REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00048

In the matter between:

JJF INVESTMENT CC	**APPLICANT**

and

HELGAARDT MOUTON	**1ST RESPONDENT**
ROBBEN W DORTSKY	**2ND RESPONDENT**
RIVIC CONSULTANCY CC	**3RD RESPONDENT**
PETRUS HOFFMANN	**4TH RESPONDENT**
HARDAP REGIONAL COUNCIL	**5TH RESPONDENT**
DUNAMIS CONSULTING ENGINEERS	**6TH RESPONDENT**

and

Case no: HC-MD-CIV-MOT-GEN-2017/00049

JJF INVESTMENT CC	**APPLICANT**

and

HELGAARDT MOUTON	**1ST RESPONDENT**
ROBBEN W DORTSKY	**2ND RESPONDENT**
RIVIC CONSULTANCY CC	**3RD RESPONDENT**
PETRUS HOFFMANN	**4TH RESPONDENT**

NAMIBIAN-GERMAN SPECIAL INITIATIVE PROGRAMME 5TH RESPONDENT
LITHON PROJECT CONSULTANTS 6TH RESPONDENT

Neutral citation: *JJF Investment CC v Mouton* (HC-MD-CIV-MOT-GEN-2017/00048) [2017] NAHCMD 109 (5 April 2017)

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Coram: ANGULA DJP
Heard: **21 February 2017**
Delivered: **5 April 2017**

Flynote: Applications and Motions – Spoliation – In order the applicant must prove on a balance of probabilities that he or she was I peaceful and undisturbed possession of the property; and that he or she was deprived unlawfully of such possession.

Summary: The applicant was sub-contracted by the respondents to carry out construction works on two separate site situated at Hoachanas, in the Hardap Region – A dispute arose between the parties regarding alleged non-performance by the applicant on the one hand and alleged outstanding payments by the respondents owed to the applicant by the respondent on the other hand – The respondents the terminated the contract and took occupation of the sites due to the alleged non-performance and further that the applicant had vacated the sites leaving behind its equipment and materials – In an application for a spoliation order, the applicant disputed that it vacated the sites furthermore that the non-performance was due to the respondents' failure to pay money due to the applicant in terms of the payment certificates – The applicant contended that it was in peaceful and undisturbed possession of the sites and that it was unlawfully dispossessed of such possession by the respondents.

ORDER

1. The applicant's non-compliance with the forms and service provided by the Rules of this court in both applications, to wit Case No.: HC-MD-CIV-MOT-GEN-2017/00048 and Case No.: HC-MD-CIV-MOT-GEN-2017/00049 are hereby condoned and the two applications are heard as one of urgency.

2. The first, second and third respondents are ordered to forthwith, in any event not later than 1 April 2017, restore *ante omnia* to the applicant, possession of the construction site described in the parties' papers as "**LOT 1 G"** and referred to in in this case as Site 1, situated at Hoachanas in the Hardap Region, as well as the construction site concerning the construction of a sewer referred in this case as Site 2, also situated at Hoachanas in the Hardap Region, together with the goods and equipment, listed below, situated or stored on the said two construction sites:

   2.1 The goods and equipment which are on Site 1 are as follows:

   Sand; gravel; (one hundred and ten) bags of cement, (two) concrete mixers, (one) plate compactor; (one) vibrator; (one) generator; (one) broken-down tipper truck; various loose building tools, scaffoldings, fillings, (fifteen) manhole covers and15 PVC pipes.

   2.2 The goods and equipment on Site 2 are as follows:

   Sand, gravel; (one hundred and ten) bags of cement; two concrete mixers, (one) plate compactor; (one) vibrator; (one) generator; (one) broken-down tipper truck; various loose building tools; scaffolding; fillings; and (fifteen) manhole covers.

3. Should the first, second and third respondents fail to comply with order 2 above, the Deputy Sheriff for the district of Mariental is hereby ordered and authorized

to do everything possible within the law to restore possession of the said construction sites, goods and equipment to the applicant.

4. The first, second and third respondents are ordered to pay the applicant's costs, such costs to include the costs of one instructing and one instructed counsel.

