



**NOT REPORTABLE**

CASE NO: SA 40/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**NICOLAAS JACOBUS KOCH**

**Appellant**

And

**WILLEM ALBERTUS KOCH**

**First Respondent**

**HENDRIEKA DE VILLIERS**

**Second Respondent**

**Coram:** HOFF JA, MOKGORO AJA and NKABINDE AJA

**Heard:** 5 June 2019

**Delivered:** 14 October 2019

**Summary:** This appeal concerns a dispute between two brothers regarding possession of immovable property situated in the premises of and owned by of the first respondent. The brothers had agreed that the appellant will stay in the flat and money advanced by him to the first respondent was allegedly used to refurbish to make it habitable. The appellant only stayed in the flat on two occasion over a period of six years and undisputedly abandoned flat.

The first respondent advised the appellant of the need to move their elderly and ailing aunt into the flat and asked him to remove his movable assets. This strained the

relationship between the siblings. The appellant sought a spoliation order on the basis that the first respondent unlawfully dispossessed him of the flat and deprived him of his peaceful and undisturbed possession of the flat. Because he had the physical possession and control of the keys of the flat, the High Court held that he satisfied the first requirements of possession, physical possession and control of the flat.

The High Court, however, held that the appellant failed to establish the second requirement of possession, namely *animus possidendi*. The appellant had left the flat in a state of neglect for six years. The flat was, unquestionably covered in a thick of layer of dust and of rodent faeces which had accumulated over a period of six years. The flat was, therefore, uninhabitable. The cumulative effect of all these facts, the High Court surmised, demonstrated an absence of a mental state necessary to sustain possession of the flat. This appeal is in respect of this latter holding.

*On appeal* this Court held that the High Court did not misdirect itself, neither on the law or facts. This Court endorsed the High Court's decision and dismissed the appeal with costs including costs of one instructing and one instructed legal practitioner.

---

## APPEAL JUDGMENT

---

NKABINDE AJA (HOFF JA and MOKGORO AJA concurring)

### Introduction

[1] This opposed appeal concerns a partly unsuccessful application in the High Court where the appellant sought a spoliation order against the respondents based on *mandament van spolie*.<sup>1</sup> In a spoliation application an applicant has to establish certain essentials before the order may be granted. The High Court held that the appellant had the physical possession of the immovable property (flat) concerned

---

<sup>1</sup> The remedy is aimed at every unlawful and involuntary loss of possession by a possessor of a thing and its object is the restoration of the status *quo ante* as a preliminary to any enquiry into the merits of the respective claims of the parties to a thing in question.

through his possession of the key and dismissed the application with costs on the basis that he lacked the requisite intention to possess that immovable property and the movable assets which he had abandoned together with the flat. The latter decision of the Court *a quo* is the subject matter of this appeal. Essentially, the issue for determination is whether the appellants satisfied the requisite of being in peaceful and undisturbed possession of the flat and whether he was unlawfully dispossessed of such possession.

#### Background facts and litigation history

[2] The appellant and first respondents are brothers. The second respondent is their aunt who has found herself in the centre of a bitter feud between her nephews. She is a more than eighty four years old widow and, due to poor health, unable to take care of herself.

[3] The dispute between the brothers concerns possession of a flat owned by the first respondent and situated in his yard. It is common cause that the flat was made available to the appellant for use. There are conflicting reasons why the appellant occupied the flat. According to him they had concluded an oral agreement in terms of which he would upgrade the flat and furnish it at his costs and that the first respondent would not allow anyone into that flat. The first respondent, he stated, breached the agreement when the first respondent allowed their aunt to stay in the flat and was asked to remove his belongings.

[4] However, according to the first respondent the appellant lent him N\$23 400 for his relocation from South Africa to Namibia. Appellant purchased floor tiles and two window frames for the flat. In exchange of these items the appellant would use the flat when visiting and would not pay rent, water and electricity. The appellant took possession of and moved his furniture into the flat but allegedly stayed there only on two occasions. He changed locks of the flat without notifying the first respondent or giving him spare keys. After the appellant's alleged long absence from the neglected flat he was requested in writing to remove his belonging so that the elderly and frail aunt could be moved into that flat. The reason was to enable the first respondent and his wife to take care of her.

[5] The appellant considered the request to constitute spoliation. That caused an acrimonious relationship between these siblings and gave rise to litigation in the Magistrate's Court in which the appellant sought damages arising out of an alleged loan to the first respondent. Allegedly, the funds were used to refurbish the flat into a habitable setting for occupation by the appellant, his family and friends. The first respondent also applied for the eviction of the appellant from the flat.

