REPORTABLE
CASE No. SA 42/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JOSEPH FRANS KUIIRI	**FIRST APPELLANT**
ANGELIKA KUIIRI	**SECOND APPELLANT**

and

OBETH MBUYIPAHA KANDJOZE	**FIRST RESPONDENT**
KAHOO FRIEDA KANDJOZE	**SECOND RESPONDENT**
SHAFIMANA UEITELE	**THIRD RESPONDENT**

Coram: Maritz, JA, Chomba, AJA, et Mtambanengwe, AJA

Heard on: 09/10/2008

Delivered on: 03/11/2009

APPEAL JUDGMENT

MTAMBANENGWE, AJA:

[1] On the return day thereof the High Court (Parker J) discharged with costs the *rule nisi* granted in favour of the appellant's in this matter on 9 November 2006. The *rule nisi* reads:

"IT IS ORDERED:

1. …

2. That a *Rule Nisi* do hereby issue calling upon the respondent to show cause, if any, on Monday, 20 November 2006**,** at 10.00 a.m. why, pending the outcome of this application, the following orders should not be made:

2.1 Ordering first and second respondents to forthwith restore the possession of the premises known as KANAINDO BOTTLE STORE AND BAR to applicants and authorizing the applicants to remove any locks that prevent such restoration.

2.2 Ordering first and second respondents to forthwith return all the fridges, tables, chairs, beds, bedding, clothing, cutlery, crockery and any other movable items removed from the said premises.

2.3 Authorizing the messenger of the court for the district of Gobabis, alternatively, the station commander of the Namibian Police at Buitepos, to remove first and second respondents, and anyone else occupying it, from the said premises.

2.4 Interdicting the first and second respondents from in any way interfering with applicants' possession or any other rights in respect of the said premises.

2.5 Ordering third respondent to pay the applicants' costs *de bonis propriis* on an attorney and own client scale, alternatively ordering first and second respondents to pay applicants' costs on an attorney and own client scale.

3. The orders in terms of sub-paragraphs 2.1, 2.2, 2.3 and 2.4 of this *rule nisi* shall serve as an interim interdict with immediate effect."

[2] The third respondent is first and second respondent's legal representative. The cost order against him was sought on the allegation that he advised first and second respondents to take whatever actions they took against the appellants contrary to or against the warning that those actions were unlawful. For convenience, I shall refer in the rest of this judgment only to first and second respondents as "respondents" and deal with the relief claimed against third respondent when I come to deal with the question of costs.

[3] The founding affidavit in the application before the court *a quo* was sworn to by first appellant. In it he states that he and the second appellant (his wife) are married in community of property; that they reside at Plot Nuwe Hoop, number 114, Gobabis; that respondents are married in community of property and reside at Farm Sandfontein No. 468 Gobabis which is currently registered in their names (the farm).

[4] The appellants dispute the legality of respondents' ownership of the farm, alleging that they were party to a fraud that led to their acquisition of ownership thereof, alternatively that they bought the farm from Bulk Trade (Pty) Ltd with the knowledge that appellants were disputing the latter's ownership thereof.

[5] The dispute about ownership of the farm is the subject of a pending trial action in the High Court. In regard to that dispute it is, therefore, relevant only to mention that in the course thereof the appellants were evicted from the farm by

the respondents and that, although the eviction order was subsequently set aside, the appellants allege that they have been prevented from regaining possession of the farm by the respondents.

[6] The bone of contention between the parties is the portion of the farm on which the buildings of a business called the Kanaindo Bottle Store and Bar are situated (the premises). The appellants allege that they built the bottle store and restaurant on that portion of their farm in 1994; that they always occupied and operated these premises as a separate entity; that the said premises never formed part of the sale of the farm to Bulk Trade (Pty) Ltd and that the premises were never transferred to Bulk Trade (Pty) Ltd: their intentions had been to subdivide the premises from the farm and, to that end, they had obtained a separate appraisal thereof as worth N$251,500.00. The said appraisal was annexed to the founding affidavit.

[7] A letter written by respondents' legal practitioner to appellants' legal practitioners on 31st January 2006 explicitly shows what the dispute is all about:

> "**RE: FARM SANDFONTEIN NO.468, KUIRI // OBETH KANDJOZE**
>
> We refer to the above-captioned matter.
>
> As you are well aware Farm, Sandfontein No.468, Omaheke Region, is currently registered under the name of Mr. & Mrs. Obeth and Frieda Kandjoze. You are equally aware that a legal dispute is raging between Mr. Kandjoze and Mr. Kuiri over the ownership of the said Farm.

> We now hold instructions from our client that, your clients, in particular Ms. Angelica Kuiri is renting out a portion of the Farm which she used to occupy, and that she draws financial benefits from such rent.
>
> We further hold instructions to inform your client that Farm Sandfontein is currently registered in our client's name and is thus the property of our client until the High Court of Namibia decides otherwise.
>
> We furthermore hold instructions to demand from your client (Ms. Angelica Kuiri) as we hereby demand that she forthwith terminate the Lease Agreement between herself, and the Lessee, Mr. Uno Hengari, and vacate the portion of the Farm which she now occupies, alternatively our client demand that the proceeds of the Lease in respect of the portion of Farm Sandfontein No.468, be paid into an interest bearing trust account, pending the outcome of the resolution of the Legal Dispute between the parties." (the underlining is mine)

[8] That letter would appear to form the basis of the following further allegations by the appellants:

(a) that after they had lost possession of the farm, they transferred most of their (movable) property from the farmstead to the premises;

(b) that at all material times second appellant conducted the business of a bar, bottle store and restaurant on the premises;

(c) that in December 2005 second appellant entered into a lease agreement in respect of the premises with one Uno Hengari for a

rental of N$1,500,00 per month plus N$1,500,00 per month for electricity supplied by NamPower with which appellants had a supply agreement;

(d) that the lease agreement with Hengari was terminated after respondents, accompanied by their legal representative, had gone to the premises and demanded that he should vacate the premises or make payment of the rental direct to them;

(e) that, on 16 September 2006, the first respondent went to the premises and broke the lock to the property, replaced it with his own and left a message with one of his workers that appellants should remove all their property on the premises because he intended to take occupation of the premises.

These allegations and others led to the essential allegation that appellants always maintained an undisturbed possession of the said premises. The allegations are disputed by the respondents.

[9] On 9 August 2006 respondents' legal practitioner also wrote to the lessee of the premises, Uno Hengari, stating that he was leasing a portion of the farm from the second appellant and that the latter had no right to lease out that portion of the farm as she was not the owner of that piece of land. I will return to

consider these letters in conjunction with other correspondence between the parties' legal practitioners when I come to consider the court *a quo's* assessment of the correspondence as a whole.

[10] The grounds of the appeal noted on behalf of appellants are stated by counsel for the appellants in his heads of argument as that:

> "The appellants contend that the judge *a quo* erred or misdirected himself, amongst others:
>
> 10.1 In finding that appellants did not prove they were in possession of the premises containing Kanaindo Bottle Store and Bar and that they were not illicitly deprived of possession by first and second respondents;
>
> 10.2 In formulating the test for possession in respect of *mandament van spolie* and applying it to the facts in this matter;
>
> 10.3 By finding that the letters exchanged between the parties' legal practitioners do not bear out an acknowledgment that appellants were at all material times in possession of the premises;
>
> 10.4 By ignoring, or not properly taking cognizance of, facts – especially deposed to in appellants' replying affidavits – that clearly show possession of the premises, at all material times, by appellants; and
>
> 10.5 Alternatively, by not referring the issue of possession to evidence."

