FMT

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓
22.6.2012
DATE SIGNATURE

22/6/2012

CASE NO: A364/2010

In the matter between

GAUTENG PROVINCE DRIVING SCHOOL ASSOCIATION	**APPELANT**
And	
AMARYLLIS INVESTMENT (PTY) LIMITED	**1ST RESPONDENT**
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**2ND RESPONDENT**

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The first Respondent, being Applicant in the court *a quo,* and on an urgent basis had brought an

application against the Appellant (the First Respondent in the court *a quo*) seeking an order in the following terms:

"1. That the forms and time periods for service provided for in the Rules of the above Honourable Court are dispensed with and that this application be heard on an urgent basis in terms of Rule 6(12);

2. That Applicant's possession of the parking area on Erven 847, 849 and 851, Ferndale, Randburg be restored immediately upon service of this order on the First Respondent;

3. That the First Respondent be ordered to immediately, upon service of this order, vacate the premises and return the premises to the Applicant in exactly the same manner as it was found on April 2009;

4. ***That the First Respondent be ordered to remove all chains and locks on the gates leading to the parking area on Erven 851 and 849, Ferndale, Randburg;***
5. ***That the First Respondent be ordered to pay costs of this application;***
6. ***Further and/or alternative relief."***

[2] On 2 September 2009 the court *a quo* handed down its judgment and made the following order:

"[16.1] The Applicant's possession of the parking area on Erven 849, 851 and portion of 847 Ferndale, Randburg be restored immediately.

16.2 The First Respondent is ordered to remove all chains and locks on gates leading to the parking area on Erven 849, 851 Ferndale, Randburg.

16.3 The First Respondent is ordered to pay the Applicant's costs on party and party scale."

[3] On 15 September 2009 the Appellant brought an application for leave to appeal against the judgment and order of 2 September 2009. The application was dismissed with costs.

[4] On 7 April 2010 the Supreme Court of Appeal granted the Appellant leave to appeal to the Full Court of the North Gauteng High Court against the judgment and order of 2 September 2009. The Supreme Court of Appeal set aside the costs order of the court *a quo* in dismissing the application for leave to appeal and the costs of the application for leave to appeal in the Supreme Court of Appeal and the court *a quo* were then made costs in the appeal.

[5] On 11 May 2010 the first Respondent brought an application before this court seeking an order in the following terms:

"1. That judgment granted by the Honourable Justice Phatudi on 2nd September 2009 be carried into effect, pending the decision of the appeal lodged by the First Respondent;

2. That the First Respondent be ordered to pay the costs of this application;

3. Further and/or alternative relief."

[6] The court *a quo,* on the same day, made the following order:

"13.1 That it is directed that paragraph 16.1 and 16.2 of the order made by this court on 2 September 2009 in case 41787/2009 shall not be suspended pending the decision Full Bench appeal (sic) against such order;

13.2 ***That the Sheriff, in whose area of jurisdiction the premises at Erven 849, 851 and 847 Ferndale is situated is directed and ordered to take all necessary steps to give effect to 1;***

13.3 ***That the applicants (sic) shall not be required to furnish security as contemplated in Rule 49(11);***

13.4 ***That the applicant is ordered to pay first respondent's costs of this application on party and party scale."***

The Respondent appealed against the costs order that the court *a quo* granted against the First Respondent (Applicant in the Rule 49(11) application).

[7] The Appellant too served and filed a Notice of Application for leave to cross appeal/appeal against the whole of the judgment and order delivered and

made by Phatudi J on 11 May 2012 in the Rule 49(11) application. The appeal was not pursued by the Appellant when the main appeal was finally heard.

CONDONATION

[8] An application, at the outset of the appeal, was brought for the reinstatement of the lapsed appeal. The application was not opposed. This court then:

1. Condoned the late filing of the court record and extended the time periods accordingly.
2. Granted the Appellant leave to reinstate the appeal.