[6] In the meantime the appellant sought a spoliation order in the High Court – proceedings that are a sequel to this appeal. He contended that he was in peaceful possession of the flat and was unlawfully dispossessed of the flat by the respondents who took the law in his hands. The appellant's claim for possession, relying on the South African Supreme Court decision in *Wightman*,<sup>2</sup> was based on the fact that he

---

<sup>2</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA).

was in possession of the keys of the flat and thus exercised control over it. He admitted not having occupied the flat for six years consecutively.

[7] The first respondent opposed the application and deposed to an affidavit also on behalf of the second respondent – the aunt, disputing the appellant's claims. He argued that the flat was unoccupied for almost six years and therefore was abandoned. Indisputably, the flat was left for years with rodent faeces and dust all over.

[8] The High Court, having considered the applicable legal principles and case law and having applied them to the facts, correctly held that in order to succeed the appellant bore the onus to establish on balance that he was in peaceful and undisturbed possession of the flat and that he was unlawfully deprived of the possession which consists of both an objective and subjective elements – to wit, physical control and an intention to possess. Regarding the physical control of the flat the Court *a quo* held that the appellant had succeeded in proving that he had physical possession and control over the flat through the keys and, so the Court's observations continued, appeared to 'be using the physical possession of the flat as a bargaining chip or as a tool to settle scores or harass the first respondent'. The Court mentioned certain instances to bolster the proposition:

'On the first occasion in 2009 when the first respondent requested him to remove his movables from the flat, the [appellant] caused summons to be issued against the first respondent, which he claimed refund of the money he had lent and advanced to the first respondent. Then he unilaterally changed the locks of the flat without giving a

spare key to the first respondent who is the owner of the premises. I pause here to observe that plain decency dictates that the applicant should have left a spare key with the first respondent in consideration of an emergency such as a geyser burst or fire on the premises, for that matter. I accordingly consider the applicant's conduct rather mean if not just plainly vindictive.

Thereafter he stayed away for eight months just to reappear to collect some movables from the flat. The last straw was when the [appellant] was requested by the respondent to remove his movables from the flat in order for the first respondent to accommodate their aunt in the flat. The [appellant] refused to collect his movables and shortly thereafter launched the present application. In my view the [appellant's] assertion in his replying affidavit that he did not want to collect his movable from the flat but he wanted to return to the flat, rings hollow. Given the rather sour relationship between him and the first respondent, it is in my view highly improbable that he honestly wishes to return to the flat. If he had any genuine intention to use the flat beneficially he would not have stayed away from the flat for six consecutive years.<sup>3</sup>

[9] The High Court was, however, not oblivious of the principle that once possession has been acquired, continuous physical possession or use is not necessary for the retention of such possession. However, relying on a South Africa High Court decision in *Welgemoed*<sup>4</sup> – quoted with approval by this Court, per Maritz JA in *Kuiiri*<sup>5</sup> that ‘. . . the required continuity of occupation need not be absolute continuity, for it is enough if the right is exercised from time to time as occasion requires and with reasonable continuity’<sup>6</sup> (emphasis added), the Court *a quo* said that six years of continuous absence or non-beneficial use of the flat goes beyond reasonable tolerance of the requirement of continuous possession principle.

<sup>3</sup> High Court judgment at paras 33 – 34.

<sup>4</sup> *Welgemoed v Coetzer* 1946 TPD 701 at 702 (*Welgemoed*).

<sup>5</sup> *Kuiiri & Another v Kandjoze & others* 2009 (2) NR 447 (SC) (*Kuiiri*).

<sup>6</sup> High Court judgment at para 31.

[10] The High Court further remarked that there has been an absolute absence of exercise of right of use or occupation of the flat for a continuous period of six years and during that time the flat was not used or occupied from time to time. It drew a reasonable inference from the admitted facts that the appellant abandoned the flat. That, according to the Court *a quo*, was bolstered by the undisputed evidence of the first respondent that the appellant left the flat in a state of dereliction resulting in it being covered in a thick layer of dust and of rodent faeces which had accumulated over a period of six years. The flat was therefore uninhabitable. The cumulative effect of all these facts, the Court surmised, demonstrated an absence of a mental state necessary to sustain possession of the flat.

