

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Pamo Trading Enterprises (Pty) Ltd Applicant and Nutrifood (Pty) Ltd 1 st Respondent Minister of Health and Social Services 2 nd Respondent Minister of Safety and Security 3 rd Respondent Vicmac Security Services CC 4 th Respondent	Case No: HC-MD-CIV-MOT-GEN-2023/00244
	Division of Court: Main Division
	Heard on: 7 June 2023
Heard before: Honourable Mr Justice Usiku	Delivered on: 28 June 2023
Neutral citation: <i>Pamo Trading Enterprises (Pty) Ltd v Nutrifood (Pty) Ltd</i> (HC-MD-CIV-MOT-GEN-2023/00244) [2023] NAHCMD 357 (28 June 2023)	
Order:	
<ol style="list-style-type: none">1. The matter is treated as one of urgency and the applicant's non-compliance with the forms and service provided for by the Rules is condoned.2. The first and second respondents are hereby ordered to immediately and forthwith restore possession to the applicant of the premises described as:<ol style="list-style-type: none">(a) the kitchen of the Intermediate Hospital Katutura; and(b) the storerooms and cool rooms of the kitchen of the Intermediate Hospital Katutura, as more fully described and depicted in paras 17 to 20 of the applicant's founding affidavit.3. The first and second respondents are ordered to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, which costs include costs of one instructing and two instructed counsel.	

4. The matter is removed from the roll and is regarded as finalised.

Reasons for order:

USIKU J:

Introduction

[1] This is an urgent application brought by the applicant against the respondents seeking a spoliation order in respect of certain immovable property, which the respondents had allegedly wrongfully prevented it from accessing.

[2] The applicant seeks an order in the following terms:

‘1. The applicant’s non-compliance with the forms and service provided for by the Rules of this Honourable court is condoned and the application is heard as one of urgency as contemplated by rule 73.

2. The first respondent is hereby ordered to immediately and forthwith restore possession to the applicant of the premises fully described as:

2.1 the kitchen of the Intermediate Hospital Katutura; and

2.2 the storerooms and cool rooms of the kitchen of the Intermediate Hospital Katutura; and as more fully described and depicted in paragraphs 17 to 20 of the applicant’s founding affidavit.

3. In the alternative, the first respondent and/or second respondent and/or third respondent and/or fourth respondent is hereby ordered to immediately and forthwith restore possession to the applicant of the premises fully described as:

3.1 the kitchen of the Intermediate Hospital Katutura; and

3.2 the storerooms and cool rooms of the kitchen of the Intermediate Hospital Katutura; and as more fully described and depicted in paragraphs 17 to 20 of the applicants’ founding affidavit.

4. That the first respondent, together with those respondents who oppose the application or who are found to have spoliated the applicant’s possession, pay the applicant’s costs, jointly and severally the one paying the others to be absolved, which costs include one instructing and two instructed legal practitioners on the legal practitioner and own client scale.

5. Further and/or alternative relief.’

[3] The first and second respondents oppose the application.

Background

[4] During April 2020, the applicant was awarded a tender to render catering services to the second respondent's health facilities within the Khomas Region. The tender was renewed and extended on various occasions.

[5] In terms of a written contract concluded by the applicant and the second respondent, the latter made available to the former the hospital kitchen, the hospital storerooms and cool rooms ('the premises'), since April 2020, in order to render the catering services. The premises are located on the ground floor of the Intermediate Hospital Katutura ('the hospital').

[6] The second respondent handed the keys to the premises over to the applicant and the applicant's personnel opens the premises at about 04h00 in the morning and locks the premises in the evening and kept the keys with them.

[7] On or about 28 April 2023, the second respondent forwarded a correspondence to the applicant indicating that the contract is due to expire on 31 May 2023 and that the applicant should prepare to hand over the contract for the provision of meals at the hospital, to an incoming company as from 1 June 2023.

[8] By letter dated 22 May 2023, in response to a letter from the second respondent dated 17 May 2023, the applicant declined to hand over the premises claiming that it had already accepted appointment to render catering services to the second respondent until 30 August 2023.

[9] On 1 June 2023, at about 04h00 in the morning, when the applicant's personnel arrived at the premises, they found the second respondent having provided access to the premises to the first respondent's personnel, who were by then using the kitchen facilities providing catering services. The applicant's personnel was informed by the second respondent's personnel to leave the premises.

[10] On 2 June 2023, the applicant launched the present application seeking the aforesaid relief.

The application

[11] The applicant alleges in its founding affidavit, that it took possession of the premises and has been in peaceful and undisturbed possession of the premises since April 2020. The applicant continues in the affidavit that it was unlawfully dispossessed of the premises by the first and second respondents on 1 June 2023.

Opposition

[12] The essence of the defence of the first and second respondents as to why the spoliation order should not be granted is that:

- (a) the applicant was not in possession of the premises. The second respondent was and remains in the possession on the premises. The applicant was merely allowed to use the second respondent's premises by virtue of the agreement between the parties, which agreement expired on 31 May 2023 and which agreement was not extended and that;
- (b) the first respondent is not in possession of the premises. The second respondent is in possession of the premises and the first respondent is merely allowed to use second respondent's premises.

Analysis

[13] In order to succeed getting a spoliatory relief, an applicant bears the *onus* of proving that:

- (a) he was in peaceful and undisturbed possession of the property at the time of the alleged spoliation and that;
- (b) the respondent wrongfully deprived him of the possession without his contest.¹

[14] The aforesaid facts are to be determined on the basis of the Plascon-Evans rule.²

[15] The objective of the remedy of *mandament van spolie* is to prevent people from taking the law into their own hands.

