



**REPORTABLE**

CASE NO: SA 31/2018

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**WOLFGANG HANS FISCHER**

**Appellant**

and

**HENNING ASMUS SEELENBINDER**

**First Respondent**

**FISCHER SEELENBINDER ASSOCIATES CC**

**Second Respondent**

**Coram:** SHIVUTE CJ, FRANK AJA and NKABINDE AJA

**Heard:** 12 March 2020

**Delivered:** 8 June 2020

**Summary:** This appeal stems from events that started with Fischer giving Seelenbinder a notice to retire (allegedly in terms of an agreement between the parties) as a member of Fischer Seelenbinder Associates CC (FSA) a civil engineering practice in which Fischer and Seelenbinder were equal members. An application in the court *a quo* by Fischer saw the court give judgment on 17 November 2017 which upheld Fischer's contention, and ordered that Seelenbinder 'must retire from (FSA) by 31 March 2016'. The court gave further orders as

to the valuation of Seelenbinder's member's interest as at that date and ordered that Seelenbinder be paid the amount of his member's interest as determined as well as his loan account.

Shortly prior to the handing down of the judgment, Fischer changed the locks to the entrance of the FSA offices. This meant Seelenbinder no longer had his own keys to access the offices at will. He could and did enter the offices during normal business hours, albeit intermittently, through pressing the doorbell and waiting for the receptionist to open the door for him. Armed with the court order of 17 November 2017, Fischer insisted that Seelenbinder vacate his office at FSA, but the latter refused to do so. Letters were exchanged between the legal practitioners of the parties. The upshot of this exchange of letters was that neither party was persuaded by other party and Seelenbinder continued to use his office at FSA. In essence Seelenbinder's stance was that he remained a member until he received payment in respect of his membership and his loan account; whereafter he would vacate the premises of FSA.

On 23 April 2018 when Seelenbinder went to the offices of FSA in the afternoon, the receptionist refused to open the door and informed Fischer of Seelenbinder's presence whereafter Fischer indicated to Seelenbinder that he would no longer be granted access to the offices of FSA. Seelenbinder launched a spoliation application on an urgent basis in the court *a quo*. The court *a quo* granted an order compelling Fischer to restore the possession of the offices to Seelenbinder and a punitive cost order - ordering that Fischer pay the costs of the spoliation application on an attorney and client scale inclusive of the costs of one instructing and two instructed legal practitioners. This is the judgment that is the subject matter of the current appeal.

On appeal, the court must determine whether Seelenbinder's continued possession of the offices was such that he exercised the necessary direct physical control over the office he worked from?

*Held that*, access to the offices was an incident of the possession and control of such offices. The access was not something that could be separated from the possession and control of the offices and of the office of Seelenbinder of which, on the evidence, he was at all times the sole occupier.

*Held that*, Seelenbinder had possession of the office, with the intention of securing a benefit for himself. This is sufficient for the purpose of the *mandament van spolie*.

*Held that*, the court *a quo* did not authorise Fischer to evict Seelenbinder or authorise him to execute the retirement judgment in this specific manner and hence Fischer cannot rely on this to justify or defend his spoliation of Seelenbinder.

*Held that*, Fischer's approach to claim counter spoliation against Seelenbinder about five months after the 17 November 2017 judgment is simply too late to qualify as a counter spoliation. He should have acted much earlier – but instead he decided to resolve the matter by bringing a rule 103 application.

*Held that*, the circumstances of the matter did not justify the punitive cost order in the court *a quo*. The nature of the spoliation coupled with the fact that the spoliation was committed on the advice of his legal practitioners and taking cognisance of Seelenbinder's dogged determination in insisting on his joint possession in the face of the order that he had retired as an active member nearly two years earlier distinguishes this from the cases of self-help (without seeking advice) where the person(s) despoiled are seriously and adversely affected.

*Held that*, the appeal fails on the merits and succeeds against the punitive cost order.

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## APPEAL JUDGMENT

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FRANK AJA (SHIVUTE CJ and NKABINDE AJA concurring):

### Introduction

[1] The appellant (Fischer) appeals against the judgment and orders of the High Court following an urgent application launched by the first respondent (Seelenbinder). Seelenbinder sought and was granted an order compelling the appellant (Fischer) to restore possession in respect of offices of the second respondent, Fischer Seelenbinder Association CC (FSA) and for costs on a punitive scale. The appeal is opposed by Seelenbinder.

