NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

CASE NO. **A 351/15**

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**1ST APPLICANT**
MINISTER OF HIGHER EDUCATION, TRAINING & INNOVATION	**2ND APPLICANT**

And

MR ANDREW MATJILA	**1ST RESPONDENT**
MS ROLENE BOER	**2ND RESPONDENT**
MS DORA LEBEREKI-THLABANELLA	**3RD RESPONDENT**
MR PAUL HELMUT	**4TH RESPONDENT**
TIA PROTECTION SERVICES CC	**5TH RESPONDENT**
MR WALTER LOUW	**6TH RESPONDENT**

Neutral citation: *Government of the Republic of Namibia v Matjila* (A 351/2015) [2016] NAHCMD 63 (8 March 2016)

Coram: ANGULA, DJP

Heard: 12 February 2016

Delivered: 8 March 2016

Flynote: Urgent application for a spoliation order. Termination of a lease agreement and ownership of the property raised by the respondents as defence to an application for a spoliation order.

Summary: The applicants are occupying a proper registered in the name of a Trust in terms of an oral lease agreement entered into on or about 2008 and are further conduct avocational training center for people with disabilities. On about the same time discussions took place between the parties with the aim of transferring the property to the applicants but such process stalled during 2009. On 25 June 2015 the trustees, through the Trust's legal

practitioner gave notice of termination of the lease and further advised that the property has been sold and that the Trust was under obligation to handover the vacant property to the purchaser and therefore the applicants must vacate the property by the end of November 2015. The Attorney- General responded to the letter pointing out that the Government shall not vacate its own property. On 5 December 2015 the first and the second respondent attended at the property and ordered the applicants employees or people who were occupying the property on behalf of the applicants to vacate the property; they then proceeded to cut the padlocks securing access to the premises and the buildings, with a bolt cutter and replaced it with their own padlocks and then placed security guards on the premises whose aim was to prohibit access to the premises by the applicants and/or their employees. On 7 December 2015 the applicants' legal practitioner of record addressed a letter to the respondents' legal practitioner of record requesting him to advise the respondents to stop and desist with their conducts. The legal practitioner for the respondents' responded saying that the lease between the parties has been terminated and accordingly his clients were thus entitled to lock the gates and place guards at the gates. The applicants then launched this applications seeking for a spoliation order.

Held that by its own nature spoliation is urgent. In the instant matter the self-admitted conducts of the respondents constitutes the taking the laws into their own hands by

changing the padlocks to the premises thereby denying the applicants and their employees access to the property without due process of law. Furthermore the people affected by the respondents conducts were the physical challenge and as such most vulnerable member of the society who were locked out from their only place of abode without access to their personal belonging.

Held further, that the applicants have successfully discharged the onus on them and have established that they were in a peaceful and undisturbed possession of the property.

Held further that by changing the padlocks to the doors or gates property the respondents wrongfully and unlawfully despoiled the applicants' possession of the premises and their movables on the premises without due process of law. Accordingly the applicants are entitled to an order restoring the status *quo ante*.

ORDER

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1. The spoliation order is confirmed.
2. The offending paragraphs affidavit namely, 2.4, 2.5, 3.4, and 3.5 of the answering affidavit, are struck from record.
3. The respondents are ordered to pay the applicants' costs occasioned by the affidavit filed by their legal practitioner of record.
4. The respondents are ordered to pay the applicants' costs such costs to include costs of one instructing counsel and one instructed counsel.

JUDGMENT

ANGULA, DJP:

Background

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[1] I have before me a spoliation application. The matter came before me *ex parte* on 14 December 2015 on which date I granted a *rule nisi* with a return date on 22nd January 2016.

[2] The applicants are well known and as such do not require any introduction. The first to fourth respondents are sued in their capacities as trustees of Ehafo Trust ("the Trust"). The Trust was established during February 1995. According to the Trust's document the objects of the Trust are amongst others, to take over the then Association for the Handicapped as a going concern; to introduce and promote measures for quality [life] for disabled persons and to promote measure for the rehabilitation of disabled persons. The fifth respondent is a security services providing entity which was tasked by the respondents to guard the premises which forms the subject matter of this application.

