

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

<p>Case Title: Namibian Aviation Services CC Applicant</p> <p>v</p> <p>Brian David Roos Trading as BD Roos Properties 1st Respondent Municipal Council Of Windhoek 2nd Respondent Comav (Pty) Ltd 3rd Respondent</p>	<p>Case No: HC-MD-CIV-MOT-GEN-2021/00124</p> <p>Division of Court: HIGH COURT (MAIN DIVISION)</p>
<p>Heard before: Honourable Lady Justice Rakow, J</p>	<p>Date of hearing: 30 April 2021</p> <p>Date of order: 12 May 2021</p> <p>Reasons Delivered: 17 May 2021</p>
<p>Neutral citation: <i>Namibian Aviation Services CC v Roos</i> (HC-MD-CIV-MOT-GEN-2021/00124) [2021] NAHCMD 235 (12 May 2021)</p>	
<p>IT IS HEREBY ORDERED THAT:</p> <ol style="list-style-type: none">1. The Court condoned the applicant's non-compliance with the forms and service as provided for by Rule 73(3) of the Rules of this Honourable Court and this matter was heard as one of urgency.	

2. The first and second respondents are directed to immediately and *ante omnia* re-connect and restore to the applicant the peaceful and undisturbed use and possession of its electricity supply at its business premises situate at 12 Aviation Road, Eros Airport, Windhoek, Republic of Namibia.
3. The first respondent to pay the costs of this application to the applicant, such costs to include the costs of one instructing and one instructed counsel.

Reasons for orders:

Introduction

[1] The applicant approached the court on an urgent basis seeking the following relief:

'(1) Condoning the applicant's non-compliance with the forms and service as provided for by Rule 73(3) of the Rules of this Honourable Court and directing that this matter be heard as one of urgency.

(2) Ordering and directing the first and second respondent to immediately and *ante omnia* re-connect and restore to the applicant the peaceful and undisturbed use and possession of its water and electricity supply at its business premises situate at 12 Aviation Road, Eros Airport, Windhoek, Republic of Namibia.

(3) Ordering any respondent opposing this application to pay the costs of this application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

(4) Granting the application such further and/or alternative relief as this Honourable Court may deem fit.'

[2] The respondents are Brian David Roos Trading as BD Roos properties, who opposed the urgent application, The Municipal Council of Windhoek, who did not oppose the application, and Comav (pty) Ltd who did not oppose the application but filed an affidavit setting out their current position.

Background

[3] The applicant entered into a written lease agreement with BD Roos properties represented by Brian David Roos on 20 May 2009. In terms of the lease agreement, the applicant was to lease a business premise, a hanger, at Aviation Road, Eros Airport. The applicant has occupied the said premises since and in terms of the lease agreement the responsibility for payment of water and electricity consumption rests with the applicant

who would typically be provided by the first respondent, with a monthly tax invoice for rental, water, and electricity consumption. Since October 2020 the applicant has not received a tax invoice from the first respondent. The relationship between the applicant and the first respondent deteriorated to such an extent that the first respondent issued summons against the applicant in December 2020 under case HC-MD-CIV-ACT-CON-2020/05178 where-in it asks for the cancellation of the lease agreement and arrear rental. This matter has in the meantime become finalized and the plaintiff's claim dismissed.

[4] In July 2020 technicians of the second respondent visited the applicant's leased premises and informed them that the applicant's water and electricity supply was suspended due to non-payment of the municipal account by the first respondent. The notice handed to the applicant was addressed to COMAV (Pty) Ltd. Upon inquiry from the offices of the first respondent, they were informed that the municipal account was kept in the name of COMAV (Pty) (Ltd) as they were the previous occupier of the leased premises before 2009 and that the first respondent is the owner of the said business. To keep the electricity supply connected the applicant made a payment of N\$27 756.21 directly to the second defendant and thereafter in September, November, and December 2020 after a visit from technicians of the second defendant. The applicant paid various amounts on 25/8/2020, 24/9/2020, 9/11/2020, 18/12/2020, and 15/3/2020 and these payments were made directly to the second defendant.

[5] On 22 March 2021 employees of the second defendant again suspended water and electricity supply to the applicant's business premises. The employee of the applicant was then informed on 23 March 2021, when attending to the premises of the second defendant, that the municipal account in the name of COMAV was closed by the first respondent and that they could not re-connect it again. The second respondent also refused to open a new municipal account in the name of the applicant. The legal practitioners for the applicant then raised the issue with the legal practitioners of the first respondent on 29 March 2021. The water connectivity was somehow restored but the electricity connectivity has not been restored and the applicant is currently renting a generator at N\$1092,50 per day.