### Background

[2] Fischer and Seelenbinder are both civil engineers who practised as such and as equal members of FSA.

[3] The relationship between the members of FSA was a cordial one for about eight years when Fischer, relying on an agreement allegedly entered into between the members, gave Seelenbinder notice that the latter must retire from FSA. Seelenbinder denied that such an agreement existed and refused to recognise the notice to this effect given to him by Fischer.

[4] As a result of Seelenbinder's refusal to recognise the notice to him to retire, Fischer lodged an urgent application in the High Court to compel him to retire from FSA. This issue of the retirement of Seelenbinder soured the relationship between them which became more rancorous over time as will become apparent from what is stated below.

[5] The urgent application was launched in September 2015 but was only heard on 5 July 2016. The court *a quo* delivered its judgment on 17 November 2017 and upheld the contention of Fischer, ordered that Seelenbinder 'must retire from (FSA) by 31 March 2016', gave further orders as to the valuation of Seelenbinder's membership interest as at that date and ordered that Seelenbinder be paid the amount of his membership interest as determined as well as his loan account.

[6] From June 2015 the monthly remuneration to Seelenbinder from FSA stopped. Despite this, Seelenbinder continued to invoice customers for engineering work done in the name of FSA. Seelenbinder all along also acted as arbitrator on occasion and paid half the fees earned in this regard directly to Fischer. He said he did this because he did 'part of the arbitration work from the office'. This fee splitting with Fischer in respect of arbitration work stopped after the judgment of 17 November 2017. However, he continued to do the engineering work in the name of FSA.

[7] Shortly prior to the handing down of the judgment Fischer, changed the locks to the entrance of the FSA offices. This meant Seelenbinder no longer had his own

keys to access the offices at will. He could and did enter the offices during normal business hours, albeit intermittently, through pressing the doorbell and waiting for the receptionist to open the door for him. Armed with the court order of 17 November 2017, Fischer insisted that Seelenbinder vacate his office at FSA but the latter refused to do so. Fischer's legal practitioner wrote a letter to Seelenbinder on 17 November 2017 stating that he must remove his personal belongings and vacate the office by 16h00 that day as thereafter he will have no further access. Seelenbinder's legal practitioners simply responded by stating that the court order did not eject Seelenbinder from the premises. Further letters were written to and from by the respective legal practitioners up to 28 November 2017 in which the parties basically reiterated their stances. The upshot of this exchange of letters was that neither party was persuaded by other party and Seelenbinder continued to use his office at FSA. In essence Seelenbinder's stance was that he remained a member until he received payment in respect of his membership and his loan account whereafter he would vacate the premises of FSA.

[8] It seems that the traditional summer holidays caused a lull in the stand-off between Fischer and Seelenbinder as the next significant move was an application in terms of rule 103(1)(c) of the High Court launched on 25 January 2018 by Fischer seeking clarity as to the meaning of the order that Seelenbinder had to retire on 31 March 2016.<sup>1</sup> Seelenbinder noted his intention to oppose this application and the matter was referred to case management for the managing judge to give directions as to the further process of the application.

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<sup>1</sup> Rule 103(1)(c) provides that a court may be approached to clear up any ambiguity in an order or judgment.

[9] At the first case management meeting held on 13 February 2018, the managing judge (the same judge that granted the order) strongly indicated that in terms of the judgment Seelenbinder had no entitlement to continue to use the offices of the FSA. The judge nevertheless granted Seelenbinder the opportunity to file an answering affidavit. The directive allowing the filing of the answering affidavit was the only order made at the case management meeting of 13 February 2018.

[10] On 20 April 2018 Fischer's legal practitioners per letter to the legal practitioner of Seelenbinder indicated that it was clear from the comments of the judge at the case management meeting that Seelenbinder's right to occupy the premises of FSA had come to an end and his continued refusal to do so meant he was in contempt of the court order. Seelenbinder was thus given until noon on 23 April 2018 to remove his personal belongings from the offices of FSA whereafter he would not be given further access to the offices. In response, Seelenbinder's legal practitioners stated that the rule 103 application had been postponed to May 2018 for the hearing of the matter and that any effort to prevent Seelenbinder from entering FSA's offices would amount to a spoliation.

[11] When Seelenbinder went to the offices of FSA in the afternoon of 23 April 2018 the receptionist refused to open the door and informed Fischer of Seelenbinder's presence whereafter Fischer indicated to Seelenbinder that he would no longer be granted access to the offices of FSA.

