

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION : MTHATHA**

Case No.: 2188/2019

Date heard : 17 October 2019

Date delivered : 22 October 2019

In the matter between:

GOD NEVER FAILS REVIVAL CHURCH

Applicant

and

SIMPHIWE MGANDELA

First Respondent

RESTORATION WORSHIP CENTRE

Second Respondent

JUDGMENT

BENEKE, A.J.:

- [1] The Applicant initially sought relief based upon two causes of action: (i) the *rei vindicatio*; and (ii) the *mandament van spolie*. The Applicant abandoned the *rei vindicatio*. With the abandonment of the *rei vindicatio*, the Respondent's special plea of non-joinder fell away. This was conceded in argument by the Respondent's attorney.
- [2] Accordingly, all that remains for determination is whether or not the Applicant is entitled to relief under the *mandament van spolie*.

[3] In respect of the *mandament van spolie*, the Respondent raised the preliminary point that there exists a dispute of fact on the papers. The Applicant elected not to refer the matter to oral evidence, relying, instead, on the facts as set out in the Respondent's version. This it is entitled to do in terms of the decision of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), particularly the portion of the judgment at 634E–G.

[4] The facts underlying this application are therefore as follows:

- a. The First Respondent joined the Applicant's church. He was thereafter tasked with leading the Mount Frere branch of the Applicant. During 2012, the Applicant's Mount Frere branch worshipped at Jolobe Junior Secondary School. The Applicant was then advised that the school was no longer available and other accommodation had to be found.
- b. The Respondent, thereupon, offered the Applicant land for the Mount Frere branch to use ("the Site"). In terms of the agreement between the Applicant and the First Respondent, the First Respondent would be entitled to take back the Site in the future when he decides to commence business.
- c. The Applicant used the Site until 5 May 2019. On that day, the First Respondent informed those present in the church that day that he had as of that day established a new ministry, the Second Respondent, from the Site. Here it must be pointed out that the Respondents aver that the First Respondent never "*required people to leave*". The Respondents admit that the First Respondent advised the Applicant's congregants that he was, as of then, running the Second Respondent from the Site.
- d. Since that declaration, the Second Respondent, under the guidance and leadership of the First Respondent solely uses the Site to the exclusion of the Applicant. This is confirmed in the letter of the

Respondents' attorneys, dated 5 June 2019, where it is stated that "*unless your clients enter the premises to worship under our client's ministry, Restoration Worship centre, they will not be allowed to use the premises*".

- e. On 17 May 2019, some twelve days after the announcement by the First Respondent, the Applicant wrote a letter of demand to him, seeking return of the Site. The Respondents' attorneys replied on 24 May 2019 disputing that the Applicant was entitled to the return of the Site or the items situated thereon. On 3 June 2019 another letter was addressed by the Applicant's attorneys to the Respondents' attorneys. The Respondents' attorneys replied to that letter on 5 June 2019. It is clear from the last letter that all attempts to settle the matter extracurially had failed.

[5] The issues to be considered in this matter are as follows:

- a. Did the Applicant act within a reasonable time to restore possession?
- b. Was the Applicant in possession?
- c. Was the Applicant wrongfully deprived of possession and against his wish?

[6] Did the Applicant act within a reasonable time to restore possession?

- a. The court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of the application.¹ In exercising this discretion, the bar after one year imposed at common law on the *mandament* consequential upon *complainte* is a guide to modern practice. If an applicant delays for more than a year before bringing his

¹ *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (C) at 687A.

application for a *mandament van spolie*, there will have to be special circumstances present to allow the applicant to proceed with his application. Conversely, if an application for a *mandament* is brought within one year of the spoliation, special circumstances will have to be present before relief can be refused merely on the ground of excessive delay.² In some cases it may be necessary to determine whether delay was inordinate so as to constitute acquiescence.³

- b. The delay of the Applicant is clearly less than a year. The dispossession occurred on 5 May 2019. The Application was launched on 25 June 2019. This is within two months of the dispossession.
- c. The Respondents' attorney, during argument, suggested that a reasonable time for the launch of the Application would have been three weeks from the date of the dispossession. There was no reference to any authority for that proposition. The attempts at extracurial settlement apparently failed on receipt of the Respondents' attorneys' letter of 5 June 2019. The Application was launched on 25 June 2019. This is within the three weeks of the failure of the settlement attempts. There is no suggestion that the attempts at extracurial settlement were unreasonable. Accordingly, on the Respondents' attorney's own argument, the delay was not unreasonable.
- d. I, accordingly, find that the Applicant has acted within a reasonable time to protect its possession.

[7] Was the Applicant in possession?

- a. The possession enjoyed by the party who asks for the spoliation order must be established.⁴ In spoliation proceedings the court is not

² *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 893.

³ *Le Riche v PSP Properties CC* 2005 (3) SA 189 (C) at 198F, 204B–C and 205B.

