

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES:
No

Case No: 2024-015638

In the matter between:

POMONA ENERGY PROPRIETARY LIMITED

Applicant

and

BERNADETTE VAN DER BERG *N.O.*

First Respondent

PHILIPPUS CHRISTOFFEL WILLEM VAN DER BERG *N.O.* Second Respondent

BERNADETTE VAN DER BERG

Third Respondent

PHILIPPUS CHRISTOFFEL WILLEM VAN DER BERG

Fourth Respondent

KOPANO PROCUREMENT & SERVICES
PROPRIETARY LIMITED

Fifth Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicant seeks by way of urgent spoliatory proceedings to be immediately restored "*undisturbed possession of portion 1 of Holdings 285 Pomona Estate Agricultural Holdings, Registration Division I.R Province of Gauteng*".
2. A trust, of which the first and second respondents are the trustees, permitted the applicant to take up occupation of the site for the purpose of conducting a business consisting of the sale of diesel and the provision of parking facilities for logistic companies. This was pursuant to a contractual arrangement but the details of which are not relevant for purposes of spoliatory relief. There is some dispute as to whether it is the applicant rather than a related entity that was given occupation of the site by the trust, but I will assume in favour of the applicant that it was the applicant who was so afforded occupation of the site.
3. For reasons that will follow, it is important to appreciate that the restoration that the applicant seeks is the undisturbed possession of the entire site.
4. For the applicant to succeed, it would have to show that it was in undisturbed possession of the site and that the respondents deprived it of that possession forcibly or wrongfully or against its consent.

5. On 29 January 2024 the applicant's chief executive officer, who is the deponent to the founding affidavit, was denied entry at the gate to the site by a security guard acting upon the instructions of the respondents. This precipitated these urgent proceedings.
6. I find that the spoliatory proceedings were initiated with sufficient expedition to justify a hearing of the application on the urgent court roll.
7. The requirements for a spoliation order are clear: an applicant must prove that he was in peaceful and undisturbed possession (occupation) of the property and that the respondent deprived it of its possession (occupation) forcibly or wrongfully or against its consent.
8. Bristowe J in *Burnham v Neumeyer* 1917 TPD 630 at 633 is typically cited as authority:

“Where the applicant asks for spoliation he must make out not only a prima facie case, but he must prove the facts necessary to justify a final order – that is, the things alleged to have been spoliated were in his possession and they were removed from his possession forcibly or wrongfully or against his consent.”

9. Greenberg JA in what is perhaps the *locus classicus* of *Nienaber v Stuckey* 1946 AD 1049 at 1053 said as to the level of the proof required:

“Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated

were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict, and not of a temporary interdict.”¹

10. What this means is that if there are two *bona fide* but conflicting factual versions, the respondent’s version is effectively to be preferred in terms of the usual *Plascon-Evans* rule.²
11. Before turning to the facts, something it to be said of the kind of possession that is required and is protected by spoliation proceedings.
12. The full bench of the Transvaal Provincial Division in *Scholtz v Faifer* 1910 TPD 243 at 246 (in what has been described as an ‘authoritative expression of the law’ on the nature of the possession of property which the law requires the applicant has to retain continuously in order to preserve his lien) as cited in *De Jager v Harris N.O. and the Master* 1957 (1) SA 171 (SWA) at 178I – 179A, held:

“Here the possession which must be proved is not possession in the ordinary sense of the term – that is, possession by a man who holds pro domino, and to assert his rights as owner. The whole question is discussed by Voet (41.2.3), and he called that kind of possession ‘natural possession’ as distinguished from

¹ See too *Painter v Strauss* 1951 (3) SA 307 (O) at 312 A-C.

² *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-G.

juridical possession ... But to this natural possession, as to all possession, two elements are essential, one physical, and the other mental. First there must be the physical control or occupation – the detentio of the thing; and there must be the animus possidendi – the intention of holding and exercising that possession.”

