

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 631/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Regional Magistrates: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

BRIGHT IDEAS PROJECTS 860 CC

(REGISTRATION NUMBER 2005/045268/23)

FIRST APPLICANT

JOHANNES CHRISTIAAN REITZ

SECOND APPLICANT

and

MATSAPA TRADING 647 CC

(REGISTRATION NUMBER 2008/242592/23)

FIRST RESPONDENT

CHESLYN MICHAEL EDWARD MOSTERT

SECOND RESPONDENT

PETRI VAN DER COLFF

THIRD RESPONDENT

Neutral citation: Bright Ideas Projects 860 CC and Another v Matsapa Trading 647 CC and 2 Others (631/2024) [28 March 2025]

Coram: Stanton J

Heard: 05 March 2025

Delivered: 28 March 2025

Summary: Application for leave to appeal – applicant succeeded in showing a reasonable prospect of success – absence of jurisprudence in respect of spoliation of a business as a going concern – leave to appeal granted to the Supreme Court of Appeal.

ORDER

1. Leave to appeal to the Supreme Court of Appeal is granted.
 2. The costs of this application shall be costs in the appeal.
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JUDGMENT

Stanton J:

Introduction:

[1] On 12 March 2024, the applicants filed an urgent spoliation application, requesting that: -

“1.1 The first respondent, Matsapa Trading 647 CC, the second respondent, Mr CME Mostert and the third respondent, Mr P van der Colff (collectively *“the respondents”*), and all those holding under them, be ordered to immediately restore to the applicants and/or the applicants’ representatives, peaceful, undisrupted and undisturbed possession and control of all the businesses and the premises situated at Erf 6[...], K[...], Northern Cape Province (*“the property”*), and better known as the Puma fuel station business, as well as the OK shop conducted from the premises (*“the businesses and the premises”*);

1.2 The Sheriff for the relevant district be ordered to do what is necessary to be done and to generally assist the applicants and their duly authorised representatives to immediately procure peaceful,

undisrupted and undisturbed control and possession of the premises and the businesses; and

- 1.3 The respondents, jointly and severally, the one paying the other to be absolved, be ordered to pay the applicants' costs on the scale as between attorney and own client, such costs to include the costs of two counsel."

("the main application")

- [2] The Puma-filling station business ("*the Puma business*") and the OK grocery business ("*the OK business*") formed the subject matter of the main application.
- [3] The respondents opposed the main application, alleging that the applicants failed to: (a) lay a basis for the granting of final relief; and (b) establish the two jurisdictional requirements for a spoliation order.
- [4] On 22 March 2024, after hearing arguments, I reserved judgment and on 02 April 2024, the written judgment, dismissing the main application with costs, was handed down.

Grounds of appeal:

- [5] The applicants now seek leave to appeal against the whole of the judgment, and the order, to the Full Court of this Division, alternatively to the Supreme Court of Appeal. The grounds of appeal they aver the Court had erred upon can be distilled as:

- 5.1 Finding that Matsapa could have used the terms of the resolution as a legally justifiable basis to oust the applicants from the possession of the entire business, alternatively the Puma business; and
- 5.2 Finding that the applicants had failed to prove that they were dispossessed of the OK business when it was evident on the objective and common cause facts that the whole of the work force employed by

the applicants, including the employees of the OK business were hijacked by the respondents, with the result that the applicants also took possession of the OK business.

Application for leave to appeal:

Applicable law:

[6] An appeal lies against the decision of the court and not against the reason for the decision.¹ Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 (“the Act”) provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have (a) a reasonable prospect of success, or (b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed, leave may not be refused.

[7] In *Ramakatsa and others v African National Congress and another*,² Dlodlo JA placed the authorities with regard to the applicable test when applications for leave to appeal are considered, in perspective as follows:

‘Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*³, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that ‘but here too the merits remain

¹ Section 16(1)(a) of the Superior Courts Act 10 of 2013. See also *Medox v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA) para 10 and *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] All SA 149 (SCA) para 17.

² [2021] JOL 4993 (SCA) para 10.

³ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZACSA 17; 2020 (5) SA 35 (SCA).

vitality important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'

The first ground of appeal – the revocation of the resolution:

[8] The respondents aver that the purported, but terminated, management agreement relied on by the applicants does not create rights of a nature protectable by the mandament van spolie. Mr P Lourens, for the respondents, submitted that the main application was in truth not a spoliation application, but an application to impermissibly vindicate the applicants' contractual rights under the guise of a spoliation application by relying on the management agreement.

