

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 65643/2015

A878/2015 →

24/5/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO	NO
(3) REVISED. ✓	
24/5/17 DATE	[Signature] SIGNATURE

In the matter between:

HYPROP INVESTMENTS LTD

APPELLANT

(RESPONDENT IN THE COURT A QUO)

And

JENNI BUTTON (PTY) LTD

RESPONDENT

(APPLICANT IN THE COURT A QUO)

INTERVENING:

JOHANNES FREDERICK KLOPPER N. O.

JOINT BUSINESS RESCUE

PRACTITIONER FOR RESPONDENT

(FOR APPLICANT IN THE COURT A QUO)

JACQUES DU TOIT N. O.

**JOINT BUSINESS RESCUE
PRACTITIONER FOR RESPONDENT
(FOR APPLICANT IN THE COURT A QUO)**

JUDGMENT

Fabricsius J,

1.

In the Court a quo the Applicant, being Jenni Button (Pty) Ltd, applied to the Court

for an order:

2. "Directing Applicant's possession of Shops 39, 40 and 41 Woodlands

Boulevard, 100 Woodlake Avenue, Pretoriuspark, Pretoria (the premises) to

be restored immediately.

3. Directing Respondent immediately to allow Applicant unrestricted access to the premises".

The application was brought in the Urgent Court and was argued on 22 September 2015. Judgment was given on 2 October 2015 by Holland-Muter AJ and the application was granted.

2.

This is the appeal against such an order.

3.

The application is by its nature based on the principles of *mandament van spolie* and as such a particular Applicant merely has to prove possession and dispossession. It is a speedy remedy to protect possession and does not concern the legal right to the property.

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

4.

All that was required therefore was that the Applicant in these proceedings file short affidavits expeditiously on the limited issues of possession and dispossession.

See: *Willow Vale Estates CC and Another v Bryanmore Estates Ltd 1990 (3) SA 954 W at 961.*

5.

In the Founding Affidavit, the Applicant alleged that it had been in possession of and traded from the particular premises since December 2004, until about July 2015 when the Respondent unlawfully deprived it of its possession by forcing the locks, breaking into the premises and so taking possession. The Founding Affidavit was made by M. P. Joubert, who was a director of Jenni Button, a company with its registered address in Cape Town. He described Jenni Button as being a brand on the one hand specialising in "elegant women's fashion" and on the other hand being the principal trading company for every Jenni Button store in South Africa, including that at Woodlands. He added that Jenni Button forms part of the larger Platinum

Group which also owned a number of other brands, and each one of these brands had its own principal trading company. He also was the Chief Executive Officer of the Platinum Group and a director in all the Group trading and entities. Each brand conducts business across the country from leased retail premises situated in leading shopping centres.

6.

He then set out the "leasing history" in some detail and stated that at the time the premises in Woodlands were opened, namely by the first week of December 2004, Woodlands was owned by ATT Fund Ltd and he negotiated the Woodland lease with ATT Fund. Agreement had been reached on all the lease terms and these were encapsulated in various oral agreements and other recordals such as emails, Minutes of meetings and similar notes. No single lease document was ever signed. The agreement with ATT Fund was that as a main trading company, Jenni Button would be entitled to install a separate Jenni Button Rental Enterprise as the tenant at Woodlands, once Rental Enterprise was formed. Until such time, Jenni Button

would occupy and take possession of the premises and operate therefrom as the tenant and main trading entity. No Jenni Button Rental Enterprise was ever formed and Jenni Button has accordingly always remained the *de facto* tenant and trader at the premises.

7.

Subsequent thereto, Hyprop, the present Appellant, acquired the whole of ATT Fund during about September 2011 and has since been Jenni Button's landlord. During June 2015, Hyprop issued Summons against "Platinum Clothing Woodhill 5 CC", claiming an amount for rental and other charges allegedly then due and owing in respect of the Jenni Button premises at the Woodlands Mall. He stated that Jenni Button disputed this claim, because it was not against the correct party, nor correctly computed, nor was it due and payable. He referred to the Particulars of Claim in this context which were annexed, and the fact that Hyprop had pleaded a version of the lease agreement that it relied on. He disputed the correctness of this lease

agreement, but also said that they were immaterial to the application before the Court a quo.

8.

He then gave details as to the dispossession and the correspondence between the parties in connection therewith.

9.

In the Answering Affidavit, it is stated that the Applicant had not paid rent for a number of months and that an agreement had been entered into to the effect that if there was no compliance with certain of the terms that were referred to in that correspondence of 17 March 2015, the landlord would have the right to cancel the lease and take back the store. This condition was accepted by Jenni Button's representatives.