[3] The deponent to the founding affidavit filed on behalf of the applicant is the Permanent Secretary for the second applicant. Mr Matjila, the first respondent, deposed to the opposing affidavit on behalf of the respondents. He dealt in detail about the historic ownership of Erf 235, Klein Windhoek ("the property or the premises"). It appears from the papers that there is a dispute between the parties about the ownership of the property, I must immediately point out that ownership is not an issue this court is called upon to determine in these proceedings.

[4] One of the Trust's activities was the operating or running a Vocational Training Centre for disabled people ("the Centre"). It is common course that from about 2007 the applicants and

the trustees engaged in discussions aimed at the applicants to either financially assist the trustees with the operation of the Centre or to take over the operation of the Centre due to the fact that the Trust had run out of money to continue with the activities of the Centre in particular to continue to employ disabled people so as to provide them with an opportunity of employment and to facilitate the meaningful activities to enable such disabled people to earn an income. As an interim measure the applicants agreed to give the Trust an annual allowance of N$1 million to enable the Trust to continue with the operation of the Centre. In the meantime discussion between the parties continued for the possibility of the applicants to take over the Centre including the property, however, it would appear that such discussion somehow stalled sometime on or about 2009.

[5] It is common cause that during March 2007 the Government took over the operation of the Centre and took occupation of the premises and continued to be in occupation ever since. On the 29 June 2015 the respondents' trustees, through their legal representative, gave a written notice to the applicants to vacate the property by the end of November 2015 advising further that the property has been sold. Further follow-up letters were addressed to the applicants during July and August 2015. On 25 August 2015 the Attorney General responded to the letters from the legal practitioner for the respondents in which he, *inter alia*, stated that the Government "shall not vacate its own property".

[6] It is further common cause that on 5 December 2015 the first and second respondents accompanied by security guards from the 5th respondent, attended at the property and ordered the applicants' employees or people who were occupying the property on behalf of the applicants to vacate the property; they then cut off the padlocks on the doors of the buildings or gates with a bolt cutter and replaced it with their own padlocks and further placed security guards on the premises whose aim was to prohibit access to the premises by the applicants and/or their employees.

[7] On 7 December 2015 the applicants' legal practitioner of record addressed a letter to the respondents' legal practitioner of record requesting him to advise the respondents to stop and desist from their conducts. The legal practitioner for the respondents' responded saying that the lease between the parties has been terminated and accordingly his clients were thus entitled to lock the gates and place guards at the gates. The applicants then launched this application on 11 December 2015 saying that they have been in peaceful occupation of the property and that they have been unlawfully dispossessed of such possession and occupation by the respondents. I granted the rule *nisi* on 14 December 2015. The return date on 22 January 2016.

[8] After the application papers were served and the rule *nisi* issued, Mr Vaatz who says that he has been acting for the Trust and not for the respondents, and that he has no instructions to act on behalf of the respondents, filed an affidavit on 18 December 2015. The status of

this affidavit is a subject of attack by the applicants. I will revert to this issue later in this judgments.

Points *in limine*

[9] Both parties have raised points *in limine*. I prefer to first deal with the points *in limine* raised on behalf of the respondents. I will thereafter deal with points *in limine* raised on behalf of the applicants.

Urgency

[10] The respondents contends that there was no urgency to move the application on 14 December 2015, three days before most of the attorneys' firms, the courts and the deputy-sheriff office's closed for the Festive Season's recess. The respondents say that the applicants were notified as earlier as 29 June 2015 that the property had been sold and requested to vacate the property. Furthermore that at end of November 2015 the vocational school conducted from two sheds situated on the property had closed down its activities for the Festive Season. Accordingly so the argument goes, there was no need to bring the application on an urgent basis. The respondents however admit that they placed padlocks on the buildings to secure access to the buildings during the recess in order to prevent unauthorised person enter the buildings. In justification for their conducts the respondents

state that if the applicant required access to the property, they could have requested the respondents to allow access to the premises or requested to be provided with a copy of the keys to the property.