[12] Seelenbinder launched a spoliation application on an urgent basis in the High Court. The High Court granted the order compelling Fischer to restore the possession of the offices to Seelenbinder and ordered that Fischer pay the costs of the spoliation application on an attorney and client scale inclusive of the costs of one instructing and two instructed legal practitioners. This is the judgment that is the subject matter of the current appeal.

[13] In this judgment the court granting the spoliation order will be referred to as the court *a quo*, the judgment ordering Seelenbinder to retire will be referred to as the retirement judgment and the case management proceedings of the 13 February 2018 will be referred to as the case management proceedings.

#### Preliminary issues

[14] On behalf of Fischer it is submitted that the court *a quo* should not have heard the application as Seelenbinder was in contempt of a court order when he attempted to gain access to the premises of FSA.

[15] The submission is that the comments of the managing judge at the case management proceedings 'made it clear that the continued presence of Seelenbinder at the offices of FSA militated against, spurned and offended the provisions of the November 2017 order'. Whereas the comments made by the managing judge in the case management order did indicate a very strong *prima facie* view along the lines suggested, no order to such effect was given. On the contrary the respondent was



given leave to file an answering affidavit in opposition to the application further indicating that an order would be given in due course, after hearing the respondent.

[16] In short there was no order in the terms suggested namely: that Seelenbinder had to vacate the offices and hence he could not be in contempt of court. Furthermore, the dispute as to the meaning of the retirement judgment also is destructive of the contention that Seelenbinder was in contempt as it is clear that Seelenbinder acted at all times on legal advice and there was never an intent to ignore or disobey a court order.

[17] In the heads of argument filed on behalf of Seelenbinder, reference is made to matters that occurred subsequent to the judgment *a quo*. All it does is to demonstrate that the relationship between Fischer and Seelenbinder became more rancorous over time. Thus the valuation of the membership of Seelenbinder was contested in court and an urgent eviction application was brought by Fischer against Seelenbinder. The current situation is that Fischer paid Seelenbinder as stipulated in the retirement judgment and Seelenbinder, as a consequence, vacated his office at FSA and no longer uses it.

[18] The facts subsequent to the spoliation order granted by the court *a quo* do not make the matter moot as submitted on behalf of Seelenbinder. Fischer is entitled to revisit the matter even if it is only to seek the reversal of the costs order of the court *a quo* as one of the grounds of appeal is aimed at that costs order. Furthermore the payment to Seelenbinder in terms of the retirement judgment seemed to have

occurred sometime after the appeal had been lodged and as mentioned the attack on the costs order of the court *a quo* features as one of the grounds of appeal.<sup>2</sup>

[19] The judgment in respect of the eviction application is currently on appeal. In other words it is suspended pending its finalisation on appeal. The legal practitioners for Seelenbinder submitted that pending the appeal, its findings are nevertheless *res judicata* between the parties thereto. I do not agree. It is not yet a final judgment between the parties thereto. I will simply ignore it for the purposes of this judgment.

#### Possession

[20] The main thrust of the submissions made on behalf of Fischer was to the effect that the nature of Seelenbinder's possession of the offices of FSA was not such as to have entitled him to a possessory remedy. It was submitted with reference to *De Beer v Zimbali Estate Management Association (Pty) Ltd & another*<sup>3</sup> that Seelenbinder was attempting to protect a right to access instead of a right of possession with the *mandament van spolie* which was not competent.

[21] The legal practitioner for Fischer conceded that prior to the changing of the locks and the retirement judgment, Seelenbinder had joint control or possession with Fischer in respect of the offices of FSA.<sup>4</sup> He submitted however that subsequent to the events mentioned this was no longer the case. Without keys Seelenbinder no longer had untrammelled access to the offices. He could no longer enter the offices

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<sup>2</sup> *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 659 (A) at 666H and *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 at 1294-1295 and 1301H-I.

<sup>3</sup> 2007 (3) SA 254 (N).

<sup>4</sup> *Oberholster v Wolfaardt & others* 2010 (1) NR 293 (HC).

outside normal business hours as there would be no one there to open the entrance door for him. His access was limited to office hours and even that was dependent on Fischer or the receptionist granting him access. The receptionist obviously acted on instructions from Fischer.