5. The matter is considered as finalised and is accordingly removed from the roll.

JUDGMENT

ANGULA DJP:

Introduction

[1] This Court is once again faced with yet another spoliation application. *Mandament van spolie* applications have become so common and frequent in this court, despite the rationale behind the remedy, that no person should be allowed to take the law into his or her own hands, and that conducts in breach of the peace should be discouraged. It has often been stressed by this court that when people commit acts of spoliation by taking the law into their own hands, they must not be disappointed if they find that courts of law take a serious view of their conduct.

[2] That having been said, I now turn to the task at hand. I have before me two applications which have both been lodged on an urgent basis. The two matters essentially seek the same relief, which is a spoliation order, and have been brought by the same applicant. There are six respondents in each application. The first, second, third, and four respondents in both applications are the same. It is only the fifth and sixth respondents who are different in the two applications. In one application the fifth and sixth respondents are Hardap Regional Council and Dunamis Consulting Engineers, respectively. In the other application the fifth and sixth respondents are Namibia-German Special Initiative Programme and Lithon

Projects Consultant, respectively. In both applications no orders are sought against the fifth and sixth respondents.

[3] In both applications the applicant seeks orders restoring to its possession two constructions sites which the applicant alleges it has been unlawfully dispossessed by the first, second and third respondents. Incidentally, both construction sites are situated at Hoachanas Settlement in the Hardap Region. For reasons not explained in the papers, instead of filing one application, the applicant filed two separate applications, one in respect of each construction site. The applicant was sub-contracted by the third respondent to carry out constructions works on the two sites. The contracts in respect of the two sites were not awarded on the same date. The site in respect of application No. 00049 was awarded first. And the site in respect of case No. 00048 was awarded last. When the applications were issued by the Registrar they were not issued in the sequence of awarding the contracts; in other words the sequence was swapped, resulting in the application where the first contract was awarded being allocated case number 00049 and the application where last contract was awarded being allocated case number 00048. Needless to say, that it is obvious that the Registrar would not have known the sequence in which the two contracts were awarded is significant. I deem it necessary to point this out, which might at first glance appear to the reader to be rather a small matter, but events or facts relating how the dispute arose, follow the sequence in which the contracts were awarded.

[4] First, Second and Third Respondents ("the respondents") opposed the application. The answering affidavits in both applications have been deposed to by the second respondent, Mr Robben Drotsky. Mr Boesak appeared for the applicant and Ms Katjipuka-Sibolile appeared for the respondents. Both counsel filed heads of argument.

Background

[5] By letter dated 9 March 2016 from the fourth respondent to the third respondent, the third respondent was awarded a tender by the Namibian-German Special Initiative Programme. The National Planning Commission (NPC) oversaw

the implementation of the Programme. On 14 March 2016 the second respondent and the NPC entered into an agreement for the construction of what is described as "LOT 1G". Thereafter on 10 May 2016 the third respondent sub-contracted the applicant "to *supply and install, labour and materials as instructed by the Bill of Quantities for the finishing of all existing works at Hoachanas on LOT 1G.* For the sake of convenience I will refer to this contract as "Site 1"- being case number HC-MD-CIV-MOT-GEN-2017/00049.

[6] On 18 May 2016 the third respondent was again awarded another tender by the Hardap Regional Council, for the provision of civil engineering services concerning a sewer also situated at Hoachanas Settlement. The third respondent once again sub-contracted the applicant to supply materials and labour and to execute the works as required in the Bill of Quantities for the project. For the sake of convenience, I will refer to this contract as "Site 2" – being case HC-MD-CIV-MOT-GEN-2017/00048.

Applicant's case in respect of Site 1

[7] It is the applicant's case in respect of Site 1 that since 10 May 2016 it has been in peaceful and undisturbed possession of the construction site situated at LOT 1G ("the construction site") where it kept all the construction materials, equipment and equipment products and other stockpile; that since then applicant has been conducting construction works at the construction site; that for that purpose, it employed a number of staff members who performed the work. The applicant says further that the operation required the use of equipment and materials including, amongst others, machinery, trucks, other plant and generators which it brought onto the construction site in order to execute the works. Such equipment and goods are listed in the notice of motion. The applicant went on to say that the construction work was on-going at all relevant times until the time when the respondents interfered and unlawfully deprived the applicant of possession of the construction, site including equipment and materials which are on the construction site.

