IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

52197/10
CASE NO: ~~52179/2010~~

4/10/2010

In the matter between:

LUNGA SIZA MHLONGO First Applicant

LINDA MSIPA Second Applicant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE. ~~YES~~/NO No
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO No
(3) REVISED
04/10/10
DATE
SIGNATURE

and

STENGIE MONSIEUR First Respondent

BIRDSEYE LUXURY LODGE CC Second Respondent

JUDGMENT

TUCHTEN J:

1 The applicants applied urgently for a spoliation order in relation to the premises called BirdsEye Luxury Lodge, an accommodation establishment at 79 Allan Road Glen Austin, Midrand. They contend that they were unlawfully deprived of their possession of the premises by the first respondent acting either personally or as the agent of the second respondent.

2 The matter came before me in the urgent court on 23 September 2010. I could not decide the matter on the papers and directed that evidence be heard. The evidence was taken on 24 and 29 September 2010. After argument I granted an order as follows:

> 1 The respondents are directed immediately to restore to the applicants possession of both the entire premises called BirdsEye Luxury Lodge, 79 Allan Road Glen Austin, Midrand ("the premises) and the business of an accommodation establishment conducted on the premises ("the business");
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> 2 The respondents are directed immediately to restore to the applicants a set of keys to the premises and the business in all respects identical to the set of keys appropriated by the first respondent on 1 September 2010;
>
> 3 Subject to 4 below, the first respondent shall be entitled to exercise possession of the premises and the business jointly with the applicants;
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> 4 The applicants may on reasonable notice to the respondents approach the court on the same papers, supplemented as they be advised, to vary the order in 3 above.
>
> 5 The respondents must pay the costs of this application, jointly and severally.

3 When I gave the order, I said that I would deliver written reasons on 4 October 2010. My reasons follow. The applicants, Anthony Nkata, the first respondent, Chiza Banda and Mrs Lerato Rosinski gave

evidence before me. There was no discovery prior to the evidence and many of the documents handed in took the other side by surprise. The case stood down from time to time to enable counsel to take instructions. On one issue, to which I shall return, the respondents did not have enough time to prepare their case. On other issues, documents probably exist but due to the urgency were not produced without any fault on either side. I took all this into account in my evaluation of the evidence.

4 The first respondent is the widow of the owner of the premises and one of his intestate heirs. The deceased, in his lifetime the owner of an ammunition business and a police reservist, was murdered in 2009. In November 2009, the executor gave the first respondent limited powers to deal with the premises pending the winding up of the deceased estate. She prepared a draft lease of the premises under which a lessee would acquire the right to operate the accommodation business on the premises for a year at a rental of R26 500 payable in advance. The executor would not approve a lease for so long a period but authorised the first respondent to lease the premises out on this basis from month to month. It was not suggested that the applicants were aware of the restrictions on the authority of the first respondent so to deal with the premises.

5 The applicants were introduced to the first respondent and in about April 2010 came onto the premises and were participants with the first respondent in the administration of the business. The applicants put a substantial sum of money into the business by way of the purchase of appurtenances and refurbishment. The terms on which the applicants would came onto the premises and into the business were not settled at the outset and a prolonged period of negotiation ensued.

6 In early June 2010, the parties agreed to operate the business as a partnership for the duration of the World Cup, ie from 11 June to 11 July 2010. The applicants produced a written partnership agreement but the first respondent says her signature on the partnership agreement was forged. The first respondent says that the only basis on which the applicants came onto the premises was under the partnership arrangement, which she says was verbal. The applicants on the other hand say that the partnership was to operate for the period of the World Cup only and that before and after the World Cup the applicants would be the first respondent's tenants with the right to operate the business without reference to the first respondent except that during the initial stages of their tenancy, the first respondent would act as a consultant, giving them advice and guidance because they were new to this kind of business.

