

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

**Case No: HC-MD-CIV-ACT-GEN-2020/00587**

In the matter between:

**JONAS SHININGENI**

**APPLICANT**

and

**ONDONGA TRADITIONAL AUTHORITY**

**1<sup>ST</sup> RESPONDENT**

**KASHONA KAMULULU**

**2<sup>ND</sup> RESPONDENT**

**OSHIKOTO COMMUNAL LAND BOARD**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Shiningeni v Ondonga Traditional Authority* (HC-MD-CIV-ACT-GEN-2020/00587) [2021] NAHCMD 108 (3 March 2021)

**CORAM:** NDAUENDAPO J

**Heard:** 5 February 2021

**Delivered: 3 March 2021**

**Reasons: 15 March 2021**

**Flynote:** Spoliation - Mandament van spolie – Requirements - Applicant must allege and prove peaceful and undisturbed possession and deprivation of possession - Deprivation of possession not proven - Spoliation refused.

**Summary:** The applicant launched an urgent application seeking a spoliation order against the respondents. The applicant states that he was given a permit to graze on a piece of land known as farm Oshatotwa, in Northern Namibia by the Ondonga Traditional Authority. He fenced off the land and drilled a borehole. He states that he has been in peaceful and undisturbed possession of the farm grazing with his livestock at least for four years. On 5 December 2020, members of the community pulled down the fence of the farm on the instruction of the second respondent. He launched this urgent application seeking a mandament van spolie to order the respondents to restore the fence that was pulled down. The respondents state that the land fenced off is communal land and the applicant had no right to fence it off. He was not deprived of possession as his livestock are still grazing on the farm.

*Held*, that, the applicant has not proven that he was deprived of possession of the land as he is still in possession of the farm.

*Held*, further that, the application is refused.

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### ORDER

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1. The applicant's non-compliance with the rules relating to time periods, forms and service is condoned and the matter is heard as one of urgency in terms of rule 73(3).

2. The application is dismissed with costs, such costs to include the costs of one instructed counsel.

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## JUDGMENT

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NDAUENDAPO, J

### Introduction

[1] This is an urgent application for *mandament van spolie* in which the applicant seeks an order that the first and second respondents immediately be ordered and forthwith restore *ante omnia* the possession of the farmland described as Farm Oshatotwa, Onalusheshete traditional district, Oshikoto, region by restoring the fence thereof. In the alternative, a rule nisi calling upon the respondents to show cause if any, on a date to be determined, why an order (sic) that the respondents immediately and forthwith restore *ante omnia* possession of the farm Oshatotwa by restoring the fence thereof. The application is opposed by the respondents.

[2] The relevant facts giving rise to the application are the following (as gleaned from the papers): During 2006, the applicant applied to the first respondent, Ondonga Traditional Authority for a piece of communal land for grazing. The permit to graze on farm Oshatotwa was granted to him in 2015 and he took occupation of it and erected a fence around the farm. He also erected a kraal and drilled a borehole. The applicant has livestock on farm Oshatotwa.

[3] Since October 2015, the applicant has been in peaceful and undisturbed possession of farm Oshatotwa except during November 2016 when certain members of the community around the farm unlawfully destroyed part of the fence. Those members were arrested by the Namibian Police. However, since November 2016, the applicant

has been in peaceful undisturbed possession of the farm with the erected fence for about 4 years.

[4] On 5 December 2020, the second respondent representing the first respondent and also acting in his capacity as a senior councilor of the first respondent, held a meeting with applicant and informed the applicant to pull down the fence erected around the farm as it was communal land. A certain unknown member of the community who was present at the meeting asked permission from the second respondent to pull off the fence and permission was granted by the second respondent. At the meeting, the second respondent gave applicant 30 days to remove the fence. After the meeting of 5 December 2020, members of the community went ahead and pulled down the fence as permitted by the second respondent.