[8] Regarding the dispossession, the applicant states that that on 9 January 2017 the applicant's employee, a certain Mr Jod was informed by the applicant's foreman,

one Petrus Hoffman (the fourth respondent) that they were no longer working for the applicant but instead they were then working for the third respondent. Thereafter Mr Jod went to the construction site in order to verify whether the information which he had received was correct. When he arrived at the construction site he found the workers busy putting up a house where they would be staying. He instructed them to stop what they were busy with. He then locked the water tap, the gate of the site where most of the materials were stored and another third place. In support of this allegation Mr Jod annexed to his affidavit three photographs marked "**JJF2**". The photos were apparently taken by the Station Commander of Hoachanas Settlement, one Warrant Officer Otneil Gowaseb. The latter filed a confirmatory affidavit. The first photo depicts a gate with a chain linking together two steel poles. The two ends of the chain are joined together with a padlock. The second photo shows a water tap head covered with a steel cover and a padlock hanging from the steel cover. The third photo shows what appears to be a gate with a locked padlock.

[9] Mr Jod continues to say that on the same date, being 9 January 2017, the second and fourth respondents arrived at the construction site. They found one of the applicant's employees, Mr Andy Ricardo Balzar, and Warrant Officer Gowaseb at the construction site. The second respondent then informed them that he would take responsibility for breaking the lock on the gate in order to gain access to the construction site. On the following day, being 10 January 2017, the second respondent broke the lock at the gate and informed Mr Balzar that he had broken the lock on the instructions of the fourth respondent. Mr Balzar filed a confirmatory affidavit. In support of these allegations, Mr Jod referred to the confirmatory affidavits of both Mr Balzar and Warrant Officer Gowaseb.

[10] Following the actions of the second respondent as described in the preceding paragraph, Mr Jod then instructed Mr Balzar to open a criminal case at the Police Station against the second respondent, of trespassing and malicious damage to property. In this respect here Mr Jod attached a copy of his statements which he made to the police which formed the basis for laying the said charges.

The first, second and third respondents' opposition to the application in respect of Site 1.

[11] The respondents' opposing affidavit has been deposed to by Mr Robben Drotsky, the second respondent. He confirms that the applicant was sub-contracted to do the work. He further confirms that in terms of the contract the applicant was required to have his own equipment and to supply its own employees and for taking responsibility for all the material on site. He further confirms that the applicant took occupation of the building site. Mr Drotsky continues to say that it transpired during the execution of the work that the applicant was not in a position to do the work satisfactorily. Mr Drotsky states further that during October 2016 the contract was terminated; however, at a meeting held on 19 October 2016, it was agreed between the parties that the applicant would continue to do the work, subject to certain conditions. Mr Drotsky continues to say that on 2 November 2016 the contract was finally terminated due to non-performance by the applicant.

[12] According to Mr Drotsky, by the time the contract was terminated on 2 November 2016, the applicant had already vacated the construction site even though he left his employee, Mr Jod on site, together with equipment and material. Mr Drotsky states further that by that time the third respondent had also taken over the employment of the applicant's former employees, including the foreman, Mr Hoffman. According Mr Drotsky. the applicant was not in possession of the construction site on 2 November 2016 when the contract was terminated.

[13] Mr Drotsky states further that on 9 January 2017, completely out of the blue, Mr Jod for the applicant arrived at the construction site and locked the site with equipment and materials inside the site. Mr Drotsky continued to state that after the contract was terminated the applicant was requested to vacate the site, taking along his equipment and material with him, and that the applicant had chosen to leave the equipment and material on site.

