REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A3008/11

DATE:13/05/2011

REPORTABLE

In the matter between:

BUILDER'S DEPOT CC Appellant

and

DAMIAN, TESTA Respondent

JUDGMENT

VAN EEDEN AJ:

1. On 6 December 2010 the Additional Regional Magistrate of Germiston, Mr Achenbach, dismissed the appellant's application that the respondent be directed to restore its possession of certain immovable property. The appellant claimed to have been in possession of such property situate at 653

Monkey Thorn Close, Blackrock Street, Thorn Valley Estate, Greenstone Hill Extension 11. The appellant alleged that it had performed building works for the then owner of the property, one Yan Bin Wu (**"Wu"**), who failed to effect payment to it. It accordingly took possession of the property and exercised a builder's lien in respect thereof. Its possession of the property was exercised through locks to which its sole member, Mr Harry Papas, had the keys.

2. In due course the appellant instituted action against Wu and obtained judgment against him. A warrant of execution was issued on 22 January 2010 in terms whereof the appellant instructed the Sheriff of Kempton Park South to sell the property in execution. The Sheriff attached the property during February 2010. The property was, however, also bonded in favour of ABSA Bank Limited. Unbeknown to the appellant, the bank also obtained judgment against Wu and a second warrant of execution was issued at its instance. The property was again attached at the instance of the bank during August 2010, and the bank instructed the same Sheriff to sell the property on its behalf.

3. Execution at the instance of the appellant progressed slowly, and on 7 October 2010 the appellant's attorney wrote to the Sheriff requesting it to proceed with the sale in execution. Seemingly in response to this letter, the Sheriff issued a notice to the effect that the appellant's matter *"will participate in the sale in execution which will be held on 28 October 2010 at 11:00 under Case No 13044/10 by attorneys Smit Sewgoolam Inc"*. The case number referred to is the matter where the bank obtained judgment against Wu. The appellant

denied that its attorney received this notice from the Sheriff. It seems clear, however, that the Sheriff's intention was to sell the property pursuant to the attachment made in the bank's matter, but on behalf of and for the benefit of both creditors.

4. On 28 October 2010 the Sheriff sold the property in execution to the respondent. On the same day the appellant gained knowledge of the sale. Its attorney immediately addressed a letter to the Sheriff advising that the appellant was in possession of the property and that it intended to retain such possession until such time as the full amount of its judgment debt had been paid. When Mr Papas thereafter visited the property, he found that the locks giving access to the house had been changed. The appellant consequently claimed that it's peaceful and undisturbed possession of the property was lost, and that it was entitled to a spoliation order against the respondent.

5. Clause 9 of the conditions of the sale in execution stipulated as follows:

> *"9. The property may be taken possession of immediately after payment of the initial deposit, and shall after payment be at risk and profit of the purchaser."*

6. The respondent stated that the Sheriff advised him that possession of the property could be taken immediately after he had made the necessary payments by changing the locks. Upon making the payments he arranged for a locksmith to meet him at the property where the locks were changed, all

still on 28 October 2010. All parties accept that from that moment the respondent was in possession of the property.

7. Mr De Oliveira on behalf of the appellant submitted that the respondent, and not the Sheriff, was the spoliator. The evidence, however, reveals that the appellant contended that the *"Sheriff misrepresented to the respondent the true state of affairs in the publication of the terms of the sale of the property to the respondent"* (Record page 103) and *"the Sheriff misrepresented the true status pertaining to the property to the respondent"* (Record page 106). Furthermore the appellant denied *"that the Sheriff has the legal capacity to grant the purchaser vacant possession of the property"* (e.g. Record page 102, 106 and 109). When the respondent took possession, there was, other than for the need to change the locks, no evidence that anybody else was in possession of the property. Specifically, the appellant did not erect any signs to advertise his possession, and he also did not employ a guard to protect his possession. There was no reason for the respondent to think that he was doing anything unlawful or against the will of the appellant when he changed the locks, and the appellant did not allege that the respondent was aware of its possession of the property. The respondent's intention was to obtain possession of the property pursuant to the purchase of the property and payment of the fees in terms of the conditions of sale. It seems clear that in the court *a quo* the appellant accepted that the respondent's possession was obtained *bona fide* and that it derived from the Sheriff's actions following the sale in execution.

