HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A62/2020

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 18 JANUARY 2021

SIGNATURE:

In the matter between:

BRETT PHILLIPS First Appellant

TRACEY IRENE PHILLIPS Second Appellant

KYLE BRENDAN PHILLIPS Third Appellant

and

DR STEVEN WILLIAM GUNN Respondent

J U D G M E N T

This matter has been heard in terms of the Directives of the Judge President of this

Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

1.1 This is an appeal against an order by the magistrate in the Magistrates Court for the District of Tshwane Central held at Pretoria 2 December 2019 whereby a spoliation order was granted against the appellants.

1.2 The matter in the court a quo took the form of an opposed motion. The relief claimed by the respondent, namely the immediate restoration of peaceful and undisturbed possession and access to a certain residential property, patient files and "all rights as previously enjoyed", had to be determined by way of resolution of factual disputes in accordance with the principles applicable to motion proceedings. See: Stellenbosch Farmers Winery Ltd v Stelling Vale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 23 5-2G and Plascon Evans v Fund Remake Paints

[2] Salient facts and the evaluation of the evidence by the magistrate

2.1 After having considered the affidavits filed of record, the court a quo found the following to be common cause

- that the property in question, being [….], Pretoria, consists of a medical clinic as well as a residential portion, occupied by both the appellants and the respondent.

- the respondent was at all relevant times an employee of the clinic and the "responsible doctor".

- for purposes of discharging his obligations, the respondent had access to the clinic, an office, patient files and the medicine cabinet.

2.2 Despite the above, there appeared to be a dispute regarding the extent of the respondent's possession and his subsequent disposition of either the whole or parts of the property. The learned magistrate summed up the description of the property as follows: "*the respondents [the current appellants] seek to paint a picture that the property consists of three autonomous structures namely, the clinic, the applicant's [the current respondent] property and the first respondents [appellants] property. But what emerges from the photographs annexed by the respective parties to the affidavits… is an image of one big structure whose rooms adjoin one another from the clinic to the residential living areas… . The subdivision of the property into clinic, applicant's residential portion and respondent's residential portion was rather hypothetical and based on the understanding between the parties as opposed to being practical. At paragraph 8.1 of the founding affidavit the applicant [respondent] further alleges that the respondents [appellants] have blocked the entrance and doors to the clinic, house, gym and toolshed. It is further stated that the respondents [appellants] locked the steel gates with a chain and used a large piece of wood and fridge to board up access to the kitchen and pantry. In response thereto the respondents [appellants] have not dealt with the allegations in paragraph 8.1 except to simply deny. However, what the respondents [appellants] do not deny is the fact that they have cordoned off certain areas leading to the exclusive use areas of the respondents [appellants] as a security measure against threats made by the applicant [respondent]".*

2.3 It appeared from the papers that the relationship between the parties had soured to such an extent that the appellants obtained a protection order against the respondent. In the affidavit deposed to in support of the protection order, the appellants alleged that the respondent has verbally threatened them as follows: *1) to kill both of us 2) to cause harm to our families3) has put in place a directive to take us out".* I interpose to point out that the respondent has explained the threats in his founding affidavit already as a response to protect his own, family and has apologised for having uttered it. In furnishing detail for the request for the protection order the appellants alleged that they have been business partners together with a Mrs Patricia Rosema of the respondent. They further confirm that the appellants and the respondent and his family share a house adjacent to the clinic premises. In addition to the alleged threats, the appellants complained that since their fall-out, the respondent has been unreliable as a business partner has absented himself from the clinic, has been making business decisions without the other partner's knowledge or approval and has taken medication and supplements from the business for himself and his family.

2.4 The disputes regarding the acrimony between the parties have escalated and remain on unresolved on the papers. So for example has the respondent accused the appellant of being a cannabis dealer and illegally purporting to practice as a medical doctor. The remainder of the allegations contained in support of the application for a protection order exceed the ambit thereof and refer to aspects more at home in the termination of a business relationship such as the returning of laptops, computer equipment and the like. It also included the complaint that the respondent and his family treated the residential portion of the property as their own, coming and going as they

like and using the common areas including the kitchen and the fridges as if their own.

2.5 Having regard to the above, the learned magistrate answered the question whether the respondent had enjoyed unrestricted movement and access to certain areas within the property prior to the cordoning off in the affirmative. On our reading of the papers and appellants' own version, as being part of their complaint referred to above, this finding appears to be correct.

2.6 On the issue of dispossession, there is no dispute that certain aspects or areas have been cordoned off. The learned magistrate magistrate found as follows "*what must be appreciated is the fact that the applicant's [respondents] access and movement within the property is limited as a result of the cordoning off. Although cordoning of certain areas leading to the respondents' [appellants'] exclusive use areas it not operate to deprive the applicant [respondent] of the whole of the property, the very act of cordoning off in my view is tantamount to partial deprivation of possession and use of certain areas have the property"*. In our view, this finding also appears to be correct.

[3] <u>The law regarding spoliation</u>

3.1 It has been held that: *"a court hearing a spoliation application does not concern itself with the rights of the parties (whatever they might have been) before the spoliation took place; it merely enquires whether or not there has been a spoliation and if there has been, it restores the status a quo. See <u>Lottering v Palm</u> 2008 (2) SA 553 (D) at 555H.*

3.2 A court will therefore neither concern itself with lawfulness of the applicant's possession nor the ownership of the thing. See Mankowitz v Loewenthal 1982 (3) SA 758 (A) at 763A. It is sufficient for the applicant to establish that he was *de facto* in possession at the time of being despoiled. See Malan v Green Valley Farm Portion 7 Holt Hill 434 CC 2007 (5) SA 114 (E) at paras 22 – 26.

3.3 Once possession has been established, what the applicant for a spoliation order furhter needs to establish, is that he has been deprived of such possession, forcibly or wrongfully without his consent. See: Yeko v Qana 1973 (4) SA 735 (A) at 739. The dispossession need not extend to the whole property previously possessed, it is sufficient if the applicant is deprived partially. See Du Randt v Du Randt 1995 (1) SA 401 (O) at 406 B-D.

[4] Evaluation

It is clear that the respondent had been in peaceful and undisturbed possession of all those parts of the clinic to which he needed access to perform his duties. He and his family were also in peaceful and undisturbed possession of the residential part of the property, in similar fashion as the appellants. The appellants have, in fact, conceded in their answering affidavit that the respondent was the co-owner of the property. It is also beyond dispute that the appellants have locked access to certain areas and boarded or condoned off certain other areas not previously condoned off, thereby, at least partially, dispossessing the respondent. We find that the elements of spoliation have correctly been found by the magistrate to have been established at the time he made his order. Accordingly, the appeal must fail.

[5] Having regard to the pre-existing relationship between the parties and their co-ownership, we expressed concern at the hearing of the appeal regarding the continued and future co-existence of the parties. We repeat that concern, but that aspect falls outside this appeal. It is, however, an aspect which may benefit from mediation if the parties cannot otherwise resolve it.

[6] Having reached the above conclusions, we however, find no cogent reason why costs should not follow the event.

[7] Order:

The appeal is dismissed with costs.

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N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree

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S. N. I MOKOSE
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 10 September 2020

Judgment delivered: 18 January 2021

APPEARANCES:

For the Appellants:	Adv. W.S Jungbluth
Attorney for Appellants:	Dawie De Beer Attorney, Pretoria
For the Respondent:	Adv. H. C van Zyl
Attorney for Respondent:	Lily Rautenbach Attorney, Pretoria