[14] Mr Drotsky further admits that on 10 January 2017 he went to the site accompanied by Warrant Officer Gowaseb and removed the locks Mr Jod for the applicant had put on the construction site; that while on site Mr Balzar for the applicant, arrived at the site after he, Mr Drotsky, had removed the locks. Mr Balzar then removed the locks which Mr Drotsky had just put on and replaced them with

new locks. Mr Drotsky again, for the second time, removed the locks that Mr Balzar had put on. According to Mr Drotsky, it was the applicant who on 9 and 10 January 2017 unlawfully interfered with the respondents' peaceful and undisturbed possession of the construction site and equipment thereon.

[15] It is Mr Drotsky's contention that it was impermissible for the applicant to return to the site almost three months after the contract with the applicant had been terminated for the sole purpose of obstructing the respondents in their work. Mr Drotsky goes on to say that he is aware that Mr Balzar has opened a criminal case against him for trespassing and malicious damage to property. He, however, contends that he, being the main contractor and having been awarded the tender for the construction, remains responsible for the site and everything on it. Accordingly the respondents could not have trespassed on their own site.

[16] Regarding the issue of urgency, Mr Drotsky denies that the matter is urgent; alternatively, that if it is urgent, the urgency is self-created. In this respect Mr Drotsky points out that the contract was terminated on 2 November 2016; that on 17 October 2016 the applicant threatened to approach this court on urgent basis should the third respondent not reinstate the contract, and that this threat was again repeated on 9 November 2016; that the third respondent confirmed to the applicant in writing on 18 November 2016 that he persisted with the termination of the contract; that the applicant did nothing until 9 and 10 January 2017 when the applicant's Mr Balzar sought to lock the construction site; that after that event it took another month for the applicant to lodge this application. Finally, Mr Drotsky points out that none of these delays have been explained in the applicant's papers.

[17] Accordingly, the respondents deny that the applicant has made out a case for the relief sought and therefore ask that the application be dismissed with costs.

The applicant's case in respect of the Site 2

[18] The facts with respect to Site 2 are more or less the same as the facts relating to Site 1. With respect to this site, the applicant states that it has been in possession of the construction site since 20 June 2016.

[19] According to the applicant, on 17 January 2017, following the respondents' unlawful dispossession of the applicant from Site 1 on 9 and 10 January 2017, Mr Jod was informed by his employee, Mr. Balzar that the respondents had brought an excavator to the construction site in order to dig trenches on the site. Furthermore, that the respondents had used the applicant's materials on site, such as sand, gravel and bags of cement, to do the construction works on the site over which the applicant had full responsibility. It is the applicant's case that at that stage, the work on the construction the site had already been in progress and materials and equipment had been stored and stockpiled on the construction site by the applicant for the purposes of completion of the project. Accordingly, the applicant contends that the respondents has unlawfully deprived the applicant of its peaceful and undisturbed possession of the construction site, together with its goods and equipment on site.

The, first, second and third respondents' opposition to the applicant's application in respect of Site 2.

[20] As mentioned before, Mr Drotsky, the second respondent, deposed to the respondents' opposing affidavit in respect of the application regarding Site 2. He confirmed that the applicant was sub-contracted by the third respondent to execute the works at this site; that the in terms of the contract, he was required to provide his own equipment and material and further for taking responsibility for all material on site. Mr Drotsky states further that by October 2016, the applicant was not performing according to the schedule and was consequently afforded an opportunity to show the necessary progress by 25 November 2016, failing which the contract would be terminated.

[21] According to Mr Drotsky, due to the lack of improvement in progress on the project, the contract was formally terminated by a letter on 5 December 2016, through the second respondent's legal representatives. He states that the applicant did not respond to the termination letter. As a result of the absence of a response from the applicant, the respondents had assumed that the matter was closed and

continued with the project with a view to meeting the deadline imposed by the project's clients, who expected a site handover on 10 March 2017.

The applicant's reply

[22] In reply, the applicant denies having received the alleged termination letter from the respondents' legal representatives. In this respect the applicant refers to the meeting held with the respondents at the site on 08 December 2016 and maintained that at that date the applicant was still in peaceful and undisturbed possession of the construction site.

