IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/131/2019**

In the Matter Between:-

YU QUANG **APPLICANT**

AND

HATA-BUTLE (PTY) LTD **1ST RESPONDENT**

COMMISSIONER OF POLICE **2ND RESPONDENT**

OFFICER COMMANDING ROMA POLICE STATION **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

JUDGMENT

CORAM **: M. A MOKHESI J**

DATE OF HEARING **:06TH MAY 2019**

DATE OF JUDGMENT **:05th AUGUST 2019**

SUMMARY:

Civil Practice – application for Mandament van Spolie – applicant failing to prove possession – suitability of spoliation proceedings to enforce contractual rights, considered – Rule discharged and application dismisses with costs.

Annotations:

BOOKS : Neethling Potgieter Visser *Law of Delict 3ed (1999)*

STATUTES : *High Court Rules 1980*

CASES : **:***Tśehlana v National Executive Committee of LCD and Another LAC (2005 – 2006) 267*

Plascon – Evans Paints v Van Riebeeck Paints 1984 (3) SA 623

ATM Solutions CC (PTY) Olkru Handelaars CC and Another (739/07) [2008] ZASCA 153: 2009 (4) SA 337 (SCA)

Mbangamthi v Mbangamthi LAC (2005 – 2006) 295

Ntai v Vereeniging Town Council and Another 1953 (4) SA 579

AD

Griesel v Liebenberg (201/2007) [2008] ZAFFSHC 39 (24.04.2008)

PER MOKHESI J

[1] INTRODUCTION

The applicant had approached this court on urgent basis seeking the following orders:

> "1. Dispensing with the normal periods and forms and forms due to the urgency of this application hereof.
>
> 2. RULE NISI be issued calling upon the 1st respondent to show cause if any why the following orders should not be made final and absolute on the date and time to be fixed by this Honourable Court.
>
> a) Granting applicant an order for restoration of the *status anti quo* by restoring his occupation of the filling station situated at Roma opposite National University of Lesotho, with the assistance of the applicant or her agents, failing which the deputy sheriff be authorized to break the locks and open the doors in order to restore possession to the applicant.
>
> b) Directing the Commissioner of the Police through Officer Commanding of Roma Police to assist the Deputy Sheriff in implementing prayer 2(a) and (b) above."

On the return day this court was informed that the interim order which was issued was not obeyed, but the respondent had opposed both the main application and contempt application, and duly filed opposing papers in regard thereto. But due to the fact that

contempt application was defective for not citing the individual alleged to have disobeyed the order of this court, I determined that I proceed to deal with the main application, that is, the spoliation application. After hearing arguments I discharged the rule and dismissed the application with costs. I intimated that written reasons for my decision will be provided in due course. What follows below are those reasons.

[2] Factual Background:

The applicant is a Chinese male businessman trading as BAFANG. He alleges that he had been on peaceful and undisturbed possession of the Filling Station situate at Roma Mafikeng opposite the National University of Lesotho, at all material times until 18th April 2019 when he was despoiled of the possession of the said filling station "when respondent unlawfully using force broke into the place and placed armed people with guns to illicitly take occupation of the place without due proceeded of law." The applicant avers that he was in occupation of the said filing station on the strength of a sub-lease agreement with an entity known as Lesotho Observatory Foundation (L.O.F), which was concluded on the 10st April 2019. The issue of possession is hotly disputed by the 1st respondent.

[3] In opposition, one Stefan Carl Buys deposed to an affidavit on behalf of the 1st respondent. The authority of Buys to defend these

proceedings is not in dispute. He prays for the dismissal of this case on the following grounds:

1. The matter involves a commercial dispute which is justiciable before the Commercial High Court.

2. The applicant is guilty of material non-disclosure of facts. He alleges that the applicant should have disclosed that he was sued to vacate the shop in the complex which was previously occupied by Pep stores. That the applicant's lawyers intentionally did not bring to the attention of this court the judgment of my Brother Moiloa J dated the 25th March 2019 in CIV/A/18/17 in which the court found that the filling station premises belongs to the 1st respondent since the property was registered in its names. Mr. Buys vehemently denies that the applicant was ever in occupation of the said filling station as the premises on which the filling station is situated does not belong to LOF, but to the 1st respondent. He alleges that in 2014 the 1st respondent's names were fraudulently removed from the record of the Registrar of Companies, and consequently, the records were forged to reflect new directions and shareholders of the 1strespondent. Consequently the entity which one Mr. Metsing Khoete and his partner Mr. Clark Mafitoe and other individuals had purported to be its shareholders and directors under the letterhead and names of the 1st respondent instituted action against all the tenants who were in occupation of the complex in 2016, inclusive of the occupant of the filling station (Felix Petroleum (PTY) Ltd).

[4] Felix Petroleum was successful in resisting ejectment in the Magistrate Court, against the entity using the 1st respondent's names. The plaintiff "Hata-Butle" appealed the order. On 25th March 2019, Moiloa J dismissed the appeal on the basis that the appellant failed to prove ownership as Mr. Metsing could not prove that he was a shareholder of the entity known as "Hata-Butle" which sought to eject Felix Petroleum (defendant). Mr. Buys avers that the applicant could not have been in occupation of the said filling station as during ejectment litigation between the occupants and the "Hata-Butle" entity, Felix Petroleum placed the locks on the property, and immediately took occupation thereof in terms of the new lease agreement following the conclusion of the matter in CIV/APN/18/17 on 25th March 2019.

[5] Discussion and the Law

While I agree that this matter involves contractual rights, my view is that this application is essentially about a matter which is justiciable before this court – *mandament van spolie*. Mr. Mpaka sought to exclude jurisdiction of this court on the basis of Rule 5(1)(j) of **High Court (Commercial Division) Rules 2009** which provides that the business of Commercial Court includes "all delicts committed in a commercial context." He argued that spoliation is a delict. I think that this view is misplaced and ignores the legal definition of the term "delict". According to the learned authors **Neethling Potgieter and Visser *Law of Delict 3ed (1999);*** a

delict is wrongful and culpable act of a person which causes harm to another. All five requirements or elements, namely; an act, wrongfulness, fault, harm and causation must be present before the conduct complained of can be classified as a "delict." However, given the nature of spoliatory relief, it can hardly be argued that the element of fault or causation (i.e legal and not factual) is present in spoliation. It will be well – nigh difficult if not impossible to prove these two elements in spoliation-based claims given that almost invariably, when the owner of property recovers it from whoever is possessed of it does so without the necessary fault on his part. There is dearth of authority on this aspect, but in ***Ntai v Vereeniging Town Council and Another 1953 (4) SA 579 AD 579 at 588*** Van den Heever JA made it clear that the common law does not recognize a delictual claim for damages based on the act of spoliation. At 588C – D the following was said:

> "But it does not follow, as Mr. Lakier seemed to assume, that self-help exercised by an owner to recover the possession of property unlawfully withheld from him is in itself an actionable wrong automatically entitling the person dispossessed to damages…"

This decision was followed in ***Griesel v Liebenberg (201/2007) [2008] ZAFSHC 39 (24 April 2008).*** In this case, the dispute was about the horse which the appellant had removed from the respondent's possession on two occasions without the latter's

consent. On both occasions the respondent managed to secure its return by successfully applying for a *mandament van spolie*. The appellant then applied for the return of the horse based on *rei vindicatio.* The respondent defended the action and filed a counter claim in terms of which she claims an amount of R75,000.00 as damages for her shock resulting in post-traumatic stress, as a consequence of being despoiled of her horse on those two occasions. The Magistrate determined that the appellant was the owner and returned the horse to him. However, the Magistrate further allowed the respondent's counter claim for damages based on spoliation.

The issue to be determined on appeal was whether an action for damages lies against the owner of the property who resorts to self-help in order to retrieve his property, in other words whether spoliation is a delictual claim entitling spoliatus to sue spoliator for damages. Musi JP writing for the court said:

> "[8] The reason why a delictual action for damages does not lie is possibly because public policy considerations dictate that *spoliatus* should not be allowed to benefit from his/her unlawful activity in the same way that the law does not allow anybody to use illegal means in order to enforce his/her right. The *mandament van spolie* is meant merely to cancel out the initial unlawful conduct of the spoliator but confers no rights on the spoliatus.

> [9] The position of a spoliatus who claims general damages arising purely from an act of spoliation should not be confused with a case where a spoliator causes collateral damage in the course of retrieving his/her property….
>
> [10] In my view, a juridical explanation why an act of spoliation *per se* cannot give rise to delictual liability is to be found in the absence of fault or causation or both in any given situation (I am referring here not to factual causation but to legal causation)."

I respectfully endorse the views expressed by the learned Judge above, and it follows that the point *in limine* raised regarding jurisdiction of this court to hear this matter is dismissed.

[6] *Material dispute of facts and the approach to dealing with it*

There is a material dispute of fact in this matter concerning the issue of possession of the filling station by the applicant, and no application for referral to *viva voce* evidence was made by him either. These two issues will be dealt with together. The discretionary powers of this court in relation to material dispute of facts is covered under Rule 8(14) of the **High Court Rules 1980** which provides that:

> "If in the opinion of the court the application cannot properly be decided on affidavit, the court may dismiss the application

or may make such order as to it seems appropriate with a view to ensuring a just and expeditions decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issues, or otherwise as the court may deem fit."

[7] It is trite that a litigant who chooses to proceed by way of motion proceedings as opposed to action, when the facts of the case cry out to be ventilated in terms of the latter, such a litigant faces a real risk of having his application dismissed with costs merely on the ground that he should reasonably have foreseen a material dispute of fact arising *(**Tŝehlana v National Executive Committee of LCD and Another LAC (2005 – 2006) 267 at 277**).*

[8] In motion proceedings where dispute of fact arises on the affidavits, a relief prayed for, may only be granted if the facts averred to by the applicant together with those admitted by the respondent justify such an order. The power of the court to grant relief, however, is not confined to this situation, and this was stated

in the famous case of ***Plascon – Evans Paints v Van Riebeeck Paints 1984 (3) SP 623 at pp. 634 I – 635 A – C*** where it was said:

> "In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)..; and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it may determine whether the applicant is entitled to the final relief which he seeks…. Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers…."

[9] Now, coming back to the factual matrix of this case, it is the applicant's case that he was in possession of the filling station from the 1st of April 2019 following the conclusion of a lease agreement with the "owner" of the property by the name of L.D.F. On the other hand the 1st respondent avers that the applicant was never in possession of the property in question, and to illustrate this a historical excursion of occupation of the site was made by Mr. Buys. He highlighted that the complex in question (inclusive of the filling

station) belongs to Hata-Butle. Hata-Butle had concluded a lease agreement with a company known as Felix Petroleum. Following this agreement, an entity which used the names of Hata-Butle instituted ejectment proceedings against the said Felix Petroleum. "Hata-Butle" lost the case in the Magistrates' Court, and appealed against the Magistrate's decision. On appeal, on 25th March 2019 My Brother Moiloa J dismissed the appeal on the basis that the said entity which referred to itself as "Hata-Butle" did not prove ownership of the site as its supposed shareholders and directors did not prove that indeed they held such status in 'the real' Hata-Butle. The court made a finding that Hata-Butle ('the real one') has one Arend Hattingh as its sole shareholder and director. It is the 1st respondent's case that, when ejectment proceedings started, Felix Petroleum locked the site and placed security guards on site. At the conclusion of the ejectment matter in this court, a new lease agreement was signed between Hata-Butle and Felix Petroleum, thereby putting the latter in occupation.

[10]In light of the factual matrix sketched above, I am convinced as to inherent credibility of the 1st respondent's version regarding possession the filling station and I proceed on the basis of its correctness. If I proceed on the basis of the 1st respondent's version it follows that the applicant failed to prove that he was in occupation of the filling station and therefore entitled to a spoliatory relief. It follows that the application ought to be dismissed on this ground.

[11]*Suitability of spoliatory relief to enforce rights*

There is a further observation which needs to be made in relation to this matter, and it relates to the suitability of spoliation proceedings in the enforcement of rights. My considered view is that the applicant is using spoliation proceedings to seek to enforce contractual rights between himself and L.O.F.

[12] In spoliation proceedings, the person must to prove that he had possession which should be protected and that was unlawfully despoiled. It is trite that whether his possession was lawful or not is irrelevant. It is the basic purpose of this relief that self-help be curbed at all costs, due to its potential to disturb peace (***Mbangamthi v Mbangamthi LAC (2005 – 2006)* 295 at 301 para. 8**). However *mandament van spolie* cannot be used as a 'catch-all function to protect *quasi–possessio* of all kind'. This was aptly stated in the case of ***ATM Solutions (PTY) v Olkru Handelaars CC and Another (739/07) [2008] ZASCA 153; 2009(4) SA 337 (SCA)***. In this case the court refused to grant *mandament van spolie* against the respondents. ATM Solutions and Olkru had entered into a "Site Location Agreement" in terms of which Olkru would provide floor space within its premises occupied by Kwikspar for an ATM machine supplied by ATM Solutions. The ATM's intended users were Kwikspar customers. The ATM was installed and fixed to the floor using bolts.

In terms of the agreement ATM Solutions had a right to "use and Occupy" the premises" for the "Sole purpose of placing and operating" an ATM machine. Sometime in September 2007 Olkru, without consent of ATM Solutions, disconnected electricity supply to the ATM, removed it and placed it in a storeroom on the Kwikspar premises. Subsequent to this act, an ATM belonging to ABSA Bank was installed where ATM Solutions ATM was installed. ATM Solutions claimed a spoliatory relief on the basis that in terms of the contract between itself and Olkru, it was entitled to occupation of the spot where its ATM was initially placed. The court held that the relief which ATM Solutions sought, i.e. re-installation and connection of the ATM amounted to an order of specific performance which is not suitable to be made through spoliation proceedings.

[13]The importance and relevance of this case to this matter is what was said by Lewis JA at para. 9 of the same decision wherein she said;

> "The cases where quasi-possession has been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes or the purported exercise of servitudes - …) or an incident of the possession or control of the property. The law in this regard was recently succinctly stated in First Rand Ltd v Scholtz where Malan AJA pointed out that a spoliation order 'does not have a "catch-all

function" to protect the *quasi-possessio* of all kinds of rights irrespective of their nature. In cases… where a purported servitude is concerned the *mandament* is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed*; its purpose is the protection of quasi-possessio of certain rights. It follows that of the professed right, even if it need not be proved, must be characterized to establish whether its quasi possession is deserving of protection by the mandament.' Mere personal rights, said Malan AJA, are not protected by the mandament. Thus only rights to use or occupy property, or incidents of occupation, will warrant a spoliation order."* (*emphasis added*)

[14]In the present matter, my considered view is that, through the instrumentality of spoliation, the applicant is seeking to enforce the contractual rights between himself and L.O.F. It has to be remembered that I have already held that the applicant was never in occupation or in possession of the site in issue, and therefore in terms of the current application, the applicant is seeking to enforce contractual rights between himself and LOF against adverse claims of rights to this property by Hata-Butle. In fact the 1st respondent alleges dishonesty in the transaction between the applicant and L.O.F as the site does not belong to the latter. Given that the applicant is seeking to enforce this contract through spoliation

proceedings, this cannot be countenanced by this court. It follows that the application ought to be dismissed on this ground as well.

[15]In the result the following order is made:

a) The rule is discharged and the application is dismissed with costs.

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M. A. MOKHESI J

FOR APPLICANTS : ADV. MOHANOE instructed by K.D MABULU ATTORNEYS

FOR 1ST RESPONDENTS : ADV. MPAKA instructed by Du Preez Liebetreau and Co. ATTORNEYS