[22] There is merit in the submission that the nature of Seelenbinder's possession changed. From being an active member entitled to participate in the business of FSA with his own keys to access the offices at any time; day or night, he became a retired member with his interest frozen at 31 March 2016 without keys and a right to access the offices only during business or office hours at the will of Fischer. At best on the submission of counsel for Fischer, at the time of the spoliation, Seelenbinder exercised a precarious right of possession. A precariat is, of course, entitled to bring a *mandament van spolie* if he or she is unlawfully despoiled of possession.<sup>5</sup>

[23] The question whether Seelenbinder continued to possess the offices is not dependent on the right to possess<sup>6</sup> he thought he had but on whether he exercised the necessary direct physical control over the office<sup>7</sup> he worked from.

[24] As mentioned, the legal practitioner for Fischer submitted that the fact that Seelenbinder no longer had his own key and thus could not access the premises outside business hours without the co-operation of Fischer coupled with the fact that

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<sup>5</sup> *Adamson v Boshoff* 1975 (3) SA 221 (C).

<sup>6</sup> *Dalby v Soffiantini* 1934 EDL 100 and *Zulu v Minister of Works, KwaZulu & others* 1992 (1) SA 181 (D) at 187G et seq.

<sup>7</sup> *Manderlkoorn v Strauss* 1942 CPD 493 and *Meyer v Sentrale Westelike Ko-operatiewe Mpy* 1943 OPD 93.

even during business hours he was dependent on this co-operation to access the offices meant he was not in possession of the offices. As pointed out in *Kuiiri & another v Kandjoze & others*<sup>8</sup> absolute continuity of occupation is not required provided there is substantial interruption of possession. In this context it is also important to look at the nature of the property and the use thereof.<sup>9</sup> The premises were clearly intended to be the offices of FSA which primarily provided civil engineering services and which would be open to the public and clients also primarily during the normal business hours. Occupation outside business hours would be the exception and not the norm. In my view, the curtailment of Seelenbinder's access to the office in the ways mentioned did not interrupt his occupation to such extent as to destroy his possession. He was allowed to continue with his occupation, even if it was at the will of Fischer, in essence, as he did when he still had his own key, namely to occupy the office during business hours to work in.

[25] Seelenbinder did not use the access to admire the paintings in the foyer of the offices or to go and drink a cup of tea with the receptionist. He used it to occupy an office and do work there and used the infrastructure of FSA to assist in his work. What he did in the office was simply an extension of what he always did as an active member. This differs *toto coeli* from what happened in the *De Beer*<sup>10</sup> case where Ms de Beer had access via a token to a certain part of a residential estate which she visited in her capacity as estate agent to inspect properties. She neither owned nor occupied property in that portion of the estate. When her token was disabled to deny

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<sup>8</sup> 2009 (2) NR 447 (SC) at 458F-J.

<sup>9</sup> *Kuiiri* case at 459G-460A and 464G-H.

<sup>10</sup> *De Beer v Zimbali Estate Management Association (Pty) Ltd and another* 2007 (3) SA (N).

her access to that part of the estate she brought a spoliation application. The court held that her right of access was not a right that could be protected by the *mandament van spolie*. The *mandament van spolie* is a possessory remedy and hence if the right of access is not an incident of the possession or control of the property the *mandament* cannot be invoked. Thus if Ms de Beer had property in the estate in which she lived, the access would have been an incident of her possession and control of such property. In the present matter the access to the offices was an incident of the possession and control of such offices. The access was not something that could be separated from the possession and control of the offices and of the office of Seelenbinder of which, on the evidence, he was at all times the sole occupier.

[26] It is not in dispute that Seelenbinder occupied the offices with the aim of deriving a personal benefit. Whether Seelenbinder's possession of the offices was in accordance with the retirement judgment is neither here nor there. The fact is he had possession thereof with the intention of securing a benefit for himself and that is sufficient for the purpose of the *mandament van spolie*.<sup>11</sup>

#### Unlawful deprivation of possession

[27] The underlying rationale of a spoliation application is to discourage people from taking the law into their own hands to recover possession, and to rather invoke

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<sup>11</sup> *Council of the Itereleng Village Community & another v Madi & others* 2017 (4) NR 1127 (SC) para 38.

the aid of the law for this purpose.<sup>12</sup> The legal practitioner for Fischer submitted that he acted in terms of a court order namely the retirement judgment.

