REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 71429/2013

DATE: 21 MAY 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

LOBELO, KAGISO LAMBERT First Applicant

DEPHUKA CONSULTING (PTY) LTD Second Applicant

and

KUKAMA, AOBAKWE REGINALD KOKETSO First Respondent

PEOLWANE PROPERTIES (PTY) LTD Second Respondent

JUDGMENT

THOBANE, AJ

[1] The applicants have launched these proceedings seeking an order directing the first and the second respondent to:

1.1. Immediately restore to the applicants possession of the following property; portion 103 (a portion of Portion 4) of the farm D[....] 3[...],

1.2. Pay the costs of the application jointly and severally.

[2] The respondents on their part opposed the application and on the same papers launched a conditional counter application. Such application was conditional on the Court finding that the first and the second applicants were spoliated. The order sought in that event was the following:

2.1. Evicting the first and the second applicants from the premises,

2.2. Interdicting the second applicant from carrying on any business on the premises,

2.3. Interdicting the first and the second applicant from accessing the premises without the written authority of the first respondent,

2.4. Directing the first and the second applicant to pay the costs of the application on a scale as between attorney and own client.

[3] Initially this application was brought before the urgent Court. The application was on the 3rd December 2013 struck off the roll for want of urgency, with costs.

[4] The following facts are common cause:

4.1. Prior November 2012, the first applicant had access to the premises,

4.2. The second respondent is the registered title holder of the premises,

4.3. On the 12th April 2012 the first applicant was declared a delinquent director in terms of section 162 of the Companies Act, Act 71 of 2008,

4.4. Prior to the order of delinquency, the first respondent as well as the first applicant were business partners and had joint control over the second respondent as well as various other entities through which they owned immovable assets.

[5] The crisp issues for determination are:

5.1. Whether the applicants were in peaceful and undisturbed possession of the property known as portion 3 (a portion of portion 4) of the farm D[...] 3[...];

5.2. Whether the respondents deprived the applicants of the possession forcibly or wrongfully against their will.

5.3. Whether in the event of a finding that the applicants were spoliated, a case has been made out for an order:

5.3.1. Evicting the first and the second applicant from the premises,

5.3.2. Interdicting the second applicant from carrying on any business on the premises,

5.3.3. Interdicting both applicants from accessing the premises without the written authority of the first respondent,

5.3.4. Directing the first and the second applicants to pay the costs of the second respondent on a scale as between attorney and own client.

[6] According to the applicants:

6.1. An agreement was entered into on the 28th November 2012 in terms of which the first applicant was to take free transfer of the property of which he alleges he has been spoliated,

6.2. On an undisclosed date, he gave consent to the second applicant to occupy the premises and to conduct business thereon. This, he alleges, was with the full knowledge of the respondents,

6.3. On the 3rd of October 2013 he was served by the sheriff with a letter ejecting him from the premises. The letter called on him to vacate the premises by the close of business on the 7th October 2013 and also directed him to return the keys in his possession,

6.4. On the 20th November 2013 he was telephoned by one of the employees of the second applicant and was informed that armed guards were placed at the entrance of the premises, whereupon he telephoned the police and spoke to a police officer, whose name he could not recall who confirmed to him, upon being asked, that there was an eviction order. I pause to indicate that although there is nothing evidencing the telephone discussion from the police or the second respondent's employee, nothing turns on it in view of the admission by the first respondent that indeed such security detail was procured.

6.5. On the instruction of the first and/or the second respondent, the locks to the premises were changed and that this rendered the remote controls inoperative.

6.6. He visited the police station and spoke to an officer in charge, who informed him that the first respondent had informed him that an eviction order had been obtained. The details of this senior police officer are not known. The first applicant informed the officer that he was not aware of the existence of that court order,

6.7. What followed thereafter was an exchange of telephone calls and letters between the legal

representatives.

[7] The case for the applicants is that the letter referred to in 6.3 above that was served by the sheriff, coupled with the conduct of placing armed guards at the entrance to the premises, plus the changing of locks as well as the exchange of letters between the legal representatives, amount to spoliation.

