

CCA/0043/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

LEBOHANG PHOOKO

APPLICANT

AND

J & M PROPERTIES (PTY) LTD

RESPONDENT

JUDGMENT

Coram : L.A. Molete J
Date of hearing : 30th April, 2015
Date of Judgment: 29th July, 2015

SUMMARY

Spoliation Proceedings – Requirements thereof – Applicant to be in undisturbed possession – Evidence on affidavits considered – Applicant not entitled to confirmation of the rule – Application dismissed.

ANNOTATIONS

CITED CASES

Matime and Others V Moruthoane LAC 1983-1989

**Cabinet of the Transitional Government for the territory of West Africa v
Eins1988(3) SA 369**

Commander LDF & Another V Matela 1999-2000 LLR13

Mbangamthi V Sesing-Mbanganthi LAC 2005-2006 295

**Scoop Industries (Pty) Ltd V Lang Laagte Estate & GM Co. Ltd 1948(1)
SA 91**

Mbangi & Others V Dobsonville City Council 1991(2) SA 330

STATUTES

BOOKS

**Herbstein and Van Winsen, “The Civil Practice of the Supreme Court of
South Africa (4th ed) Juta & Co**

Harry Silberbeg “The Law of property” Butterworths (1975)

[1] The Applicant applied to this Court for the following relief:

“1. Dispensing with the rules of court concerning notices and service of process on account of the urgency of the matter.

2. A rule nisi returnable on a date and time determinable by the above honourable court calling upon Respondent to show cause if any why the following order shall not be made final, namely;

“2.1 Interdicting and restraining Respondent from interfering with Applicant’s development of his site as held by lease number **12281-010, Hoohlo Industrial, Maseru** except by due process of law;

- 2.2 Directing Respondent to remove its security guards, vehicles, plant, machinery, fencing and apparatus or other property from the aforesaid property;
- 2.3 Directing Respondent to pay costs on an attorney and client scale and;
- 2.4. Granting Applicant further/ and or alternative relief.”

- [2] The Court granted an interim order of interdict in terms of Prayers 1 and 2.2 to operate with immediate effect. The matter was opposed and finally ready to be heard after a number of postponements to complete the filing of papers and heads of argument.
- [3] The application was moved and granted on the basis that at the time there was a matter before this court in terms of which J & M Properties (Pty) Ltd was involved in a dispute with one **Masitise Seleso** concerning this property. In that dispute **J & M Properties** (Pty) Ltd sought to compel Respondent to either transfer the disputed site to it, or refund the sum of M400,000-00 allegedly paid for the plot.
- [4] The present Applicant claimed title to the same plot, and alleged that Respondent had despoiled him and forcibly removed him from the site and placed its own security guards, vehicles and machinery on the said property.
- [5] Applicant accordingly moved this application in the form of *mandament van spolie*. Indeed at the hearing of the matter applicants counsel maintained the nature of the application was for a spoliation order.

[6] The Respondent raised a number of objections *in limine* to the application. They consisted of non-joinder, lack of *locus standi* and abuse of *ex parte* procedure. There was a number of authorities to support the points in *limine* including:

1. Matime and Others v Moruthoane¹

2. Cabinet of the Transitional Government for the territory of West Africa v Eins²

3. Commander LDF and Another v Matela³

[7] The authoritative text of **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa⁴** was also used as authority for where *ex parte* application procedure may be used.

[8] The approach of this Court to the matter is however different. It is necessary first of all to establish whether there was spoliation in order to avoid dealing with the matter sporadically. If the essential elements for a spoliation order are not satisfied, the court will have to dismiss the matter.

[9] In an application of this nature, it is necessary to allege and prove that a person who is entitled to legal possession of a thing or right has been unlawfully ousted.

Mbangamthi v Sesing-Mbanganthi⁵

¹ LAC 1983-1989

² 1988(3) SA 369

³ 1999-2000 LLR13

⁴ 4th edition Juta & Co P367

⁵ LAC (2005-2006) 295 at 296

[10] In his Book, “**The Law of Property**”, the learned author **Harry Silberberg**⁶ puts it as follows;

“A possessor who has been deprived; or despoiled of his possession by force, fraud or stealth, may apply to court by *mandament van spolie* for an order directing to return the thing to him immediately.....all that the applicant must prove is that he was in possession and that he was ousted illicitly from such possession-----
----the first question in every spoliation case must, of course, be whether the applicant was in possession of the thing which he claims should be returned to him.”

[11] **Scoop Industries (Pty) Ltd v Langlaagte Estate & GM Co. Ltd**⁷ make the point clearer, that there must be clear proof of possession and an illicit deprivation before the order should be granted. It must be shown that the Applicant had had free and undisturbed possession in the physical sense, then applicant will be entitled to be restored in possession *ante Omnia*.

[12] The same principle is stated in the case of **Mbangi & Others v Dobsonville City Council**⁸ and that case goes further to emphasize that the remedy is available only where there is “peaceful and undisturbed” Possession at issue;

⁶ Page 86

⁷ 1948 (1) SA 91 at 98-99

⁸ 1991 (2) SA 330

“in other words, the possession sought to be protected or restored must be possession which clearly exists, which is sufficiently firm or established The justification for a spoliation order would be lacking where applicant for such order was still in the process of trying to wrest possession from the respondent.”

[13] These are well established principles which are succinctly set out in the Respondents Heads of Argument by **Adv Chobokoane**.

[14] I also agree with Counsel for the applicant **Adv. Ntlhoki KC**, that there is no final determination of the parties rights in these proceedings, and whether possession is *bona fide* or *mala fide* may not be relevant as the main consideration for the court is to stop resort to self help by the party claiming unlawful deprivation.

[15] In this case before me, It is apparent that the seller of the plot had sold it to both parties. The applicant has not attached any proof that he acquired and paid for the property, while the Respondent in the answering affidavit has attached a Deed of Sale and alleged that full payment was made. It is common cause that the lease was still in the name of the seller.

[16] Applicant states in Paragraph 7 of his founding affidavit (which is the only part which is meant to sustain the application) that;

“In an attempt to take occupation of the aforesaid plot after paying the agreed consideration (value) demanded by the owner; I was met with resistance from Respondent’s security

guards on the plot with instructions at gunpoint to stop me and my hired construction to start developing this land belonging to me. This was on 2nd to 5th December 2013 when I met this resistance.”

- [17] According to the Deed of Sale attached to the answering affidavit, the transaction between the owner and Respondent was done and signed on the 9th November 2010 by seller and purchaser with two witnesses for each party.
- [18] It is clear from the affidavit of the applicant that he never had any peaceful and undisturbed possession at any point in time. The only possible inference to be made from his statement is that when he sought to take possession he was prevented by respondent’s security guards who were already on the plot, presumably on respondent’s instructions.
- [19] Furthermore, if it was in December 2013, when he met such resistance; it would seem that the Respondent had already purchased the plot in November 2010 according to the attached Deed of sale. Then at some point decided to place security guards on the premises. The very same guards who then resisted or blocked applicant’s entry to the plot. In other words the application is made in the process dislodging Respondent from its possession or to wrest possession from Respondent. This is not acceptable.
- [20] In the circumstances the applicant has failed to show that he is entitled to the relief sought and the court has no other option but to dismiss the application.

[21] The result is the following order;

- (a) The Rule is discharged and the application is dismissed.
- (b) The costs of the application are awarded to Respondent.

L.A. MOLETE
JUDGE

For the Applicant : Adv. M.Nthloki KC

**For Respondent : Adv. A.M. Chobokoane (Instructed by
V.M. Mokaloba attorneys)**