

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 76/2020

Date heard: 24 January 2020

Date delivered: 30 January 2020

REPORTABLE

In the matter between:

MOGAMAT RIFAAD MOOSA

Applicant

And

HIMAT RAMSUGIT

First Respondent

CLAUDETTE DOROTHY LOUISA

VAN DER MESCHT N.O

Second Respondent

WANDA ALFONSO N.O

Third Respondent

JUDGMENT

Goosen J:

[1] The applicant conducts a carwash business from a property it has leased from the first respondent. The carwash business is operated from this property at 98 Govan Mbeki Avenue. According to the applicant the first respondent is also the owner of the adjacent property, 96 Govan Mbeki Avenue from which is operated a used car dealership by another party who is also a tenant of the first respondent. The second and third respondents are the trustees of the De Franca Property Trust, the erstwhile owners of the properties sold.

[2] It is common cause that until 16 January 2020 the applicant enjoyed the use and occupation of a portion of a large metal container which was situate on 96 Govan Mbeki Avenue adjacent to the boundary between that erf and 98 Govan Mbeki. The applicant used the container to store certain equipment used by him in the conduct of his business.

[3] The applicant states that he entered into a sale and lease agreement with the Franca Property Trust in terms of which he purchased the carwash business from

the Trust and entered into a lease agreement in respect of 98 Govan Mbeki Avenue from whence the business is conducted. According to the applicant his use and enjoyment of the container on 96 Govan Mbeki Avenue is in terms of his lease agreement. The applicant states that the first respondent is the new owner of the immovable properties that comprise 96 and 98 Govan Mbeki Avenue. This is denied by the first respondent who states that the property is owned by Astana Properties CC of which he is the managing member. The first respondent further denies that the applicant's use of the container forms part of the subject of a lease agreement. It was no more than an informal arrangement not contingent upon the lease agreement. It is common cause that there is presently a dispute regarding the lease which is the subject of litigation between the applicant and the Trust.

[4] On 6 January a group of workmen arrived on 96 Govan Mbeki Avenue to commence removal of the container in order to undertake renovations to the property. The circumstances giving rise hereto are matters in dispute. The first respondent states that notice was given of the termination of the use arrangement. The applicant denies this. On that occasion the applicant (in the presence of Mr Killik, his attorney's agent) advised the workmen that they were not permitted access to that portion of the property on which the container was situated. On 16 January 2020 the workmen were again on site. They removed those items from the container belonging to the applicant and placed them on his business premises. Both applicant and Killik were present.

[5] The workmen proceeded to dismantle the container which appears to have been fixed to the ground in some manner by cutting it into pieces. The pieces were

then loaded onto a vehicle and removed from the site, apparently to be sold as scrap metal.

[6] The events of 16 January 2020 sparked an exchange of correspondence between applicant's attorney and the attorney for the first respondent. The applicant's attorney adopted the view that possession of the container ought to be restored. The first respondent's attorney, in an effort to avoid litigation, tendered possession of a store container on the applicant's premises. This was rejected. On 23 January the applicant commenced the present application in which he seeks restoration of possession of the container pursuant to the *mandament van spolie*.

[7] The application is opposed on several grounds. In the first instance the first respondent contends that the possessory relief sought is not competent in the light of the fact that the subject property has been destroyed. Secondly, it is contended that the applicant has failed to join the party who took the action complained of, namely Astana Properties and has failed to join the party in lawful possession of 96 Govan Mbeki Avenue including that portion on which the container was situated. Thirdly, it is submitted that the applicant has, in the circumstances of the matter, failed to make out any case for urgency.

[8] In answer to the first ground of opposition applicant's counsel took the stance that either the common law ought to be developed alternatively that the court ought to fashion appropriate constitutional relief to meet the exigency arising from the destruction of the property. In respect of the non-joinder it was submitted that the first

respondent is in effect the controlling mind of Astana Properties and the person who caused the spoliation.

