IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: A5042/2010

In the appeal between:

SANDRA MTHIMKULU	First Appellant
THE OCCUPIERS OF CHUNG HUA MANSIONS 191 JEPPE STREET, JOHANNESBURG	Second Appellant
	The Applicants in the Court *a quo*

And

HOOSEIN MAHOMED	First Respondent
SNG SECURITY AND SAFETY CC	Second Respondent
CHANGING TIDES PROPERTIES (PTY) LTD	Third Respondent
STATION COMMANDER, JOHANNESBURG CENTRAL POLICE STATION	Fourth Respondent
DONNOVAN REED	Fifth Respondent
	The Respondents in Court *a quo*

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED ✓

03/12/2010
DATE

SIGNATURE

JUDGMENT

C. J. CLAASSEN J:

[1] This is an appeal against the judgment handed down by Maluleke J on 26 August 2010. The court *a quo* dismissed the application brought by the first and second applicants. No order in regard to costs was issued.

[2] In the court *a quo* the first and second applicants sought an urgent order against the respondents in the following terms:

> "2. Declaring the eviction of the Applicants unlawful;
>
> 3. Ordering the Respondents, *ante omnia*, to immediately restore to the applicants undisturbed possession of their home at the premises situated at 191 Jeppe Street, ERF 1298, Johannesburg ('the property');
>
> 4. That, failing the Respondents complying with paragraph 3 hereof within two hours of this order being served on them, the Applicants are authorised to obtain the services of a locksmith to open the property to afford the Applicants access thereto;
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> 5. Following restoration of the property to the Applicants, the Respondents are interdicted and restrained from taking any steps or performing any conduct, whether acting personally or through the agency of any other person, with the intention or effect of evicting the Applicants from the property without an order of court entitling them to do so.
>
> 6. Declaring that the First, Third, Fourth and Fifth Respondents are in contempt of the order of this Honourable Courts.
>
> 7. Ordering that the First, Third, Fourth and Fifth Respondents shall be sentenced to a fine which shall be suspended on condition that the Respondents shall not within the next 20 years, evict the Applicants from the property without an order of court authorising the eviction.
>
> 8. Ordering that the Respondents, jointly and severally, the one paying the other to be absolved, pay the costs of this application on the scale as between attorney and client."

THE BACKGROUND FACTS

[3] The following facts are common cause or undisputed:

1. The property is a multi-storey building situated at 191 Jeppe Street Johannesburg. It is owned by the third respondent, Changing Tides Properties (Pty) Ltd ('the owner'). The first respondent is the son of one of the owner's directors.[1] His name is Hoosein Mahomed ('Mahomed').

2. On 8 October 2009 Ntsebeza AJ granted an order[2] in this court under case number 2009/40253:

   2.1 Declaring that the eviction by Mahomed and two corporate entities of the occupiers of the property was unlawful;

   2.2 Directing Mahomed and the other respondents in that case to restore possession of the property to the occupiers of the property; and

   2.3 Interdicting Mahomed and one of the corporate entities from taking steps with the intention of evicting the occupiers from the property without an order of court entitling him to do so.

3. Despite this order, a further eviction ensued four days later on 12 October 2009 with the involvement of certain police officials.[3] This application was placed before Kgomo J who granted an order in the following terms:[4]

   3.1 Declaring that the eviction of the occupiers of the property was unlawful;

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[1] See Volume 1, p 51, paragraph 10.
[2] See Volume 1, p 9, paragraph 14.1; the order is Annexure B at Volume 1, pp 33 – 36.
[3] See Volume 1, p 9, paragraph 14.1.
[4] See Volume 1, p 10, paragraph 14.2; the order is Annexure C at Volume 1, pp 37 – 38.

3.2 Directing Mahomed and the other respondents in that case (including the present third to fifth respondents) to restore possession of the property to the occupiers of the property; and

3.3 Interdicting Mahomed and the other respondents in that case (including the present third to fifth respondents) from taking steps with the intention of evicting the occupiers from the property without an order of court entitling them to do so.