7 The applicants say that on about 14 August 2010 the first respondent finally signed the lease drafted by her but as an interim measure pending the drafting of a comprehensive final lease. The first respondent says that here again the signature on this interim lease, which is not dated, is a forgery. The first respondent agrees with the applicants that there were negotiations toward the conclusion of a formal lease but, as I have said, denies that there was any relationship of landlady and tenants created pending the conclusion of these negotiations.

8 The question whether the first respondent signed the partnership agreement or the interim lease cannot be decided in these proceedings, or at least at this stage, because the first respondent has not had a fair opportunity to have the handwriting on the documents analysed. Although I have reached firm, albeit in this sense provisional, conclusions on the credibility of the parties, I cannot in these circumstances find at this stage that the allegations of forgery have or have not been established. I therefore decided this application on the basis that the applicants are presently entitled to no more than an order restoring them to the premises as the partners in the business.

9 Although the first respondent placed in issue the allegation by the applicants that they were in quiet and undisturbed possession of the premises, what she really means is that the applicants were not in possession to her exclusion. It is on that basis that I decided the case. By the end of the case it was not disputed that the applicants were, before their exclusion from the premises, occupying as their personal quarters two rooms on the upper storey of the house on the premises[1] and that they had unrestricted access to the whole of the premises for the purpose of administering the business.

10 During August 2010 the relationship between the applicants and the first respondent deteriorated drastically. After writing at least one courteous email to the respondent recording that the relationship between them was one of landlady and tenants, the applicants consulted their attorney. He wrote the first respondent a letter dated 24 August 2010, attaching a copy of the interim lease and recording the applicants' contention that they held the premises under this lease.

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1 They had a four year old child and a young lady in matric living with them on the premises.

11 The reaction of the first respondent to the applicants' lawyer's letter was to lay, during August 2010, a charge of forgery against the applicants with the Midrand police, claiming that her signature on the interim lease had been forged. But it has not been established that there was any reply to the applicants' lawyer's letter of 24 August 2010 or that the first respondent ever confronted the applicants with this extremely serious allegation. The conclusion is irresistible that at least from the time she received the lawyer's letter of 24 August 2010, the first respondent wanted the applicants to leave the premises and worked toward making it difficult for the applicants to remain on the premises.

12 There is a disturbing thread that runs through the evidence: that the first respondent has some special influence with the SA Police at Midrand, possibly arising from the connections established by her late husband. I have the uneasy feeling that the first respondent is able to use certain members of the police in Midrand to do her bidding. Indeed, it was not disputed that when the second applicant arrived, as requested, in the company of police officers to remove certain of her goods from the premises, the first respondent refused her access until "her" (ie the first respondent's) police arrived.

13 Round about the same time that the forgery charge was laid, the supplies of electricity and water to the premises were interrupted. On 26 August 2010, the applicants hired a generator to supply them with electricity at the premises for which they paid from their own funds the sum of R4 000. On 31 August 2010, the applicants obtained an *ex parte* order against the first respondent in the Randburg magistrate's court under case no. 23237/10 for the immediate restoration of water and electricity.

14 On the same day, 31 August 2010, the applicants moved out of the premises temporarily because of the lack of water. The second applicant wrote a courteous but firm email setting out the facts in this regard and pointing out that the applicants remained the first respondent's tenants.

15 The first respondent denies that the water was cut off with malicious intent. She says that the water was cut off because there were pressure problems and the plumbers needed to cut the water off for a short period while they dealt with the problem. However, the evidence of Anthony Nkata is that the first respondent brought in men who cut off the supply of water.

16 On 1 September 2010, matters came to a head. The first applicant went to the premises in order, he says, to pick up the computer which was being used in the administration of the business and take it to a friend where, making use of the friend's electricity supply, he could work on the administration of the business. The applicants and the first respondent agree that there was a desktop computer belonging to the first respondent on the premises which had been used in the administration of the business, that during the World Cup period this computer had crashed and could no longer be used and that the applicants then made available to the business a desktop computer bought by the second applicant from her employer on 14 April 2010. On 1 September 2010 the second applicant's computer was being used in the administration of the business.

