



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

CASE NO. 66060/11

In the matter between:

17/10/2013

MTETWA LEBOHANG WILLIAM
()

FIRST APPLICANT

MTETWA: DIEKETSENG MIRRIAM
()

SECOND APPLICANT

and

SEKALEDI TUMO BOURMAN
()

FIRST RESPONDENT

DIPALE: MPHO DOREEN
()

SECOND RESPONDENT

JUDGMENT

HASSIM A AJ

1. The applicants are the owners of and reside in the property at Stand 11965 Sebokeng Unit 7. The respondents reside at stand 11966

Sebokeng, Unit 7. The essence of the dispute is where the boundary of the respondents' property appropriately lies. The respondent erected a wall that, according to the applicants, encroach on the applicants' land. The applicants seek relief restoring the encroached-upon land to their possession.

2. The first applicant claims that he has been residing on his property since 1969 when he purchased the property. During this time, he says, and at least since 1980 when he purchased a motor vehicle, he has been using the lane between his property and the respondents' as his own. The first applicant attached an aerial diagram distinguishing the disputed portion of land as ABCD. In addition the first applicant installed a driveway gate at the entrance to the lane. The gate has since been obstructed by the erection by the respondent of a new boundary wall. A picture of the driveway gate is attached to the applicant's affidavit.
3. The first app claims that he has acquired ownership of this portion of land (marked ABCD) through prescription because he has used the land for more than 30 years. The respondents deny the averments of the first applicant in relation to the uninterrupted possession of the disputed land for 30 years.
4. The dispute that has arisen with the respondents is due to their erection of a wall, in about 2011, between the two properties that has dispossessed the applicants of the use of the driveway. The result is that the first applicant is unable to remove his vehicle from his property.
5. Much of the affidavit of the respondents is directed at showing that the first applicant did not acquire a right of ownership through prescription. However, this misses the point of the application. The application is for a spoliation order restoring the possession of the lane to the first applicant. While the first applicant makes averments as to his ownership, he does not seek a declaration of rights in this regard.

6. In order to succeed the applicant is required to prove, on a balance of probabilities, that he was in possession and that the respondents unlawfully deprived him of possession. The applicant is not required to prove the lawfulness of his possession, but only the fact of his possession. [*Nienaber v Stuckey* 1946 AD 1049 at 1053].
7. The purpose of the mandament van spolie is to prevent people from taking the law into their own hands. "A person who asserts that or she has a real right to a particular thing which is in another's possession should take recourse to a court of law and not resort to self-help." [See Silberberg, Law of Property, 288].
8. The written argument for the respondents consists of two paragraphs. The first is to submit that the local municipality should have been joined to the proceedings. The second is a submission challenging the lawfulness of the possession of the disputed property by the first applicant.
9. Immediately prior to the hearing, counsel for the respondents made available to the court supplementary heads of argument in which counsel submitted that the deprivation of possession was not unlawful because the respondents acted in terms of the National Building Regulations and Building Standards Act 103 of 1977. No specific provision was identified upon which the respondents relied. However, the thrust of the argument is that the respondents obtained permission from the Emfuleni Local Municipality to effect improvements to their property and that the boundary of the property was ascertained by a land surveyor. I will return to this shortly.

Possession of land ABCD

10. The respondents have sought to challenge the lawfulness of the possession of the disputed portion of land. They deny that the first applicant acquired a right of ownership over that land in terms of section 1 of the Prescription Act 68 of 1969. That need not detain this court. There

may well be a contention between the parties as to the applicants' rights but that is not what is before this court in this application. It may have to be resolved in future litigation, not these proceedings. [See *Stocks Housing v Department of Education and Culture Services* 1996 (4) SA 231 (C) at 239 H-J.]

11. It is common cause that the applicants were in possession of ABCD when the respondents began to move the original wall and replace it with a new wall. The element of possession is therefore established.

Unlawful dispossession

12. With regard to the requirement of unlawful dispossession, Rose-Innes J held the following in *Stocks Housing*:

"The element of the unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit, or theft, but in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of the possession, since consent to the giving up of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the dispossession. The allegations, therefore that the applicant was in default and in breach of the building contract, that respondents were entitled to cancel the contract and did so, and that respondents were entitled in terms of the contract to demand that applicant vacate the site, do not serve as a defence to the claim for a spoliation order, and do not justify respondents' depriving applicant of possession of the building site without applicant's consent and without proceeding lawfully against applicant for an ejectment order from the site and not by resorting to self help to obtain possession of the site. "

[At 240B-E]