[9] The *mandament van spolie* is a common law remedy available to the possessor of property, whether movable or immovable, who has been deprived of such possession by the conduct of another. There are two requirements, namely that the applicant for the relief was in possession of the property, and that the respondent wrongfully deprived him/her of possession without his/her consent.

[10] In ***Van Rhyn and Others NNO v Fleurbaix Farm Pty Ltd***¹ it was held that:

“It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying dispute concerning entitlement to possession of the object or right in issue.”

[11] The doctrinal basis of the remedy and its limitations was considered in ***Rikhotso v Northcliff Ceramics (Pty) Ltd and Others***². Nugent J (as he then was) held as follows³:

“The remedy afforded by the mandament van spolie, expressed in the *maxim spoliatus ante omnia restituendus est*, is generally granted where one party to a dispute concerning possession of property seizes the property pursuant to what he believes to be his own entitlement

¹ 2013 (5) SA 54 (WCC)

² 1997 (1) SA 526 (W)

³ At 532G-533B

thereto. In such cases a Court will summarily order return of the property irrespective of either party's entitlement to possession, and will not entertain argument relating to their respect rights until this has been done. The principle underlying the remedy is that the entitlement to possession must be resolved by the Courts, and not by a resort to self-help.

By its nature then a spoliation order will usually operate as no more than a preliminary order for restoration of the status quo until the entitlement to possession of the property is determined. The assumption underlying the order is that the property exists and may be awarded in due course to the party who establishes an entitlement thereto.

Viewed from that perspective, the remedy is inappropriate if the property has been destroyed. There is nothing upon which the order can operate, and no possessory entitlement left to be adjudicated upon. It is because it is a possessory remedy that most of the modern writers hold the view that a spoliation order may not be granted if the property has been destroyed (see Van der Merwe *Sakereg* 2nd ed at 119 and 212, 140-3; Silberberg and Schoeman's *The Law of Property* (edited by Klein and Borraine) 3rd ed at 139 and 141; Delport and Olivier *Sakereg Vonnisbundel* at 83; Kleyn 'Die Mandement van Spolie as Besitsremedie' 1986 *De Jure* 1; Sonnekus 1978 *TSAR* 168; De Waal 1984 *THRHR* 115)."

[12] The learned judge went on to state⁴:

⁴ At 535B

“In my view, the weight of authority supports the proposition that a spoliation order cannot be granted if the property in issue has ceased to exist. It is a remedy for the restoration of possession, not for the making of reparation.”

[13] Since the mandament is a possessory remedy, where possession of the property cannot be given, either because it has been destroyed or alienated or passed into the possession of a third party the remedy cannot be granted. The question as to impossibility of restoration of possession is a factual inquiry⁵.

[14] The question that arises is whether the common law remedy either has been or ought to be developed in the light of the Constitutional Bill of Rights to extend its ambit.

[15] In ***Tswelopele Non-Profit Organisation and Others v City of Tswane Metropolitan Municipality and Others***⁶ this question was pertinently addressed. In that matter a large number of people had been forcibly removed from land occupied by them and their shelters destroyed and removed in the process. The High Court had refused an order restoring possession. On appeal the Supreme Court of Appeal granted relief in terms of s 38 of the Constitution.

⁵ Administrator, Cape And Another v Ntshwagela and Others 1990 (1) SA 705 (A) 720G-H

⁶ 2007 (6) SA 511 (SCA)

[16] Cameron JA found that the doctrinal basis of the mandament and the nature of that remedy as set out in **Rikhotso** was correct⁷. The Supreme Court of Appeal further held that it would be superfluous to graft onto the mandament a remedy countenanced by s 38⁸. The court accordingly expressly did not develop the common law to extend the ambit of the mandament. Instead the court addressed the constitutional dimension which arose in that matter by fashioning an appropriate remedy in terms of s 38 of the Constitution⁹.