[23] The applicant further reiterates that it never vacated the site and that the only time that it left the site was the during the period 16 December 2016 until 09 January 2017, which is the builders' holiday period. Regarding the issue of performance, applicant admits that it did not perform as expected, because of non-payment of its payment certificates by the second respondent. Applicant further contends that it did not accept respondents' unilateral termination of the contract; that that the alleged termination of the contract is in any event irrelevant to the unlawful dispossession of the construction site by the respondents.

Applicable legal principles

[24] I think s is fair to say that the principles governing the remedy of spoliation are by now well settled. I therefore do not intend to dwell on them in detail except where necessary to support the conclusion or findings I have to make.

Urgency

[25] As has been observed, the respondents contend that the matter is not urgent; that if it is urgent the urgency is self-created, and finally that the applicant took about a month to bring its application and that the delay is not explained. It is generally accepted that an application for spoliation relief is by its very nature urgent[1].The remedy's main objective is to preserve law and order and to prevent or discourage

[1]*Oceans 102 Investments CC v Strauss Group Construction CC & Another* (A 119/2016) [2016] NAHCMD 139 (10 May 2016) at para 16.

self-help. It has been held that for the purpose of deciding urgency, the court's approach is that it must be accepted that the applicants' case is a good one and that the respondent has unlawfully infringed upon the applicant's right[2]. In my view, in order to achieve the objective of the remedy and in pursuit of upholding the rule of law, allowance should be made in deserving cases not to stringently and strictly demand compliance with the letters of the two requirements of Rule 73. As it will later appear from the facts of this matter, I am of the view that this is one such few deserving cases.

[26] I agree with the respondents' criticism of the applicant's lack of narrative as to what steps were taken by the applicant between 17 January 2017, when the last alleged acts of spoliation took place, and 13 February 2017 when this application was filed. It has however been held when considering urgency, the court should also take into consideration reasonable steps preceding the launching of an urgent application including considering and taking advice, attempts to negotiate a settlement, obtaining copies of relevant documents and obtaining and preparing affidavits and that allowance should also be made for differences in skill and ability between practitioners practising as attorneys and advocates[3].

[27] Taking into account what has been said in the Three Musketeers *supra* the court notes that the event which gave rise to the application took place at Mariental about 200 km from Windhoek; that all three deponents to the applicant's founding affidavits reside at Mariental, whereas the office of the legal practitioner for the applicant is situated in Windhoek. It is fair to expect that a considerable amount of logistical arrangements were involved for the deponents to travel from Mariental to Windhoek for consultation. Further logistics must have also been involved to have the affidavits commissioned. In this regard it appears from the two main supporting affidavits that they were commissioned in Windhoek on 10 February 2017. The confirmatory affidavit of Warrant Officer Gowaseb was equally commissioned on the same day being 10 February 2017 but at Hoachanas Police Station. The affidavit by Warrant Officer Gowaseb must have then been thereafter couriered or brought to Windhoek to be ready for filing on 13 February 2017.

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[2] *Shetu Trading CC v The Chairman of the Tender Board of Namibia* Case A352/2010 delivered on 22 June 2011.
[3] *The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing and Others* Case No A 298/2006 delivered on 30 November 2006.

[28] With regard to the skill differences between legal practitioners, it is fair to say that, having regard to the quality of drafting of the founding papers in this matter, it is clear that this was a challenge to the legal practitioner who initially drafted the papers. Advocate Boesak, who appeared at the hearing of this matter, was at pains to stress that he was not involved in the drafting of the initial papers. In this connection there is a notable difference between the quality of the initial papers and the applicant's papers subsequent filed. Mr Boesak's drafting skill is discernible.

[29] Regarding the alleged delay of one month as contended by the respondents, this approach is based on the so-called 'delay rule', where the respondent calculates each day from which the incident which gave rise to the application being brought, took place, up to the day when the application is launched. Calculating the days which went by, it is then contended that there has been undue delay because so many days went by. It has been pointed out in the matter of *ShetuTrading v The Chair of the Tender Board for Namibia* that there is no such thing as the 'delay rule' in our law as far as urgency is concerned. Based on the objective facts of this matter I am of the view that there has not been culpable remissness on the part of the applicant in launching this application.

[30] In the exercise of my discretion and taking all the factors outlined above into account, I am of the firm view that the matter is urgent.