17 The applicants say that when the first respondent's computer crashed, it was removed from the office and placed in the storeroom. The first respondent says that her, crashed, computer remained in the office.

18 The first applicant says that after finishing his work he drove back to the premises with the computer in his car to return it to its place in the office in the premises. When he arrived, he said, he found the police there. They said they were there to investigate a case of housebreaking. The first applicant says he took the police through the

premises to show that nothing untoward had happened but the police said that they had to await the arrival of the first respondent, who was the complainant. The police did not confront the first applicant with any charges until the first respondent arrived.

19 The first respondent had been shopping at a local shopping centre with Mrs Rosinski, her friend and occasional chef at the premises. She did not tell Mrs Rosinski about the alleged forgery or that the police had been summoned to the premises. If Mrs Rosinski's recollection is accurate, it would appear that the first respondent was not even aware that the police were at the premises because she took no steps to cut her shopping trip short and hasten back to the premises.

20 There is a contradiction in the evidence in this regard: the first respondent says that she summoned the police because she had received a report from Chiza Banda, the gardener, guard and gatekeeper at the premises that the first respondent had stolen the first respondent's computer and a microwave oven.[2]

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2 The alleged theft of the microwave oven was never put to the applicants or alleged in the first respondent's answering affidavit. The first respondent said, when she mentioned the microwave oven in evidence, that she had previously forgotten that it had been stolen.

21 Banda, on the other hand, says that it was he who summoned the police. He said that he had been "forced" to load the computer and microwave oven into the first applicant's car. He was quite unable to explain how he had been so forced.

22 The first respondent eventually arrived at the premises and accused the first applicant of stealing her computer. The first applicant was arrested. He said that the police would not listen to his version, saying that they were there for the first respondent and that the first applicant should tell the magistrate his story in due course. The first applicant and taken to the Midrand police station where he signed an official SAPS disposal authorisation authorising the police to hand the computer back to the first respondent. The first applicant says that he thought the document was required to enable the first respondent to take the computer back to the premises rather than leave it at the police station but the document authorises the police in its terms to restore possession of the computer to the first respondent.

23 The police did a particularly shoddy job of investigating the first respondent's charge. They did not identify the computer on the disposal receipt by reference to its make or serial numbers and every indication is that they were not interested in the first applicant's version. It ought not to be necessary to state the obvious: that it is the

duty of the police to investigate a charge that has been laid, not to act as advocate or enforcer for the complainant.

24 This is highly relevant because the first respondent's charge is that the first applicant stole her crashed computer while the first applicant says that the computer which he took - and returned - was that belonging to the second applicant. Had the computer seized by the police been identified as it should have been, this issue would never have arisen. Banda and Mrs Rosinski were adamant that the computer taken by the first applicant belonged to the first respondent but they were equally adamant that the "stolen" computer was functional at the time the first applicant took it away and that after it was returned, it continued to be used in the administration of the business. Mrs Rosinski confirmed that there was only one desktop computer in the office at any given time.

25 I formed clear impressions of the various witnesses who testified before me. I found the applicants both to be cultured, intelligent, honest witnesses but that they lacked the quality of being commercially "streetwise". They naively parted with large sums of money before the precise nature of their relationship with the first respondent had been fully documented and without any adequate security for their investment. But they documented their dealings with

the first respondent in lucid emails written by the second applicant and used the machinery of the law to enforce what they regarded as their rights, rather than the enforcement machinery available on the streets.

26 I was similarly impressed by the evidence of Anthony Nkata. I found him to be honest and straightforward in his account of the arrival of men, in a vehicle which he says looked like those used by the water authorities, who in the company of the first respondent turned off the supply of water to the premises and then left.

