



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT (REASONS)

Case no: HC-MD-CIV-MIT-GEN-2017/00195

In the matter between:

MICHAEL DAVID MERORO

APPLICANT

And

HILIA MERORO

RESPONDENT

Neutral citation: *Meroro v Meroro* (HC-MD-CIV-MOT-GEN-2017/00195)
[2017] NAHCMD 185 (11 July 2017)

Coram: Bassingthwaighte AJ

Heard: 18 June 2017

Order delivered: 30 June 2017

Reasons released: 11 July 2017

Flynote: Rule 73 – Urgent application for prohibitory interdict and *mandament van spolie* – application opposed on the ground that applicant did not satisfy the requirement set out in rule 73(4)(b) – respondent denied that

applicant was in peaceful and undisturbed possession and that he was disturbed in any such possession – requirements for possession considered.

Summary: The applicant brought the application on an urgent basis seeking interim relief in the form of a *rule nisi*. When the matter became opposed, he moved for final relief. The applicant alleged that he is the bona fide possessor of 99 cattle held on Unit B of Farm Corsica where they roamed freely and that the respondent on 11 June 2017 disturbed him in his possession by detaining the cattle on farm Corsica in a camp. Respondent submitted that the applicant has failed to make out a case that he could not be afforded substantial redress in due course and that he thus failed to satisfy the requirements for urgency. Counsel for respondent argued that urgency should be determined on the basis of the *Plascon Evans* rule where there are disputes regarding the facts relied on for urgency. The applicant alleged that the animals will die in 7-9 days as there is no food in the camp in which they are detained. Respondent alleged that the animals have always been in the particular camp which has adequate grazing. On the merits, the respondent alleged that the applicant is not in possession of the cattle, that Ms Kaura on whose brand the cattle are registered, is the owner and possessor of the cattle. Applicant alleged that he exercised his possession through Ms Kaura who at all times acted as his agent. Respondent argued that an owner cannot act as an agent in respect of his own property on behalf of someone else.

Held: A spoliation application is by its very nature urgent – In considering urgency, the court must accept that the applicant is entitled to the relief sought. Court satisfied on the facts that the applicant has made out a case for urgency;

Held further: The applicant failed to prove that he was in possession of the cattle or any other part of the farm other than the camp in which they were locked by the respondent – Even if he was in possession of the cattle, respondent did not interfere in his possession of the cattle as he was not denied access to the cattle – Respondent's act of locking the cattle in the camp not dispossessing the applicant of the cattle nor does it interfere with the applicant's possession of the cattle – Applicant also failed to prove the requirements for a

final interdict - Application therefore dismissed.

ORDER

1. The non – compliance with the Rules of the High Court is hereby condoned and the matter is heard on an urgent basis.
 2. The application is hereby dismissed with costs, including the costs of two instructed legal practitioners.
 3. The reasons for the ruling will be released on 28/06/17.
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JUDGMENT (REASONS)

BASSINGTHWAIGHTE, AJ

- (a) I gave an order on 19 June 2017 in which I dismissed the application after I heard arguments on the matter. I undertook to provide reasons. These are my reasons.
- (b) The applicant brought an urgent application on less than one day's notice in which he sought the following relief:
- '1. That the application be heard on an urgent basis as is envisaged by Rule 73(3) and that the non-compliance with the Rules of the High Court be condoned;
 2. That a *rule nisi* be granted in terms whereof the respondent or any other interested parties are called upon to show cause, if any, on a date to be arranged with the Registrar of the above Honourable Court or as soon thereafter as this matter may be heard, why an Order in the following terms should not be granted:

- 2.1 That the respondent be ordered to forthwith desist from detaining the 99 cattle on farm Corsica (unit B of farm Corsica no 89, registration division M, in the district of Windhoek);
 - 2.2 Ordering the respondent to forthwith reinstate the status *quo ante* insofar as it relates the 99 cattle of farm Corsica, failing which the Deputy Sheriff for the district of Windhoek is authorized to forthwith cut the lock and remove the chain at the kraal where the cattle are detained and/or to do whatever is necessary to reinstate the status *quo ante*;
 - 2.3 Interdicting and restraining the respondent from in any way interfering with applicant's possession or any other rights in respect of the said cattle;
 - 2.4 Ordering the respondent to pay applicant's costs on an attorney and own client scale;
 - 2.5 Further and alternative relief.
3. The orders in terms of sub-paragraphs 2.1, 2.2 and 2.3 of this *rule nisi* shall serve as an interim interdict with immediate effect, pending the return date of the said *rule nisi*.
 4. Further and/or alternative relief.'
- (c) The applicant caused the application to be served on the respondent at about 20h30 on 15 June 2017 at No 89 Unit B, Farm Corsica. The application was received by a farm worker simply referred to as 'David' in the return of service. It was apparent that the application had not yet come to the attention of the respondent by the time that the matter was called at 09h00 on 16 June 2017 as there was no opposition from the respondent. In the founding affidavit, the applicant stated that the respondent resides at Erf 723 Potgieter Street, Pionierspark and sometimes

on Farm Corsica. I thus found it strange that the applicant, in light of this allegation, elected to have the application served on the farm which is about 180 kilometres from Windhoek without attempting to serve the papers in Windhoek. Attached to the application as one of the annexures was a letter from Sisa Namandje Inc addressed to the applicant's legal practitioners in which they confirmed that they act on behalf of the respondent and that any application brought against her would be opposed. This letter is dated 26 May 2017 and was written in response to a letter from the applicant's legal practitioner referring to the previous incident in which the cattle, which forms the subject matter of the application, were also closed/locked in a camp.

- (d) In light of the above, I enquired from Mrs Garbers - Kirsten who appeared on behalf of the applicant as to the reasons why the application was not served on the respondent at what appears to be her primary residence or at least on her legal representatives who had communicated to the applicant's legal representative as recently as 26 May 2017. Mrs Garbers - Kirsten indicated that they decided to serve the application on the farm because they previously effected service on her in the same manner on the farm. She could, however, not inform me whether any attempt was made to serve the application on the respondent at her address in Windhoek.
- (e) According to the applicant, the incident which gave rise to the urgent application happened on 11 June 2017. It took the applicant about 4 days since the incident to launch his urgent application, which he then brought on one day's notice without ensuring that it actually comes to the attention of the respondent despite being clearly able to do so. I was also not satisfied that the matter was so urgent that it should be heard in the absence of the respondent. In light of this, I ordered the applicant to serve the application on the respondent at her residence in Windhoek

and/or by serving the application on her legal representatives. The matter then stood down until 3 o'clock to enable the applicant to serve the application.

- (f) As suspected, once service was effected as ordered, the application became opposed. The matter was, however, only argued on 18 June 2017 at the request of the respondent who only received the full application shortly before 3 o'clock on 16 June 2017.
- (g) At the request of the respondent I heard the parties on the question of urgency first. Mr Namandje argued that the applicant failed to show that he would not have substantial redress in due course. In this regard Mr Namandje argued that when I consider the facts as alleged by the parties regarding urgency, I should apply the *Plascon-Evans* test as the applicant is in essence seeking final relief when it comes to that part of the relief. He argued that I must accept the respondent's version that the cattle have always been in the ninth camp in which they have adequate grazing. When the respondent locked the gate of the camp it was simply to stop them from moving to other camps after attempts by Mr Naikete (who looks after the cattle) and/or Ms Kaura to open the gate to move them to the other camps. Mr Namandje also argued that the applicant has not established that he is the possessor or owner and therefore he would not have *locus standi* to claim damages in due course and therefore he has not proved that he will suffer irreparable harm.
- (h) Mrs Garbers – Kirsten in response argued that the respondent has not said anything to challenge the urgency of the application save for bare denials. The applicant will suffer irreparable harm because all his animals would have died by the time this matter is heard, if only heard in due course. She also argued that the *locus* argument made by Mr Namandje actually supports the applicant's

case that he will not have adequate redress in due course. She argued with reference to what was said in the case of *Rehoboth Properties CC v The Permanent Secretary of National Planning Commission*¹ that an application for a *mandament van spolie* is inherently urgent its main objective being to preserve law and order and to prevent self-help. She also argued that the court must for purposes of urgency accept that the applicant is entitled to the relief he seeks.

- (i) After hearing submissions from both parties, I found for the applicant in this regard and condoned non-compliance with the rules and heard the matter on an urgent basis as contemplated in Rule 73(3). When considering the question of urgency, the court must accept that the applicant's case is a good one and that the respondent is infringing the applicant's rights.² It is trite that by its very nature, an application for a *mandament van spolie* is inherently urgent and that the overriding objective is to prevent self-help.³ For this reason I decided to hear the matter on an urgent basis.

