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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: HCAA 10/2023

. (1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 7/5/25

SIGNATURE:

In the matter between:

Ndlovu Traditional Council

First Appellant

Johannes Ledwaba N.O

Second Appellant

Lesiba Ledwaba N.O

Third Appellant

**Department of Co-Operative Governance
Human Settlement and Traditional Affairs**

Fourth Appellant

**All Other Unknown Person who have Illegally
Erected or Intend Illegally Erecting Fences or**

Fifth Appellant

Structures On stand Described as Stand No:

A[...], Andries Park, Ga-Ledwaba

and

Modiegi Caven Masela

Respondent

JUDGMENT

MULLER J:

[1] This appeal is with leave granted by Mthimkulu AJ on 12 April 2023. The application was not opposed by the fourth and fifth respondent when it was heard in the urgent court. The notice of appeal, however, does not specifically state which of the appellants applied for, and were granted leave to appeal, although all the respondents are cited as the appellants in the heading. For ease of reference the parties will be referred to as they were cited in the application.

[2] It is important to point out early on that the fifth respondent was cited in the notice of motion as "All other unknown persons who have illegally erected or intend illegally erecting fences or structures on stand described as stand no: A[...] Andries Park Ga-Ledwaba." It is the case of the applicant that the first, second and third respondent allocated the abovenamed stand to the applicant. The particular stand was thereafter allocated to another person who is not identified by the applicant in the founding affidavit without the consent or knowledge of the applicant. That person, who was allocated the stand is, however, identified in the answering affidavit as one Joe Mdakane. There is no indication from the record before us that the papers were in fact served on the mentioned Joe Mdakane.

[3] There is, in addition, no indication in the record how service was affected on the collective "All other unknown persons who have illegally erected or intend illegally erecting fences" cited as the fifth respondent. We were informed by counsel for the applicant that service of the papers on the fifth respondent was affected by the sheriff who affixed them at the stand in question. The question was raised by the

court whether the non-joinder of Joe Mdakane after his identity was revealed in the answering affidavit is not determinative of the appeal as it is clear that he has a direct and substantial interest in the order that was sought and granted against the fifth respondent. The appropriateness of the order granted against the fifth respondent when the papers were not served on Joe Mdakane at all, is therefore highly questionable. Counsel for the respondents immediately conceded that Joe Mdakane should have been joined.

[4] Counsel for the applicant however, argued that service of the application was duly effected in terms of the rules by affixing them at the stand and that it follows that he acquired knowledge of the application. The argument is shortsighted and unacceptable. His identification in the answering affidavit should have alerted the applicant as to the identity of the (until then) unknown person to whom the stand was allocated. Neither this individual nor any other member of the fifth respondent opposed the application. It no doubt has to be taken into account that the applicant approached the court on an urgent basis in terms of rule 6(12) but that fact did not relieve the applicant from the duty to ensure that effective service of the papers comes to attention of whoever will be affected by the order sought. Service in terms of rule 4(1) has not been effected by affixing the papers at an empty stand and, it cannot simply be inferred by us, as urged by counsel for the applicant that the papers came to the knowledge of Joe Mdakane. In the normal course of events the applicant should have approached the court for directions in terms of rule 4(2) how to cause effective service on an unidentified group of persons at an empty stand. Finally, on this aspect; even if it is accepted that service at an empty stand was sufficient, the non-joinder of Joe Mdakane after he was identified in the answering affidavit is a vital flaw in the proceedings.

[5] Furthermore, an order was also granted against the fourth respondent when no order was sought against the fourth respondent in the notice of motion.

[6] Returning to the merits of the appeal. The issues to be determined is whether the applicant has lost possession of the stand and secondly, whether it is competent for a court grant the restoration of possession of property against first, second and third respondents in a *mandament van spolie* application when it is common cause

that the first, second and third respondents were no longer in possession of the despoiled immovable property, namely, stand No A[...], Andries Park, Ga-Ledwaba Limpopo Province.

[7] It is undisputed that the applicant was allocated the above mentioned stand by the first respondent on or about 18 May 2020 in terms of a permission to occupy permit.¹ Pursuant to granting the PTO, possession of the stand was given to the applicant who was in undisturbed possession of the stand until January 2023 when the stand was allocated to Joe Mdekane without notice to the applicant that his right of occupation in terms of the PTO issued to him has been withdrawn or has been cancelled. This happened when the brother-in-law of the applicant informed the first, second and third respondents that his brother in law (without mentioning his name) has requested him to inform them that he is no longer in need of his stand. The first second and third respondents accepted without verifying the truth of the statement with the applicant that he wished to abandon the stand and they then allocated the stand to Joe Mdakane without first obtaining the consent of the applicant personally. (It later turned out that the brother-in-law referred to, is not the applicant, but another brother-in-law.) Joe Mdekane took occupation of the property and has erected a perimeter wall around the stand.

[8] Counsel for the applicant, on the one hand, averred that re-allocation of the stand to Joe Mdekane does not constitute a transfer of the stand to him as the stand remained under control of the respondents by virtue of the Bantu Areas Land Regulations.² Counsel for the first, second and third respondents, on the other hand, contended that restoration as such was impossible as they were not in possession of the stand when the application was instituted and that Joe Mdakane (the fifth respondent) was in fact in possession of the stand and has erected a wall along the perimeter of the stand.