[28] The problem with this submission is that there was an ongoing dispute over the exact meaning of this order which did not expressly state that Seelenbinder had to vacate the offices. Normally court orders are executed by the deputy-sheriff subsequent to a writ of execution being obtained. It would be a very exceptional case for a court to authorise a party to the litigation to execute a court order. In short the court order did not authorise Fischer to evict Seelenbinder or authorise him to execute the judgment in this specific manner and hence Fischer cannot rely on this to justify or defend his spoliation of Seelenbinder.

#### Counter spoliation

[29] Counsel for Fischer submitted that the fact that Seelenbinder continued to occupy the office of FSA subsequent to the retirement judgment amounted to an act of spoliation. This is so because according to counsel, the unlawful retention of property after the lawful right of possession or occupation has expired amounts to an act of spoliation. Once again the approach is premised on Seelenbinder being in unlawful possession of the offices after the retirement judgment. On this approach, the blocking of Seelenbinder's access was, according to counsel for the appellant, an act of counter spoliation.

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<sup>12</sup> See eg *The Three Musketeers Properties (Pty) Ltd & another v Ongopolo Mining and Processing Ltd & others* (SA 3/2007) [2008] NASC 15 (28 October 2008).

[30] In support of his submissions counsel for Fischer referred to cases where the holding over by a lessee was regarded as spoliation,<sup>13</sup> where the refusal to deliver a car sent for repairs to the hire purchaser was labelled as an act of spoliation<sup>14</sup> and where the retention of flower bulbs by the owner of land against the lessee who had planted them was regarded as spoliation.<sup>15</sup> These cases do not assist Fischer as in none of them did the 'spoliator' gain possession through unlawful means or what can be termed 'breaches of the peace'.<sup>16</sup> For the reason that follows immediately below it is not necessary to deal with this aspect.

[31] Even if it is assumed that Seelenbinder committed an act of spoliation by retaining the possession of the offices subsequent to the retirement judgment on 17 November 2017 to counter spoliage about five months later is, on the facts of the current matter, simply too late to qualify as a counter spoliation. I am aware of the principle that one should not adopt an 'overly detached arm chair view'<sup>17</sup> to determine whether the alleged counter spoliation was instant or not. The fact of the matter is that Fischer decided to resolve the matter via a rule 103 application and not with a spoliation application. This may be because Fischer also had access to the offices allowing him to do his work. This was two months after the exchange of letters where the parties set out their respective views and Fischer thus knew that Seelenbinder contested his view to remain in possession of the offices contrary to the retirement judgment. Even after the case management meeting in February 2018 access to the

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<sup>13</sup> *Crause v Reyersbach* (1882) 1 SAR 50.

<sup>14</sup> *Dawood v Robb & Co* 1933 CPD 178.

<sup>15</sup> *Gore NO v Parvatas (Pty) Ltd* 1992 (3) SA 363 (C).

<sup>16</sup> *Three Musketeers Properties* case para 59.

<sup>17</sup> *Three Musketeers Properties* case para 52. Also see *De Beer v Firs Investments Ltd* 1980 (3) SA 1087 (W) and *Ness & another v Greef* 1985 (4) SA 641 (C).

offices was not refused to Seelenbinder but he was eventually given notice to vacate. To then after almost five months block access and raise counter spoliation was not an act of counter spoliation but a classic example of someone taking the law into his or her own hands. On the facts of this matter, Fischer had to act much earlier if he wanted to claim a counter spoliation as there was nothing that prevented such earlier action.

### Costs

[32] The court *a quo* made a punitive cost order against Fischer as indicated above.

[33] It is trite law that a court of appeal will only alter a decision as to costs, which is a discretionary one, where there has been an irregularity or a misdirection indicative of an improper exercise of the judicial discretion.<sup>18</sup> As will be pointed out below at least one such misdirection occurred in this matter and this court is thus at liberty to consider the issue of costs afresh.

[34] The court *a quo* with reference to a case in Swaziland reasoned that self-help by citizens should not be tolerated as this is a threat to an order based on law and that 'Courts have traditionally' awarded punitive cost order in such matters. Reference was also made to the frequency of spoliation applications which were indicative of a trend of people taking the law into their own hands and the effect this has on the administration of justice. It was further stated that the only way to stem self-help

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<sup>18</sup> *Ward v Sulzer* 1973 (3) SA 701 (A), *Rondalia Assurance Corporation of South Africa Ltd v Page & others* 1975 (1) SA 708 (A) and *Beinash v Wixley* 1997 (3) SA 721 (A).



which was referred to as a tide was to award punitive cost orders against those who resort thereto. A further consideration was that Fischer was a 'well read' man who should have known that he was 'venturing in very dangerous terrain' albeit on advice of his legal practitioner. The court *a quo* typified Fischer's behaviour as 'clearly an unlawful crusade'.