- (j) The relief sought by the applicant is in the form of a prohibitory interdict (prayers 4.1.1 and 4.1.3 of the notice of motion) and a *mandament van spolie*. The applicant initially sought an interim order but after the respondent filed answering papers, the applicant sought final relief. The requirements for a final interdict are the following:

6.1 A clear right;

¹ *Rehoboth Properties CC v The Permanent Secretary of National Planning Commission* (HC-MD-CIV-MOT-GEN-2017/00090) [2017] NAHCMD 132 (3 May 2017), para 22 – 25.

² *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at par 19 – 22.

³ See *Rehoboth* matter supra.

- 6.2 An injury actually committed or reasonably apprehended; and
- 6.3 The absence of a similar or adequate protection by any other ordinary remedy.⁴

(k) As far as the requirements of a *mandament van spolie* are concerned, the applicant must demonstrate that he was in peaceful and undisturbed possession of the subject matter of the application and that he was unlawfully deprived of such possession.⁵

(l) If one has regard to the applicant's original notice of motion as well as the amended notice of motion it immediately becomes apparent that the subject matter of the application i.e. the thing(s) in respect of which possession is claimed by the applicant and which the applicant claimed was dispossessed through the alleged act of spoliation by the respondent are 99 cattle which applicant says were held on Unit B Farm Corsica. This is apparent from the fact that the applicant seeks an order that the respondent be ordered to desist from detaining the 99 cattle, reinstate the status *quo ante* insofar as it relates to the 99 cattle and that the respondent be interdicted and restrained from in any way interfering with the applicant's possession or any other rights in respect of the said cattle.

(m) In the amended notice of motion prayer 2.2 was amended to read as follows:

'Ordering the respondent to forthwith reinstate the status *ante quo* insofar as it relates (sic) the 99 cattle of Farm Corsica, failing which the deputy sheriff for the district of Windhoek is authorised to forthwith cut the lock and remove the chain at the kraal where the cattle are detained and/or to do whatever is necessary to reinstate the status

⁴ *Bahlsen v Nederloff and Another* 2006 (2) NR 416 (HC) at p 424 par 30.

⁵ *Oberholster v Wolfaardt and Others* 2010 (1) NR 293 (HC) at pp. 298-299 par 15.

quo ante.'

- (n) The amended notice of motion was filed after I pointed out to the applicant's counsel that the relief sought in paragraph 2.2 of the original notice of motion was not clear enough for purposes of execution. I granted the applicant leave to amend the wording of the prayer before serving the application on the respondent.
- (o) Wherever the applicant refers to his *bona fide* possession in his founding affidavit, he refers to his *bona fide* possession of the 99 cattle. The applicant states in his founding affidavit that his late father David Hosea Meroro acquired a 99-year lease in respect of Unit B Farm Corsica during April 2003. The applicant occupied the farm with his animals by virtue of a special power of attorney granted to him by his late father during 2003 and he remained in occupation of the farm in this manner after his father passed away until 2012 when he was incarcerated. It seems to be common cause that the applicant did at some point occupy part of the farm at least (the ninth camp) although the extent of his occupation and the basis upon which he occupied is disputed. However, I accept that he was in occupation at least until 2012.
- (p) In his founding affidavit, the applicant alleged that he transferred all his cattle onto his niece's brand when he was incarcerated in 2012. He states that he continued paying all expenses in respect of the cattle. According to the applicant Ms Kaura visits the farm once a month in order to check on the livestock and his employees and then reports to him. She did this on his behalf also during his incarceration. The applicant also alleged that his cattle roamed freely on the farm.
- (q) The applicant furthermore alleged that during January 2014 the respondent also brought livestock to the farm. He was then advised by his legal practitioner to stay away from the farm in

order to keep the peace between himself and the respondent. The cattle, which he says he is the *bona fide* possessor of, and his employees remained on the farm and his niece, Ms Kaura checked on the livestock and employees on his behalf.

(r) In his replying affidavit the applicant changed his version regarding the cattle. In reply he alleged that he sold all his cattle when he was incarcerated in 2012. He then gave the proceeds of the sale of the cattle to Ms Kaura with the instructions to purchase cattle which were to be registered on her brand. Why this was necessary if the cattle were bought with his money is not explained by the applicant. He admitted that Ms Kaura is the owner of the cattle but claimed that he remained the *bona fide* possessor of the cattle and its progeny and all other cattle born thereafter. The reason why he did not state the correct position regarding the cattle in the founding affidavit is not explained. These facts are not insignificant as they have a bearing on whether the applicant continued to remain in possession of the cattle or the farm after his incarceration which issue is in dispute.

