



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO: 400/2023

In the matter between:

FERREIRA EQUESTRIAN CENTRE (PTY) LTD

APPLICANT

and

CHRISTO SPIES

FIRST RESPONDENT

HARRISMITH POLO CLUB

SECOND RESPONDENT

JUDGMENT BY:

Gusha, AJ

HEARD ON:

2 March 2023

DELIVERED ON:

This judgment was delivered electronically by circulation to the parties' representatives by way of email. The date and time for delivery is deemed to be at 14h00 on 24 March 2023.

JUDGMENT

- [1] This is an opposed application wherein the Applicant seeks an order directing the Respondents to restore its full access to and undisturbed possession of the polo fields situated at the Harrismith Polo Club (the club), by removing a fence erected thereon on the 24th and 25th January 2023. This application was brought within the purview of a *mandament van spolie*.
- [2] The Applicant is a duly registered and incorporated private company conducting business as an equestrian centre at the club. It is duly represented herein by Ms Ferreira, its sole director and shareholder. The 1st Respondent is an adult male and a member of the 2nd Respondent. The 2nd Respondent, the club, is an association with perpetual succession which can acquire rights apart from its members and conducts a polo sports club at the polo fields.
- [3] Pursuant to the aforesaid fence being erected, the Applicant, on an urgent basis, approached this court on the 14th February 2023. My learned brother Tsangarakis AJ, declared the matter urgent and granted leave for the joinder of the 2nd respondent to the main application. He further granted leave to the Applicant to amend its notice of motion and founding affidavit in the main application by filing its amended notice of motion as well as its supplementary founding affidavit in the application for the joinder of the 2nd Respondent. Costs in those proceedings stood over for adjudication in the main application.
- [4] This matter was eventually postponed to the opposed motion roll for adjudication and my learned sister Van Rhyn J, directed that the parties file heads of arguments, which were duly filed, and made no order as to costs.
- [5] At the time of hearing this matter the Applicant conceded that due to the trajectory this matter took prior to hearing, the urgency thereof had ceased and consequently moved for the granting of prayers 2 and 3 as per the amended notion of motion.

- [6] It is not in dispute that the Applicant has since March 2020 conducted business at the club, at a fee and for its own benefit. Its business consists of horse training, schooling, livery, stabling, as well as "eventing". It caters to approximately 43 members and has 34 horses, 19 of which are stabled at the club's stables. Its main selling point being that its members can ride their horses on the polo fields as evinced by the photos as depicted on its Facebook page.
- [7] Subsequent to receiving a message from the 1st respondent on the 24th January 2023, informing the Applicant to refrain from using the polo fields, the 1st Respondent and others under his direction, removed its equipment from the polo fields and erected a fence. On the 25th January 2023 the said fence was fully erected with the result that Applicant's access to the polo fields was now truly and completely curtailed.
- [8] The Respondents do not dispute that the Applicant had access to and use of the club. What is placed in issue is which portion of the club the Applicant was entitled to use, the FEC arena, the polo fields or both. It is the contention of the Respondents that the Applicant only had use of the FEC arena and was on numerous occasions pertinently informed to desist from using the said fields. The Respondents however alluded to knowing that the Applicant, from time to time made use of the polo fields, but contend that this did not establish free and undisturbed possession of the fields, as it was informed to desist therefrom whenever it and or its members, were spotted using the fields. As a result of her failure to heed the warnings the fence was, at the instance of the 2nd Respondent, erected around the polo fields, leaving the Applicant still with access to the FEC arena.
- [9] Further, that proof that the Applicant did not have use and control of the polo fields, is to be found in the Whatsapp messages exchanged between the parties, as the Applicant, so it was submitted, therein sought permission from the 1st Respondent to use the polo fields. I shall at the opportune time revert to this aspect.

