

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2024/00011

In the matter between:

**TRADEPORT NAMIBIA INVESTMENT (PTY) LTD**

**APPLICANT**

and

**NAMIBIA PORTS AUTHORITY (NAMPORT)**

**RESPONDENT**

**Neutral Citation:** *Tradeport Namibia Investment (Pty) Ltd v Namibia Ports Authority* (HC-MD-CIV-MOT-GEN-2024/00011) [2023] NAHCMD 61 (16 February 2024)

**Coram:** MASUKU J

**Heard:** 29 January 2024

**Delivered:** 16 February 2024

**Flynote:** Civil Practice - Spoliation – Requirements – Applicant must allege and prove peaceful and undisturbed possession and unlawful deprivation of possession – Deprivation of possession proved – Spoliation granted – Costs in spoliation application discussed.

**Summary:** The applicant launched an urgent application seeking a spoliation order against the respondent. The applicant deposed that there was an oral lease agreement that exists between the parties and it has been in force and in effect since 2019. The applicant further alleged that it has been in peaceful and undisturbed possession of a portion of land situated at Port of Luderitz, Hafen Street, Luderitz, Republic of Namibia, leased to it by the respondent and on which it stored and or kept its skips/containers. The respondent on 16 January 2024, and also owing to subsequent events and communication between the parties, without the applicant's consent, began to remove the applicant's skips/containers from the portion of land as described immediately above.

The applicant launched this urgent application seeking a *mandament van spolie*, specifically for an order that the respondent restores possession of the portion of land to the applicant.

*Held:* The applicant has proven that it was illegally deprived of possession of the portion of land situated at Port of Luderitz, Hafen Street, Luderitz, Republic of Namibia, as it was being forced to vacate the site to pave way for a new operator.

*Held that:* The applicant has established urgency in the papers as required in terms of rule 73(4) of this court's rules.

*Held further:* Whether the respondent is the owner of the portion of land and claims there was no oral lease agreement, is irrelevant, as it is the actual possession which is protected and not the right to possession.

*Held:* The courts in Namibia do not generally grant punitive costs in matters where spoliation is proved to have occurred. The normal rule is that ordinary costs should follow the event and the punitive cost order is only issued when there are special circumstances justifying it.

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## ORDER

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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 respondent, is hereby ordered forthwith to immediately restore possession of the property fully described as a portion of land situated at Port of Luderitz, Hafen Street, Luderitz, Republic of Namibia, to the applicant.
3. The respondent is hereby ordered to return all the applicant's skips/containers it removed from the portion of land situated at Port of Luderitz, Hafen Street, Luderitz, Republic of Namibia, to exactly the same place from which they have been removed.
4. The respondent is ordered to pay the applicant's, costs such costs to include the costs of one instructing counsel and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

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## JUDGMENT

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MASUKU, J:

### Introduction

[1] This is an urgent application for *mandament van spolie*, in which the applicant seeks an order that the respondent immediately be ordered and forthwith restore *ante omnia* the possession of 80 skips/containers belonging to the applicant, removed from the respondent's site on a portion of land situated at Port of Luderitz, Hafen Street, Luderitz, Republic of Namibia (hereinafter, the site).

[2] The applicant further seeks a *rule nisi*, calling upon the respondent to show cause if any, on a date and time to be determined by this court, why an order that the respondent immediately and forthwith restore *ante omnia* possession of the portion of land as described, should not be issued. The application is opposed by the respondent.

### The parties

[3] The applicant is Tradeport Namibia (Pty) Ltd, a company duly incorporated in terms of the company laws of Namibia. Its place of business is situated at Port of Luderitz, Hafen Street, Luderitz. The respondent, on the other hand, is Namibia Ports Authority, a state owned enterprise with its offices situated at the Ports of Walvis Bay and Luderitz.

[4] The applicant was represented by Ms V Kauta, whereas the respondent was represented by Mr Maasdorp. The court records its indebtedness to both counsel for the assistance they duly rendered to the court in the determination of this matter.

### Background

[5] The relevant facts giving rise to the application are the following, as gleaned from the papers: The applicant has enjoyed occupation and possession of the respondent's site described above. The applicant in its founding papers indicated that there has been an oral lease agreement between itself and the respondent since 2019. The applicant was, in terms of the agreement, allowed to keep its skips on the property for a monthly consideration of N\$96 255.

[6] It is the applicant's case that on 13 November 2023, the respondent dispatched a letter to the applicant, wherein the respondent informed the applicant to start removing its skips from the site, in order to pave way for the development of a warehouse by a second operator, by 01 December 2023.

[7] On 11 January 2024, the respondent, communicated via email and informed the applicant that it had allocated the site where it kept its skips to another operator. The applicant was further informed on 15 January 2024, that the respondent's head of operations would work hand in hand with the applicant's team to relocate the applicant's skips.

[8] The applicant, in response to this email dated 11 January 2024, addressed an email to the respondent in the following terms:

'Dear Cecil,

1. Take note that Tradeport's occupation of the land is premised on an oral lease agreement in terms of which:

1.1. Tradeport leased the land from Namport; and

1.2. In turn Tradeport would pay Namport a rental fee.

2. Tradeport has fully complied with its obligations in terms of the agreement and shall continue to comply.

3. What Namport now seeks to do is to terminate the oral lease agreement which termination Tradeport disputes.

4. Take note that should Namport proceed to remove Tradeport from the land under the current circumstances, that would be tantamount to spoliation which occurs when:

(1) a party is in peaceful and undisturbed possession of property and that possession is deprived from that party forcibly against that party's consent.

5. Tradeport proposes that the parties engage in a resolute discussion to resolve this matter.'

[9] The respondent, contrary to the applicant's legal position, responded on 15 January 2024, as follows:

'Dear Nande,

There is no lease agreement between Namport and Tradeport on that land in question,

Namport doesn't do oral lease agreement on Land, therefore there is no termination of any agreement.

We had a discussion already on this matter, deploy your team to assist Phillip to remove your skips.'

[10] The respondent's position, as recorded in the answering affidavit, is that the applicant agreed to the removal of the skips on 16 January 2024. In this regard, it was contended by the respondent that the applicant did not resist the removal of the skips from the site and in fact provided some of its employees to participate in the exercise. It was submitted in this regard that the question of the unlawfulness of the removal of the skips looms large and should result in the court finding for the respondent that there was no spoliation.

[11] The applicant's case is a different kettle of fish altogether. It denied the allegation that it agreed to the removal of the skips. It was stated by the applicant instead, that the respondent merely instructed the applicant's members of staff to remove the skips and the applicant had not itself agreed to the removal of the skips. Ms Kauta submitted that the respondent's conduct was akin to intruders coming into a house occupied by a family and instructing the children to do or carry out particular instructions in the absence of the parents and without their permission or authority.

[12] For his part, Mr Maasdorp submitted that there was no oral lease agreement *inter partes*. He further submitted that the property in question has not been properly

described in the notice of motion and that the court should, on that basis, refuse to grant the relief sought. It was further argued for the respondent that the terms of the agreement alleged were not stated in the papers neither was it pleaded as to who entered into the said agreement on behalf of the parties. This, he submitted should result in the court non-suiting the applicant.

### Determination

[13] It is clear, having regard to the papers that were filed by the parties, that the respondent does not dispute that the applicant enjoyed peaceful and undisturbed possession of the site where the applicant has held about 650 container/skips.

[14] I am of the considered view that the question that has to be determined, is whether or not the applicant was lawfully despoiled of the property in question. I am of the considered view that the matrix of the facts and the letters exchanged by the parties show that the parties were at odds regarding the question of the removal of the items. Right from the beginning, the applicant pleaded an oral agreement was in place.

[15] I am of the considered view that this was sufficient for the purpose of meeting the case of spoliation. It is clear from the facts that the applicant exercised some colour of right and degree of control in relation to the property. This answers why the respondent had to request the applicant to remove its skips in the correspondence exchanged by the parties.

[16] In point of fact, the inquiry whether or not the applicant was the owner of the portion of land where its property was kept, or whether or not there was an oral lease agreement, is with respect, irrelevant. It must be recalled that the protection afforded by the *mandament* is the actual possession and not the right to possession. This distinction must not be allowed to escape the litigants. Once actual possession is established, then *cadit quaestio* as far as the *mandament* is concerned.

[17] I am of the considered view that there is no merit in the respondent's position that the applicant agreed to the removal of the property in question. The attitude of the applicant towards the intended removal of its property from the premises was clear, unequivocal and fairly consistent. It did not tergiversate on the demand for it to move out of the premises. There is accordingly no basis upon which the court can find for the respondent that the applicant agreed to the removal of its property as argued by the respondent. The correspondence, including the very last letter written to the respondent, evinces a clear and unequivocal intention by the applicant, to remain in possession of the property until such time that the parties came to an understanding or the respondent evicted the applicant according to law.

[18] The respondent's position is clearly not borne out by the facts, as recorded in the letters exchanged. I agree with the submission by Ms Kauta that the respondent's argument that there was an agreement, is akin to a man who moves property away from a house when he finds children there and tells them to move and the children assist in doing so, leading to him then alleging that the moving was agreed to by the parents.

[19] There is no convincing explanation by the respondent when it is that clear and unequivocal stance of the applicant to insist on remaining *in situ*, as the parties argued over the legal position changed into one of agreement by the applicant to move its property. This is certainly not consistent with the applicant's official position to the last minute when the applicant eventually launched the application. I am of the considered view that the respondent's position on this issue is one that is untenable and would thus not qualify to stand for scrutiny when regard is had to the standard required by the *Plascon Evans* rule.<sup>1</sup>

[20] It must be recalled that the requirements of spoliation are trite. In this regard, an applicant for a *mandament van spolie* must first and foremost establish that he or

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<sup>1</sup> *Plascon-Evans Paints Ld v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).



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>2</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>3</sup>

[21] 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.'

[22] I am accordingly of the considered opinion that the applicant has met both legs of the requirements for the granting of a spoliation order. I must mention that the argument advanced by Mr Maasdorp regarding the failure to identify the exact location of the place where the property was removed from, lacks candour. There is no dispute between the parties as to where the skips were removed from. I shall not accept this as a genuine reason for refusing the relief sought as this smacks of fastidious high watermark of point taking. The applicant and the respondent know the identity of the property and there is no dispute as to where the property was removed from. It would not serve justice, in the circumstances, considering the extremely urgent manner that this application was moved, to dismiss the application for this reason. I decline to do so.

[23] Regarding urgency, I should mention that I did not understand Mr Maasdorp to question the urgency. It must be recalled that spoliation matters are, in terms of the law, inherently urgent matters. In the instant case, the applicant demonstrated that

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<sup>2</sup> *Kuiiri and Another v Kandjoze and Others* (SA 42-2007) [2009] NASC 15 (3 November 2009).

<sup>3</sup> *Ibid*, para 2.

the matter was urgent as its property was unlawfully removed and it did not know where it was being placed, not to mention how safe it was at the place to which it was moved. In the wake of all this, there was correspondence from the applicant, lecturing the respondent about the unlawfulness of its intended escapade. This landed on deaf ears and the applicant was compelled in the circumstances, to approach the court on an urgent basis. There is nothing to gainsay the applicant's case in this particular regard.