(s) Regarding the issue of possession, the applicant alleged the following in his replying affidavit which basically sums up his position on the question of possession:

'I always exercised control over the cattle and kept the possession thereof, even when I was in prison during the years 2012 until 2014. I have always paid the salary of the employee, Mr Naikete who took care of the cattle on the farm and Ms Kaura used to visit me once a month in prison to give account of the situation of the cattle and I instructed her how to deal with them. After my release from prison in 2014, I refrained from visiting the farm on the instructions of my legal practitioner, but carried on exercising control over the animals via Ms Kaura and I stay the *bona fide* possessor of the animals as set out in my founding affidavit.'

(t) Although there are some references to occupation of the farm and

that the cattle roamed freely on the farm in both the founding and replying affidavits of the applicant, this seems to be a side issue. The applicant's case is that he had free and undisturbed possession of his cattle and that the respondent unlawfully interfered with his possession of the cattle. Mrs Garbers-Kirsten in argument also confirmed that the case is about the possession of the cattle which roamed freely on the farm and the detention thereof by the respondent.

(u) It is common cause between the parties that the respondent closed or locked the camp in which the cattle were. According to the applicant he was called on 11 June 2017 by Matthew Naikete who informed him that the respondent had once again detained his cattle. The respondent's counsel argued that this is inadmissible hearsay evidence and that the court should ignore it because Mr Naikete did not depose to a confirmatory affidavit. The applicant explained in his affidavit that Mr Naikete is the only permanent employee that looks after his cattle, the farm is 180 kilometres from Windhoek and for that reason his confirmatory affidavit could not be filed simultaneously with his founding affidavit. Even after the matter stood down to be heard on 18 June 2017, no confirmatory affidavit was filed. I thus agree with Mr Namandje that these allegations must be ignored. The applicant did not make the necessary allegations in the founding affidavit for me to exercise my discretion to admit the hearsay evidence on the basis that they are made in an urgent application.⁶ However, as it is common cause between the parties that the gate was locked, this is a non-issue.

(v) There were, however, further allegations in the relevant paragraph where the aforementioned allegations were made which Mr Namandje argued should also be ignored in so far as the applicant relies on information he received from Mr Naikete for

⁶ See *Mahamata v First National Bank* 1995 NR 199 at 203-204.

those further allegations. These are that the animals have no food in the camp, can only survive without food for 7 – 9 days, roamed freely on the farm where they had access to sufficient grazing. In response, Mrs Garbers – Kirsten stated that the applicant does not rely on information provided to him by Mr Naikete for the rest of the allegations in that paragraph and that these are based on the applicant's own knowledge. I deal with these allegations below.

- (w) This was the second time that the respondent had locked the cattle in the camp. The first time was on 13 May 2017. The applicant drove to the farm on 21 May 2017 and cut the chain. In his founding affidavit the applicant alleges that Mr Naikete informed him that the cattle were huddled into this camp on the first occasion (on 13 May 2017). Again this evidence constitutes hearsay evidence and I must ignore it especially in so far as it is said to support the contention by the applicant that his cattle roamed freely on the farm before this incident. The relevance of this aspect becomes clearer later.
- (x) The respondent denied that the applicant was in possession of the said cattle and that he is in occupation of the farm. In her answering affidavit the respondent alleges that she has been in possession of Unit B Farm Corsica since it was allocated to her husband. In 2009 she signed a lease with the Government and claims that she acquired exclusive possession through that lease. The farm has 9 fenced off camps and according to respondent she keeps her cattle on 8 of the camps whilst Ms Kaura's cattle are and have always been in the 9th camp since 2012 which occupation she always resisted. The respondent furthermore alleges that Ms Kaura is the registered owner and possessor of the 99 cattle and denies that the applicant owns or possesses the cattle.

