



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2019/00003

In the matter between:

**UTE STELLMACHER**

**FIRST APPLICANT**

**FAWZIA STELLMACHER**

**SECOND APPLICANT**

and

**GOLDA ADELHEID STELLMACHER**

**FIRST RESPONDENT**

**ZIA ENGELHILDE STELLMACHER**

**SECOND RESPONDENT**

**Neutral citation:** *Stellmacher v Stellmacher* (HC-MD-CIV-MOT-GEN-2019/00003)  
[2019] NAHCMD 26 (15 February 2019)

**Coram:** ANGULA DJP

**Heard:** 25 January 2019

**Delivered:** 15 February 2019

**Flynote:** Applications – Spoliation – Applicants must prove peaceful and undisturbed possession of the thing – That he or she was unlawfully dispossessed of such possession.

*Lien* – A *lien* is dependent on continuous possession; there must be physical control or occupation (*detentio*) and the intention of holding and exercising possession (*animus possidendi*).

**Summary:** The first applicant launched this application on urgent basis – The first applicant alleges that she has been dispossessed by the first respondent of her peaceful and undisturbed possession over a herd of cattle situated on Farm Groendoorn, over which she exercised a *lien* as security for the expenses she incurred with respect to the upkeep and preservation of the said herd of cattle.

The application is opposed by the first and second respondents. The respondents contend, in the first place, that the application is not urgent. In the second place, the respondents contend that the first applicant still has access to the farm and they deny that she has been restricted by the action taken by the first respondent when the latter locked the gate to Farm Groendoorn for the purpose of establishing the identity of the owners of the cattle that were grazing on Farm Groendoorn.

*Court held:* that the applicants have proved on a balance of probabilities that the first applicant was in a peaceful and undisturbed possession and access of Farm Groendoorn and that such possession and access have been unlawfully despoiled by the action of the first respondent.

*Held further* that the first applicant has proved on a balance of probabilities that he has a *lien* over the herd of cattle that were in his possession in respect of the expenditures he incurred on the herd of cattle for their care and provision of food and water.

*Held further* that the first applicant has proved on a balance of probabilities that she has been unlawfully deprived of her possession of the said herd of cattle by the respondents and is entitled to the restoration of her *lien*.

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**ORDER**

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1. The respondents are ordered to forthwith restore the peaceful and undisturbed possession and access to the applicants herd of cattle, comprising about 150 herd of cattle of various Simmental, Brahman and Angus cows, calves and bulls which are situated in an enclosed camp of Farm Groendoorn No. 362, Portion 3 of the Farm Groendoorn and Portion 4 (Uitstel) of Farm Groendoorn 362 situated in Registration Division 'M', Rehoboth (hereinafter referred to as 'Farm Groendoorn') to the first applicant, *ante omnia* – as the status was as before.
2. The first applicant's possession of and access to Farm Groendoorn be restored forthwith *ante omnia*.
3. The first respondent is ordered to remove all locks and chains from the gates which currently serve to restrict and deny the first applicant access to Farm Groendoorn and to the herd of cattle, and to her possession thereto, *ante omnia*.
4. In the event the first respondent fails to comply with foregoing orders within a day from the date of service of this order upon her, the Deputy-Sheriff for the district of Rehoboth is hereby authorised and ordered to take all reasonable and necessary measures to give effect to this order and particularly to restore the first applicant's possession and access to Farm Groendoorn and the herd of cattle referred to in paragraph one of this order.
5. The first respondent is ordered to pay the costs of this application.
6. The matter is removed from the roll and considered finalized.

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## JUDGMENT

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ANGULA DJP:

## Introduction:

[1] This urgent application concerns a dispute amongst family members. The parties are sisters and the mother. A sister and the mother are pitched as applicants against two other sisters and daughters on the opposite side as respondents. According to the first applicant 'there is a fair amount of discontent and infighting between the parties, and the relationship between the parties has completely broken down'.

[2] During February 2016 the second applicant's husband, who was the father of the first applicant and of the two respondents passed away. He died testate, leaving a substantial estate. In terms of his Will, he bequeathed to the second applicant all his cash and cash investments and all movables. The remainder of the estate was bequeathed into the hands of the trustees of the Stellmacher Family Trust. All the parties to these proceedings are trustees of the said Trust.

[3] The first applicant is an accountant employed as such by a major retail company in Namibia. The second applicant is a widow and the mother of the first applicant and of the two respondents. The first respondent is a medical practitioner specialising as an Urologist. The second respondent's occupation has not been stated. No relief is sought against the second respondent.

[4] The first applicant is the owner of Farm Brakkom adjacent to the main Farm Groendoorn. The second applicant owns a number of farms, including Hamis and Opdam.