[11] The leaned Judge *a quo* concluded that "the applicants have failed, on a balance of probabilities, to discharge the onus that they were in peaceful and

undisturbed possession of the bottle store – possession that was sufficiently established, stable and durable – and that they have been illicitly deprived of possession of the bottle store by the respondents". The learned Judge came to this conclusion after considering "the letters exchanged between third respondent and applicants' legal practitioners" which letters he described as "an extremely flimsy strand on which to hang an application for a spoliation order without breaking" (sic). In the process he rejected Mr. Coleman's submission, on appellants' behalf, that there was no substance in the respondents' argument that the applicants had "lost possession when they leased the bottle store to others".

[12] The other finding by the learned Judge *a quo,* adverse to appellants, was that "the applicants have failed to prove when they claim that their 'previous possession' was dispossessed (sic) by the respondents". This finding, it appears, did not form part of the conclusion he reached; that apparently explains why Mr. Coleman did not mention it in stating the grounds of appeal as above quoted. But it was clearly one of the "above considerations and reasoning" that propelled the learned judge to his conclusions, and this Court must deal with it.

[13] Before I turn to consider the findings that led the learned Judge *a quo* to discharge the *rule nisi*, I must acknowledge that most of his exposition of the principles applicable in considering an application for a spoliation order cannot be

faulted. It would therefore be superfluous to repeat those principles in this Judgment. Suffice it to say that the learned Judge rightly emphasized that.

> "The central principle of the remedy is simply that no person is allowed to take the law into his or her own hands and thereby cause a breach of the peace. The remedy is aimed at every unlawful and involuntary loss of possession by a possessor. Its single object is the restoration of the *status quo ante* as a prelude to any inquiry into the merits of the respective claims of the parties to the thing in question".

He referred in this connection to *Ness and Another v Greef,* 1985(4) SA 641 (C). He also correctly concluded that "in the present case, the justice or injustice of the applicants' possession is, therefore, irrelevant"

I, however, have a problem with his application of the principles to the facts of this matter; and I therefore turn to consider this problem.

[14] The learned Judge *a quo* directed his attention to the letters "exchanged between the third respondent and applicants' legal practitioners" and found-

(a) them "an extremely flimsy strand on which to hang an application for a spoliation order without breaking"

(b) that they dwelt primarily on, or dealt substantially "with ownership of farm Sandfontein."

Before he turned to consider the letters the learned Judge *a quo* had dealt with the dispute as to when appellants left the farm. The dispute included the denial by respondents that "the applicants had possession of the bottle store after January 2004" and respondents' assertion that "the applicants of their own volition 'finally moved from the Farm Sandfontein in approximately December 2004 with all their belongings'"; the Court went on to say.

> "If the applicants left Farm Sandfontein in December 2004 "with all their belongings," the applicants could not have been in possession of the bottle store after that date since the bottle store is situated on Farm Sandfontein, and since the respondents took possession of Farm Sandfontein from that time." (my emphasis)

The fallacy involved in the quoted passage, in my view, arises, *inter alia,* from what appears to be the learned judge *a quo's* wrong interpretation or superficial reading of the letters.

[15] As regards the letters it is not clear what the learned Judge *a quo* meant when he said the following about them in his judgment.

> "Considering the letters contextually and purposely and not parochially, it seems to me clear that the question of ownership was uppermost in the mind of the third respondent, even if it can be said that the concern of the applicants' legal practitioners was possession – even that comes through only in their last two letters as I have said above. That being the case, I cannot see how, with respect,

> one can stand on those letters and argue seriously that the respondents considered the applicants to be in possession of the bottle store." (my emphasis)

If "contextually" refers to all the letters "exchanged between the third respondent and the applicants' legal practitioners, it seems to me that the concern in all the letters is the portion of the farm on which the bottle store is situated and related to both ownership and possession thereof. Third respondent's letter of 16 May 2006 states in paragraph 3 thereof:

> "In light of what we have stated above, we still maintain the portion of the land on which the bottle store is situated is part of our clients farm and that your client must immediately terminate the lease agreement between herself and Mr. Uno Hengari."

Paragraph 4 of third respondent's letter of 16 October 2006, states:

> "We furthermore advice that we hold instruction to inform you that our client shall, not relinquish any part of his Farm (not even an inch) unless so ordered by Court, or unless you provide us with proof that the portion of land in dispute (not portion 6 or 7) are indeed your clients property. Kindly advice your clients to stay away from our clients property ….." (sic) (my underlining)

In paragraph 3 of the letter addressed by appellants' legal practitioners to third respondent on 15 September 2006 it is stated:

> "We are instructed that your client have (sic) attended at the portion currently occupied by our client, demanding that our client vacates the premises …..We

> are instructed that our client shall not vacate the portion occupied, unless by a Court order, lawfully granted to your client."

Again, a further letter by appellants' legal practitioners to third respondent on 29 September 2006, talks of the "portion(s) of land under discussion," and says that third respondents' clients "have no right to enter the land or occupy it". Thus the "last two letters" to third respondent (i.e. those dated 16 and 31 October 2006 respectively) are not the only ones directly referring to possession of the premises – as the judgment seems to suggest. The last two letters merely put the whole series of letters into proper context when e.g. the one dated 31 October 2006 states:

> "We advise that our clients indeed attended to the removal of your client's locks on the property as advised by us. Subsequently thereto, your clients again entered in upon the premises and replaced our client's locks. Moreover, and on the 14th of October 2006, your client entered upon the premises and removed most of our client's property out of the premises and left the property outside. We assume that your client is acting on your advice."

Significantly, there is no denial of these allegations in the respondents' reply thereto on 16 October 2006.

[16] Lastly there is a letter addressed by third respondent to Messrs. Kempton & Scholtz - who was apparently also acting as second appellant's legal practitioners - dated 30th August 2006. It reads:

"RE: OCCUPATION OF FARM SANDFONTEIN: UNO HENGARI

We acknowledge receipt of your letter dated 9th August 2006.

We hold instructions to inform you that, as long as back as May 2006, we informed your client that the portion of the Farm on which the bottle store is situated forms part of Farm Sandfontein. And the Farm is under occupation and control of our client. We challenge you to provide us with a copy of the Title Deed for the portion on which the bottle store is situated.

Since your client was given notice as early as January 2006 (see copies of the attach) (sic) a letter to vacate the portion of the land on which the bottle store is situated, and in light of what we have stated in the foregoing paragraphs, we herby inform you that our client has taken occupation of the bottle store and will henceforth deal with it in that manner. Our client has also taken a lien over all the property which is on the portion of the land on which the bottle store is situated, pending your client paying fair and reasonable rent to our client for the period 01 February 2006 to 31 August 2006.

We hereby furthermore inform you that our client will now formalize the lease agreement between himself and Mr. Uno Hengari and Mr. Uno Hengari will henceforth proceed to lease and occupy that portion of the Farm." (my emphasis)

[17] There is some denial of the allegations of spoliation, but as Mr. Coleman for the appellants rightly said, the denials are untenable in light of the Deputy Sheriff's return of service in the execution of the rule *nisi* and interim interdict issued by the Court. It lists the property so removed: It reads:

"RETURN OF SERVICE

The undersigned, ANDRIES JOHANNES FREDERIK PRETORIUS, do hereby certify that I have on this 6th day of Sec. 2006, at 15H00, duly served the

attached, RULE NISI, of the above-named First Defendant, Obeth Mbuyipaha Kandjoze and Second Defendant, Kahoo Frieda witness Kandjoze, on the First Defendant, Obeth Mbuyipaha Kandjoze, by exhibiting to him on the Farm Sandfontein, No. 468, Gobabis, the original document, at the same time handing personally a true copy thereof and explaining to him the nature and contents thereof. Attachment: 1 x Pool Table, 1 x Sofa, 1 x Wardrobe & 9 x chairs.
Handed property over to Mr. Tjeripo, at Kanaindo Bottle Store and Bar, Gobabis. Mr. Obeth Mbuyipaha Kandjoze refused to hand over the two Coca Cola Freezers.

