

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHERS

(3) REVISED.

22.5.2024

DATE

MV SEMENYA DJP

CASE NO. 6476/2020

In the matter between:

BABINAKGOMO SOCIETY ACADEMY
(BBKS ACADEMY)

APPLICANT

and

NAMISHI PHILLEMOM SHAI

RESPONDENT

JUDGMENT

Heard on 12 February 2024.

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives via email and release to SAFLII. The date and time of hand-down is deemed to be the 22 May 2024 at 11:00

SEMENYA DJP.

[1] The applicant is the owner of BBKS, a private school situated at Ga-Phala village. The applicant launched this application in which it seeks relief in the form of the restoration of the land which it has been allegedly dispossessed by the respondent.

[2] The applicant avers that sometime in 2015, it bought pieces [pockets] of vacant land from Tholongwe Mokwena and various other people with the intention of building a private school on it. It erected a barbed wire fence around that land in order to secure it. It proceeded to build a primary school on the eastern part of the land which was running as at the date of the application. The plan was to build the high school on the western part of the property in the future.

[3] The applicant avers that on the 16 of February 2016 the respondent and a certain unknown person arrived at the school and began to cut off the fence on the western part of the land with a plier. They used the van they were travelling in to pull open the fence from one corner to the other. The applicant annexed the photos of the respondent and the other person in the process of removing the fence the replying affidavit. After removing the fence, the respondent proceeded to erect his own fence

and steel bars in front of the school gate, thereby blocking access to the school premises from the western side.

[4] The applicant proceeded to the reported a criminal case at Mecklenburg police in July 2020. However, the police refused to open a case against the respondent. The applicant regards the conduct of the respondent as constituting an unlawful and forceful dispossession of the property, which conduct made it difficult for the applicant to proceed with the building of the high school on the western side of the school premises as requested by the Limpopo Department of Education.

[5] It is common cause that there is a pending case in Tubatse magistrate court under case No.1055/2015, which the applicant has launched against the respondent. The issue in that case is the ownership of the same property which is the subject matter of this application. Both parties in this matter claim to be the owners of the property concerned.

[6] The respondent is opposing the application and has, in doing so, raised points *in limine* and a defence on the merits of the application. In

the first point *in limine*, the respondent contends that the applicant has acquiesced by launching this application 3 years and 10 months after the alleged dispossession had occurred. The respondent contends that in our law a possessor who alleges that he has been unlawfully disposed of his property is required to approach the court within a reasonable time which has been determined to be within a period of a year. The respondent contends that a period of 3 years and 10 months is unreasonable. The respondent contends that the applicant has failed to prove the existence of special circumstances that justify the granting of the order sought.

[7] The second point *in limine* raised by the respondent is that of *lis pendens*. The respondent contends that the pending case in the Tubatse magistrate court is based on same cause of action, same set of facts and is launched against the same respondent. According to the respondent the relief sought in that matter is that of prohibiting the respondent from interfering with the applicant's peaceful and unrestricted occupation of the property. It further seeks an order which authorises it to remove any barbed wire, poles, fencing or any other obstruction placed by the respondent at the property. The respondent contends that the splitting of the claims, namely, the spoliation

application and the ownership claim goes against the once and for all rule. The respondent contends that these proceeding should be stayed pending finalisation of the Tubatse Magistrate court matter.

[8] The third point *in limine* is that there is a taxed bill of costs and a writ of execution which were issued out of this court against the applicant in case No. HCA 34/2017 in the amount of R111 785.65. The respondent avers that the applicant is either refusing or neglecting to pay the taxed costs and contends that it is not in the interests of justice for the applicant to proceed with this litigation against him while payment of costs is still pending.

[9] On the merits, the respondent disputes the applicant's claim to ownership of the western part of the property. He contends that the property is tribal land which cannot be owned by an individual. He further contends that the applicant failed to prove the existence of a resolution from relevant traditional leader/s confirming the sale of land to it. In addition, the respondent alleges that he has inherited the western part of the property from his father and has been in possession thereof since 2012. According to the respondent, it is the applicant, who, acting through its directors or agents, has disposed him of the property by

setting alight the wood fence that his father had erected around it. He states that he had to replace it with a wire fence.

[10] The respondent further avers that in the case before the magistrate, the applicant testified that he did not personally see the respondent when he removed the fence and that he heard about it from someone who is afraid to testify in court. He states that he could not have damaged the fence on the 16 February 2016 as he was at work at Springs on that date. He denies that the applicant was ever in peaceful and undisturbed possession of the land.

[11] In **Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd**¹ the court said the following:

[5] " ... The requirements for the *mandament van spolie* are trite: (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession.^[3] The *mandament van spolie* is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands". (footnotes omitted).

¹ 2021 (5) SA 54 (SCA)

[12] The respondent's version which is proffered in defence to the merits of the case is that he inherited the property the said land in 2012 from his father who was using it to cultivate crops. His father had erected a fence around it with logs and branches of trees as it is normally done in villages. He avers that in 2014, the applicant demanded the western part of the property saying it bought it from certain people. His explanation with regard to how he came to own the property was ignored by the applicant. He too went to the police to report the incident but, like the applicant, was not given the help that he required. He went back to the field and erected a wire fence and steel posts to protect his crops. He denies that his conduct is an act of self-help.