[11] The following facts are advanced on behalf of the applicants in support of the contention that the matter is urgent: urgency, is by its very nature, present in matters involving spoliation; the application was launched within three court days from the date the alleged spoliation took place; that there are presently about 66 employees who are unable to access their workstations and who are unable to carry out their works as a result of the spoliation by the respondents; that the employees personal belongings are on the property and are unable to access such properties; and finally that the premises is utilised as a vocational training for people with disabilities that the Centre provides a caring environment for such disabled people from which they have been denied access through the conducts of the respondents.

[12] In my judgement two factors make this matter urgent; the self-admitted conducts of the respondents constitute the taking of the laws into their own hands by changing the padlocks on the doors or gates to the premises thereby denying the applicants and their employees or trainees access to the property without due process of law; and secondly the persons affected by the respondents' conducts are the physically challenged and most vulnerable members of our society being unlawfully locked out from the only safe place of abode in Windhoek without access to their personal belongings. I consider it unconscionable and highly inconsiderate to for the respondents to lock out physical disable people from their only

place of safety and comfort. In my view the facts set out made this matter urgent and the applicants were entitled to launch the application as a matter of urgency. It follows therefore that the respondents' point *in limine* in this respect falls to be dismissed.

Non-service of the application papers and the court order on the respondents

[13] Mr Vaatz for the respondents submits that, neither the application papers nor the court order was served on any of the respondents; that, only the court order was served at his office on 19 January 2016. Relying on the decision of *Knouwds NO.v. Josea and Another*[1]. where it was held that where there had been a failure of service of papers on the affected party and even though such party became aware of the proceedings and entered appearance to defend, it matters not, a proceeding which has taken place without service, is a nullity and it is not competent for a court to condone such proceedings. Accordingly, Mr Vaatz submits that this application should be dismissed on that ground alone. In countering Mr Vaatz's submission, Mr Phatela for the applicants refers to the case of *Witvlei Meat (Pty) Ltd and Others v The Disciplinary Committee for the Legal Practitioners and Others*[2]. He submits that the facts in the *Knouwds* matter are distinguishable from the facts in the present matter in that, the *Knouwds* application was concerned with a status of a person namely effect of sequestration on the status of the respondent. He points out that in the *Witvlei*

[1] 2007 (2) NRL 792.
[2] 2013 (1)NR 245 (HC).

matter, the court held that any defect in the service would be cured by the entering of opposition by the respondent; further that the fundamental purpose of service is the bringing the proceedings to the attention of the party; and that if a the party proceeds to defend the matter or files a notice to oppose through a legal representative the fundamental purpose for service has been met, particularly where the legal representative has been served with the papers. I associate myself with court's view in the *Witvlei* matter. What was said in the *Witvlei* matter is applicable in this matter. In this matter there was an attempt to serve the papers on the office of legal representative for the respondents but could not be served because the office was closed for the Festive Seasons recess. However the rule nisi was serve on the offices of the legal representative for the respondents. After such service the legal representative for the respondents proceeded to obtain a copy of the application from the Registrar's office after which he filed a notice to oppose together with an answering affidavit before the return date of the rule *nisi*. On the return date the rule was extended in order to allow the applicants to file their replying affidavit and for counsel to file heads of arguments. Relying on *Witvlei* judgment, I am satisfied that the fundamental purpose of service, namely to bring the proceedings to the attention of the respondents have been met in this matter. Accordingly this point *in limine* likewise falls to be dismissed.

