law and order and to discourage persons from taking the law into their own hands;
3. To give effect to the objectives of the remedy it is necessary for the *status quo ante* to be restored until such time a court has assessed the relative merits of each party;
4. The lawfulness or otherwise of the applicant's possession of the thing does not fall for consideration during the hearing of the spoliation application, the question of ownership in the thing is equally not considered;
5. The applicant for a spoliation order must establish that he/she was in peaceful and undisturbed possession of the thing at the time he/she was deprived of possession;
6. The words 'peaceful and undisturbed' possession mean sufficient stable or durable possession for the law to take cognisance; and

⁷*Nino Bonino v De Lange* 1906 TS 120 .

7. As a form of remedy spoliation is not concerned with the protection of rights “in the widest sense”.

[39] I now proceed to apply some of the principles summarised above to the facts on this application. Was the applicant in peaceful and undisturbed possession of the Plot prior to being evicted? The applicant states that he has been farming on the Plot since 2000; that the farm belongs to the Government; that the farm is divided in small plots but he was allocated Plot 40. The applicant has attached a copy of the diagram and plan of the farm from which it appears that the farm is indeed divided into small plots. His name is jotted on the plan at Plot 40. The respondent appears to be disputing that the applicant has been in possession of Plot 40 since 2000. However the farm was only acquired by the Government during 2005 and subsequently allocated to Mr Thobias in 2006. It appears that the respondent has no basis to dispute that the Plot was occupied by the applicant between 2000 and 2006. However on the respondent own version Mr Thobias handed back the Plot to the Ministry on or about June 2014. The deponent visited the Plot on 26 November 2015 as was part of the investigation team from the Ministry which visited the Plot. They found the applicant’s farmworker on the Plot as well as small livestock. The farmworker told the team that he had been on the Plot since earlier in the year but could not provide them with an exact date. I interpose here to point out that according to the farmworker he has been a farmworker for the applicant since 2009 and has ever since been residing on the farm looking after the applicant’s livestock. During the telephone conversation to the applicant in Windhoek the applicant informed the deponent that the Plot was allocated to him by Mr Kanyemba a Deputy Director in the Ministry when he was Head of lands in Otjiwarongo region. The applicant informed him that he was in possession of documents to prove his allocation. On the respondents own version the applicant was in occupation of the Plot on 26

November 2015 to 2 December 2015. I however consider it highly probably on the facts of this case that the applicant had been in possession of the Plot prior to 26 November 2015. In my view all the foregoing facts prove that the applicant was in peaceful and undisturbed possession of the Plot, immediately prior to the date he was dispossessed of the Plot.

[40] Regarding the question whether the applicant was unlawfully deprived of possession, there is slight dispute of facts as to the date when the eviction took place. I have already found that on the probabilities that the applicant was deprived of possession of the Plot on 9 December 2015. Even if I am wrong on that point the exact date when the eviction took place is not material, what is important is to establish whether the facts alleged, prove that the applicant was wrongfully deprived of his peaceful possession of the Plot. According to the deponent to the first respondent's affidavit, on the day of the alleged eviction took place a team of officials the Ministry, officials from the National Youth Services together with police officers went to the Plot "to request the farmworker to leave the plot". This means to me that the whole purpose of the team's mission was to evict the farmworker from the Plot; it was a follow-up on the previous mission which took place on 1 December 2015, when the police officers forcefully gain access to the Plot and shed and left caretakers on the Plot. According to the farmworker he was forcibly evicted from the Plot; he was pushed of the premises and in the process the shirt he was wearing was torn. The officials drove the animals from the Plot into the corridor of the neighbouring plots on the same farm. The respondent's version around this issue is that initially the farmworker declined to co-operate; that it was explained to him that his employer, the applicant failed to deliver documents he had promised to do; that the farmworker might be obstructing justice; that it was only then that the farmworker unlocked the padlock on the plot gate went to pack his personal belongings and was assisted by the team members to carry his

belongings to the gate to the plot.

[41] Mr Shipena for the respondents submits that the respondent did not take the law in their own hands, because it was the applicant's farmworker who unlocked the padlock of the gate to the Plot thus facilitating access by the members of the team to the farm. It is necessary to point out implicitly in this argument is the admission that the farmworker was in possession of the plot is that the gate was secured with padlocks thus regulating access to the plot. Furthermore on the respondent's own version the farmworker initially declined to co-operate and it was only after being informed that he might be obstructing the course of justice that he voluntarily decided to leave the Plot. In my view the farmworker did not act voluntarily; he was put under pressure to leave. Even if it were to be accepted that the farmworker decided to voluntarily leave the Plot surely his action cannot be attributed to the applicant who was effectively the occupier or possessor of the Plot. There is no allegation that the farmworker was authorised to act on behalf of the applicant or a mandate from the applicant to consent to give up occupation of the Plot.

