



IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Not Reportable

Case Number: 7132/2024

In the matter between:

SEMPE MAKHABANE
THANDY MAKHABANE
MANTI MAKHABANE
NTHABISENG AGNES LEPILE
LEBOEA NOOSI

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant

and

RAPELANG ORABELENG (PTY) LTD
[Registration No.: 2022/345676/07]

First Respondent

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS – REPUBLIC OF SOUTH AFRICA**

Second Respondent

**THE SHERIFF OF THE DISTRICT OF LADYBRAND
WONDERHOEK FARMS (PTY) LTD**

Third Respondent
Fourth Respondent

Neutral citation: *Sempe Makhabane and others v Rapelang Orabeleng (Pty) Ltd and others* – Case No. 7132/2024

Coram: Grobler, AJ

Heard on: 27 February 2025

Delivered on: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be at 11:00 on 07 March 2025.

Summary: **Spoliation proceedings are incompetent to secure restoration of original possession from a bona fidei third party possessor.**

ORDER

1. The rule nisi is discharged with costs, the costs of counsel to be on scale B.
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JUDGMENT

INTRODUCTION:

- [1] The Applicants approached this court on 13 December 2024. They sought a rule nisi calling upon all the Respondents to show cause why they should not be ordered to restore possession to the Applicants of fifty-one cattle, contending they were unlawfully deprived of possession of these on 6 December 2024.
- [2] Significantly as against the First Respondent (*'Rapelang'*) a separate order was asked that it be ordered to immediately release the cattle to the Applicants without any demand for counter performance for the release of

said cattle. This is significant because of what I say below, and suffice to say for now that this relief obviously extended beyond the ordinary relief usually sought in terms of the mandament van spolie.

- [3] On 13 December 2024 the court granted the order for which the Applicants prayed. Subsequently only Rapelang filed an opposing affidavit and the return of the rule nisi served before me.

THE FACTS:

- [4] Spoliation proceedings seek final relief. Thus, the *Plascon-Evans*' rule finds application. I say at the outset that I have no reason to discard the Rapelang version out of hand. There is no basis for such a finding. Of significance also in the present case, I highlight the Applicants' version as well. Unless I could find that Rapelang was part of some grand, nefarious scheme to commit the spoliation [as the Applicants contend] and was given possession simply to thwart possible spoliation proceedings, to my mind a spoliation application was never on the cards.
- [5] The First-, Second- and Third Applicants are siblings. Their father kept livestock but passed away on 17 September 2022. He died intestate, his estate has not been finalised and no executor has been appointed. The Applicants state that they possess the cattle pending the finalisation of the estate. I assume that they had possession of the cattle and I deal with the matter from there. I have no reason to believe that they are mistaken.
- [6] They state further that they were – together with the Fourth- and Fifth Applicants - in free and undisturbed possession of a herd of cattle, which they exercised through the Fifth Applicant. On 6 December 2024, soldiers in the employ of- and acting within the course and scope of their employment with the Minister of Defence and Military Veterans (*'the Second Respondent'* or *'the Minister'*) had robbed the Applicants of their possession and when the

application was launched, they said the depravation was then continued '*.....through the refusal of the First Respondent to restore our possession*'.

- [7] The Applicants contend the cattle were grazing on Municipal land when four trucks filled with soldiers arrived in the vicinity of the herd. There were other herders and cattle there as well, who at the sight of the soldiers abandoned their herds and ran away. This was because – so the Applicants contend – the soldiers were armed with machine guns.

- [8] After some discussion with the Fifth Applicant, the soldiers loaded all the cattle [abandoned and in possession of the Fifth Applicant] onto the trucks and transported them to the farm Rohallion, which they contended belong to the Fourth Respondent ('*Wonderhoek Farms*'). Subsequently the cattle were taken to Ladybrand and were then placed in possession of the First Respondent.

- [9] The Applicants attempted to negotiate the release and return of the cattle but to no avail. They realised that they had to approach court. They contended that the actions of the soldiers and after that, the First Respondent' refusal to return the cattle amounts to spoliation.

- [10] As an interposition thus, the Applicants' own version is that at the time of the institution of the proceeding the First Respondent was in possession, but he had received the cattle through the actions of the soldiers. The soldiers took possession, took the cattle to the farm Rohallion and thereafter to the First Respondent. Apart from unfounded statements of general grand conspiracy, no allegation is made that the First Respondent had acted in cahoots with the soldiers, is acting in their interest or had acted as a co-spoliator.