Failure by the applicants to present to the courts with all relevant facts

[14] Mr Vaatz submits that the founding affidavit filed on behalf of applicants is unsatisfactory and should not be used as foundation for a court order. He submits further that both the founding affidavit as well as the replying affidavits there are allegations which could not have been within the deponents' knowledge. He then went on to point out those facts which he contends are not within the deponent's knowledge of the deponents or that such alleged facts are untrue. He points out that the applicants failed to inform the court that none of the applicants had ever entered into an agreement of sale with the respondents in respect of the property; that the applicants did not produce a deed of transfer of the property indicating that they are the registered owner of the property; that the applicants failed to place before court the minutes of the meeting between the officials of the second applicant and the respondents dated 30 April 2010 where it was *inter alia* recorded that the Ehafo Board of Trustees are still the rightful owners of the property; that the applicants failed to place before court a letter dated 25 June 2015 from the legal practitioner for the respondents informing the applicants that the property has been sold and that the applicants should vacated the property as well as subsequent letters on the same subject-matter; that the applicants failed to place before court the inter-ministerial committee's report on Ehafo Trust which recommended amongst other things that the Trust should consider to dispose the current property to any interested commercial entity in order to enable it to generate funds to properly run the Centre; that the Government should donate a portion of Ramatex facility to the Trust so that the Trust can continue with its activities at Ramatex facility; and finally that the Government should in future resist from taking over institutions started by private citizens to provide services to certain

group of needy persons. It is then finally submitted that as a result of failure to place this information before court, the court was not correctly informed when the rule nisi order was issued.

[15] In my view all the facts or information detailed above would have been relevant had the question of ownership of the property been the issue for determination of this application. As pointed earlier in this judgment the issue of ownership of the property from which the applicant has been spoliated is not relevant in these proceedings. In my view the applicants were within their right to disregard those facts and not to unnecessarily burden the court with facts which are not necessary for determination of the issue before court. I am however satisfied that on the core issue of spoliation, the affidavits filed on behalf of the applicants make out a case for the relief sought. In so far as these complains are intended to constitute a combined point *in limine*, they are dismissed for lack of substance. In the result this point *in limine* equally falls to be dismissed.

[16] The fourth point *in limine* raised by Mr Vaatz on behalf of the respondent is that of non-joinder of the purchaser of the property. Firstly the point is not properly taken on papers. It is raised for the first time in the heads of argument. In the heads of argument it is merely stated that it is trite law that every person who has a material interest in the proceedings before court must be joined in such proceedings; that the purchaser of the property in this matter should have been joined. It is then pointed out that to the respondents as sellers were under

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a legal obligation to handover the property to the purchaser, vacant. It would appear from the papers before me that the purchaser has not taken occupation of the property yet. It would therefore appear to me that the purchaser had no interest in the proceedings because all what the purchaser was expecting to receive was a delivery of a vacant property. It follows therefore in my view that the purchaser did not have any interest in the proceedings. There is accordingly no merit in this point *in limine* and is similarly dismissed.

[17] I now proceed to deal with the points *in limine* raised on behalf of the applicants.

[18] In the replying affidavit filed on behalf of the applicants notice was given by the applicants of their intention to apply to strike out certain portions in the respondents' answering affidavit which the applicants considered to contain scandalous, vexatious and/or irrelevant matters. But before dealing with each such alleged offending paragraphs as identified by counsel for the applicants, I consider it necessary to briefly set out the legal principles against which the alleged scandalous vexatious and/or irrelevant matters are to be determined.

[19] Rule 58 of the Rules of this court stipulates that where a pleading contains averments which are scandalous, vexatious or irrelevant, the opposing party may make an application to court to strike out such averments but that the court may not grant the relief sought unless it is satisfied that the applicant will be prejudiced in the conduct of his or her defence if such

application is not granted. In the matter of *Vaatz v Law Society of Namibia*[3] the meanings of the words scandalous, vexatious and irrelevant matters were explained as follows:

> "Scandalous matter – allegations which may or may not be relevant, but which are so worded as to be abusive or defamatory. Vexatious matter – allegations which may or may not be relevant, but are so worded as to convey an intention to harass or annoy. Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter"[4].