[13] The respondent argues that the applicant has acquiesced by instituting these proceedings in 2020 when according to its version it was dispossessed in 2015. In **Jivan v National Housing Commission**² the court said the following:

“ 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...”

² 1977 (3) SA 890 (W)

In **Central Authority for the Republic of South Africa v L F**³ at [12] the court said the following:

[12] Acquiescence is a concept well-known in our law. A person is said to acquiesce in something if such person by unequivocal conduct, knowing of his or her rights, inconsistently acts with the intention to the contrary and shows that he acquiesced to a set of facts. If such a person has clearly and unconditionally acquiesced in, and abided by, a situation, he or she cannot thereafter challenge it. See *Gentiruco AG v Firestone SA (Pty) Limited*⁴ where Trollip J said:

‘The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be pre-empted if he, by unequivocal conduct inconsistent with the intention to appeal, shows that he acquiesces in the judgment or order’.

In *Standard Bank v Estate Van Rhyn*⁵, Innes CJ said:

“If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment it cannot thereafter challenge it.”

What is required is conduct leading to a conclusion of an intention not to assail a factual position. The onus of proof rests on the person alleging acquiescence.⁶ The high watermark of the appellant's case is what the second respondent said in a crude manner that she can keep the children. This utterance during a matrimonial dispute is not open for an argument that the second respondent, with full knowledge of his rights, decided to abandon the children. (footnotes excluded)

³ South Gauteng Appeal case No. A5055/2026

⁴ 1972 (1) SA 589 (A).

⁵ 1925 AD 246 at p 274.

⁶ See *Dabner v SAR&H* 1920 AD 583 at 594.

[14] It cannot be said in this case that the applicant has acquiesced. It took steps to protect its rights by, firstly, reporting the matter to the police and secondly, by launching the application in the magistrate court. The applicant simply weighed its options and decided launch an application based on *rei vindicatio* as its cause of action instead of relying on a quick remedy of *mandament van spolie*.

[15] I agree with counsel for the respondent that the applicant is the author of its own misfortune. The delay for a period 3 years 10 months is extreme and unreasonable. Furthermore, the applicant failed to prove any special circumstances that would persuade this court into restoring its alleged possession of the property. In the absence of those special circumstance that justifies the delay in launching this application, the respondent's point *in limine* of lapse of time should succeed.

[16] On the issue of *lis pendens*, the following was said in **Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others**⁷

“The purpose of *lis pendens* is to prevent duplication of legal proceedings. As its requirement illustrate, once a claim is pending in a court, a litigant is not

⁷ [202] 10 BLLR 1001 (LAC)

allowed to initiate the same claim in different proceedings. For a *lis pendens* defence to succeed, the defendant must show that there is a pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter. This is a defence recognised by our courts for over a century.”

[17] The applicant instituted *rei vindicatio* proceedings against the respondent over the same property in the Tubatse magistrate court. Those proceedings are still pending. The respondent contends that the two applications are aimed at preventing the respondent from interfering with the applicant’s possession of the property. In the circumstances, the respondent’s point *in limine* of *lis pendens* should succeed.

[18] The allegations made by the respondent that the applicant was previously ordered to pay the respondent’s costs in case number HCA 34/2017, which costs remain unpaid is not disputed. That such conduct is frowned by our courts appears clearly in **Western Assurance Co v Caldwell’s Trustees**⁸ where the following was stated:

“The court’s inherent right to prevent vexatious litigation is the principle which underlies the interference of the courts with lawsuits where the costs of previous proceedings remain unpaid. In the same matter Solomon JA (as he

⁸ 1981 AD 262

then was) expressed the opinion that orders staying proceedings are based upon the inherent jurisdiction on the court to prevent an abuse of its process, although very few decisions are expressly put on this ground.”

The same view was expressed as follows in **Beinash and Another v Ernest & Young and Others**⁹ where the following was said:

“[17] The right of access to courts protected under section 34 is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of section 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection. However, a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the court is under a constitutional duty¹⁴ to protect *bona fide* litigants, the processes of the courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that “[n]o person or organ of state may interfere with the functioning of the courts.” The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to section 36(1)(b). It would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation.”

[19] The respondent contends that the proceedings in this application should be stayed until the applicants pay the outstanding costs.

⁹ 1999 (20 SA 116 (CC))

Although I agree that the applicant is a vexatious litigant, I am of the view that such an order would not be necessary. The applicant's claim ought to fail on the point *in limine* of lapse of time, which in my view is dispositive of the issues between the parties in this matter.

[20] The defences raised by the respondent on the merits of the application will best be determined in the case launched in the magistrate's court in that they have to do with the issue of ownership. It is not necessary for this court to decide on them.

[21] On the issue of costs, I find no reason to deviate from the well-established principle that costs should follow the winner. The applicant should pay the respondent's costs.

[22] In the result I make the following order:

The application is dismissed with costs



M V SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION, POLOKWANE.

APPEARANCES:

For the applicant: Adv MP Chidi

Instructed by: Botha Massyn & Thobejane Incorporated Attorneys
c/o Phokoane Phasha Attorneys

For the Respondent: Adv Thobejane

Instructed by: Mammule Chidi Incorporated
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