13. The cases recognise that exclusive control or possession is not necessary, including for spoliatory proceedings. See, for example, *Nienaber v Stuckey* above and *Painter v Strauss* above at 314 C.
14. The applicant’s counsel relied particularly on *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E), in which terms such as “control”, “use” and “enjoyment” and the holding of the property were considered.³ This case is particularly instructive as it demonstrates that what an applicant would be required to establish by way of possession need not be possession to a greater degree than that which it enjoyed when operating under the contractual arrangement pursuant to which it was afforded occupation of the site as that was the sort of possession envisaged as sufficient by the parties when the applicant took occupation of the site pursuant to that contractual arrangement.
15. As the judgment points out,

“the question of ‘possession’ is one of degree. Where what is encompassed by possession (in this case to run the abattoir)

³ At 232H – 233H.

requires little in the way of positive physical action by the possessor, the person who gave him such right and he now invades it cannot justify his conduct on the ground that there was very little positive physical activity by the possessor. The enquiry must be whether the conduct of the possessor – minimal as it might be – shows that he did exercise rights or carry out activities consistent with the transfer to him of control of the premises; and whether he did so with the intention of securing some benefit to himself".⁴

16. The applicant's counsel submitted that this was authority for the proposition, if I understood his argument correctly, that any form of possession, minimal as it may be, would be sufficient for protection by way of spoliatory proceedings. In my view, this is an over-reading of *Bennett Pringle*. Rather the kind of possession that would be protected by way of spoliatory proceedings is that possession which was consistent with the transfer to the possessor of control of the property. In some instances, but not all, this may be minimal. But in the present instance the kind of possession that the applicant had as at 29 January 2024 must be consistent with the transfer of control of the site to the applicant for the purpose of the sale of diesel and the provision of parking facilities for logistic companies.
17. Also to consider, in determining the kind of possession that the applicant had as at 29 January 2024 when it was denied any further access to the

⁴ At 237 B-D. My emphasis.

site, is the degree of control that one or other of the parties had in relation to the site, particularly by way of access. In *MMAC Access Scaffolding CC v Xstrata South Africa (Pty) Ltd* 2010 JDR 105 (GNP) it was held that where a person needs to rely upon another in order to obtain access, this cannot constitute possession or control. But the specific circumstances and facts of each case need to be considered as this criterion is not necessarily decisive.⁵

18. The respondents contend that the applicant had effectively abandoned the site and had not controlled the site since 8 December 2023. That is when the respondents first denied the applicant access to the site. After various demands made by the applicant's attorneys, the applicant was permitted to continue to access the premises. There appears to have been a similar incident on 21 December 2023 when the respondents again denied access to the applicant and again after some letter-writing, access to the site by the applicant's representatives was restored by the respondents.
19. On 29 January 2024, the respondents again denied access to the site by the applicant's representatives, but this time did not allow the applicant's representatives to return. That precipitated these urgent proceedings.
20. It is fair to say from the applicant's own version that the applicant's conduct of the diesel depot and parking facility for logistic companies,

⁵ See the many decisions dealing with whether it can be said that an occupant of a home in a sectional title complex or a gated residential community can be said to be in occupation of his or her home in circumstances where a security company engaged by the body corporate or the homeowners association, as the case may be, controls access to the residential facility through boomed entrances.

whatever it may have been before December 2023, had become sporadic, at best. The respondents contend for a gradual abandonment of the site, commencing on 8 December 2023. The respondents contend that when they denied any further access to the applicant's representatives on 29 January 2024, the applicant had effectively abandoned the site entirely.

21. The applicant deny that it abandoned the premises, and that it intended to resume full-scale business operations, and so that when the respondents denied its representatives access on 29 January 2024, that constituted spoliation.
22. The following facts are common cause or not seriously disputed.
23. The respondents with what appears to be relative ease were able to instruct the security guards that were regulating access to the site. This is apparent from the respondents having instructed the security guards to deny access to the applicant on 8 December 2023, again on 21 December 2024, and then again on 29 January 2024. While until mid-January 2024 the security guards may have been paid by the applicant, those security guards nonetheless appear to have taken instructions from the respondents rather than the applicant. Then from mid-January 2024 it appears that the security guards refused to take any further instructions from the applicant, apparently as they had not been paid.
24. The respondents control access of trucks to the site. The applicant complains that the respondents denied access to the site of trucks that

were making diesel deliveries. The applicant in its founding affidavit describes how on 21 December 2023 the respondents prevented one of their diesel deliveries from being off-loaded at the site.

25. The applicant describes an incident where the third respondent arrived at the site and without the applicant's consent took away 100 litres of diesel. The respondents deny that this was without consent, but what is relevant for present purposes is the ease with which the respondents could enter the site and effectively do as they please.
26. It also appears from the affidavits that it is not only the security guards but also the employees generally on site that were prepared to take instructions from the respondents. The respondents state that from mid-January 2024 the applicant no longer had any employees on site as they had resigned, apparently because of non-payment. The applicant denies certain aspects of this version but what is relevant for present purposes is that there is at least a factual dispute as to what extent the applicant controlled its staff or even had any staff on the premises.
27. The electricity to the site was disconnected, apparently because of non-payment by the applicant, and so the electrical fencing surrounding the site was no longer operational.
28. It is common cause that the applicant's representatives, particularly the deponent to its founding affidavit and his wife, had access to the premises and could, and did, at least occasionally, come and go. What this demonstrates is intermittent access by the applicant's

representatives. But this is not by itself sufficient to demonstrate, at least for purposes of final relief, that the applicant exercised control over the site.

29. When regard is had to these facts, there is a *bona fide* factual dispute whether the applicant retained the sort of possession envisaged as sufficient by the parties in this particular instance for conducting from the site the business as a diesel depot and parking facilities for logistic companies. To put it differently, when regard is that to these facts, it cannot be said that respondents' contended for overall factual version that the applicant was not in possession as at 29 January 2024 is so far-fetched or clearly untenable that it is to be rejected merely on the papers.⁶

30. Taking the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits,⁷ it cannot be found that the applicant enjoyed the kind of control when the dispossession took place on 29 January 2024 that the parties envisaged as sufficient when the applicant initially assumed and exercised occupation of the site for purposes of its business in terms of their contractual arrangement. While the applicant may initially have had this kind of control, such as being able to instruct its security guards and employees, there is a genuine factual dispute whether that control still persisted as at 29 January 2024.

⁶ *Botha v Law Society, Northern Provinces* 2009 (1) SA 277 (SCA) at para 4, with reference to *Plascon-Evans Paints* above at 634 E – 635 C.

⁷ *Plascon-Evans* at 634 E-G, as reaffirmed in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290 D-G.

31. Controlling access is not, in every instance, a *sine qua non* for a person to be in possession of the site from which it conducts its business. Whether control of access is required is matter specific. In this matter, the kind of control that was envisaged by the parties when the applicant took possession of the site was that it would control access to the site, and so it is that kind of control or possession – one that entails controlling the access to the site – that the parties envisaged as sufficient when the applicant initially assumed and exercised occupation of the site for purposes of its business in terms of their contractual arrangement. There is a genuine dispute of fact that the applicant had such control of access as at 29 January 2024.
32. It is common cause that the applicant had until 29 January 2024 intermittent access to the site and that at all times the applicant retained, and still has, keys to an office situated on the site in which the applicant stored its documents. So, the applicant contends, it has possession to at least that extent and therefore is entitled to the spoliatory relief that it seeks. And so, the applicant’s counsel submits, this “possession”, as minimal as it may be is, and relying on *Bennett Pringle* above, is sufficient to warrant protection by way of the spoliation.
33. But, as I have already explained, it is not minimal protection that is protected by spoliatory relief in this instance but that kind of possession which would have been regarded as sufficient when the applicant took occupation of the site for purposes of its business. And, as I have found,

there is a serious factual dispute whether that kind of occupation existed as at 29 January 2024.

34. But assuming that the kind of 'possession', or perhaps more aptly described 'access' that the applicant enjoyed (being intermittent access to the site and to the office) but was then denied on 29 January 2024 is capable of protection by way of spoliatory proceedings, in the present instance the applicant does not seek the restoration of that form of 'possession' or 'access'. This appears from the formulation of the relief by the applicant in its notice of motion, which I have set out at the beginning of this judgment. The applicant seeks restoration of undisturbed possession of the entire site. And there is a *bona fide* dispute of fact whether the applicant had possession of the entire site as at 29 January 2024.

35. At least for purposes of this application this intermittent 'access' to the site and the retention of the office keys is not synonymous with control and therefore undisturbed possession of the entire site.

36. The following order is made:

36.1. the application is dismissed; and

36.2. the applicant is to pay the respondents' costs.

Gilbert AJ

Date of hearing: 28 February 2024

Date further submissions received: 6 March 2024

Date of judgment: 12 March 2024

Appearance for the applicant: Mr J Dorning (attorney)

Instructed by: MJD Law Inc

Counsel for the respondents: Mr S Viljoen

Instructed by: Pienaar Kemp Inc