"Reportable"

CASE NO: A 62/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHANNES OBERHOLSTER	**APPLICANT**
and	
GEORGE SEBASTIAAN WOLFAARDT JACOBZ	**1ST RESPONDENT**
ANNETTE JACOBSZ	**2ND RESPONDENT**
ANNA MARGARETHA OBERHOLSTER	**3RD RESPONDENT**
ZEST INVESTMENTS 15 CLOSE CORPORATION	**4TH RESPONDENT**

CORAM: DAMASEB, JP

Heard on: 18th March 2010

Released on: 30th March 2010

REASONS

DAMASEB, JP: [1] This opposed urgent spoliation application was argued before me on 18 March 2010. On 19 March 2010, I made and order in the following terms:

> "1. That leave be granted to dispense with the forms and service provided for by the Rules of [Court] and that this application be heard as a matter of urgency as envisaged in Rule6(12)(a).
>
> 2. Calling upon the respondents to show cause on a date to be determined by [the Court] why an order in the following terms should not be granted.

2.1 That the first, second and third respondents be ordered to forthwith restore possession of and access to the applicant, *ante omnia,* of the premises situated at 99 Church Street, Gobabis.

2.2 That for the purposes as referred to in prayer 2.1, *supra*, the first, second and third respondents be ordered to replace the locks fitted to the entrance gate, the metal trellis door to the offices and the door to the supplies stores of the aforementioned property prior to 6th March forthwith, alternatively to provide the applicant with keys for the new locks fitted;

2.3 That for the purposes as referred to in prayer 2.1, *supra,* the first, second and third respondents be ordered to restore the code of the remote control to the entrance gate of the aforementioned property as it was prior to 6 March 2010, alternatively to provide the applicant with a remote control with the new code;

2.4 That the respondents be ordered forthwith to restore applicant's desk/workstation to where it was in the business prior to 6 March 2010.

2.5 Interdicting the first, second and third respondents from interfering with the applicant's free and undisturbed access to and joint possession of the aforementioned immovable property;

2.6 That the first, second and third respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, on a scale as between legal practitioner and client;

2.7 Granting the applicant such further and/or alternative relief as [the Court] deems fit.

3. Directing that paragraphs 2.1 to 2.5 above operate as interim interdicts with immediate effect pending the return date of the rule *nisi.*

4. Granting applicant such further and/or alternative relief as this … Court deems fit."

I advised then that my reasons would follow. The following are the reasons.

Applicants' case

[2] The applicant is one of four (4) members of a close corporation (fourth respondent) that owns and runs butchery, bakery, restaurant and a take-away, from premises bought by the fourth

respondent in 2007. The applicant holds 10% member's interest in the CC. The applicant's wife (third respondent) also holds 10% member's interest in the fourth respondent. The remaining 80% members' interests are held by the applicant's parents-in-law (first and second respondents) in equal shares. The applicant's wife (third respondent) is the daughter of first and second respondents. The business is located in Gobabis where the applicant and the third respondent. The first and second respondents live on a farm 40 km outside Gobabis.

[3] The applicant and the third respondent married in 2004. At the time they lived in Windhoek and the applicant was then employed as a lecturer at the Neudam Agricultural College. In 2007, the first and second respondents offered the applicant and the third respondent the opportunity to become members of the fourth respondent, relocate from Windhoek to Gobabis, and to run the business of the fourth respondent and in that way to earn an income for themselves. The fourth respondent is sustained by a large loan facility from a bank with the first and second respondents as sureties. The applicant alleges that it was the understanding between the parties that he and the wife (third respondent) would run the fourth respondent for their own account- an allegation which implies that the they were to run it for their own profit and loss.

[4] The applicant's version is that he had become the *de facto* manager of the business. He kept a set of keys to the premises and unlocked the business at 06H00 every morning and locked up again after close of business. The applicant and the wife run the day-to-day business of the fourth respondent and receive an income. The applicant says he runs the operations while the wife attends to the debtor's and finances. It is from the income he derives from running the fourth

respondent that he finances his vehicle, rents a house, and pays the insurance and running costs of the car.

[5] The above arrangement was possible in happier times. The problem now is that the applicant and the third respondent are on the brink of divorce and the first to third respondents want him out – at least from active involvement in the management of the fourth respondent.

[6] The third respondent has since left the common home with the applicant and moved in with the first and second respondents. The marriage having fallen on bad times, the third respondent finds it difficult to work with the applicant at the business premises of the fourth respondent. In fact, in January 2010, the first respondent advised the applicant that the third respondent and the applicant could no longer work together and that one of them must leave the business. The first to third respondents made an offer to the applicant to buy out his 10% interest. He declined the offer; it seems principally because he thinks he should get more.

[7] On 23 January 2010 the first to third respondents called a meeting of the fourth respondent on two day's notice to which the applicant was invited. The purpose was to see how they could part ways. The applicant did not attend. He said the notice was too short and he required more time to prepare himself. A further meeting was called for 30 January. The meeting never took place apparently on the advice of the lawyers of the applicant. Then on 9 February the applicant received a letter purportedly dismissing him from the employ of the fourth respondent because of the ‘’marriage problems’’ between him and the third respondent.

