

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 263/2014

In the matter between:

JOHANNES T NTUKO

APPLICANT

And

SAMUEL MBANGO

1ST RESPONDENT

OMUTHIYA TOWN COUNCIL

2ND RESPONDENT

Neutral citation: Ntuko v Omuthiya Town Council (A 263/2014) [2014] NAHCMD 322 (2 October 2014)

Coram: SMUTS, J

Heard: 2 October 2014

Delivered: 2 October 2014

Flynote: Spoliation application. Requisites restated. Applicant failing to establish possession. Application dismissed.

ORDER

That the application is dismissed with costs.

EX TEMPORE JUDGMENT

SMUTS, J

[1] This is a spoliation application brought by the applicant on an urgent basis to this court.

[2] The applicant seeks an order restoring possession of a number of items set out in paragraph C of the notice of motion which I do not intend to fully set out for current purposes. These items include fencing, building materials as well as bedding and clothes. The applicant also seeks an order directing the 2nd respondent to re-erect what is termed his house and to re-erect a perimeter fence and to restore the status *quo ante*, and that these orders should apply with immediate effect pending the outcome of the *rule nisi*. The application was launched on Friday 26 September 2014 and set down for Monday 29 September. When it was called, Ms Feris appeared for the respondents and sought time for them to be able to answer to the allegations. The respondents were then put on terms to do so by 1 October and the matter was set down for the next day, today.

[3] The respondents filed answering affidavits on 1 October and the applicant replied in the short time available to him.

[4] The applicant did not apply for further time to supplement that reply. Nor did he apply for a referral of the matter for evidence.

[5] Mr Namandje who appeared for the respondents submitted that a final order should be granted if the court were to find that the applicant had met the requisites for spoliation relief and that it would not thus serve any purpose to issue a *rule nisi* in the circumstances as the respondents had answered to the allegations.

[6] I now turn to the facts set out in the papers.

[7] The applicant is the headman for the Onaanda village in the area of Omuthiya. The 1st respondent is the Chief Executive Officer of the Omuthiya Town Council which is cited as the 2nd Respondent. It is the local authority for that area, duly constituted under the Local Authorities Act, 23 of 1992.

[8] The applicant's case is that he permanently occupies premises which comprise what he terms as "my house and property", referred to as his premises in his papers. He says that he has done so since his mother has passed away in 2013. He further states that he regards the house as his permanent residence. He states that on 19 September 2014, while he was away at work, the respondents demolished his house and removed the perimeter fence and took away the movable property contained in the structure (including its components) on those premises, as well as removing his water infrastructure. He further states that the respondents stole the property listed in the notice of motion and in his affidavit.

[9] As I have indicated, he stated that this happened on 19 September while he was away at work in Rundu. The respondents admit removing certain of the items but in far smaller quantities than those set out in notice of motion. They deny the removal of most of the movable property. The respondents however in

their answering affidavits squarely place in issue that the applicant was in peaceful and undisturbed possession of those items and the premises.

[10] In the answering affidavit, the respondents first give some background with reference to their dealings with the applicant. In setting out that background, the respondents state that the applicant erected a house on a different piece of land which also belongs to the local authority namely the Omuthiya Town Council.

[11] The respondents state that the applicant, having erected that house on the local authority property, the 2nd respondent decided to compensate the applicant in a sum exceeding N\$ 167 000 in 2012 for that structure and for him to remove it within a reasonable time. They state that he however continued staying there and residing at that house to date. In the replying affidavit it is stated that these allegations are irrelevant. It is of course correct that the title to be present on premises is irrelevant in spoliation proceedings and that it would be clearly irrelevant whether or not the applicant was occupying other land of the local authority where the local authority disputed his title to do so.

[12] What is however in my view highly relevant is the allegation that the applicant resided and stayed in that structure on that other piece of property. The applicant in his replying affidavit however denies residing there and went on to state

“It would appear that the respondents cannot positively state where I reside, because they also alleged that I permanently reside on plot 48 which is purportedly also the property of the 2nd respondent”.

(The reference to plot 48 concerned an allegation raised by the respondents that his mother had illegally occupied plot 48 and had erected a structure there which the applicant also occupied.) But in this statement, the applicant would appear to misapprehend the nature of the burden of proof in matters of this nature. It is not for the respondents to show where the applicant resides. It is

for the applicant to establish on a balance of probabilities peaceful and undisturbed possession of the property from which the applicant alleges he was spoliated. Ms Van Wyk for the applicant correctly accepted in argument that the applicant has the burden to establish the requisites of spoliation.

[13] The respondents further stated in their answering affidavit that photographs were taken of the premises before the removal of the structure. It was stated that this occurs as a matter of course before removals take place. The dates reflected on the photographs support that contention, because they are all dated 19 September 2014.

[14] The respondent's answering affidavit provides a description of the premises as a 'shack' and denies that the applicant permanently resided in it.

[15] The first respondent goes on to state:

'The shack was in the process of being built and was at all times unoccupied. The Applicant in fact moved into one of his late mother's houses after she had passed on and still resides there and sometimes at his alleged dwelling in respect of which he was compensated.

It is also evident from the photographs that the area in which he erected the illegal shack was just recently debushed. The bushes are still laying around and have not yet been removed.'