- [10] The main submissions advanced on behalf of the applicant is that on the undisputed facts before the court, it is clear no issue is taken with spoliation as the Respondents do not dispute erecting the fence nor that it was erected at the instance and behest of the 2nd Respondent. For that reason, it was submitted, that I should find that the 1st and 2nd Respondents are co-spoliators. It was further submitted that I must find that the Applicant had free and undisturbed possession of the polo fields as it had used said fields daily, freely and in plain sight since March 2020, as evinced by the presence of its equipment on the field as well as the photographs depicting its members and riders on the polo fields. The Applicant further averred that in conducting its business, it had, in addition to the undisputed access to the FEC arena, free and undisturbed access to and use of the polo fields where the majority of its activities were, for approximately 3 years, conducted thereon in plain sight.
- [11] The Respondents submitted that the Applicant had access to and use of only the FEC arena and not the polo fields. It was averred that the Applicant could not have had sole use and control of the fields as the Respondents also used the fields for the past 30 years. The genesis of this averment escapes me, as I do not understand the Applicant's case to be that, at the time of the alleged spoliation, it had sole and exclusive use of the fields.
- [12] To fortify its averments, the Respondents relied on the WhatsApp message exchanges. I am loathe to burden this judgment any more than I have, however in the context of this application and the findings I reach hereunder, I would be remiss if I do not deal with a few extracts of their exchanges. On the 7th February 2022 Ms Ferreira sent a message to the 1st Respondent in the following terms;

"Christo skies ek pla jou jou op vakansie, Mag ons op die polo veld ry? Ek gaan die dresseer baan teen my heining opste vir Vicky se dogter laat hy nie op die veld is nie, maar mag ons op m outride op die veld ry?"¹

¹ Annexure "CS6", page 85

In response the 1st respondent wrote;

"Hi nee glad nie op die veld nie asb Ek het wel vir V gese sy kan laat Tyla agter die pale net sy"

*"Die velde is off limit asb"*²

[13] At this stage of the judgment already it is prudent to mention that the Applicant disputed that these messages served as proof that she did not have access to and use of the polo fields, contending however that these were sent as a courtesy as the grass on the fields was at that stage being cut in preparation for an upcoming tournament.

[14] It was argued that as the Applicant seeks final relief and to the extent that there is a clear dispute of facts, this court had to apply the trite approach employed in the Plascon Evans case ³ wherein the court held that:

"...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact..."

[15] The Respondent implored this Court to find that the dispute between the parties regarding the Applicant's alleged possession of the polo fields, is a genuine and *bona fide* dispute of fact which cannot be resolved merely on the papers. In that respect they besought this Court to refer the dispute for oral evidence. They contend that their version would be supported and conclusively be established

² Annexure "CS6", page 86

³ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634; National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) at par [26]

through oral evidence. The Applicant in turn implored this court not to refer this matter for oral evidence as no genuine dispute of fact existed. I shall at the opportune time revert to this aspect.

- [16] It was finally further submitted that the Applicant did not pass muster of the requirements for the *mandament van spolie*, as it failed to establish what measure of control it had over the fields and that it was unlawfully deprived of free access to and undisturbed possession thereof. Further that mere access to the fields did not establish free and undisturbed possession thereof. If, however the court found that spoliation occurred, the Respondents urged the court to find that the 1st and 2nd Respondents were not co-spoliators as the 1st Respondent acted at the instance of the 2nd Respondent.
- [17] It is against the aforementioned factual milieu that I am called upon to decide whether at the time the fence was so erected the Applicant had control of and undisturbed possession of the polo fields.
- [18] As correctly submitted by the parties, two requirements must be met in order to obtain the remedy. Firstly the party seeking the remedy must, at the time of the dispossession, have been in possession of the property. The second is that the dispossessor must have wrongfully deprived them of possession without their consent. The *mandament van spolie* is a possessory remedy which is available to a person whose peaceful possession of a thing has been disturbed. It lies against the person who committed the dispossession. The *mandament* is not concerned with the underlying rights to claim possession of the property concerned. It seeks only to restore the *status quo ante*. It does so by mandatory order irrespective of the merits of any underlying dispute regarding the rights of the parties. The essential rationale for the remedy is that the rule of law does not countenance resort to self-help ⁴.
- [19] The court in **Ngqukumba v Minister of Safety and Security and Others** ⁵ succinctly held that:

⁴ *Monteiro and Another v Diedricks* (Case no 1199/19) [2021] ZASCA 015 (2 March 2021) at par 14