[9] It is appropriate, in my view, to first consider whether Joe Mdakane was a co-spoliator. The general principle was explained in *Nino Bonino v De Lange*:³

¹ Hereinafter called "the PTO."

² Regulation R188 of 1969.

³ 1906 TS 120.

"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 enquiry or investigation into the merits of the dispute."⁴

[10] And in *Mans v Marais*⁵ the court explained that:

"A *mandament van spolie* is designed as a speedy remedy against a person who has taken the law in his own hands, and who, without recourse to the Courts, has dispossessed another. Its object is merely to restore the *status quo ante* the illegal action. It decides no rights of ownership; it secures only that if such decision is required, it shall be given by a court of law, and not effected by violence. If before the spoliation either party needed a legal decision to establish its rights, he requires it just as much after, as before, the order. He is in no better, and in no worse position than he was in before the spoliation."⁶

[11] There is no dispute that the applicant was in possession of the stand when it was allocated to Joe Mdakane. The applicant was unaware that his PTO has been cancelled and that the stand was re-allocated to someone else. There is no suggestion in the founding papers at all that the first, second and third respondent acted *mala fide* when they allocated the stand to Joe Mdakane nor that he is a co-spoliator who acquired the stand in a *mala fide* transaction with the first, second and third respondent, well knowing that the stand belonged to someone else. Counsel for the applicant argued that he must have realized that the stand belonged to someone because there was a fence erected on the stand. The presence of a fence on the stand is not evidence to support the proposition that the first second and third respondents acted unlawfully. Joe Mdakane was issued with a PTO by the authority

⁴ 122.

⁵ 1932 CPD 352.

⁶ 356.

in charge who allocates stands for that community. There was no reason for him to suspect that they are acting unlawfully.

[12] Joe Mdakane in my judgment is a *bona* occupier of the stand that he acquired from the first second and third respondents in the normal course of events, and prior to the date that the application was launched.

[13] The intended purpose of a spoliation order is to prevent people from taking the law in their own hands.⁷ In *Administrator Cape and Another v Ntshwaqela and Others*⁸ it was explained that:

"An order to restore possession of a movable is generally performed by the physical handing over of the article. In the case of an order to restore possession of an immovable, on the other hand, there can in the nature of things be no physical handing over. Such an order may be mandatory in part, as where it requires the *spoliator* to vacate the property, or to procure that it be vacated, or to hand over the keys to premises, or to remove fences or other obstacles or to perform other acts require for the restitution of the *status quo*. And it is prohibitory in part, requiring the *spoliator* to forbear from preventing or hindering the *spoliatus* in resuming possession."

[14] Courts will not make orders that cannot be carried out. The principle is embodied in the maxim *lex non cogit ad impossibilia*. In the context of the *mandament van spolie*, impossibility is a factual issue. It must be shown that that compliance of the order is impossible. Cameron JA in *Tswelopelo Non-Profit Organization v City of Tswane Metropolitan Municipality*⁹ stated:

"While the *mandament van spolie* clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of

⁷ *Jivan v National Housing Commission* 1977 (3) SA 890 (W) 8968-H.

⁸ 1990 (1) SA 705 (A).

⁹ 2007 (6) SA 511 (SCA).

physical control and enjoyment of specified property - not its reconstituted equivalent."¹⁰

[15] Factually, the stand was allocated to Joe Mdakane under a PTO *bona fide* obtained at an arm length transaction. In order for the first, second and third respondent to restore the stand to the applicant, the PTO issued to Joe Mdakane has to be lawfully cancelled or be set aside by an order of court, even if they do act under regulation R188 of 1969. The *mandament van spolie* is a possessory remedy. It is aimed at the restoration of the *status quo ante* as a precursor to a process where the rights of the parties to the stand in dispute will be determined. It is impossible for the first, second and third respondent to carry out the order to restore possession of the stand if they are not in possession of the stand. As far as the order relate to Joe Mdakane he was not shown on the facts to be a co-spoliator and he was, in addition, not joined as a necessary party to the proceedings.

[16] There is no reason why the applicant should not pay the cost. The application was doomed to failure from the outset. The costs should follow the result. In the result, and for the reasons set out above, the appeal should succeed.

ORDER

- 1. The appeal is upheld with costs.**
- 2. The order of the court a quo is set aside and is replaced with the following order:**

"The application is dismissed with costs."

G.C MULLER
JUDGE OF THE HIGH COURT

¹⁰ Par 24.

LIMPOPO DIVISION, POLOKWANE

**M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE**

**M. MANGENA
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

**FOR THE APPELLANT : ADV T.P MOTLATLE
INSTRUCTED BY : HLM MAMABOLO ATTORNEYS**

**FOR THE RESPONDENT : ADV K. MOKOENA
INSTRUCTED BY : EK MOHALE ATTORNEYS**

**DATE OF HEARING : 02 MAY 2025
DELIVERED DATE : 07 MAY 2025**