[17] This approach was approved by the Constitutional Court in **Schubart Park Residents' Association v City of Tswane Metropolitan Municipality**¹⁰. The court found that the possessory focus of the mandament is to be retained. It was, in that matter, called upon to deal (as was the court in **Tswelopele**) with an infringement of, *inter alia*, the rights to housing set out in s 26 of the Constitution. Accordingly, appropriate relief to vindicate and protect that right was granted. The court did not, either expressly or by necessary implication develop the common law relating to the availability of the mandament in circumstances where the property dispossessed has been destroyed.

[18] Mr Dyke SC, who appeared for the applicant, fairly conceded during argument that he could not, in light of the authorities advocate for a development of the common law ambit of the remedy of mandament van spolie. Instead he relied upon the adjunct remedy provided for in s 38 of the Constitution.

⁷ At par [24]

⁸ At par [27]

⁹ At par [26]-[28]

¹⁰ 2013 (1) SA 323 (CC) at

[19] The applicant in its founding papers seeks occupation/possession of that piece of immovable property on which the portion of the container it used was located. It also seeks restoration of possession of a container. It is common cause that the container has been destroyed. The portion of the immovable property forms part of the adjacent property, 96 Govan Mbeki Avenue which is in the possession of a third party. It is accordingly the case that physical possession of the immovable property and/or the container is factually impossible. If an order restoring that which was lost by way of dispossession were to be fashioned it would necessarily involve the restoration of the use of some structure for storage upon the applicant's premises. This is a wholly different arrangement to that to which the applicant was entitled by way of his now deprived possession of the container. Such relief would in my view extend beyond the reach of relief countenanced by the mandament. It would have the effect of providing adjunct constitutional relief in circumstances where no constitutionally protected rights are engaged other than those regulated by the ordinary mandament van spolie remedy.

[20] This present application is distinguishable upon the facts from both the ***Tswelopele*** and ***Schubart Park*** matters. It should be emphasized that orders by way of reconstituted possession or restoration are not granted by mandament. In each instance where a restoration order has been made it has been made pursuant

to s 38 of the Constitution and in circumstances where the right to housing or shelter and dignity has been infringed¹¹.

[21] It was argued that the unlawful dispossession negates the rule of law; that the consequential effect of the dispossession is an affront to the applicant's dignity; and a violation of his right to pursue the profession of his choice. Accordingly for these reasons a constitutional dimension arises and this court is enjoined to grant appropriate relief to vindicate the constitution.

[22] There is no doubt that an unlawful dispossession violates the rule of law. That is so in every instance in which the requisites for *mandament van spolie* are established. Indeed it is to protect the rule of law that the remedy is provided so that the underlying dispute as to rights may be determined in accordance with law in due course. But that in itself is not sufficient for the granting of relief outside of the ambit of the possessory remedy. Nor is the contended for breach of the right to dignity or the right to pursue a profession (assuming for the moment that the mere assertion is sufficient). As noted in **Schubart Park**¹²:

"... an order made in relation to factual possession in spoliation proceedings does not in itself directly determine constitutional rights . . ."

¹¹ Tswelopele (*supra*); Schubart Park (*supra*). See also Ntantana and Others v Mhlontlo Local Municipality and Another (CA 51/2015) [2016] ZAECHMC 10 (15 April 2016)

¹² At par [29]

[23] Where an appropriate Constitutional remedy is fashioned the approach will be guided by what was said of such remedy in *Hoffmann v South African Airways*¹³:

"The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'."

[24] In this instance an order for restoration of possession of the now destroyed property at some other location would serve to address no other mischief or constitutional infringement than the unlawful dispossession. The granting of such remedy under the guise of s 38 would in effect graft onto the mandament a constitutionally extended remedy which our courts have felt constrained not to allow.