[8] The respondents contend as follows:

8.1. The application by the applicants is vexatious and was launched by the first applicant to get even with the first respondent,

8.2. On the 12th April 2012 an order of delinquency was granted against the first applicant by Tshabalala, J, in the South Gauteng High Court. That although the first applicant challenged such declaration in the various courts, he did not succeed and he remains liable for cost orders granted against him in those matters,

8.3. That the truthfulness and the correctness of the information contained in the first applicant's affidavit is placed in dispute. That the accuracy of certain annexures thereto is equally placed in dispute,

8.4. That between the 28th November 2013 and the date of the application, the first applicant did not reside at the business premises,

8.5. That at all times the second respondent had possession of the premises.

That prior the delinquency application both the first applicant and the first respondent had control over the second respondent,

8.6. That a meeting was held on the 22nd November 2012 to discuss settlement terms. The terms of such settlement were captured in a letter dated the 23rd November 2012. The first applicant however failed to sign such an agreement.

8.7. That the first applicant by virtue of the order of delinquency, had no power to dispose of assets and/or enter into agreements concerning the second respondent, alternatively, that he could not enter into any agreement even if he were a director, without the consent of his co-director, the first respondent,

8.8. That the first applicant has failed to disclose the details of the "lease agreement" between him and the second applicant,

8.9. That the existence of a brick manufacturing company on the premises is disputed, however if it did exist, it was conducting an illegal operation in violation of municipal by-laws,

8.10.That the keys that the first applicant possessed, he possessed in his

capacity as a director and ought to have been returned to the second respondent after the delinquency order,

8.11.That the gates to the premisses were broken and that upon their repair, new remote controls were issued. However, no locks were changed,

8.12.That two employees of the second applicant confirm the presence of security detail on the premises but deny that they have been prevented from accessing the premises or that the locks were changed.

[9] The respondents further contend with regard to the conditional counter application that;

9.1. The second respondent is the owner of the property,

9.2. Neither the first nor the second applicant has a lawful right or entitlement to possession of the premises and that any business being conducted thereon is unlawful,

9.3. The consent given by the first applicant to the second applicant to rent the premises is null and void,

9.4. The occupation of the premises by the first and the second applicants is prejudicial to the respondents particularly with regard to insurance of the property.

[10] The applicant replied to the respondents' papers effectively restating their case. PEACEFUL AND UNDISTURBED POSSESSION

[11] The first applicant contends that he was in peaceful and undisturbed possession and that while he enjoyed such possession, he gave consent to the second applicant to use the property or a portion thereof.

[12] The respondents deny the possession and submit that the first applicant was not entitled or authorized to deal with the assets of the second respondent, be it as an individual, as alleged by him, or as director as he had been declared a delinquent director as at the time of the giving of such consent.

[13] To determine whether the first applicant did in fact possess the premises, I have looked at the following:

13.1. The fact that the parties are in agreement that prior November 2012, the first applicant had access (my emphasis), to the premises. None of the parties deal in some detail with the nature and extent of such access (see page 8 paragraph 42 and page 55 paragraph 52). One must therefore accept thatsince we are dealing with immovable property, we are dealing with entering and exiting of the premises . On the version of the first respondent, the applicant did have access to the premises.

13.2. Nowhere in the papers is it contended that November 2012 impacted on the access referred to above. That the right of such access ceased on that day. The closest indicator one can get to, is to be found in page 55 paragraph 53, where the first respondent states that:

> *"At the time of institution of this application, LOBELO neither resided nor carried on business from the premises. Indeed between 28th November 2012 to date he never resided or carried on business from the premises*".

13.3. The legal representative submitted on behalf of the respondents during argument that the significance of November 2012 is that it is the day of the granting of the order of delinquency. His view was that the right of the first applicant to access, and therefore possess the premises, ceased on that day and that possession beyond that day was unlawful. It is trite that the court does not, in these proceedings, concern itself with the lawfulness of the applicant's possession nor even with the question of ownership. What the respondents legal representative is asking me to do, is to consider that the possession of the premises by the first applicant ceased on the day on which the first applicant was declared a delinquent director. That any possession beyond that date was unlawful. In the **Ivanov v North West Gambling Board 2012 (6) 67 (SCA),** the matter of **Schoeman v Chairperson of the North West Gambling Board [2005] ZANWHC 81,** came into play. In that matter the applicant possessed gambling machines albeit unlawfully and without a license, in clear contravention of the National Gambling Act, which prohibited such possession. Although the court was of the view that lawful possession was a factor to be considered, the full bench disagreed. In dismissing such an approach, **Mhlantla JA,** stated the following:

> *"In my view the submission on behaif of the respondents is devoid of merit. The historic background and the general principles underlying the mandament van spolie are well established. Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first, is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant - that is why possession by a thief is protected. The second, is the wrongful deprivation of possession. The fact that possession is*

wrongful or illegal is irrelevant as that would go to the merits of the dispute."

13.4. He further went on to say:

> *In **Kelly v Wright, Kelly v Kok 1948 (3) SA 522 (A) at 528 -530** the lessor had leased to two joint lessees a flat without first obtaining the consent of the controller of manpower as required by War Measure 74 of 1945. Rent was paid monthly. Wright had been given notice to vacate the flat forthwith whilst Kok was given some six weeks notice. The lessor applied in the magistrate's court for the ejectment of the lessees. The application was dismissed on the basis that insufficient notice of ejectment was given.*
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> *The effect of the court's decision was that the lessees who had committed an offence remained in possession. The lessor appealed against that decision and submitted that he would be committing an offence if the court allowed the lessees to remain in occupation. In this regard, he found support in the decision of **Gopai v Cohen 1946 TPD 283.** In that matter **Neser J (Maritz and De Villiers JJ concurring**) said at **288:***
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> *I am of the opinion, moreover, that there is a further ground for granting an order of ejectment. Every day appellant resides on or occupies the property she is committing a criminal act and if respondent permits appellant to remain on the property she commits a criminal act. It may well be that respondent cannot be held to be permitting the appellant to occupy the property if the Court rules that she is not entitled to an order of ejectment against the appellant, but if the Court does so rule the Court is in effect permitting appellant to remain on the property and by so doing to continue committing criminal acts. It would clearly be against public policy to countenance a breach of the law which is declared by statute to constitute criminal conduct. '*

Tindall ACJ** held that the approach of the court was in conflict with the decision in **Jajbhay v Cassim 1939 AD 537** and overruled it. He went on to say at **529:

> '*I am unable to accept as correct the alternative ground given in **Gopal v Cohen,** for ejecting the lessee in that case. It does not seem to me that by refusing the decree of ejectment the Court would be permitting or countenancing the commission of an offence by the lessee or would be acting against the requirements of public policy. In my opinion the requirements of public policy in a case like **Gopal v Cohen** would be satisfied by enforcing the criminal law*'

*Turning to the case before him, **Tindall ACJ** said at **530:***

"The refusal to eject the lessees can hardly prejudice the lessor in respect of prosecution; she apparently was liable to prosecution in any event and if she should be prosecuted it is not likely, even if she be legally liable to further prosecution, that she would thereafter be prosecuted a second time, seeing that she has taken legal steps to attempt to eject the lessees. As for the lessees they also apparently are liable to prosecution. Assuming against them that as long as they remain in occupation they will be liable to punishment as for a continuous offence, it cannot rightly be said that the Court, by refusing to eject them, will be permitting or countenancing the commission of an offence by them. It does not seem to me that considerations of public policy demand intervention by a civil court; such considerations will be satisfied by proceedings in a criminal court."

13.5. The access or the right of access was exercised by the first applicant *inter alia* by way of the keys or remote controls that he possessed. There is therefore no doubt that the first applicant possessed the premises, in view of the submissions advanced, dealing with the declaration of delinquency and the unlawful possession, from the point of view of the legal representative of the first and second respondents.

13.6. The critical question therefore is whether access, such the one admitted by the first respondent and enjoyed by the first applicant, amounts to possession. Put differently, whether on the facts of this case, the applicants exercised control, and therefore possession over the immovable property.

13.7. Mr Silver conceded in argument, that the second applicant both accessed and possessed the premises. In so far as the second applicant is concerned, there is no doubt that the first leg of the requirement, i.e. peaceful and undisturbed possession has been established.

