



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 117/18

In the matter between:

**AWELANI REXON MUHANELWA**

Applicant

and

**FLOYD GCINGCA**

Respondent

**Neutral citation:** *Muhanelwa v Gcingca* [2019] ZACC 21

**Coram:** Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

**Judgment:** Froneman J (unanimous)

**Decided on:** 17 May 2019

**Summary:** Jurisdiction — no constitutional issue or arguable point of law of general public importance — not in interests of justice to grant leave to appeal

Spoliation order — legal requirements for owner to regain possession — impact of spoliation order on owner's right of access to housing

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**ORDER**

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On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. The application for leave to appeal is dismissed with costs.

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## JUDGMENT

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FRONEMAN J (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

[1] In the end this matter turns on a building dispute that does not involve constitutional or other legal matters of general public importance. The application for leave to appeal must be dismissed. “In the end”, only because there seemed to be a possibility of wider issues being involved.

[2] The respondent (builder) agreed to do building work for the applicant (owner) on the disputed property (property). While the building work progressed the owner vacated the property and the builder took control and occupation of it. The work was done, but not to the satisfaction of the owner. He sought to retake possession with the consent of the builder, but this was refused. The owner then took matters in his own hands, obtained an “occupation certificate” and moved back onto the property with his family. This resulted in a successful spoliation application by the builder in the High Court,<sup>1</sup> against which the owner sought leave to appeal, ultimately to this Court after his application for leave to appeal was dismissed by both the High Court and Supreme Court of Appeal.

[3] Directions were issued calling for written submissions on two issues:

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<sup>1</sup> High Court of South Africa, Gauteng Local Division, Johannesburg (High Court).

- (a) What will be legally required for the owner to regain possession of the property after the spoliation order is given effect to?
- (b) Does the spoliation order impact the owner's right of access to housing and result in the permanent dispossession or eviction of the owner?

[4] The builder's answer was short and sweet: the owner can pay him the outstanding monies owed for the building work, or he can bring court proceedings to determine the dispute about the monies owed, together with an application for substitution of the builder's lien by way of security pending the outcome of the legal proceedings.

[5] The owner's response was more roundabout. It involved an argument that the spoliation order should not have been granted because the provisions of PIE<sup>2</sup> applied. This is not strictly an answer to the questions posed in the directions. There is, in any event, artificiality in the submission that the owner here was an unlawful occupier under PIE. And this Court has approved that it is conducive to clarity to retain the "possessive focus" of the remedy of spoliation and keep it distinct from constitutional relief.<sup>3</sup> It is only when spoliation proceedings seek to serve as the judicial foundation for permanent dispossession or eviction in terms of section 26(3) of the Constitution that alarm bells start ringing.<sup>4</sup> That is not the case here.

[6] This is a commercial dispute between private parties. The owner may regain possession by ordinary legal means in the manner suggested by the builder. There is nothing on record to suggest that he is not in a financial position to do so. He deliberately moved back onto the property after spoliation proceedings were brought.

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<sup>2</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

<sup>3</sup> *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC) at para 29.

<sup>4</sup> Section 26(3) of the Constitution reads as follows:

"No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

These are additional factors why it is not in the interests of justice to grant leave to appeal.

[7] The following order is made:

1. The application for leave to appeal is dismissed with costs.

For the Applicant:

S L Mohapi instructed by KMNS Inc

For the Respondent:

R J Stevenson instructed by Roland T  
Eloff Attorneys