[20] In this context it is also necessary to keep in mind in terms of the rules of the court that in motion proceedings a party is required to answer to each and every allegation made by the other party and if such party fail to do so he or she would do so at his/her own risk. The main consideration for not leaving such statements unchallenged has been said to be that if the other party is required to deal with scandalous or irrelevant matters the main issue could be side-tracked but on the other hand if such statements are left unanswered, the innocent party may be left defamed; that furthermore to leave such statements unanswered would be prejudicial to the innocent party. Keeping the foregoing principles in mind I will now proceed to deal with the specific alleged offending statements.

[21] In paragraph 2.4 the following is stated:

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[4] *Vaatz v Law Society of Namibia* 1990 NR 332 at pages 334 to 335 J to A.

> "Our lawyer, Andreas Vaatz, who has been assisting the Ehafo Trust as from January 2009, advised the Trustees that the duress exercised by the First and Second Applicants in collusion with the worker and the trade union officials to compel the Trustees to draw up and sign the resolution of the 7th of March 2007 (Annexure "C" to application) as more fully appears from the letter of the Second Respondent dated 8th of March (Annexure "B") which literally orders the Board of Trustees to hand over the assets of the Trust – at that time worth more than N$18 000 000,00 – to the Government was illegal and that anything done under such duress is illegal and not enforceable and that in any event the takeover as demanded by the Government was in conflict with Section 9 of the Trust Deed, which provides that if the Trust wishes to dissolve, the assets must be handed over to "an organization in Namibia having similar objects to the Trust".

[22] Having read the minutes of the meetings between the officials of the applicants and the trustees as well as the correspondences exchanged between or on behalf of the parties it leave me with the impression it was conducted in a spirit of co-operation and in a honest effort by the parties to co-operate and to find a solution to what appeared at that time to be rather a dire situation faced by trustees with regard to precarious financial future operation of the Centre. In the light of that impression I consider it, at best, to be vexations to label such discussions and attempt to find a solution as an exercise of duress by the applicants upon the trustees or to accused the applicants that they were acting in collusion with the workers.

The trustees on their own volition approached the applicants with a request to assist the Trust. It appears from the written communication between the parties that the takeover of the Trust's operation and infrastructures was initiated by the trustees. Annexure B being lettered from the Permanent Secretary of Education clearly states that; "after careful consideration of the pleas of the Chairman of Ehafo Trust and the plight [of the] workers of the Trust [the Government of the Republic on Namibia] has decided on the following, that the Board of Ehafo Trust takes a resolution to hand over assets and liabilities of the Trust to the Government". The letter was merely an offer from the Government as it clearly appears from its concluding paragraph which reads: "Hoping that the Board of Ehafo Trust would take this offer in the very serious light for the benefit of its employees and everyone involved". It appears further from the papers that the take-over was an option discussed and agreed upon by the parties and it was only after the legal advice was obtained that it was pointed out that the take-over option was not possible because of the terms of the dissolution clause of the Trust Deed. In any event I consider the allegations in the paragraph in question to be irrelevant in the context of the issue of spoliation before court. Paragraph is 2.4 is accordingly struck from the record with costs.

[23] Paragraphs 2.5 , 3.4, 3.5 and 3.6 read:

> '2.5 Our lawyer also stated that any such "handover" must be regulated in a comprehensive written agreement signed by both parties, i.e. the Trust and the Government in which all aspects relating to such a transfer are regulated, such

as whether the Government pays to the Trust the difference between the value of the assets (N$18 000 000,00) and the amount which the Government alleged to have disbursed on behalf of the Trust (apparently N$3 500 000,00) and whether the Government takes over all employees of Ehafo and all other responsibilities.'

'3.4 On that Friday, the 2nd of March 2007, we met with the workers committee at 10:00 in the small boardroom of Ehafo and reported to them about the positive outcome of the discussions we held with the PM as well as the Permanent Secretary. The chairperson of the workers committee wanted to know why we didn't just hand over Ehafo to the Government. I was taken aback because this was the first time that the notion of a handover of Ehafo to the Government emerged. We proposed to the workers that we were prepared to give each worker N$100,00 for the weekend and that we would then review the situation the following Monday after discussions with the Government officials.'