[6] The application was opposed by the first respondent in that there was no basis for urgency set out on the papers of the applicant as they still have access to water and have

secured an alternative electricity supply. He explained that he in the past had occupiers arrange for their payment to the second defendant but has stopped to do so due to the arrear accounts getting above N\$60 000 and it ultimately becomes a big loss to an owner of leased premises.

[7] This application was filed on 8 April 2021 and the matter was initially before the court on 16 April 2021 where-after the court gave directions regarding the filing of further papers and heads of argument. The first respondent requested the court to make an order that security for costs is payable, which application was heard first and dismissed by the court and the matter was eventually argued on 30 April 2021.

Arguments by the parties.

[8] The applicant argues that a mandament van spolie relates to the applicant's peaceful and undisturbed possession of its electricity supply. To be successful with a spoliation application, an applicant needs to meet two requirements, being that the applicant was in peaceful undisturbed possession of the property and unlawful deprivation of the said possession.¹ The leased business premises were made available for occupation by the applicants and as such the water and electricity supply formed part of the said leased premises and is material for the conduct of the business of the applicant. It is further argued that in principle water supply is capable of protection by way of spoliation proceedings – see *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*.²

[9] It was further argued that the first respondent does not deny the spoliation and as there are only two elements to the mandament van spolie, the possession and the deprivation thereof, both these were met and therefore met the requirements for the said order. The first respondent took the law into his own hands and did not wait for the outcome under case HC-MD-CIV-ACT-CON-2020/05178 when he went to close the municipal account directly at the municipality.

[10] On behalf of the first respondent, it was argued that the applicant was supposed to make payments to the first respondent in terms of their agreement although they cannot stop the applicant to make payments directly to the second respondent. The payments

¹ *New Era Investments (Pty) Ltd v Ferusa Capital Financing Partners CC* 2018 JDR 1202 (NmS) at [37].

² *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A).

made by the applicant were only made after the employees of the second defendant came to switch off the water and electricity supply. They further argue that the owner of the property carries the burden of any outstanding municipal accounts and cannot transfer any such property without the account having been paid up to date in terms of the Local Authorities Act, No 23 of 1992.

[11] There is no machinery available for the first respondent to mitigate his losses and he, therefore, made up his mind to mitigate the said by closing the account, and to hold under such circumstances that the owner is taking the law into his own hands, is incorrect. The first respondent further argues that the applicant is conducting business as a flight training center and aircraft maintenance facility and both these businesses are being conducted under different names and further, the Aircraft Maintenance Organization Approval certificate is issued in the name of Trio Aviation Namibia CC and as such the applicant is contravening section 54(2)(c) and 233 of the Namibia Civil Aviation Act, 6 of 2016.

Spoliation

[12] It has been held that 'the essence of the mandament van spolie is the restoration, before all else, of unlawfully deprived possession to the possessor. The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. The main purpose of the relief is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process'.³

[13] The purpose of a spoliation application was further set out in the Supreme Court in *Kock t/a Ndhovu Safari Lodge v Walter t/a Mahangu Safari Lodge*⁴ and *Others* as follows:

'The remedy has found recognition in the modern Namibian common law (*Ruch v Van As* 1996 NR 345 (HC)) and it is trite that it is available to protect possession. (*Kuiiri and Another v Kandjoze and Others* 2007 (2) NR 749 (HC); [1] *Nino Bonino v De Lange* 1906 TS 120; *Nienaber v Stuckey* 1946 AD 1049; *Yeko v Qana* 1973 (4) SA 735 (A); *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W).) What gives rise to the controversy is the nature and ambit of the remedy. What is clear is that since it is a possessory remedy, it serves as a counter against spoliation. (*Silberberg and Schoeman The Law of Property* 5 ed at 287.) Its purpose is to provide robust and speedy relief where spoliation has occurred to restore the status quo ante because, as stated by Van Blerk JA in *Yeko v Qana* supra, of 'the fundamental

³ *Ngqukumba v Minister of Safety & Security & Others* 2014 (5) SA 112 (CC) para 10.

⁴ *Kock t/a Ndhovu Safari Lodge v Walter t/a Mahangu Safari Lodge* 2011 (1) NR 10 (SC).

principle . . . that no one is allowed to take the law into his own hands' and no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable'.

[14] Langa AJA then proceeded and quoted Zulman J in *Shoprite Checkers Ltd v Pangbourne Properties (supra)*:

'It is trite that the purpose of the mandament van spolie is to protect possession without having first to embark upon an enquiry, for example, into the question of the ownership of the person dispossessed. Possession is an important juristic fact because it has legal consequences, one of which is that the party dispossessed is afforded the remedy of the mandament van spolie.'

