

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3883/2012

In the matter between:-

GERHARDUS JOHANNES PIENAAR

Applicant

and

MATJHABENG PLAASLIKE MUNISIPALITEIT

1st Respondent

MICHAEL RAMOHODI

2nd Respondent

HEARD ON:

15 NOVEMBER 2012

JUDGMENT BY:

KRUGER, J

DELIVERED ON:

22 NOVEMBER 2012

[1] This is the extended return date of a mandament van spolie granted on 17 September 2012. The applicant contends that he had free and undisturbed possession of the farm in question and on 17 September 2012 the respondents disturbed his possession by spraying poison on the farm.

[2] In the answering affidavit the following defences are raised:

- (i) Applicant was not in undisturbed possession;
- (ii) The spraying caused no damage and did not constitute spoliation.

- (iii) The spraying was done to prevent unlawful squatting on the farm.

THE FACTS AND ISSUES

- [3] The facts as stated by respondent, together with the admitted facts in the applicant's affidavit (**STELLENBOSCH FARMERS' WINERY LTD v STELLENVALE WINERY (PTY) LTD** 1957 (4) SA 234 (C) at 235E – G) can be set out as follows:

- [4] On 26 August 2009 an agreement of lease of the farm described as “Gedeelte 2 van die Restant van die plaas Vlakplaats 125 geleë in die distrik Welkom groot 191.6886 hektaar” (hereinafter described as “the farm”) was entered into between Piet Bezuidenhout as lessor and Lopin Engineering Services (Pty) Ltd, represented by Gerhardus Johannes Pienaar (the applicant), as lessee for a five year period from 1 September 2009.

- [5] On 11 March 2010 an agreement of lease of the farm was entered into between Piet Bezuidenhout as lessor and Gerhardus Johannes Pienaar (the applicant) for a five year

period from 1 March 2009. The two agreements are identical save for the identity of the lessee and the commencement date of five years.

Clause 1 reads as follows:

“1. **HUURTERMYN:**

Die huurtermyn sal wees vir 'n tydperk van 5 (VYF) jaar gereken vanaf 1 MAART 2009.

Die partye kom egter ooreen dat indien die eiendom binne die huurtermyn van vyf jaar verkoop word, die huurder die eiendom sal ontruim en die partye skriftelik die kontrak sal beëindig VOOR die vyf jaar verstreke is, op die volgende voorwaardes:

- a) Die huurder eers self die gesaaides van die lande te stroop en te verwyder van die land.
- b) Die huurder vergoed sal word vir die KALK wat ten opsigte van die grond aangekoop, aangewend of ingewerk is, vir die bepaalde termyn waarvoor die bemesting steeds aktief sal wees in die grond. Die partye kom ooreen dat die bepaalde termyn bepaal sal word deur die verskaffer van die KALK en dat die partye daardie verskaffer se skriftelike bevestiging as bindend op hulself sal aanvaar.”

- [6] The farm was purchased by the first respondent at the beginning of 2012 and was registered into the name of the first respondent on 20 July 2012.
- [7] On 5 September 2012 the first respondent wrote a letter to the applicant's attorneys:

**"RE: PURCHASE OF PROPERTY BY MATJHABENG
MUNICIPALITY: THE REMAINING EXTENT OF PORTION 2
OF THE FARM VLAAKPLATS 125, WELKOM**

The abovementioned matter bears reference.

Following your correspondence dated 23rd August 2012 with regard to the matter above, the matter herein was brought to my attention and herewith the following:

- We confirm that the abovementioned property was purchased by the Department of Land Reform and Rural Development for the municipality and same has since being registered into municipality's name;
- That certain Mr. Piet Bezuidenhout, believed to be your client's landlord, approached the Department of Land Reform and Rural Development and made an offer for Farm Vlaakplats 125 and same was purchased for municipality for future housing development;

- That your client, Mr. Gert Pienaar had a lease agreement with Mr. Bezuidenhout and not the municipality that may possibly warrants payment of compensation.