27 I was most unimpressed by the first respondent as a witness. She appeared to me to be an imperious, wilful, even arrogant person who reacts in an aggressive but underhand manner when she does not get her own way. I believe that she is quite prepared to concoct evidence. I give two examples of this:

28 First example: It emerged during the evidence in chief of the first respondent that it is her case that the applicants *voluntarily* gave up possession of the premises and business after an altercation between the first respondent and the second applicant on the day that guests belonging to an organisation called SASCO arrived to stay, The date of the arrival of the SASCO guests was established as being probably 22 August 2010. The first respondent says that during the altercation

the second applicant gave her 24 hours notice of the termination of their relationship and, by implication, her intention to vacate the premises. She says that the first applicant subsequently associated himself with this 24 hours notice.

29 But this crucial element of the first respondent's case, ie the 24 hours notice, was never alleged in her answering affidavit. Nor was it put to either of the applicants. Her explanation for this was that she told it to her former attorney but he left it out of her affidavit. I reject this explanation as untruthful and absurd. It of course does not explain why the 24 hours notice version was not put to the applicants in cross-examination.

30 Moreover, the probabilities are overwhelmingly against the first respondent's 24 hours notice version. The applicants had invested a substantial sum of money in the business and had, at the very latest by 22 August 2010, no where else to live. Their actions display a determination to hold onto their possession of the premises and the business. The emails admittedly addressed to the first respondent showed a determination on the part of the applicants to stay on the premises and continue to run the business. There is no indication at all that the first respondent ever asserted her 24 hour notice version in correspondence even though she says she discussed the lawyer's

letter of 24 August 2010 with her lawyer and could have sent emails to the second applicant setting this out.[3] Finally, in this regard, there is no suggestion that the applicants took any steps in the period between 22 August and 1 September 2010 to implement their alleged decision to vacate or that the first respondent ever raised with them the question of their vacating or ever demanded that the applicants vacate as the first respondent claims they had said they would.

31 I accordingly find that the 24 hours notice version of the first respondent was a concoction, ie a deliberate lie designed to mislead the court.

32 <u>Second example</u>: The first respondent made considerable play in evidence in chief of the fact that the interim lease did not reflect her identity number. She said that she would not have signed such a lease unless it reflected her identity number. On questioning by the court, she was adamant that neither of the respondents knew her identity number, unless they got it from the Department of Home Affairs, something which may safely be ruled out.

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3 The allegation of forgery was made *to the applicants* for the first time in the answering affidavit. There is no suggestion that the first applicant was accused of forgery on 1 September 2010.

33 But when it emerged that the partnership agreement, which the first respondent says also contains her forged signature, did reflect her identity number, the first respondent came up with the version in the witness box that she recalled a specific incident when the second applicant became aware of the first respondent's identity number. She had, the first respondent said, simply forgotten this incident. I reject this evidence, similarly, as a concoction, ie a deliberate lie designed to mislead the court.

34 The witnesses Banda and Rosinski were called in the main to corroborate the first respondent's version in regard to the alleged theft of the computer. I find on a balance of probabilities that they were schooled, rather ineptly, in what they were to say in this regard and that each of them conspired with the first respondent to give false evidence in an attempt to persuade the court that the first applicant was a thief. But the allegations of theft against the first applicant are literally incredible. I say so for the following reasons:

34.1 It is established beyond doubt that the computer which the first applicant took away from - and returned to - the premises was a *functional* desktop computer. The only other desktop computer on the premises was that belonging, on the evidence, to the first respondent. But the computer belonging to the first respondent had crashed: it was not functional. That was why the second applicant's computer was used in the business. This conclusion in my judgment destroys the theft allegation in regard to the computer.

34.2 Furthermore, the probabilities are overwhelmingly against the proposition that the first applicant would want to misappropriate the first respondent's computer. A crashed desktop computer is of little or no value. And if the first applicant *did* want to steal it, he would hardly have drawn attention to himself by getting Banda to load it into the first applicant's car. Nor would he have brought it back to the premises.