[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.<sup>19</sup> 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.

[36] It may be correct that one will encounter more punitive cost orders in spoliation proceedings if compared to other kinds of proceedings but this will usually be where the acts of spoliation were of such nature that the considerations mentioned by the

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<sup>19</sup> 27 *Lawsa* 2 ed para 86.

court *a quo* needed to take centre stage. The considerations of public policy not to allow self-help are indeed weighty and can in certain circumstances justify a special or punitive cost order. Similarly the fact that there seems to be a rise in spoliation applications to which the court *a quo* referred to as a tide is also a weighty consideration. The question is whether these considerations outweigh the other considerations in the present matter.

[37] The protagonists in this matter were both professional people. The relationship soured and became more rancorous as time passed. Whereas Seelenbinder had joint possession of the offices of FSA which he never relinquished, his reasons for holding on to such possession was probably more to harass and spite Fischer than for the benefit he was securing from such possession. He knew his retirement and the valuation of his membership had to be determined on a date in the past namely 31 March 2016. Yet he insisted on occupying the offices to 'keep oversight of his interest' and to continue working and using the facilities at the offices of the FSA and to also protect his reputation. He did not explain his reasons which have a hollow ring to them. There is no suggestion that Fischer would not have been able to adhere to the retirement judgment. In this manner he could still express his disapproval of the fact that he was given six months' notice to retire and hold him out as an active member of FSA for nearly two years after he had agreed to retire. Whereas he had established possession in a strictly legal sense, his refusal to vacate the office was churlish.

[38] Fischer did not act without seeking advice. He was assisted all along by his legal practitioners. The court *a quo* seems to have held this against him. Thus it is stated that as Fischer is a well-read man he should have realised he was venturing into very dangerous terrain and continued to state:

‘What is particularly disturbing in this matter, is that he appears to have acted on legal advice in doing what he did and this is unacceptable and should not be repeated.’

I am not sure what is intended by the sentence quoted above. Clearly it cannot mean that one should not act on legal advice. Indeed, as it stands it constitutes a further misdirection. How would lay persons, even well-read ones, vindicate their rights if they are not entitled to seek legal advice. In any event, the fact that Fischer acted on legal advice must surely be a factor in his favour when considering a punitive cost order. In fact where a person does not even bother to obtain legal advice and simply takes the law into his or her own hands would normally count against such person when it comes to a punitive cost order.

[39] The role of Fischer’s legal practitioners however does warrant comment. Seelenbinder’s legal practitioners cautioned Fischer’s legal practitioners that their advice would result in Fischer committing an unlawful act of spoliation. Instead of taking heed of this stance by Seelenbinder’s legal practitioners and advising Fischer to rather be safe than sorry and engage the normal legal routes to get Seelenbinder to vacate the offices they advised Fischer to simply lock out Seelenbinder. They must have realised their position was not as clear in law as they made out to Fischer. The manner in which Fischer’s legal practitioner conducted themselves is relevant as

being his agents, he is responsible for their actions. Unless it can safely be said that the nature of their advice was such that no reasonable legal practitioner would have given it (which was not submitted in this matter) it does not in my view detract from the fact that Fischer, at least, in his mind thought he adhered to the law and that this is a factor mitigating against the granting of a punitive cost order.

[40] The fact that the legal practitioners of the respective parties did not at all times act dispassionately but became personally involved in the dispute between the parties was commented on by the court *a quo* and probably also played a part in the matter not being resolved but ending up in a spoliation application. The court *a quo* under the heading 'Admonition' in its judgment had the following to say with regard to the conduct of the legal practitioners:

'86 Before drawing a curtain on this judgment, I find it imperative to comment on some ugly spectacles that played themselves out in the drafting of the papers and to some limited extent, in the heads of argument. Counsel appear to have engaged in some unwarranted verbal sparring, issuing jabs with some invective in some places in the process.

