

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

Case No. : 1133/2008

In the matter between:-

MOKGATLA MOSES KHOMO

Applicant

and

NOLUTHANDO KHOMO

Respondent

HEARD ON: 8 MAY 2008

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 29 MAY 2008

[1] This is an application for a spoliation order. Applicant and the respondent are married to each other in community of property and have been so married for some time. On 14 December 2007 the applicant moved out of the communal home and subsequently instituted action in this Court for, *inter alia*, a decree of divorce. That action is still pending. It is common cause that on leaving the communal home the applicant left a Mercedes Benz vehicle in the respondent's

possession. The applicant retained possession of a Toyota Hilux twin cab vehicle registered as DHB 781 FS, which he had purchased in the first quarter of 2007 in terms of a credit agreement as well as an Audi A4 motor vehicle. The applicant has alleged in his founding papers that he is in the construction business and needs the Toyota vehicle for the day-to-day running of his business.

- [2] It is common cause that the Audi vehicle was used exclusively by the applicant up until 4 February 2008 when it was involved in an accident and damaged beyond economical repair. The respondent contends, however, that the Toyota vehicle is not suitable for construction purposes, it is not a four wheel drive vehicle, the applicant knows nothing of the construction industry, does not need to go to construction sites, and that the only extent of his involvement in that industry is office work. She contends, moreover, that the Toyota vehicle was purchased for use as a family vehicle and used exclusively by her. She alleged in the opposing papers before the court that she was surprised when the

vehicle was retained by the applicant for his personal use when he left the communal home but abided his decision to retain the vehicle because she believed that the separation between them was temporary. When it became apparent that the applicant was not intending to return to the communal home, she decided to remove the Toyota vehicle and did so with a spare key to the vehicle which she had in her possession. She alleges this was done with the consent of the applicant. The applicant denies consent and avers that he reported the matter to the SAPS who refused to intervene in what they regarded was a domestic civil matter between husband and wife. The applicant chose to ignore the fact of the deprivation thereof for approximately six weeks. No demands for the return of the vehicle were made by the applicant. The first intimation which respondent received that applicant wanted the vehicle returned, was when a letter of demand was received by respondent's attorney of record from the applicant's attorney of record. The letter is undated but was clearly written after 4 February 2008, when the Audi vehicle was written off in an accident,

as reference is made to the accident in that letter. It is obvious and can safely be accepted that the letter was written before 12 February 2008 as reference is made to that date as being the expiry date for compliance with the demand. This application was launched on 3 April 2008. On these common cause facts I have been requested by the applicant to find that a spoliation did in fact occur and conversely by the respondent to find that no spoliation took place, alternatively that, the delay in bringing the spoliation application within a reasonable time after the deprivation of the applicant's possession of the vehicle amounted to an abandonment of his right to claim spoliatory relief. As authority for the respondent's stance, I was referred to the case of **JIVAN v NATIONAL HOUSING COMMISSION** 1977 (3) SA 890 (W).

- [3] As early as the decision in **ROSENBUCH v ROSENBUCH AND ANOTHER** 1975 (1) SA 181 (W), Colman J found that a joint possessor who has been deprived of his share of the possession of property should be entitled to a spoliation

order, if the other legal requirements for such relief are present and conversely where a joint possessor illicitly and/or contrary to the will of his co-possessor takes exclusive possession of shared property, a spoliation order is competent. Such an approach is in line with the principles laid down in the case of **NINO BONINO v DE LANGE** 1906 TS 120. At p. 183 A – B the learned Judge opined:

“As was pointed out by GREENBERG, J.A., in *Nienaber v Stuckey*, 1946 A.D. 1049 at p. 1053, the Court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place. It merely enquires whether there has been a spoliation or not, and if there has been, it restores the *status quo*.”

And at p. 183 H to 184 D:

“No authority was cited to me against the proposition that the remedy lies at the suit of a joint possessor, but there is an authority which seems to support the view that that remedy does lie. I refer to the case of *Nienaber v Stuckey, supra*. It was there held that the remedy of a spoliation order was available to one of two people who had held in joint possession, against the other, when that other had wrongfully assumed exclusive possession. The facts were

entirely different from the facts of the case before me but that is the principle upon which the decision of the Appellate Division rested, and the authority is binding upon me.