'3.5 An Ehafo official was then given a cheque to cash at the bank, but we soon learned that he was prevented from leaving the premises by workers who had locked the gates. Then there was an unexpected demonstration by the workers outside of the Ehafo office, demanding that we hand over Ehafo to the Government. I then phoned the PM himself to inform him of the situation at Ehafo whereupon be said he would phone a Mr Tjombumbi of the disability

desk in the office of the PM to come and call off the strike. It was when we heard that Mr Tjombumbi was already on the premises agitating the workers to strike. We call Mr Tjombumbi into our office and remonstrated with him about what he was doing, which he denied. He later spoke to the workers to allow an official to go to the bank. The workers were later given each an amount of N$100,00 for the weekend, awaiting the outcome of the Monday meeting with Government officials.'

'3.6 At this stage, I must highlight a very traumatic incident I experienced at Ehafo. During the meeting with the workers, it became quite clear that I was being kept hostage. Gates were locked and the trellis-gate of the office was also locked so that no one could go out. That day, I could not go home for lunch and was sure that something very serious was going to happen to me personally. The workers were highly strung and watched me like a pack of wild dogs about to pounce on prey. I could not believe that people with disabilities could adapt such attitudes.'

[24] In my view the contents of these paragraphs are not scandalous or vexations. It is clearly irrelevant if considered in the context of a spoliation application. It is irrelevant in that it does not contribute one way or the other to the resolution of this matter. It is accordingly struck from the record.

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[25] Paragraph 11. Reads:

> 'It is correct that the workers came every day to the premises, but they were not working as such any real work for the Applicants. They merely signed an attendance register and then disappeared again. The presence of the workers on the site cannot be treated as proof that the Applicant was exercising any peaceful possession or control over the premises. What is proveN though is that the tenants of the premises, the said Chinese company was working every day on the garden section of the premises which was by far the biggest piece of land and producing vegetables, that was the only production that was taking place on the premises and they sold whatever vegetables they produced and paid a regular rent to the Trust. In fact, the workers did not come to the premises in the period 2007 - 2008 at all. They started to come to the premises again in 2009. The only persons from the 1st & 2nd Applicants were eleven persons who were working in the training shed managing the training of student workers.'

[26] In my view this paragraph is a legitimate response to what is stated in the paragraph 7 of the applicants founding affidavit. In my view the paragraph cannot be said to be scandalous, vexatious or irrelevant. The respondents are required by the rules to respond to each and every allegations made by the applicants. The application to strike it is accordingly declined.

[27] The next point *in limine* raised on behalf of the applicants was an objection to the unstamped lease agreement which was attached to the respondents' affidavit allegedly in contravention of the Stamp Duties Act, 1993. This point was not persisted with after Mr Vaatz produced a copy of the lease agreement indicating that the lease agreement had been duly stamped in compliance with the Stamp Duties Act; 1993.

[28] The next issue challenged by Mr Phatela for the applicants, was the status of the affidavit filed by Mr Vaatz, on 18 December 2015, before he was instructed by the trustees to act on their behalf. In that affidavit Mr Vaatz points out that he had no instruction to act on behalf of any of the respondents; that he had never been the lawyer for the trustees of Ehafo Trust, therefore there was no justification by the lawyers for the applicants to have tried to serve the application papers at his office. He went on to say that notwithstanding the lack of instructions from the respondents he felt obliged to place before court facts which he considered important to be brought to the attention of the court.

[29] I accept the good intention of Mr Vaatz however procedurally and in terms of the rules his affidavit does not fit anywhere in the application. He is not a party to the proceedings and on his own admission at the time he deposed to the affidavit he did not have instructions from the respondents to depose to such an affidavit. Under these circumstance I have decided not have regard to the content of Mr Vaatz's affidavit in considering the issues before me.

However the affidavit have a costs implication for the parties which I will deal with when considering the costs aspect at the end of this judgment.

[30] I now proceed to deal with the merits of the case. But before considering the merits it is necessary to set out the legal principles which are applicable to a spoliation application such as this one.

