



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: 3309/2015

In the matter between:

SHELVING MAN (PTY) LTD

Applicant

And

SAYED DAWOOD

First Respondent

IMRAAN ADAM

Second Respondent

AYUB VALLY

Third Respondent

JUDGMENT

Heard : 17th June 2015
Delivered : 22nd June 2015

JEFFREY AJ:

[1] This is an application for leave to appeal brought by the first respondent against my judgment delivered on 20th May 2015 granting spoliatory relief to the applicant. The applicant has also instituted an application in terms of s 18 of the Superior Courts Act, No. 10 of 2013, for leave to execute on the order granted by

me in the event of the first respondent being granted leave to appeal.

[2] For the purposes of this judgment, the parties will be continue to be referred to the applicant and the first respondent respectively.

[3] After the application for leave to appeal was argued, by consent I adjourned the s 18 application *sine die*, reserved the question of costs for later decision and made a direction regarding the delivery of further affidavits.

[4] Turning to the application for leave to appeal, s 17 of the Superior Courts Act, No. 10 of 2013 provides that:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success;
or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties. leave to appeal may only be given where the judge concerned is of the opinion that an appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.”

- [5] The provisions of s 17(1)(b) are not applicable. The decision sought on appeal does not fall within the ambit of s 16 (2) (a). This sub-section provides for the case where the issues are of such a nature that the decision sought on appeal will have no practical effect or result. Nor are the provisions of s 17(1)(c) applicable *in casu* because the the decision sought to be appealed is final and does dispose of all the issues in this matter.
- [6] The first respondent has raised two grounds of appeal. Mr *Moosa* who together with Mr *Edy* appeared for the first respondent informed me that the first respondent would not persist with the second ground of appeal relating to costs.
- [7] Thus, the first respondent's sole ground of appeal concerns the narrow issue of whether - despite the applicant's withdrawal at the outset of the hearing before me on 20th April 2015 of the interdictory relief that it had claimed - because more than merely spoliatory relief had been initially claimed by the applicant meant that the first respondent was entitled to contest the merits of the applicant's possession of the premises concerned. In other words, Mr *Moosa's* argument was that when the first respondent claimed the initial interdictory relief this gave rise to the qualification to the general rule of the *mandament van spolie* that the restoration of unlawfully dispossessed property will be awarded *ante omnia* before any consideration of the merits. This

qualification is that if an applicant goes further than only claiming spoliatory relief, he in effect forces an investigation of the issues relevant to the further relief he claims.

[8] The issue that was argued and which arose for decision before me was whether or not the applicant's withdrawal of the interdictory relief, before the argument commenced and this interdictory relief was not persisted with by the applicant, meant that the matter fell squarely within the parameters of the *mandament van spolie* and that the aforementioned qualification did not apply.

[9] I held in para [10] of my judgment that the qualification did not apply in these circumstances of withdrawal and non-persistence since the issue concerning the interdictory relief was not before the Court and, therefore, the merits of whether or not the applicant's possession was wrongful was irrelevant. This finding was based on a passage from *Minister of Agriculture & Agricultural Development v Segopolo* 1992 (3) SA 967 (T) 971E-G where Goldstein J said that merely by asking for more than spoliatory relief does not disqualify an applicant from invoking the *mandament van spolie* "... since our law contains no such formalism ... (but) if an applicant asks for the extra relief *and persists in it at court* (my emphasis), the court has perforce to adjudicate upon the extra relief and the respondent's allegations in regard thereto, and the result of this may indicate that the applicant has no right to the thing of which he was

despoiled, which in turn will deprive the applicant of his entitlement to the restoration of the *status quo ante*.”

[10] Mr *Moosa* argued that there was a reasonable prospect on appeal that another Court may find that the Goldstein J was wrong in saying that by merely asking for more than spoliatory relief does not disqualify an applicant from invoking the *mandament van spolie* “... since our law contains no such formalism.” He submitted that our law does indeed contain ‘such formalism’ because, so his argument continued, once more than spoliatory relief was claimed, a substantive right accrued to the first respondent that entitled him to contest the merits of the applicant’s possession despite the withdrawal of this additional relief. Mr *Moosa* was unable to refer me to any authority in support of this proposition. But he did make the following submissions.

[11] First, Mr *Moosa* submitted that Goldstein J’s statement was merely the learned judge’s opinion of what the full Court meant in *Zinman v Miller* 1956 (3) SA 8 (T) 12B when Rumpff J (as he then was) referring to *Bester v Grundling* 1917 TPD 492, said:

“The moment an applicant asks for the return of an article *or its value* he no longer claims a *mandament van spolie* but is relying on a vindicatory action.”

Mr *Moosa* further submitted that Goldstein J’s statement conflicted with what Rumpff J said. I do not think that there is a reasonable

prospect that another Court on appeal would agree with these submissions. Literally, this statement means that once extra relief to spoliatory relief is claimed, the relief is not characterized as spoliatory relief. That, with respect, is correct. But further than that, what Rumpff J said cannot mean that the *spoliatus* is forever precluded from invoking the *mandament van spolie*.

