

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



30/5/14

CASE NO: 35724/13

HEARD ON 6 March 2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
28/5/2014	
DATE	SIGNATURE
30/5/2014	

In the matter between

HEINRICH MOLLER

APPLICANT

And

MN GASANT

1ST RESPONDENT

(In his capacity as Sheriff Pretoria South – East)

BENJAMIN SWANA ROKGOTHO)

2ND RESPONDENT

(in his capacity as Deputy Sheriff Pretoria South-East)

**THE ILLEGAL OCCUPANTS OF 2 TIPU PLACE,
MORELETA PARK, EXT 52, PRETORIA, GAUTENG**

3RD RESPONDENT

ELIZABETH LESENTESE NKWANA

4TH RESPONDENT

URSULA NKWANA

5TH RESPONDENT

J U D G M E N T

MALI AJ:

- [1] This is an application for a final order in respect of spoliation to restore possession of the Applicant's goods that had been illegally removed from the residence situated at 2 Tipu Place, Moreleta Park, Extension 52 Pretoria ("the property") The interim order for Mandament van Spolie was granted by this honourable court on 7 June 2013 against the Respondents.
- [2] The first and second Respondent are opposing the application. The third to fifth Respondents are not opposing the application as they could not be found to effect service upon them.

PARTIES

- [3] The Applicant is the registered owner of the property where the Applicant's goods have been dispossessed.
- [4] The third, fourth and fifth Respondents were occupants of the property until they were evicted through the order granted by this Honourable court on 3 June 2013.

- [4] The third, fourth and fifth Respondents were occupants of the property until they were evicted through the order granted by this Honourable court on 3 June 2013.
- [5] The first and the second Respondents are sheriff and deputy sheriff of the Pretoria South East respectively. They were instructed by the applicant to attend to the eviction of the third, fourth and fifth respondents.

APPLICANT'S CASE

- [6] On 3 June 2013 a final eviction order was granted by this honourable Court for the eviction of third, fourth and fifth respondents. On 4 June 2013 the Applicant instructed the first and second Respondents to carry out the warrant of execution.
- [7] On 5 June 2013 whilst the second Respondent was still carrying on with the execution order, he allowed the third, fourth and fifth Respondents access to the property and they removed and/or damaged the following:
- 7.1. Light fittings and bulbs;
 - 7.2. Electrical plug fittings;
 - 7.3. Shower doors by breaking it out of its brackets and they;
 - 7.4. Ruined and removed kitchen and other cupboards;
 - 7.5. Sprayed and/ or cluttered and/or threw kitchen cupboards, tiled floors, the bath, walls and toilets with wet paint.
- [8] On 5 June 2013, the second Respondent handed the keys to Barend Kruger

carried out and when the Respondents removed and damaged the applicant's aforementioned goods. Kruger observed the second, third, fourth and fifth Respondents loading the goods on a truck and left off with the goods.

[9] The applicant launched an urgent application for spoliation and the interim order was granted on 7 June 2013.

[10] The Applicant submitted that he was in possession of the property when the first and second Respondent as the duly mandated and authorised agents of the applicant exercised physical control and possession of the property on his behalf. The Applicant's possession of the property was further supported by the presence of Kruger the duly authorised agent of the Applicant who exercised physical control and possession over the property from 4 June to 5 June 2013.

[11] The applicant stated that he was deprived of the items which are fixtures of the immovable property by the second, third, fourth and fifth Respondents a fact which is confirmed by the second respondent.

RESPONDENTS' CASE

[12] The second Respondent in its opposing affidavit averred that the property in question was bought at an auction held by the first Respondent approximately four years ago. The second Respondent successfully bid on the property at the auction, but caused the property to be registered in the name of the Applicant. It

four years ago. The second Respondent successfully bid on the property at the auction, but caused the property to be registered in the name of the Applicant. It seems there is an on-going dispute between the parties since then.

[13] The first and second Respondents stated that the Applicant was not in possession of the property as the applicant did not exercise physical control of the property. The Respondents do not deny that the goods were removed from the property; however they challenge the physical control by the Applicant. They allege that the third, fourth and fifth Respondents were in physical control of the property for four years since the Applicant bought the property.