[31] It is trite that in the spoliation application the applicants bear the onus to prove that they had been in peaceful and undisturbed possession of the property and that they have been despoiled therefrom. Furthermore the principles were recently collected by this court in an unreported judgment of *Kandombo v The Minister of Land Reform* delivered by this court on 16 January 2016 Case No. A352/2015. The principles are as follows:

> '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;
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> 2. The purpose of the remedy is to preserve law and order and to discourage persons from taking the law into their own hands;
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> 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;
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> 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;
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> 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;
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> 6. The words 'peaceful and undisturbed' possession mean sufficient stable or durable possession for the law to take cognisance; and
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> 7. As a form of remedy spoliation is not concerned with the protection of rights "in the widest sense".'

[32] It is common cause between the parties that following negotiations between the parties during 2007 to 2009 the applicants took over the operation of the Centre which is situated on the property. The applicants also took occupation of the premises and also took over the former employees of the Trust. The respondents admit that the second applicant is operating a vocational training centre on the property under an oral or implied lease agreement then

existing between the parties; that such relationship continued for a number of years during which the second respondent paid the Trust an annual fee of N$1 million. However the respondents state that the trustees acting on behalf of the Trust as owner of property, they were entitled to terminate the lease agreement between the parties by giving notice of such termination. They continue to say that on 29 June 2015 they gave the applicants a written notice of termination of the lease indicating that the property has been sold and requesting the applicants to vacate the property by the end of November 2015. It is not disputed that on 5 December 2015 the first and second respondents accompanied by guards from the 5th respondent, the security entity, attended at the property and ordered the applicants employees or people who were occupying the property on behalf of the applicants to vacate the property; that they proceeded to cut the padlocks securing access to the premises and the buildings, with a bolt cutter and replaced it with their own padlocks and then placed security guards on the premises whose aim was to prohibit entrance to the premises by the applicants and/or their employees.

[33] On 7 December 2015 the applicants' legal practitioners of record addressed a letter to the respondents' legal practitioner of record requesting him to advise the respondents to stop with and desist from their conducts. The legal practitioner for respondents' then replied on behalf of the respondents saying that his clients were entitled to lock the gates and place guards at the gates. The applicant then launched this application on 11 December 2015.

[34] Mr Vaatz requests that before the court deals with the issue of spoliation issue, the court should first make a decision on two issues; firstly whether the Trust is the owner of the property; and secondly whether the applicants have a clear right to occupy the property.

[35] With regard to the issue of ownership of the property, it is trite law in a spoliation application the question of ownership in the property does not fall for consideration. [5] It has been held that in an application for spoliation order the court is not called upon to decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation took place and that the court merely orders that the status *quo ante* be restored**.** [6] The applicants in this application are not required to prove their ownership in the property or disprove the respondents' ownership in the property; all what is required from the applicants is to prove that they were in peaceful and undisturbed possession of the property and that they have been despoiled from such possession, in order to succeed with the spoliation application. In the light of this clear and well established legal position Mr Vaatz first request or point in this regard cannot prevail and stands to be rejected.

[36] As to Mr Vaatz second point whether the application have a clear right to occupy the property; the legal position is clear that it is irrelevant whether the respondents have a stronger right of possession or not. It is the actual possession which is protected and not the

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[5] *Kandombo case supra*.
[6] *Hiember v. Stuckey* 1946 AD 1049 at 1053.

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right to possession.[7] In this connection Mr Vaatz points out that the respondents' admit that the applicants did not have the right to possess or use the whole property which is apparently 37 729 square meters but that the applicants' possession was only in respect of about 3 500 square metres of the property. It is then argued that the applicant's right of occupation of that portion of the property has been terminated and once the termination took effect then the applicants no longer have a right to stay on the premises. In support of this proposition Mr. Vaatz referred to the judgment of Maritz JA in the case of *Kuiri v. Kandjoze*[8]. In that matter the appellants (applicants in the court a *quo*) had leased the premises from the respondent they had in turn sub-let the premises to a third party. The sub-tenant then terminated the lease and handover the key to the premises to the appellant's son who continued to stay on the premises. Thereafter the respondent put padlocks on the door of the premises. The court then stated at para 14 that:

'The appellants' case is therefore not that they had been spoliated during the currency of the lease, but that it happened after the termination thereof. The court then proceeded at para. 15 to say that [*In De Beer v. First Investments* 1980 (3) SA. 1087 (w) at 1092 (H) Coetzee J emphasised that a "on termination of a lease the lessee's right to the use and enjoyment of the property leases absolutely and he is bound to restore the property to the leaser".'