[16] The photographs support the description which the respondents give of the premises. It clearly looks like there has been recent excavation. The item referred to as a shack I would describe as a shed. Its natural floor inside is of the ground, where there is some grass. Mr Namandje, who appeared for the respondents, referred me to that grass. The grass itself on the colour photographs is green in colour. That would not be consistent with a structure having been there for some time, and on the applicant's version since the

previous year. The photographs also depict plastic on the ground on which cement is placed. There are also pieces of cut corrugated iron which Mr Namandje submitted with some force supported the contention of the erection of a recent structure. But what is compelling to me from the photographs is that there is simply no evidence whatsoever of any human habitation.

[17] In the replying affidavit, it is not disputed that the photographs depict the structure, but it is stated that they have been selected to support the respondent's version. It is not however stated in what respects they are either selective and do not properly depict what was there, except with reference to bedding and other items which the respondents deny removing.

[18] The applicant in paragraph 17 of the replying affidavit reiterates that he resided in the shack 'and most of the time when I was not present and when I was working away, my employees Martin and Shikongo occupied the premises'.

[19] He further states that, 'I admit that I was in the process of building a more permanent home on the premises'. But he denies that the structure was used to store building and fencing material.

[20] There is no statement by the applicant that the employees in question were in occupation at the time of the removal and that they did so on behalf of the applicant. There is on the other hand the unequivocal statement made by the respondents that the premises were entirely unoccupied. There were also no affidavits from these employees.

[21] I turn now to the test in matters of this nature and to the applicable legal principles. As was stressed recently in a judgement of this court with reference to authority in *Junias and Another –v- the Municipal Council of the Municipality of Windhoek* of 12 March 2014, this remedy is a possessory remedy to address spoliation which is the wrongful deprivation of the right to possession whether

with regard to movable or immovable property. In this instance the applicant only seeks a restoration of possession of movable property as I understand the notice of motion.

[22] The underlying rationale for the remedy as I also stressed during argument is that no one should resort to self-help or taking the law into their own hands to obtain or regain possession. Once an order is given, it is in the form of a final order which determines the right to immediate occupation once an applicant can establish the requisites for that relief, being peaceful and undisturbed possession and the wrongful deprivation of that possession.

[23] Now in these proceedings it has not been contested that there was a form of deprivation in the sense that some items had been removed. But what has been placed in issue throughout, as I have already stressed, is the element of possession which needs to be established. As both sides correctly accepted, the *causa* of possession is irrelevant in proceedings of this nature. Even an illegal occupant's possession is protected if that possession was peaceful and undisturbed. As I pointed out to Mr Namandje in argument, the authorities make it clear that it would be sufficient for an applicant to establish factually holding a thing, in other words the concept of *detentio*, with the intention of securing some benefit for himself. But what must be established is that, even though possession need not be physical or personal as Ms Van Wyk correctly submitted, it needs to be effective. That is what the authorities have clearly established. (The Law of South Africa, Volume 11 (2nd ed) at 438 and the authorities collected in footnotes 7, 8 and 9 on p438.)

[24] Turning to the facts of this case, the applicant has not in my opinion established that the shed or the structure was possessed to the exclusion of everyone else. This could have been established if it had been locked. But there is no allegation to that effect. Furthermore, the applicant himself was not there at the time the deprivation occurred. Nor were his employees. There is no

evidence of any *detentio* to the exclusion of others by locking or some way of preventing access or physical possession by others.

[25] There is also an unexplained aspect relating to the applicant's work and where in fact he works. The only allegation was that he was working in Rundu at the time this occurred. In view of the challenge to his possession and to residing there, I would have expected this issue to be further explained in reply.

[26] In applying the test in *Plascon Evans*¹ with regard to disputed facts in motion proceedings and having regard to the photographs of the area, and in the absence of any application to refer to oral evidence the respondent's version of the structure being unoccupied at the time of its removal is to be accepted. The photographs are also consistent with that version. Applying the test in *Plascon Evans*, it would follow that the applicant has in my view not established possession in the sense required by this remedy in the form of *detentio* to the exclusion of others.

[27] Whilst it is clearly not permissible for local authorities to take the law into their own hands by forcibly removing structures and especially those where there is human habitation without first obtaining a court order, I must also point out that the court cannot condone the illegal invasion or occupation of land belonging to local authorities, because the latter is equally inimical to rule of law which is at the very heart of the constitutional dispensation in this country.

[28] In all of these circumstances and applying the *Plascon Evans* test, I conclude that the applicant has not met the requisite of establishing peaceful and undisturbed possession for the purpose of spoliation. It would follow that the application should be dismissed.

¹Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

[29] The respondents seek costs. I see no reason why costs should not follow the event. The dismissal of this application is accompanied by a party and party cost order. I also note that Mr Namandje has on behalf of the respondents tendered the returned to the applicant against proof of ownership the items which are currently in possession of the respondents.

[30] It follows that the order which I make is:
The application is dismissed with costs.

D F Smuts
Judge

APPEARANCES

APPLICANTS: C Van Wyk
Instructed by Legal Assistance Centre

RESPONDENT: S Namandje
Instructed by Sisa Namandje & Co. Inc.