BRIEF FACTS

[9] The Appellant's case is that in 1993 a number of driving school owners operated from the

Johannesburg Motor Vehicle Testing station at Malanshof training their learner drivers. They, on weekends, operated from the parking area, the subject matter of this appeal. They moved to Randburg parking area during March 2000 when the Second Respondent requested them to cease operating from Malanshof. These driving school owners formed the Gauteng Province Driving School Association, the present Appellant, in August 2008 and registered it as a section 21 Company in terms of the then Companies Act no. 61 of 1973 ('the Companies Act'). The parking area in Randburg, according to the Appellant, was an open space which was not fenced. In 2007, and at a meeting, Ms Allison Van der Molen, a councillor of the Second Respondent, advised the members of the Appellant that they needed to negotiate for a lease agreement with the Second Respondent if they wanted to peacefully continue using the parking area for training their learner drivers. The parking

area at the time, was also used as a bus transit area. In November 2008 the Second Respondent, the owner and administrator of the property which included the parking area, subdivided and fenced the area with palisades along erven boundaries. The negotiations, as advised, continued through to 17 February 2009 when the Appellant formally applied to the Johannesburg Property Company (Pty) Ltd ('JPC'), the property department of the Second Respondent, for the granting of the lease agreement. The lease agreement, subject to renewal, was concluded between the Second Respondent and the Appellant duly represented by Kubuzie and Masinga respectively on 24 May 2009 and 28 May 2009. The second Respondent, in terms of the agreement, agreed to grant the Appellant the use of Portion 1 of Erf 847 Ferndale for a period of (six) 6 months commencing on 1 May 2009 until 31 November 2009, as a training ground for learner drivers subject to section 79(18) of the Local Government

Ordinance 1939, as amended. Attached to the agreement was Annexure "A" a locality map showing a number of erven which include Erf 847 Ferndale.

The Appellant, for the use of the property as a training ground, was to pay a monthly rental of R10.000.00 excluding Value Added Tax ('VAT') plus an administration fee of R600.00. The Second Respondent used the money for the management and maintenance of the property, Erf 847. The lease agreement is being renewed and the monthly rental according to the Appellant is being paid. On 23 April 2009 and 28 May 2009 a deed of suretyship was signed by Molefi Kubuzie, the JPC general manager in the property portfolio and Masinga on behalf of the Appellant in respect of the intended lease agreement. The Deed of Suretyship became part of the signed lease agreement. Masinga the general secretary of the Appellant, stood surety for

the Appellant in respect of the rent payable in terms of the lease agreement.

The First Respondent is the owner of Erf 855 Ferndale and it alleges an entitlement to, *inter alia*, use erf 847 for the purpose of parking for its customers. This is a disputed issue which is not necessary to presently resolve for the reasons that follow.

Before the signing of the lease agreement, while negotiations for the agreement were proceeding, on 23 May 2009, the Appellant's members discovered that the gate leading to Erf 847 had been locked with a chain and a padlock. The training of learner drivers was done on the parking area of Erf 847. Masinga on learning this, contacted the Second Respondent and spoke to Mokitle who was surprised to learn of the locking of the gate which, according to her and the Second Respondent, had

not been locked. She did not know who could have done that if the gate, indeed, had been locked. Masinga while at the gate, noticed a man who identified himself to him as Samson Tshuma. Tshuma informed Masinga that he worked for Madison-Leibold, the managing director of the First Respondent and that his employer had instructed him to lock the gate. Masinga notified Mokitle of the Second Respondent who in so many words advised him that Tshuma and the First Respondent had no right whatsoever to lock the gate. She told Masinga that the members of the Appellant had to remove the chain and the padlock in order to regain their lost possession and continue to possess and use the parking area for the intended purpose. On the same morning and date the chain and padlock were removed and handed to Tshuma.