⁴ *Yeko v Qana* 1973 (4) SA 735 (A) at 739.

concerned with the lawfulness of the applicant's possession. In other words, the applicant must show not that he was entitled to be in possession,⁵ but that he was in *de facto* possession at the time of being despoiled.⁶

- b. The possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself,⁷ accompanied by the physical element of *corpus* or *detentio*.⁸ The physical element 'implies physical control rather than physical prehension'.⁹ It is, therefore, not necessary that the possession be continuous.¹⁰ It has often been held that in the case of immovable property the continuous presence of the applicant or his servants on the premises is not required, if the nature of the operations which he conducts on the premises do not require his continuous presence.¹¹
- c. The possession need not have been exclusive possession. A spoliation claim will lie at the suit of a person who holds jointly with others.¹² If one of the joint possessors of a thing takes exclusive possession of it against the other's will, the latter can avail himself of the *mandament van spolie* against the former.¹³
- d. Among those who can avail themselves of the remedy are, therefore, not only true possessors such as a *bona fide* possessor,¹⁴ but also holders such as a lessee.¹⁵

⁵ *Ngewu v Union Co-operative Bark and Sugar Co Ltd* 1982 (4) SA 390 (N) at 394.

⁶ *Malan v Green Valley Farm Portion 7 Holt Hill 434 CC* 2007 (5) SA 114 (E) at 124B.

⁷ *Yeko v Qana* 1973 (4) SA 735 (A) at 739D–E.

⁸ *Reck v Mills* 1990 (1) SA 751 (A) at 759D.

⁹ *Mbuku v Mdinwa* 1982 (1) SA 219 (TkS) at 221.

¹⁰ *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 233.

¹¹ See, for example, *Nienaber v Stuckey* 1946 AD 1049.

¹² *Nienaber v Stuckey* 1946 AD 1049 at 1056.

¹³ *Du Randt v Du Randt* 1995 (1) SA 401 (O) at 404E–F.

¹⁴ *Setlogelo v Setlogelo* 1914 AD 221 at 225 and 227.

¹⁵ *Nienaber v Stuckey* 1946 AD 1049.

- e. As a defence, the respondent may plead that the applicant did not possess the property in dispute at the time of the alleged spoliation. This entails a denial that the applicant had the necessary physical control of the property, or that he held the property with the intention of securing some benefit to himself.¹⁶
- f. The nature of the Applicant's right in the Site appears to be the subject of a dispute between the parties.

- i. The Applicant avers that:

- 1. Since 2012, the Applicant was in peaceful and undisturbed possession of the Site and the movable property therein, with the Applicant conducting all of its affairs, and the Applicant's congregants worshipping, from the Site [Founding Affidavit, paras 12 and 18];
- 2. Sign boards, paraphernalia and emblems of the Applicant had been placed on the Site [Founding Affidavit, par 20];

- ii. In answer, the Respondents deny the Applicant's peaceful and undisturbed possession and, in support of the denial, aver:

- 1. The First Respondent offered the Site to the Applicant for worship purposes [Answering Affidavit, par 10];
- 2. The use of the Applicant of the Site was in terms of the verbal agreement between the Applicant and First Respondent [Answering Affidavit, paras 18 and 24 read with par 10];

¹⁶ *Yeko v Qana* 1973 (4) SA 735 (A) at 739D–G.

- g. Given the admission that the Applicant was entitled to use the Site for worship, the remainder of the denial by the Respondents is rather bald.
- h. I am of the view that, given the nature of the Applicant and its business, the continuous presence of the Applicant or its servants and congregants on the premises is not required. It is clear that the holding by the Applicant of the Site was with the intention of securing some benefit for itself, accompanied by physical control of the Site.
- i. I, accordingly, find that the Applicant was in possession of the Site on 5 May 2019.

[8] Was the Applicant wrongfully deprived of possession and against his wish?

- a. The second requisite for the grant of a spoliation order is proof by the applicant that he has been deprived of possession.¹⁷ Spoliation takes place if the applicant is deprived by the actions of the respondent of control over the property in question.¹⁸
- b. Any wrongful deprivation suffices.¹⁹ Wrongful deprivation in this context means deprivation against the will of the person and without resort to the legal process.²⁰
- c. As a defence, the respondent may deny that the act alleged was one of spoliation, or claim that it was legally justified.²¹ Thus, the respondent may raise the defence that the applicant had consented to the removal of the property,²² or that his actions were lawful by virtue of an order of court,²³ or under a statutory provision.²⁴

¹⁷ *Moleta v Fourie* 1975 (3) SA 999 (O) at 1001.

¹⁸ *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 719–20.

¹⁹ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).

²⁰ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 381A–B.

²¹ *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D) at 274H.

²² *Nongcingane v Mbini and Garcia* 1923 EDL 412.

²³ *Ntai v Vereeniging Town Council* 1953 (4) SA 579 (A) 589H–590A.

²⁴ *Potgieter v Du Plessis* 1978 (1) SA 751 (NC) at 754H.

