



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

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

27.08.2014

DATE

SIGNATURE

CASE NO: 34431/2013

DATE: 18/9/14

In the matter between:

CORPORATE PREMIUM CLEANING cc

APPLICANT

and

VAN BAALEN P

RESPONDENT

REASONS FOR JUDGMENT

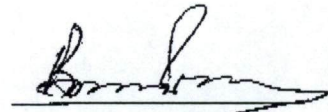
RAULINGA J,

- [1] The applicant in this matter instituted proceedings against the respondent for repayment of an amount of R304, 279.00 withdrawn by the respondent from the applicant's bank account on 24 May 2013.
- [2] The respondent wishes to obtain reasons for judgment for an order that I granted on the 30 January 2014, in the following terms:
- (a) That the respondent pays to the applicant the amount of R304, 279.00;
 - (b) That the respondent pays interest on the amount of R304, 279.00 calculated at a rate of 15.5% per annum from 27 May 2013 until date of final payment;
 - (c) That the respondent pays costs of the application.
 - (d) That the counter-claim be and is hereby dismissed with costs.
- [3] It is common cause between the parties that the applicant is a close corporation with three members, to wit; Piet Nortjie, Theo van Aswegen, and Petrus Johanes van Ballen; the respondent in this case. Each member holds 33.3% of the issued member's interest. The respondent withdrew an amount of R304, 279.00 on the 24 May 2013 from the applicant's account. The respondent claims that the amount of R304, 279.00 was owed to him in lieu of his loan in the applicant.
- [4] The respondent launched a counter-claim on the basis that he was entitled to withdraw the amount from the applicant's bank account in light of the fact that such amount was allegedly owing to him. However, the applicant contends that no person may take the Law into his own hands and that the failure by the respondent to involve a court of Law in his collection steps has resulted in a situation where the respondent's conduct constitutes self-help or parate executie. The essence of the applicant's relief is mandament van spolie.

- [5] The following reasons illustrate my objection to the procedure adopted by the respondent in withdrawing the amount of R304, 279.00 from the applicant's bank account.
- [6] There is an old standing principle laid down by *Innes, C.J.*, in *Nino Bonino v De Lange* 1906 TS 120, that the Law will not allow a man to take the Law into his own hands and to take out of the possession of another, who is unwilling to yield it up, property which he thinks he has a claim to or may have a very good and very just claim to. His remedy is to enforce his rights through the court. The Law will not let a man to be a judge in his own case.
- [7] This dictum was confirmed in *Bock V Duburoro Investments (PTY) Ltd* 2004 (2) SA 242 (SCA) at 249 para 14- that common Law has always recognised that self-help is unlawful. It is for this reason that the mandament van spolie was developed in judgments such as *Nino Bonino*, supra.
- [8] The following phrases in *Juglal NO v Shoprite Checkers (PTY) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) per Heher, JA, is apposite to this matter:
- "To this I would add that the 'matter of practice' referred to is in fact a constitutional requirement; creditors not in possession are obliged to apply for judicial sanction. With that qualification, Hurt J's exposition seems to me to be a correct summary of the present state of the common Law".
- [9] It is clear from the facts of this case that the respondent was not in possession of the money when he removed it from the applicant's account. In accordance with the laid down legal principles, the respondent had a legal obligation to apply for judicial sanctioning. Therefore his conduct was unlawful.
- [10] I now turn to deal with the respondent's counter-claim. I am of the view that the counter-claim must be dismissed as well, because the applicant (in the main claim), has established the requisites for a successful mandament van spolie. Where an applicant establishes the requisites for a successful mandament van spolie, the respondent cannot raise a defence based on his alleged rights in the thing concerned. Such defence, if raised, is ignored and any counter-claim in respect

thereof is dismissed without a consideration of the merits- *Minister of Agriculture and Agricultural Development v Segopolo 1992 (3) SA 967 (TPD)*. This is so, because to allow the counter-claim would defeat the whole purpose of the mandament van spolie.

- [11] The applicant's other two members place the calculation of the alleged loan account in dispute. The basis for the dispute is that the respondent is the person with formal accounting qualifications who was involved in quantifying the loan account.
- [12] The applicant is the respondent in the counter-application. For that reason, the respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and unworthy of credence- *Fakie NO vs CC Systems (PTY) Ltd 2006 (4) SA 326 (SCA) at 348 para 56*.
- [13] I am satisfied that the respondent's version is neither far-fetched nor improbable. The version of the respondent in the counter-claim is accepted.
- [14] It leaves me with no choice but to reject the version of the applicant in the counter-claim. I confirm the order that I made on 30 January 2014.



T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT