

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO. HC-MD-CIV-MOT-GEN 2018/00128

In the matter between:

HENNING ASMUS SEELENBINDER

APPLICANT

and

WOLFGANG HANS FISCHER

1ST RESPONDENT

FISCHER SEELENBINDER ASSOCIATES CC

2ND RESPONDENT

Neutral Citation: *Seelenbinder v Fischer* (2018/00128) [2018] NAHCMD 135
(21 May 2018)

CORAM: MASUKU J

Heard: 9 May 2018

Delivered: 21 May 2018

Flynote: CIVIL PROCEDURE – Application for spoliation – requirements to be met by applicant therefor – the *mandament van spolie* – not available to protect access but possession - RULES OF COURT – Rule 32 (9) and (10) discussed and the peremptory nature thereof – applicant’s attempt to comply therewith sufficient to condone non-compliance in the circumstances – Rule

73 (3) – need for applicant in urgent applications to afford the respondent reasonable time limits within which to file answering affidavits – LEGAL ETHICS – Need for practitioners to act with punctilious courtesy towards colleagues and avoid partaking in the acrimony displayed by their clients COSTS – the court normally grants punitive costs to discourage members of the public from taking the law into their own hands, risking anarchy during the process.

Summary: The applicant and the first respondents were the members of the 2nd respondent and each held 50% members' interest in the 2nd respondent. Relations between the applicant and the respondent deteriorated to very low levels. The 1st respondent then approached the court seeking an order that the applicant resign from the 2nd respondent. The court granted the order, together with directions as to how to deal with the dissolution of the 2nd respondent. The applicant continued to attend at the premises of the 2nd respondent. In November 2017, the 1st respondent changed the locks to the premises unilaterally but gave the applicant as spare key thereto. In April 2018, the applicant was denied access to the premises and he approached the court on an urgent basis seeking restoration of possession of the premises of the 2nd respondent.

Held – that although the matter was urgent, and fitted in the scheme of rule 73 (3), the respondents had been afforded a very limited period of time within which to oppose the relief sought and that this is to be avoided.

Held further – that although the applicant had not complied with the peremptory provisions of rule 32 (9) and (10), he had attempted to do so but was hamstrung by the absence of the respondents' legal practitioner from the city. The non-compliance was accordingly condoned and the matter was allowed to proceed.

Held – that although the 1st respondent had complained about certain depositions in the respondent's answering affidavit being irrelevant and liable to being struck out therefor, a consideration of the matter as a whole

suggested that the facts relied on founded the 1st respondent's defence and should therefor be allowed. Further that the court being manned by a trained lawyer would not side tracked by irrelevant matter, if any and which would be consigned to the proper pigeonhole.

Held further – that an applicant for a *mandament van spolie* had to allege and prove that he was in peaceful and undisturbed possession of the premises and that he was illicitly ousted therefrom without a court order. Found that on the evidence, the applicant was in peaceful of the property but had been ousted from that possession without an order of court.

Held – that on the facts of the matter, the unilateral changing of the locks to the premises by the 1st respondent did not serve to oust the applicant from possession, thereby reducing his interest merely to access. Held that although locks were changed, he continued to attend to the premises regularly and without let or hindrance and therefor continued to exercise his right of possession.

Held further – that legal practitioners should ensure that they do no allow the bad blood existing between clients to affect them in the performance of their duties to the court. Punctilious courtesy should remain their guiding light in their dealings with the court and each other.

Held – that courts normally grant costs on the punitive scale in spoliation matters and this is done in order to register the message that people are not allowed to take the law into their own hands.

The application for spoliation was thus granted with costs on the punitive scale.

ORDER

1. The applicant's non-compliance with the forms and service provided for in the Rules of Court is hereby condoned and the matter is heard as one of urgency, as contemplated by the provisions of Rule 73 (3) of the Rules of this Court.
2. The 1st Respondent, Mr. Wolfgang Hans Fischer be and is hereby ordered forthwith to immediately restore possession of the property fully described as No. 15 Bougan Villas Centre, Cnr. of Hebenstreit Street and Sam Nujoma Drive, Klein Windhoek, Windhoek, Namibia (the 'Office') to the Applicant, Mr. Henning Asmus Seelenbinder.
3. The 1st Respondent shall pay the applicant's costs of this application, on the scale between attorney and client, consequent upon the instruction of one instructing and two instructed counsel, on the attorney and client scale.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Falling under judicial microscopic examination in the instant case is an application for spoliation and in respect of which the applicant seeks *ante omnia*, the restoration of certain premises, which are fully described hereunder.

[2] By notice of motion dated 24 April 2018, the applicant approached this court under a certificate of urgency, seeking the following relief:

'1. That the applicant's non-compliance with the forms and service provided for by the rules of this Honourable Court is condoned and that the matter is heard as one of urgency as contemplated by Rule 73 (3) of the Rules.

2. That the 2st respondent be ordered to immediately restore possession of the property fully described as: no 15 Bougain Villas Centre, corner of Hebenstriet Street and Sam Nujoma Drive, Klein Windhoek, Windhoek, Namibia (the 'office') to the applicant.

3. That the applicant shall pay the applicant's costs of this application, including the costs of the instructing and two instructed counsel on the legal practitioner-client scale.

4. Granting to the applicant such further or alternative relief as this Honourable Court may deem fit.'

[3] It is fair to state this early in the judgment, that this application is vigorously opposed by the 1st respondent and who, in that regard, filed a full set of papers, contending that the application should not see the light of day and should be dismissed with costs on the punitive scale. The assessment of who between these protagonists, has the law on his side, will follow as the judgment unfolds.

[4] I must mention that the 2nd respondent did not file any papers in this matter and the irresistible conclusion in this matter, is that the 2nd respondent is content to abide by the decision of the court. In this connection, I will, for ease of reference, refer to Mr. Fischer interchangeably as 'the respondent' or 'the 1st respondent'.