## Background

[5] The event which triggered this application played out on or about 5 January 2019, when the first respondent chained and locked the gate leading to Farm Groendoorn where a herd of cattle is kept by the first applicant.

[6] According to the first applicant, this herd of cattle remained on her farm Brakkom when other cattle were moved to other farming units due to a lack of

grazing and others were sold. She took care of the herd of cattle concerned at her own expense. The first applicant further states that during October 2018 the grazing at her farm became depleted, and as a result she moved that herd of cattle from her farm to farm Groendoorn. She claims further that she repaired the camp fences as well as boundary fences of Farm Groendoorn. In this regard, the applicant contends that she has *lien* against the estate in respect of the said necessary and useful expenses she incurred; that she enjoyed unfettered access to Farm Groendoorn and has had undisturbed possession of the herd of cattle concerned, of which she has been unlawfully dispossessed by the respondents.

[7] The application is opposed by the respondents. The first respondent deposed to the opposing affidavit. She denies that the application is urgent in that the applicants did not make out a case for urgency. The first respondent further denies that her action restricted the first applicant access to the farm in question and asserts that the first applicant does have access to the farm. She denies further that she deprived the applicants of her possession of the herd of cattle and asserts that the first applicant continues to retain possession of the herd of the cattle concerned.

*Whether the matter is urgent*

[8] The first respondent alleges that the applicants do not advance reasons why they will not be afforded substantial redress in due course. Furthermore, no allegation is made that the first respondent intends to immediately remove the herd of cattle from the farm in question. In addition, the applicants do not allege that they would not be compensated for their alleged expenses incurred in caring for the cattle.

[9] In spite of the position advanced in the preceding paragraph, the applicants appear not to dispute the well-established legal principle that an application for *mandament van spolie* is inherently urgent. The foregoing principle is to be considered in conjunction with another well-established approach to this remedy, whereby the court is bound to accept that the applicant's case is a good one and that the respondents unlawfully infringed upon the applicant's right. It is further generally accepted that the underlying rationale for the remedy is that no person is allowed to

take the law into his or her own hands and therefore an act that amounts to the breach of peace in the community should be discouraged by courts by ordering restoration of the position *ante omnia*. In my view, once those principles are accepted there is little point in denying that the matter is urgent.

[10] On the facts of this matter there is another compelling reason why the matter is to be considered urgent and that reason is the first applicant's alleged *lien* she has on the herd of cattle.

[11] A *lien* has been defined as a form of security. It is a right to retain the property or thing until payment has been done. According to *Silberberg and Schoeman's, The Law of Property*<sup>1</sup> a *lien* is dependent on continuous possession of the property. Furthermore, that a right of *lien* exists only if the *lien* holder retains possession of the thing to which his or her claim relates and for as long as he or she retains possession thereof. The only exception to this rule is the circumstance where the *lien* holder is deprived of the thing by force or the threat of force, or if he or she parts with its possession as the result of a fraud. As a general rule, a possessor, such as a *lien* holder who alleges that he has been despoiled, must act immediately and before the spoliator has acquired a right or interest in the property in respect of which a spoliation order is sought. It has been held that 'an *agistor* (a person who takes cattle to pasture at a certain charge-out rate) has a *lien* for grazing fees and fodder supplied in respect of animal under his control'<sup>2</sup>.

[12] In the present matter the respondents do not dispute the first applicant's allegation of *lien*. If regard is had to the authorities referred in the preceding paragraph, in regard to the retention of the *lien*, the *lien* holder, as in the present matter, is required to act with immediate haste upon being despoiled of his or her possession of the thing in order to restore possession and with it, its concomitant *lien*. In this connection Mr Jones for the applicants – correctly, in my view – submits that the relief in the application for spoliation may be refused if the possessor delays in bringing the application, as such delay might be construed as acquiescence in the dispossession of the good. In my view, the reasons set out herein fully demonstrate that the matter is urgent.

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<sup>1</sup> PJ Badenhorst (et. al.) (2003) *Silberberg and Schoeman's The Law of Property*, 4<sup>th</sup> ed, p. 392 – 393.

<sup>2</sup> *Land Bank v Mans* 1933 CPD 16 at p 24-25.

[13] The Court, having regard to the foregoing, is satisfied that the applicants have made out a case that the matter is urgent. I proceed to consider the merits.

#### The law

[14] The law around the remedy of spoliation is well settled in this jurisdiction. It is now accepted that in order for the applicants to succeed, the law required him or her to prove that she was in peaceful and undisturbed possession of the thing; and that she was unlawfully deprived of that possession. The rationale underlying the law of spoliation is that no person is allowed to take the law into his or her own hands and that conduct which causes a breach of public peace should be discouraged<sup>3</sup>. I have already referred to the law in regard to *lien* when I considered the issue of urgency. It would suffice for me to point out that the *lien* holder in possession of a thing has all the remedies available against a spoliator<sup>4</sup>.

[15] In law, possession consists of both an objective and a subjective element, namely, the physical control and the intention to possess. The physical control is occupation of a thing. The intention to possess entails either the intention to be the owner of the thing or the intention to exercise control or occupation of the thing for the holder or occupier's own benefit<sup>5</sup>.

#### Issues for determination

[16] It seems to me that the issue for determination is whether the applicants have proved, on a balance of probabilities, firstly, that they were in peaceful and undisturbed possession of the herd of cattle and that have been unlawfully deprived of such possession by the respondents and; secondly, whether the first applicant has proved that she has a *lien* over the herd of cattle in question.

#### Application of the law to the facts

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<sup>3</sup> *Nino Bonino v De Lange* 1906 TS 120 at 122; *Kuiri and Another v Kandjoni and Others* 2009 (2) NR 447 (SC).

<sup>4</sup> *Donaldson v Estate Veleris* 1938 TPD 269 at p 271.

<sup>5</sup> *Koch v Koch* (HC-MD-CIV- MOT-GEN- 2016/00264) [2017] NAHCMD 145 (17 May 2017).

[17] It is common cause that the respondents do not dispute the first applicant's *lien* over the herd of cattle and consequently possession of the said herd of cattle. In regard to the *lien* asserted by the first applicant, the first respondent's position is that 'the first applicant cannot now claim to have instead cared for them (the herd of cattle) without having made continuous efforts to have them removed to Farm *Hamis* as she was obliged to do'. The first respondent further states that the first applicant 'will be free to submit her claim against the estate under the control of the Master of this Honourable Court'. It is clear in the context of the first respondent's statement, that the 'claim' referred to by the first respondent, is the *lien* claim by the first applicant for the necessary expenses she claims to have incurred in caring for the said herd of cattle. In my judgment the first respondent does not dispute the first applicant's *lien*, but only expresses doubt 'whether such claims will be successful and/or approved by the Master of this Honourable Court'. It follows therefore from this admission by the first respondent that the first applicant has established that she has a *lien* over the herd of cattle in question.

[18] The next issue for consideration is whether the first applicant has proved that the respondent has unlawfully dispossessed her of her peaceful and undisturbed possession.

[19] Mr Mouton, who appeared on behalf of the respondents, argued that the first applicant was not a 'possessor' but was a mere 'caretaker'. Counsel relied on what was stated by the Supreme Court of Transkei in *Mbuku v Mdinwa*<sup>6</sup>, namely that an agent who has no interest in the property which he holds for his principal or who derives no benefit from him holding the property, is not entitled to claim the relief of a *mandament van spolie*. It is a remedy which is available to a possessor and not to a mere *detentor*. A *detentor* is a person who holds the thing with no intention of deriving any benefit for himself or herself from holding the thing.

[20] I have no issue with the principle as a general statement of our law. In fact, I am aware that it has been applied by this court in no less than two matters. I consider it unnecessary to cite such matters here. In my view, the principle does not find application to the facts of the present matter. In this matter, the applicants' case is that they exercised possession over the herd of cattle because they have a *lien*

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<sup>6</sup> 1982 (1) 219.



over the herd of cattle in respect of the expenses they incurred in taking care of the cattle. Furthermore, that they exercised possession as security to ensure payment in respect of their expenditure over the herd of cattle while under their possession. Significantly, the respondents do not dispute the applicants' *lien*. Even if counsel was correct in his submission, I would have expected the respondent to have raised a point *in limine* that the applicants do not have the *locus standi* to bring the application for the reason that they were mere agents and did not possess the herd of cattle for their own benefit. That is not the respondents' case as set out in their papers. Counsel's argument in this regard is, in my view, at variance with the respondents' case as set out in their papers. The respondents' position is much clearer as it appears below.

[21] The respondents' basis of defence is that they never dispossessed the applicants of possession of the subject matter and that the applicants are still in possession of the subject matter.

[22] The first respondent admits that she locked the gate which serves as the entrance to the Farm Groendoorn which gives access to the first applicant to the said farm and consequently to the herd of cattle which is the subject matter of these proceedings. As the reason for doing so, the first respondent states that she did it in order to 'retake control of the estate's property consisting Farm Groendoorn and the herd of cattle as assets for the estate'. The first respondent further elaborates that she 'wanted (to carry) some investigation as to how it came about' that the first applicant was in possession of the herd of cattle which belonged to the estate. In my view, if the foregoing admitted facts are posed against the first respondent's denial that, 'I never in any manner whatsoever deprived the applicants of any access or possession', the denial rings hollow. In other words the denial is irreconcilable with the rest of the first respondent's case. In my view, the first respondent's denial is so untenable and is liable to be rejected as not raising a real dispute of facts.