Dated at Gobabis on this 6th day of Dec. 2006.

TEMPORARY DEPUTY SHERIFF (GOBABIS)"

[18] I believe that the wider, and not parochial, context in which the letters are to be read, as confirmation of appellants being in possession after January 2004, of the bottle store, would include not only the Deputy Sheriff's return of service (which shows, contrary to respondents' claim that applicants left the farm in December 2004 with all their belongings, that their belongings were still in the bottle store) but also the fact that respondents waited from 2004 till 2006 before they suddenly started asserting a claim to the premises.

[19] Lastly, my analysis of the letters, and a reading thereof in the above context, shows that they essentially dealt with or dwelt on the question of possession by the respondents of the bottle store or that portion of the farm occupied by the bottle store, and not on or with Sandfontein Farm No. 468 as such.

[20] The court *a quo* rejected the claim by appellants that they were disposed of the bottle store by the respondents. The court did so when it considered what it termed "the central planks which in their view constitute pieces of evidence that evince possession." Emphasising that "the time at which an applicant claims he or she was unlawfully disposed by the respondent is crucial in spoliation proceedings" the court went on to find that the appellants had failed to prove when they claimed they were dispossessed of the bottle store by the respondent". It said further that "there must be a date on which the alleged spoliation occurred." It rejected Mr. Coleman's submission that there was a series of spoliation and counter spoliation.

[21] As regards the Court *a quo's* reasoning, I note first of all that the evidence on the affidavits indeed shows that there was a series of acts of spoliation and counter spoliation. Secondly, apart from saying that he took occupation of the premises on 31st August 2006 the first respondent also gives a specific date – 1st September 2006 when, he admitted, his servant, one Gideon Kandimuine put a padlock on the door of the restaurant. Most importantly, as already said above, there was no denial of the allegations contained in the letter annexure "JK12" to the founding affidavit. With respect, in my opinion, to hold appellants' failure, if that is so, to mention a specific date against them on which the spoliation occurred, was a misdirection on the part of the Court.

[22] It remains to say that respondents did not go to Court when they acted as alleged against the appellants in connection with the bottle store, they resorted to self help. Mr. Coleman was quite correct to say, in the grounds of appeal, that "the judge *a quo* erred or misdirected himself" by ignoring or not properly taking cognisance of facts especially those deposed to in the appellants' replying affidavit.

[23] If I should find that appellants were in possession of the disputed premises, the affidavits in this case (of both parties) clearly reveal that acts of spoliation by respondents and counter spoliation by the appellants took place up until 31st October 2006. The principles applicable to counter – spoliation were recently dealt with by this Court at paragraphs [48] – [54] in *The Three Musketeers (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and Others* (unreported, delivered on 28/10/2008. In that case, as in this case, various acts of spoliation and counter-spoliation occurred, all taking place on different dates. What matters, in my opinion, is that the claimant was in possession at any of the different days involved.

[24] Almost in the same breath as it dismissed appellant's claim that they were dispossessed of the bottle store by the respondents, the court *a quo* described the claim that "at all material times hereto" second appellant conducted the business of the bar bottle store and a restaurant in the bottle store. It described the term "at all material times" as a 'legalese' cliché" and as "too amorphous

meaningless and purposeless in spoliation proceedings to show when applicants claim they were in peaceful and undisturbed possession of the bottle store and also to show when an act of spoliation was committed by the respondents". I accept that the phrase "at all material times" under certain circumstances may properly be described in the terms used by the Judge *a quo.* But, with great respect, and without indulging in semantics, it is my opinion that the learned Judge *a quo* completely missed the nuance in the phrase as used by the appellant "at all material times hereto", and did not properly consider the particular circumstances of this case. The circumstances in this case before the court below included the following –

(a) that the time frame involved in the dispute about the portion in dispute was between December 2004 and October 2006,

(b) that there is no allegation by respondents that appellants, in particular second appellant, returned to occupy and do business in the disputed premises after December 2004. Yet in the letters he admits that second appellant was in occupation after that date,

(c) that respondents in so many words accepted at the time that second appellant occupied the disputed premises,

(d) that implicit in the argument by the respondents that appellants lost possession when they leased the premises to others i.e. from December 2004 to December 2005 the date of the first leasing i.e. to Uno Hengari, is an admission that second appellant was in possession of the disputed portion of the farm after December 2004. and

(e) that the affidavit of first respondent clearly shows a vacillation as to whether appellants left with all or some of their property, that they left with all their property is belied by the Deputy Sheriff's return of service: the fridges tables etc that were in the premises were left by appellants as they alleged and which fact first respondent purports to deny.

All these circumstances or facts clearly fix the time frame encompassed by the phrase "at all material times hereto." In these circumstances there is nothing amorphous, meaningless or purposeless about the phrase "at all material times hereto", nor, to my mind, is the phrase used as a mere 'legalese cliché"

[25] The Court *a quo* said in paragraph [18] of its Judgment that the applicants had not put forth any credible evidence in support of their contention that they conducted the business of the bar and restaurant in the bottle store, obviously relying mainly on the fact that the only liquor licence produced covered the period

16 March 2006 to 31 March 2007. Soon thereafter, in paragraph [19], the Court then stated:

> "Besides in December 2005 – 31 August 2006, i.e. more than a half of the licence period, the bottle store was leased to Hengari; for about six months in 2005 it was leased to Guim; and for almost three months in 2005 it was leased to Kapenda. The liquor licence filed of record does not say Hengari was a manager for the licenced business appointed by 2nd applicant for the licenced period, which second applicant qua licensee could have done lawfully in terms of s. 18 of the Liquor Act, 1998 (Act No. 6 of 1998). Neither have the applicants shown the Hengari, Guim and Kapenda were their agents or representatives. With the greatest deference, I cannot accept Mr. Coleman's submission that there is no substance in the respondent's (sic) argument that the applicants lost possession when they leased the bottle store to others. Being leasees (sic), Hengari, Guim and Kapenda were, in law, in possession of the bottle store during the periods that their leases subsisted. They were in physical occupation of the bottle store and they had the necessary intention to hold it as their own and to derive some benefit from it for themselves (Badenhorst, et al, supra, at pp 254-5,: p. 406) Particularly, in Hengari's case, as lessee of the bottle store, he further sublet part of the premises to Uvangapi Matirua and Tangee Mbasuwa for the payment of rent to him"

[26] Uno Hengari's affidavit in support of respondents' case states, in part:

> "I specifically want to state the following:
> During December 2005, the second applicant and I concluded a lease agreement in respect of a Bottle store situated on Farm Sandfontein No. 468 Omaheke Region. When we concluded the lease agreement the second applicant brought me under the impression that first and second applicants were the owners of the Bottle-store."

[27] Obviously the one licence that was produced by the applicants was the current licence; if the Court *a quo* was implying that Uno Hengari and the other lessees had operated the bottle store without a liquor licence, then that was not the case for the respondents, nor can that be inferred from their affidavits. It is trite that the court cannot make out a case for the parties, or draw adverse inferences against a party without the necessary facts or on facts that are clearly incomplete, thereby purporting to fill gaps in the evidence.