Background

[5] From the papers filed of record, it would appear that the following issues are common cause: The applicant and the 1st respondent are practising civil engineers at the premises described in para 2 of the notice of motion above. In or about July 2006, the two gentlemen became equal

members of the 2nd respondent and practiced their trade at the premises described above.

[6] As most relationships are wont to, their professional relationship navigated tempestuous seas as a dispute between them developed and required, it would seem, resolution by this court. The dispute, which appears to revolve around the need for the applicant to retire from the 2nd respondent, was accordingly submitted for this court's determination.

[7] The matter served before My Brother Ueitele J, who, after listening to argument, delivered a judgment, dated 10 November 2017 and in which he issued an order, which, I must say, has been subjected to disparate interpretations and which discordant interpretations have largely resulted in the current proceedings. The said order reads as follows:

'1. The application to adduce a further supplementary replying affidavit is dismissed with costs the costs to include the costs of one instructing and one instructed counsel.

2. I declare that the applicant is entitled to request the first respondent to retire from the close corporation by giving 6 months' notice to so retire.

3. The first respondent must retire from the close corporation by 31 March 2016.

4. The applicant and the first respondent must, not later than fourteen days from the date of this judgment, appoint a referee, who must determine the value of the close corporation and each party's loan account.

5. If the parties fail to appoint a referee as contemplated in in paragraph four of this order then and in that event the President of the Law Society of Namibia must appoint not later than seven days from the date that the Law Society is informed of the failure, to appoint the referee.

6. For the purpose of giving effect to paragraph four and five of this order the referee:

- 6.1. Must be a person who holds a qualification in the field of accounting or auditing;
 - 6.2. May call upon either party to produce any books or documents which the referee reasonably requires to perform his or her duties. The books or documents must be delivered to the referee within the time period specified by him or her;
 - 6.3. May engage the services of any suitably qualified person or persons to assist him in determining the proper value of the Close Corporation and to pay that person or persons the reasonable fee, which may be charged thereof.
 - 6.4. Must, if required, afford either party or their legal representatives, the opportunity to make representations to him or her about any matter relevant to his or her duties.
 - 6.5. Must prepare the financial statements of the Close Corporation and determine the value of the Close Corporation as at 31 March 2016, not later than three months from the date of his or her appointment.
 - 6.6. May apply to this Court for any further direction(s) that he or she considers necessary to give effect to his or her obligations in terms of this judgment and the law;
 - 6.7. Is entitled to claim his costs of determining the value of the close corporation and the loan account of each member, from the close corporation.
7. Once the referee has determined the value of the close corporation and has determined the loan account of each of the parties, the applicant must pay to first respondent 50% of the value of the close corporation and the value of the first respondent's loan account.
 8. The first respondent must pay 80% of the applicant's costs of this application. The costs to include the costs of one instructing and two instructed counsel.'
- [8] It is common cause between the parties that the order of this court quoted above, has not, for the most part, been complied with. It is clear that

the applicant has not been paid any amount and it also appears, and there is no contest, that even the referee was not appointed, nor, it would seem, has the Law Society of Namibia been approached as the court order stipulates in the clearest of terms.

[9] Whilst the order remained and appears to remain uncomplied with, the relationship between the protagonists appears to have sunk and hit a rock bottom level. This culminated in the 1st respondent changing the locks to the premises. This occurred on or about 17 November 2017. The applicant was nonetheless thereafter, still able to access the premises as he was provided with a key for that purpose.

[10] A dramatic episode occurred, however, on 23 April 2018. It is common cause that on that day, the applicant attended at the premises as usual and whereas he would be able to press a button and the receptionist would allow him entry into the premises, this time he hit a brick wall as it were. The receptionist, on seeing him, did not open the door but seems to have gone to consult the 1st respondent, who waved the applicant away. He has, since that day, been unable to access the premises. It is the events of that day that have culminated in the current application, the applicant contending that he has been illegally despoiled of the occupation of the premises. That is the matter that this court is called upon, in this judgment, to resolve.

Preliminary issues

[11] The respondent, as he was entitled to, raised a number of preliminary issues and on the basis of which he implored this court to either dismiss the application or to strike it off from the roll. These issues include the following: the lack of urgency; failure to comply with the provisions of rule 32 (9) and (10) in relation to an application for the striking out of certain paragraphs of the applicant's founding affidavit and the alleged failure to properly index the pleadings in the matter.

[12] I am of the view that it is necessary to deal with each of these issues but I will attempt to do so in very brief terms. The result will be that if any one of these issues raised holds, and depending on the implications thereof, an order for the dismissal of the application or of the striking of the matter from the roll will follow. In the event none of the matters hold, for reasons that the court will pronounce upon, the matter will then move to be dealt with on the merits. I immediately turn to deal with these issues in turn.

Urgency

[13] The 1st respondent does not appear to have challenged the urgency that attaches to applications for spoliation. This is because authority abounds to the effect that cases of spoliation are inherently urgent.¹ The 1st respondent's complaints, which are more formal in nature, regarding the urgency of the matter, are two-fold. First, he complained that the notice of motion was defective in so far as it did not seek the abridgment of the rules relating to forms and service. The second issue related to the argument that the applicant, who technically sets the time limits for the respondent for filing of the notice to oppose, together with any affidavits in opposition, set time limits that were oppressive to the respondent, considering in particular, that there was a number of holidays intervening between the launching of the application and the hearing.

[14] Regarding the first issue, I am of the view that same must be dismissed without further ceremony. I say so for the reason that a reading of the applicant's notice of motion makes it abundantly clear that the applicant prayed that the court makes an order 'That the applicant's non-compliance with the forms and service provided for by the rules of this Honourable Court is condoned and that the matter is heard as one of urgency as contemplated by Rule 73 (3) of the Rules.'

¹ *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 at 339 para 25.