- (y) The respondent explains that she locked the gate to the 9th camp when Ms Kaura and Mr Naikete tried to move the cattle from the 9th camp to a neighbouring camp. She did so instantly and only to ensure that the cattle stay in the 9th camp where they have always been. She denies that any dispossession took place as the cattle are in the 9th camp where they had always been grazing. She furthermore denies that the applicant has been in occupation of any part of the farm. The respondent furthermore states that the cattle has sufficient grazing in the 9th camp.
- (z) In his replying affidavit the applicant made some admissions which Mr Namandje argued were fatal to his case. Firstly, he admitted that he does not reside on the farm although he said so in his founding affidavit. He furthermore admitted that the farm is divided in 9 fenced-off camps, a fact which he did not mention in his founding affidavit. He also admitted that he was advised by his legal representative in 2014 when he was released from prison to not go to the farm in order to keep the peace.
- (aa) The applicant was also constrained to admit that Ms Kaura was the owner of the cattle that are currently on the farm and that he sold all his cattle which he had on the farm during 2012 when he was incarcerated. I say constrained because if applicant were to claim that he is in fact the owner of the cattle, he and/or Ms Kaura would have committed an offence in terms of section 16(c) read with section 17(1)(c) of the Stock Brand Act, Act 24 of 1995. This issue was raised by the respondent in her answering affidavit as it was not clear from the founding affidavit whether the applicant's case is that he is the owner and possessor of the cattle which possession he has been exercising through Ms Kaura since he was incarcerated or whether he is only the *bona fide* possessor and that Ms Kaura is the owner. He referred to the cattle as his cattle and also stated that he is in *bona fide* possession thereof. A court is not concerned with the nature of the

rights the applicant has in respect of the property which has been dispossessed when determining an application for a *mandament van spolie*.⁷ The purpose of the remedy is to restore the status *ante quo*. The question of who is in fact entitled to possess or own the property is irrelevant in these proceedings.⁸ However, Mr Namandje argued that if the applicant relies on ownership of the cattle as the basis for his possession, the court should not come to his assistance as it would result in the court giving effect to an illegal act. In light of the applicant's admission that Ms Kaura is in fact the owner of the cattle, I do not need to decide on this issue.

(bb) Ms Kaura did not file an affidavit in which she makes specific factual allegations. Both in respect of the founding and replying affidavits she simply deposed to a confirmatory affidavit confirming what the applicant said regarding her in his affidavits. She has thus only confirmed that:

27.1 applicant transferred his cattle onto her brand in 2012;

27.2 she visits the farm once a month to check on the applicant's livestock and employees;

27.3 She owns the 99 cattle as listed in a computer printout attached to the respondent's answering affidavit which she has kept on Unit B Farm Corsica since 2012;

27.4 a letter was handed to her during 2017 instructing her to remove the cattle from the farm;

27.5 respondent unilaterally refused to grant her as agent of the applicant, free and unfettered access to applicant's animals;

⁷ *China Harbour Engineering Co Ltd v Erongo Quarry and Civil Works (Pty) Ltd and Another* 2016 (4) NR 1078 (HC) at 1081 – 1082, par 8 – 9.

⁸ *China Harbour Engineering supra*.

27.6 applicant gave her money in 2012 and instructed her to purchase cattle which she registered on her brand; (This is of course contrary to what was said by applicant and confirmed by her in the founding papers);

27.7 she used to visit the applicant once a month in prison to give account of the situation of the cattle and he instructed her how to deal with them;

27.8 after applicant was released from prison applicant continued exercising control through her;

27.9 she was not aware of the respondent's lease agreement with Government.

(cc) It seems Ms Kaura simply confirmed whatever the applicant said about her and it seems she did so without reading the affidavit of the applicant. If she had read the affidavit she would have pointed out to him or the applicant's legal representative that he did not transfer cattle onto her brand in 2012 and that he in fact sold all his cattle at the time and gave her money to buy other cattle which she then took to the farm.

(dd) There are a number of facts in dispute which are relevant for determination of the issues in this case. In light of the fact that the applicant now seeks final relief, the approach in *Plascon-Evans* is applicable. The applicant's case must be determined on the facts alleged by the applicant that are not disputed by the respondent together with the facts asserted by the respondent insofar as any denial by the respondent raises a real or bona fide dispute of fact. It is only if I find that the respondent's version consists of bold or un-creditworthy denials or raises fictitious disputes of fact, is palpably implausible, farfetched and clearly untenable, that I would be justified in rejecting the respondent's