[5] The second respondent does not dispute that the applicant was occupying farm Oshatotwa and that he indeed fenced off the farm. The second respondent states that the farm is on communal land and that the applicant had no right to exclusively occupy and fence off the land. The second respondent states that it is communal land that belongs to the community and was unlawfully fenced off by the applicant. The second respondent does also not deny the fact that members of the community pulled down the fence around the farm but denies that he ordered the members to pull down the fence. He states that the applicant was informed to pull off the fence, but refused.

[6] The applicant states the matter is urgent because a claim for a spoliation order is inherently urgent. He also states that he will not get substantial redress in due course because after the fence was pulled down, his livestock were scattered and he had no control over the livestock. The fence was pulled down on 5 December 2020. Around 7 December 2020 he consulted his lawyers and before counsel could be instructed, he had to raise money to pay a deposit and that took time. Eventually he managed to raise the funds and the application was launched during 20 December 2020.

### The applicable legal principles

[7] It is trite that an applicant for a mandament van spolie must first and foremost establish that he or she was in peaceful and undisturbed possession of the thing in question at the time he or she was illicitly deprived of such possession. That is all that an applicant must establish in order to succeed.<sup>1</sup> And such possession is not merely ‘possession’ simpliciter: it is ‘peaceful and undisturbed possession. And as Maritz JA put it in *Kuiiri and Another v Kandjoze and Others*:<sup>2</sup>

The mandament, it was held, may be granted –

‘If the claimant has been unlawfully deprived of the possession of a thing. It does not avail the spoliator to assert that he is entitled to be in possession by virtue of, eg, ownership, and that the claimant has no title thereto. This is so because the philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should be discouraged.’

[8] ‘Furthermore, in spoliation proceedings the ‘peaceful and undisturbed possession’ is ‘not just any measure of possession – however technical, remote, tenuous or brief – will suffice: the court must be satisfied, regard being had to the nature of the thing dispossessed, that the despoiled possession of the thing was sufficiently stable and durable to constitute “peaceful and undisturbed possession”’. (See *Kuiiri* SC judgment), para 4, per Maritz). It should be remembered that ‘(e)vent though the *mandament van spolie* is therefore not intended to bring about the ultimate determination of the competing proprietary or possessory claims of the litigants to the things in contention, it nevertheless constitutes a final determination of the litigants’ “immediate right” to possess them for the time being’.<sup>3</sup>

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<sup>1</sup> *Kuiiri and Another v Kandjoze and Others* (SA 42-2007) [2009] NASC 15 (3 November 2009).

<sup>2</sup> *Ibid*, para 2.

<sup>3</sup> *Ibid*, para 3.

[9] It is a well-established principle that in order to obtain a spoliation order two allegations must be made and proved. Firstly, that the applicant was in peaceful and undisturbed possession of the property and secondly, that the respondents deprived her of the possession, forcibly or wrongfully against his consent. Lawfulness of possession is not relevant. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands.

[10] Accordingly, the causa of the applicant's possession is irrelevant, and it is also irrelevant whether the respondent has a stronger right of possession. Actual possession is protected and not the right to possession.

#### Submissions by applicant

[11] Counsel argued that during October 2015 the applicant took occupation of farm Oshatotwa and in doing so he erected a fence around the subject land. The physical structures of the fence can be seen in the photo in the newspaper in annexure "JS2" to the applicant's founding affidavit. Therefore, it can possibly not be disputed that the applicant took occupation of the subject land. It's the applicant's case that he has been in peaceful occupation for about four years.

[12] Counsel further submitted that the applicant has livestock on farm Oshatotwa where he practices rotational grazing. The applicant has put up a borehole and a custom-made kraal. All these infrastructures were fenced off. The fence allowed the applicant to have control over the grazing land in that he can control which part of the grazing area is utilized and the number of livestock to have in such area. Thus the fencing is incidental to the occupation and possession of farm Oshatotwa.

[13] Counsel further argued that, the second respondent in his capacity as a Senior Councilor or in representing the first respondent had no powers in law to authorize that members of the community pull down the applicant's fence. This conduct is unlawful and violates the principle of legality.