[14] The first and second Respondents confirmed that the second, third, fourth and fifth Respondents removed the aforementioned property and or goods. They further stated that the removal of the goods does not amount to unlawful deprivation of possession by the Respondents as the Applicant was not in physical control of the property

THE LAW

[15] **LAW OF SOUTH AFRICA** volume 11 (First reissue 1998 at paragraph 338) states as follows:

“Spoliation is any wrongful deprivation of another’ right of possession, whether in regard to movable or immovable property or a legal right, but it is not available where a party seeks to enforce a contractual obligation,

specifically so since the respondent would in those circumstances be precluded from adducing evidence to disprove the existence of the obligation. An applicant for a spoliation order is not required to prove, as part of his cause of action, that the spoliator had acquired possession. The remedy is available again co-spoliators as joint wrong doers, even if they merely fulfilled a supportive role”.

- [16] In **AMLER’S PRECEDENTS OF PLEADINGS** (5th Edition) by **HARMS JA** at page 371 it is stated:

“Possession: The plaintiff must allege and prove that he was in peaceful and undisturbed possession of the property. In **KGOSANA V OTTO 1991 (2) SA 113 (W)** *Dispossession:* The plaintiff must allege and prove that he was unlawfully deprived by the defendant of his possession”.

- [17] **YEKO V QANA 1973 (4) SA 735** at 739 G stated:

“The fundamental principle of the remedy is that no one is allowed to take the law into his own hand. All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted”.

- [18] In **KNOX AND ANOTHER V SECOND LIFESTYLE PROPERTIES (PTY) LTD AND ANOTHER** (CA 28/2011) [2012] ZAGPPHC page 223, Mothle J stated:

“It seems to me that the remedy provided by spoliation permits very limited

defences. The only possible defences should be in the form of a response to the grounds stated above, namely that the applicant was not in peaceful and undisturbed possession alternatively that the deprivation was lawful"

EVALUATION

[19] The Applicant had clearly shown his intention to be in possession of the property by obtaining eviction order, by having the first and second Respondents with the applicant's keys at the Applicant's premises and furthermore by placing Kruger in the property. Kruger was also in possession of the Applicant's keys. The first and the second Respondents do not dispute that they were at the Applicant's property at the instance of the Applicant and that Kruger was physically placed in the premises by the Applicant and by so doing the Applicant meets the requirement of actual possession as opposed to the right to possession. For the foregoing I am satisfied that applicant was in peaceful and undisturbed possession of the property.

[20] It is not in dispute that the Applicant's goods were removed by the second third, fourth and fifth Respondents. I am satisfied that the Applicant indeed proved that he was unlawfully dispossessed of its property by the Respondents.

[21] The first and the second Respondents allege that the applicant was not in physical control of the property. The Respondents submitted that the Applicant only came in possession of the property once the keys were handed to him on 5 June 2013. I disagree with this submission for the reasons stated above, namely

that the second Respondent on the instruction of the applicant was in possession of the Applicant's keys (a practical way of being in physical control of the property).

[22] On 5 June 2013 the second Respondent later handed the keys to Kruger a representative of the applicant who was on the premises at all material times. Definitely the Applicant's representatives including the second respondent were not expected to carry the house including the dispossessed contents in their hands to prove any form of control including physical control.

[23] Furthermore the law as stated above does not make much of the physical control but is very emphatic on the two requirements; namely peaceful and undisturbed possession and dispossession. Therefore the defence tendered by the first and second Respondents falls to be rejected as not amounting to a valid defence against the Applicant's allegations of possession and dispossession.

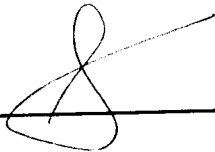
[24] The Applicant has met the two requisites to found a claim for an order for restitution of possession. The Applicant had proved possession and unlawful dispossession by the first, second, third, fourth and fifth Respondents.

[25] In the result , I make the following order:

1. The Respondents are ordered to immediately restore possession of the Applicant's property to its original location and position and in particular to restore possession and fitment of all electrical lights and fittings ,

shower and shower doors, stove, kitchen cupboards as well as any other fixtures that have been removed from 2 Tipu Place, Moreleta Park, Extension 52 , Pretoria;

2. The Respondents are ordered jointly and severally to pay the costs of this application.
3. This order as granted herein to be served on the Respondents, or any of the Respondents that can be found, either by fax, email, or service by a representative of the Applicant' s attorneys of record.


A handwritten signature in black ink, consisting of a large loop and a horizontal stroke, is positioned above a solid horizontal line.

NP MALI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPLICANT:	ADV C Zietsman
INSTRUCTED BY :	Jarvis Jacobs Raubenheimer Incorporated
FOR THE RESPONDENT:	ADV R Deminey
INSTRUCTED BY :	Fuchs Roux Incorporated
DATE OF HEARING:	6 March 2014