allegations on the papers.⁹

- (ee) Mr Namandje argued that applicant failed to meet the requirements for the *mandament van spolie* and the requirements for a final interdict.
- (ff) Possession consists of both an objective (*corpus, detentio*) and a subjective element (*animus*). As far as the objective element is concerned the applicant needs to show that he exercised physical control over the thing himself or through someone else who acted as his representative. A herdsman, for instance, can exercise control over cattle on behalf of the owner of the cattle.¹⁰
- (gg) Different degrees of control are required for different things and this depends on the nature, size and function of the object, whether possession of the particular thing is acquired by delivery or by occupation and whether acquisition or retention of possession is being considered.¹¹
- (hh) As far as the mental element is concerned, the applicant must prove that he has the appropriate mental attitude towards the thing. He must show that he has the will to possess the thing and that he exercises control over the thing for himself in the sense of wanting to secure some benefit for himself. The mental element of possession need also not be exercised personally but can be exercised vicariously through an employee or an agent.¹²

⁹*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D – G para 26; See also *Tjamuaha and Another v Master of the High Court and Others* 2016 (1) NR 186 (HC) at p 210 par 82.

¹⁰ Joubert *et al* . 1987. *The Law of South Africa* (Vol. 27). Durban: Butterworths' Publishers, p 68, para 75.

¹¹ Joubert *et al*, *supra*; see also *Nufesha Investments CC v Namibia Rights and Responsibilities Inc and Others* 2013 (3) NR 787(HC) at 791 – 794.

¹² Joubert *et al*, *supra*, at p 76, par 80.

- (ii) As the respondent put the applicant's possession in dispute, the applicant had to prove both elements of possession.
- (jj) As indicated above, the applicant's claim of possession is in respect of the 99 cattle, not the farm itself although there is mention of the cattle roaming freely on the farm. In so far as it can be argued, which Mrs Garbers – Kirsten did not argue on behalf of the applicant, that he actually was in possession of the farm and wanted to have possession of the farm restored to him, I also deal with that aspect.
- (kk) The applicant has not been in personal occupation of the farm since 2012 because he never returned to the farm since his incarceration. This was not because the respondent denied him access as he alleged but because he was advised to stay away. He, however, sold all his cattle in 2012. It is not clear when Ms Kaura took the new cattle to the farm or how much time passed between the cattle being sold and new cattle being bought. But the applicant may well at that stage have lost whatever possession he may have had of the farm and the cattle he sold. This would certainly be the case if I find that Ms Kaura is not only the owner but also the actual possessor of the cattle currently on the farm.
- (ll) Assuming for a moment that applicant is the possessor of the cattle, the applicant has not proven that he was in possession or occupation of the entire farm. No confirmatory affidavit was deposed to by Mr Naikete who, apart from Ms Kaura, is the only other person identified in the papers who could say whether the cattle roamed freely on the farm or were only kept in one camp since 2012. Where the applicant speaks of the cattle roaming freely, he states it as if these are facts within his personal knowledge. He does not say that this information was conveyed to him by Ms Kaura or Mr Naikete. In any event, neither of them

said this in any of the affidavits before the court. There is no way that the applicant could have personal knowledge of this fact as he has, on his own version, not been on the farm since his incarceration in 2012 except when he went to the farm recently on 21 May 2017. But on this occasion, the cattle were in one camp.

(mm) After considering the facts in accordance with the *Plascon-Evans* test set out above, I find that the applicant failed to discharge his onus of proving that he was in peaceful and undisturbed possession of the entire farm. At best, he can claim possession of the 9th camp if I find that he was in *bona fide* possession of the cattle as he claimed.

(nn) In 2012 when the applicant was incarcerated, he relinquished possession over the cattle which he had on Unit B Farm Corsica by selling them. He claims that he gave the proceeds of the sale of this cattle to Ms Kaura who then on his instructions purchased cattle which she placed on the farm. Ms Kaura is the owner of these cattle. She is also the one exercising physical control over the cattle. It is thus not surprising that the respondent considers Ms Kaura to be the possessor of the cattle because these facts actually suggest that Ms Kaura is not only the owner of the cattle but also the possessor. On the face of it, this seems to be the correct conclusion to be drawn from these facts.

(oo) Considering the peculiar circumstances alleged by applicant as a basis for saying that he had possession of the cattle, he should, in my view, have done a little more in the replying affidavit to prove possession when the respondent denied his possession. This would have been a simple matter of annexing proof that he is in fact the one who benefits from the cattle and that he is the one who pays Mr Naikete. It may have also helped the applicant to explain what he means when he says he is the *bona fide* possessor. In cases where a person claims to

exercise his possession through others, they allege facts which clarifies the relationship. In this case, applicant says the owner of the cattle, who has physical control over the cattle does so on his behalf. This does not seem plausible in the absence of proof that the applicant is the one who pays for the expenses in respect of the cattle or is actually benefiting from the cattle. Also, considering the nature of the relationship created by an agreement of agency, I do not think that an owner of a thing can act as an agent, in the manner alleged, on behalf of another.