[28] <u>The crucial finding that appellants lost possession when they leased the premises to others.</u>

In accepting that argument by the respondents the court referred to *pp 254-5 and p 406 of Silberberg and Schoeman's The Law of Property 4th ed (Badenhorst, et al).* I have scanned the relevant pages but I must confess my failure to find anything therein that supports that proposition or can be distilled as support thereof. What appears on p 254 is:

> "12.2 Right of possession and the intention to control a thing
> The right of possession is often referred to as the ius possessionis and must be distinguished from the so-called ius possidendi, the entitlement to demand control over a thing19. The former is available only to a person actually in possession of a thing. The right of possession exists either in addition to, or independently from, the intention to control a thing. Ius possidendi enables a person to demand that he or she be given possession of a thing, that is, an entitlement which justifies a person's claim to have a thing in his or her possession. Thus a person may have the intention to control a thing without

> actually being in possession of the particular thing and, conversely, he or she may have a right of possession without having a ius possidendi. The following examples will serve to illustrate the distinction as well as the connection between the ius possesionis and the ius possidendi:

And at page 255-6 the following appears:

> "12.3 Objective control element
> As mentioned before, the law requires certain elements to be present before a person is regarded a possessor. Basically, two requirements have to be met: (i) the person needs to be in effective physical control of the thing; and (ii) needs to have the intention to derive some benefit from the possession. To acquire possession, effective physical control must be exercised over the thing concerned. Possession of both movable and immovable things can be acquired by either delivery (traditio) or occupation (occupatio). In the case of delivery the physical element consists in the actual handing over of the thing by the existing possessor to the acquirer of possession, except in the case of the fictitious forms of delivery where the physical element takes on a less conspicuous form[23]. Occupation is a unilateral method of acquiring possession, the physical element consisting in the taking of a thing whether possessed or unpossessed, without the co-operation of a previous possessor."

[29] If reliance is placed on paragraph 12.3 of the cited authority, I turn to what was said in one of the cases cited in footnote 21 on that page, namely *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another (1972 (2) SA 464 (W.L.D)* In that case, considering the requirement of continuous possession for 30 years for the purposes of acquisitive prescription, the Court (Coleman J) had the following to say at p. 467 H - 468 A.

> "The continued possession for 30 years need not have been that of the claimant alone. He can rely on the possession, of the appropriate kind, by his immediate predecessor or predecessors (Voet 44.3.9; Stephenson v Lamsley, 1948 (4) S.A. 794 (W) at p. 796). It is not necessary that every part of the area be occupied or used; in some circumstances use of every square foot of an area would be impracticable, and the test is whether there was such use of a part or parts of the ground as amounts, for practical purposes, to possession of the whole. (See Pollock and Weight on Possession at p. 31, quoted with approval in Welgemoed v. Coetzer and Others, 1946 T.P.D.. 701 at p. 720). Nor is absolute continuity of occupation required, provided that there is no substantial interruption. Much depends, in this regard, upon the nature of the property and the type of use to which it is put. (see Boshoff and Another v. Reinhold and Co., 1920 A.D. 29 at p. 33; Mocke v. Beaufort West Municipality," 1939 C.P.D. 135 at p. 142; Head v. Du Toit, 1932 C.P.D. 289 at p. 292)"

The case *Nienaber v Stuckey,* 1946 A.D. 1049, also cited in footnote 21; discusses mainly the question whether exclusive possession was a requirement to entitle a claimant to the remedy of mandament van spolie. The court (Greenberg J.A) in that case accepted at 1056 the fact that "there may be different rights, in respect of the same piece of land, vested in different persons, all entitled, to the protection of spoliation proceedings"

[30] In paragraph 260 *LAWSA* vol 27 appears the following:

> "260 Indirect or vicarious possession
> Physical control over a thing need not be exercised personally but may be exercised indirectly by a representative or a servant of the owner. Thus, a herdsman can exercise control on behalf of the owner of the cattle. Likewise, a lessee can exercise control on behalf of the lessor."

The authorities for that statement are cited in footnote 3 as, *inter alia*, *Voet 41.2.12 and Van Wyk v Louw,* 1958 (2) SA 164 (C).

In Van Wyk's case, supra, Ogilvie Thompson J (as he then was) stated: at p171 D.

> "The next point taken by Mr. Bloch was that plaintiffs had failed to show sufficient legal possession of Lot 10 in J. J. Louw upon which plaintiffs can now in law rely in computing the thirty-year period. Since Abraham Louw and van Wyk occupied Lot 10 by virtue of leases thereof from J.J. Louw, such occupation by them did not constitute legal possession upon which plaintiffs can now rely. It is of course clear that legal possession may be held through another and that a landlord may have legal possession through his tenant (Voet 41-2-12: Gane's trans. vol. 6 p. 244)". (my emphasis)

(See also *Philotex v Snyman,* 1994 (2) SA 715 (T) *at 715 F-G and Glaston House (Pty) Ltd v Cape Town Municipality,* 1973 (4) SA 276 (C) at 282 C-D *per* Corbett J., as he then was, and *Ex Parte Van Der Horst: In Re Estate Herold,* 1978 (1) SA 299 TPD at 301 B-G. Lastly, in the 3rd edition of Silberberg & Schoeman's, *The Law of Property,* the authors state:

> "Once possession has been acquired continuous physical contact or, in the case of land, continuous occupation or use, is not necessary for the retention of such possession." (my emphasis)

In footnote 35 the learned authors cited a number of cases as authority for this statement; among the cases cited is the case *Welgemoed v Coetzer and Others,* 1946 T.P.D 701. In that case Murray J said at p. 720:

> "I am prepared to accept as correct certain principles for which authority was cited – viz. the required continuity of occupation need not be absolute continuity, for it is enough if the right is exercised from time to time as occasion requires and with reasonable continuity (Mocke v. Beaufort West Municipality (1939, C.P.D. at p. 142)); the occupation and user need not be of every individual portion of the area claimed for a possession or occupation of the whole may in certain circumstance be a necessary inference from the possession or occupation of a part hereof or different parts thereof at various times (see Pollock and Wright on Possession, p. 31); and the exercise is open even without actual knowledge on the part of the true owner, provided it was open for all to see who wanted to see, and would have been known to the true owner but for his carelessness in looking after his property (Dalton v. Angus (6 A.C. at pp. 815, 816, 828))" (my emphasis)

With respect what was said in that case depicts the kind of situation appellants were in in the present matter i.e. as regards their occupation of the premises in question.

[31] To sum up, on the above authorities, it seems to me that there could be no doubt that the finding by the Court *a quo* that appellants lost possession when they leased the premises where the Kanaindo bottle store and Bar is situated on Sandfontein Farm No 468 cannot be supported. The contention by the respondents should have been rejected.

[32] The costs order was sought against third respondent *de bonis propriis* on attorney and client scale, alternatively against first and second respondents on an attorney and client scale. The Court *a quo* declined the invitation by Mr. Hinda, who appeared for the respondents, to make such an order, "including costs of an instructing and instructed councel". He did so "taking into account the nature of the case." Mr. Coleman who appeared for the appellants on appeal and in the court below now moved that costs be awarded *de bonis propriis* against third respondent because, he said, "it is clear that he advised his clients to act unlawfully; or at least refrained from advising them that their actions are unlawful". He, of course, recognized the punitive nature of such an order of costs.

[33] I have also considered the nature of the case, particularly the fact that the dispute about the Kanaindo Bottle Store and Bar is involved with the bigger dispute as to the ownership of the Farm, which is still pending for determination in the High Court. I do not think third respondent's conduct of his clients' case qualifies to be described as reckless or malicious. If a legal practitioner were to be penalized for the wrong advice he may have given his clients, I do not think that would be a proper exercise of the discretion that reposes in the court. Lastly, Mr. Coleman said that the conduct of counsel for the respondent's was exacerbated by the delay of the matter when third respondent obtained an eviction order *ex parte* which was subsequently set aside. That submission merits no further consideration in this matter, because the setting aside of the

eviction order was with costs against the respondents. Also, considering the nature of the case, I do not see this as a proper case to visit first and second respondents with a punitive order of costs. The third respondent is entitled to his costs of resisting the appeal in that regard, but I note that argument in respect thereof took less than a quarter of an hour.

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

1. The appeal succeeds save as to costs against third respondent.

2. The discharge of the *rule nisi* obtained by the appellants on 30 October 2007 and the order of costs are set aside and substituted by the following:

   "1. Paragraphs 2.1 - 2.3 of the rule *nisi* issued on 9 November 2006 are confirmed.
   2. The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the applicants' costs."

3. The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay appellants' costs on appeal, such costs are to include the costs of one instructing counsel and one instructed counsel.

4. The appellants are ordered to pay third respondent's costs of resisting the appeal, jointly and severally, the one paying the other to be absolved.

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MTAMBANENGWE, AJA

MARITZ, J.A. (*Dissenting*):

[1] The appellants unsuccessfully sought an order in the Court *a quo* against the first and second respondents to restore possession of certain movable and immovable things to them *ante omnia*. The immovables comprise a designated - but as yet unsurveyed and undivided - portion of the farm Sandfontein (referred to as portion 2 thereof) and the buildings thereon in which a business, known as Kainando Bottle Store and Bar, was carried on (the "premises"). The movable things include items of furniture, bedding, clothing, cutlery and crockery (the "movables") which, they claimed, had been on the premises at the time when they were deprived of the possession thereof.

[27] The application to restore their possessory status *quo ante* is based on the principle: *spoliatus ante omnia restituendus est*.[1] Thus, they claim, possession of the premises and movables should be restored to them by the first and second respondents before the ultimate determination of their disputed proprietary and other possessory claims and rights thereto in other litigation pending between them in the High Court[2]. The principle, which may share some characteristics with the various possessory remedies available under Roman law, is rooted in

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1 "If this principle means anything it means that before the Court will allow any enquiry into the ultimate rights of the parties the property which is the subject of the act of spoliation must be restored, to the person from whom it was taken, irrespective of the question as to who is in law entitled to be in possession of such property." Per Price J in *Greyling v Estate Pretorius*, 1947 (3) SA 514 (W) at 516 *in fine* – 517A. Compare also Wille, *Principles of South African Law,* 7th ed., p.198 - quoted with approval in *Willowvale Estates CC and Another v Bryanmore Estates Ltd,* 1990 (3) SA 954 (W) at 956D – I.

2 C.f. *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi,* 1989 (1) SA 508 (A) at 512A – F; *Le Riche v PSP Properties CC and Others*, 2005 (3) SA 189 (C) at 198D-E.

canon law and was later subsumed and developed in our common law as the *Mandament van Spolie*[3]. The mandament, it was held, may be granted –

> "if the claimant has been unlawfully deprived of the possession of a thing. It does not avail the spoliator to assert that he is entitled to be in possession by virtue of, eg, ownership, and that the claimant has no title thereto. This is so because the philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should be discouraged."[4]

[28] Even though the mandament is therefore not intended to bring about the ultimate determination of the competing proprietary or possessory claims of the litigants to the things in contention[5], it nevertheless constitutes a final determination of the litigants' "immediate right" to posses them for the time being[6]. In this regard, Greenberg JA noted in *Nienaber v Stuckey*[7] that "(a)lthough a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the *status quo* be restored, it is to that extent a final order". Consequently, it falls to be noted for purposes of the approach to be followed in this appeal that a litigant who is seeking a spoliation order bears the

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3 See: *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others,* 2007 (6) SA 511 (SCA) at 250A-B; *Malan v Dippenaar*, 1969 (2) SA 59 (O) at 64 *in fine and the authorities referred to therein;* Badenhorst *et al., Silberberg and Schoeman's The Law of Property*, 5th ed., p. 287-288 and Van Der Merwe, *Sakereg*, 2nd ed., p.118-119.

4 *Per* Van Den Heever, JA in *Boompret Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd,* 1990 (1) SA 347 (A) at 353B-D and the authorities referred to. See also: *Nino Bonino v De Lange*, 1906 TS 120 at 122.

5 "The remedy is aimed at every unlawful and involuntary loss of possession by any possessor, and its object is no more than the restoration of the status quo ante as a preliminary to any inquiry or investigation into the merits of the respective claims of the parties to the thing in question." Per Viviers J in *Ness v Greef*, 1985 (4) SA 641 (C) at 647B-C.

6 See: *Mankowitz v Loewenthal,* 1982 (3) SA 758 (A) at 767F-H.

7 1946 AD 1049 at 1053

burden to prove the facts necessary for the success of the application on a balance of probabilities.

[29] One of the essential constituent elements of the mandament which a *spoliatus* is required to so establish on the evidence is that he or she had been "in possession" of the thing when spoliation occurred.[8] Moreover, not just any measure of possession – however technical, remote, tenuous or brief - will suffice: the Court must be satisfied, regard being had to the nature of the thing dispossessed, that the despoiled possession of the thing was sufficiently stable and durable[9] to constitute "peaceful and undisturbed possession".[10]

[30] The application in the Court *a quo* failed on this point[11]: the presiding Judge found after an extensive analysis of the relevant authorities and facts that the appellants "were not and could not have been in possession – peaceful and undisturbed possession – of" the premises during the periods that they let it to a number of lessees[12]. He, therefore, concluded that the appellants had failed, "on

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[8] Compare: *Yeko v Qana,* 1973 (4) SA 735 (A) at 739D-H where Van Blerk JA said: "The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established." In *Ness and Another v Greef*, 1985 (4) SA 641 (C) at 647D-E, Vivier J elaborated on it: "According to the authorities, the applicant for a spoliation order must first of all establish that he was in peaceful and undisturbed possession of the thing in question at the time he was deprived of possession. By the words "peaceful and undisturbed" is probably meant sufficiently stable or durable possession for the law to take cognizance of it." See also: *Shoprite Checkers Ltd v Pangbourne Properties Ltd,* 1994 (1) SA 616 (W) at 619F-H.

[9] See: *Ness and Another v Greef*, *supra,* at 647D-E followed in *Mbangi and Others v Dobsonville City Council,* 1991 (2) SA 330 (W) at 365 *in fine.*

[10] C.f. *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another,* 2008 (3) SA 371 (SCA) at 380E-F: "In order to succeed in the application the appellant had to establish that he was in peaceful and undisturbed possession of the property and that he was unlawfully deprived of that possession". See also: *Singh v Santam Insurance Ltd,* 1997 (1) SA 291 (A) at 294H-I.

[11] Reported as: *Kuiiri and Another v Kandjoze and Others,* 2007 (2) NR 749 (HC).

[12] At p 755D.

a balance of probabilities, to discharge the onus that they were in peaceful and undisturbed possession of the bottle store – possession that was sufficiently established, stable or durable – and that they have been illicitly deprived of possession of the bottle store by the respondents"[13]. In addition, he concluded that there was also "no credible evidence to support (the appellants') rearguard assertion that at the time the bottle store was leased, they kept some of their belongings in the bottle store." In the result, he discharged the rule *nisi,* which had been issued previously, with costs.

[31] My brother Mtambanengwe, whose judgment I had the advantage and privilege to read, arrived at a different conclusion: His judgment highlights at the outset a number of important factual misdirections in the reasoning of the Court *a quo* and then turned to, what he considered as, "the crucial finding that the appellants lost possession when they leased the premises to others". On that issue, he reasons with reference to *Nienaber v Stuckey,* 1946 AD 1049 at 1056 that, in respect of the same land, different rights may be vested in different persons, all of whom may be entitled to protection under the mandament; with reference to *LAWSA,* vol. 27, par. 260 that physical control over the premises need not be exercised personally but may be exercised by a lessee on behalf of the lessor (the appellants in this case); with reference to *Van Wyk v Louw,* 1958 (2) SA 164 (C) at 171D that a landlord may have legal possession of the leased premises through his tenant; and, by parity of reasoning to the possessory requirement for acquisitive prescription referred to in *Morkels Transport (Pty) Ltd*

[13] At p 756B.

v Melrose Foods (Pty) Ltd and Another, 1972 (2) SA 464 (W) at 467H-468A, *Welgemoed v Coetzer and Others,* 1946 T.P.D 701 at 707 and *Silberberg and Schoeman's The Law of Property,* 3rd ed. by Badenhorst *et al*., that neither complete nor absolute continuity of occupation of land is required for possession. On account of these authorities, he concludes that the Court *a quo*'s findings that the appellants lost possession when they leased the premises cannot be supported and that the appeal should therefore succeed.