[8] The termination notice states: "*Your services as employee are terminated and you are no longer required at work and may not conduct work for and on behalf of Zest Investments 15 CC"*. The applicant refused to accept the termination. He was told that if he did not stop coming to the business premises civil and criminal proceedings would be instituted. None of that happened. On 5 March 2010 the applicant travelled to Okahandja (the wife knew he was going out) to attend a spiritual gathering. He returned to Gobabis on 7 March. Upon his return he found his personal belongings -which were in the business premises when he left for Okahandja- in his garage. He also found with his belongings a letter from first to third respondents that thenceforth the "*management of the Gobabis Bakery"* will be handled by the first and third respondents and that he was relieved from all "*management functions*."

[9] While he was out on the *spiritual trip* to Okahandja, the first to third respondents changed the locks and the alarm system combination to the business premises as, upon his return from Okahandja, he could no longer gain access to the fourth respondent's business premises - with the keys and the remote control in his possession. The desk from which the applicant worked at the fourth respondent's premises was also removed. He came to the premises on the 8th and 9th and was met by the second respondent and the third respondent (on the 9th). Both respondents made it clear to him that he was not welcome. The applicant deposed that before all this, he and the third respondent "exercised joint physical control over the premises by holding keys thereto". The changing of the locks and the alarm system combination therefore denied him access to and control of the premises. The applicant, apart from what he fears will be a loss of income as an

employee, states that he believes that his exclusion from the business will have the effect that the business will not be managed properly resulting in "*indeterminable financial loss."*

[10] The applicant comes to this Court to be restored access to the business premises so he can continue to manage the business and to run it for his and the third respondent's account. He maintains that by denying him access to the business premises, the first to third respondents have taken the law into their own hands. He deposes that the respondents should have sought remedies under the Close Corporations Act to resolve the disputes that now exist between them and that the marriage problems now existing between him and the third respondent cannot be a justification for his exclusion from the premises of the fourth respondent.

The respondents' case

[11] The first to third respondents maintain that the applicant has no right to have access to the fourth respondent's business premises as he has been dismissed as an employee. They say he was told not to come again to the said premises and that he accepted that. They further maintain that his 10% interest in the fourth respondent does not entitle him to have access to the business premises in the form that he requires and that he can - as a member of the CC - exercise his rights in other ways. The first and third respondents maintain that the applicant continues to be paid his employment benefits – and will continue to be so paid until the matter is resolved. They take the view that now that he has been dismissed, the applicant's recourse lies in seeking remedies under labour laws for unfair dismissal. It is until that event occurs and is finalized that he will continue to receive his employment benefits.

[12] The first to third respondents therefore maintain that the balance of convenience does not favour the applicant and that in any event, in respect of his dismissal - considering that his remuneration will not be affected immediately- he suffers no prejudice and that he has a remedy under the labour laws to challenge his dismissal. The first and second respondents maintain that the balance of convenience favours them in that they stand to lose the most in view of their financial exposure to creditors for the debts of the fourth respondent. The first to third respondents maintain that the fourth respondent is, at the core, a family business and that the breakdown in the marriage of the applicant and the third respondent has made the applicant incompatible with the rest of the family as members of the CC.

[13] The first respondent concedes that the applicant and the third respondent "were to run the business in such manner that the loans can eventually be repaid **and to increase membership value**". (My emphasis) He also adds that the "business was conducted in the name of the fourth respondent **and all members were involved in the business.**" (My emphasis) Significantly, the first respondent concedes that when the applicant is not at the business or is on leave, it is the second and the third respondent who manage its day-to-day business- meaning that the primary responsibility for fourth respondent's management rests with the applicant.

[14] Although the respondents suggest that the applicant was told to leave the premises and did so of his free will[1], I do not place any weight at all on that because it is clear from his conduct

[1] Which is a valid defense to a spoliation claim : *Ntshwaqela v Chairman , Western Cape Regional Services Council* 1988 (3) SA 218 (C) at 225; *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director , Department of Education & Culture Services 1996 (4) SA 231 (C)*.

that he did not accept the exclusion. He returned and demanded access and in the end sought legal advice. It would have been unacceptable for him to remain at the premises by force. He would in that event have taken the law into his own hands.

The law to the facts

[15] It is trite that in order to succeed with the claim based on the *mandament van spolie*, the applicant must demonstrate a prima facie case, on balance of probabilities[2] , that (a) he was in peaceful and undisturbed possession of the premises of the fourth respondent, being 99 Church Street, Gobabis; and (b) he was unlawfully deprived of such possession. The spoliation remedy is available even where the applicant was not the sole possessor but was in joint possession with others. He need not prove exclusive possession.[3]

[16] The applicant's case is that he derives a benefit from being a member of the fourth respondent – in which capacity he had acquired the right of access to the business premises by means of the keys and the remote control. He maintains that he and the third respondent *qua* members were responsible for running the affairs of the fourth respondent and that his exclusion

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Scholtz v Faifer 1910 TPD 243 at 246; *Nienaber v Stuckey* 1946 AD 1049, 1053, 1054; *Mankowitz v Leowenthal* 1982 (3) SA 758 (A) 767F-G.