(pp) If the applicant was the owner of the cattle (despite them being registered on Ms Kaura's brand) and his case was that Ms Kaura and Mr Naikete are his employees or representatives, it would have been more plausible but he was very adamant that he is merely the *bona fide* possessor. I am also not convinced otherwise by the fact that Ms Kaura has confirmed certain allegations made by the applicant. She has confirmed contradictory versions on crucial aspects without explaining that contradiction.

(qq) Applying the approach as set out in *Plascon-Evans* I find that Ms Kaura is in fact the possessor of the cattle not the applicant.

(rr) Even if I am wrong, the applicant has failed to prove that the respondent has interfered in any possession "or any other right" he may have in respect of the cattle. I must accept the respondent's version that the cattle in question were always in the 9th camp and were not roaming freely. The camps are fenced off and based on what has been said, must have gates and this must limit free movement of any of the cattle. The respondent also has cattle on the farm and it is thus more probable that movement of the cattle would be more controlled rather than free as alleged by the applicant.

- (ss) The only person who could have given contrary evidence in this regard is Mr Naikete who was the one who specifically looked after the cattle. He did not depose to any affidavit. The applicant on his own version had not been on the farm since 2012 until he went there in May 2017. Ms Kaura who may have such knowledge also did not confirm this fact. The applicant's version in this regard can therefore not be accepted.
- (tt) Furthermore, I can also not accept that the respondent's actions denied the applicant and Ms Kaura access to the cattle. She states that she simply locked the gate of the camp in which they had always been. In fact, when the parties appeared on Friday, 16 June 2017 after the respondent had opposed the application, Ms Shilongo, who appeared on her behalf then, stated quite emphatically that neither applicant nor Ms Kaura has ever been denied access to the cattle and, based on an undertaking by the respondent through her legal representative, I made an order that the applicant be granted free access to the cattle in the 9th camp. The applicant made a bold allegation in his founding affidavit that he and Ms Kaura were denied free and unfettered access without any facts to substantiate the allegation. There was not even any mention of an attempt to access the cattle which was stopped by the respondent. In light of these facts, I cannot find that there has been any dispossession of the cattle.
- (uu) Not much needs to be said regarding the interdictory relief sought by the applicant as that relief in fact depended on the applicant proving that he has was in possession of the cattle and that he had some other right in respect of the cattle. The applicant did not only ask for an interdict prohibiting the respondent from interfering with his possession, he also wanted an order restraining the applicant from interfering with 'any other right in respect of the cattle'. No such other rights have been

established. Having failed to prove that he was in possession and that there was interference with his possession in the cattle, the applicant cannot succeed in respect of the interdictory relief sought. In any event, there is no proof of irreparable harm that he will suffer.

(vv) Applicant alleged that there is no food in the camp. As evidence he attached 2 photos to his replying affidavit. Mr Namandje objected to the photographs because the applicant did not say who took the photos, he does not describe where the photos were taken and it seems the photos are taken of one small part of the camp. One cannot even see all the cattle. The camp itself is not described in terms of size. In the Notice of Motion, the applicant refers to a kraal which according to Mr Namandje is not the same thing as a camp. Since the farm is divided into 9 fenced off camps, it is doubtful that they can be compared to a kraal taking into account the size of the farm itself, 1004.4610 hectares. That means, if the camps are divided in equal sizes, each camp would be about 111.607 hectares which will be about one hectare per head of cattle.

(ww) The respondent was adamant that there is grazing in the camp, which is more probable than what the applicant has stated. The least the applicant could have done was to describe the camp in which the cattle have been detained in a bit more detail. Even if the grazing is not sufficient, the applicant does not say that he cannot afford to feed the animals in any other manner. He does not tell the court that he has no other place to take the cattle in the meantime where there may be sufficient grazing. These are all reasonable actions applicant could take to prevent irreparable harm.

(xx) In light of the above, I am of the view that the applicant has also failed to satisfy the requirements for the final interdict he

sought.

N BASSINGTHWAIGHTE
Judge

APPEARANCES

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RESPONDENT:

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