[15] I am of the considered view that there is no merit whatsoever in this attack. I say so for the reason that the applicant did make the relevant averrals so to speak and requested the court to condone his non-compliance and to endorse the abridgment of the rules relating to form and service. It would be harsh to descend on the 1st respondent with a ton of bricks on this mistake in his argument. I can in fairness, attribute this to the stringent time limits within which the respondent was called upon to oppose the matter and to also file the affidavits. The allegation that the first prayer is wanting is nothing more than an oversight, probably fuelled by the urgency attached by the applicant to the application. I therefor dismiss this attack as lacking merit.

[16] The second attack relates to the stringent time limits yoked upon the respondents if they wished to oppose the matter. In this regard, it is important to record that the applicant required the respondents to enter their appearance to oppose within a day and to thereafter, file their answering affidavits, if any, within a day of the filing of the notice to oppose.

[17] I am of the view that the complaint by the respondent is completely justified in the circumstances. I say so particularly considering the fact that the application preceded a spate of holidays and might have, without sufficient notice, served to dislocate the respondents' plans and ability to properly, fully and timeously deal with the matter. In this regard, it is common cause that the 1st respondent was, and remains outside the country at the hearing of the matter and was thus unable to file the answering affidavit himself, necessitating that his legal practitioner of record does so on his behalf.

[18] That notwithstanding, the respondent defied the odds and within the stringent time limits determined by the applicant, filed a lengthy and meaty affidavit, running into around 44 paragraphs. He must be commended for doing so and placing all the material issues before court for determination. Furthermore, on the day the matter was supposed to be heard, the applicant was afforded time to file replying a affidavit and the respondent applied for and was granted leave to file a rectified affidavit, which removed certain errors committed, regard had to the stringent time limits.

[19] It is however fitting that this court should point out that the urgency procedures are not meant to serve as a weapon of oppression in the hands of the applicant, to use at will and to manufacture injustice thereby. The time to stipulate for the respondent to file affidavits must not be oppressive and serve to turn the tables in the applicant's favour in that the respondent is unable to place his case for the full and proper consideration of the court. In this regard, the applicant must carefully balance his interests in having a speedy hearing but this is not the only or primary consideration. The respondent also has a constitutional right, even in urgent matters, to place his case before the court.

[20] In this regard, the sagacity and fairness of the applicant's legal practitioner must shine through. They should strike a fair and even handed balance and ensure that all the competing rights of the applicant and those of the respondents are adequately catered for. In this regard, all the prevailing circumstances, which affect or inform the fairness at the end of the day should be factored in by the applicant's counsel and should be taken into account in setting the time limits for filing papers and the hearing of the matter.

[21] In *Henwood and Another v Swaziland Tobacco Co-Operative and Others*,² the court stated the following in regard to the issue under scrutiny at para [8] of the judgment:

'I have previously expressed grave concern regarding some applicants in matters of urgency, seeking immediate redress from this Court, often with interim effect. As often happens, the rights of respondents, even in matters that are not *ex parte* in nature, are literally run roughshod over. In *Lisa Evans v Gareth Evans* Case No. 1470/09 at page 15-14 para [16] and [17], I stated the following in the cyclostyled judgment:

"[16] That finding in the applicant's favour notwithstanding, it is my considered view that although urgency is established on the papers, a proper balance must necessarily be struck by an applicant in redesigning the Rules relating to the time

² (2500/09) [2010] SZHC 93 (25 June 2010).

limits so to speak, between that applicant obtaining the urgent relief he or she seeks in order to forestall the damage, injury or prejudice to him or her on the one hand, and the right of the respondent to adequate notice in the circumstances, so as to consider the application, instruct an attorney (who depending on the circumstances, complexity and importance of the matter, may have to instruct counsel) who can adequately prepare to fulfil the twin solemn duties to his client and the Court.

[17] The present practice, where respondents are routinely given little or no notice or in any event an unreasonable length of time to deal with urgent matters, is obnoxious and certainly has a negative effect on their right to access the Court and to meaningfully exercise the right they have at law to be heard.”

[22] At para [11] of the judgment, the learned Judge in the matter quoted above, referred the sentiments expressed by Stegmann J in *Knox D’arcy Ltd and Others v Jamieson And Others*³ where the court expressed itself thus, albeit in relation to an unrelated subject, namely the *Mareva Injunction*:

‘The making of an order which affects an intended defendant’s rights, in secret, in haste, and without the intended defendant having had an opportunity of being heard, is grossly undesirable and is contrary to fundamental principles of justice. It can lead to serious abuses and oppressive orders which may prejudice an intended defendant in various ways, including some ways that may not be foreseeable. The exercise of such a discretion can therefore never be allowed to develop into a routine or standard practice . . . The exercise of such powers must be attended by due caution; with all practical safeguards against abuse; and with careful attempt to visualise the ways in which the order may prove to be needlessly oppressive to the intended defendant. Consideration should also be given to ways in which the order may interfere with rights and obligations of third parties such as banks or other debtors of the intended defendant, or other custodians of the intended defendant’s assets. Both the oppressiveness of the order to the intended defendant and its interference with the rights and obligations of third parties must be kept to the minimum that are necessary in order to achieve the objectives of the anti-dissipation interdict.’

[23] These remarks must be taken seriously by applicants’ legal practitioners and right at the nascent stage of the drafting of the founding

³ 1994 (3) SA 700 at 797 I to 708 B-D.

papers. As officers of the court, they must be eminently fair and not use the leeway they have in structuring the time limits, to inflict a gaping fatal wound of injustice on another litigant, in favour of their client. I am, however, alive to the fact that although the time limits served on the respondents were extremely short in the circumstances, the 1st respondent was able to put up a formidable case and had time thereafter to correct errors and to file additional heads of argument. That the 1st respondent's counsel was able to do this within the stringent time limits does not in any way, shape or form justify or serve to countenance the applicant's oppressive time limits enforced.