[9] Mr JL Olivier, on behalf of the applicants, denied reliance on the management agreement to justify its possession of the businesses and premises; and that same was only referenced in the founding affidavit to provide context. He submitted that the respondents were not entitled to dispossess the applicants based on the revocation of the resolution, but that they were obliged to follow legal process, and without same, their actions amounted to self-help, without any lawful sanction or consent. According to him, *Elastocrete (Pty) Ltd v Dickens*⁴ does not bolster an argument that a respondent can deny spoliation if the action was legally justified, in view of

⁴ [1953] All SA 105 (SR) p. 111.

the fact that Elastocrete dealt with the impoundment of animals under certain circumstances when authorised by legislation.

Applicable law:

- [10] It is trite that the right to possession is ordinarily not a relevant consideration in spoliation applications. The Supreme Court of Appeal in *Monteiro v Diedricks* (“*Monteiro*”)⁵ confirmed that the mandament is not concerned with the underlying rights to claim possession of the property concerned, but only seeks to restore the status quo ante and it does so by mandatory order, irrespective of the merits of any underlying dispute regarding the rights of the parties. In *Monteiro*, with reference to *Rikhotso v Northcliff Ceramics (Pty) Ltd and others*⁶, it was affirmed that:-

‘The remedy afforded by the mandament van spolie, expressed in the *maxim spoliatus ante omnia restituendus est*, is generally granted where one party to a dispute concerning possession of property seizes the property pursuant to what he believes to be his own entitlement thereto. In such cases a Court will summarily order return of the property irrespective of either party’s entitlement to possession, and will not entertain argument relating to their respective rights until this has been done. The principle underlying the remedy is that the entitlement to possession must be resolved by the Courts, and not by a resort to self-help.’

- [11] The Supreme Court of Appeal in *Street Pole Ads Durban v Ethekwini Municipality*,⁷ confirmed the qualification to the above general rule as:

‘If...however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case,⁸

⁵ [2021] 2 All SA 405 (SCA) para 14. [also reported at [2021] JOL 49792 (SCA)].

⁶ 1997 (1) SA 526 (W) at 532G – I.

⁷ [2008] 3 All SA 182 (SCA) para 15; [also reported at 2008 (5) SA 290 (SCA)].

⁸ *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services and others* 1996 (4) (SA) 231 (C) at 244C – E. [also reported at [1997] JOL 294 (C)].

“the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims.”

This is because such an applicant –

“... in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent’s defence in regard thereto has to be considered ...”⁹

Conclusion:

- [12] The crux of the matter is whether another court would find that the applicants claimed a substantial right to possess the businesses and the premises; and, whether the respondents could then rely on the revocation of the resolution to oust the applicants from their possession. Having considered counsels’ arguments, I am persuaded that the application for leave to appeal cannot be categorised as hopeless; and that the appeal would have a reasonable prospect of success.
- [13] The next question is whether this matter should be referred to the Full Court of this Division or to the Supreme Court of Appeal. Section 17(6)(a) of the Act requires that I weigh-up two broad considerations. In the first instance, whether the issues involve important questions of law and secondly, whether the interests of justice, either generally or in the particular case, require that the matter be heard by the Supreme Court of Appeal.
- [14] Having regard to paucity of jurisprudence in matters where a business as a going concern is spoliated, I am persuaded that compelling circumstances exist that the Supreme Court of Appeal should provide guidance in this instance; and that leave to appeal should accordingly be granted in terms of section 17(1)(a)(ii) of the Act to the Supreme Court of Appeal.

Wherefore the following order is made:

⁹ *Minister of Agriculture and Agricultural Developments and others v Segopolo and others* 1992 (3) SA 967 (T) at 971B. [also reported at [1992] 3 All SA 474 (T)].

1. Leave to appeal to the Supreme Court of Appeal is granted.
2. The costs of this application shall be costs in the appeal.

STANTON, A
JUDGE

On behalf of the applicants: Adv JL Olivier
On instruction of: Oosthuizen Sweetnam Reitz & Fourie
Care of: Van de Wall Incorporated

On behalf of the respondents: Adv P Lourens
On instruction of: Werkmans Attorneys
Care of: Engelsman Magabane Incorporated