8. In the founding affidavit it was not alleged that the Sheriff acted *mala fide* in any manner. In the replying affidavit (Record page 106 para 23), however, it was alleged that prior to the spoliation the Sheriff was informed that the appellant had retained possession of the property and that any interference would be resisted. The appellant's original contention that the spoliation only occurred on 3 November 2010 (page 8 para 14.4) is incorrect, since in the replying affidavit the appellant admitted the respondent's evidence that he had taken possession of the property on 28 October 2010. In fact, prior to the appellant's attorney's letter there is nothing to indicate that the Sheriff should have been aware that the appellant had possession of the property and that it had obtained the judgment whilst exercising a builder's lien. It is not even clear if and when the Sheriff received the letter of 28 October 2010. The suggestion in the replying affidavit that the Sheriff was *mala fide* appears to be an afterthought based on the letter written by the appellant's attorney to the Sheriff on 28 October 2010.

9. On behalf of the respondent Mr Sadler submitted that the appellant had voluntarily surrendered its possession when the Sheriff attached the property pursuant to the writ of execution. The submission was based on the Sheriff's notice of attachment at the instance of the appellant, which *inter alia* notified Wu, as defendant, *"that I hereby attach and take into possession"* the property in issue. Reliance was also placed on **Orbit Motors (Pty) Ltd v Reeds (Cape) Ltd 1975 (2) SA 333 (C)** for this submission. In this matter it was held that the holder of a lien over a motor vehicle had lost possession thereof, even though it had physically retained same, when the Messenger of the

Court attached same at its own instance. These days movables are attached by the Sheriff by taking same into his custody in terms of Uniform Rule 45(3), unless the execution creditor directs otherwise. In **Barclays Western Bank Bpk v Upington Paneelkloppers (Edms) Bpk en Andere 1986 (2) SA 409 (NC)**, which in turn purported to follow **Orbit Motors**, the motor vehicle was also physically removed from the possession of the lien holder, and it seems to me that that is the real reason why he lost his rights of retention. Today possession by the Sheriff is not a requirement for the attachment of movables, and whether the Sheriff could ever come into possession without *detentio*, as was seemingly held in **Orbit Motors**, seems doubtful to me.

10. The sale of immovable property in execution is dealt with by Uniform Rule 46, and the attachment thereof by subrules (2) and (3), which read as follows:

> *"(2) An attachment shall be made by any sheriff of the district in which the property is situate or by any sheriff of the district in which the office of the registrar of deeds or other officer charged with the registration of such property is situate, upon a writ corresponding substantially with Form 20 of the First Schedule.*
>
> *(3)(a) The mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof, and upon the registrar of deeds or other officer charged with the registration of*

such immovable property, and if the property is in the occupation of some person other than the owner, also upon such occupier."

11. It is not a requirement that the Sheriff must take immovable property into his possession. The property is attached by notice as is prescribed, and such mode of attachment does not dispossess the possessor. It follows that I respectfully agree with Hofmeyr J's findings in **De Jager v Harris, NO and the Master 1957 (1) SA 171 (SWA)**, where a similar decision was reached. **Sedibe and Another v United Building Society and Another 1993 (3) SA 671 (T)** provides a clear example that the Sheriff is not always in possession of what he sells in execution: the sale in execution was set aside when the Sheriff could not give the purchaser *vacuo possessio*, as he was obliged to do in terms of the conditions of sale. It also illustrates the importance of *detentio* as an element of possession, a consideration that was seemingly lost sight of in **Orbit Motors**.

12. It is not contended that the sale on 28 October 2010 was invalid in any manner, and the conditions of sale bind the Sheriff and the respondent. In terms of the quoted Clause 9 the Sheriff was required to give possession of the property to the respondent. I consequently find that the appellant lost its possession on 28 October 2010 by virtue of the Sheriff's actions in selling the property in execution, accepting payment from the respondent and by authorising the latter to take possession by changing the locks. I also conclude that the Sheriff was *bona fide* when he gave possession of the property to the respondent. He was not taking the law into his own hands.

He was acting on instructions of the bank to sell the property in execution, and knowing of the appellant's claim, had the intention that the appellant would also benefit by the sale. When the Sheriff gave possession to the respondent, the latter was *bona fide*. Thus possession of the property passed into the hands of a *bona fide* possessor.

13. If am wrong that the Sheriff was *bona fide* in dispossessing the appellant, the question would arise whether a spoliation order could be granted against him. In **Chitiz v Loudon & Another 1946 WLD 375** Roper J dealt with the situation in which the owner of a house, through his agent, incorrectly concluded that the tenant had vacated the property let to him, whereas the tenant had temporarily left the house for the purpose of having it fumigated and with intention of returning. The owner gained possession of the property and, in terms of the operative law, informed the Controller of Manpower that the premises were unoccupied. Thereupon the Controller on 30 April 1946 issued to one Prinsloo a certificate authorising the owner to let to Prinsloo the premises in question. The premises were let to Prinsloo on 1 May 1946 and he was put in occupation on the same day. On 3 May the respondent received the original tenant's cheque for the May rent and the misunderstanding was discovered. Respondent took the attitude that they had reported in good faith and that the house was standing empty and that they could not eject the new tenant, i.e. Prinsloo. The original tenant refused to accept this position and sought to regain possession by means of an application for a spoliation order. Roper J followed the judgment of Bristowe J in **Burnham v Neumeyer 1917 TPD 630**, which had also been followed in **Louw v**

Hermann 1922 CPD 252. These cases provide some authority for the proposition that a spoliation order cannot be made where possession has passed to a *bona fide* third party. Roper J accordingly dismissed the application for a mandament van spolie.

14. **Chitiz** was followed by FS Steyn J in **Jivan v National Housing Commission 1977 (3) SA 890 (WLD) 895G-896A**, where he declined to follow the following passage in **Malan v Dippenaar 1969 (2) SA 59 (O)** 65G: *"Uit hoofde van bogemelde passasies wil dit voorkom of dit miskien gesê kan word dat die mandament van spolie soos ontwikkel en opgeneem in ons gemenereg so uitgebrei het dat dit selfs beskikbaar geword het teen 'n persoon wat besit bona fide van 'n spoliator bekom het. (Vgl. Ntai and Others v. Vereeniging Town Council and Others, 1953 (4) S.A. 579 (A.A.)".* I respectfully agree with FS Steyn J that the reference to **Ntai's** case is without obvious reference. The learned judge declined to follow **Malan's** case in these terms:

> *"I associate myself with the positive attitude taken by Roper, J., and prefer this view to 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 Bristowe 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: that 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 possessor. 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."

15. In **Bank van die Oranje-Vrystaat v Rossouw 1984 (2) SA 644 (C) 648H-649B** the Cape Full Bench followed both the **Burnham** and **Jivan** cases. No reference was made to the **Malan** judgment. In **Harris v Unihold (Pty) Ltd & Others 1981 (3) SA 144 (W) 148** Coetzee J (later Coetzee JP) followed **Jivan**. In **Raik v Raik 1993 (2) SA 617 (W) 623 E-H**, after quoting the above *dictum* from **Malan's** case, Coetzee J stated as follows:

"This is contrary to Jivan's case. I do not consider that Jivan's case is clearly wrong, and I am bound by Jivan's case."

16. The **Burnham** case, as developed by the line of cases commencing with **Chitiz**, has regulated the legal position in this jurisdiction for almost 100 years. I see no reason for thinking that they do not correctly set out the law,

and I think they should be followed. I accordingly conclude that a spoliation order cannot be granted against a spoliator who has parted with possession to a *bona fide* possessor.

17. Can the appellant then seek the return of the property from the *bona fide* third party as it tries to do? I think not. The respondent is clearly entitled to possession. He did not take the law into his own hands. He did not dispossess the appellant wrongfully or against his consent. In short, he performed no act of spoliation. (Compare the definition of spoliation approved in **Nino Bonino v de Lange** 1906 T.S. 120). If his *bona fide* possession cannot be disturbed via the spoliator, I cannot see how it can avail the appellant to go directly against the *bona fide* third party. I agree with the view in **Harris** *supra 148 D* that **Jivan's** case is authority that in a spoliation matter the person who had come into possession of the property claimed by the applicant is entitled to hold it against the applicant if indeed he is an innocent third party.

18. Unfortunately the appellant has misconstrued its remedy, for the dispute has moved from the realm of the possessory remedies. In the premises I see no reason to disturb the order of the learned Magistrate. I would consequently propose the following order:

The appeal is dismissed with costs.

_____
H VAN EEDEN
ACTING JUDGE OF THE HIGH COURT

_____
C NICHOLLS
JUDGE OF THE HIGH COURT
I AGREE

IT IS SO ORDERED

DATE :

Counsel for appellant: Mr M de Oliveira
Instructed by: John Walker Attorneys

Counsel for Respondent: Mr C B Sadler
Instructed by: Kokinis Inc

Date of hearing: 21 April 2011
Date of judgment: 13 May 2011