[32] The view I respectfully take is that the appeal should be upheld but, as against the first and second respondents, for reasons somewhat different to those proposed by my Brother. I agree with his reasoning that an order of costs *de bonis propriis* against the third respondent is not justified and that the appeal must, to that extent, fail. In what follows, I shall therefore only refer to the first and second respondents and, for considerations of convenience, firstly deal with the alleged spoliation of the premises before I briefly turn to the relief sought in respect of the movables.

[33] The appellants were previously the registered owners of the farm on which the premises are situated. Although both the validity and the extent of the farm's alienation by sale are being contested in litigation pending between the parties in the High Court, it is not in dispute that the appellants had been in possession of the premises at least until they rented it to a succession of lessees. Once possession of an immovable thing has been has been established, occupation,

control and use thereof need not always be complete, continuous or direct for it to be sustained. It would be impracticable – and in many instances be impossible - to continuously occupy or use every square centimetre of land and the appurtenances thereof. This is not just illustrated by numerous authorities to that effect (some of which have been referred to in the judgment of my Brother Mtambanengwe[14]), but also follows as a matter of common sense[15]. Moreover, as will be illustrated in more detail later, possession may sometimes be exercised vicariously or indirectly, e.g. through an employee or representative of the possessor.

[34] Possession of an immovable thing may, of course, be lost for a number of reasons[16]. Whether the possessor's physical absence from the immovable thing or the nature and extent of the use, occupation or control thereof by another party justifies the inference that the physical and/or mental requirements[17] necessary to sustain possession are no longer present, must be determined with regard to the circumstances of each case. As a general proposition, however, I agree with my Brother that the mere letting of an immovable thing does not justify, without more, an inference that the lessor/possessor has lost possession thereof. In the context of acquisitive prescription, it has been accepted with

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[14] Most notably *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another, supra* at 468A-B; *Welgemoed v Coetzer and Others, supra* at 720 and Badenhorst *et al*., *Silberberg and Schoeman's: The Law of Property,* 4th ed., p 278.

[15] See: *Ex parte Van der Horst: In re Estate Herold,* 1978 1 SA 299 (T) at 301A-B and the later discussion (at 301F-G) of the judgment in *Mulder v Divisional Council of Prince Albert*, (1886) 4 S.C. 139 at 142-143. See also: *Bennett Pringle (Pty) Ltd v Adelaide Municipality,* 1977 (1) SA 230 (E) at 233G-H.

[16] Compare: Joubert et al., *LAWSA*, Vol. 27 (First Reissue) par 261.

[17] For a general discussion of those elements, see: Siblerberg and Schoemans, *op.cit.,* at p 293.

reference to Voet 41.2.12 that "legal possession may be held through another and that a landlord may have legal possession through his tenant".[18]

[35] It is evident, in my view, from the from the uncontested facts in the application and from terms of the lease agreement between the second appellant and the last tenant, one Uno Hengari, that the appellants did not relinquish physical control of the premises or abandon their intention to possess it by letting it to him. The contract was for a fixed – and relatively short - term (clause 2(b)); the second appellant was the holder of a liquor license issued under the Liquor Act, 1998 in respect of the premises and it was agreed, subject to the provisions of section 36 of the Act relating to the leasing of licensed businesses, that Hengari would continue the trade in liquor on the premises on the authority of the second appellant's license and that she had to renew the licence from time to time at her own expense (clauses 2(a) and (c)); the local electricity supplier, Nampower, supplied electricity to the premises during the currency of the lease in terms of a service agreement with the appellants (clause 4); Hengari was precluded from making any alterations to the premises without the second appellant's prior written consent (clause 6); the second appellant retained the right to inspect the premises at all reasonable times upon adequate notice (clause 9); a number of movable items, which belonged to do the appellants but were used in the running of the business (such as two pool tables,

[18] Per Ogilvie Thompson, J in *Van Wyk and Another v Louw and Another*, 1958 2 SA 164 (C). See also *De Jager v Harris, NO and the Master*, 1957(1) SA 171 (SWA) where the Court held that a *bona fide possessor* of an immovable who had erected a dwelling thereon may, for purposes of enforcing his lien, retain possession thereof through the agency of a tenant. And, in general: Joubert et al., *LAWSA*, Vol. 21 (First Reissue) par 131

three bar fridges, one steel table, one bench corner unit, two steel shelves and a number of wall shelves), were left on the premises for use by the lessee in terms of the lease agreement (clause 7(a)); the second appellant was entitled to 75% of the profits generated from the two pool tables during the period of the lease (clause 7(b)) and, finally, that the lessee was obliged to return the premises to the second appellant upon termination of the lease in good order and repair, fair wear and tear excluded (clause 7(a)).

[36] It was both practical and convenient for the second appellant to carry on the business of a bar, bottle store and restaurant on the premises whilst her husband, the first appellant, farmed with livestock on the remainder of the farm. The situation changed after the first appellant had sold the farm and, when the respondents deprived them of possession of the remainder (i.e. the portions of the farm which do not include the premises) and they had to move their farming operations elsewhere, it was no longer practical and financially feasible for her to carry on with the business on the premises in person. Hence, they decided to let the premises and allow the lessee to carry on with the business as a going concern on authority of the second appellant's liquor licence. The cumulative effect of the provisions of the lease agreement to which I have referred to earlier evidences continued - albeit indirect - physical control over the premises by the second appellant and, by letting it at an agreed rent, also an intention to so possess it for their own benefit.

[37] I do not understand the judgment of the Court *a quo* to hold that the appellants did not possess the premises all during the currency of the lease. Had it done so, I would have respectfully disagreed for the reasons and on the authorities I have mentioned. The Court *a quo* held - and emphasised - that the appellants had failed to show "possession that was sufficiently established, stable or durable" for the Court to grant the mandament. In arriving at this conclusion, the Judge *a quo* reasoned that the lessees "were in physical occupation of the bottle store and (that) they had the necessary intention to hold it as their own and to derive some benefit from it for themselves." A tenant almost invariably possesses leased premises *animus ex rebus commodum acquirendi*. But, so too, does the landlord who lets it. The nature of the benefits they are seeking for themselves may well differ but, even though they relate to the same premises, they are not mutually exclusive. In the context of the mandament's requirements, the more significant difference is that a tenant's possession and control of the leased premises are immediate and direct whereas that of the landlord is, at most, indirect. It follows that, if spoliated, a tenant may obtain the mandament against the spoliatus to restore possession[19] – even if the latter happens to be the landlord[20].

[38] The more difficult question is whether a landlord has a right, concurrently with that of the tenant, to claim such relief in respect of the leased premises against a third party? More so, if the tenant fails or refuses to take action against

[19] *Blomson v Boshoff* 1905 TS 429; *Bennett Pringle (Pty) Ltd v Adelaide Municipality, supra,* at 233H; *Magadi v West Rand Administration Board,* 1981 2 SA 352 T.