The merits considered

[31] In order to succeed with a spoliation application, the applicant must establish that he or she was in peaceful and undisturbed possession of the property or the thing in question at the time when he or she was unlawfully deprived possession of such property or thing[4]. Ueitele J in the matter of *Wylie v Villinger*[5] summarised the meaning of peaceful and undisturbed as follows:

[4]*Mbangi and others v Dobonsville City Council* 1991 (2) SA 330 (W) at 335H-I applied in *Kuiiri and Another v Kandjoze and Others* 2007 (2) NR 749, at para 9; see also *Mpasi v Kudumo* (A 235/2015) [2015] NAHCMD 252 (22 October 2015).
[5](A 42/2012) [2012] NAHCMD 69 (13 February 2013)

‘[17] In *Ness and Another v Greef*[6] the court considered the meaning of the phrase ‘peaceful and undisturbed’, Vivier, J who delivered judgment of the full bench said:

> “By the words "peaceful and undisturbed" is probably meant sufficiently stable or durable possession for the law to take cognizance of it.” ’

[32] It is common cause that in both contracts, the applicant was subcontracted by the second respondent to supply equipment, materials and to employ its own staff in order to carry out the construction works on the Sites. It is not in dispute that the applicant took possession of Site 1 on 10 May 2016 and Site 2 on 20 June 2016 respectively. It is also common cause that in terms of the contract the applicant was required to supply own equipment and a material and that the applicant did in fact bring such equipment and material on both sites. It is also not in dispute that the equipment and materials were on the sites when the dispute which gave rise to this application arose. Subject to what happened later, it would appear thus from the foregoing undisputed facts that the applicant had complied with the first requirement of the remedy of spoliation.

[33] It is the applicant’s case that at all material times it has been in peaceful and undisturbed possession of the two sites until it was unlawfully dispossessed of such possession by the respondents in respect of Site 1 on 9 and 10 January 2017 and in respect of Site 2 on 17 January 2017.

[34] On the other hand, it is the respondents’ case in both applications that both contracts between them and the applicant in respect of both sites were terminated due to non-performance on the apart of the applicant. And therefore from the date of the termination of each contract the applicant no longer had the right to be in possession of either site. Furthermore, even before the contracts were terminated the applicant had already vacated the sites, but most definitely after the contract was terminated; hence they took possession of the site.

[35] I thought it appropriate and convenient to consider the two sites separately.

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[6] 1985 (4) SA 641 (C) at 647

Site 1

[36] The difficulty with the respondents' contention is that they do not say exactly when they took possession of Site 1. According to the respondents, the contract was terminated through an email from the first respondent on 2 November 2016. In response to the aforesaid email the applicant, through its legal representative, wrote a letter on 9 November 2016 addressed to the respondents' legal representatives, advising that it still wished to finalise the works. In response to the letter of 9 November 2016 the respondents' legal representative wrote a letter to the applicant on 18 November 2016 wherein *inter alia* a demand was made to the applicant to vacate the site not later than 25 November 2016. In my view, what is to be deduced from the foregoing is that the applicant did not vacate the site immediately after the termination of the contract on 2 November 2016, as contended by the respondents. The applicant remained in possession of the site. This conclusion is reinforced by the respondents' self-admitted demand to the applicant to vacate not later than 25 November 2016. The obvious question which comes to mind is: if the applicant had already vacated the site after the letter of 2 November 2016, as contended by the respondents, why would the respondents instruct their legal representatives on 18 November 2016 to demand that the applicant vacate the site not later than 25 November 2016. In my view the obvious answer is that it was because the applicant was still in possession of the site by the 18 November 2016, latest by 25 November 2016. It is significant to note that the respondents do not say what steps, if any, they took to evict the applicant from the site. In my view, in the absence of any explanation by the respondents as to what steps were taken to evict the applicant, the only reasonable inference to be drawn is that the applicant remained in possession of the site.

[37] The second respondent's case appears to be premised on the notion that after the notice of termination was given, that in itself entitled them to simply move onto the site. In my view that approach, from the legal perspective, is incorrect. Firstly, the termination was contested by the applicant. Secondly, on respondents' own admission, the applicant's equipment and materials were still on site, which in my view signified the applicants continued possession of the site. I am of the further view that the applicant's possession of the site was sufficiently stable or durable

given the fact that the applicant's equipment and materials were on site. The leaving of the equipment and material on site further demonstrate the applicant's *animus possidendi* - the intention to exercise possession. Under those circumstances, the respondents were required by the law to obtain an eviction order against the applicant. Taking into account the facts as set out above, the conclusion I have arrived at is that the conduct of the respondents amounts to a spoliation.

[38] It is further trite law that possession is not lost through temporary absence from the place or loss of possession of a thing. It is the applicant's case that the period 16 December 2016 to 9 January 2107 was a builders' holidays and that that was the only time when there was nobody on site. The respondents admit that the construction work ceased for holiday during that period. It would appear to me therefore that the respondents cannot legitimately claim that the applicant had vacated the site simply because the site was not occupied during the holiday period. In any event, as I held in the preceding paragraph, the applicant had the necessary *animus possidendi* demonstrated by the fact that it left its equipment and materials on site.

[39] I have already, earlier in this judgment, mentioned that the respondents do not say exactly when they took possession of the site. In the light of the foregoing, it therefore follows, in my view, that should the respondents' case be that they took possession of the site during the during the applicant's short absence from the site, such possession would equally amount equally to a spoliation.

[40] Lastly, before I conclude with the respondents' contention that the applicant vacated or abandoned the site, it would appear to be common cause between the parties that there was a dispute about the payment owed in respect of work done. The applicant alleges that it could it not execute the woks because there were unpaid interim payment certificates. The respondents, on the other hand, in their legal representative's letter of 18 November 2017 disputed the applicant claims of non-payment. Given such a dispute and having regard to well-known practice in the construction or building industry that a builder will never abandon the construction site until he is paid, I consider it highly improbable that the applicant would have abandoned or vacated the site without the dispute of payment having been resolved.

Holding to the site was his strongest bargaining chip to ensure that he was paid the money he claimed was owed to him by the respondents. I therefore find that the respondents' version that the applicant had abandoned the site improbable, and stands to be rejected. I therefore do so reject the respondents' version on this point as a matter of fact.

[41] The respondents' state that on 9 January 2017 the applicant, out of the blue, came to the site and locked the site and the equipment on site. In my view this statement cannot be correct. The applicant did not 'come out of the blue' as contended by the respondents. According to Mr Jod for the applicant, he was informed by, *inter alia,* his foreman Mr Hoffman (the fourth respondent) that the respondents were working on the construction site. It should also be noted that 9 January was the first day of the commencement of the construction works after the builders' holiday. The respondents contend that the applicant acted unlawfully in depriving them from accessing the site. I have already found that it was the respondents who in the first instance committed a spoliation by taking possession of the site without first obtaining an eviction order, and that appears to have happened during the short absence of the applicant from the site.

[42] It is common cause that Mr Balzar for the applicant twice placed locks on the gate of the site. It is also not in dispute that the second respondent in the presence of Mr Balzar and Warrant Officer Gowaseb, twice broke, removed and replaced the locks at the gate in order to get access to the construction site, thereby effectively taking the law into his own hands. What is disconcerting about the conduct of the second respondent is that he committed such acts in the presence of a high-ranking law enforcement officer. In my view it demonstrated his total disregard of both the authority and the law. Even if the second respondent thought that the applicant, through Mr Balzar, acted unlawfully, he was required by the law not to remove the locks but only to do so after he had obtained a court order authorising him to do so.

[43] Coupled to the respondents' forcible and unlawful deprivation of the applicant's peaceful and undisturbed possession of the site, is the fact that the respondents also unlawfully deprived the applicant of possession and control of its equipment and materials which were on site. The respondents, in fact, admit that

they proceeded to utilise some of the applicant's materials without the applicant's consent. It might appear to be a side issue, but in the context of the second respondent's conduct, such conduct is a further clear manifestation of the respondents' 'self-help' mentality which fits in with their instances of spoliation conduct.