On 25 May 2009 Madison-Leibold personally approached Masinga and other members of the

Appellant alleging for the first time that they had to vacate the property which was his. Masinga there and then advised him that they had since March 2000 possessed and used the property to train their learner drivers and that permission had been granted by the Second Respondent. Masinga advised Madison-Leibold to see the Second Respondent about the matter. Madison-Leibold, according to Masinga, never returned to him. On 9 June 2009 Madison-Leibold addressed an e-mail to Mokitle of JPC referring to their telephone conversation of the previous day and advising her that they had noted that the parking area on Erf 847, Ferndale, was at the time used 'by a driving school' and that the Second Respondent had signed 'a lease/rent/management agreement'. He requested them 'to cancel the agreement with the driving school with immediate effect' as the driving school activities were 'interfering' with their rights. On 12 June Ms Felicia Matiti ("Matiti") also an

employee of the JPC addressed an e-mail to Van der Molen and Madison-Leibold also copying Mokitle advising that a meeting was held on 11 June 2009 where it was 'agreed that a legal opinion would be sought regarding the exclusive use of JPC properties by the owners of erven 855 and 1763 Ferndale, since a formal user or management agreement should have been entered into between the affected parties, thus clarifying which party should be responsible for maintenance purpose'. On 12 June 2009, the same date, Van der Molen also addressed an e-mail to Madison-Leibold stating that he had suggested to JPC which did not have money to maintain its own properties, to 'allow uses in return for maintenance of their Land'. She also requested JPC to relook at the situation if it was felt that the First Respondent's rights were 'being infringed upon'. It was believed that 'other land could be made available but then JPC would have 'to ensure' that the parking lot would be 'properly maintained'.

On 13 June 2009, Madison-Leibold addressed an e-mail to Matiti of JPC attaching an inquiry from his concerned tenant who was moving in by the end of June. He specified that he had not agreed that legal opinion be sought regarding the matter because he had already done that. He threatened to approach court with an urgent application of spoliation if the matter could not be resolved by Friday 19 June. On 31 July 2009, in the morning, Masinga of the Appellant, found a copy of urgent application papers of the First Respondent at the training area of Erf 847, indicating that the application was to be heard on 4 August 2009 at 10H00 in the North Gauteng High Court Pretoria. On 18 August 2009 the Appellant filed its answering affidavit while the First Respondent filed its replying affidavit on 20 August 2009.

THE ISSUES BEFORE THE COURT *A QUO*

[10] The issues before the court *a quo* seemed somewhat blurred. This was, in my view, due to the nature of the documents that were used in the matter. The manner in which the papers were drawn caused the confusion that resulted. Reference in the papers is made to erven 851, 849 and 847 and one ends up having first to establish which one of the three is the real subject matter of the issue. The issues, as far as I could establish, seem to be:

1. Whether the Appellant spoliated the First Respondent in respect of the possession and use of Erf 847.
2. Whether the First Respondent had been in peaceful and undisturbed possession of Erf 847.
3. Whether the Appellant deprived the first Respondent of such possession forcibly or wrongfully against its consent.

4. Whether the lease agreement concluded between the Appellant and the Second Respondent granted the Appellant the possession in issue in this matter and
5. Whether the act of the Appellant of removing the chain and the padlock from the gate leading to Erf 847 amounted to counter spoliation worthy of protection.

SPOLIATION OR *MANDAMENT VAN SPOLIE*

[11] *Mandament van spolie* is a process which protects a party's possession. It does not deal with the rights of the parties. The lawfulness of a party's possession and the question of ownership are not relevant considerations where the issue of spoliation is in question (See ***Shoprite Checkers Ltd v Pangbourne Properties Ltd 1994 (1) SA 616 (W) at 619 H – I; Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd***

2010 (2) SA 59 (N) at 63 H –I; Viljoen v Viljoen and Others [2002] 2 All SA 143 (T) at 146 a – b; Markowitz v Loewenthal 1982 (3) SA 758 (A) at 763 and Erasmus: Superior Court Practice, Appendix E 9 at E9 – 1 to E9 - 14).

[12] It is trite that spoliation is by its nature a speedy remedy designed to provide summary relief. (See ***Minister of Agriculture and Agricultural Development and Others v Segopola 1992 (3) SA 967 (T) at 971 J – 972 A and Burger v Van Rooyen and Another 1961 (1) SA 159 (O) at 161 F - G***). Evidence at the disposal of the court clearly demonstrates that the Appellant acted immediately upon discovering that the gate had been locked with a chain and a padlock.