87 Counsel should always display punctilious courtesy towards colleagues, regardless of how hot and enraging the battle contours prove to be. Counsel should always avoid partaking in the dish of acrimony and resentment served by their clients. In this regard, counsel should remain robed in the court regalia and must avoid the temptation, beneath those robes, to be adorned in the shimmering robes of anguish and bitterness their clients are dressed in.

88 The courts, even in heated legal battles, expect counsel, as officers of the court, to provide a calming and sobering influence, separating themselves as wheat from the chaff that their clients throw into the equation. In this regard,

counsel should stay clear of the dizzying and emotional euphoria that seems to understandably seize the clients in moments of confrontation. If counsel heed this advice, they become useful both to their clients and the court. See *New Africa Dimensions CC v Prosecutor General*.<sup>20</sup>

I fully endorsed the comments made by the court *a quo* in this regard.

[41] Fischer thus at all times intended to act within the law. Had his legal practitioners not advised him to act as he did he would not have acted in that manner. The advice from his legal practitioner that Seelenbinder's position had changed subsequent to the retirement judgment and that he could change the locks to deprive Seelenbinder of the joint possession of the offices of FSA was persisted with in this court and has now turned out to be wrong. Must Fischer now be mulcted with a punitive cost order because he acted on legal advice all along?

[42] The nature of the act constituting the spoliation and the effect thereof on Seelenbinder cannot be described as devastating in any manner to Seelenbinder. There was no violence involved nor was he excluded from property vital to his profession and personal life and neither were there any serious negative effects on his life save, perhaps, a dent to his ego.

[43] In my view the circumstances of the matter thus did not justify a departure from the normal costs order. The nature of the spoliation coupled with the fact that the spoliation was committed on the advice of his legal practitioners and taking

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<sup>20</sup> (SA 22-2016) NASC para 51.

cognisance of Seelenbinder's dogged determination in insisting on his joint possession in the face of the order that he had retired as an active member nearly two years earlier distinguishes this from the cases of self-help (without seeking advice) where the person(s) despoiled are seriously and adversely affected. The public policy principle underlying the aversion to self-help thus does not play such important role in this matter where Fischer was assured by his legal practitioners that he would be acting within the law to block Seelenbinder's access to the offices of FSA. Furthermore, I do not read the comments as to the prevalence of spoliation applications to extend to self-help activities where this was sanctioned by a party's legal practitioner but to the classic cases where a person simply ignores the legalities and seeks to exercise a perceived possessory right without seeking advice or recourse in a court. In fact to simply refer to the increase in spoliation orders without distinguishing between those where self-help is resorted to without even attempting to adhere to the law and those where legal advice is sought and acted on is in itself a generalisation that is not apposite in the present context.

[44] In the result, this was a matter where the ordinary costs order would have been an appropriate order.

### Conclusion

[45] It follows from what is stated above that the appeal against the order that Fischer must restore the joint possession of the offices of FSA to Seelenbinder is bound to fail.

[46] It further follows from the discussion above relating to the costs order that the punitive cost order was wrongly granted and the normal costs order should have been granted. The appeal against the punitive cost order is thus successful.

[47] As far as the appeal is concerned it is partly successful. The appeal on the merits failed, but the appeal against the punitive cost order succeeded. The bulk of the heads of argument on both sides as well as the bulk of time on appeal focused on the appeal on the merits. In this regard the appellant was not successful. In my view the equitable order as to costs on appeal will be to make no order as to costs which will mean that each party will have to pay their own costs on appeal as they were both successful in part and unsuccessful in part.

[48] In the result the following order is made:

- (a) The appeal on the merits against the order that Seelenbinder's possession of the offices of Fischer Seelenbinder Associates CC be restored is dismissed.
- (b) The appeal against the punitive cost order is upheld and the cost order of the court *a quo* is set aside and substituted with the following cost order:

‘The first respondent (Wolfgang Hans Fischer) is to pay the costs of this application inclusive of the costs of one instructing and two instructed legal practitioners.’

- (c) There shall be no costs order in respect of the costs of this appeal.

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**FRANK AJA**

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**SHIVUTE CJ**

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**NKABINDE AJA**



## APPEARANCES

### APPELLANT:

T A Barnard

Instructed by Behrens & Pfeiffer,  
Windhoek

### FIRST RESPONDENT:

R Heathcote (with him S J Jacobs)

Instructed by Van der Merwe-Greeff  
Andima Inc., Windhoek