- [11] The First Respondent's answering affidavit reveals that Mr Tebogo Motsetsele was appointed by the Mantsopa Local Municipality as the pound

master for the Ladybrand area on 22 May 2023. He stated that he operates the pound under the name of Rapelang.

- [12] His involvement generally as pound master in related matters is that landowners in the area [private or governmental institutions] invariably find cattle and other livestock that do not belong to the landowner on their land. This is apparently rampant at the South African border with the Republic of Lesotho. Once a farm owner, South African Defence Force or the South African Police on request of the landowner round up stock on the land in question, the livestock gets delivered to the pound. There are two operating pounds in the Free State Province. The pound master cannot refuse to accept stock that has been impounded.
- [13] On receipt of such livestock, the herd or the impounded animals get registered onto a pound register, they are kept and fed, and owners of impounded stock are allowed to attend to the pound to claim their property. This all happens under the auspices of the Mantsopa Local Municipality.
- [14] What invariably happens as well is that the owner of the land in question provides a damages assessment, seeking compensation for lost grazing etc.
- [15] Mr Motsetsele says that on 6 December 2024, he was telephonically contacted by a member of the South African National Defence Force. This person told him that they had taken possession of over one-hundred cattle in the Wepener district, these need to come to his pound whereafter the stock was delivered to him at the Mantsopa/Ladybrand pound and he issued possession receipts. This happened on 7 December 2024.
- [16] The next day, the owners of the impounded stock attended to the animal pound to identify their livestock, which included Mr Leboea Noosi [the Fifth Applicant]. The Applicants did not want to pay the pound fee and damages assessment.

- [17] He denied possession of any cattle that were found in the Applicants' possession. That is because a large number of cattle had already been removed from the pound from various other owners, and there was no form of identification of the cattle left after other owners had taken ownership of cattle belonging to them.
- [18] He confirmed further that a pound release fee is payable for the release of impounded stock and referred to two damages assessments submitted by farmers claiming that the Applicants' cattle had grazed on their land. The pound fees remained unpaid, and he denies – most strenuously – any effort on his or anybody else's part to act against the Applicants in any unlawful manner.
- [19] The Replying Affidavit deals – in substance – with much concerning Rapelang's apparent appointment, his right to retain possession etc. There was no rejoinder affidavit filed. I do not deal with these in this judgment because those facts are to my mind irrelevant. Rapelang operates at as the pound for the Ladybrand area. Whether there is some form of error in its appointment, or the fees that it charges etc are issues best kept for vindicatory proceedings. I say why this is so later.
- [20] The facts to my mind thus reveal that Rapelang was in *bona fide* possession at the time when the application was launched, and it did not commit spoliation. The only way I can thus find for the applicants on the facts of the case, is if I find that notionally spoliation proceedings can restore possession to an applicant where the object or thing is in possession of a bona fidei third party.

SPOLIATION PROCEEDINGS GENERALLY:

[21] The kind of possession an applicant in spoliation proceedings needs to prove is generally described as being of a peaceful and undisturbed nature.¹ This denotes objective control and a subjective mental element to derive some benefit for oneself consequent to said possession.² The lawfulness of primary possession is irrelevant, as even unlawful possession is protected. This is established law.³

[22] *De Jager's* case states the position concerning possession as follows:

*'What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to proceedings, cannot be interfered with in his position except by due process of law.'*⁴

[23] An Applicant further needs to show only spoliation. That is the deprivation of possession by means of wrongful and unlawful acts. Deprivation must happen sans acquiescence and consent and may happen in numerous unlawful ways. The absence of consent is the key because if consent is genuinely and freely given, it negates the unlawfulness of the

¹ *Magadi v West Rand Administration Board*, 1981 (2) SA 3452 (T) at 354 F.

² *Animus ex re commodum acquirendi*.

Agha v Sukan, 2004 (3) All SA 421 (T) at 428 H – 431D.

³ *Nienaber v Stuckey*, 1946 AD 1049 at 1055;

Magadi, supra, at 354D;

Vena v George Municipality, 1987 (4) SA 29 (C).

⁴ *De Jager v Farah and Netstat*, 1947 (4) SA 28 (W) at 35;

See also: Silberberg and Schoeman's *The Law of Property*, 5th Edition, Badenhorst *et al*, p. 293 and the recordal of Prof. Van der Walt's 1983 THRHR 239; 1988 THRHR 292 articles, where the learned Professor describes the protection of unlawful possession to the overriding purpose of the mandament which, according to him, is the protection of public order against breaches of peace. The protection of unlawful possession can, however, only be explained in light of the character of the possessory remedy, where the rights of the parties are irrelevant.

dispossession.⁵

- [24] There can of course also be no spoliation if the deprivation – even without consent – is consequence to some lawful means of dispossession. A court order springs to mind, as an example.
- [25] As a '*general denial of the facts in issue*' defence, a respondent can successfully defend himself by showing that someone else had committed the spoliation.⁶ The respondent may also – as is the case here under the general defence of restoration being impossible – show that a third party has acquired possession of the thing.⁷ There are conflicting judgments as to the application of this defence, and I deal below with the tension and what I believe is the correct approach.

THE FIRST RESPONDENT IN POSSESSION:

- [26] Mr Cronje for the Applicants, submitted that on the facts of the present case, spoliation proceedings were competent against the First Respondent because Rapelang's possession is a simple continuation of the spoliation performed by the soldiers. He referred me to an unreported decision of this division in *Khali v Abdulla*.⁸ The facts of that case are not readily apparent from the judgment, except to state that apparently the matter involved the impounding of livestock at the behest of Messrs Jacobs and De Nett who were the stated landowners. For unstated reasons the court found that the mandament was applicable and ordered return as against the pound master. Mr Cronje submitted that this case is authority for the proposition that a third-

⁵ *Stocks Housing Cape (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services*, 1996 (4) SA 231 (C) at 240 C – D.

⁶ *Pieter v Muller*, 1973 (4) SA 126 (E) at 129 A – B.

⁷ *Silberberg*, *op.cit.* p. 304,

⁸ 792/2014 Free State High Court, Bloemfontein, Case heard on 8 August 2014.

party possessor may be ordered under the mandament – such as a pound master – to restore the possession of the original possessor.

[27] Khali's judgment is obviously correct if the court found that the pound master's possession was *mala fidei*. But as this is not clear from the judgment itself, reliance on the decision does not help. If the court's finding was that it does not matter if possession by the pound master was *bona* – or *mala fidei*, respectfully it was wrongly decided.

[28] Two decisions of this division appear at first blush to support Mr Cronje's submission of general competency to order restoration of possession under the mandament when the thing is in possession of a third party. In 1951, *Brink J* in this court held in the case of *Painter*:

*'Mr van Rhyn also submitted that the court would not order restoration of the possession of the dwelling house because the respondent, acting as agent for his wife, had placed another party in possession of it. He referred to the case of Burnham v Neumeyer, which decided the court would not grant spoliation order where the goods, which were the subject of the proceedings, had been alienated to an innocent third party without any intention of defeating the proceedings. In the case referred to alienation had taken place without knowledge that the proceedings were being instituted. There is nothing in the respondent's affidavit which suggests that Rautenbach, who was placed in possession of the house, is an innocent third party, but even if he is, respondent does not allege that it would not be possible for him to restore possession of the dwelling house to applicant and that he will not be able to make the necessary arrangements to do so.'*⁹

[29] It seems as if *Brink J* found thus because the learned Judge was of the view – based upon Burnham's case – that alienation with the aim of defeating spoliation proceedings (thus *mala fide* conduct and consequent possession) would not protect the third party from an order. I have no difficulty with that. Secondly, the court opined that nothing served before the court factually to suggest restoration of possession was wholly impossible, even if the possessor were in *bona fidei* possession. This indicates that a spoliator must

⁹ *Painter v Strauss*, 1951 (3) SA 307 at 318 B – D (FS).

assert and show that either he or the bona fidei possessor cannot restore possession. It equates to one party before court being obligated conclusively to defend the position of another [as if that party has got no say in the matter], and that in relation to the origin and continued right of possession, which classically are irrelevant considerations in spoliation proceedings.

- [30] Eighteen years later, *De Villiers J* wrote the *Malan* judgment. The learned Judge cited *inter alia Burnham's case*¹⁰ , but decided to follow the contrary authority of *Painter* in finding thus:

'Uit hoofde van bogemelde passasies wil dit voorkom of dit miskien gesê kan word dat die mandament van spolie soos ontwikkel en opgeneem is in ons gemenereg, so uitgebrei het dat dit selfs beskikbaar geword het teen 'n persoon wat besit bona fide van 'n spoliator bekom het. Maar hoe dit ookal sy, word dit nêrens in die outoriteite gesê dat dit vir die rede nie meer beskikbaar is teen 'n spoliator nadat hy van sy besit ontslae geraak het nie. Uit die aard van die saak sou so 'n stelling strydig wees met die doelstelling van die mandament, naamlik om voornemende spoliators te ontmoedig om die wet in hul eie hande te neem. Na my mening is 'n hof geregtig om 'n bevel te maak teen 'n spoliator vir teruglewering van die besit van gespolieëde eiendom al is hy nie meer in besit daarvan nie tensy, om een of ander rede – bewys waarvan op die spoliator is – dit duidelik is dat dit onmoontlik vir hom sal wees om die hof se bevel uit te voer.' ¹¹

- [31] *De Villiers J's* approach is thus limited to one of the grounds *Brink J* mentioned in *Painter* and that is if the spoliator showed that restoration of the thing had become impossible. *De Villiers J* does not seem to have expressed an opinion as to whether *bona* or *mala fides* play any part in that possession. The court found that the mandament may still be instituted against the spoliator even if it is showed that he or she no longer has possession. Respectfully this seems contradictory to what the weight of authority dictates on the point.

¹⁰ *Burnham v Neumeyer*, 1917 TPD 630;

Louw v Herman, 1922 CPD 252;

Chitiz v Loudon and another, 1946 WLD 375.

¹¹ *Malan v Dippenaar*, 1962 (2) SA 59 (FS) at 65 G – H.

- [32] In *Jivan*, Steyn J rejected the approach of both Malan and Painter's case. The court found – and with reference also to *Chitiz*, and *Burnham* – as follows:

*'I associate myself with the positive attitude taken by Roper J, and this view of that of De Villiers J in Malan v Dippenaar quoted above. Without exhaustive reference to the old authorities who are divided and who have no direct relevance to the point in question, I am persuaded to support the view put forward by Bristow J and Roper J, because it has been the operative law of the Transvaal for sixty years and because it fits in with the overriding principle and purpose of the mandament van spolie: the wrongful dispossession by a person taking the law into his own hands can promptly be cured by an order against the spoliator to restore the goods in dispute to the peaceful possession. A spoliation order against a party other than the spoliator is logically beyond the scope of the purpose of the mandament to prevent persons from taking the law into their own hands. Where possession has passed to a new possessor who became such in good faith, the status quo ante cannot be restored by remedial action against the disturber of the status quo. Unfortunately for the original possessor, the dispute has at that stage moved from the realm of possessory remedies to that of a vindicatory action. Delay on the part of the original possessor in recovering his possession, especially after he is aware of the advent of a new possessor in good faith, would, in my view, further exclude the right to such a spoliation order.'*¹²

- [33] An analysis of *Jivan* reveals the court's approach is that as long as the third party's possession is *bona fide*, spoliation proceedings against a third-party possessor is wholly incompetent.
- [34] In *Rossouw's* case, Vos J in the then Cape Provincial Division decided to follow *Jivan's* case and held:

'Die getuienis toon na my mening dat eiser die voertuig bona fide aan 'n derde verkoop het. Weliswaar het mnr Foxcroft in sy argument gesê dat hy nie die aspek van bona fides toegee nie, maar ek meen die korrekte opsomming van en afleiding uit die getuienis is dat dit 'n bona fide verkoping was. Derhalwe sou die hof nie in hierdie omstandighede 'n spoliëering bevel toestaan nie. Hierdie beginsel blyk uit Jivan v National Housing Commission, 1977 (3) SA 890 (W) op 895 G – 896D en die gesag waarna daar verwys word. In hierdie verband het mnr Foxcroft die hof na verskillende gewysdes verwys vir die argument dat laasgenoemde beslissing nie korrek is nie. Die argument was dat in Burnham v Neumeyer, 1917 TPD 630 daar obiter gesê is dat

¹² *Jivan v National Housing Commission*, 1977 (3) SA 890 (WLD) at p. 896 A – F.

*in gepaste omstandighede daar nie 'n teruggawe gelas word waar die eiendom bona fide in die besit van 'n derde gekom het nie. Ek verskil. Ek meen dat daardie dicta wel rationes was. Ek meen ook met eerbied dat die redes wat in die Jivan saak gegee word oortuigend en korrek is.'*¹³

- [35] *Schippers JA* for the minority in *Monteiro*¹⁴ referred to the authors of *Silberberg's and Schoeman's* approach¹⁵ and held that transfer of possession to a third party cannot imply that restoration will always *per se* be impossible. The court held that where a third party has acquired possession a spoliation order can still be granted, unless the spoliator proves that it is impossible for him to give effect to the order. The court did not deal with the difference of position on fideis and seem to have found that the defence is always and broadly related only to a question of whether it is possible to restore possession. The learned Judge of Appeal imbibed the Silberberg and Schoeman approach, which accepts that the mandament is inapplicable if the possessor is bona fidei
- [36] Respectfully, I think the *Malan* decision is incorrect. And to the extent that *Painter* also suggests that spoliation proceedings are competent against a bona fidei third party to restore possession (or an order to compel restoration against the spoliator, to the extent that he or she must do what is necessary to restore possession to the original possessor) that decision is incorrect as well.

¹³ *Bank van die Oranje Vrystaat v Rossouw*, 1984 (2) SA 644 (CPD) at p. 649.

See also *Chopper Worx (Pty)Ltd v WRC Consultation Services (Pty) Ltd* 2008 (6) SA 497 ©

¹⁴ *JA Monteiro and Another v Diedericks*, (2021) ZASCA 015 (2 March 2021).

¹⁵ *Loc.cit* at p. 305 where the learned authors wrote:

'...It submitted that the approach in Painter v Strauss and Malan v Dippenaar is to be preferred. Transfer of possession to a third party cannot imply that restitution will always per se be impossible. In cases where the spoliator can regain possession without much trouble or delay the mandament van spolie should be granted. The bona fides or mala fides of the spoliator should therefore be irrelevant. Bona and mala fides are only relevant when it comes to the possession of a third party as it is accepted that the mandament van spolie can only be granted against a mala fide third party. In Raik v Raik, (1993 (2) SA 617 (W)) the court refused restoration of jewellery which was in the possession of the respondent's mother who acquired it bona fide.'

- [37] The distinction should first be made on the position of the spoliator as against that of the *bona fide* third party, all vis a vis the original possessor/applicant/plaintiff. The spoliator is not a conduit or agent for the *bona fide* third party's spoliation, for otherwise the third party becomes a *mala fidei* possessor and co spoliator. *Mala fide* third parties no doubt have a hand in the spoliation action, which makes such third parties co-spoliators.¹⁶ The principle here is that the person who has ordered or ratified an act of spoliation is also deemed a spoliator.
- [38] Indeed, in the case of *bona fidei* third party possession, there can conceivably be little relationship between the spoliator and the third-party possessor, that is not *bona fidei* and at an arm's length. Thus, the position between the original possessor and the third party is not one caused by the *de facto* possessor committing spoliation vis a vis the original possessor. Simple logic then dictates that the original possessor cannot proceed against the *bona fidei* possessor on the mandament, because in that context there was no spoliation by the ultimate possessor¹⁷.
- [39] Cases such as *Malan* and *Painter* seeks to avoid this anomaly, by notionally suggesting that if the original spoliator can achieve possession again from the *bona fidei* third party, an order may be granted against the spoliator and an obligation to do what is necessary to regain possession from the *bona fidei* third party and in order to restore possession to the original possessor. In effect thus the spoliator needs to attend and sort out whatever right the *bona fidei* third party has to possession. But that is a question that is wholly irrelevant to matters of spoliation, and once again involves irrelevant considerations because the actual *de facto* possessor can thus in effect

¹⁶ *Administrateur Cape and Another v Ntshwaqela and Others*, 1990 (1) SA 705 (A) at 718 G – 719 A.

¹⁷ *Pieter v Muller* supra at 128 D , 129 B

defeat the mandament by asserting a right to possession. Indeed, this model pontificates that the bona fidei third party may assert his or her right to possession against the spoliator, but not against the original possessor.

[40] The ambit of the enquiry is so extended to well beyond what the mandament entails, because the order against the spoliator must consider what the rights of the bona fidei third party are to hold on to possession. Ironically in this context then, it is the spoliator who must show that the right of retention by the bona fidei third party is so strong that it is impossible for him or her to restore that possession. It seems to me that this creates somewhat of a mess.

[41] To my mind, the mandament cannot apply to the possession of a *bona fide* third party. And I do not think that that a spoliator can be compelled to restore possession when he or she has in good faith since parted with possession. In such instances the *rei vindicatio* must be instituted.

[42] In the present case Rapelang is a bona fide third-party possessor. That means that spoliation proceedings were not competent as against it. Prayer 2 highlighted above cannot thus succeed as well, because the Applicants cannot ask the court to deal with the entitlement on the part of Rapelang to retained possession and the charging of fees, when they chose to institute spoliation proceedings.

CONCLUSION:

I make the following order:

1. The rule nisi is discharged with costs, the costs of counsel to be on scale B.



S. GROBLER, AJ

On behalf of the Appellants;

Adv. PR Cronje
On instruction of
Barnard & Venter
c/o Lovius Block
BLOEMFONTEIN

On behalf of the First Respondent:

Adv. Stian Janse van Rensburg
On instruction of:
EDJ Attorneys
BLOEMFONTEIN