

NORTH GAUTENG HIGH COURT, PRETORIA

DATE: 02 September 2009
CASE NO: 41787/09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

02/09/2009

DATE

SIGNATURE

Not reportable

In the matter between:

AMARYLIS INVESTMENTS (PTY)LTD

APPLICANT

AND

GAUTENG PROVINCE DRIVING
SCHOOL ASSOCIATION
CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

PHATUDI J

[1] The applicant instituted this urgent application for spoliation seeking relief, among others,

“That [the] applicant’s possession of the parking area on Erven 847, 849 and 851 Ferndale, Randburg be resorted immediately upon service of this order on the First Respondent.”

- [2] The First Respondent disputes the Applicant’s allegation of spoliation and allege “contra spolie”. It is evident from the papers filed that the Second Respondent, City of Johannesburg Metropolitan Municipality, being the owner of the property, approved, at the instance of the Applicant on the 12 September 2007 as per Government Gazette No 253, the usage of the parking area as defined thereat for the benefit of the applicant.

- [3] The approval is known as Amendment Scheme 04-7857 which provided parking,

“For the exciting building, comprising 10301 m² of floor area a total of 460 parking spaces have been provided, of which 100 parking bays have been provided on site and 360 parking bays

have been provided on adjoining Erven to the North and North west of the site in terms of the erstwhile Randburg Town Council Master Plan for the Central Area of Randburg and the pedestrians areas note shall be taken of Amendment Scheme 1187, Annexure 31187, in respect of Erven 846,847,848,849, 1/850, 851 and 853 Ferndale where provision is made for 540 free parking spaces..."

(my underline.)

- [4] The Applicant, as alleged, has been in possession of the said allocated parking. It is further alleged that the bus transit had used portion of the parking area, as their on and off loading zone for its passengers.
- [5] A Palisade fence was then erected, apparently by the Second Respondent, around the Erven 849, 851 and portion of 847 as clearly marked on annexure NL3 attached to the Applicant's founding Affidavit. Annexure NL3 is further amplified and supported by the map attached to the First

Respondent's answering affidavit. (page 72 of the paginated papers.)

- [6] On the 23 April 2009, the Applicant cleaned the area as marked on annexure NL3 and has since caused the gate to be chained and locked.
- [7] On the 23 May 2009, the First Respondent cut the lock together with the chain that was used by the Applicant to lock the premises. The cut lock and chain were subsequent thereto given to Applicant's employee, one S Tshuma. The applicant engaged the First and Second Respondent. The umpteenth correspondence between the parties did not bear any fruit.
- [8] In rebuttal, the First Respondent submitted that they have concluded a lease agreement with the Second Respondent on the 28 May 2009. A copy of the lease agreement is attached to the answering affidavit marked "GM3".

[9] The preamble of the agreement state:

“And whereas the COJ has consented to grant the use of Portion 1 of Erf 847 Ferndale(the Property) to the user, which will use the property for a temporary period of 6 months commencing on 1 May 2009 and terminating on 31 October 2009 for a training ground for learner drivers...”

AND WHEREAS the user has accepted the use of Portion of Erf 847 Ferndale as shown on the locality map attached hereto as Annexure A.”

[10] In considering the evidence tendered and the submissions made by both counsel for the Applicant and First Respondent, it is clear that the Applicant is duly authorised since 2007 to utilize the parking areas marked NL3 and amplified by Annexure A of First Respondent’s answering affidavit.

- [11] I am of the view that the Applicant has been in possession of the Parking area since 12 September 2007. The parking area is a public area entitling any member of the community to use freely.
- [12] The Applicant has been in possession with the duties on its shoulder to, among others, keep the area clean and user friendly. I accept that the Applicant has been in an undistributed possession for a period since 12 September 2007.
- [13] Counsel for the First Respondent conceded that the First Respondent did cut the lock and chain without the court order. He further conceded that the First Respondent knew that the said lock and chain belonged to the Applicant.
- [14] It is noted that the lease agreement was concluded after the cutting of the Applicant's lock and chain. I infer that the lease agreement between the First and second Respondent was

concluded to quote the bitter pill of spoliation with a little sugar. The retrospective effect of the lease agreement is the sugar I am referring to.

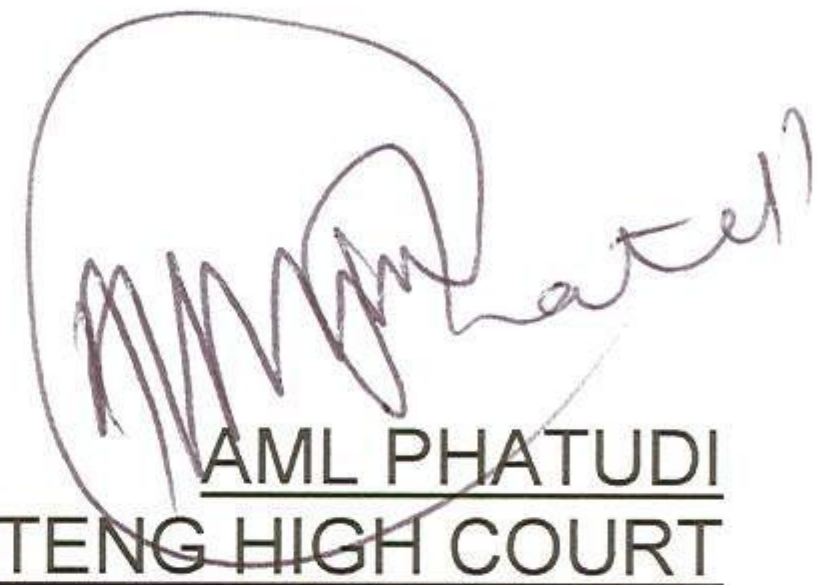
[15] I, as result, find that the First Respondent spoliated the Applicant by cutting the lock and chain the Applicant used to safeguard property it possessed undisturbed against vandalism.

[16] I thus make the following order:

[16.1]The Applicant's possession of the parking area on Erven 849, 851 and portion of 847 Ferndale, Randburg be restored immediately.

[16.2]The First Respondent is ordered to remove all chains and locks on gates leading to the parking area on Erven 849, 851 Ferndale, Randburg.

[16.3]The First Respondent is ordered to pay the Applicant's costs on party and party scale.



AML PHATUDI
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 25 August 2009

For the Appellant: Adv VAN RENSBURG

Instructed by: Messrs TIM DU TOIT & KIE

For the Respondent: Adv G SHAKOANE

Instructed by: Messrs DOLF MOSOMA ATTORNEYS

Date of Judgment: 02 September 2009