It was suggested that the principle does not apply to the present case because the husband had in fact driven the wife from the joint household and thus, in substance, wrongfully deprived her of her share in the possession of the household goods. I do not know whether the husband did that or not; he denies it, and that is one of the issues which will fall to be determined in the pending action; it certainly cannot be determined at this stage. But even if the husband did commit the type of constructive desertion suggested I find it difficult to see how that can assist the wife in the present proceedings. A spoliator cannot justify his conduct, and avoid the consequences of that conduct, by saying that he was the victim of prior spoliation. If he was, he had a remedy in law, but not the right to take the law into his own hands. If the wife in this case was driven out of her home and thus deprived of the use of the goods which she reasonably required she had her remedy in an application to this Court for maintenance *pendente lite* or possibly for some specific relief. But it would be flying in the face of the well established principles underlying our law of possession and spoliation if it were to be said that in such circumstances she had the right, against the will of her husband, to take for herself whatever she needed or thought she needed.”

And at p. 184 H:

“... even if it could be said that the husband had wrongfully dispossessed the wife of her undivided share of the possession of the chattels in suit, she did more than merely repossess herself of what her husband had taken from her. She removed the articles and thereby dispossessed the husband of his undivided share of that possession. There is no authority of which I am aware which justifies conduct of that kind.”

This decision was quoted with approval and followed in

OGLODZINSKI v OGLODZINSKI 1976 (4) SA 273 D and it

has been settled law since that the remedy of the mandament van spolie is available to cases between husband and wife where the one has deprived the other of factual possession of an article jointly possessed by both without consent.

[4] In the present case it is common cause that the parties being married in community of property, were jointly in possession of all the assets in the joint estate including the Toyota Hilux vehicle which was in the factual possession of the applicant up until 24 December 2007 when the respondent removed it, thus depriving the applicant of his possession thereof. On the probabilities it is apparent that the facts surrounding the removal of the vehicle favour the applicant's version that it was done without his consent and I make that finding.

[5] It follows therefore on the principles laid down in **NINO BONINO v DE LANGE**, *supra*, that the respondent spoliated the applicant on 24 December 2007. The question, however, which arises in this application is whether the fact that the

applicant delayed a period of approximately two months in bringing the application, has any impact on that spoliation or put another way, whether it can be said that such a delay had the effect of amounting to a waiver on the applicant's part of his rights to claim an order of spoliation. In **JIVAN v NATIONAL HOUSING COMMISSION**, *supra*, p. 891 H the learned Judge quoted and analysed old South African and Roman Dutch authorities with reference to the question of acting promptly when deprived of possession and concluded at p. 893 A – D as follows:

“In my view the Court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of such application.

In exercising this discretion I think the bar imposed after one year in respect of the mandament consequential upon complainte is a guide to modern practice. If an applicant delayed for more than a year before bringing his application for a mandament of spolie, there would have to be special considerations present to allow such applicant to proceed with his application, and conversely, if an application was brought

within the period of one year after interruption of the possession, special circumstances would have to be present before relief could be refused, merely on the ground of excessive delay. In the present matter the delay of eight months before the petition was launched is not so gross, nor had it such self-defeating consequences, that, on this ground alone, relief should be refused to the applicant.”

At p. 893 F – H the learned Judge cites with approval the dictum of Maasdorp J in DE VILLIERS v HOLLOWAY (1902) 12 CTR 566 at p. 569:

“In this matter MAASDORP, J., considered the effect of delay in bringing an application for a mandament of spolie and he framed the argument for the view that a possessor loses his right to seek an order due to an inordinate delay in the following terms:

‘It is said that having lain by so long it must be taken that he acquiesced in what had been done by the respondent to such an extent as to deprive the conduct of the respondent of the character of forcible spoliation’.

After considering the facts the learned Judge concludes:

‘therefore, the mere fact that the applicant did not press forward legal proceedings immediately was not such an acquiescence in what had been done by the respondent as to deprive the applicant of the right of now asking the Court to put him in the position he would have been in had he not been deprived of peaceable possession by the respondent’.

I adopt this approach. It is conceivable that the delay of an applicant to bring his petition either confirms or displays a state of mind in which the applicant acquiesced in the alleged disturbance of his possession, and, in such an event, I am satisfied that he would not be entitled to a mandament of spolie.”