[14] Counsel argued that the second respondent's conduct of permitting members of the community to pull down the applicant's fence, results in an unlawful deprivation of possession over farm Oshatotwa. By pulling down the fence, the applicant has no control over the grazing area that he protected for his livestock. After all, the purpose of erecting the fence is to protect the grazing area and have control over the use thereof.

[15] Counsel submitted that the applicant has established spoliation of farm Oshatotwa in that, the second respondent in his conduct admitted having taken the law into his hands. The applicant in paragraph 30 of his founding affidavit explains the conduct of the second respondent as reported by the local newspaper in the article annexed and marked "JS2". In that article, the second respondent confirms the incident of 5 December 2020 that the reason the fence was removed is because it is an illegal fence. Counsel submitted that, regardless of whether the fence was illegal, the second respondent was not entitled to order the removal of the fence without following due process. In any event, whether the applicant is in law entitled to possession of farm Oshatotwa and whether the applicant was legally entitled to erect a fence around it is of no moment.

[16] Counsel submitted that the matter is urgent for the following reasons: It is accepted in our law that a claim of spoliation is invariably an inherently urgent process; the breach to the foundational principle of the rule of law is substantial, this must be remedied without delay. This is to prevent members of the public from resorting to self-help; the applicant will not be able to secure substantial redress in due course. Considering the factual circumstances of this matter, as the applicant explains in his affidavit, with the fence down the applicant's livestock is scattered and he has no control over the grazing area that is meant for his livestock. The livelihood of the applicant being a subsistence farmer continues to be disrupted by the absence of the fence around his farm.

#### Submissions by the respondents

[17] Counsel argued that, the applicant must allege and prove peaceful and undisturbed possession and an unlawful ousting or deprivation of that possession by the respondents. 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.

[18] Counsel argued that it is common cause that the applicant alleges that the fence has been removed by members of the community. Applicant is thus asking this court for an order that the first and second respondents immediately and forthwith restore ante omnia possession of the farm land described as farm Oshatotwa by restoring the fence.

[19] Counsel argued that no allegation is made that the removal of the fence caused the applicant to lose possession of the farm. There are no facts before this Court upon which it can be determined the extent to which the applicant has allegedly lost his farm. It is submitted that the Applicant has possession of the farm despite the fact that the fence has been removed. According to the applicant's founding papers, the fence was removed on a certain part of the farm to enable the community to gain access to grazing area. Therefore, and in the absence of any allegation that the Applicant has by virtue of the removal of the fence, lost possession, the Applicant has failed to make out a case for *mandament van spolie*.

[20] Counsel argued that the remedy available to the applicant is to claim damages for the fence that was removed because the applicant is still in possession of the farm. This is the obvious remedy available to the applicant, as fencing off a farm is a labor-intensive process requiring time and resources.

[21] Counsel argued that it should also be noted from the onset that a grazing permit (which authenticity is disputed) did not grant the applicant possession of the farm but merely the right to exercise access, which in turn will allow him to graze his livestock. The said grazing area fenced off by the applicant was allocated to the community by the



Founding President to be used by all community members to graze their livestock. The Traditional Authority has since respected the said determination by the Founding President and did not allocate the area to a specific person indefinitely. The grazing area which form the crux of this application is commonage and that for that reason, the *mandament* is not available to him.

[22] The Applicant has been requested numerously to remove the fence that is erected on the commonage area. It is submitted that the Applicant has not been in peaceful and undisturbed peace as he alleges. The Applicant was requested to remove his fence as per annexure “KK1” to the first and second respondents’ answering affidavit. The Applicant himself in his founding affidavit informed this court that community members destroyed his fence in 2016 and again in 2020 he was advised to remove the fence despite notice of annexure “KK1”. The erected fence has restricted other community members from exercising their grazing rights.

[23] Counsel relying on, *Mangala v Mangala*,<sup>4</sup> argued that it does not follow that, because an application is one for spoliation order, the matter automatically becomes one of urgency.

[24] Counsel argued that the urgency is self-created and there are no explicit circumstances set out in the papers that renders the matter urgent.