¹³ 2001 (1) SA 1 (CC) at par 45 (2001 (11) BCLR 1211; (2000) ILJ 2357; [2000] 12 BCLR 1365)

[25] The Supreme Court of Appeal elected not to develop the common law remedy of *mandament van spolie* to cater for reparation in circumstances where the property has been destroyed or restoration of possession thereof is otherwise not possible. It elected, instead, in the context of the constitutional rights enshrined in s 26 which were engaged, to provide constitutionally mandated relief in terms of s 38. That the formulation of appropriate relief was required in the context of that case (**Tswelopele**) and in the later case (**Schubart Park**) arose in consequence of the particular circumstances. In both cases the unlawful dispossession and destruction of the property had rendered people homeless, and the dispossession itself has been carried out in violation of several protected rights¹⁴. There was accordingly an interplay between the deprivation of possession and its remedy on the one hand and the consequential infringement of rights on the other. As Froneman J noted in **Schubart Park**¹⁵:

“The applicants sought an order in the high court for restoration on the ground that they were despoiled of possession of their homes. This immediately added the dimension of s 26(3) of the Constitution to what would otherwise have been a normal spoliation application. It is the interplay between the ordinary requirements of spoliation and the demands of s 26(3) of the Constitution that is at issue here.”

¹⁴ See Tswelopele (supra) at par 15 where Cameron JA records the following: “That the wanton destruction of the occupiers’ dwellings violated the Constitution was not disputed. What must be owned is how far-reaching and damaging the breach was. The governmental agencies violated not merely the fundamental warrant against unauthorised eviction, but (given the implicit menace with which the eviction was carried out) the occupiers’ right to personal security and their right to privacy. It infringed not only the occupiers’ property rights in their materials and belongings, but trampled on their feelings and affronted their social standing. For to be hounded unheralded from the privacy and shelter of one’s home, even in the most reduced circumstances, is a painful and humiliating indignity.”

¹⁵ At par [22]

[26] The learned judge went on to address this interplay as follows¹⁶:

“[29] I agree that it is conducive to clarity to retain the “possessory focus” of the remedy of spoliation and keep it distinct from constitutional relief under section 38 of the Constitution. This is because the order made in relation to factual possession in spoliation proceedings does not in itself directly determine constitutional rights, but merely sets the scene for a possible return to the status quo, in order for the subsequent determination of constitutional rights in relation to the property.

[30] The implication of this is that spoliation proceedings, whether they result in restoration or not, should not serve as the judicial foundation for permanent dispossession – that is, eviction – in terms of section 26(3) of the Constitution. Neither the dismissal order of 22 September 2011 nor the later tender implementation order could serve as justification for the eviction of the applicants from their homes for the purposes of section 26(3) of the Constitution. But could the dismissal order, and the later tender implementation order, legitimately count as “appropriate relief” under section 38 of the Constitution?

[27] In the present matter such considerations do not arise. Whilst the act of dispossession is in itself an act contrary to the rule of law, neither restoration nor its

¹⁶ At para [29]-[30]

refusal would constitute a consequential determination of constitutionally protected rights.

[28] In my view the applicant has not made out a case for such relief in the circumstances of this case. It follows therefore that the application cannot, on this basis, be granted.

[29] As indicated at the outset the first respondent also relied upon the applicant's failure to join the owner of the property, at whose instance the first respondent acted, and the occupant of the adjacent property. These challenges on the basis of joinder are not without merit. I have, however, determined the matter upon a more fundamental basis of principle. It is therefore unnecessary to consider this aspect.

[30] The same is true of the challenge to the urgency with which the application was brought. This challenge, which was premised upon the applicant's failure to set out any grounds for urgency in his founding affidavit is also not without merit. It is, in the view I take of the matter, however, not necessary to consider this aspect.

[31] There is no reason why the costs should not follow the result. It was submitted that given the fact that the relief sought was not competent from the outset I should

mulct the applicant in a punitive cost order. In my view, that would not be an appropriate order. It should be borne in mind that the first respondent acted outside the law in depriving the applicant of the possession he enjoyed. The fact that the applicant's remedy does not lie in restoration of possession does not mean that the first respondent's conduct is sanctioned in any manner. The ordinary costs order is sufficient.

[32] I make the following order:

The application is dismissed with costs.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicant: *Adv B.C Dyke SC*

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