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Lawsa, Vol. 27. First Re-issue, par 269

will result in an indeterminable loss. His case further is that it was agreed that he and the third respondent would run the business of the fourth respondent for their own account.

[17] Mr. Dicks for the applicant concedes that had the applicant sought relief solely on the basis that he had been terminated as an employee he would have had difficulty obtaining the relief he seeks through the *mandament van spolie.* In order to succeed on the mandament, the applicant must show that he has an interest over and above that interest which he has as an employee.[4] Mr. Dicks is therefore correct in his submission because in that event the applicant's remedies would have had to be under the relevant labour legislation.

[18] The concessions to which I referred in par [13] support the applicant's claim that he had access to the business premises *qua* member and that he derived a benefit from such access and the management of the fourth respondent in order to "increase membership value". The additional ground which bestows the applicant a "benefit" is the allegation that he and the third respondent were to run the business for their own account. That allegation is of course disputed and is suspect in view of the admitted large financial exposure of the first and second respondents - through the sureties in favour of the fourth respondent - and the relatively small member's holdings (10% each) of the applicant and the third respondent in the fourth respondent. The first and second respondents have underwritten the debts of the fourth respondent up to N$3,500 000. As sureties they are therefore bound to honor the fourth respondent's debts if the

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Mpunga v Malaba 1959 1 SA 853 (W) at 861; *Du Randt v Du Randt* 1995 (1) SA 401 (O) 406H–I; *Erasmus v Dorsyd Farms (Pty) Ltd* 1982 (2) SA 107 (T) 111.

business fails. That however goes to the merits of the matter and is an irrelevant consideration at this stage.

[19] The respondents do not deny that the applicant was denied access to the business premises; rather their actions are sought to be justified on the basis that he had been terminated as an employee and that the balance of convenience favours the first and second respondents who stand to lose a great deal if the business fails on account of their sureties in favour of the banks.

[20] I will deal with the last concern first. When an applicant seeks protection by means of the *mandament,* discretion and considerations of convenience have no place.[5] Equally, any suggestion that the applicant made himself guilty of some improper conduct is also irrelevant at this stage as no defense on the merits is allowed in spoliation proceedings.[6] The status quo must be restored before the merits are considered.[7] It also does not matter that the respondent has a stronger *ius possidendi* in respect of the thing which the applicant wants possession restored to.[8]

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5 *Greyling v Estate Pretorius* 19473 SA 514 (W) at 517; *Runsin Properties (Pty) Ltd v Ferreira* 1982 (1) SA 658 (SE) 670G-H; *Ngewu v Union Cooperative & Sugar Co Ltd, Masondo v Union Cooperative Bank & Sugar Co Ltd* 1982 4 SA 390(N) 394

6 *Lawsa*, First re-issue vol. 27, par 272 at p.195 and the authorities there collected.

7 supra

8 supra

[21] The respondents took the law into their own hands by excluding the applicant from the business premises of the fourth respondent by changing the locks to the doors and the combination of the remote control which allowed him access to 99 Church Street, Gobabis. Although they purported to terminate his services as employee and based on that could properly have excluded him, he also relies for the relief he seeks on the bases that he derived a benefit from being at the premises as member and on account of an agreement to run for his' and the wife's own account. I regard to the breakdown in the relationship between the parties as members, the respondents ought to have pursued remedies under the Close Corporations Act, No. 8 of 1994[9], either on the basis of conduct on his part which has a prejudicial effect on fourth respondent's business , that it is not reasonably practicable for the other members to carry on the business of the fourth respondent with him, or that circumstances have arisen which render it just and equitable that he should cease to be a member.

[22] The respondents have placed in dispute the urgency of the matter. Although I do not wish to lay down an inflexible rule in a spoliation application not much can turn on that consideration as long as the application has been brought to court within a reasonable time and practical relief still remains possible.[10] In the present case the applicant realized on 7 March he had been excluded

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9 Section 36(1) (b)-(e).

10 *Jivan v National Housing Commission* 1977(3) SA 890 (W) , *and Manga v Manga* 1992 (4) SA 502 (ZS)

from the premises. He made clear to the respondents that he was unhappy with the exclusion. He came to the premises on the 8th and the 9th when he was shown away. He thereafter consulted counsel and the papers were settled and filed of record on the 11th of March and set down for the 18th March to allow for service on the respondents. Service was effected on 12 March 2010 and the notice to oppose was filed of record on behalf of the respondents on the 15th of March. I am satisfied that the application was brought within a reasonable time and practical relief is still possible. The respondents have not suggested that practical relief is no longer possible.

[23] It is for the above reasons that I granted the *rule nisi* in the terms sought in the notice of motion.

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DAMASEB, JP

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ON BEHALF OF THE APPLICANT:	Mr G Dicks
Instructed By:	**Van Der Merwe-Greeff Inc.**
ON BEHALF OF THE RESPONDENTS:	Mr P J De Beer
Of:	**Pieter J De Beer Legal Practitioners**