[24] In the peculiar circumstances of this case, I find that the short time limits may not be a basis to strike the matter from the roll but the point the respondent makes has to be noted. If the respondent had been unable to file an affidavit at all within the time limits allowed by the respondent, the court would not have hesitated, in all fairness, to extend those time limits and to allow the respondent sufficient time to bring the full import of its matter before the court.

[25] In view of the foregoing, I accordingly find that the respondent did not, objectively speaking, suffer irreparable harm in the peculiar circumstances, in the presentation of his case to court. This is so despite the court acknowledging that the time limits placed by the applicant were oppressive, particularly taking into account the particular season when the urgent application was launched. I say no more of this issue.

[26] A second tier to the argument on urgency, relates to an application that is pending before Mr. Justice Ueitele and set down for hearing on 24 May 2018. That application has been launched in terms of rule 103 and relates to a clarification of his order stated elsewhere in this judgment. Mr. Barnard argued that it was unfair for the applicant to move this matter with the extreme urgency with which he did when the court will be clarifying its order, whose interpretation has, to some extent, been that cause of the act complained of in this matter. There would have been no harm for the applicant to wait a few more weeks, so the argument ran.

[27] An insidious motive for setting this matter on urgency was read by the respondent, namely, to disposing of the spoliation proceedings before Ueitele J could 'confirm that the applicant has been in court since the date of his judgment on 17 November 2017.' I am not convinced that the respondent is correct, nor entitled to make that allegation.

[28] I am of the view that Ueitele J should be allowed, when the day comes, for him to listen to the argument before him and to render his judgment. It is improper to second-guess what he will or may do on the day. In this case, the applicant claims that he was despoiled by the applicant by being denied access and therefor possession of the premises in question. As indicated earlier, cases of spoliation are inherently urgent and the haste with which the applicant approached this court, which cannot be said to have been undue, is justified, subject to the comments on the oppressive time lines imposed by the applicant.

[29] A party, who claims his rights have been violated and in circumstances where the law has allegedly been wrestled into his own hands by the respondent, should be allowed to come to court for appropriate redress. In the peculiar circumstances of this case, I am of the view that the applicant does not have to wait for Ueitele J to render his judgment in order to know whether to vindicate his rights or not.

[30] It must also be considered that the matter may not be resolved on 24 May 2018, as the learned judge may require time to consider the argument advanced and to write a judgment. It would be insensitive to expect the applicant, when he feels strongly that he has been given the short end of the stick, to wait and hold the redress he seeks in abeyance, pending judgment on a matter, whose direction we all cannot and need not surmise. In the premises, I am of the view that the point raised by the respondent and its alleged effect on the urgency of the matter is misplaced.

[31] I accordingly hold that the matter is urgent and although the applicant imposed stringent time lines, which the respondent was able to meet, nothing should detract from the imperative need for the applicant to approach this court with deliberate haste.

Non-compliance with Rule 32 (9) and (10).

[32] It is not in dispute that the applicant, after receiving the respondent's answering affidavit, formed the opinion that certain allegations contained therein, were either irrelevant, vexatious or scandalous, and therefor liable to be struck out in terms of rule 58.

[33] It is not in contention that the application to strike out is an interlocutory proceeding within the meaning of rule 32. That being established, it is, in my view unmistakable that the parties were in duty bound to comply with the provisions of rule 32 (9) and (10) in particular. These subrules speak of the need to attempt to resolve interlocutory matters amicably and avoiding the need to expend a lot of time, effort and expenses on same. It is not in dispute that the parties never engaged in this mandatory process. What is the penalty therefor?

[34] Mr. Barnard moved the court to strike the matter from the roll for this avowed non-compliance. In adopting this stance, he placed heavy reliance on a judgment of this court in *Visagie v Visagie*,⁴ where strong sentiments were expressed regarding the imperative need to comply fully with the mandatory requirements of the said sub-rules.

[35] In that case, the court issued the following admonishment regarding the need to follow the said peremptory provisions:

'The import is that a party, who seeks to raise an application for an irregular step must before launching the said proceeding do two things: (a) seek an amicable solution to the dispute and (b) file with the registrar the details of the steps taken to

⁴ (I 1956) [2015] NAHCMD 117 (26 May 2015).

attempt to resolve the matter amicably. It is plain, in my view, that failure to comply with either or both requirements in rule 32 (9) and (10), is fatal. The court cannot proceed to hear and determine the interlocutory application. The entry into the portals of the court to argue an interlocutory application must go via the route of rule 32 (9) and (10) and any party who attempts to access the court without having gone through the route of the said subrules can be regarded as improperly before court and the court may not entertain that proceeding. In colloquial terms, that party can be said to have 'gatecrashed' his or her way into the court. Gate crashers are certainly unwelcome if regard is had to the provisions of the said subrules. A proper reading of the above rule suggests unequivocally that once an application is interlocutory in nature, then the provisions of the subrule are peremptory and a party cannot wiggle its way out of compliance therewith . . . For that reason, I am of the considered view that a party may not circumvent compliance with the said subrules, whatever the circumstance and the one at hand, namely, that the case involves minors, is not, in my view one that brooks an exception.'

[36] The question to determine at this juncture is whether Mr. Barnard is correct that this is a proper case in which to strike the application from the roll for non-compliance. In order to do so, it is important to recognise that he is correct that both subrules were not complied with by the parties. Are there any circumstances extant in this case that would stave the execution of the full import of the non-compliance?

[37] There are a few issues that need to be taken into account in this regard. First, it is clear that the applicant realised that its application to strike out certain portions of the applicant's affidavit, was interlocutory in nature. In this regard, a meeting was arranged with my office to enable the court to make directions in that regard. It turned out later that the respondent's legal practitioners were not available for the meeting as they were out of town, probably in view of the number of holidays that decorated the week in question.

[38] Thereafter, the applicant filed a brief application requesting the court to give directions in chambers seeing that the parties were unable to meet to comply with rule 32 (9) and (10) aforesaid. In particular, the applicant sought

an order excusing it from compliance because of the unavailability of the respondent's legal practitioner of record.