WHAT MUST BE PROVED IN THE DETERMINATION OF SPOLIATION

[13] *Mandament van spolie* is a possessory remedy which is extraordinary, robust and speedy. It concerns nothing else but the restoration of the status *quo ante* the illegal action. An Applicant, in a spoliation application, has to prove:

1. That he/she was in possession of the property. The right to possession need not be proved as only factual possession need be proved; (See ***Ness and Another v Greef 1985(4) 641 at 647 F.***)
2. That the Respondent deprived him/her of the possession; and
3. forcibly or wrongfully against his/her consent (See ***Nino Bonino v De Lange 1906 TS 120 at 122; Nienaber v Stuckey 1946 AD 1049 at 1053; Willowvale Estates CC and Another v Bryanmore Estates Ltd 1990(3)***

SA 954 (W) at 988 and Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd (supra)).

COUNTER SPOLIATION

[14] There are instances where a despoiled possessor is permitted by law to retake possession from his spoliator without a court order. This, as ***Erasmus (supra)*** puts it, as a defence 'amounts to a confession and avoidance'. The Respondent in such a situation admits that he has despoiled the Applicant but states that this act of spoliation amounts to a lawful counter-spoliation. The counter-spoliation must be effected *instanter* which means it must be 'then and there' 'following immediately upon the spoliation and forming part of the *res gestae* of that occasion' . The reasoning behind the principle is that the despoiled possessor who then and there ousts the spoliator is regarded

as never having lost possession and the original spoliator, in that event, cannot maintain any spoliation proceedings against him. This immediate recovery is condoned by the law. (See ***Erasmus : (supra) E9 – 14 [Service 35, 2010]; Mans v Loxton Municipality and Another 1948 (1) SA 966 (C) at 977 and De Beer v Firs Investments Ltd 1980 (3) SA 1087 (W) at 1090 -1091***).

In ***Ness and Another v Greef 1985 (4) 633 (CPD)*** the court held that an owner who had acted 11 days after the applicant had entered the premises had acted *instanter* and that was regarded as *instanter* recovery of the premises.

The law condemns the effort of recovery where dispossession has been completed as in such a case the act of recovery is not done *instanter* or forthwith. The act in itself becomes a new act of spoliation (See ***Mans v Loxton Municipality and Another (supra) at 977; Erasmus at E9 -14***

[service 35, 2010]. ***Erasmus*** holds the view that approval of an act of counter spoliation is not a matter of discretion and that the test that has to be applied in deciding whether or not to allow counter-spoliation is 'whether or not the counter-spoliation forms part of the *res gestae* of the act of spoliation'. The view, in my opinion, has merit.

COMMON CAUSE FACTS

[15] These are that:

1. Erf 847 belongs to and is owned by the Second Respondent.
2. The Second Respondent is a Local Government and an organ of the state.
3. The Erf is available for use and enjoyment by members of the public as may be permitted by the Second Respondent.
4. Negotiations had been on for some time between the Appellant and the Second

Respondent regarding possession and the use of Erf 847 Ferndale for training learner drivers.

[16] The Second Respondent, on the evidence before court, had been aware that the Appellant had been possessing and using Erf 847 for training its learner drivers. It therefore came as no surprise when the Appellant was approached by the Second Respondent which, for purposes of peaceful possession and use of the Erf, requested the Appellant to apply to it for a lease agreement for the same purpose. The lease agreement would give the Appellant peace of mind. This eventuated.

[17] The First Respondent was aware that the Appellant had been possessing and using Erf 847 for training its learner drivers. This became more evident after the First Respondent locked the gate giving accessing to Erf 847 with a chain and a padlock. To prove its awareness, the First Respondent

complained to the Second Respondent that the activities of the driving schools had been infringing upon their right in respect of Erf 847. It is noteworthy that the First Respondent, in so complaining, specifically refers to Erf 847 Ferndale. The First Respondent, at the time, was also aware that a lease agreement in respect of Erf 847 Ferndale had been concluded between the Appellant and the Second Respondent. This gave the First Respondent problems to a point where Madison-Leibold requested the Second Respondent to 'cancel the lease agreement with the driving school with immediate effect'. The agreement was not cancelled and is still intact. That the Appellant could not have possessed and used the Erf from March 2000 because the Appellant had not yet come into existence cannot assist the First Respondent. The members of the Appellant as evidence has demonstrated had been using the Erf before the formation of and the registration of the Appellant as