[12] Second, in order to fortify his first submission and to demonstrate by way of analogy that, contrary to what Goldstein J said, there is ‘formality’ in our law that once additional relief to spoliatory relief was claimed by the applicant, the first respondent acquired an immutable accrued right that entitled him to contest the merits of the applicant’s possession and this accrued right survived the applicant’s later withdrawal of the interdictory relief. I was referred in this regard by Mr Moosa to the decision of the SCA in *Zwelibanzi Utilities (Pty) Ltd t/a Adams Mission Service Centre v TP Electrical Contractors CC* (160/10) [2011] ZASCA 33 (25 March 2011) and in particular to para [16] where Heher JA said:

“That an amendment operates retrospectively is a procedural consequence. It does not affect accrued rights. So, for example, a right already extinguished by prescription cannot be revived by subsequent introduction of a claim by amendment. See *Cordier v Cordier* 1984 (4) SA 524C at 533B-C, 533F-G and *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506(A) at 516G-517A. Nor can jurisdiction already vested by the appellant’s failure to object to its absence before *litis contestatio* be rendered non-existent by subsequent amendment, as in this case. Since the establishing of jurisdiction in this manner gives rise to an objective fact without the intervention of the plaintiff in the

action, the latter's inaction in opposing the amendment is of no consequence. Absence of jurisdiction on the ground that the defendant was a peregrinus in the magisterial area of Durban was no longer a potential issue in the case once it had been so established."

In order to demonstrate that the first respondent had such an accrued right *in spoliation proceedings* Mr Moosa referred me to a passage in *Street Pole Ads Durban (Pty) Ltd v Ethekewini Municipality* 2008 (5) SA 290 (SCA) 295D-E at para [15] where Cameron JA, as he then was, quoted a passage in *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and Others* 1996 (4) SA 231 (C) at 244C-E and said:

"There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case *'the respondent may answer such additional claim of right* and may demonstrate, if he can, that applicant does not have the right to possession which it claims'.

(My emphasis)

In other words, Mr Moosa's submission was that the words "the respondent may answer such additional claim of right ..." mean that the respondent has an accrued right to answer the applicant's additional claim. I do not agree. This submission is based on a clear misreading of the passage. In my view there no reasonable prospect that another Court on appeal would find otherwise. The words 'of right' do not refer any accrued right of the respondent to

answer the applicant's additional claim. These words refer to the applicant's claim to 'a substantive right to possession' or the applicant's 'additional claim of right'. This is plain if the passage is read in context and from what Innes J said in *Stocks Housing* at 244C-E from which the passage quoted by Cameron JA was taken:

"The qualification to the rule that a person who has been despoiled of possession must be restored to possession before any dispute as to who is entitled to possession will be investigated is that, if the applicant goes further than to claim spoliatory relief, and claims a substantive right to possession, whether based upon a vindication or upon contract, then the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims. The Court will not order return of possession of the property in such a case if respondent succeeds in refuting the applicant's claim of right to possession."

(The underlined portion was quoted in the passage *supra* in *Street Pole Ads Durban*)

[13] For the above reasons I am of the opinion that the proposed appeal has no reasonable prospect of success. I also am of the opinion that there is no 'other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration': see s 17(1)(a)(ii) of the Superior Courts Act, No. 10 of 2013.

[14] Even if I am wrong, there is an additional question of law that was neither argued before me nor does it appear among the reasons

for my judgment. It concerns the nature and ambit of interdictory relief initially claimed by the applicant and whether this relief gave rise to the qualification aforementioned. This point does, however, emerge from the notice of motion prior to its amendment and from affidavits which, of course, have the function of being both pleadings and evidence. It is that the interdictory relief initially claimed by the applicant was merely directed at restraining the respondents from unlawfully depriving the applicant of possession of the premises *post* the restoration of possession thereof to the applicant in terms of the spoliation order sought. In other words the interdict was, in the particular circumstances of this case, merely directed at preventing the spoliation order being rendered nugatory. In *Vena v George Municipality* 1987 (4) SA 29 (C) such an interdict was granted in addition to spoliatory relief. And on appeal the Appellate Division - see *George Municipality v Vena* 1989 (2) SA 263 (A) 275D - the order granted also included an interdict in addition to spoliatory relief in the following terms: 'That respondent is interdicted and restrained from further demolishing the said home of first applicant when restored as aforesaid other than in consequence of an order of court.' It seems to me, therefore, that if either or both the parties decided to adopt this point on appeal, the appeal would also not have reasonable prospects of success.

Order

[15] The following order is made:

The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel.

JEFFREY AJ

Appearances:

Applicant's counsel	:	Mr A E Potgieter SC (with him Mr D D Naidoo)
Applicant's attorneys	:	Sabeer Joosab Attorneys Ref. Mr Joosab/2S214 Tel. 031-207 8337 E-mail shabeer@lantic.net
First respondent's counsel	:	Mr O A Moosa SC (with him Mr C B Edy)
First respondent's attorneys	:	Miriam Cassim & Associates Tel. 031-702 2786
Date of hearing	:	17 th June 2015
Date of judgment	:	22 nd June 2015