[39] Whereas the motives of the applicant's legal team were pure, I am of the considered view that the court cannot properly give a directive that a party is excused and is not required to comply with any peremptory rule of court. I accordingly declined to issue same and the applicant proceeded to file its application to strike out nonetheless.

[40] It becomes clear, from the foregoing, that the applicant at all material times, was aware of its obligation to comply with this provision and accordingly made arrangements for a meeting for directions. It was hamstrung in its endeavours by the absence of the respondent's legal practitioners and the meeting could thus not be held.

[41] In *Kondjeni Nkandi Architects v Namibia Airports Company Ltd*,⁵ the court held that parties may not choose to opt out of compliance with rule 32 (9) and (10) and that every effort must be made to comply therewith, even if pessimism that the meeting will bear no fruit may be accurate. The court proceeded, in that case, recognising that both parties had done all the necessary preparations to argue the exception, in compliance with the other overriding objectives of judicial case management, to allow the parties to proceed to argument regardless of not having complied therewith. The court was quick to mention though that it was not thereby setting a precedent that parties may, willy-nilly, not comply with the above subrules.

[42] I am of the view that the facts in this case are markedly different and actually far better than those in *Kondjeni*. I say so for the reason that in that case, no attempts whatsoever, were made by the legal practitioners to comply, resting on the forlorn hope that prospects of coming to an amicable resolution were nil, which the court rightly condemned. In this case, the applicant was desirous of complying with the rule in question and put

⁵ *Kondjeni Nkandi Architects v Namibia Airports Company Ltd* Case No. I 3622/2014.

mechanisms in place for compliance but only for the applicant's legal practitioner, out of no fault of his own, to be out of town at the material time.

[43] It must be mentioned and recalled that this was a matter that was brought on urgency and time was of the essence. The matter could thus not be allowed to remain in limbo as compliance with rule 32 was awaited. In point of fact, a date of hearing of the urgent application had already been pronounced and was approaching in earnest. In the circumstances, I am of the considered view that it would be incorrect to strike the matter from the roll for non-compliance, taking into account that the applicant went to hell and back to try and comply with the said provisions and that the meeting did not take place is no reflection on the applicant's lack of effort or endeavour, nor is it as a result of his disregard and contempt for the rules.

[44] What cannot be gainsaid is that as the application for striking out was eventually lodged, there is very little prejudice, if any, that the respondent and the court suffered. By the time the application was heard, the parties knew the nature, extent and bases of the application. In the premises, I am of the view that this is a proper case in which the court can overlook the non-compliance and actually condone the non-compliance as it would seem that circumstances conspired to render the applicant unable to comply with what are otherwise mandatory provisions of the rules and which from what appears, the applicant had every noble resolve and intention to comply therewith.

[45] In the premises, I am of the view that the application for the striking of the matter, understandable as it is, and deeply embedded in the rules as it is, should not be granted in the special circumstances of this case. The application for the striking out of the application for non-compliance with rule 32 (9) and (10), is therefore refused. It must be pointed out that this case must be viewed and considered to turn on its peculiar facts regarding the failure to comply.

Notice of motion to strike out

[46] As foreshadowed earlier in the judgment, the applicant moved an interlocutory application for striking out certain paragraphs in the respondent's answering affidavit on the basis that they are irrelevant. In the main, the applicant contended that the irrelevancy emanated from the fact that the portions sought to be struck out were in relation to a pending case before this court, namely, Case A 217/2015.

[47] In this regard, the applicant argued that in spoliation applications, the requirements to be met and which the respondent has to answer to are clear, namely, whether the respondent unlawfully deprived the applicant of peaceful and undisturbed possession. The other allegations, which the respondent made, it was so submitted, are irrelevant to the present enquiry.

[48] In answer, Mr. Barnard argued quite forcefully, that firstly, there is no prejudice to the applicant if the allegations are placed before court and that any irrelevant matter will be appropriately assigned by the court to its proper pigeon hole and will not affect the outcome of the proceedings in any way. If the court was manned by a person with no legal training, he further submitted, different considerations may well have applied.

[49] Secondly, Mr Barnard also argued that the allegations that are made in relation to the other case form the basis of the respondent's defence and that they will show that the applicant did not have peaceful and undisturbed possession of the premises in question and that he is not, therefor, entitled to the *mandament*.

[50] I am of the view that I should take a practical and common sense approach in this matter and allow the allegations to stand. I do so for the reason that Mr. Barnard is partially correct that the full basis of the respondent's case requires a rendition of some of the allegations that have been included by the applicant and are the subject of the application to strike out. Secondly, there is no danger that those allegations that may be correctly

characterised as irrelevant, may serve to jaundice the court's view or approach to the matters in need of resolution and thus lead to an injustice.

[51] In the premises, I allow the applicant's answering affidavit to stand as is for the purpose of allowing the respondent to fully canvass its case. I will not therefor have to deal with the question of whether there has or has not been any prejudice as a result of the impugned portions of the answering affidavit. In my view, it will be beneficial to all the parties if the matter is dealt with on the papers as they stand and I therefor refuse the application for striking out the aforesaid paragraphs in the peculiar setting of this case.

The merits

[52] A long line of case law has authoritatively established the twin requirements that an applicant in a spoliation application should allege and prove. These date back from *Nino Bonino v De Lange*;⁶ *Sillo v Naude*;⁷ *Ntai v Vereeniging Town Council*⁸ *Yeko v Qana*⁹ and *George Municipality v Veena*.¹⁰ These are that the applicant must allege and prove peaceful and undisturbed possession and an unlawful ousting or deprivation of that possession by the respondent. In this jurisdiction, one can readily refer to *The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining Ltd and Two Others*.¹¹

[53] The question that this court will have to decide is whether the applicant has not only alleged these twin requirements, but whether he has, by admissible evidence, proved them. In this regard, it should be mentioned that the applicant did make the necessary allegations regarding the said elements.