[24] The applicant states on oath that the matter is urgent because a claim for a spoliation order is inherently urgent. It also states that it will not get substantial redress at a hearing in due course, as the respondent has taken the law into its own hands and has commenced removing the applicant's skips/containers from the site, without following the due process of the law. Stating further that the respondent's conduct is unlawful, and this application has been launched within hours of the respondent's unlawful spoliation. I agree with the applicant in this regard.

#### Costs

[25] The applicant prayed for a punitive costs order. It submitted that the respondent acted in a dishonourable, vexatious and in an improper manner, therefore, warranting the issuance of a punitive costs order against the respondent on the scale of attorney and client. Ms Kauta argued that the warnings sent to the respondent of its illegal conduct, did very little to persuade the respondent to do the right thing and follow the dictates of the law. Is this reason enough for the court to grant punitive costs?

[26] The law in this regard, was authoritatively stated by the Supreme Court in *Fischer v Seelenbinder and Another*.<sup>4</sup> The court stated the following at para 35:

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<sup>4</sup> *Fischer v Seelenbinder and Another* 2020 (2) NR 596 (SC).

'35. The Namibian courts have not 'traditionally' awarded punitive cost orders in spoliation proceedings. The normal rule is that ordinary costs should follow the event and the punitive cost orders are only made when there are special circumstances justifying it. In special circumstances, costs may even be given against a successful applicant for a spoliation order and a harsh and mean spirited approach in utilising the mandament van spolie has been mentioned in this regard. The starting point of the court a quo was thus not correct. All the other reasons given by the court a quo are essentially the justification for the premise that this was not a case to depart from the 'traditional' order. As the traditional order in Namibia is not the same as that in Swaziland, this was not the correct approach and this amounted to a misdirection by the court a quo. The question in this matter should have been whether there were unusual circumstances in the case to deviate from the normal costs order and not whether there were unusual circumstances to deviate from the 'traditional' order.'

[27] In the premises, I am of the considered view that there is no reason that should justify the court departing from the beaten track, as laid by the Supreme Court. Of course the respondent was intransigent and did not heed the warning that it was embarking on a precipitous and unlawful escapade. That does not, of its own, require that harsh censure that a punitive costs order heralds. I will, for that reason, order the respondent to pay the applicant's costs on the normal scale.

[25] Despite the fault in the respondent's approach to the matter, I am of the view that a punitive costs order should not be granted just because the respondent's actions were wrong. The applicant has to prove that the respondent acted in a vexatious, dishonourable, vindictive or other improper manner, unless such behaviour can be deduced from the reading of the papers other than merely wrong in the eyes of the law.<sup>5</sup>

#### Order

[26] I should mention that on the first date of hearing, I granted a *rule nisi*, with interim effect, namely, which ordered the respondent to stop the removal of the skips. This followed an undertaking by the respondent not to remove any further skips,

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<sup>5</sup> *Dornfontein Safaris (Pty) Ltd v Ellis & Partners Legal Practitioners* (HC-MD-CIV-ACT-CON-2021/00278) [2021] NAHCMD 358 (05 August 2021).

pending the finalisation of the matter. I have not heard any complaint about the respondent not complying.

[27] I have now had the opportunity to hear both parties to the matter and I am of the view that the applicant has made out a case for the granting of a spoliation order, as discussed above. For that reason, I issue the following 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 respondent, is hereby ordered forthwith to immediately restore possession of the property fully described as a portion of land situated at Port of Luderitz, Hafen Street, Luderitz, Republic of Namibia, to the applicant.
3. The respondent is hereby ordered to return all the applicant's skips/containers it removed from the portion of land situated at Port of Luderitz, Hafen Street, Luderitz, Republic of Namibia, to exactly the same place from which they have been removed.
4. The respondent is ordered to pay the applicant's costs such costs to include the costs of one instructing counsel and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

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T S MASUKU

Judge

## APPEARANCES

APPLICANT: V Kauta

Instructed by: Ndaitwah Legal Practitioners, Windhoek

RESPONDENT: R Maasdorp

Instructed by: Koep & Partners, Windhoek