

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Cuff's Cattle Enterprise (Pty) Ltd & Another // Daniel Botes & 2 Others</i>	Case No: HC-MD-CIV-MOT-GEN-2018/00389
	Division of Court: High Court (Main Division)
Heard before: Honourable Mr Justice Angula, Deputy Judge-President	Date of hearing: 2 November 2018
	Delivered on: 5 November 2018
Neutral citation: <i>Cuff's Cattle Enterprise (Pty) Ltd v Botes</i> (HC-MD-CIV-MOT-GEN-2018/00389) [2018] NAHCMD 348 (5 November 2018)	
The order: Having heard Mr Strydom , counsel for the applicants, and Ms Campbell , counsel for the first and second respondents, and having read the documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. Non-compliance with the Rules relating to the service and time limits as set out in Rule 73(3) of the Rules of this Honourable Court is condoned and the matter is treated as urgent.2. The application for spoliation is granted.3. The first and second respondents are ordered to pay the applicants' cost such costs to include the costs of one instructing counsel and one instructed counsel.4. The matter is removed from the roll and considered finalized.	
Reasons for orders: [1] I have before me a spoliation application brought on urgent basis. The applicant alleges that he has been spoiled of possession by the first respondent about 115 of his cattle plus his Toyota Land Cruiser. He seeks an order to restore to his possession the said items. The applicants further seek an order to interdict	

the respondents from interfering or preventing his employees to have access to the respondents' farm in which the cattle and the Land Cruiser are situated.

[2] The application is opposed by the first and second respondents (the respondents). In support of their opposition, the respondents contend that they have a lien in respect of the cattle for the unpaid grazing fees.

[3] It is common cause that the applicants rented a portion of the respondents' farm to graze his cattle. The written agreement expired at the end of September 2018 where after the cattle were kept on the respondents farm by an oral agreement pending the applicants' removal of the cattle.

[4] The second applicant was in the process of removing his cattle from the farm when the respondents prevented the applicant to remove the last 115 of the original of about 400 cattle of the applicants' cattle which were on the farm. On the applicant's case, the Land Cruiser was impounded by the respondents while it was on the farm with the applicants' employees, and when the first respondent removed the keys of the Land Cruiser from the applicant's employees.

[5] It is conceded by the respondents and I am satisfied that the application is urgent.

[6] By agreement between the parties, the dispute regarding the return of Land Cruiser, was removed from the issues for determination by the court and the parties agreed that it would be sorted out between them. This followed after the respondents indicated that they were not holding the vehicle and that the applicants was at liberty to collect the vehicle from the farm. There was a dispute about the whereabouts of the key for the vehicle. Fortunately, as indicated earlier, the court has, by agreement between the parties, been relieved from deciding the whereabouts of the keys of the Land Cruiser.

[7] In addition to the claim of a lien the respondents hold over the cattle, the respondents contend that the applicants are not in possession of the cattle which is a necessary requirement for the second applicant to succeed with his spoliation application. The applicant contended that he never surrendered possession of his cattle and has at all material time been in possession of his cattle; that all what happened during the duration of the agreement was that he had access to the leased grazing area of the respondents' farm.

[8] Mr Strydom for the applicant, referred the court to WE Cooper in his work, Landlord and Tenant where the learned author at page 195 says the following with regard to the issue the lessors' right in respect of the lessee property brought of the leased property.

'A lessor cannot perfect his hypothec by seizing *invecta et illata* and if he does so against the lessee's wishes, he is a spoliator and can be ordered to restore the goods to the lessee.'

[9] At page 181, the learned author citing the classic author, Grotius, states that: 'All things brought or carried on to the property hired by the lessee – animals, furniture, gold, ornaments clothes, jewels, arms implements, tools, whatever their nature – are subject to the lessors hypothec'.

[10] It would appear from the above authority that possession of the movable property brought on the leased property remain vested in the lessee and possession does not transfer to the lessor upon the movable properties being brought on the leased property. This conclusion is in my view further reinforced by the learned author's statement that: 'To render his hypothec legally effective, a lessor must by judicial process perfect his hypothec over *invecta et illata* (goods brought or driven to the leased premises) while they are on the hired premises'.

[11] It would appear to me that the respondents had free access to the area but such access did not amount or constitute legal possession¹. It is inconceivable that the respondents could or would have the legal intention to possess the cattle which did not belong to them.

[12] It follows from the above conclusion that the respondents' argument the applicants were not in possession of the cattle stands to be dismissed.

[13] It would further appear that a lien can only operate as a defence against an action of *rei vindicatio* and not against an application for spoliation. A lien differs from a tacit hypothec in that the rententor must retain possession of the article². In this connection the court in *Reed Bros v Ford*³ the court held that a stable-keeper has no cause of action against the owners of a horse for the necessary expenses of its maintenances, but where the owner claims delivery of the horse the court will only order the delivery subject to the owner paying such expenses; and that if a claim in reconvention has been instituted, the plaintiff in reconvention is entitled to a judgement for the amount due before he can be ordered to relinquish possession of the goods. In the present matter no claim in reconvention has been instituted.

[14] It follows therefore from the foregoing, that the respondents' opposition to the applicants' application cannot be sustained. The ineluctable conclusion I have arrived at, is that the respondents have unlawfully dispossessed the applicants' of their cattle and the respondents must be ordered to restore possession of

¹ See: *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 (3) SA 254 (N).

² Willes' Principles of South African Law, 9th Edition page 663

³ 1923 TPD 150 at page 154

such cattle to the applicants by allowing the applicant to remove his cattle from his farm.

[15] It the result I make the following order:

1. Non-compliance with the Rules relating to the service and time limits as set out in Rule 73(3) of the Rules of this Honourable Court is condoned and the matter is treated as urgent.
2. The application succeeds.
3. The applicants are ordered to pay the respondent's costs such costs to include the costs of one instructed counsel and one instructing counsel.
4. The matter is removed from the roll and considered finalized.

Judge's signature:	Note to the parties:
Counsel:	
Applicants	Respondents
J A N Strydom <i>instructed by</i> De Klerk, Horn & Coetzee Inc., Windhoek	Y Campbell <i>Instructed by</i> Koep & Partners, Windhoek