⁶ 1906 TS 120, at 122.

⁷ 1929 AD 21.

⁸ 1953 (4) SA 597 (A).

⁹ 1973 (4) SA 735 (A).

¹⁰ 1989 (2) SA 263 (A).

¹¹ Case No. (P) A 298/2006, per Smuts J.

What confronts the court is whether the applicant has proved that both elements were met.

[54] Mr. Pith and Marrow of Mr. Barnard's argument was that there are two important dates that the court must consider in deciding this matter. The first is 17 November 2017, when the 1st respondent changed the keys but gave the applicant a key, which he could use to access the premises. It was argued by Mr. Barnard that from that date, the 1st respondent was solely in charge of the premises. The second date was the one that gave rise to the present application, namely, 23 April 2018, when the applicant was denied access completely to the premises in question.

[55] In regard to the first date, Mr. Barnard argued that the applicant accepted the position and that as a result, he no longer exercised any control or possession of the premises but only access thereto. In this regard, he relied on the case of *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another*,¹² where the court made a distinction between access to and possession of property.

[56] The applicant, Mr. De Beer, had been allowed access to the premises of Zimbali Estate via a disc which when enabled, opened the boom gate to grant him access to the estate. The disc was later disabled and the applicant approached the court with an application for spoliation. The court held that the applicant did not possess the premises but merely exercised access and that for that reason, the *mandament* was not available to him.

[57] After reviewing a number of cases, the court came to the following conclusion at para [54]:

'A summary of the above cases would seem to me to indicate that the mandament is there to protect possession, not access. Such possession must be exclusive in the sense of being to the exclusion of others. The possession of keys by a multiplicity of parties waters down their possession, and in present case it becomes so dilute that it

¹² 2007 (3) SA 254 (N).

ceases to be the sort of possession that is required to achieve the protection of the mandament. It must be recalled that the real purpose of the mandament was to prevent breaches of the peace. If someone is in exclusive possession and exercises such possession, then deprivation thereof can, and often does, lead to a breach of the peace. No such breach would in the ordinary course of events take place where a large number of persons have access, rather than possession, of the property in question.'

[58] I am of the considered view that the facts in the *Zimbali* case are distinguishable from the instant case. As appears from the latter portions of the excerpt quoted above, in the *Zimbali* case, many people had access to the premises and not necessarily possession thereof. In the instant case, it must not be forgotten that the applicant was a member in the 2nd respondent and although he was supposed to have retired in terms of the judgment of Ueitele J, he had not been given his dues in line with the judgment and continued to exercise his possession of the premises in the circumstances, although he used a certain portion of the building where his office was situated.

[59] To this extent, I am of the considered view that he exercised not only access but possession as his office, with all the equipment and personal effects, was situate therein and also considering his position in the 2nd respondent. Both he and the 1st respondent, it would seem, possessed keys to the premises, although the 1st respondent changed the locks. It appears plain to me that his case clearly falls under the category referred to in *Zimbali*, namely, where a breach of the peace would occur once deprivation eventuates, hence the present application.

[60] Mr. Barnard criticised the applicant for taking what may be referred to as a supine position when the applicant changed the locks in November 2017. According to Mr. Barnard, it was at that time that the applicant should have taken the matter to court because he was thereby being denied possession of the premises and contemporaneously being limited only to access to his office.

[61] It may well be true that he did not approach the court at that juncture but what he does say in his affidavit is quite revealing. At para 12 of the founding affidavit, the applicant states the following regarding the changing of the locks by the 1st respondent:

‘Until recently, the 1st respondent and I each had a set of keys and we could each freely gain access to the office to enjoy our joint possession whenever we wanted. Without telling me, the 1st respondent had the locks to the office changed. While this inconvenienced me, I tolerated it, simply because I was never refused entry into the office and I could still exercise joint possession thereof with the 1st respondent. As a result I continued to go into the office almost every weekday between the hours of 08:00 and 17:00 in my workspace, as I had always done. My joint possession remained intact.’

[62] It thus becomes clear that although the applicant was unhappy about this state of affairs, since he could still access and possess his office and do his work without let or hindrance, he was able to put up with the irritation. I am of the view that this provides a full answer to the respondent’s argument on this score. I agree that the applicant not only had access but also had possession of the premises and had unlimited access to the premises even though the locks had been unilaterally changed by the 1st respondent. The change of the locks did not, without the applicant losing complete access to the building, affect his possession of the premises in my view.

[63] In *Kuiiri v Kandjoze*,¹³ the Supreme Court dealt with the issue of possession as follows:

‘Lastly, in the 3rd edition of Silberberg and Schoeman’s The Law of Property the authors state:

“Once possession has been acquired continuous physical contact or, in the case of land, continuous occupation or use is not necessary for the retention of such possession.”

¹³ 2009 (2) NR 447 at 459 G-460 A.

In footnote 35 the learned authors cited a number of cases as authority for this statement. Among the cases cited is the case of *Welgemoed v Coetzer and Others* 1946 TPD 701. In that case Murray J said at 720:

“I am prepared to accept as correct certain principles for which authority was cited – viz the required continuity of occupation need not be absolute continuity, for it is enough if the right is exercised from time to time as occasion requires and with reasonable continuity (*Mocke v Beaufort West Municipality* (1939, C.P.D. at p.142); the occupation and user need not be of every individual portion of the area claimed, for a possession or occupation of the whole may in certain circumstances be a necessary inference from the possession or occupation of a part thereof or different parts thereof at various times (see Pollock and Wright on Possession, p.31); and the exercise is open even without actual knowledge on the part of the true owner, provided it was open for all to see who wanted to see, and would have been known to the true owner but for his carelessness in looking after his property.”