[25] The Applicant was made aware already as far back as in December 2019 that the fence erected on the said grazing area was unauthorized as it restricts animals and people to access communal grazing. He was informed to remove the fence, but failed to do so. The applicant was informed that all previous occupants of the area were not authorized to fence-off the area in the manner to restrict access to grazing.

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<sup>4</sup> *Mangala v Mangala* 1967(2) SA 415 E.

[26] The community members became despondent and decided to remove the fence themselves. The area that was fenced off by the Applicant is commonage, and the Applicant was given a fair amount of warning.

[27] As a result, counsel, argued that the matter is not urgent: the applicant was warned since December 2019 that he must remove the fence, but failed to heed the warning. The removal of the fence by members of the community was not instructed by the second respondent.

[28] The application is not urgent, and the Applicant has failed to make out a case for urgency. On this basis, the application should be dismissed with costs, argued counsel.

### Discussion

[29] It is common cause that the applicant was in peaceful possession of farm Oshatotwa since at least 2016. He fenced off the farm and his livestock were grazing on the farm. He build a kraal and drilled a borehole on the farm. On 5 December 2020 the fence was pulled down by members of the community apparently on the instruction of second respondent. Second respondent denies that. After the fence was pulled down members of the community have been grazing on the farm as they say it is commonage land or communal land and according to the respondents the applicant has no right to fence off the land. The evidence suggests that the applicant was in peaceful undisturbed possession of the farm and that the fence was pulled down and destroyed on 5 December 2020. The question that arises is: Has the applicant been deprived of possession of the farm? His livestock are still on the farm. Is the mandament available to him under those circumstances? The requirements for obtaining the mandament van spolie are met when (a) a person has been deprived unlawfully of the whole or part of his possession of movables or immovable. In *Painter v Strauss*<sup>5</sup> Brink J held that “*The mandament van spolie is employed to prevent people from taking the law into their own hands, and it requires the property despoiled to be restored as a preliminary to any*

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<sup>5</sup> *Painter v Strauss* 1951(3) SA 307(O) at 314A-B.

*enquiry or investigation on the merits of the dispute.*” In the founding affidavit, the applicant states that the second respondent authorized the ‘destruction of his farm, particularly in regard to the fence’ and certain members as authorized by the second respondent went ahead and pulled down the fence erected around the farm. He further states that ‘in having the fence pulled down and destroyed, the second respondent representing the first respondent unlawfully deprived me of the possession of farm Oshatotwa. ‘Those are the facts alleged by the applicant in support of the granting of the mandament van spolie. Does the mere fact of pulling down and destroying the fence around the farm amount to deprivation of possession of the farm? The answer is ‘no’. Nowhere in the founding affidavit does the applicant explain how the pulling down and destruction of the fence deprived him of possession of the farm. He does not state that he was chased off the farm nor does he state that other members of the community invaded the farm with their livestock to graze and thereby deprived him of possession. No facts are placed before the court to support the relief prayed for. The applicant must not only allege peaceful and undisturbed possession and unlawful ousting or deprivation of possession, but he must prove it. In this particular case, there are only allegations without prove of deprivation of possession. Accordingly, the applicant has not met the requirements for the mandament van spolie.

[30] I agree with the applicant that the matter is urgent on the basis that immediately after the fence was pulled down and destroyed he consulted with his lawyers. The lawyers informed him to place them in funds and it took him a few days to raise the funds and as soon as that was done, the application was launched. In light of the conclusion I arrived at, it is not necessary to consider the other issues raised by the parties.

[31] The order

1. The applicant’s non –compliance with the rules relating to time periods, forms and service is condoned and the matter is heard as one of urgency in terms of rule 73(3).

2. The application is dismissed with costs, such costs to include the costs of one instructed counsel.

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**G N NDAUENDAPO**

**Judge**

APPEARANCES:

FOR THE PLAINTIFF/APPLICANT: Adv L. Ihalwa (with Silas-Kishi Shakumu)  
Instructed by Kishi Shakumu & Co. Inc.  
Windhoek

FOR THE DEFENDANT/RESPONDENT: M. Angula  
Of AngulaCo Inc  
Windhoek