[11] On these facts, the Court concluded that the appellant failed to prove the second requirement of possession, *animus possidendi*, and had no intention to possess the flat for any use to him or to derive any benefit from such possession.<sup>7</sup>

[12] As to the appellant's movable assets in the flat the High Court was of the view that no useful purpose would be served to treat the possession of the movables separately from the flat and that to the extent it was necessary to make a finding regarding the possession of those movables, it said that its findings in respect of the possession of the flat apply with equal force to the possession of the movables as the appellant had abandoned them together with the flat.<sup>8</sup> The Court, therefore, dismissed the spoliation application with costs.

---

<sup>7</sup> Id at para 32.

<sup>8</sup> Id at para 37.

On appeal

[13] The appellant noted an appeal to this Court against the whole of the High Court's judgment including the costs award, excluding the part of the judgment which favoured him. In other words, excluding the High Court's finding that the appellant was in physical possession and control of the movables. Although the appellant accepted in his submissions, as correct and referred to what the High Court's recital of the legal principles applicable to the losing of possession, he argued, that the Court erred and misdirected itself in its wrong application of the legal principles set out in *Kuiiri* to the relevant facts.

[14] The appellant submitted that even if the facts regarding purpose of the use of the flat were accepted to be true, that aspect was irrelevant as it related to the underlying cause of possession. He argued that applying the principles enunciated in *Plascon-Evans*<sup>9</sup> to the irrelevant facts and making incorrect findings the Court misdirected itself by ignoring established facts including the following, that: on the first occasion when his possession was threatened he brought a spoliation application and his possession was restored; thereafter he secured his possession by changing locks and keeping the only key and leaving his movables in the flat until the spoliation, an unpleasant situation he stated, was committed – when the first respondent gained entry to the flat without a key.

---

<sup>9</sup> *Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).



[15] The respondents opposed the appeal and maintained that the appellant abandoned the flat and left it derelict. They argued that in addition to physical control of the flat the appellant had to have intention to possess it. The respondents implored this Court not to interfere with the impugned judgment of the Court *a quo*.

[16] It is trite that where there is no misdirection of facts by the trier of facts, the presumption is that his or her conclusion is correct and cannot be interfered with on appeal. An appeal court will generally only interfere if it is convinced, among other things, that the conclusion is demonstrably wrong and the discretionary power of the lower court was not properly exercised, moved by a wrong principle of law or an incorrect appreciation of the facts.<sup>10</sup>

[17] The appellant has correctly accepted that the High Court's restatement of the legal principles was correct. To avoid prolixity, it is not necessary to repeat same here. It bears underlining however that to sustain a claim based on spoliation an applicant requires possession which, borrowing the words used in *Ness*,<sup>11</sup> has become 'ensconced'. The question remains whether, given all the circumstances, it can safely be said that the High Court was wrong in its conclusion. The answer is NO.

---

<sup>10</sup> See in this regard *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC); *Du Toit v Dreyer & others* 2017 (1) NR 190 (SC); *S v Shapumba* 1999 NR 342 (SC); *S v Teek* (SA 12-2017) [2018] NASC (3 December 2018). See also the recent South African Constitutional Court's decision in *Jacobs & others v S* [2019] ZACC 4; 2019 (5) SACR 623 (CC) (14 February 2019) para 104 and *Buffalo City Metropolitan Municipality v Metgovis* [2019] ZACC 9; 2019 (5) BCLR 533 (CC) para 34 and the South African Supreme Court's decision in *Carneiro v S* ZASCA 45 2019 (1) SACR 675 (SCA) 29 March 2019 para 23; See also *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W) at 472.

<sup>11</sup> *Ness & another v Greef* 1985 (4) SA 641 (C) at p 649.

[18] The High Court dealt with the established principles regarding, among other things, onus by the appellant to establish on balance a peaceful and undisturbed possession and that he was unlawfully deprived of possession; that possession consisted of an objective and subjective elements – (i) the physical control, (ii) the intention to possess – the latter entailing, inter alia, the intention to exercise the control and occupation of the thing for the occupier’s benefit and (iii) not just measure of possession (however technical and remote, tenuous or brief will suffice). The Court must, however, be satisfied that the despoiled possession was sufficiently stable and durable to constitute peaceful and undisturbed possession as was said by this Court in *Kuiiri*.