[7] *Harms, Amlers Precedents of Pleadings*, 3 ed at p. 276.
[8] 2009 (2) NR447 at 467.

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[37] The above quotation appears to be the basis of Mr Vaatz's submission. As a statement of law it is correct but it does not deal with the lessor's right where the lessee remains in occupation or possession of the property after termination of the lease. Is the lessor then entitled to put padlocks on the doors to the premises? The answer is clearly "No". Because such act would amount to self-help. The court then went on to say at para 18 page 470 at A:

'that respondents did not have keys to the building and, in dispossessing the appellant on 2 September 2006, were constrained to put padlocks on the doors; in doing so, they despoiled the second appellant's possession of the premises and movables therein illicitly i.e in manner which the law will not countenance.'

[38] This is exactly what happened in the instant matter. The applicants were in physical possession of the property through their employees, the respondents despoiled the applicants' possession of the property by cutting the padlocks to the premises with a bolt cutter and replacing the applicants' padlocks with their own padlocks and then ordered the employees of the applicants off the premises and placed their own guards on the property to guard it. The court is not called upon to determine the exact location of the area which the applicants had occupied prior to the spoliation, all what the court is required to do is to order the status *quo ante* be restored, whatever the area of occupation might have been prior to the spoliation. In summary and in response to Mr Vaatz two points the position legal is this:

neither ownership in the property nor the termination of the lease by the lessor would constitute a defence to the application by the occupier of the property, for a spoliation order.

[39] I am satisfied that the applicants have established that they were in peaceful and undisturbed possession of the property and that they were unlawfully and wrongfully dispossessed on such possession by the respondents. Accordingly they are entitled to an order restoring the status *quo ante*.

Costs

[40] What remains is the question of costs. I indicated earlier in the judgment that I would deal with costs occasioned by the affidavit deposed to and filed by Mr Vaatz before he was instructed to act on behalf of the respondents. Mr Phatela argued that the content of the affidavit is irrelevant and prejudicial to the applicants. The respondents did not disassociate themselves from the affidavit; that they approved or acquiesced themselves with the Mr Vaatz's affidavit appears to be borne out by the fact that they thereafter instructed him to act on their behalf. Under these circumstance I cannot see any reason why the respondents should not be ordered to bear the applicants costs occasioned by Mr Vaatz's affidavit.

[41] Mr Phatela applied for the court to grant a costs order on attorney and client scale. He submits that the unlawful conducts of the respondent were perpetrated while being

represented by an experience and a legal practitioner. I do not think it would be a proper exercise of discretion to penalise a litigant for the wrong advice he might have received from his legal representative whatever the experience or seniority of such a legal practitioner. The application for costs on attorney and client costs is refused and the applicants are awarded costs on party and party costs, such cost to include costs of one instructing counsel and one instructed counsel.

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

1. The spoliation orders is confirmed;

2. The offending paragraphs namely 2.4, 2.5, 3.4 and 3.5 are struck from record;

3. The respondents are order to pay the applicants' costs occasioned by the affidavit filed by their legal practitioner of record.; and

4. The respondents are ordered pay the applicants' legal costs such cost to include the costs of one instructing counsel and one instructed counsel.

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H Angula

Deputy-Judge President

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APPEARANCES

1st & 2nd

APPLICANTS: Mr Phatela

Instructed by the Government Attorney

1st, 2nd, 3rd, 4th, & 6th

RESPONDENTS: Mr A Vaatz

Instructed by Andreas Vaatz & Partners