[44] In the light of the foregoing I have arrived at the conclusion that the applicant has established on the balance of probabilities that it was in peaceful and undisturbed possession of Site 1 and was unlawfully dispossessed of such possession between 09 and 10 January 2017 by the respondents, and further that the applicant is entitled to an order restoring it to such possession *ante omnia*.

Site 2

[45] Regarding this site I have already mentioned that it is common cause that the applicant took possession the Site 2 on 20 June 2016. The applicant's case is that it was in peaceful and undisturbed possession of this site until 17 January 2017, when the respondent brought an excavator to the construction site in order to dig trenches on the site. The respondents' attitude is that they had terminated the contract on 5 December 2016. The respondents contend that that by 17 January 2017 when the excavator was brought on site, the contract with the applicant had already been terminated. The applicant denies having received the letter of termination of the contract or that the contract had been terminated.

[46] When I dealt with Site 1, I have already dealt with the respondents' attitude regarding the consequence of termination of the contract, namely a mere termination of contract does not entitle the respondents to simply move onto the site while the applicant was still in possession of the site. I pointed out that the respondents were required to obtain an eviction order against the applicant. I have also already rejected the respondents' contention, as improbable, that the applicant would have vacated or abandoned the site while he was owed money by the respondents and also while leaving his valuable equipment and material abandoned on site.

[47] In short, and in order to avoid unnecessary repetition, I think it would suffice to say that, my findings with respect Site 1, apply with equal force to Site 2.

[48] In respect of Site 2 I have also arrived at the conclusion that the applicant has established on the balance of probabilities that it was in peaceful and undisturbed possession of the said site and that it was unlawfully dispossessed of such possession between on17 January 2017 by the respondents, and further that the applicant is entitled to an order restoring it to such possession *ante omnia*.

[49] In the result I make the following order:

1. The applicant's non-compliance with the forms and service provided by the Rules of this court in both applications, to wit Case No.: HC-MD-CIV-MOT-GEN-2017/00048 and Case No.: HC-MD-CIV-MOT-GEN-2017/00049 are hereby condoned and the two applications are heard as one of urgency.

2. The first, second and third respondents are ordered to forthwith, in any event not later than 1 April 2017, restore *ante omnia* to the applicant, possession of the construction site described in the parties' papers as "**LOT 1 G"** and referred to in in this case as Site 1, situated at Hoachanas in the Hardap Region, as well as the construction site concerning the construction of a sewer referred in this case as Site 2, also situated at Hoachanas in the Hardap Region, together with the goods and equipment, listed below, situated or stored on the said two construction sites:

   2.1 The goods and equipment which are on Site 1 are as follows:

   Sand; gravel; (one hundred and ten) bags of cement, (two) concrete mixers, (one) plate compactor; (one) vibrator; (one) generator; (one) broken-down tipper truck; various loose building tools, scaffoldings, fillings, (fifteen) manhole covers and15 PVC pipes.

2.2 The goods and equipment on Site 2 are as follows:

Sand, gravel; (one hundred and ten) bags of cement; two concrete mixers, (one) plate compactor; (one) vibrator; (one) generator; (one) broken-down tipper truck; various loose building tools; scaffolding; fillings; and (fifteen) manhole covers.

3. Should the first, second and third respondents fail to comply with order 2 above, the Deputy Sheriff for the district of Mariental is hereby ordered and authorized to do everything possible within the law to restore possession of the said construction sites, goods and equipment to the applicant.

4. The first, second and third respondents are ordered to pay the applicant's costs, such costs to include the costs of one instructing and one instructed counsel.

5. The matter is considered as finalised and is accordingly removed from the roll.

H Angula

Deputy-Judge President

APPEARANCES

APPLICANT:	A Boesak Instructed by Nambahu & Associates, Windhoek
FIRST, SECOND AND THIRD RESPONDENTS:	U Katjipuka-Sibolile Of Nixon Marcus Public Law Office, Windhoek
FOURTH RESPONDENT:	No appearance
FIFTH RESPONDENT:	No appearance
SIXTH RESPONDENT:	No appearance