[16] Possession is defined as a 'combination of a factual situation and of a mental state, consisting in the factual control or detention of a thing (*corpus*) coupled with the will to possess the thing (*animus possidendi*)'.³

¹ *Bisschoff v Welbenplan Boerdery (Pty) Ltd* 2021 (5) SA 54 para 5.

² *Mankowitz v Lewenthal* 1982 (3) SA 758 at 763A.

[17] Spoliation may take place in a variety of unlawful ways. It may take place by force, threat of force, stealth, deceit, theft or just without consent.⁴

[18] In the present matter, the application of the Placon-Evans rule leads me to the conclusion that:

(a) the second respondent made available and granted the applicant access to the premises during April 2020. When the premises were thus made available, the second respondent handed the keys to the premises over to the applicant and the applicant kept custody of the keys;

(b) on or about 31 May 2023, the second respondent requested the applicant to hand the premises and the keys back to the second respondent or to the first respondent, and the applicant declined to do so;

(c) on or about 1 June 2023 at about 04h00, the second respondent made the premise available to the first respondent and instructed a security guard to allow only the first respondent's staff into the premises; and,

(d) it appears that both the applicant and the second respondent had means of access to the premises, as it is alleged that second respondent's dietician operates on a daily basis on the premises.

[19] Generally, a person can be said to have physical control over a building if they hold a key to it.⁵ And *mandament van spolie* is available to a joint possessor of an immovable property, who has been wrongfully dispossessed of the property when one of the two joint possessors takes exclusive possession of the property against the will of the co-possessor.⁶

[20] In the present matter, by virtue of its right of access to the premises, the applicant exercised control of the premises as was necessary for the operation of the kitchen. It opened the premises in the morning and closed them in the evening. It performed catering services on the premises. In doing all that, the applicant held the premises to the extent and with the intention necessary to constitute possession for the purposes of spoliation.

³ *Blendrite (Pty) Ltd v Moonisami* Case No 227/2020 [2021] ZASCA 77 (10 June 2021).

⁴ *Stocks Housing (Cape) Ltd v Chief executive Director: Department of Education and Culture Services* 1996 (4) SA 231.

⁵ *Malan v Dippenaar* 1969 (2) SA 59 at 62H-63A.

⁶ *Rosenbuch v Rosenbuch* 1975 (1) SA 181 at 183F-J.

[21] On the facts as set out above, I find that the applicant was in the peaceful and undisturbed possession of the premises as from April 2020 up until at least 1 June 2023 at 04h00. The possession ended when second respondent handed the premises over to the first respondent and when the second respondent prevented the applicant's employees from re-entering the premises when they returned in the morning of 1 June 2023.

[22] I am therefore, satisfied that the applicant has established the first requirement of *mandament van spolie*.

[23] In regard to the second requirement, it is apparent that the applicant has, during the period of 22 May 2023 and 29 May 2023, insisted that it has concluded a contract with the second respondent to render catering services until 30 August 2023 and was unwilling to vacate the premises. Whether such a contract exists, is irrelevant in the present proceedings. It is clear from the facts that the applicant's exclusion from the premises, on 1 June 2023, was involuntary and wrongful. I am therefore, satisfied that the applicant has discharged the onus of showing that it has been wrongfully deprived of its possession of the premises, by the second and first respondent.

[24] It is apparent from the facts, that the first respondent is presently in the occupation of the premises. From the contents of a letter from the first respondent dated 31 May 2023, addressed to the second respondent, it is clear that the first respondent was aware that the premises were in the possession of the applicant who was unwilling to vacate the premises. The first respondent acted closely with the second respondent in dispossessing the applicant of the premises, to the extent that the first respondent qualifies as a co-spoliator. I shall therefore, grant the relief prayed for against both the first and second respondent.

[25] As stated earlier, the applicant approached the court on an urgent basis. The basic principle is that matters involving spoliation are considered inherently urgent. Having considered the nature of this application and the facts and circumstances in which the dispossession of the premises took place, I am satisfied that this matter deserves to be treated as one of urgency and I shall so order.

[26] As regards the issue of costs, the general rule is that the successful party is entitled to its costs. During oral argument, the applicant indicated that it shall no longer ask for a punitive costs order but just for a costs order on the normal scale. There is no reason not to grant costs to the

successful party in the present case and I shall grant an order to that effect.

[27] In the result, I make the following order:

1. The matter is treated as one of urgency and the applicant's non-compliance with the forms and service provided for by the Rules is condoned.
2. The first and second respondents are hereby ordered to immediately and forthwith restore possession to the applicant of the premises described as:
 - (a) the kitchen of the Intermediate Hospital Katutura; and
 - (b) the storerooms and cool rooms of the kitchen of the Intermediate Hospital Katutura, as more fully described and depicted in paras 17 to 20 of the applicant's founding affidavit.
3. The first and second respondents are ordered to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, which costs include costs of one instructing and two instructed counsel.
4. The matter is removed from the roll and is regarded as finalised.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Applicant:	Respondents:
R Heathcote (SC) (with him C Visser) Instructed by Koep & Partners, Windhoek	AW Corbett (SC) (with him B De Jager) Instructed by Ellis & Partners Legal Practitioners, Windhoek
	Second Defendant:
	F Da Silva Of Office of the Government Attorney