- d. A term in a contract which authorizes a party thereto, in given circumstances, to take possession, without recourse to the courts, of property in the possession of the other party, is void.²⁵ In *Nino Bonino v De Lange* 1906 TS 120 at 123, Innes CJ stated:

“[T]he Court cannot recognise such a provision. It is an agreement which purports to allow one of the two contracting parties to take the law into his own hands, to do that which the law says only a court shall do, that is, to dispossess one person and to put another person in possession of the property.”

- e. There is some dispute about whether or not some dispossession occurred. It is common cause that on 5 May 2019, the First Respondent informed those present in the church that he had as of that day established a new ministry, the Second Respondent, from the Site. Despite protestations in the papers and argument that this did not mean that the Applicant had to leave the Site, the sole use of the First Respondent, to the exclusion of the Applicant, is confirmed in the letter of the Respondents’ attorneys, dated 5 June 2019, where it is stated that *“unless your clients enter the premises to worship under our client’s ministry, Restoration Worship centre, they will not be allowed to use the premises”*.
- f. I, accordingly, find that the Respondents have deprived the Applicant of control of the Site.
- g. The Respondents then go on to argue that the deprivation is lawful, in that it is in terms of the verbal contract between the First Respondent and the Applicant.
- h. In their Heads of Argument, and in argument in court, the Respondents persisted with the allegation that

²⁵ *Erasmus v Dorsyd Farms (Pty) Ltd* 1982 (2) SA 107 (T) at 110A–E.

“... upon deciding to commence business the first respondent alerted the applicant’s congregants to take the site back. In so doing and acting in accordance with the agreement, the applicant has not stated in clear terms as to how such a conduct and invoking a term or provision of an agreement could amount to ‘unlawful deprivation’. The first respondent merely exercised a provision available to him in terms of the agreement.”

- i. As set out above and in the *Nino Bonino* decision,²⁶ term in a contract which authorizes a party thereto, in given circumstances, to take possession, without recourse to the courts, of property in the possession of the other party, is void.
- j. In argument I asked the attorney for the Respondents what the usual recourse would be in the event that the Applicant failed to vacate the Site upon notice, which notice had been given in terms of the verbal agreement. He readily conceded that the appropriate recourse was to launch an action based on breach of contract.
- k. Given both the invalidity of any term allowing the Respondents simply to retake possession of the Site without recourse to a court, and the failure to first obtain a court order evicting the Applicant, the dispossession must be unlawful.
- l. I, accordingly, find that the Applicant was wrongfully deprived of possession against its wish.

[9] One last issue raised by the Respondents is that the Applicant is seeking to enforce specific performance of a contract. The Respondents contend that the *mandament van spolie* does not protect contractual rights and that it cannot be used to enforce specific performance of a contract.

²⁶ *Nino Bonino v De Lange* 1906 TS 120 at 123.

- a. The Respondents are correct when they state that the *mandament van spolie* does not protect contractual rights and that it cannot be used to enforce specific performance of a contract.²⁷
- b. However, this is not what the Applicant seeks. It seeks restoration of possession, irrespective of the foundation of that possession. This is in line with the function of the *mandament van spolie* which is, in the first place, a possessory remedy.²⁸ The object of the order is merely to restore the *status quo ante* the illegal action. It decides no rights of ownership; it secures only that if such decision be required, it shall be given by a court of law, and not affected unlawfully. If, before the spoliation, either party needed a legal decision to establish his rights, he requires it just as much after, as before, the order. He is in no better, and not worse, position than he was before the spoliation.²⁹
- c. A court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place; it merely inquires whether or not there has been a spoliation, and if there has been, it restores the *status quo ante*.³⁰ In spoliation proceedings the court will, therefore, neither enter into the lawfulness of the applicant's possession,³¹ nor into the question of ownership.³²
- d. I, therefore, find that the Applicant is not seeking to enforce specific performance of the verbal contract between the Applicant and the First Respondent.

[10] In light of what I set out above, I find for the Applicant and the following order shall issue:

²⁷ *FirstRand Ltd t/a Rand Merchant Bank v Scholtz* NO 2008 (2) SA 503 (SCA) at 510A–B.

²⁸ *Jigger Properties CC v Maynard* NO 2017 (4) SA 569 (KZP) at 574E–H.

²⁹ *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) at 117D–118B.

³⁰ *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) at 117D.

³¹ *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at 331A.

³² *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) at 763.

1. The Respondents' dispossession from the Applicant of the unsurveyed site situated along the N2 road between Mount Frere and Mount Ayliff behind the KwaBhaca Art Centre in Mount Frere ("the Site") together with all the property stored therein, which spoliation occurred on 5 May 2019, is declared unlawful;
2. The Respondents are directed forthwith to return to the Applicant possession of the Site, together with all the property stored therein as at 5 May 2019.
3. The Respondents shall pay the costs of this application jointly and severally, the one paying, the other to be absolved.

M BENEKE
JUDGE OF THE HIGH COURT (ACTING)

Appearances:	For the Applicant	: Mr AM Bodlani
	On the instructions of	: VV Msindo & Associates
	For the Defendant	: Mr SB Bavu
		: Of SB Bavu Inc. Attorneys
		: c/o M. Hlazo Attorneys