[20] C.f *Bennett Pringle (Pty) Ltd v Adelaide Municipality, supra,* at 237E-G; Nino Bonino v De Lange, *supra,* at 125

the *spoliatus*. I have not been able to find judicial pronouncements on this point. Some legal commentators[21] and writers suggest the landlord's indirect possession should also be protected by the mandament. One of the views, expressed by Van Der Merwe in *LAWSA*,[22] is the following:

> "In cases of indirect possession the question may arise in future whether the direct possessor and the person exercising indirect possession through another should not both be entitled to a mandament van spolie. Where physical control is exercised on behalf of a master or employer by a servant or an employee, the courts have decided that only the master or the employer can institute the mandament. What, however, about the case where the direct possessor such as an agent or a lessee who exercises control on behalf of a principal or a lessor does in fact have the intention of deriving some benefit from the thing? In this case it is submitted that both the direct and the indirect possessor should in principle be entitled to the mandament. The direct possessor should have the first opportunity of instituting the mandament. If the latter is, however, unwilling or unable to institute the mandament, the vicarious possessor (namely the principal or the lessor in the above example) should be entitled to avail himself of the mandament."

Interesting as his contention may be, I do not find it necessary to decide the point in the context of this case and, therefore, refrain from expressing any view thereon. It suffices for purposes of the reasoning to follow to hold, as I do, that the second appellant did not lose possession of the premises during the currency of the successive leases entered into by her.

[39] It is not necessary to express myself on a landlord's concurrent (or accessory) rights to the mandament because it is common cause that the

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[21] Sonnekus 1978 *SALJ* 217 at 221; Delport and Olivier, *Sakereg Vonnisbundel,* p 74–75; Sonnekus 1982 TSAR 178 180.

[22] Vol.27 (First Reissue) par 266 *in fine.* See also: *Sakereg* (2nd ed.) by the same author at p127.

alleged spoliation of the premises took place after termination of the lease agreement, not during the currency thereof. The tenant, Hengari, terminated the lease agreement and vacated the leased premises "on or before 31 August 2006" – in the first respondent's words. It was only on 2 September 2006, while the first respondent was in Moscow, that he received a telephone call from his wife, the second respondent, informing him about the development. He then called one of his employees, Mr Kandimuiine, to confirm the second respondent's earlier report and instructed him to put padlocks on the doors of the premises. It follows, even if the respondents' version of events is to be accepted, that they secured possession of the premises for themselves by locking it only a couple of days after the lease had terminated and the premises had been vacated by the lessee. It was by putting padlocks on the doors, the appellants allege, that they have been deprived of possession. The appellants' case is therefore not that they had been spoliated during the currency of the lease, but that it happened after the termination thereof.

[40] In *De Beer v Firs Investments Ltd*[23] Coetzee J emphasised that "(o)n termination of a lease the lessee's right to the use and enjoyment of the property ceases absolutely and he is bound to restore the property to the lessor". Although the respondents dispute the appellants' claim that the latter personally took possession of the premises after the lessee had vacated them, it is common cause that the appellants' eldest son, Alfons, continued to stay on

[23] 1980(3) SA 1087 (W) at 1092H.

therein. He, in fact, states in reply that when the lessee vacated the premises, he (Hengari) left the key to the premises with him.

[41] I interpose here to note that it was contended on behalf of the respondents that this evidence, tendered in reply, should be disregarded because it constitutes "new" evidence which should have been part of the appellants' founding papers. It is trite that all allegations necessary to sustain the relief being sought in application proceedings must generally be supported by evidence tendered in the founding papers and that the court will only allow an applicant to supplement those allegations where necessary to establish its case in reply under exceptional circumstances.[24] The case which a respondent is called upon to meet is, after all, the one set out in the founding affidavits.[25] The evidence which the respondents requested the Court to disregard – and I must note that there was no application for it to be struck – does not seek to introduce a new ground for the relief prayed for: It is been alleged in the first appellant's founding affidavit (and supported in the confirmatory affidavits of the second appellant and their son) that they took possession of the premises after the lessee had vacated them and that their son, Alfons, remained on the premises to take care thereof. Although some of these allegations are denied, it is not denied that Alfons remained on the premises. What remained in issue was the underlying reason for his presence on the premises – a denial which I shall presently deal with. It is common cause, however, that he was resident on the premises when, on 2

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[24] See: *Stipp and Another v Shade Centre and Others*, 2007 (2) NR 627 (SC) at 634G-H.
[25] *Pountas' Trustee v Lahanas*, 1924 WLD 67 at 68

September 2006, the respondents put padlocks on the doors. According to the answering affidavits of respondents and that of the former tenant, Hengari, which was tendered in support, Alfons (and two other persons) continued to occupy the premises after he had vacated them. The appellants' son could obviously not do so without keys to the premises. The allegation by second appellant's son in reply constitutes in my view a fair response to respondents' denial of the clear factual basis of possession laid in the appellants' founding affidavits and, in any event, has been invited by the defence set up by the respondents in opposition. Had the respondents been surprised by this allegation in reply and possessed information to the contrary, they would have been at liberty to tender a further affidavit to the contrary and to seek the Court's leave for it to be allowed in evidence.[26]

[42] The respondents also deny that the appellants' son occupied the premises as the appellants' agent or representative after termination of the lease. In the view I take, this denial does not raise a *bone fide* dispute of fact and is, in any event, so patently untenable that it may be rejected merely on the papers.[27] In terms of clause 7(a) of the lease agreement and the authority I have referred to earlier, Hengari was obliged to return the leased premises (and the second appellants' movable property specified in the contract) to her. Even if I accept, on the respondent's version, that Hengari allowed appellants' son (and two other ladies) to take up residence on the premises during the currency of the lease

[26] As to the general rule compare *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v J Simmons NO,* 1963 (4) SA 656 (A) at 660D – H and as to the discretion of the Court in that regard see: *Standard Bank of SA Ltd v Sewpersadh and Another*, 2005 (4) SA 148 (C) at 154B-F.

[27] C.f. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,1984 (3) SA 623 (A) at 634E - 635C.

because of a shortage of accommodation elsewhere in town, the indulgence extended to them terminated at the same time as the lease agreement. When Hengari vacated the premises all those occupying under him or on his authority had to do so as well. The act of handing over the keys to the premises to the second appellant's son could therefore not signify his permission for the latter to stay on – that permission was no longer his in law to give. In the circumstances, the inference that he handed over the keys in the discharge of his contractual and common law obligation to return the premises and movables thereon to the second appellant is almost irrefutable. At the very least, it is justified on a balance of probabilities.

[43] It has long been recognised that the handing over of the key to a building is not only an important symbolic act of delivery but, if none other than the holder of the key and his or her representatives have keys to access a building, it also constitutes an act of "transferring" possession of and control over the building and its contents to the receiver. Many of the authorities in that regard have been collected and discussed by Thring J in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[28]. Three of the points relevant to this appeal which emerged from his analysis are the following:

"(1) There is no particular magic in the possession of keys to a building as a manifestation of possession of the building; as a mere symbol their possession alone will not *per se* necessarily suffice to constitute possession of the building; to have that effect they must render the building subject to the immediate power and control of the

[28] 2007(2) SA 128 (C) at 133I-136F.

possessor of the keys: they must be the means by which the latter 'is enabled to have access to and retain control of the building….

(2) To be effective in conferring possession of the building on or retaining it for the possessor of the keys, the keys must have the effect of enabling their possessor to deal with the building as he likes (in the sense of affording him access thereto) to the exclusion of others; after all, that is the primary purpose which locks and keys are designed to achieve.

(3) Where … possession of the building is sought to be retained adversely to its owner, possession of the keys must, subject to what follows, have the effect of excluding the owner, in the sense of precluding him from exercising the right of possession which an owner of property usually enjoys ….".

