NOT REPORTABLE

CASE NO.: A 332/2007

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

MAIN DIVISION

In the matter between:

NAMIBIA AIRPORTS COMPANY LIMITED **APPLICANT**

and

S E DUTY FREE TRADING (PTY) LTD **RESPONDENT**

CORAM: HOFF, J

Heard on: 17 December 2007

Delivered on: 19 December 2007

Reasons on: 12 April 2012

JUDGMENT

HOFF, J: [1] This Court on 19 December 2007 gave the following order:

1. That the respondent is ordered with immediate effect to vacate the premises comprising a duty free shop at the Hosea Kutako International Airport.

2. That the respondent is ordered to pay the costs of this application on an attorney-client scale.
3. That the counter-application is dismissed with costs.

[2] The following are the reasons for above-mentioned order.

[3] This is an urgent application in terms of which the applicant sought the eviction of the respondent from premises at Hosea Kutako International Airport (hereinafter referred to as the premises) comprising a duty free shop and an order that the respondent pay the costs of this application on a scale as between legal practitioner and client.

[4] The respondent in a counter application sought an order that respondent be permitted to continue to occupy the premises until this Court has given a ruling in respect of a review application, alternatively that the Court grants a provisional or final eviction order but suspends such order pending the ruling in the review application. (Case A 327/2007).

Point *in limine*

[5] A point *in limine* was raised by the respondent that the applicant has not proved ownership of the premises and has thus no *locus standi* to bring this application.

It was submitted on behalf of the respondent that the applicant should have proved ownership in its founding affidavit and that a certificate attached to the replying affidavit is of no assistance to applicant to prove ownership. The certificate in question attached to the replying affidavit is a certificate issued in terms of the provisions of section 14(3) of the Airports Company Act, Act 25 of 1998. (hereinafter referred to as the Act).

It is necessary in my view to read the provisions of section 14 (3) in context with the provisions of subsections (1), (2) and (4). Section 14(1) of the Act provides that the Minister responsible for Civil Aviation shall transfer to the Company (applicant) with effect from a date determined by the Minister by notice in the *Gazette* the aerodromes mentioned in the Schedule for the effective maintenance, management, control and operation of such aerodromes.

[6] Section 14(2) provides that notwithstanding any other law, the company (applicant) shall, with effect from the transfer date, be vested with the ownership of the aerodromes and other assets and rights and be charged with the liabilities and obligations transferred or assigned to it by virtue of subsection (1).

[7] Section 14(3) provides that a certificate issued by the Minister in which it is stated that any State land or a servitude or other real right or lease or any other asset or right described in such certificate has been transferred to the company in terms of subsection (1), shall be sufficient proof that the asset or right described vests in the company.

[8] Section 14(4) provides that upon submission of a certificate referred to in subsection (3) to the Registrar of Deeds, the Registrar shall make such entries in the relevant register, title deed or other document necessary to effect the transfer contemplated in that subsection in the name of the company.

[9] The applicant in its replying affidavit attached a copy of a Government Notice (No. 19 dated 5 February 1999) in which the aerodrome situated at Hosea Kutako International Airport was transferred to the applicant pursuant to the provisions of section 14(1) of the Act together with a certificate issued in terms of the provisions of section 14(3) of the Act stating

that the ownership of the aerodrome at Hosea Kutako International Airport, *inter alia*, vests in the Company (applicant).

[10] It was submitted on behalf of the respondent that the certificate in terms of section 14 (3) should have been attached to the founding affidavit deposed to on behalf of the applicant since an applicant must make out its case in its founding affidavit.

It was further submitted that the provisions of section 14(4) has not been complied with and therefore the transfer to the applicant has not been *effected* or has not been completed since on the strength of an affidavit of respondent's instructing attorney, there are no entries by the Registrar in any relevant register kept at the Deeds Registry which recorded the ownership of the applicant in respect of the premises.

[11] In reply to the submissions (*supra*) Mr Smuts who appeared on behalf of applicant referred the Court to the founding affidavit of the respondent in the review application which file was available at this hearing and was not attached to the founding affidavit in the present application to avoid duplication of annexures and an unduly burdening of this application. It was submitted firstly that the respondent under oath admitted ownership of the premises by the applicant and that it was for this reason the certificate in terms of section 14(3) (*supra)* had not been attached.

