

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2023/124355

- [1] REPORTABLE: YES
- [2] OF INTEREST TO OTHER JUDGES: YES
- [3] REVISED: NO

SIGNATURE

DATE: 10.04.2024

In the matter between:

LAPVENT PROJECTS (PROPRIETARY) LIMITED

Applicant

and

THE MINISTER OF POLICE

First Respondent

**THE COMMANDING OFFICER VEHICLE
IDENTIFICATION**

Second Respondent

**NATIONAL INTERVENTION UNIT, DURBAN SAPS
NATIONAL OFFICE**

Third Respondent

JUDGMENT

SUMMARY

Mandament van spolie – the applicant is the lessor of storage space on or within immovable property. It alleges that it is the spoliatus in respect of certain movable property placed in storage on the immovable property by a third party. The applicant was required to prove that it enjoyed “possession” of the third party’s movable property in the juridical sense. As a general proposition, a lessor in the circumstances of the applicant will not enjoy the requisite animus to possess the third party’s movable property, unless the lessee falls into arrears with its obligations and its movable property is attached pursuant to the perfection of the lessor’s hypothec.

PULLINGER AJ

- [1] The applicant applies, by way of urgency, for relief in terms of the *mandament van spolie*.
- [2] The facts are uncontested by virtue of the respondents’ failure to have filed papers or appeared in court.

- [3] The applicant is the owner of a motor vehicle described as an Isuzu Gigamax truck and trailer bearing registration numbers CF [...] GP and KP [...] GP respectively.
- [4] The applicant carries on business, *inter alia*, as the lessor of storage space. One of its lessees is Ama Jayy Trading.
- [5] On 5 September 2023 Ama Jayy Trading leased 50m² of storage space in or on the applicant's immovable property in terms of an oral agreement.
- [6] That day Ama Jayy Trading placed eight bags of building sand, 68 tonnes of manganese concentrate and 11 tonnes of ferrochrome into the let space.
- [7] On 25 October 2023, the third and fourth respondents attended at the applicant's premises and seized the applicant's truck and trailer and Ama Jayy Trading's manganese concentrate and ferrochrome, ostensibly, as part of an on-going investigation into the theft of certain goods in Kwa-Zulu Natal. The lawfulness of the third and fourth respondents' conduct is not an issue before me.
- [8] Pursuant to the service of this application, the State Attorney, on behalf of the respondents, tendered the return of the truck and trailer.

[9] Accordingly, the only issue in this application concerns whether the applicant enjoys *locus standi* to seek relief in terms of the *mandament van spolie* in respect of Ama Jayy Trading's goods.

[10] The classic formulation of the elements of the spoliation remedy have been stated repeatedly as follows:

“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. . . . All that the *spoliatus* has to prove is possession of the kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.”¹

[11] The *spoliatus* must, therefore, adduce facts that found the legal conclusion that enjoyed in “possession” in the juridical sense.

[12] Ordinarily, proving “possession” of the nature contemplated should not present difficulties to a *spoliatus* because the elements of “*corpus*” and “*animus*” appear from the facts surrounding the manner in which possession was exercised. But where, as in the instant case, the alleged *spoliatus* held the *res* in question on behalf of a third party, the question of *animus* comes more sharply into focus.

[13] *Aminus*, as an element of possession, has received substantial attention from academics and the courts alike. Whilst the authorities are not all *ad idem* when possession is derived from a personal right or a real right, that which is

¹ **Yeko v Qana** 1973 (4) SA 735 (A) at 739 D - H

uncontroversial is a *spoliatus* must establish it held the allegedly spoliated *res* for its benefit.² In each instance this is fact specific.³

[14] In the instant case, the applicant is a lessor of space in or on immovable property.

[15] A lessor of space in immovable property has no interest in any movable property brought onto the let property by the lessee because under a contract of lease, such as that alleged by the applicant, the lessor grants the lessee use and enjoyment of the let property.⁴

[16] The lessor would, in these circumstances, only have an interest if the lessee falls into arrears with its rental obligations and the lessor perfects its hypothec.

[17] Only once the lessor perfects its hypothec, would a lessor would enjoy the *animus* to hold the movable property its own benefit because the attached *res* serves as security for the lessee's debt.

[18] It is difficult to see how a lessor would enjoy the requisite *animus* at any other time as this would change the fundamental nature of a lease of immovable property.

² Willie *Principles of SA Law*, 7th ed at 196-7; **Mbuku v Mdinwa** 1982 (1) SA 219 (TK) at 222 H; **Mdlulwa and another v Gwija and others** 1992 (3) SA 776 (TK) at 778 B – E; **Barlow Motors Investments v Smart** 1993 (1) SA 347 (W) at 351 I

³ **Eskom Holdings SOC Ltd v Masinda** 2019 (5) SA 386 (SCA) at [15] and **Makeshift 1190 (Pty) Ltd v Cilliers** 2020 (5) SA 538 (WCC) at [20] to [41] dealing with possession of an incorporeal right, **Checkers Ltd v Pangbourne Properties Ltd** 1994 (1) SA 616 (W) at 620 E; **De Beer v Zimbali Estate Management Association** (Pty) Ltd 2007 (3) SA 254 (N) at [54] dealing with exclusive physical possession.

⁴ Maasdorp *et al*, *Maasdorp's Institute of South African*, volume 3, *The Law of Contracts*, 6th Ed at 174

[19] The applicant's position must be distinguished from a depository under a contract of deposit or a pledgee under a contract of pledge. In each of these instances the depository or pledgee is obliged to take care of the *res* deposited or pledged to it, as the case may be, and to return it in the same condition. In each of these cases, the depository or the pledgee holds the *res* concerned for its benefit.

[20] Seen through this prism, a lessor in the position of the applicant, a detentor, agent or *negotiorum gestor* is only the custodian of the goods on behalf of the possessor. As such, an agent, detentor or *negotiorum gestor* does not enjoy the possession over the *res* said to have been spoliated necessary to found relief in terms of the *mandament van spolie*.⁵

[21] On the facts of this matter, Ama Jayy Trading's goods were being stored on the applicant's premises. Whether these goods were in a separate lock-up facility in respect of which Ama Jayy Trading had a key and was freely able to access the storage facility is not stated on the papers. The nature of the control exercised by the applicant is not stated either and there is no indication how the applicant exercised the requisite degree of *animus*.

[22] The limited evidence adduced by the applicant is as follows:

"14. The Applicant also provides storage facilities for businesses who need rental space for their products at its place of business. On the 5 [sic] September 2023, as

⁵ **Agha v Sukan** [2004] 3 All SA 421 (D) at 428 *et seq*

business known as Ama Jayy Trading (“the Applicant’s customer”) rented 50 square meters of storage space from the Applicant and stored the customer’s product therein. The parties entered into a month-to-month contract in terms of which the customer will pay a monthly rental amount for the storage of its goods at a cost...”

[23] In the circumstances the application for the return of Ama Jayy Trading’s goods must fail.

[24] Finally, on the issue of costs. These should follow the event up until the date of the State Attorney’s tender.

[25] In the result, I make the following order:

1. The respondents are directed to restore the applicant’s possession of the Isuzu Gigamax truck and trailer bearing registration number CF [...] GP and KP [...] GP forthwith.
2. The first respondent is to pay the costs of this application up until the date of the tender to return the Isuzu Gigamax truck and trailer bearing registration number CF [...] GP and KP [...] GP on the scale as between attorney and client.

A W PULLINGER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 10 April 2024.

DATE OF HEARING: 4 DECEMBER 2023

DATE OF JUDGMENT: 19 MARCH 2024

APPEARANCES:

COUNSEL FOR THE APPLICANT:

C J WELGEMOED

ATTORNEY FOR THE APPLICANT:

BESONG ATTORNEYS INC

COUNSEL FOR THE RESPONDENTS:

NO APPEARANCE

ATTORNEY FOR THE RESPONDENTS:

NO APPEARANCE