IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Reportable

CASE NO.: 3309/2015

In the matter between:

SHELVING MAN (PTY) LTD	**Applicant**
And	
SAYED DAWOOD	**First Respondent**
IMRAAN ADAM	**Second Respondent**
AYUB VALLY	**Third Respondent**

JUDGMENT

Heard: 20rd April 2015
Delivered: 20th May 2015

JEFFREY AJ:

[1] This is a spoliation application. The applicant approached this court claiming restoration of possession of its business premises which it alleged had been despoiled by the respondents.

[2] In addition, the applicant also claimed interdictory relief when the application was first instituted against all the respondents and others acting through them from unlawfully depriving it of possession of its business premises.

[3] When this matter came before me Mr *Potgieter*, who appeared with Mr *Naidoo* for the applicant, applied to amend the initial relief claimed. Mr *Gajoo*, who appeared with Mr *Edy*, for the first respondent did not object to this amendment being granted. In terms of this amendment the applicant: (a) abandoned the interdictory relief that was initially sought by it; and (b) confined the amended relief for a spoliation order to the first respondent only.

[4] The essential characteristic of the remedy of spoliation - the *mandament van spolie* - is, of course, that it is a possessory remedy. It is only the possession of a party that is protected. The underlying *rationale* of the remedy is that no person is allowed to take the law into his or her own hands and to unlawfully dispossess another of possession of property. If this occurs, the court will summarily restore the *status quo ante* without enquiring into or investigating the merits of the dispute to determine a party's right to ownership or other right to the property in dispute. It was said in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA):

"Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor — a fraud, a thief or a robber — is entitled to the *mandament*'s protection. The principle is that illicit deprivation must be remedied before the courts will decide competing claims to the object or property."

[5] The requirements for the *mandament van spolie* were restated in *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) 67B-D at para [19] as follows:

"The historical background and the general principles underlying the *mandament van spolie* are well established. Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant — that is why possession by a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute."

[6] But there is a qualification to the general rule regarding spoliation. That is, if an applicant goes further than claiming spoliatory relief – and claims a substantive right to possession of the spoliated thing as well - he in effect forces an investigation of the issues relevant to the further relief that he claims: see *Minister of Agriculture & Agricultural Development v Segopolo* 1992 (3) SA 967 (T) 971B;

Street Pole Ads Durban (Pty) Ltd v Ethekwini Municipality 2008 (5) SA 290 (SCA) 295C-E at para [15] and *Ivanov supra* 78C-E at para [25].

[7] Mr *Gagoo* submitted that this qualification was applicable in this matter because the applicant had gone further than merely claiming spoliatory relief on two grounds. First, so Mr *Gagoo* argued, in the amended order prayed, the use of the word "its" in the phrase: "… restore possession to the applicant *its* business and *its* business premises …" (my emphasis), meant that the applicant conveyed that it had a substantive right to the business and the business premises. This, so his argument continued, introduced a dispute about the applicant's title to the business and the business premises and, therefore, took the determination of this application beyond the confines of a *mandament van spolie*. Second, Mr *Gagoo* argued, an enquiry into the merits of the dispute to determine the parties right to ownership or other right to the property in dispute was permissible because the applicant had initially claimed interdictory relief and the mere fact that this was later abandoned, was irrelevant. The die was cast - to echo the idiom used by Mr *Gagoo* - at the outset when this application was instituted and, thus, a consideration of the merits was permissible despite the later abandonment of the interdictory relief.

[8] There is no merit in these propositions.

[9] First, the use of the possessive pronoun “its” in the amended order prayed does not mean that the applicant is claiming a substantive right to possession to the business and to the business premises. Indeed, the meaning Mr *Gajoo* sought to ascribe to this word does not appear from the context in which it was used, its apparent purpose or the factual background of the applicant’s case gleaned from a holistic reading of the applicant’s allegations in the papers before me. The construction sought to be placed on the word ‘its’ by Mr *Gagoo* is linguistically and contextually untenable.

[10] Mr *Gagoo’s* second submission that the applicant’s abandonment of the extra interlocutory relief was irrelevant and an enquiry into the merits was still permissible, also cannot be sustained. This submission is based on a misunderstanding of the underlying *rationale* underlying the qualification to the general rule; namely, if an applicant goes further than only to claim spoliatory relief, he in effect forces an investigation of the issues relevant to the further relief he claims. That principle is well-established. But that does not mean that if the further relief claimed is abandoned by the applicant *before* the application is heard by the court, then the parties’ substantive rights to possession of the thing concerned must be considered by the court. It may be otherwise if an applicant persists with the further relief claimed before the court. Goldstein J explained in *Minister of Agriculture & Agricultural*

Development v Segopolo 1992 (3) SA 967 (T) 971E-G that merely by asking for more than spoliatory relief does not disqualify an applicant from invoking the *mandament van spolie* "… since our law contains no such formalism … (but) if an applicant asks for the extra relief *and persists in it at court*, the court has perforce to adjudicate upon the extra relief and the respondent's allegations in regard thereto, and the result of this may indicate that the applicant has no right to the thing of which he was despoiled, which in turn will deprive the applicant of his entitlement to the restoration of the *status quo ante*." (My emphasis). With respect, this passage is correct in principle. Where the extra relief is not persisted with at court by the applicant, as *in casu*, the issue concerning such relief is not before the court. The merits, therefore, of whether or not the applicant's possession was wrongful is irrelevant.

[11] The issues thus limited, the applicant would be entitled to a *mandament van spolie* restoring the *status quo ante* upon proof of two requirements – first, that the applicant was in possession of the business and the business premises. Second, that the applicant was wrongfully deprived of its possession.

[12] It is common cause that since 2014 the applicant has conducted a shelving business from the premises. It is also common cause that on 23 March 2015 the applicant was in possession of the

business and the business premises. The first requirement, therefore, has been met. This was properly conceded by Mr *Gagoo*.

[13] There is a dispute of fact as to precisely what occurred on 23 March 2015 and whether or not the applicant was wrongfully deprived of its possession on that day.

[14] The applicant's version is that is that six adult males who were unknown to its director, Mr Ashraf Yusuf Omar, arrived together with the third respondent at the applicant's business premises. They confronted him in the administrative section and took him into the private office of his co-director, Mr Mohamed Farouk Adam. They closed the door and questioned him in an aggressive tone about rental payable in respect of the business premises, the vehicles used by the applicant to conduct its business and other matters regarding money they alleged belonged to the late Mr Abdul Kader Adam. Their conduct and demeanour terrified him and he was afraid that harm would come to him if he failed to co-operate with them. They aggressively told him to answer their questions and alleged that the business belonged to the late Mr Adam and waived certain documents at him. The third respondent used his cell phone to telephone the second respondent who then came into the office. The second respondent questioned Mr Omar about money that belonged to

his late brother and which he alleged Mr Omar had knowledge of this. The second and third respondent and the group that accompanied them decided that Mr Omar should hand over the applicant's business to them. Mr Omar did not want to comply but because he was alone and afraid he said he consented to do so. The first respondent then arrived. Mr Omar says that it was clear to him that the first, second and third respondents were acting together and had carefully planned and orchestrated the dispossession of applicant's business with the assistance of the six men. Mr Omar says that he had no alternative but to hand over the keys to the applicant's business to the three respondents. He also signed a document under duress and out of fear, as he put it, stating that the first respondent had received the keys to the applicant's business and a cell phone and recording that this was done on behalf of the landlord who was the mother of the beneficiaries and children of the late Mr A K Adam. It is common cause that the first respondent is married to the widow of the late Mr A K Adam.

[15] The first respondent's version is that the applicant was not wrongfully deprived of its possession because this was done with Mr Omar's consent - voluntarily and without demur by him – when he was handed the keys and cell phone by Mr Omar as well as when Mr Omar placed his signature to the document. If this is so, then the second requirement entitling the applicant to a

mandament van spolie restoring the *status quo ante* would not be established and the application would have to fail.

[16] There is a dispute of fact on the papers with regard to whether or not the deprivation of the applicant's possession was wrongful.

[17] It is trite that where there is a genuine dispute of fact in a claim for final relief – and a spoliation application is one where the relief is final in nature - the respondent's version must be accepted. But, it is equally trite that there is an exception to this general rule. And this is that a dispute will not be real, genuine or *bona fide* if the respondent's version is so far-fetched or so untenable that the court is justified in rejecting it on the papers. A real, genuine and *bona fide* dispute of fact can exist only where a court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed: see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635C read with *Wrightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) 375D-G at paras [12] and [13]. As Cameron JA (as he then was) pointed out in *Fakie NO v CCII Systems (Pty) Ltd* v 2006 (4) SA 326 (SCA) 324F-348C at paras [55]-[56], it is in the interests of justice that unvirtuous respondents should not be permitted to shelter behind patently implausible versions on affidavit or bald denials. Cameron JA added, in para [56], that the practice in this

regard has become more robust but he cautioned that "… the limits remain, and however robust a court may inclined to be, the respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so-far fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence." The correct approach is not to evaluate the competing versions of either side since the issue here is not which version is the more probable but whether or not the first respondent's version is so far-fetched and improbable that it can be safely rejected on the papers: see *National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA) paras 21-22 and cf *PMG Motors Kyalami (Pty) Ltd and Another v FirstRand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA) 644E-H at para [23] fn 22.

[18] I am not persuaded that the first respondent has seriously and unambiguously addressed the disputed wrongfulness of the applicant's dispossession in the answering affidavit. It is common cause that the applicant was in possession of the business and the business premises at the time. It is also undisputed that Mr Omar was approached by the second and third respondents accompanied by six men. It is also undisputed that the first respondent, who coincidently was working nearby, was called on his cell phone by one of these men and he then joined the group. The first respondent's own version is that the keys to the business

and the cell phone were handed over to him and that a document was signed by Mr Omar recording that this was done on behalf of the landlord who was the mother of the beneficiaries and children of the late Mr A K Adam. It emerges clearly from the first respondent's affidavit that there is a family dispute about who is entitled to the applicant's business and the business premises. Indeed, he goes so far as to suggest that the court will be approached to resolve this dispute, if need be. That is, of course, what ought to have been done. The first respondent and his companions acted wrongfully by resorting to self-help by arriving *en masse* at the applicant's premises and demanding that Mr Omar hand over the business and the premises. A group of men intent on extracting the business and its premises from the applicant is obviously nothing short of intimidatory conduct that was designed to instil fear in Mr Omar and induce him to sign the document against his will. There is no explanation by the first respondent as to why it was necessary for a gang of six men to accompany the first, second and third respondents to the premises. In the absence of an explanation, the only inference that can be drawn is that this was to harass and intimidate Mr Omar and cower him into submitting to the handing over the applicant's business and premises to the first respondent. It is immaterial whether or not the first respondent was acting on behalf of the widow of the late Mr A K Adam or not. Self-help is not countenanced by the law and, indeed, the remedy of the

mandament van spolie is there, as Thirion J succinctly said in *Zulu v Minister of Works, KwaZulu, and Others* 1992 (1) SA 181 (D) 187G-H "… to restore the factual possession of which the *spoliatus* has been unlawfully deprived." There can be no doubt on a *conspectus* of the first respondent's allegations and the circumstances in which the dispossession took place as outlined above, that the first respondent's version that Mr Omar consented to the applicant's business and its premises being handed over is so far-fetched and clearly untenable that I am confidently able to reject it on the papers as completely lacking credence.

[19] I accordingly find that the applicant was wrongfully deprived of possession of its business and its business premises by the first respondent.

[20] That being so the applicant has satisfied the requirements for the grant of a spoliation order. I accordingly grant an order that:

1. The first respondent and/or all other persons acting through or for the first respondent as agents, employees and/or servants of the first respondent be and are hereby directed to forthwith restore possession to the applicant its business and its business premises described as Shelving Man (Pty) Ltd situated at 505/507 Umgeni Road, Durban, KwaZulu-Natal.

2. In the event of the first respondent failing alternatively refusing to

comply with Order 1 *supra*, the Sheriff of this court be and is hereby authorized to give immediate effect to Order 1 *supra*.

3. The Sheriff of this court be and is hereby directed to utilize the services of the South African Police Service and a locksmith insofar as may be necessary to give effect to Order 1 *supra*.

4. The first respondent is directed to pay the costs of this application, such costs to include the costs of two counsel.

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JEFFREY AJ

Appearances:

Applicant's counsel	:	Mr A E Potgieter SC (with him Mr D D Naidoo)
Applicant's attorneys	:	Sabeer Joosab Attorneys Ref. Mr Joosab/2S214 Tel. 031-207 8337 E-mail shabeer@lantic.net
First respondent's counsel	:	Mr V Gagoo SC (with him Mr C B Edy)
First respondent's attorneys	:	Miriam Cassim & Associates Tel. 031-702 2786
Date of hearing	:	20 April 2015
Date of judgment	:	20 May 2015