⁵ 2014 (5) SA 112 (CC) par 10

*The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.*

- [20] The legal principles in regards of the *mandament van spolie* are clear and very few defenses thereto can be raised. The Applicant's possession must be restored first and foremost (if it would be legal to do so) and thereafter the dispute as to the legality of any right relied upon could be considered.⁶
- [21] At the risk of repetition, it is common cause between the parties that the Respondents erected a fence which curtailed the Applicant's access to the polo fields. The only fact in disputed being whether the Applicant had, in the first place, free and undisturbed access thereto. From the dates on which the WhatsApp exchanges occurred between the parties, it can clearly be gleaned that same occurred almost a year before this dispute between them arose. A careful reading of all of the messages attached to the papers, reveal that the parties were in constant communication and being civil with each other, I might add, (at least until the 23rd March 2022) as per the attached messages, on diverse days and over various issues pertaining to the usage of the club.
- [22] Against this backdrop therefore, it is inexplicable why they would wait almost a whole year before taking action against the Applicant's infringing actions of continually using the polo fields. Consequently, I can arrive at no other conclusion than, that at some point, during their association with the Applicant, the Respondents had no quibble with the Applicant using of the polo fields, until the

⁶ Harrismith Intabazwe Tsiame Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another (567/2022) [2022] ZAFSHC 151 (14 June 2022)

fence was erected. This much is evinced by the presence, in plain sight, of the Applicant's equipment on the field. Considering that the parties were no longer on speaking terms at the time of this dispute (an aspect not disputed by the Respondents), I can only surmise that something must have happened to trigger this change in attitude in the Respondents.

- [23] I could find no genuine or *bona fide* dispute on these facts, the Applicant on a careful reading of the conspectus of the evidence was clearly on a balance of probabilities using and had access to the polo fields. Not only was it using same for its benefit as evinced by the attached photographs, the presence of its equipment on the field, the following WhatsApp message sent by the 1st Respondent to the Applicant lends credence to this ⁷;

"More Sam

Ons gaan die B veld ook sny vandag...as daar van jou perde ook daar loop..."

The Respondent's contention that the Applicant at no point had access to the fields is simply untenable and does not justify a referral for oral evidence. I am satisfied that the facts averred in the Applicant's affidavits which have been admitted by the Respondents, the erection of the fence, together with the facts alleged by the Respondents (absence of proof that the Applicant had exclusive use and control of the fields), justify the granting of the order as sought by the Applicant.

- [24] Having established that the Applicant successfully passed muster of the 1st requirement, spoliation, what remains for decision is whether it had possession of the polo fields. On this score too, I am not persuaded by the Respondents' arguments that in order to succeed the Applicant had to show that it had effective control of the fields and intended to secure some benefit from it. In spoliation matters what the court is concerned with is not possession in the judicial sense but rather *de facto* possession. Differently put, the court is not

⁷ WhatsApp message sent on 7th February 2022, Annexure "CS6", page 82

concerned with the lawfulness, or otherwise, of the possession, only that the Applicant was in *de facto* possession⁸. The facts of this case reveal that the Applicant had *de facto* possession and she ran an equestrian centre for profit at the club and more specifically on the polo fields. Any other dispute that the parties may have with regards to the lawfulness, or not, of the Applicant's possession, falls outside the purview of these proceedings.

[25] Having arrived at the aforementioned conclusion it follows that there could be no other finding other than that the 2nd Respondent is a co-spoliator. It is after all the case for the 1st Respondent that he acted at the instance and behest of the 2nd Respondent. The 2nd Respondent being an entity, was incapable of carrying out the spoliation itself, hence the instruction to the 1st Respondent. The 2nd Respondent, though not physically carrying out the spoliation, it played a pivotal role in the spoliation. Without its instruction same would not have been carried out.

ORDER

[26] Resultantly, I make the following order:

1. The 1st and or the 2nd Respondents are ordered to restore forthwith to the Applicant full access to and undisturbed possession of the polo fields, Harrismith by removing the fence that was erected on the 24 and 25 January 2023.
2. The Respondents are ordered to pay the costs of this application, on a party and party scale, jointly and severally, the one paying, the other to be absolved.

⁸ God Never Fails Revival Church v Mgandela 2019 JDR 2063 (ECM)


Gusha, AJ

On behalf of the applicant

Instructed by:

Adv. J Els

EG Cooper Majiedt Inc

BLOEMFONTEIN

On behalf of the respondent:

Instructed by:

Adv. CD Pienaar

Lovius Block

BLOEMFONTEIN