10.

Apart from that, the Respondent in the proceedings a quo set out in great detail facts relating to a business rescue application launched in the High Court of the Western Cape Division during July 2015. It was pointed out that in those proceedings the same M. P. Joubert made an affidavit describing the whole structure of the "Platinum Clothing Clearwater 5 CC" entity, from which it was clear that Jenni Button (Pty) Ltd was not the entity that leased the premises in the particular shopping centre. In summary it was stated that it was difficult to understand on what basis Jenni Button (Pty) Ltd had *locus standi* in this matter, and that on Mr Joubert's own version in the Cape High Court it became clear that it did not have any lease agreements in respect of the premises that they occupied.

11.

The affidavit of M. P. Joubert was annexed, and I do agree that it appears therefrom that the *locus standi* of Jenni Button (Pty) Ltd was challenged on grounds that on the face of it were completely justified. A Replying Affidavit was drafted by the Fifth

Respondent in his capacity as a joint business rescue practitioner for Jenni Button (Pty) Ltd. In essence he stated that it was the only entity that ever took possession of, fitted out and stocked the premises and the only entity that ever operated from such premises.

12.

In my view, a *bona fide* dispute of fact had arisen in that context and of course, in *mandament van spolie* proceedings the onus is on the Applicant to prove that it was in possession of the premises. Despite the *bona fide* disputes of fact that were raised in the proceedings a quo, neither party asked that the matter be referred to evidence, and nor did the Court a quo raise this point. It must in any event also be remembered that *mandament van spolie* proceedings cannot be used when contractual rights are disputed or where in effect a specific performance of contractual obligations is claimed.

See: *First Rand Ltd T/A Rand Merchant Bank v Scholtz N. O. and Others 2008*

(2) SA 503 SCA at 510 B to D.

It is not necessary to deal with the contractual dispute between the parties as it emanated from notes, discussions and correspondence. It is in my view clear that a serious and bona fide doubt existed whether Jenni Button (Pty) Ltd had the necessary *locus standi* to launch the spoliation proceedings, and that it had shown that it, as a legal entity, was the possessor of the premises in terms of a contractual right granted to it. The Court a quo ought to have approached the dispute between the parties on this basis, but the learned Judge did not do so. In the light of the conflicting versions relating to what the actual terms of any agreement were between the parties, and in fact who were the parties to any such agreement relating to the Woodlands shopping centre, it is my view that the Applicant in the Court a quo did not prove on the balance of probabilities that it had possession of the particular premises. The application ought therefore not to have been granted.

14.

It is also common cause on the affidavits before us that another entity is now occupying the particular premises, and that in any event, possession thereof cannot now be restored to the Respondent in the proceedings before us. A Court will not make an order that cannot be enforced, that will not have practical effect, and that does not refer to the rights and obligations of parties affected thereby.

See: *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005*

(6) SA 205 SCA at 213 E - G.

15.

However, on the basis that the Applicant in the Court a quo did not prove on a balance of probabilities that it was in possession of the premises, the appeal must in my view, succeed with costs.

The following order is therefore made:

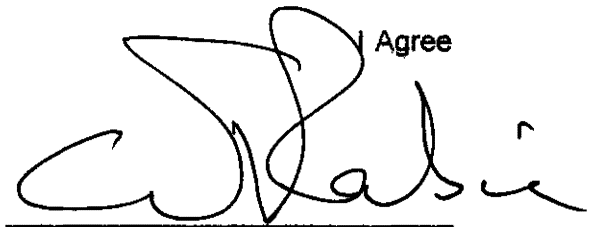
1. The appeal succeeds with costs, including cost of Senior Counsel;

2. The order of the Court a quo is set aside, and substituted with the following order: "The application is dismissed with costs, including the cost of Senior Counsel".



JUDGE H.J. FABRICIUS

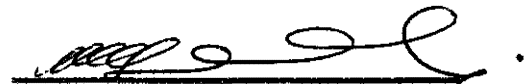
JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

 I Agree

JUDGE P. RABIE

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

I Agree



JUDGE F. LEGODI

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

19 MAY 2017

Case Number: A878/2015

65643/2015

Counsel for Appellant:

Adv A. C. Ferreira SC

Instructed by: Mark Efstratiou Inc

Counsel for Respondent:

Adv J. Smit SC

Instructed by: Deon Perold & Associates Inc.

Date of hearing: 17 May 2017

Date of judgment: 24 May 2017