[15] Paker AJ in *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia*⁵, stated as follows about mandament van spolie and what applicant for a spoliation order should establish to succeed:

'It is trite that an applicant for a spoliation order must first and foremost establish that he or she was in peaceful and undisturbed possession of the thing in question at the time he or she was illicitly deprived of such possession. That is all that an applicant must establish to succeed. (*Kuiiri and Another v Kandjoze and Others 2007 (2) NR 747 (HC) para 9.*) And such possession is not merely 'possession' simpliciter: it is 'peaceful and undisturbed possession'. (*Kuiiri loc cit, applying a dictum in Mbangi and Others v Dobsonville City Council 1991 (2) (SA) 330 (W) at 335H-I.*)'

[16] In *Scholtz v Faifer*⁶ Innes CJ said the following about the type of possession:

' Here the possession which must be proved is not possession in the ordinary sense of the term – that is, possession by a man who holds pro domino, and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner . . . But to this natural possession, as to all possession, two elements are essential, one physical, and the other mental. First there must be the physical control or occupation – the detentio of the thing; and there must be the animus possidendi – the intention of holding and exercising that possession.'

[17] Hefer JA in the locus classicus in this regard, *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*⁷ where he stated that possession and spoliation of the alleged right must be proved. In the case of a servitude, possession lies in the use of the

⁵ *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia* 2016 (2) NR 547 (HC).

⁶ *Scholtz v Faifer* 1910 TS 243 at 246-7.

⁷ *Supra*.

servitude over some time and that this replaces the physical possession of a corporeal. It concerns the exercise of actions that are usually associated with the particular rights.

[18] It was explained in *Shoprite Checkers Ltd v Pangbourne Properties Ltd*⁸ in the following way: '[T]he status quo that the spoliatus desired to restore by means of the mandament van spolie was the factual exercise of the servitude and not the servitude itself' and also in *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another*⁹: 'Although it might appear illogical that the servitude does not have to be proved, it is the status quo which has to be restored by the mandament van spolie until it is determined whether the servitude indeed exists...'

Application of the law on the current facts

[19] In spoliation matters, the court is only interested in whether the two elements, whether the applicant was in peaceful undisturbed possession of the property and unlawful deprivation of the said possession took place when the electricity supply was suspended. In this instance, the court took into account that the applicant was in peaceful and undisturbed possession of access to an electricity supply as from 2009 when the applicant and the first respondent entered into an agreement, similar to the case law discussed above regarding servitudes.

[20] On the question of whether such possession was unlawfully deprived by the actions of the first and second respondent, the court concludes that the first respondent had no lawful reason to close its account with the Municipality of Windhoek, which in turn resulted in the Municipality of Windhoek disconnecting access to the electricity supply for the applicant. There was a case pending before this court and the first respondent should have waited for that matter to be finalized before taking the law into his own hands. In any event, that matter is now finalized and as such, the applicants were successful as the claim was dismissed, even further strengthening their argument that the first respondent took matters into his own hands.

[21] The court further notes that the electricity connection was not interrupted because of an action by the second defendant because the account was in arrears but simply

⁸ *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (WLD) at 620D. See also *Xsinet (Pty) Ltd v Telkom SA* 2002 (3) SA 629 (CPD) at 637 E-G.

⁹ *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 (3) SA 254 (N) par. 44.

because the account held with them was closed by the first defendant.

[22] The court further took into account that by its nature, mandament van spolie applications are urgent and should be dealt with as soon as possible, and therefore find that the application indeed meets the requirements for urgency simply because a case was made out for fast relief in that the applicant is entitled to have his access to an electricity connection restored as soon as possible.

[23] I therefore make the following orders:

1. The Court condoned the applicant's non-compliance with the forms and service as provided for by Rule 73(3) of the Rules of this Honourable Court this matter was heard as one of urgency.
2. The first and second respondents are directed to immediately and *ante omnia* re-connect and restore to the applicant the peaceful and undisturbed use and possession of its electricity supply at its business premises situate at 12 Aviation Road, Eros Airport, Windhoek, Republic of Namibia.
3. The first respondent to pay the costs of this application to the applicant, such costs to include the costs of one instructing and one instructed counsel.

Judge's signature	Note to the parties:
E Rakow Judge	Not applicable.
Counsel:	
Applicants	Respondent
Adv A Small Instructed by Theunissen, Louw & Partners Windhoek	Mr H Stolze Instructed by Masiza Law Chambers Windhoek