13. It was clear to the respondents that the boundary line between their property and the applicants' was in dispute. When the respondents began to remove the then existing wall between the properties, the first applicant immediately sought legal assistance.
14. On 10 December 2010, his attorneys wrote to the respondents confirming that they act on behalf of the first applicant and that they have been using the passage between the two properties as a driveway for the past 30 years. The last paragraph reads "If you, in any way, disturb our client from using the channel for his right of way we will have no other option but to bring a Supreme Court application against you to stop you from doing so..."
15. On 15 December 2012, the first respondent replied stating that he had been granted permission to build a wall by the relevant authorities. He also stated: - "With due respect Sir/Madam, I will appreciate a supreme court application against [sic] me: I am not a land surveyor, town planner, building control officer....". Whatever the first respondent intended by this statement, it is clear that he was aware that the first applicant disputed the lawfulness of his action.
16. On 4 January 2011, a letter of demand was delivered to the first respondent denying allegations made by him in his letter and putting him on terms to refrain from the 'illegal digging and building' or else legal proceedings would be instituted against the first respondent.
17. There is no further communication on record. On 17 November 2011, the first applicant instituted these proceedings.
18. The submission by respondents' counsel that the respondents' conduct falls within the ambit of the National Building Regulations and Building

Standards Act and is therefore lawful cannot succeed. As I stated earlier, there was no reliance on specific provisions of this Act. See *George Municipality v Vena and Another* 1989 (2) SA 263 (A). But even so, it would not protect the respondent's resort to self-help. The principle against self-help is an incident of the rule of law, and is given further effect in section 34 of the Constitution.

19. Section 34 provides:

'Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.'

20. In *Chief Lesapo V North West Agricultural Bank and Another* 2000 (1) SA 409 (CC), the Constitutional Court confirmed a high court judgment, by Mogoeng J (as he then was) in which it was found that a provision of the North West Agricultural Bank Act 14 of 1981 that permitted the bank to execute in settlement of a debt without recourse to a court to be in violation of section 34 of the Constitution. The court held that a hearing before a court serves several purposes "including that of institutionalising the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by s 1(c) of our Constitution" [at para 11].

21. In *African Billboard Advertising (Pty) Ltd v North and South Central Local Councils, Durban* 2004 (3) SA 223 (N), the question was whether the spoliation in that case had been unlawful since it was sanctioned by statute. In that case, the applicant erected advertising sign on property belonging to Spoornet in contravention of certain by-laws. It therefore placed the applicant on terms to remove them. When the applicant failed to do so, Spoornet engaged the services of a contractor to remove them. The applicant then brought a spoliation application on the basis that Spoornet should have first obtained a court order. Spoornet's position was

that a court order was not required in terms of the by-laws. The full bench held that, in view of the rationale of the mandament – ie to prevent people from taking the law into their own hands- the legislation must be interpreted in a manner that interferes as little as possible with this principle, and with due regard to section 39(2) of the Constitution, which obliges a court to have regard to the rights in the bill of rights when interpreting legislation. [at 228 A-D]

22. The court found that the removal of the billboards was unlawful and granted the spoliation order.

23. Counsel for the respondent referred the court to *Impala Water Users Association v Lourens* NO 2008 (2) SA 495 (SCA). However, the respondents can find no assistance there. The decision of the SCA was in line with that of the court in the *African Billboards* case. In *Impala Waters*, the respondent, acting in accordance with the Water Act of 1998, had suspended water supply due to the non-payment of water charges by the users. The dispute regarding the non-payment of the charges had not been resolved before the water connection was suspended. In such situations, where the dispute is not resolved, the court held that the dispossession was unlawful. The court reiterated the principle that legislation should be interpreted so that it interferes as little as possible with the principle that no one may take the law into his own hands. [At 501 E-F]. The spoliation order was granted.

24. Accordingly, I hold that the respondents failed to resolve the dispute regarding the appropriate determination of the boundary of the respondents' property. Knowing that their right to ownership of the portion ABCD was disputed, and that legal proceedings were in the offing, the respondents continued to act so as to deprive the applicants of possession of the disputed land. They took the law into their own hands, and in so doing unlawfully deprived the applicants of possession. The applicants are therefore entitled to succeed in their application for restoration of possession.

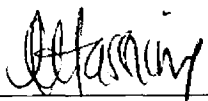
25. In addition to the spoliation order, the applicants seek a declaration of rights regarding a servitude over the respondents land. This is an issue to be determined in separate proceedings, in the mix with the rights of the respondent and the question of ownership that the applicants have raised. I therefore decline to grant paragraph 4 of the relief requested by the applicants. I also refrain from anticipating non-compliance with the order I make here.

26. I therefore make the following order:

26.1 The applicants' possession of the area ABCD on Annexure LWM3 is to be restored;

26.2 The respondents are directed to remove the brick wall erected at position CD on Annexure LWM3 within 7 days of this order.

26.3 The respondents are to pay the costs of this application.


JUDGE HASSIM/A AJ