

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 201/2007

In the case between:

ROBIN GERALDINE GRIESEL

and

LENRÉ LIEBENBERG

CORAM: H.M. MUSI, JP *et* HANCKE, J

JUDGMENT: H.M. MUSI, JP

HEARD ON: 10 MARCH 2008

DELIVERED ON: 24 APRIL 2008

[1] This is an appeal from a judgment of the Magistrate's Court, Welkom. The appellant had instituted action against the respondent claiming delivery of a horse called Honey Girl, which had been in the respondent's possession. Prior to the institution of action, the appellant had on two occasions removed such horse from the respondent's possession without the latter's consent. On each occasion the respondent had successfully applied for a *mandament van spolie* and the horse duly returned to her.

Subsequently the appellant obtained an order in terms of which the horse was placed in the custody of the sheriff pending institution of an action for delivery thereof (*rei vindication*). The respondent defended the action and filed a counterclaim wherein she averred that the removal of the horse by the appellant had been unlawful and that it had caused her shock resulting in post traumatic stress. She claimed damages in the amount of R75 000,00.

[2] The Magistrate was satisfied that the appellant was the owner of the horse, that the respondent had no right to keep it and granted the appellant's claim for delivery thereof. However, the Magistrate also allowed the respondent's counterclaim for damages but for a reduced amount of R25 000,00. He also ordered that the appellant pay the stable costs of the sheriff and that each party pay their own costs of suit.

[3] The appeal was directed at only two aspects of the judgment of the Magistrate's Court: the award of damages to the respondent and the order that the appellant was liable for the stable costs. The respondent does not

oppose the appeal and gave notice that she will obite by the decision of the court.

[4] Mr. Grobler who argued the appeal on behalf of the appellant conceded, correctly in my view, that the appeal against the order relating to the stable costs had no merit and abandoned that part of the appeal.

[5] This appeal raises a novel but the important legal question of whether an action for damages lies against the owner of property who resorts to self-help in order to retrieve his/her property from an unlawful possessor. Put otherwise, does an act of spoliation constitute a delict entitling the spoliatus to sue the spoliator for damages? Counsel for the appellant indicated that he could find no direct authority on the point. He submitted, however, that spoliation does not constitute a delict for the lack of one important element of delict, namely, wrongfulness. He referred to authority dealing with the criteria for wrongfulness in delict.

[6] Counsel also cited a passage in the matter of **NTAI & OTHERS v VEREENIGING TOWN COUNCIL AND**

ANOTHER 1953 (4) SA 579 AD at 588 which would seem to give an indication of what the common law position is.

There Van den Heever JA stated the following:

“But it does not follow, as Mr. Lakier seemed to assume, that self-help exercised by an owner to recover the possession of property unlawfully withheld from him is in itself an actionable wrong automatically entitling the person dispossessed to damages. It is difficult to imagine how a lessee who unlawfully remains in occupation after the termination of the lease can sue the evicting landlord for general damages, since I am inclined to think, although it is not necessary for the purposes of this case to decide the point, that he is himself a spoliator and one would have thought that the wrongs of the litigants *in pari delicto* would cancel each other by compensation. If the lessee after termination of the lease remains in possession without lawful cause, his conduct amounts to an unlawful *dejectio* of the lessor (D.43.16.12 and 18; Glück, 19.2, para. 1061 after note 47; Voet (19.2.32) calls him an *invasor alienae possessionis*).”

- [9] Now, the *maxim in pari delicto potior conditio defendentis* belongs to the law of contract and has no application in the law of delict. As the above passage makes clear, the

statement that the wrongful conduct of the litigants *in pari delicto* would cancel each other was made obiter. However, the passage is relevant and significant in highlighting the fact that the conduct of the *spoliator* in particular is wrongful. The *rationale* for holding the *spoliator's* conduct to be wrongful is to be found in the principles underlying the possessory remedy of *mandament van spolie*. The principles were stated by Innes CJ in **NINO BONINO v DE LANGE** 1906 TS 120 at 122 as follows:

“It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.”

See **THE ADMINISTRATOR, CAPE & ANOTHER v NCHWA & OTHERS** 1990 (1) SA 705 AD at 717 H – J.

The law prohibits people from taking the law into their own hands in order to enforce their rights and there are sound

policy considerations for this. In the premises the view that spoliation is not a delict for want of wrongfulness cannot be correct.

- [8] The judgment in **Ntai** is significant in another respect. It makes it clear that the common law does not recognise a delictual claim for general damages based on an act of spoliation. In the passages following the one quoted above, Van den Heever, JA made it clear that the remedy available to a *spoliatus* is the *mandament van spolie* and that no claim for general damages lies in respect of a “tort”. The reason why a delictual action for damages does not lie is possibly because public policy considerations dictate that the *spoliatus* should not be allowed to benefit from his/her unlawful activity in the same way that the law does not allow anybody to use illegal means in order to enforce his/her right. The *mandament van spolie* is meant merely to cancel out the initial unlawful conduct of the *spoliator* but confers no rights on the *spoliatus*.

- [9] The position of a *spoliatus* who claims general damages arising purely from an act of spoliation should not be

confused with a case where a *spoliator* causes collateral damage in the course of retrieving his/her property. If, for instance, A has stolen B's TV set and in an attempt to retrieve it B breaks the door of A's locked house, surely B would have a claim for patrimonial damages against B. Or B assaults A in the process of retrieving the TV. Surely A would be entitled to sue for general damages for pain and suffering.

- [10] In my view, a juridical explanation why an act of spoliation *per se* cannot give rise to delictual liability is to be found in the absence of fault or causation or both in any given situation (I am referring here not to factual causation but to legal causation). For the purposes of this appeal it suffices to deal only with fault. In the instant case there can be no question of negligence. The applicable form of fault in issue would be intention. The question is whether the *spoliator* had the intention to cause harm. **Neethling, Potgieter & Visser, Law of Delict, 5th Edition** at 114 state that the necessary intention is not present if the actor lacks a "consciousness of wrongfulness".

In other words, if the *spoliator* is not aware that his/her conduct is wrongful, fault is absent.

[11] Now by far the majority of the population in our country are laymen and laywomen and most people in the position of the appellant could hardly be expected to be aware that it is wrong to retrieve one's property from, say, a thief, without first are going through the Courts. At any rate, the onus was on the respondent *in casu* to prove all the elements of delict. In my view, that onus was not discharged in the instant case.

[12] I hold therefore that the Magistrate was wrong in awarding damages to the respondent. Accordingly the appeal is allowed with costs. The magistrate's order is set aside and substituted with the following order:

- "1. The plaintiff's main claim succeeds with costs.
2. The plaintiff is liable for the stable costs of 'Honey Girl' from the date the sheriff removed the horse from the defendant's possession.
3. The defendant's counterclaim is dismissed with costs."

H.M. MUSI, JP

I agree.

S. P. B. HANCKE, J

On behalf of the appellant:

Adv. S. Grobler
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondent:

Attorney O. J. van Schalkwyk
Instructed by:
Lovius Block
BLOEMFONTEIN

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