[6] Turning then to the specific facts of this case, the question arises was the delay of approximately two months in the circumstances of the case, an inordinate delay justifying this court finding that the applicant had acquiesced in the delay. The answer to that question warrants an examination and analysis of the factual circumstances of this case subsequent to the spoliation on 24 December 2007. Such an analysis will give an indication as to the state of mind of the applicant in the period following the deprivation of possession and will throw light on the reason for the delay in bringing this application. It is common cause that between 24 December 2007 when the spoliation occurred and 4 February 2008 when the Audi vehicle was irreparably damaged in an accident, the applicant used it as a mode of transport without any attempt to recover the Toyota vehicle. I reject as false his explanation that he was unable to contact his attorney immediately after the spoliation, because same was on vacation, that during the month of January 2008 there was

no construction work to be done and in February 2008 very little construction work was done, because of a depleted Provincial Government budget. Whilst any one or more of these reasons might validly have pertained at the time, they are nevertheless individually as well as cumulatively unconvincing when considering what the belief held and the state of mind of the applicant was at the time of the deprivation as regards his right to approach the court for spoliatory relief. This is not a case where the applicant on being spoliated was determined to regain possession of the vehicle he had been unlawfully deprived of. The applicant's tardiness was clearly due to the fact that he was not in need of the Toyota vehicle at the time of the spoliation as he had in his possession the Audi motor vehicle which he was able to use and did use on his own version between 24 December 2007 and 4 February 2008. On these facts it is clear that it was the accident of 4 February 2008 which triggered his cry that he had been spoliated and not the actual dispossession of the Toyota motor vehicle. He was content to abide the respondent's actions in dispossessing him between 24

December 2007 and 4 February 2008 because he was not in need of the Toyota. Once the Audi was no longer at his disposal, he decided to reclaim possession and when his claims were refuted by the respondent, he launched this application on 6 March 2008. Because the underlying rationale for the bringing of this application was not that the applicant had peaceful and undisturbed possession which he was then unlawfully deprived of by his wife, the respondent, this application cannot succeed. The actions and conduct of the applicant subsequent to the spoliation on 24 December 2007 amount in effect to a waiver and/or abandonment of his right to spoliatory relief. In **LAWS v RUTHERFURD** 1924 AD 261 at p. 263 Innes C.J. held:

“The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.”

In **HEPNER v ROODEPOORT-MARAISBURG TOWN COUNCIL** 1962 (4) SA 772 A Steyn C.J. said:

“There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue.”

In **BORSTLAP v SPANGENBERG** 1974 (3) SA 695 (A) 704

Corbett AJA said:

“Dit is herhaaldelik deur ons howe beklemtoon dat duidelike bewys van ‘n beweerde afstanddoening van regte geverg word, veral waar op ‘n stilswyende afstanddoening staatgemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte met die bedoeling om hulle af te dwing.”

In **ROAD ACCIDENT FUND v MOTHUPI** 2000 (4) SA 38

(SCA) at par. 16 – 17 Nienaber JA held that the test for the establishment of a tacit waiver was an objective test. This meant that the intention to waive must be judged by its outward manifestation, which embodies conduct from which an intention to waive can be inferred, including inaction or silence when there is a duty to act or to speak. Uncommunicated mental reservations are irrelevant. Such

conduct, moreover, must be unequivocal that is consistent with no other hypothesis than that the intention to waive exists. The test of the existence of such conduct is an objective test judged from the perspective of the reasonable man in the position of the other party.

- [7] In my view, the conduct of the applicant subsequent to 24 December 2007, judged against the principles of waiver relative to the intention to waive as set out in **ROAD ACCIDENT FUND v MOTHUPI**, *supra*, amount to a tacit waiver of his right to reclaim possession of the vehicle in question. A reasonable man in the position of the respondent would have assumed that the applicant had abandoned his right to retain possession of the Toyota motor vehicle in view of his inaction immediately after the dispossession on 24 December 2007 until 6 March 2008 or until the middle of February 2008 when the demand was made. A reasonable man, in addition, would have believed that such inaction was due to the fact that the applicant had in his use the Audi vehicle and was not in need of the Toyota

vehicle and that the need for this vehicle only arose as a result of the accident on 4 February 2008. The delay in the present application can only, in my view, be interpreted as acquiescence in the alleged spoliation.

[8] The application is accordingly dismissed with costs.

S. EBRAHIM, J

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