[23] The finding in the preceding paragraph is, in my view, supported by the fact that the first respondent laid a criminal charge of trespass against the first applicant. This action, in my view, militates against the first respondent's denial of despoiling the applicants of their possession of the subject matter and rather reinforces the fact

that the first respondent dispossessed the applicants of the herd of cattle, and in order to ensure and solidify her unlawful dispossession she laid a criminal charge of trespass against the first applicant. I am inclined to agree with counsel for the applicants, that through this criminal charge the first respondent dispossessed the applicants by duress

[24] The first respondent, in her attempt to deflect her unlawful conduct from the full view, states that the applicants have access to Farm Groendoorn through a servitude road. In my view this is an afterthought and at best disingenuous. In the light of the charge of trespass hanging over the head of the first applicant, it begs the question that even if the servitude road is still open, how can the first respondent seriously contend that the first applicant has free access to Farm Groendoorn. The statement is also contradictory in that the first respondent stated unequivocally that, 'When I locked the gate, I did so in the exercise of my duties as the executrix to the deceased estate and in order to count, control and identify herds of cattle that were illegally grazing on Farm Groendoorn'. In my view, this statement clearly demonstrates that the first respondent intended to and indeed took control of Farm Groendoorn including the herd of cattle to the exclusion of any other person, including the applicants.

### Conclusion

[25] I have therefore arrived at the conclusion that the applicants have proved on a balance of probabilities that they have been unlawfully dispossessed by the respondents of their peaceful and unlawful possession of the herd of cattle and of their *lien* as security for the expenses they expended in caring for the herd of cattle. I next deal with the issue of costs.

### Costs

[26] During the hearing, I posed a question to Mr Jones for the applicants about what appears to be unnecessary annexures attached to the applicants' founding affidavit. In other words, why in the event should the applicants succeed, should the respondents be saddled with costs of annexures which have nothing or little

relevancy to the current proceedings? Counsel was not able to give a satisfactory explanation to the Court other than to say that sometimes it is difficult to balance between giving more as against giving less. I agree with counsel's predicament, but in this matter, I am of the view that many unnecessary annexures were attached. The annexures include *inter alia* the first liquidation and distribution account in the estate of the late Dr Stellmacher consisting of about 20 pages. No reference was made to the content of the account in this proceedings. It is therefore fair to state that it was irrelevant. The further annexure was a 'Deed of Donation of Trust of the Stellmacher Trust'. In my view it was irrelevant to the current proceedings. I am accordingly of the view that the respondents should not be burdened with the costs of these two annexures. The Taxing Master is ordered to act accordingly.

[27] Except for those exclusions, I am of the view that the normal rule that costs follow the result, shall apply.

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

1. The respondents are ordered to forthwith restore the peaceful and undisturbed possession and access to the applicants herd of cattle, comprising about 150 herd of cattle of various Simmental, Brahman and Angus cows, calves and bulls which are situated in an enclosed camp of Farm Groendoorn No. 362, Portion 3 of the Farm Groendoorn and Portion 4 (Uitstel) of Farm Groendoorn 362 situated in Registration Division 'M', Rehoboth (hereinafter referred to as 'Farm Groendoorn') to the first applicant, *ante omnia* – as the status was as before.
2. The first applicant's possession of and access to Farm Groendoorn be restored forthwith *ante omnia*.
3. The first respondent is ordered to remove all locks and chains from the gates which currently serve to restrict and deny the first applicant access to Farm Groendoorn and to the herd of cattle, and to her possession thereto, *ante omnia*.

4. In the event the first respondent fails to comply with foregoing orders within a day from the date of service of this order upon her, the Deputy-Sheriff for the district of Rehoboth is hereby authorised and ordered to take all reasonable and necessary measures to give effect to this order and particularly to restore the first applicant's possession and access to Farm Groendoorn and the herd of cattle referred to in paragraph one of this order.
5. The first respondent is ordered to pay the costs of this application.
6. The matter is removed from the roll and considered finalized.

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H Angula  
Deputy-Judge President

## APPEARANCES:

## APPLICANTS:

J P RAVENSCROFT-JONES

Instructed by Engling, Stritter &amp; Partners, Windhoek

## FIRST RESPONDENT:

C J MOUTON

Instructed by Theunissen, Louw &amp; Partners, Windhoek

## SECOND RESPONDENT:

J GAYA

Of Fisher, Quarmby &amp; Pfeifer, Windhoek