IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

26 / 02 / 2016
DATE

SIGNATURE

CASE NUMBER: 7544 / 16

26/2/2016

In the matter between:

NAD PROPERTY INCOME FUND (PTY) LTD	APPLICANT
And	
INSIGHT OUTDOOR ADVERTISING (PTY) LTD	1ST RESPONDENT
SOUTH AFRICAN NATIONAL ROAD AGENCY	2ND RESPONDENT
THE CITY OF TSHWANE METROPPOLITAN MUNICIPALITY	3RD RESPONDENT
ROELAND STREET INVESTMENT (PTY) LTD	4TH RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The applicant approached this Court by way of urgency seeking a spoliation order against the first respondent to restore the large advertising billboard which the first respondent allegedly unlawfully removed from the applicant's property without the consent of the applicant and without a Court order.

[2] Generally speaking, spoliation applications are by nature urgent. I bear in mind that the Court must in urgent applications first decide whether the application is urgent or not. Should the court find that the matter is not urgent, it must strike it off the urgent roll. This course will result in the matter being unnecessarily protracted as it will once more re-emerge in the opposed roll and burden this busy Court with a meritless issue that could have been disposed of by this Court. In my view, the essence in this matter is one of commercial urgency. I shall without deciding urgency, assume that the matter is urgent, and proceed to dismiss the application for the reasons set out herein below.

[3] In the matter of *Le Riche v PSP Properties CC and Others*[1] Yekiso J held as follows:
"Requisite for the *mandament van spolie*
[8] The law relating to the requisites for the granting of a spoliation order is well settled. This consists of any wrongful deprivation of anothetr's right of possession, whether in regard to movable or immovable property or legal right. Its underlying philosophy is that no one should resort to self-help in order to obtain or regain possession. For the remedy to be available one should be deprived of one's possession, forcibly, wrongfully and against one's consent...
It is an extraordinary, robust and speedy remedy. It follows, therefore, from the principle stated in this paragraph that for the applicant to obtain the relief sought, he or she has to allege and prove (i) peaceful and undisturbed possession and (ii) unlawful deprivation of such possession." It is not for the determination of the actual right of the dispossessed; *vide* also *Firstrand Ltd t/a Rand Merchant Bank v Scholtz NO.*[2]

[4] It is trite that an applicant who seeks a spoliation order must make out not only a *prima facie* case but must satisfy the Court on the admitted or undisputed facts, by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in the application that he was in undisturbed possession of the item he has been despoiled of; *vide Nienaber v Stuckey.* [3]

[1] 2005 (3) SA 189 (CPD) at 193.
[2] 2008 SA 503 (SCA) at 509 at F—G.
[3] 1946 AD 1049 at 1053-4.

[5] The facts of this matter which are not in dispute can be summed up as follows:

5.1 The applicant on the 1 March 2006 concluded an agreement with a company called Harlequin Duck Properties 95 (Pty) Ltd (hereinafter referred to as Harlequin) for the right to install a billboard on the Remainder of Portion 55 of the farm Doornkloof 391 JR.

5.2 The terms of the agreement were, *inter alia*, that the first respondent will, after it obtained the approval of the 3rd respondent, install a billboard on the property and sell the advertising space on the billboard to prospective advertisers. As compensation the first respondent would pay Harlequin 25% of the income received from the advertisers.

5.3 The third respondent was granted approval on the 6 May 2006, and the billboard, which is the subject matter *in casu*, was installed on Portion 55 of the Farm Doornkloof 391JR.

5.4 At the time Harlequin developed a storage facility on the property and fenced it off from the rest of the property. The billboard was erected just outside of the fence and it over hanged the fenced off portion. The first respondent continued to pay rental to Harlequin.

5.5 The first respondent per agreement with Harlequin erected other two billboards on Portion 55 of the Farm Doornkloof 391 JR.

5.6 Harlequin subdivided Portion 55 of the Doornkloof 391JR to Farm 759 of the Farm Doornkloof 391 JR ("Portion 759 ("Portion 759") and the remainder of 55 of the Farm Doornkloof 391 JR ("the Remainder").

5.7 Harlequin sold Portion 759 to the applicant in 2008.

5.8 As the result of the subdivision, the billboard in question effectively fell in the Remainder of Portion 759.

5.9 The first respondent removed the billboard which fell in the Remainder of Portion 759 without the consent of the applicant and installed it in the Remainder of Portion 55.

[6] The issue to be decided *in casu*, is whether, the applicant was in possession or control of the billboard in question, and if so whether the removal by the first respondent was a spoliation.

[7] It needs mentioning that in the matter of *Wightman t/a Jw Construction v Headfour (Pty) Ltd and Another*[4] the Supreme Court of Appeal held that:

"[12] Recognising that the truth almost lies beyond mere linguistic determination the court have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analyses by Davis J *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A-153C...)"

[8] It is instructive to note that the first respondent and Harlequin concluded a lease agreement[5] in respect of the portion on which the billboard was erected. The terms of the lease agreement, were *inter alia*, that the billboard, referred to in the agreement as Image Sign shall remain the sole and absolute property of the tenant[6] (first respondent). The first respondent was accorded the right to remove the billboard. The first respondent further had exclusive right to utilise the billboard for advertising.

[9] The question whether the applicant had possession over the billboard needs to be answered in the negative. The first respondent had the right to erect the billboard on and access the particular piece of land, post advertisements, without having to seek any permission from the previous owner, and later the applicant. What is of importance is not the physical presence of the billboard but the right to access and use it[7]. This right to use the billboard vested not with the applicant but the first respondent. The presence of the billboard on the applicant's property is therefore a consequence of the contract between the original owner Harlequin and the first respondent. In terms of the lease agreement between the first respondent and the original owner, subsequently taken over by the applicant through the purchase of the relevant piece of land, the first respondent can remove the billboard and need no permission from the applicant. I find therefore that the applicant had no *detentio* over the bill board and consequently he cannot resort to spoliation.

[10] In my view, it is not necessary to traverse the rest of the submission made on behalf of the applicant, besides same have in no way moved me from the conclusion reached herein above.

[11] It is trite that costs follow the event. Both parties engaged the services of two counsel. This demonstrates the importance of the matter to both parties. The matter raised a fine point in law and certainly warranted the services of two counsel.

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[4] 2008 (3) SA 371(SCA) at 375 E-F

[5] Vide annexure A at paginated page 77.

[6] Clause 14 .1 of the lease agreement.

[7] *Vide ATM Solutions (Pty) Ltd v OLKRU Handelaars CC* 2009 (4) SA 337(SCA) at 339D-F.

[12] In the result the application is dismissed with costs inclusive the costs of employing two counsel.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE : 17 FEBRUARY 2016
DATE OF JUDGMENT : 26 FEBRUARY 2016

APPICANT`S ADV : L.B. VAN WYK SC with ADV D. VAN DEN BOGERT
INSTRUCTED BY : DJV INCORPORATED ATTORNEYS
1ST RESPONDENT`S ADV : M.C. ERASMUS S.C with ADV W KROG
INSTRUCTED BY : BOSHOFF INC