[64] It thus becomes as clear as noonday that because the applicant attended on the premises for a number of days in a week, he cannot be said to have lost or given up possession of the premises, thus relegating him to a status of mere access thereto. He did not have to come to the office everyday to enforce possession, nor was it necessary that he occupied more space than his office. In this regard, I do not agree with Mr. Barnard that the applicant's rights were relegated to mere access in the circumstances.

[65] The events of 23 April 2018, are, however, a different kettle of fish altogether. On that day the applicant was denied access to the premises altogether. It is when that happened, that the applicant dusted his laurels, as it were, and approached the court on urgency. He could, from that day not possess the premises and was denied access, the very commotion that the *mandament* is designed to prevent. These facts, in my view, place the matter squarely within the perimeters of the *mandament*.

[66] In this connection, it appears to me that although the applicant could possess the premises even with the unilateral change of locks, once he was denied access to the premises altogether, he was also denied possession

thereof. In the circumstances, it can be held and without diffidence, that he was, previous to that intervention by the 1st respondent, in peaceful and undisturbed possession of the premises in question, thus meeting the first requirement for the granting of the *mandament*.

[67] It cannot be disputed, in the circumstances, that the 1st respondent did not have a court order that permitted him to do what he did. In this connection, his actions did not find any basis or authorisation in law. In short, they were illegal. Whatever interpretation the applicant attached to the judgment of Mr. Justice Ueitele, including the critical comments the learned Judge uttered at case management, he could not debar the applicant from accessing the premises nor could he evict him without an order of court. That he did clearly amounts to him having taken the law into his bare hands, without any court imprimatur decorating and arming his hands.

[68] Mr. Barnard argued that with the hearing of 24 May 2018 looming in the horizon, the applicant should have waited to hear what the court would say in that matter and then decide thereafter, to act, having had the benefit of the court's judgment. In bringing the matter to court, so the argument ran, he acted precipitately. I have to some extent dealt with this argument in the urgency portion. My view is that this argument is incorrect. The reasonable thing that the 1st respondent would have had to do, was since he had approached the court to interpret its judgment in the rule 103 application, he had to hold his views and interpretation of the court order in abeyance until the court had spoken on the matter in answer to his entreaties.

[69] The converse is, in my view intolerable, namely that the applicant should have stomached what he perceived to have been an unlawful appropriation of the law into the applicant's hands and then wait at attention, as it were, in full view of the illegality, for the matter to be heard. Any period of inaction by the applicant, in view of the illegality he perceived, may have worked against him in the course of time. It was not his actions that changed the entire trajectory in the matter. I say so because all he was doing was to do what he had always done without hindrance, namely going to the office.

[70] On the other hand, the 1st respondent is the one who changed the entire trajectory of the relationship between the parties by appropriating the law into his own hands. He is the one who should have waited and not interfered with the strained relationship as it then stood, until the court had endorsed the correctness of his interpretation of its judgment. More harm was done by his actions of taking the law into his hands than his 'tolerating' the applicant continuing to access and possess the premises, until the court had found in his favour.

[71] I make bold and say that even if the 1st respondent was correct in his view on the proper interpretation of the order of the court, he would still not have been entitled to bundle the applicant out of the premises, without further legal or judicial ceremony. If the applicant had been notified to remove himself, together with his possessions but refused to do so, the 1st respondent would have had to approach the court to be given the wherewithal to evict the applicant, using the instrumentality of the office of the deputy sheriff. That is what the rule of law stands to achieve, namely, the orderly and lawful conduct of business and people's affairs in the Namibian society.

[72] Mr. Barnard argued and quite forcefully too that in the premises, the conduct of the applicant was unlawful and he based his argument on the record of proceedings in case management before Ueitele J, when the rule 103 application was placed before him. He tore Mr. Andima to shreds, from contents of the transcript of proceedings. It appears from the record of proceedings that the learned Judge asked on what basis the applicant continued to sit in the office as the close corporation was dissolved. He regarded the application to have been an abuse of the court process.

[73] What the learned Judge said cannot be denied. Mr. Heathcote, for the applicant, however, submitted that those were merely views expressed by the court at the time and they should be regarded as preliminary in nature and should not lead to a conclusion that the applicant is totally offside. I agree. It must be recalled that at the time the learned Judge expressed his views, very

strongly, which cannot be denied, there was an application before him by the present respondent and the applicant was entitled to file his answering papers thereto, which the court rightly allowed him to.

[74] In the circumstances, it is clear that the learned Judge has not spoken the last word on the issue and his views, although expressed strongly, as intimated, were merely *prima facie* at that point, as the position of the respondents and the events that may have or not have taken place, were not placed before the learned Judge. I accordingly come to the view that the learned Judge did not make a definitive finding that the applicant had no right to be on the premises and his comments must be seen, interpreted and confined to the context as described above.

[75] In the premises, I am of the view that regardless of how valiantly Mr. Barnard fought his client's cause, the law was just not on his client's side. In the premises, I am of the considered view that the applicant did not only succeed in alleging the twin requirements but he has also succeeded in proving that he was in peaceful and undisturbed possession of the premises in question and that he was illicitly ousted from that possession by the 1st respondent.

[76] When one has regard to the 1st respondent's papers and heads of argument, one gathers the distinct impression that it is argued that the applicant stands in contempt of an order of court and should thus not have been entitled to be heard until he had purged his contempt. I am of the view that if there was such a situation, an appropriate application, even if in the nature of a counter-application envisaged in terms of rule 69, to have the applicant hauled into court for contempt, would have had to be moved, in the circumstances. One cannot act unlawfully and then attempt to dissuade the searching light of the courts from zeroing in on one's unlawful conduct by saying the other must not be heard, when one has not taken appropriate measures to address what one considers to be contempt of court on the part of their adversary.

Costs

[77] The outstanding issue relates to the costs of the application. Mr. Heathcote, in dealing with the issue of costs, referred this court to the judgment in *Maseko v The Commissioner of Police and Another*¹⁴ and implored this court to follow the approach adopted therein. In that case, the police had seized the applicant's 32 herd of cattle. There was no question about the fact that the applicant was in peaceful and undisturbed possession of the said cattle.

[78] The only live question related to whether they had a court order authorising the seizure. The police sought to rely on a letter from the King's Office, which allegedly authorised the seizure of the cattle. The court held that such a letter was not a court order and was therefore of no assistance to the respondents. Spoliation had thus been proved by the applicant, the court held.

[79] In dealing with the issue of costs, the court reasoned as follows at para [51] of the judgment:

'It will be seen that Courts have traditionally awarded such a punitive order for costs in matters of spoliation for the reason that such conduct, if proved, amounts to self-help and which bodes ill for the lawful and orderly conduct of affairs in society and which has the ugly potential to bring society back to the state of nature or the survival of the fittest, where the law plays no part but the muscular and the armed have their way. This cannot be . . .'

[80] These comments are fully applicable in this case. It is a matter of comment that some persons and legal entities in this country appear to arrogate to themselves the right to take the law in their own hands. Testimony to this is the regularity with which this court is called upon to deal with applications for spoliation, often on an urgent basis, thus taking away precious judicial time and resources that could be better expended elsewhere, to

¹⁴ (1778/09) [2011] SZHC 66 (17 January 2011).

nudge the errant respondents back onto the rails of proper and lawful conduct.

[81] When people, whoever they are, take the law into their own hands, they become complainants, prosecutors, witnesses, judges and executioners in their own causes, thus wresting the function of deciding disputes from the courts, which the drafters of the Constitution, in their wisdom, ordained should vest and reside in the judicial organ and without a rival.

[82] Such situations should not be tolerated or allowed to prevail any longer. One of the weapons at the disposal of the courts in stemming the tide, is that of discouraging this conduct by unleashing the especial sting of punitive costs on them. This would hopefully serve to drive the point home that such conduct is an aberration that should not be allowed to take root, however attractive, expedient and inexpensive it may have appeared to be at first blush and in a rushed bid to 'put' the applicant 'in his place'.

[83] There is a concept in colloquial parlance called 'D.I.Y.', which when interpreted, means 'do it yourself.' It must be made known that where the law is concerned, particularly where it involves self-help, 'D.I.Y.' simply does not apply. One does not usurp the functions of the judiciary and arrogate them to oneself and it remains business as usual. Where a party resorts to 'DIY', it must be made categorically clear that that is a very expensive avenue, with very serious consequences attaching thereto. That person literally courts disaster, which shall hit him or her very hard in the pocket. He or she, who has an ear, let them hear what the court says to Namibian citizens and residents.

[84] In the instant case, the 1st respondent, who is a person who is well read, should have known that he was venturing in very dangerous terrain when he resorted to self-help. What is particularly disturbing in this matter, is that he appears to have acted on legal advice in doing what he did and this is unacceptable and should not be repeated.

[85] In the circumstances, I am of the considered view that the image of the rule of law and its place in society must be redeemed and restored by imposing a punitive costs order against the 1st respondent. His example is not one to be emulated and this message must spread to all the nooks and crannies of this great Republic. Costs on the attorney-client scale, are therefore not only condign and but also called for. If I may ask rhetorically, why should the applicant be put out of pocket by being compelled to restrain a person who, in his full and sober senses, is intent on embarking on what is clearly an unlawful crusade?

Admonition

[86] Before drawing a curtain on this judgment, I find it imperative to comment on some ugly spectacles that played themselves out in the drafting of the papers and to some limited extent, in the heads of argument. Counsel appear to have engaged in some unwarranted verbal sparring, issuing jabs with some invective in some places in the process.

[87] Counsel should always display punctilious courtesy towards colleagues, regardless of how hot and enraging the battle contours prove to be. Counsel should always avoid partaking in the dish of acrimony and resentment served by their clients. In this regard, counsel should remain robed in the court regalia and must avoid the temptation, beneath those robes, to be adorned in the shimmering robes of anguish and bitterness their clients are dressed in.

[88] The courts, even in heated legal battles, expect counsel, as officers of the court, to provide a calming and sobering influence, separating themselves as wheat from the chaff that their clients throw into the equation. In this regard, counsel should stay clear of the dizzying and emotional euphoria that seems to understandably seize the clients in moments of confrontation. If counsel heed this advice, they become useful both to their clients and the court. See *New Africa Dimensions CC v Prosecutor General*.¹⁵

¹⁵ (SA 22-2016) NASC at para [57], per Shivute CJ.

Conclusion

[89] In view of the foregoing, I come to what I consider an inexorable conclusion that the applicant has satisfied all the requirements of the *mandament van spolie*. Having done so, the costs, which for reasons advanced above, should be on the punitive scale, and should, in my view, follow the event. No meaningful reason is advanced as to why this should not be the case.

Order

[90] In the premises, and for the foregoing reasons, I find the following order as fitting and eminently called for:

1. The applicant's non-compliance with the forms and service provided for in the Rules of Court is hereby condoned and the matter is heard as one of urgency, as contemplated by the provisions of Rule 73 (3) of the Rules of this Court.
 2. The 1st Respondent, Mr. Wolfgang Hans Fischer be and is hereby ordered forthwith to immediately restore possession of the property fully described as No. 15 Bougan Villas Centre, Cnr. of Hebenstreit Street and Sam Nujoma Drive, Klein Windhoek, Windhoek, Namibia (the 'Office') to the Applicant, Mr. Henning Asmus Seelenbinder.
 3. The 1st Respondent shall pay the applicant's costs of this application, on the attorney and client scale, consequent upon the instruction of one instructing and two instructed counsel, on the attorney and client scale.
 4. The matter is removed from the roll and is regarded as finalised.
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TS Masuku

Judge

APPEARANCES

APPLICANT: R Heathcote (with him J Jacobs)
instructed by Van der Merwe-Greeff Andima
Inc., Windhoek

RESPONDENT: TA Barnard
instructed by Behrens & Pfeiffer., Windhoek