[42] I have no doubt in my mind that for any person to tell a farmworker in the presence of police officers under those circumstance that he might be obstructing justice that such a statement would amount to a veil threat. It was meant to serve as some sort of coercion on the farmworker to leave the Plot. It was a deception. In my view, it was the team which was acting contrary to law. It is admitted by the respondent that "it is correct that the applicant was not provided with eviction papers". The truth of the matter is that there were no eviction papers. Neither the police nor officials from the Ministry have the right to evict an occupier of Government land from such land without first obtaining an eviction order. On those facts I am satisfied that the applicant has been forcibly and wrongfully deprived of possession of the Plot by the respondents. The eviction took

place without due process of law; it was done without first obtaining an eviction order. I found on the facts of this matter that the eviction was clearly an act of self-help.

[43] There is a small matter which I think I should deal with. On the papers there appears to be some confusion with regard as to the correct description of the land/plot which is the subject matter of this application. On the one hand, according to the applicant papers the Plot is described as Plot 40 of Farm Otavifontein, No 794, situated in Otavi district. On the other hand, according to the respondent's papers the Plot is described as Portion 14 (portion of portion 5) (Broken Hill) of Farm Otavifontein No. 794. The applicant says that he has been uninterruptedly farming on that Plot 40 since 2000. He does not know Mr Thobias whom according to the respondent was allocated the plot during 2006 neither has he seen Mr Thobias over those years. The respondent says that Mr Thobias relinquished the Plot in June 2014. The view I take on this apparent dispute of facts is this: for the purpose of this matter the applicant was forcibly removed by the respondents from a piece of land which he had been peacefully occupying, whatever its correct description of that piece of land. It is common cause that on 26 November 2015 the applicant's farmworker and his animals were found by the officials from the Ministry and police officers in peaceful and undisturbed in possession and occupation of that piece land. Again on 1 December 2015 the applicant's farmworker was found in occupation of the same piece of land by police officers from Otavi. It is the same piece of land from which the applicant was forcibly and wrongfully removed by the respondents.

[44] In view of the fact that the Government Resettlement Program (the program) is the on-going program and is likely to continue for a considerable period in future and in view of what happened in this matter it might be helpful to set out some legal principles and procedure which should be adhered to in the implementation of the program. If a piece

of land has been allocated to a beneficiary through the program, and such piece of land is occupied by someone who is claiming some right of occupation or simply in occupation of such piece of land, the Government, as the lawful owner of the piece of land must apply to court for an eviction order against such occupier before the Ministry can proceed to settle the beneficiary on such piece of land. It must be kept in mind that it is not permissible in law, as it happened in this matter, for the Ministry officials or any Government agency, such as the police, to simply force the occupier to vacate the piece of land without a court order as such conduct, in law, amounts to self-help or taking the law into own hands.

[45] In my view the applicant has established that he was in peaceful and undisturbed possession of the Plot 40 of Farm Otavifontein No. 798 Otavi and that he was forcibly and wrongfully dispossessed on such possession by the respondents. Accordingly he is entitled to an order restoring the status *quo ante*.

[46] Finally regarding the question of costs, the applicant has substantially succeeded in his application. The normal rule is that cost follows the results. I cannot see any reason why that rule cannot apply in this matter, neither was any reason to the contrary advanced to me. Accordingly the respondents are ordered to pay that costs of this application.

1. The non-compliance with rules of the High Court of Namibia relating to forms and service is hereby condoned and that the application is heard as a matter of urgency.
2. The respondents are ordered to restore undisturbed possession and occupation to the applicant of the plot referred to and marked as No. 40 on the diagram and plan attached hereto as Annexure "A" and Annexure "A.1", which plot is situated on Farm Otavifontein No.794 in the Otavi District, Namibia.

3. The respondents are interdicted and restrained from unlawfully interfering with the Applicant's possession and occupation of the Plot referred to and marked as No. 40 on the diagram and plan attached hereto as Annexure "A" and Annexure "A.1", which plot is situated on Farm Otavifontein No. 794 in the Otavi District, Namibia.

4. That the First Respondent pays the costs of his application.

5. The reasons for this order will be delivered on **18 January 2016 at 10h00** .

It is so ordered.

H Angula
Deputy Judge President

APPEARANCES:

APPLICANT:

Mr N Tjombe

Instructed by Tjombe-Elago

Incorporated

FIRST and SECOND

Mr NTK Shipena

RESPONDENTS:

Instructed by Government Attorney