[14] The last comments to be considered on this aspect are those of **Van Blerk JA** in **Yeko v Qana** outlining the requisites for the remedy he stated:

"The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was *with the intention of securing some benefit for himself. In order to obtain a spoliation order the onus is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. As the appellant admits that he locked the building it was only the possession that respondent was required to establish... For, as Voet, 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. 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."

[15] Considering the facts of this case and in light of case law quoted above, I am satisfied that the first applicant was indeed in peaceful and undisturbed possession of the premises. That, coupled with the concession of possession made by the legal representative of the respondents with specific reference to the possession enjoyed by the second applicant, means that the requirement of peaceful and undisturbed possession of both applicants has been established.

DEPRIVATION OF POSSESSION

[16] The next and last issue to consider is whether the applicants were unlawfully deprived of such possession. It was argued on behalf of the applicants by Ms Vermaak-Hay, that the following are acts evidencing spoliation:

16.1. the exchange of letters,

16.2. the placement of guards on the premises,

16.3. the changing of locks of the premises.

[17] In their application the applicants give some background of what they believe to be spoliation. It began with service of a letter on the 3rd October 2013. The letter titled "Letter of Ejectment", stated *inter alia*, *"Peolwane therefore gives you notice of ejectment from the premises and we kindly request that the premises be vacated by not later than close of business, 07 October 2013, if it is still being occupied by yourself (or your staff)".* It went on to say, "*kindly have the keys returned to security at the offices of Peolwane Properties (PTY) Ltd situate at Holding 30, Zinnia Road, Glenferness, Midrand, 1685*" The first applicant ignored this letter. The letter, according to the applicants' legal representative, was followed by the placement of guards at the premises, with the assistance of the SAPS. The first applicant, endeavored to confirm the existence of an order of eviction by going to the police station. He knew that there was no order of eviction and couldn't be provided any by the police. The locks at the premises were on the instruction of the respondents, changed, so he submitted, and this rendered the remote controls inoperative. In between all this there were telephone calls and letters being exchanged between the parties through their legal representatives.

[18] I can not agree with the submission that the exchange of letters, amount to spoliation. Especially in light of the fact that the first applicant, (page 11, paragraph 5.2), indicates that he simply ignored the initial letter purporting to "eject" him from the premises. The letter was served on him by the sheriff on the 3rd October 2013. On the first applicants version this letter can be excluded as having "spoliated" him. On his own version, nothing happened between the date of receipt of such a letter and the 20th November 2013, when

guards were posted at the entrance of the premises.

[19] The first applicant knew that only a court order could have evicted him from the premises. He also knew that there existed no such order, and he told the police that much.

[20] The respondents agree that there was placement of security guard on the entrance of the premises. This means that the placement of guards is common cause. What is in dispute however is the reason for such placement. The applicants believe that they were placed there for deprivation of possession of the premises. On the other hand the respondents submit that the assets of the company were under threat and as a result it became necessary to procure services of security guards. Nowhere on the application is there proof that the applicants were deprived possession by the security guards.

[21] The changing of the locks was vehemently disputed by the respondent. The applicants submitted that employees of the second respondent were, through the changing of locks, effectively evicted from the premises. Two employees of the second applicant, deposed affidavits where they disputed this. They indicated that they had access to the premises and also access to their tools and stock. Their affidavits coupled with the concession by the first applicant, that the employees, *"....are afforded the right to access their houses",* (pg 186 para 26.5), is a clear indication that there was no deprivation of possession.

[22] An applicant in order to succeed, must prove facts necessary to justify a final order. It is not sufficient to merely make out a *prima facie* case. Further, the applicant must satisfy the court on the admitted or undisputed facts that the property allegedly spoliated was in his possession and that the property was taken from him forcibly or wrongfully. **YEKO V QANA1973 (3) SA 735 (A).**

[23] On the admitted or undisputed facts, I can not find that the applicants were spoliated.

[24] The counter-application is conditional on the finding that the applicants were spoliated. While I have found that the applicants were in peaceful and undisturbed possession, I have found that the applicants were not spoliated. The counter-application therefore does not come into play.

COSTS

[26] I am of the view that costs must follow the results.

[27] In the premises I make the following order:

1. The application is dismissed,

2. The applicants to pay the costs jointly and severally.