If this summary of judicial authority in point is applied to the facts and the probabilities of this matter, the following conclusions must follow on the evidence: The tenant, Hengari, was contractually obliged to restore the leased premises and specified movables thereon to the second appellant upon termination of the lease, at the latest, on 31 August 2006; he did so by handing the keys of the building to the second appellant's son; the latter received and held them on his mother's behalf; as such he was able to access to the premises and to retain control thereof and of the movables therein on her behalf; through him she could exclude others from the premises and could enter the premises without assistance from or interference by others[29]; the respondents did not have keys to the building and, in dispossessing the appellants on 2 September 2006, were constrained to put padlocks on the doors; in doing so, they despoiled the second appellant's possession of the premises and the movables therein illicitly, i.e. "in a manner which the law will not countenance."[30]

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[29] C.f. *Ex parte Van der Horst: In re estate Herold, supra*, at 301F-G.

[30] Per Broome J in *R v M*, 1949(4) SA 975 (N) at 977.

[44] What remains, is to determine whether the finding that the second appellant did not directly possess the premises at the time of spoliation but used, occupied and controlled it indirectly through her son constitutes a bar to the remedy. It is now well settled law that the mandament is not available to an employee[31] or representative[32] who possesses a thing not for his or her own benefit but for the benefit of their employer or principal (*animus non sibi sed alteri possidendi*). In *Mpunga v Malaba,*[33] Steyn AJ (as he then was) restated this proposition:

> "It seems to me that the authorities have established that a servant or a person who holds no rights on his own behalf, except insofar as such rights derive from an authority given to him by the master, is not entitled to bring proceedings for a spoliation order, but that only the employer can do so. In other words, it seems to me that before a person can bring spoliation proceedings, he must show that the right of which he has been spoliated is something in which he has an interest over and above that interest which he has as a servant or as a person who is in the position of a servant or a quasi-servant."

In such instances, it is the employer or principal who actually possesses the thing[34], albeit vicariously or indirectly. They are the ones entitled to protect their possession by seeking a mandament against a *spoliatus*.[35]

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31 See: *Greaves and Others v Barnard*, 2007 (2) SA 593 (C) at 596A-B; *Du Randt v Du Randt*, 1995 (1) SA 401 (O) at 406E-G; *Dlamini and Another v Mavi and Others*, 1982 (2) SA 490 (W) at 493B-F.

32 See: *Mbuku v Mdinwa,* 1982 (1) SA 219 (Tk) at 222F-G; *Barlow Motors Investments Ltd v Smart,* 1993 (1) SA 347 (W) at 352I-J.

33 1959 (1) SA 853 (W) at 861E-G.

34 Hutchison *et al*., *Wille's Principles of South African Law* (7th ed.) at 196

35 See: *Lawsa*, *op.cit.,* par 266 and the authorities cited there

[45] It is for these reasons that I respectfully agree with the conclusion of my Brother Mtambanengwe that the Court *a quo* should have granted the mandament in respect of the premises. In addition, having been deprived of possession of the movables on the premises when the respondents barred the doors with padlocks, the mandament should have been granted for the same reasons, *mutatis mutandis,* in respect of those movables.

[46] In the result, I would therefore make the same order as the one proposed by him.

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Maritz, JA.

CHOMBA, AJA (*Dissenting)*:

(a) I have had the opportunity of perusing the lead and concurring judgments prepared by my brothers, Mtambanengwe, AJA, and Maritz, JA, respectively, in this case. Both of them, I notice, have arrived at the same decision, namely that this appeal should succeed. However, in doing so they have taken divergent routes on the main issue underpinning the appeal. That issue is whether or not in divesting the appellants of their possession of the disputed premises, namely Kanaindo Bar and Bottle Store, the respondents breached the law on *mandament van spolie*.

(b) The facts of the dispute with which this appeal is concerned have been fully recapitulated by my two brothers. Further the statement of the relevant law, as formulated by the judge of the Court *a quo,* has evoked no controversy between my brothers. Therefore it will be *otiose* for me to delve into the facts or the law, save merely to reproduce the formulation of the law as stated by the judge *a quo,* viz*:*

"From the authorities, it is clear that the central principle of the remedy (relating to the law of *mandament van spolie*) is simply that no person is allowed to take the law into his or her own hands and thereby cause a breach of the peace. Thus, the remedy is aimed at every unlawful and involuntary loss of possession by the possessor. Consequently, its single object is the restoration of the *status quo*

ante as a prelude to any inquiry into the merits of the respective claims of the parties to the thing in question."

(c) The judgment of Mtambanengwe, AJA appears to be premised on his perceived understanding that the judge *a quo* had held that the appellants had lost possession of the premises in dispute at the time that the second appellant leased the premises on three successive occasions to Guim, Kapenda and lastly to Hengari. He then held, after considering a number of decided cases, that in landlord and tenant cases, both the landlord and tenant do retain possession of the demised premises, with the tenant holding actual physical possession, while the landlord remains with legal possession.

(d) On the basis of the foregoing ratio, Mtambanengwe, AJA held that either the landlord, as in the present case, or the tenant as *de facto* possessor, has capacity to institute an action in *mandament*. It was for that reason that he concluded that the Court *a quo* had erred in holding that the fact of leasing resulted in loss of possession of the premises by the appellants, and consequently reversed its decision.

(e) While agreeing with Mtambanengwe, AJA in regard to the ultimate result of the appeal, Maritz, JA appears to have distanced himself from the holding of Mtambanengwe, AJA that

the Court *a quo* had held that the appellants had lost possession of the premises upon leasing the same as stated above. Maritz, JA found that the error of the Court *a quo* lay in the finding it made that the appellants had, on a balance of probabilities, failed to discharge the onus they bore to prove that they had been in peaceful and undisturbed possession of the premises in dispute at the time of the alleged spoliation. The learned trial judge had come to that conclusion on the basis of the reasoning that the effect of the leasing of the premises was to interfere with the state of peaceful and undisturbed possession the appellants had prior to the leasing.

(f) Upon a careful reading of the judgment appealed against in this case, I agree with Maritz, J.A. that indeed the pillar upon which the Court *a quo* based its decision was the perceived failure to discharge the onus of proof as stated in the preceding paragraph.

(g) The learned judge *a quo* does not appear to have appreciated the various factors outlined by Maritz, J.A. which evidenced elements of continued abstract possession of the premises by the appellants during the tenancy periods. The factors highlighted by Maritz in this connection were: The fact that the liquor licence used during the lease periods was in the second

appellant's name; the fact that the lease, particularly that between the second appellant and Hengari, who was the last lessee, significantly stipulated that upon its lapse the premises would revert to the 2nd appellant; the fact that it was after the termination of Hengari's lease when, on the instructions of the first respondent, one of the respondents' servants put padlocks on the doors to the premises; the fact that during the lease periods the second appellant was responsible for paying for the electricity supply to the premises; and the fact that upon termination of his lease, Hengari surrendered the keys to the premises to Alfons, the son of the appellants. That surrender of keys was done about two days before the respondent's servant put the respondents' own padlocks on the doors to the premises.

(h) I would agree that the hand-over of the keys to Alfons symbolized reversion of possession of the premises to the appellants. Alfons's status at the time of accepting the keys from Hengari was none other than that of being the appellants' son. This is because whatever relationship Alfons had with Hengari vis-à-vis the premises ended at the expiry of that lease. That relationship was incapable of surviving beyond the end of the lease.

(i) Consequently, despite the brevity of the reversion period of the possession, namely the period between the hand-over of the keys and the subsequent padlocking of the doors, that period did represent a peaceful and undisturbed possession on the part of the appellants. In my view, it follows that the padlocking constituted unlawful usurpation of possession by the respondents.

(j) I accordingly also concur with the ultimate decision of the lead judgment, and endorse the order as to costs.

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CHOMBA, AJA

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