Your client should have exhausted necessary legal avenues available against Mr. Piet Bezuidenhout for compensation of any improvements made on the property. Unfortunately the municipality is not in position to compensate your client in any form as any payment alleged to be owed for improvements made of the Farm, should be compensated by Mr. Piet Bezuidenhout.

It is against this background that the municipality gives your client notice of 7 (seven) days from the date of receipt hereof to vacate the Farm, expiry date being 14th September 2012 failing which, the municipality shall have no alternative but to apply to the court for necessary relief for the eviction as well as the order instructing the sheriff of the court to remove any implements on the Farm.”

[8] On 14 September 2012 between 08h00 and 11h00 the second respondent under the instructions of the first respondent sprayed poison. In the answering affidavits neither the first or second respondent say what was sprayed. They do not deny that poison was sprayed. The first respondent says that the spray was not on the planted wheat. He also takes trouble to make the point that there

was no wind during the spraying, thereby indicating that poison was sprayed. A further indication that poison was sprayed, is that the first respondent says the spraying was done “for reason of cleaning up the not utilised part of the farm as an attempt of prevention of unlawful squatters invading onto the farm”. In the replying affidavit the applicant says that he prepared the area on which no wheat is planted at this stage with a ripper with a view to plant after the first rains. Apart from the intention of the applicant to use the land for planting the poison sprayed on the land by the respondents affected the usefulness of the land for agricultural purposes. The question is whether that amounts to spoliation.

THE APPLICANT’S POSSESSION

- [9] In the answering affidavit the first respondent takes the point that applicant was not in possession of the farm and attaches the agreement of lease dated 26 August 2009 where the tenant was Lopin Engineering Services (Pty) Ltd, in spite of the fact that in the founding affidavit the applicant refers to and relies on the lease agreement of 11 March 2010.

[10] There is no merit in the allegations that applicant was not in possession of the farm. First respondent's letter dated 5 September 2012 quoted above indicates that first respondent knew that applicant occupied the farm and was in possession thereof. The respondents do not dispute that applicant was notified by Mr Madala, his employee who lives on the farm, of the spraying on 14 September 2012 when the spraying took place. Questions of illegality or wrongfulness of the applicant's possession are irrelevant at this stage - **YEKO v QANA** 1973 (4) SA 735 (A) at 739D – G; **BON QUELLE (EDMS) BPK v MUNISIPALITEIT VAN OTAVI** 1989 (1) SA 508 (A) at 512A – B; **IVANOV v NORTH WEST GAMBLING BOARD AND OTHERS** 2012 (6) SA 67 (SCA) par [25].

DID SPOILIATION TAKE PLACE?

[11] The next question is whether there was in fact spoliation and not merely disturbance of possession. The old writers distinguished between the mandement van spolie (*spoliare*) which was a remedy aimed at recovery of lost possession and the remedy for disturbance of possession (*turbare*) which was a remedy to retain possession. Disturbance of

possession is sufficient for a mandament of “*complainte*” and “*maintenue*”, but not for spoliation – Duard Kleyn, “Die betekenis van die begrip ‘spolie’” 19 **De Jure** 1986 279 - 292 at 283; “Mandament van Spolie ‘n Interdik?”, A.J. van der Walt, **De Rebus** (1984) 477 - 479 at 479 par 4.3(e); Van der Merwe, **Sakereg**, 2nd Ed, 130; **VAN ROOYEN EN 'N ANDER v BURGER** 1960 (4) SA 356 (O) at 363E – F per Grobler J, confirmed by the Full Court in **BURGER v VAN ROOYEN EN 'N ANDER** 1961 (1) SA 159 (O), where Potgieter J quotes with approval the dictum of Grobler J in the Court *a quo* that the mandament van spolie is generally available where there has been any substantial or serious infringement of the rights of the possessor (“enige aansienlike of ernstige inbreuk op die regte van ‘n besitter”). (**BURGER**-case 1961 (1) at 160H – 161A).

- [12] In principle the mandament van spolie is available where there has been a substantial or serious infringement of possession. This means actions of the respondent which prevent the possessor from using the property as he wishes (**KLEYN**, *supra*, at 284 footnote 28).

- [13] The locking of gates has been held to be spoliation - **BUFFELSFONTEIN GOLD MINING CO LTD EN 'N ANDER v BEKKER EN ANDERE** 1961 (3) SA 381 (T). The cutting off of electricity is spoliation - **NAIDOO v MOODLEY** 1982 (4) SA 82 (T). The erection of a fence cutting off part of applicants' property is spoliation - **OLIVIER v BOTHA** 1948 (3) SA 664 (C). A disturbance of possession without deprivation of the whole of it, is sufficient - **BENNETT PRINGLE (PTY) LTD v ADELAIDE MUNICIPALITY** 1977 (1) SA 230 (ECD) at 233.

CONCLUSIONS

- [14] On the admitted facts the respondents sprayed poison on a portion of the farm in applicant's possession. First respondent's deponent states:

“15.5 I dispute that any damage or prospective damage was done or caused to be done to the planted wheat area on the day of the spraying (**14 September 2012**).”

First respondent here addresses potential damage to the wheat which is at present growing on a portion of the farm. The spraying took place on a piece of land adjacent to the

land where the wheat is growing. Applicant says he prepared this land with a ripper which makes deep penetration possible and after the first rains the applicant intends planting on that area. In the founding affidavit applicant says that he has already prepared the land on which the poison was sprayed for the planting of mealies and/or sunflower (founding affidavit paragraph 21). In answer the first respondent states in the answering affidavit:

“AD PARAGRAPH 21 THEREOF:

19.1 This is denied.

19.2 I deny that Applicant could have or would have suffered any damages due to the spraying or that the spraying with the kind of poison could cause any damage to proposed corn or sunflower crop.

19.3 The soil on the farm is now prepared after the spraying for any form of mealies and/or sunflower to be planted.”

In reply the applicant points out that this is a bold reply, lacking in substance. The respondents do not state what type of poison was used, and the applicant, who is a farmer, says that he knows from experience that poison which is for instance used for mealies or sunflower, is harmful to wheat.

Neither the first respondent's deponent nor the second respondent professes to have any knowledge of insecticides. Nor do they disclose what type of poison was used. The declared purpose of first respondent was to clear up the land so that the land would not appear to be disused and desolated. That means all growth needed to be killed, also for the stated purpose of the residential development which the first respondent plans for the farm. The denial by the first respondent "that spraying with the kind of poison could cause any damage to proposed corn or sunflower crop" is bald, palpably implausible and clearly untenable and can be rejected on the papers (**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA** 2009 (2) SA 277 (SCA) par [26]).

- [15] On the allegations as stated by the respondents, together with the allegations of the applicant not meaningfully denied by respondents, the possession rights of the applicant have been substantially infringed. The applicant has been deprived of the right to use the lands sprayed by the poison as he wishes. Applicant has been spoliated.

THE CONTEMPT APPLICATION

[16] The applicant under Case No A3883/2012 seeks an order that the respondents be called upon to show cause why they should not be convicted of contempt of court in that the second respondent on 24 October 2012 after the order of this court had been granted on 17 September 2012, ploughed the lands on the farm. The returns of service show that that notice of motion was served on the first and second respondents. Mr. Burger, who appeared for the first and second respondents in the spoliation application, said the respondents had no knowledge of the contempt application. There appears to be no reason why the rule *nisi* requested in the notice of motion dated 31 October 2012 should not be granted.

[17] ORDER

1. The rule *nisi* granted on 17 September 2012 is confirmed (paras 2.1 and 2.2).
2. A rule *nisi*, returnable on 13 December 2012 is granted calling on the respondents to show cause why the following order should not be granted:

- 2.1 That the first and second respondents are convicted of contempt of court by virtue of their action on 24 October 2012 in contempt of this court's order of 17 September 2012.
- 2.2 That the first and second respondents are sentenced to a fine of R30 000,00 or imprisonment of 30 (thirty) days or such other sentence as the court may deem fit in its discretion.
- 2.3 That the first and second respondents, jointly and severally, pay the costs on the scale of between attorney and own client.

A. KRUGER, J

On behalf of plaintiff: Adv P J J Zietsman
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of respondents: Adv A H Burger SC
Instructed by:
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