34.3 The allegation of theft, as formulated by Banda, was that the first applicant had stolen both the computer (from the office) and the microwave oven (from the kitchen). Both these items, so says Banda, were loaded by Banda under compulsion on the part of the first applicant. But the alleged theft of the microwave oven was never asserted in the first respondent's answering affidavit or put to the applicants in cross-examination. The explanation of the first respondent for the failure to mention the microwave oven was that she had forgotten about the theft of the microwave oven until she came to give evidence. I reject this explanation as a concoction.

35 I accordingly conclude that the theft charges in relation to the computer and the microwave oven are a fabrication and part of a process designed by the first respondent to force the applicants from the premises. I find that the interruption of the electricity and water supplies were, on the probabilities, designed by the first respondent to achieve the same end. I find significant in this regard the fact that the first respondent did not ever tell the applicants that the interruption of the water supply was merely for a short period to enable her plumbers to improve the water pressure.

36 At the time the police were on the premises on 1 September 2010, the first respondent came into possession of the keys which had been provided to the applicants for the purpose of gaining access to the premises and administering the business, The applicants and the first respondent were in agreement that the bunch of keys provided to the applicant enabled them to gain access to every room on the premises. The first applicant says that the keys were taken from him by the police, who then handed them to the first respondent. The first respondent says that the first applicant voluntarily handed the keys to her in a manner consistent with the declared intention of the

applicants on 22 August 2010 to abandon the business and the premises. Mrs Rosinski says that the first applicant was in possession only of two keys and a gate remote control, which, says Mrs Rosinski, the first applicant threw to or at the second respondent, one at a time, while at the same time saying to the first respondent that it had been unnecessary for the first respondent to go to these lengths because the applicants had already told the first respondent they were leaving. There is thus a sharp contradiction between the evidence in this regard of the first respondent herself and her witness, Mrs Rosinski.

37 I do not believe the respondents' versions in relation to how the first respondent came into possession of the keys for the same reasons that I rejected the 24 hours notice version. It is further highly improbable that the second applicant would have expressed or demonstrated any intention of giving up possession, especially in the light of the email of the previous day in which the second applicant had asserted the applicants' intention of enforcing the terms of the interim lease. I accordingly accept the first applicant's version of how the first respondent came into possession of the applicants' keys.

38 It follows from what I have said that I reject as false the evidence that the applicants voluntarily gave up possession of the premises and the business. They were literally locked out of the premises by the first

respondent. Indeed, the first respondent testified that she refused to allow the applicants to return to the premises because she did not trust them. It follows from what I have said that while I find that the first respondent did indeed lock the applicants out of the premises and accordingly the business, I reject as false her explanation for why she did so.

39] Spoliation is the illicit deprivation, by whatever means, of the possession of a thing enjoyed by a person. I find that the first respondent did indeed deprive the applicants, illicitly, of their possession of the premises and the business and of the keys which the applicants together had possessed before the spoliation and which enabled the applicants to gain access to all parts of the premises. I granted a spoliation order for this reason. However, It would be unfair to the respondents to determine whether the applicants are entitled to occupy as lessees, ie to the exclusion of the first respondent, before the first respondent has been given a fair opportunity to obtain expert evidence on this issue. The order therefore puts the applicants back into the premises and the business as partners rather than as lessees. It appears from the first respondent's testimony before me that the State may be in the process of obtaining such evidence for the purpose of the prosecution of the fraud and theft charges laid by the second respondent. But the first respondent is not entitled to rely on the State to make her case for her. In my view she must take steps herself to obtain the necessary evidence and she must do so promptly. On the other hand, it would not be fair to the applicants to close the door on their efforts to prove that they are entitled to occupy as lessees. That is why I granted paragraph 4 of the order. Costs ought to follow the result of this case. Both respondents opposed the application. That is why I granted paragraph 5 of the order.

NB Tuchten
Judge of the High Court
4 October 2010

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