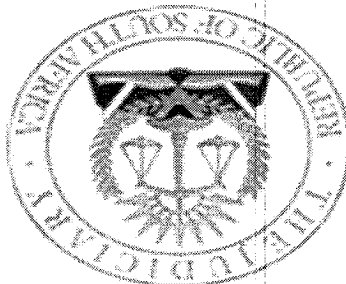


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28949/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
Date	
06/09/19	
ML TWALA	

In the matter between:

RAE'S PROPERTY CC

APPLICANT

AND

LUCKY F O AUTOMOBILE (PTY) LTD

FIRST RESPONDENT

FRANCIS ONUORAH

SECOND RESPONDENT

JUDGMENT

[1] This is an opposed *mandament van spolie* application which served before me in the urgent Court wherein the applicant sought an order in the following terms:

1.1 condoning the non-compliance with the normal time limits and rules pertaining to service, of process and hearing this matter as one of urgency in terms of Rule 6(12);

1.2 that the first and second respondents restore full possession and control of the immovable property situated at Erf7873, Benoni situated at Old Cargo Motors Portion, 86 Harpur Avenue, Benoni (the property) to the applicant within 24 hours of the date of the granting of the order;

1.3 that in the event that the first and/or second respondent do not restore full possession and control of the property to the applicant within 24 hours of the granting of this order, the Sheriff of the High Court be authorised to take all such steps to restore possession and control of the property to the applicant with (if necessary) the assistance of the South African Police Services;

1.4 that the respondents, jointly and severally, pay the costs of this application.

[2] It is common cause that the applicant obtained an eviction order on the 5th of March 2019 which order was executed on the 1st of July 2019 when the respondents were evicted from the property. It is further not in dispute that

after the eviction of the respondents from the property, negotiations for the sale or buying of the property ensued between the second respondent and the attorney for the applicant. When the negotiations fell through, the second respondent and attorney for the applicant negotiated for the respondents to re-occupy the property at a lower rental of R12 000 per month. This proposal was put to the attorney for the applicant on the basis that the respondent had a lien over the property due the improvements he effected thereon.

[3] It is further common cause that the second respondent paid a sum of R1 200 000 into the Trust account of the attorney for the applicant on the 10th of July 2019 whilst the negotiations for the sale of the property were continuing. The amount of R1.2m was intended as a deposit on the purchase of the property but the second respondent failed to raise the balance as the price of the property was increased to R4.8m and the sale fell through. On the 16th of August 2019 the respondents took occupation of the property. No lease agreement had been signed between the parties at the time the respondents took occupation of the property.

[4] Counsel for the respondents contended that the attorney for the applicant does not have the authority to depose to the founding affidavit on behalf of the applicant. It was contended further that the respondents occupied the premises with the permission or consent of the attorney for the applicant who acted as its agent. There was an oral lease agreement, so it was argued, entered into between the attorney for the applicant and the respondents – hence they took occupation of the property based on the oral lease agreement. The respondents had a lien over the property due to the improvements it had effected and therefore has a counter claim – hence the counter application.

[5] It was submitted further by counsel for the respondents that it was agreed that the R1.2m paid by the second respondent into the Trust account of the attorney for the applicant be utilised to pay rental of the premises over a period of 5 years and the monthly rental amount be the sum of R12 000 because of the improvements effected by the respondents on the property.

[6] Counsel for the applicant submitted that there was no sale agreement and or lease agreement concluded between the parties. The respondents have failed, so it was argued, to even state the terms of the alleged oral lease agreement. Yes, there were negotiations for the sale of the property and the attorney for the applicant undertook to negotiate a lease agreement with the owner of the property and his client but nothing came of it. Even the offer of R12 000 was rejected out of hand. The respondents despoiled the property from the applicant and the applicant is entitled to the order as prayed for.

[7] It has long been established that a party claiming possession of certain property need not necessarily prove ownership but either physical possession or must have control over the property to sustain a claim of *mandament van spolie*.

[8] In *Ngqubuka v Minister of Safety and Security and Others* (CCT 87/13) [2014] ZACC 14; 2014 (7) BLRC 788 (CC) (15 MAY 2014) the Court stated the following:

“para 10 the essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no

one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.

Para 13 All that the despoiled person need to prove is that –

- a) She was in possession of the object; and
- b) She was deprived of possession unlawfully.

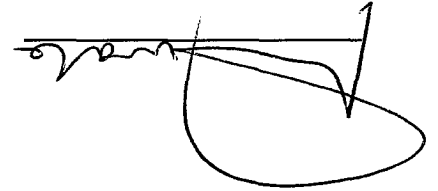
[9] In this case, I do not understand the respondents to be saying that the applicant was not in possession of the property. In fact they are saying they took occupation of the property on the permission and or consent of the applicant's attorney and agent. It is my respectful view therefore that that settles the issue that the applicant was in possession of the property.

[10] I am unable to disagree with counsel for the applicant that the respondents have failed to show the Court any terms of the lease agreement alleged to have been concluded with the applicant or its attorney. Not even during all the short message service (sms) filed on record does it appear that a lease agreement was concluded. The attorney for the applicant categorically stated that it is the call for the applicant to make but he is not making any promises. I hold the view therefore that there was no lease agreement concluded between the parties and that the respondents have despoiled the applicant of its property and are in unlawful occupation thereof.

[11] It is my respectful view that the counter application cannot succeed. On its own version the respondents were sub-tenants before they were evicted with their sub-lessor from the premises on the 1st of July 2019. Instead on the 16th of August 2019 the respondents took occupation of the premises without

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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1. Prayers 1, 2, 3 and 4 of the notice of motion are granted.
2. The respondents' counter-claim is dismissed with costs.

[13] In the circumstances, I make the following order:

as stated in the notice of motion.
of *mandament van spolie* and is therefore entitled to succeed with its prayers

considered view that the applicant has successfully satisfied the requirements
Having regard to the circumstances as enunciated above, I am of the

[12]
respondents since the applicant's claim is based on the *mandament van spolie*.
is no reason for the applicant to join the other parties as sought by the
5 years if it had such a lien on the property. It is my respectful view that there
account of the applicant's attorney, to be utilised for rent over a period of
incomprehensible why would the respondents offer its R1.2m held in the Trust
by the respondents against the applicant for such a lien. Further, it is
submitted by counsel for the applicant, no claim or action has been instituted
it alleges to have made some improvements on the property. However, as
and occupy the property because it believes to have a lien on the property since
price of the property. This is tantamount to taking the law into its own hands
any lease agreement being concluded when it failed to secure the purchase

Date of hearing: 29th August 2019

Date of Judgment: 6th September 2019

For the Applicant: Adv J Daniels SC
Adv M Silver

Instructed by: David Kotzen Attorneys
Tel: 011 453 1458/9

For the Respondents: Adv. V Olivever

Instructed by: Gilpin Attorneys
Tel: 011 333 2312