Respondent in its founding affidavit in the review application in paragraph 3 stated as follows:

> "The First Respondent is Namibia Airports Company Limited, a state owned enterprise established in terms of the Airports Company Act No. 25 of 1995 *"the Act"* with the object to develop and manage airports in Namibia on a sound business principle and is as such in control of Hosea Kutako International Airports and *acts as proprietor* of the Hosea Kutako International Airport facilities including the airport building and the premises let out by the first respondent to the applicant (hereinafter referred to as the *"duty free shop"*)."
>
> (Emphasis added).

The admission of ownership by the respondent of the premises was not denied by counsel appearing on behalf of respondent but she stressed that ownership of the premises was not proved by applicant in its founding affidavit.

[12] In my view as a matter of law and logic where the respondent has acknowledged ownership of the premises by the applicant this would obviate the need to prove ownership of the premises by the applicant since ownership of the premises is not disputed.

[13] In addition to the respondent's acknowledgement of ownership (*supra*) it is common cause that the respondent leased the premises from applicant for a period of about 10 years. The applicant in this application alleged ownership of the premises as follows in its founding affidavit:

> "As specified in section 4 of the Act, the object of the applicant is the acquisition, establishment, development, provisions, maintenance, management, control or operation of aerodromes relevant activities at such aerodromes … One such aerodrome is the principle international airport located outside Windhoek known as the Hosea Kutako International Airport. As is further set out in the Act, the applicant is the owner of the aerodromes including the Hosea Kutako International Airport, as is specified in the Schedule to the Act.
> This ownership includes the buildings located at and forming part of that airport."

[14] It was submitted on behalf of applicant that by operation of law (section 14(2)) applicant was vested with ownership of airports *inter alia* the Hosea Kutako International Airport and that lack of entries in the Deeds Office is not fatal in proving ownership.

[15] The fact that applicant alleged in its founding affidavit that it is the owner of the premises and the fact that respondent previously admitted such ownership (in the review

application) is in my view sufficient proof that applicant is the owner of the premises and the point *in limine* is dismissed.

Background

[16] The respondent was the lessee of the premises and operated a duty free shop at the Hosea Kutako International Airport in terms of a lease which was granted to it.
The lease came to an end on 30 November 2007. This lease has not been extended.
In anticipation of the expiration of the lease applicant during July 2007 invited tenders to lease the premises for a period of 5 years. Occupation of the premises by the successful tenderer was to commence on 1 December 2007.
The respondent submitted a tender but was not successful. The tender was awarded to a concern known as Paragon Investment Holdings (Pty) Ltd (hereinafter referred to as Paragon). There was also a third tenderer which was unsuccessful.
The respondent was informed on 26 September 2007 that its tender was unsuccessful.
The respondent set out its concerns for being unsuccessful in a letter dated 1 October 2007 and addressed to the applicant. Respondent complained that the tender procedure followed by applicant was unfair, unreasonable, in contravention of Aricle 18 of the Constitution of Namibia and stated that applicant acted *ultra vires* its own tender procedures.

[17] In a letter dated 8 October 2007 applicant denied the allegations and informed the respondent that it was unable to accede to the proposal that the allocation of the tender be reversed. On 9 October 2007 respondent demanded full reasons why the tender was not allocated to it. The applicant provided reasons in a letter dated 12 October 2007. The respondent was not satisfied and demanded further reasons. On 29 October 2007 applicant

provided the requested fuller reasons. No further correspondence was subsequently received from the respondent.

On 30 November 2007, the day respondent was required to vacate the premises, applicant received a letter (dated 29 November 2007) from the instructing attorneys of respondent part of which reads as follows:

> "… my clients' instructions are that we take on review your decision and the appropriate review proceedings will be served in due course. Pending the outcome of the review, my clients will continue to stay on the premises and will continue to pay the rent as reflected in your invoices."

[18] On the same day (Friday, 30 November 2007) the respondent's review application (dated 29 November 2007) was served upon the applicant.

[19] The applicant thereafter on Monday, 3 December 2007 approached its legal practitioner for an urgent consultation with counsel the next day. On 4 December 2007 applicant's legal representative addressed a letter to respondent's legal representatives informing him that respondent's occupation of the premises was unlawful and required respondent to vacate the premises by 21h00 on Thursday, 6 December 2007.

The deadline expired and the respondent remained in occupation of the premises. The present application was launched on 7 December 2007.

Urgency

[20] The applicant relies on two grounds establishing urgency.

Firstly, it was submitted that self-help and taking the law into one's own hands is in itself an inherent urgent matter. I agree with this submission. The refusal of the respondent to vacate

the premises in the absence of any legal justification amounts in my view to unlawful conduct.

[21] In *Ross v Ross* 1994 (1) SA 865 (SECLD) the court in considering an spoliation application referred to the work of Price, *The Possessory Remedies in Roman-Dutch Law* at p. 107 where the author remarked as follows:

> " … Indeed, there are many cases which seem to imply that the courts is even more interested in discouraging conduct conducive to a breach of the peace or calculated to bring the law into contempt or to undermine respect for orderly conduct than in assisting the disposed person, and that it will therefor not look too closely into the judicial nature of the possession alleged, provided that some reasonable or plausible claim can be maintained, together with an attempt by the respondent to "take the law into his own hands", in which case he will be required to restore the *status quo ante*".

[22] Reference is also made in *Ross (supra)* at 870 B to the writer *Van der Walt* (1984) *THRHR* 435 who goes so far as to conclude that the mandament van spolie is a remedy for protection of the *public order*, rather than a purely possessory remedy.

[23] The Court in *Ross (supra)* at 870 D emphasises that the question to the decided in a spoliation application was whether the relationship between the person deprived and the thing was such as to require protection in the interests of public order.

[24] The present application is analogous to a spoliation application.

[25] The second ground is that commercial considerations can justify urgent relief.
In *Channel Life Namibia Ltd v Finance in Education (Pty) Ltd and Others* Case No. (P) A 215/2004 delivered on 5 August 2004 (unreported) this Court referred with approval to the

case of *Twentieth Century Fax Film Corporation and Another v Antony Black Films (Pty) Ltd* 1982 (3) SA 582 where the Court said the following at 586 F – G:

> "In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6(12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicant's case was good and that the respondent was unlawfully infringing the applicant's copyright in the films in question." (See also *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (SE) at 213 E – F).

[26] The applicant in its founding affidavit sets out the circumstances of this commercial urgency. It stated that the successful tenderer's tender involves alterations and refurbishments to the premises which would take more than a month to complete and required immediate occupation of the premises to do so. Should the applicant not be able to provide vacant occupation of the premises to the successful tenderer within ten days those refurbishments may not be capable of being completed on time and the applicant would be severely prejudiced in that it would be held liable for damages sustained by the successful tenderer.

[27] The applicant stated that the successful tenderer, Paragon, is to pay a monthly rental of N$200 000.00 or 18% of turnover whichever is greater. The respondent's rental under its expired lease which came to an end on 30 November 2007 was N$111 236.30 or 8% of turnover, whichever was higher. This amount paid by the respondent to occupy the premises for December 2007 was returned to the respondent. If the commencement of the lease to Paragon is to be delayed, the applicant stands to sustain a considerable loss of revenue quite apart from its potential liability to Paragon. The applicant further stated it would not be afforded substantial redress at a hearing in due course since it had been informed that court

dates in the first term have already been allocated and the earliest an opposed application in the normal course can be heard would be in the second term which commences in mid May 2008.

[28] It was on the basis of these two grounds that I was of the view that the applicant could not have proceeded with this application in the normal course to obtain relief and condonation of the applicant's non-compliance with the Rules relating to service and filing was granted and allowed the application to be heard as one of urgency.

Merits

[29] There are virtually no factual disputes. It was common cause that the respondent occupied the premises. I also found that the applicant is the owner of the premises leased by the respondent as alleged by the applicant in its founding affidavit. The applicant further alleged in its founding affidavit that the respondent was the lessee of the premises and that the lease came to an end on 30 November 2007. The fact that the lease agreement has been terminated by effluction of time is not disputed by the respondent. It follows that the respondent's right to occupy the premises came to an end on 30 November 2007.

[30] In *Chetty v Naidoo* 1974 (3) SA 13 AD in considering a claim for ejectment the Court at 15 A held that one of the incidents of the legal concept of ownership is "*the right of exclusive possession of the res with the necessary corollary that the owner may claim its property wherever found, from whomsoever holding it*". It was further held that the owner, in instituting a *rei vindicatio*, need do no more than allege and prove that he is the owner and the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner e.g. a right to possession by virtue of a lease.

[31] The respondent did not allege that it had an existing right of lease to possess the property but alleged that the applicant would suffer no financial prejudice should it continue to occupy the premises against a monthly rental (in excess of what Paragon was obliged to pay in terms of the tender) pending the outcome of the review application.

[32] This however is no defence against the applicant's prayer for ejectment based on its ownership of the premises. In the circumstances I am of the view that the applicant is entitled to the relief sought in its notice of motion.

The counter application

[33] In a counter application the respondent prayed it be permitted to continue to occupy the premises at Hosea Kutako International Airport until this court has given a ruling on the Review Application (Case no. 327/2007);

Alternatively,

that if the court grants a provisional or final eviction order that such order be suspended pending a ruling by the court in respect of the pending Review Application (Case no. 327/2007).

[34] Mr S Kaulinge, on behalf of the respondent/applicant, in his founding affidavit stated that respondent (in the main application) has undertaken to pay the rental it has tendered for the period after the 30th of November 2007, so that there would be no loss of income arising to the applicant pending the outcome of the review proceeding and thus applicant cannot say

to suffer any prejudice whatsoever if the respondent is allowed to stay on in the premises until the review proceedings have been finally ruled upon by this court.

[35] He further stated that, viewed on an objective basis, respondent's tender was not only the highest amount tendered in respect of the rental but that respondent had 10 successful years of experience in managing the duty free shop.

[36] It was submitted that the review application has a good prospect of succeeding and the Court will probably set aside the applicant's tender decision. The respondent denied that it has no legal basis in law to continue to stay on the premises.

[37] Mr Smuts submitted that the counter application should be dismissed with costs on two grounds. Firstly the respondent/applicant approached this court with "dirty hands". Secondly, on the basis of non-joinder.

In respect of the first ground the legal principle *pacta sunt servanda* is applicable. The respondent/applicant approached this Court for certain relief whilst not honouring its agreement it had with the applicant (in the main application). The lease agreement having had expired on 30 November 2007 the respondent (in main application) did not vacate the premises but conveyed its intention to remain on the premises pending the outcome of the review proceedings.

[38] In *Fraind v Nothmann* 1991 (3) SA 837 (WLD) the court at 840 referred with approval to *Mulligan v Mulligan* 1925 WLD 164 where the following was stated at 167:

> "Before a person seeks to establish his rights in a Court of law he must approach the Court with clean hands. Where he himself, through his own conduct makes it

> impossible for the processes of the Court (whether criminal or civil) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interests."

[39] In *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President's Office and Others* 2004 (2) SA 602 (ZSC) the Court at 609 A –B remarked as follows:

> "Defiance of a court order does not involve dishonesty or moral obliquity yet litigants in defiance of court orders more often than not are denied relief by the court until they have purged their contempt. In my view, there is no difference in principle between a litigant who is in defiance of a court order and a litigant who is in defiance of the law. The Court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance has been purged."
> (See also *Tsabalala and Others v Minister of Health and Others* 1987 (1) SA 513 WLD 523 B – C; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 348 F – 349 B).

[40] The respondent (in main application) is in defiance of an agreement with the applicant (in main application) and cannot expect the relief prayed for as long as it remains in defiance. On this ground the counter application should be dismissed.

[41] In respect of the second ground it is common cause that Paragon and another unsuccessful tenderer where not cited in this counter application although they had been cited in the review application. Paragon and the other tenderer have direct and substantial interests in the relief sought in this counter application and should have been joined as necessary parties. Failure to join them renders the counter application defective and stands to be dismissed for this reason as well.

Costs

[42] The applicant being the successful party is entitled to costs. Applicant prayed for costs on attorney-client scale. Costs on this scale is not granted lightly but a court may having regard to special considerations arising from the circumstances which gave rise to an application or an action award costs on an attorney-client scale in order for a successful party not to be out of pocket in respect of the expense caused to him or her by the litigation.

The circumstances which gave rise to the applicant bringing this application was the improper conduct of the respondent to the extent that the respondent resorted to self-help. I am of the view that a special order is warranted against the respondent as a mark of disapproval of such conduct by this Court.

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HOFF, J

ON BEHALF OF THE APPLICANT: **ADV. SMUTS**

Instructed by: **ENGLING, STRITTER & PARTNERS**

ON BEHALF OF THE RESPONDENT: **ADV. SCHIMMING-CHASE**

Instructed by: **A VAATZ & PARTNERS**