



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 1703/2016

In the application between:

ERIC NKOSIVUMILE MATOMELA

Applicant

and

POBELA BENJAMIN MAINE

1st Respondent

REVEREND MOLETE

2nd Respondent

THE PRESBYTERIAN CHURCH OF AFRICA

3rd Respondent

JUDGMENT BY: C REINDERS, J

HEARD ON: 28 JULY 2016

DELIVERED ON: 8 AUGUST 2016

- [1] The Applicant in its Notice of Motion moves for an order that he be placed in possession of site 175 B Harankope, Phuthabitjaba.

- [2] In his Founding Affidavit he avers that he had been conducting services and serving the congregation at the said premises. On the 19th of March 2016 the First and Second Respondents proceeded and broke the locks to the fence as well as the church situated on the property in order to hold an installation meeting. Thereafter the Respondents refused to grant him entry to the premises and proceeded to replace locks on the premises of which he has no keys.
- [3] The Respondents in their Opposing Affidavit deny that the Applicant had possession of the property. They aver that the Applicant had access to the church building in order to fulfill his duties as the installed and ordained minister of the circuit. Due to his suspension he was not entitled to access and was not required to fulfil his duties as such. In amplification it is stated that the Applicant previously occupied the manse on the property but vacated same some six years ago when he moved to his own residence in Harrismith whilst still having access to the church building in his capacity as installed and ordained minister for purposes of fulfilling his duties.
- [4] Respondents deny having broken the fence and/or locks and state that pursuant to a court order dated 3 March 2016 obtained by Third Respondent against the Applicant the police, having been shown the order, cut the locks which were fixed to the gates by the applicant (the said order being annexed as "Annexure A" to the application).
- [5] It is disputed by Respondents that the Applicant was in peaceful possession of the property and reiterated that at best he had no further right of access and therefore is not entitled to keys of the premises.

[6] In reply it is conceded that Applicant lives in his own property in Harrismith. He states that the manse serves a dual purpose of an office as well as overnight accommodation from time to time. It is conceded that “the police” did indeed cut and broke the locks to the fence of the property. Applicant repeats that it is his right and obligation to serve the congregation.

[7] Spoliation is relief granted normally by way of motion proceedings to prevent self-help. It is expected of an applicant to allege and proof peaceful and undisturbed possession as well as unlawful deprivation of possession.

See: **Le Riche v PSP Property CC** 2005 (3) SA 189 (CPD)

It would suffice to proof possession if the holding was with the intention of securing some benefit for the applicant. It is actual physical possession that is protected and not the right to possession.

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

Dispossession will be unlawful if it is without the plaintiff’s consent or without due legal process.

See: **George Municipality v Vena** 1982 (2) SA 263 (A)

[8] Adv. Hefer appearing on behalf of the applicant argued that although the Applicant is suspended, he on the probabilities was the only one who could exercise control over the property and that this was illustrated by him securing locks to the property, and that I should conclude therefrom that the Applicant was in possession of the property. His view is that it is nor here nor there whether the police removed the locks in lieu of the court order. It is the actions

of the Respondents after the initiation proceedings which constituted the spoliation and which entitles the Applicants to the relief sought.

- [9] Mr Van Aswegen disagrees. He argues that the sole source of the applicant's right to use and enjoyment of the property was a master-servant relationship and that the control of the property was entirely in the discretion of Third Respondent's Deacons Court. Therefore the applicant was not in possession of the property as the property was under the direct control of the Deacon's Court. Applicant subject to their permission had only a right of access. In support hereof I was referred to **Mpunga v Malaba** 1959 (1) SA 853 (W) which bears a striking resemblance to that facts before me as it also concerned a reverend claiming that he had been spoliated as key-holder to the church. Steyn AJ found that a person who holds rights that derive from authority given to him by the master is not entitled to bring proceedings for a spoliation order.
- [10] In **Dlamini and Another v Mavi and Others** 1982 (2) SA 490 (W) the secretary and treasurer of a trade union was evicted and it was held that their right of occupation was merely as servants of the union. Kruger AJ dismissed an application for restoration of possession *ante omnia*. Mr Van Aswegen submitted that on a conspectus of the allegations by the Applicant, the Applicant equates access with possession, whilst the mandament protects possession and not access.
- [10] I have my serious reservations whether the Applicant on his own version proves possession in the sense that he was holding with the intention of securing some benefit for himself. It does not avail him to aver that as minister for the particular congregation it is his

right and obligation to serve the congregation. That to my mind is not securing some benefit for himself. It rather strengthens the Respondents' version that Third Respondent possesses the property and by virtue of the master-servant relationship Applicant merrily had access thereto.

- [11] I was referred to a judgment of Nicholson J and align myself with his conclusion that the mandament is there to protect possession and not access.

See: **De Beer v Zimbali Estate Management Association (Pty) Ltd** 2007 (3) SA 254 NPD at 264 par [54]

- [12] The common cause facts are that the South African Police Services in lieu of the court order removed the locks to the gates and granted, amongst others, the Respondents access to the premises. It therefore cannot be said that the Respondents dispossessed the Applicant. It is the Police Service who did so. Mr Hefer ostensibly alive hereto, submitted that the actions of the Respondents after the installation proceedings, constituted the spoliation. I am not so sure whether this is so. What the Applicant has to proof is that the Respondents ended his rightful possession by way of self-help and not the police. Staying in possession after the police had rightfully removed the locks, would not amount to spoliation. I mention this in passing by and do not make a final decision hereon for the reasons stated above and because I concluded that Applicant was in any event not in possession of property.

- [14] Mr Van Aswegen pressed hard upon me grant a punitive cost order. I am not prepared to do so.

[15] Accordingly I make the following order:

The application is dismissed with costs.

C. REINDERS, J

On behalf of applicant: Adv. J.J.F. Hefer
Instructed by:
McIntyre Van der Post
BLOEMFONTEIN

On behalf of respondents: Adv. W.A. van Aswegen
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