a company not for gain. This, the Second Respondent, had been aware of. It has not been denied that negotiations between members of the Appellant and the Second Respondent pertaining to the lease agreement had been ongoing. Evidence has demonstrated that the Second Respondent intended to solve the problems in an amicable manner but the First Respondent did not want to come to the table. This, as a consequence, resulted in this matter now before us. That there was something sinister with the lease agreement as the First Respondent alleged and the court *a quo* found, in the light of the evidence at the disposal of the court, does not seem to be correct. The signing of the agreement by the Appellant and the Second Respondent has been the culmination of the protracted negotiations. What I find not to be assisting the First Respondent is the absence of an agreement between the Second and the First Respondents allowing the First Respondent the

Possession of the area in issue of Erf 847. It is, therefore, no surprise that the Second Respondent advised the Appellant to "immediately" regain the lost possession.

[18] It is again noteworthy that the First Respondent specifically, in paragraphs 7 and 8 of its Founding Affidavit alleges that:

"7. The Applicant was at 23rd of May 2009 in peaceful and undisturbed possession of an area utilised by the Applicant as a parking area hereinafter referred to as 'the parking area' and/or 'the premises'.

8. The property on which the parking area is situated is better known as Erven 851 and 849 Ferndale, Randburg".

This clearly excludes Erf 847 Ferndale. The First Respondent seems to be fighting for a wrong Erf. This again explains why Mr Shakoane, on behalf of the Appellant, ended up submitting that the

Appellant had needed no order relating to Erven 849 and 851.

[19] In the light of the decision in ***De Beer v Firs Investments Ltd (supra),*** Mr van der Merwe's submission that the alleged act of spoliation by the First Respondent was, in any event, completed, cannot be correct.

[20] Applying the facts of this case to the principles referred to above on the question of counter-spoliation, the following becomes noteworthy:

1. That the Second Respondent was aware of the possession and the use of Erf 847 by the Appellant for purposes of training its learner drivers on the Erf.
2. That the First Respondent had not been in peaceful and undisturbed possession of Erf 847.

3. That the First Respondent deprived the Appellant of the peaceful and undisturbed possession that it had in respect of Erf 847, Ferndale.
4. That the deprivation had been forcible and wrongful and against the consent of the Appellant.
5. That the act of cutting the chain and the lock by the Appellant constituted an act of counter spoliation.
6. That the act of recovery of the possession had been *instanter* and followed upon the spoliation and formed part of the *res gestae* of that occasion.
7. That the Appellant successfully proved the act of counter-spoliation by proving that the requirements of *mandament van spolie* and *contra spolie* had been met.
8. That although the papers did not properly bring out the issues, it upon reading them,

became clear that it was in a way necessary to refer to the lease agreement and what led to its conclusion.

9. That the spoliation application by the First Respondent ought to have been dismissed with costs.

10. That the defence of counter-spoliation should have been upheld.

11. That the court *a quo* erred when it found that the First Respondent was entitled to the order that it had sought.

COSTS

[21] The costs in the Rule 49(11) application should have been awarded to the First Respondent which was the successful litigant. Costs, in any event, as a general rule, follow the event or the result.

[22] The Appellant is entitled to the costs of the appeal and the costs in the court *a quo.*

[23] I, in the result would propose that the following order be made:

1. The appeal succeeds.
2. The order made by the court *a quo* is set aside and replaced with the following:

   "The application is dismissed with costs".
3. The appeal regarding the costs order in the Rule 49(11) application succeeds.
4. Paragraph 13.4 of the order is set aside and replaced with the following order:

   "[13.4] that the First Respondent is ordered to pay the Applicant's costs of this application on party and party scale".
5. The First Respondent is ordered to pay the costs of this appeal.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

I agree.

P. A. MEYER

JUDGE OF THE HIGH COURT

I agree.

And it is so ordered.

W. R. C. PRINSLOO

JUDGE OF THE HIGH COURT

Heard on: 16 May 2012
For the Appellant:
Instructed by:
For the Defendants:
Instructed by:
Judgment delivered on: