



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 135/2023

Heard on: 26 October 2023

Delivered on: 14 November 23

In the matter between:

PANKI MBONGOZI

Applicant

And

MAC MKUNYANA INVESTMENTS (PTY) LTD

Respondent

JUDGMENT

MJAME AJ

[1] On the 23rd January 2023 the applicant launched an urgent application seeking an order restoring possession of her property from the respondent. The matter served before me

as a fully-fledged opposed application on the 26 October 2023, all the papers including heads of arguments having been filed.

The matter had been removed from the roll of urgent matters for hearing on 24 January 2023. Thereafter, it was no longer treated as urgent.

[2] The Respondent opposed the application on the basis that it did not support a relief of *mandament van spolie*.

[3] The relief sought appears from the notice of motion, which is couched in the following terms:-

(a) Declaring the Respondent's action /conduct, to wit, keeping, using and not releasing the property of the Applicant at Erf 400 No. 29 Nelson Mandela Drive, Mthatha, unlawful, wrongful and unconstitutional.

(b) That the Respondent and or any person(s) acting in concert with them being interdicted and restrained from keeping , using and not releasing the property and equipment of the Applicant at Erf 400, No 29 Nelson Mandela Drive , Mthatha.

(c). That the Respondent is ordered to return back to the Applicant the equipment, property that is in his possession at Erf 400, No 29 Nelson Mandela Drive , Mthatha as listed on annexure **PCM6** of the founding papers.

THE FACTUAL BACKGROUND

[4] On the 1st April 2020 the Applicant and the Respondent entered into a lease agreement, in terms of which the Applicant leased business premises from the respondent at agreed monthly rentals. The lease would endure for some time until 31st March 2025. However, on 28 September 2022 the Applicant wrote a letter to the Respondent cancelling the lease agreement. The reason for the cancellation was for the applicant's breach to pay rentals

strictly in terms of the lease agreement. The respondent agreed. Upon termination of the lease, the respondent asserted a tacit hypothec over movable properties that had been brought by the applicant onto the property during the subsistence of the lease.

THE POINTS IN LIMINE

[5] Aggrieved by the respondent's refusal to release the properties without full payment of unpaid rentals, the applicant raised two points *in limine* stating that the applicant lacked *locus standi* and that the relief sought could not be granted due to the existence of irresolvable disputes of fact.

[6] Thus, the points *in limine* must be determined first¹. The applicant's *locus standi in judicio* must be set out in the founding affidavit². She stated on affidavit that as the Lessee she has *locus standi in judicio* to approach a court of law for the relief sought. Of significance in this regard is the lease agreement (PCM 2 Annexure A) between her and the respondent that is attached to the founding affidavit. The parties appearing in the document are the applicant and respondent, as the Lessee and Lessor respectively.

[7] There is no real dispute of fact in this matter. The common cause fact is that the Applicant and Respondent entered into a lease agreement. Upon termination of the lease agreement, the Applicant left the moveable properties in the business premises of the Respondent. Based on these facts, the second point *in limine* is not proved.

[8] Accordingly, the Respondent's *points in limine* regarding the applicant's *locus standi* and dispute of fact are dismissed.

¹ WATT V SEA PLANT PRODUCTS 1998 (4) ALL SA 109 C @113-114

² .See Commissioner of Inland Revenue v Van Heever 1999(3) SA 1051(SCA) @ PAR.10.

THE MERITS OF THE APPLICATION

[9] The issue to be decided is whether the Applicant has discharged the *onus* that the Respondent's refusal to release the moveable properties of the Applicant amounts to spoliation.

[10] It is trite law that the maxim of *mandament van spolie* is directed at restoring possession of a thing to a party that has been unlawfully dispossessed thereof by the other, irrespective of who between them is the owner of a thing. In a constitutional democracy the doctrine is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands³. In *Ngqukumbana vs Minister of Safety and Security and Others*⁴ Madlanga AJA (as he was then) said:

“ The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the *maxim spoliatus ante omnia restituendus est* (the spoiled person must be restored to possession before all else).”

[11] To succeed in this application the Applicant must allege and prove on balance of probabilities that:

- (a) She was in peaceful and undisturbed possession of the property,
- (b) The Respondent deprived her of the possession of the property and
- (c) The deprivation occurred without her consent.

[12] The undisputed facts of this matter demonstrate that when the Applicant left her moveable properties at the respondent's premises in October 2023 the lease had been terminated. Thereafter, the Respondent addressed letters to the Applicant, **Annexures “PCM 5” and “PCM6”**, informing her that there were arrear rentals that she had not paid and that she would not be allowed to remove her properties from the shop as they would be sold to

³ *Tswelofele Non-Profit Organisation & Others vs City of Tshwane Metropolitan Municipality & Others* [2007] ZA SCA 70

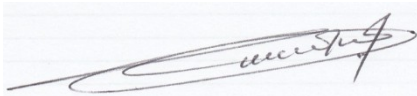
⁴ [2014] ZACC 14

recoup the unpaid rentals. This clearly shows that the Applicant had consented to place her properties at the disposal of the Respondent as early as April 2020 when she entered into the lease agreement. The Applicant lost possession of the properties on the day of vacating the business premises. She cannot be said to say that she was in peaceful and undisturbed possession of the moveable properties. The Responded, in turn, is in possession of the moveable properties based on tacit hypothec over them. The Applicant was not unlawfully deprived of possession of her properties.

[13] In light thereof, I am of the view that the Applicant has not met the requirements of *mandament van spolie*. The refusal by the Respondents to hand over possession of the moveable properties to the Applicant does not amount to spoliation. The Respondent has achieved substantial success that should entitle it to the full costs of the application notwithstanding the dismissal of the points *in limine*.

[14] In the result, the following order is made:

1. The application is dismissed.
2. The Applicant to pay the costs of the application.



P. C. N. MJAME

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant

Adv. Badli *instructed by*

Potelwa & Company

No. 43 Wesley Street

MTHATHA

For the Respondent

Adv . Hobbs *instructed by*

Drake Flemmer & Orsmond Inc.

T H Madala Chambers

14 Durham Street

MTHATHA