[19] The High Court was correct that possession is lost when the possessor abandons the thing and that the extent of the use and occupation are some of the factors to be taken into consideration to determine physical or mental control.<sup>12</sup> The High Court appropriately dealt with the disputed facts regarding the purpose of coming to the flat to determine the intention to possess. In my view, the Court *a quo* cannot be faulted in its conclusion that the appellant lost possession through his long period of six years of absence – which he has admitted.

[20] Needless to say, six-years of continuous absence or non-beneficial use (given the agreed purpose of use) of the flat was beyond reasonable tolerance of the requirement of continuous possession principle. I say this not unmindful of the fact that absolute continuity is not a prerequisite. However, the right is and must be

---

<sup>12</sup> See *Kuiiri* at para 34. See also ‘Willies Principles of SA Law’ at p 264.

exercised from time to time as occasion requires and with reasonable continuity.<sup>13</sup> The High Court was correct that, in *casu*, there has, unquestionably, been absolute absence of the exercise of the right of use or occupation for a continuous period of six years and that the only reasonable inference to be drawn from the facts is that the appellant abandoned and lost intention to possess or continue occupying the flat.

[21] As regards the principle on inferential reasoning, this Court in *Kuiiri* remarked:

'Possession of an immovable thing may, of course, be lost for a number of reasons. Whether the possessor's physical absence from the immovable thing or the nature and extent of the use, occupation or control thereof by another party justifies the inference that the physical and/or mental requirements necessary to sustain possession are no longer present, must be determined with regard to the circumstances of each case.'<sup>14</sup> (Footnotes omitted.)

[22] The appellant argued that even if the facts regarding purpose of the use of the flat were accepted to be true, that aspect was irrelevant as it related to the underlying cause of possession. There is no merit in the argument. The circumstances of this case justified the taking into account of the purpose for which the property was intended to be used as was alleged by the first respondent. The appellant did not dispute the averment. As a matter of fact, he admitted that they had agreed that the flat will be converted into a suitable living apartment is telling and bolsters the point made by the first respondent. In his founding papers the appellant stated that the agreement between him and his brother (first respondent) was to 'convert . . . the

---

<sup>13</sup> See *Kuiiri* at para 30, citing with approval *Welgemoed and Mocke v Beaufort West Municipality* 1939 CPD at 142.

<sup>14</sup> *Kuiiri* at para 9.

existing outbuilding ...into an apartment suitable for living . . .' and the first respondent granted him a 'life-long and exclusive right of habitation [residence] and use of the said apartment for myself and my family and/or my friends'. These statements are telling: The flat was, admittedly, not for storage.

[23] The inference drawn in *casu* was supported by the additional undisputed evidence that the appellant left the flat in a derelict state – with thick layer of accumulated dust and of rodent faeces that had accumulated over six years and that the flat was run-down. Clearly, as the High Court correctly found, the cumulative effect of these factors demonstrate an absence of a mental state necessary to sustain possession. But, even without the aid of inferential reasoning, the facts demonstrably showed lack of intention to possess the flat for use or to derive a benefit from such possession. Additionally, even if the appellant did have such an intention, so the Court correctly found, it did not relate to usage for deriving benefit other than for storage – using it as a bargaining chip to settle score to harass the first respondent. Besides, the obverse finding would, in the circumstances, work injustice rather than operate in furtherance of a policy designed to discourage self-help.

[24] It is also correct that the appellant's ostensible intention to return to the flat rang hollow. This was so because it was highly improbable that the appellant would have wanted to return to the flat in light of the strained relationship with his brother. Fittingly, in his written submission in this Court, the appellant described the situation as 'unpleasant'. This begs the question why he would return to that hostile setting after a protracted period of absence.

[25] Regarding the decision *a quo* concerning the appellant's movable assets, the appellant has not made out a case why this Court should upset that finding. Nonetheless, this Court was informed that the first respondent had advised the appellant to collect his movable assets stored in the flat. Seemingly, the invitation remains. There is therefore no basis in law or on the findings of fact which entitles this Court to interfere, on appeal, with the impugned decision *a quo*. The appeal should be dismissed with cost.

Order

[26] In the event, the following order is made:

The appeal is dismissed with costs including costs consequent upon the employment of one instructing and one instructed legal practitioner.

---

**NKABINDE AJA**

---

**HOFF JA**

---

**MOKGORO AJA**

APPEARANCES:

APPELLANT:

J S Jacobs

Instructed by Francois Erasmus &

Partners, Windhoek

FIRST and SECOND

T M Wylie

RESPONDENTS:

Instructed by Engling, Stritter &

Partners, Windhoek