IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 1410/2013

"NOT REPORTABLE"

In the matter between:

SLABBERT BURGER TRANSPORT (NAMIBIA) (PTY) LTD Applicant
(Registration number 2003/267)

and

RYNETTE PIETERS NO in her capacity
as joint provisional liquidator of Slabbert Burger
Transport (Pty) Ltd (in liquidation) First Respondent

GEORGE DA SILVA RAMALHO NO in his capacity
as joint provisional liquidator of Slabbert Burger
Transport (Pty) Ltd (in liquidation) Second Respondent

EZECHIEL ALBERT BEDDY NO in his capacity
as joint provisional liquidator of Slabbert Burger
Transport (Pty) Ltd (in liquidation) Third Respondent

SLABBERT BURGER EIENDOMME (PTY) LTD
(Registration number 1999/004816/0) Fourth Respondent

JUDGMENT:14 FEBRUARY 2013

R. M. NYMAN A.J.

[1] This is a spoliation application brought on an urgent basis, directing the first to third respondents to restore to the applicant possession of a number of vehicles which are kept on certain premises under the control of the first to fourth

respondents.

[2] The applicant, a Namibian transport company, is the owner of various vehicles which it uses to transport goods through the Southern African region. In terms of an oral cooperation agreement that the applicant concluded with Slabbert Burger Transport (Pty) Ltd (in liquidation) ("SBT"), the applicant's vehicles used the depots of SBT while in exchange, SBT's vehicles used the applicant's depot in Windhoek.

[3] On 7 December 2012 SBT was placed in liquidation and the first to third respondents ("respondents") were appointed as joint provisional liquidators on 12 December 2012. Its liquidation was by way of special resolution passed by SBT's board of directors and is deemed to be a creditors' voluntary winding up in terms of sections 349 and 351 of the 1973 Companies Act. On 8 February 2013 the creditors' voluntary winding up was converted into a compulsory winding-up, affording the liquidators full investigative powers.

[4] The applicant contends that the respondents have unlawfully deprived it of possession of the trucks, trailers and one Toyota Land Cruiser shown in Annexure "NAM2" ("NAM2") annexed to the founding affidavit, when they locked the gates of the depots where the vehicles are parked. It is not in dispute that the majority of the vehicles marked with the annotation "WELL" were or are situated on the property of the fourth respondent in Wellington on the date of liquidation or shortly thereafter. This property is situated next to the depot of SBT given that the fourth respondent

does not have its own entrance. Access to the property of the fourth respondent is gained by way of a servitude that is registered over SBT's immovable property. The minority of the vehicles marked with the annotation "WELL" were or are situated at the Wellington depot of SBT on the date of liquidation or shortly thereafter. The vehicles marked with the annotation "BRAKPAN" were or are situated at SBT's depot on the date of liquidation or shortly thereafter. This depot is owned by the fourth respondent.

[5] NAM2 shows that the majority of the vehicles, where the annotation "Natis" does not appear, have Namibian registration numbers. It is not in dispute that the applicant's legal representatives had furnished the respondents with registration documents to show its ownership of the majority of the vehicles. Copies of these registration documents are annexed to the founding affidavit. It is also not in dispute that the minority of the vehicles, where the annotation "Natis" appears, are registered in the name of SBT of which a number of these vehicles were financed through finance agreements concluded between the applicant and Scania finance. Copies of these finance agreements are annexed to the papers. The applicant alleges that the reason why these vehicles were registered in the name of SBT is to allow these vehicles to load and deliver loads in the Republic of South Africa without having to apply for a "cabbotage" permit.

[6] It is not in dispute that, with the exception of the vehicles parked at the Brakpan depot, the applicant retained possession of the keys of the vehicles appearing on NAM2.

[7] During the period preceding the application, correspondence was exchanged between the parties' attorneys regarding the applicant's request to have the vehicles released. At a meeting held on 15 January 2013 it was agreed that the respondents would release five of the vehicles. However, only two of the vehicles were released. In an email sent to the applicant's attorney on 30 January 2013, the first respondent failed to provide an explanation for this turn in events but described its decision as a mere "*confirmation of the respondents' instruction*".

[8] The requirements to prove spoliation are set out in *Yeko v Qana* 1973 (4) SA 735 (A) at 739 E-G:

> "*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. If the respondent was in possession the appellant's conduct amounted to self-help. He was admittedly in occupation of the building with the intention of selling his stock for his own benefit. Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. 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."

[9] Therefore, to succeed with the spoliation application, all that the applicant has to prove is that it had possession of the vehicles and that the first to third respondents had unlawfully deprived it of possession of the vehicles. In my view, the applicant has proven both requirements, given that the papers show that the respondents have not placed into dispute the relevant facts that form the bases of the spoliation application.

[10] The respondents have proven that prior to the act of spoliation, namely the time when the gates to the depots were locked, the applicant's drivers drove the vehicles and used the depots to park the vehicles. This is evident from the fact that the applicant has possession of the keys to most of the vehicles. While it is trite that ownership is not required to prove possession, the applicant's ownership of most of the vehicles and the existence of loan agreements in respect of a number of the vehicles of which the applicant is not the owner, to my mind, are relevant factors that should be taken into account in this case, to confirm the applicant's possession of the vehicles. In my view the respondents unlawfully deprived the applicant of possession by locking the gates of the depots and by placing guards at the entrances to the depots, to prevent the applicant access to the vehicles.

[11] While in their answering affidavit, the respondents oppose the application on various grounds, only two of the grounds were pursued at the hearing of the application. The respondents contend that the alleged spoliation was "*legally justified*" because the respondents are investigating possible frauds that may have been committed in respect of SBT "*having effectively funded the acquisition of vehicles, trucks and trailers by the applicant*". Mr Woodland, who appeared on behalf of the respondents, placed reliance on the case of *Van Rooyen en 'n Ander v Burger* 1960 (4) SA 356 (O) at 359 wherein Grobler J made reference to the following opinion expressed by Professor Price in *Possessory Interdicts in Roman-Dutch Law* at 108:

> "*Generally speaking, the only defence open to the respondent is a denial of the facts alleged. He may plead that the applicant did not possess the property in dispute at the time of the alleged spoliation or may, as is more usual, deny that the act alleged was one of spoliation, or claim that it was legally justified.*"

[12] It is not clear from the *Van Rooyen* decision under which circumstances an act of spoliation would be legally justified because the issue for determination before the Court was whether a respondent in a spoliation application may, in its defence, request a declaration of rights. In support of its defence that its conduct was legally justified, the respondents contend that their investigations are still ongoing and must first be completed before they can release these vehicles which are in their possession. The respondents contend further that if it transpires that frauds have

been perpetrated, the applicant would not have a valid title thereto.

[13] Mr Woodland urged me to take into account the general duties of liquidators that are prescribed in section 391 of the 1973 Companies Act in my consideration of his submission that the creditors conduct was legally justified. Section 391 places, *inter alia*, a duty on a liquidator to "*proceed forthwith to recover and reduce into possession all the assets and property of the company in liquidation*". Mr Woodland argued that for these reasons, the respondents are legally justified to refuse leave to the applicant to remove the vehicles.

[14] To my thinking, section 391 does not grant authority to a liquidator to seize, without a Court Order, the property that was in the possession of a company other than the company in liquidation. It is not in dispute that the applicant is a private company with limited liability that is incorporated in terms of the company laws of the Republic of Namibia. As such, it enjoys a separate juristic personality, separate from SBT. The fact that the applicant and SBT share the same directors, does not entitle the respondents to ignore the trite principle of our law that recognises the independent juristic personalities of companies, in the absence of averments made in the papers in support of the piercing of the corporate veil as contended by Mr Joubert who appeared for the applicant. The applicant, as a *peregrinus* of this Court, has provided security for costs in the sum or R200 000.00 as demanded by the respondents. By having done so, the respondents have recognised that the applicant enjoys a separate juristic personality. For these reasons I am of the view that the conduct of the respondents was not legally justified.

[15] It is also the respondents' contention that the vehicles are in their possession and under their control and that the applicant will not suffer prejudice if the vehicles remain in the possession of the respondents, given the undertaking that the respondents will not dispose of the vehicles. On the other hand, the applicant alleges that it is haemorrhaging loss amounting to millions of rand per month because it is unable to conduct business without having the use of the vehicles. In support of the respondents' denial that spoliation has occurred, Mr Woodland relies on the case of *Van Malsen v Alderson & Flitton* 1931 TPD 38 at 39 where Greenberg J stated that "*where one is in possession of an article lawfully, one's refusal to return that article when one's right to retain it expires*", does not amount to spoliation.

[16] To my mind, the facts in the *Van Malsen* decision are distinguishable from the facts of this case for the reason that SBT was not in possession of the vehicles prior to the date of liquidation, and therefore the respondents would not have been in possession of the vehicles prior to the act of spoliation. The respondents could therefore not retain the vehicles in circumstances where they unlawfully deprived the applicant of possession by barring access to the depots where the vehicles are kept. In any event, it is not in dispute that the majority of the vehicles are not situated on the premises of SBT, but on the premises of the fourth respondent. I am therefore of the view that the respondents have not proffered a sustainable defence to the applicant's claim of spoliation and in consequence, the respondents may not lay claim to goods which are the fruits of an unlawful act of spoliation. For these reasons I should grant the applicant the relief sought.

[17] The respondents contend, in their opposing papers, in the alternative that the application is not urgent and that the application should be postponed so that they are afforded more time to file an answering affidavit. It is trite that the remedy of spoliation is, by its very nature, a speedy remedy (*See*: *Nino Bonino v De Lange* 1906 TS 120 at 122). In *Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others* 2013 (1) SA 239 (KZD) at para 9, Gorven J captures the objective of the *mandament van spolie* in the following passage:

> *"It provides for the immediate restoration of possession regardless of, and before determining, the rights of the parties in and to the thing possessed. It is a speedy remedy available when a person has been deprived of possession by means other than agreement or recourse to law. In other words, the remedy is designed to prevent self-help, and to promote social cohesion by requiring disputes as to possession to be resolved only by lawful means."*

[18] The respondent was afforded four days to draft an answering affidavit to a founding application comprising of 15 pages together with annexures which are already in their possession. In my view, the respondents were afforded sufficient time to prepare opposing papers. Given the nature of the application and the substantial losses being incurred by the applicant, reasonable grounds are present to consider this matter on an urgent basis.

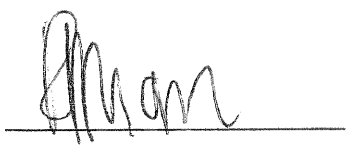
[19] No reason has been advanced why costs should not follow the result. The applicant has requested that costs be awarded *de bonis propiis*. In my view, the respondents' conduct in opposing the application, was neither unreasonable or *mala fides* to justify such a punitive costs order (*See*: *The Master v Waterston*, NO 1962 (1) SA 1 (T) at 3).

[20] It is therefore as a result of the aforegoing reasons that I make the following Orders:

(a) The applicant's failure to abide by the ordinary rules pertaining to time periods, filing and service, is condoned.

(b) The first, second and third respondents are ordered to allow the applicant to remove the vehicles as set out in Annexure NAM2 to the applicant's founding affidavit from the premises controlled by the first to fourth respondents.

(c) The first, second and third respondents are ordered to pay the costs of the application.



R. M. NYMAN A.J.

ACTING JUDGE OF THE HIGH COURT