REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/21429

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

7/8/19 .....

In the matter between:

Lydall, RW	First applicant
Lydall, RA	Second applicant
And	
Roxton-Wiggill, AA	First respondent
Nedbank Ltd	Second respondent

Judgment

Van der Linde, J:

[1] This is an application brought on the basis of a legal remedy of ancient origin, known as the mandament van spolie. I will refer to that Dutch description in this judgement as simply "spoliation relief". Spoliation relief is granted to protect possession, which is a real right, meaning that it is enforceable against any person who seeks to deprive the possessor of his or her possession. It protects possession, because in so doing it protects the rule of law. It frowns upon self-help; it decries unilateral action aimed at securing possession from someone who is in peaceful and undisturbed possession; and it restores possession before it is prepared to hear whether the deprivation of possession had a legal basis.

[2] In this sense it is thus relief which is interim in nature; it restores the status quo ante, in a sense thus walks back the respondent in his or her steps, so that the respondent can start again by taking its cause to a court first; see Eskom Holdings SOC Limited v Masinda (1225/2018) [2019] ZASCA 98 (18 June 2019):

"[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute' as to which of the parties is entitled to possession. Thus a court hearing

a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. But what needs to be stressed is that the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in Eskom v Nikelo is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute."

[3] Another feature of spoliation relief is that it protects not only exclusive possession but also joint possession, with the implication that a person who enjoys joint possession is entitled to the protection of this form of relief if the joint possession is foreclosed.

[4] Finally, it has been said – and this was stressed during argument by counsel for the first respondent – that spoliation relief avails if the deprivation was *"unlawful"*. But in this context *"unlawful"* means no more but that the deprivation will have been without the consent of the possessor. In other words, it does not avail the respondent in spoliation proceedings to defend his or her unilateral self-help action by contending that he or she had a personal or a real right to the property that was being despoiled.

[5] Indeed, so jealous is the law of its supremacy that it will not even permit of a counter-application in the same proceedings by the respondent for an order declaring that in law the applicant is obliged to afford the respondent possession of the property concerned.

[6] Against these background remarks one may now consider the essential and relevant facts of this application that comes on the urgent roll before me this week. The two applicants and the first respondent are the three owners in undivided shares of land in a game reserve. There is a personal relationship between these three individuals but that is irrelevant from the law's perspective. The two applicants have a 25% undivided ownership share each, and the first respondent a 50% undivided ownership share in the land. The second respondent, a bank who holds a bond over the property, has not participated in the proceedings.

[7] On the land in question there are – for present purposes – two abutting residences. Those residences share common and reciprocal possession of and access to the areas immediately surrounding them. That possession is joint between the two applicants on the one hand and the first respondent on the other hand. In fact, with the first respondent in one of the residences lives his wife, and she too enjoys possession of the areas surrounding the two residences.

[8] Differences of opinion having arisen between the applicants and the first respondent, and mediation proceedings having been unsuccessful in resolving the differences, the first respondent has fenced off a portion of the property surrounding the residences so as to claim for himself and his wife both possession of and access to an area which before was an area in respect of which the two applicants enjoyed joint possession. The first respondent therefore deprived the two applicants of their joint possession of and access to the area that he had fenced off. That conduct led to the application before me, which was framed in two parts: a part A and a part B.

[9] The part A seeks only to restore the joint possession to the two applicants, whereas the part B will seek relief of a substantive nature, aimed at terminating the ownership of the land by the parties by selling it. It follows that for current purposes one is concerned only with whether the dispossession was *"unlawful"* in the sense described above.

[10] The first respondent did not dispute the physical act of spoliation, nor that before the spoliation the two applicants enjoyed possession of and access to that part of the property which the first respondent now sought to annexe for himself and his wife. What he contended was that the two applicants had indeed consented to him fencing off the area concerned.

[11] For that contention he relied on a document which, towards the end of the mediation proceedings, he had sent to the mediator to form the subject of an agreement between the applicants and the first respondent as to the separated use of the living area concerned – if the applicants accepted it.

[12]This document was attached to an email by him on Sunday, 12 May 2019 and he asks in the covering email that the *"draft agreement"* containing *"a practical proposal"* be sent to the first applicant, *"asap as we are starting to direct the fence this coming week.... The sooner this is signed and sealed the better for relations around here. It is getting hot again and we will be well advised to get on with the divide.... I trust that we can continue to work towards positive negotiated outcome regarding the sale of the house."*

[13]This document provides for signature by both parties as well as by the mediator at its foot. It was however never signed by any one of those three. Nonetheless, counsel for the first respondent contended for an agreement having been reached in those terms. He was unable to point to any evidence – even evidence by the first respondent – that says explicitly that the applicants accepted the proposal contained in the document. But counsel argued that the proposal was tacitly accepted, because of the following.

[14]The penultimate sentence in the document reads: *"At present we have already separated the store rooms and the laundry areas in a spirit of good cooperation."* He submitted that since the parties had implemented this specific arrangement, it implied that the applicants had tacitly accepted the entire document.

[15]In reply, however, counsel for the applicants pointed out that on 12 July 2019 an email from the mediator to the first respondent, in response to a request that the mediator confirm that a firm agreement had been reached, said: *"I believe it was clear that it was all exploratory and would become a formal agreement only when a written agreement was signed. Alan however wanted to make two agreements, one for the separation and one for the sale, while Richard was clear that the two matters had to be signed simultaneously."*

[16]As I see it, the correct approach to the factual dispute thrown up by this response of the mediator, is to bear in mind that, as appears from Masinda supra, the relief sought is interim in nature. That means that it is the version of the applicants which must be considered, and only if the first respondent's contrary version casts serious doubt on the version of the

applicants, the applicants must fail. I do not believe that the version of the first respondent casts serious doubt on the version of the applicants, for the reasons that follow.

[17]First, I believe the mediator's email is destructive of the version for which the first respondent contends. After all, the first respondent himself, in his covering email, stressed the importance of signature of the written document before a firm agreement will have been reached. Second, the implementation of the store room and laundry facilities arrangement, as the proposal records, is a matter in respect of which agreement had been reached before. It therefore does not avail the first respondent now to rely on that earlier agreement as an unqualified acceptance by the applicants of the offer which was contained in the written document sent by him under cover of his email of 12 May 2019.

[18]And third, the first respondent's answering affidavit does not plainly assert an acceptance by the two applicants of the proposal contained in the annexure to his email of 12 May 2019. This is what compelled counsel to refer to the acceptance by the applicants of the proposal as having occurred tacitly. But even that version, that of a *"tacit acceptance"*, was not pleaded. It is well-known in motion proceedings of this nature that the affidavits are both the pleadings and the evidence. As I see it, therefore, there is simply no case on these papers of a legally enforceable consent by the two applicants for the spoliation which the first respondent admittedly performed.

[19]In these circumstances the opposition to the application under part A cannot succeed. As to costs, counsel for the first respondent asked that it be either deferred or reserved, and counsel for the applicants did not resist costs being deferred.

[20]In the circumstances I make the following order:

(a) an order issues in terms of the draft order handed up by the applicants, marked "X", initialled and dated by me;

(b) the costs of the application will be costs in the cause of part B of the application.

WHG Van der Linde

Judge, High Court
Johannesburg

Date argued: 6 August 2019
Date judgment: 7 August 2019

Counsel for the applicants:
Adv GF Porteus

Counsel for the first respondent:
Adv JHF le Roux