4. Although not served on the respondents, the orders of both Ntsebeza AJ and Kgomo J came to the notice of the respondents.[5]

5. Some 9 months later and during June 2010 the third respondent and Mahomed started planning again to remove the occupiers from the property.[6]

6. Mahomed is the person in charge of the property and the person to whom the owner had delegated the task of evicting the appellants. Mahomed had, in turn, retained the second respondent – SNG Security and Safety CC ('SNG') – to assist in the eviction of the respondents. SNG delegated the eviction of the appellants to the fifth respondent, Donnovan Reed ('Reed').[7]

7. Reed, Mahomed, a number of officers of the second respondent and a number of police officers were present at the property on the day of the eviction, on 9 August 2010.[8]

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[5] See Volume 1, p 10, paragraph 15 read with Volume 1, pp 57 – 58 paras 18.1 – 18.2.
[6] See Volume 1, pp 47 – 48, paragraphs 9.2.1 – 9.2.4.
[7] See Volume 1, pp 58 – 68, in which Mahomed's and Reed's role in organising the eviction is set out in detail.
[8] See Volume 1, p 11, paragraph 21.

8. The two hundred and fifty three appellants were residing at the property at the time of the eviction.[9] They were "unlawful occupiers" for the purposes of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act").[10]

9. The respondents intended to evict the appellants from the property. The respondents intended to launch an eviction application in terms of the PIE Act a week after the appellants were evicted.[11] On their own version, they were present at the property on the day of the eviction in order to cause the occupiers of the ninth and tenth floors to vacate those floors in order to commence renovations to that part of the building.[12]

[4] This appeal raises the following questions:

1. The applicability of the legal principle known as "counter-spoliation".
2. Whether or not the appellants were in peaceful and undisturbed possession of their homes on the property.
3. Whether or not the appellants were evicted or consented to leave their homes by their own free will.
4. Whether or not the respondents were in contempt of this court.

COUNTER-SPOLIATION

[9] See Volume 1, p 6, paragraph 4 read with Volume 1, pp 47 – 50, paragraphs 9 – 9.4 at p 50, paragraph 9.3.2 in particular. A list of the occupiers was compiled by Lwazi Mtshiyo of the appellants' attorneys of record. He deposes to an affidavit authenticating the list. That affidavit is to be found at Volume 4, p 296, paragraph 7 in particular.

[10] The third respondent, on its own version, was preparing to bring an eviction application against the occupiers. See Record, Volume 1, p 57, paragraph 16.5.

[11] See Volume 1, p 57, paragraph 16.15.

[12] See Volume 1, p 59, paragraphs 20.4 – 20.6 and Volume 1, p 65, paragraph 23.3.

[5] This principle of law applies where a person being spoliated of the possession of a thing is entitled to use self-help in regaining possession thereof from the spoliator. This can only be done if the possessor acts swiftly (*"instanter"*). This question was, however, never raised in the papers or during argument in the court *a quo* by the parties' legal representatives. The court *a quo* raised this issue for the first time in its judgment. Neither party was given an opportunity to make submissions in this regard, prior to the court *a quo* handing down its judgment.

[6] It is necessary for any court to inform the parties of any point of law, fact or other aspect of the case at hand which it wishes to raise in judgment that has not been dealt with previously. The way to do this is to inform the parties and/or their legal advisers of the court's desire to deal with it and call for their responses in regard thereto. The parties may wish not to respond to such invitation, in which case the court may justifiably proceed in handing down its judgment raising the new aspect. On the other hand, if the parties want to respond, they can be invited by the court to raise the issue in oral argument before the presiding officer in open court at a time suitable to all concerned. At such an occasion a party may wish to apply for an amendment to the pleadings or apply for leave to re-open his case and lead further evidence. The court will then have to decide on the appropriate course as justice may demand. Alternatively, the parties may wish to respond by submission of further written argument. In the latter instance it is important to allow the plaintiff or applicant the same rights normally afforded in court, i.e. by replying to any argument advanced by the other side.

[7] In the absence of affording the parties the aforesaid right to deal with any new aspect which a court wishes to raise, it is improper for a court to deal with a point of law or fact not raised by either party, for the first time in its judgment.

[8] Very appropriately, Mr. Willis for the respondents abandoned the issue of counter-spoliation raised by the court *a quo* in its judgement. Nothing need be said further in regard thereto.

PEACEFUL POSSESSION

[9] In a spoliation application the court will not entertain the merits of the dispute regarding the lawfulness of the applicant's possession. All that need to be established is:

1. That the applicant was in peaceful and undisturbed possession of the thing; and
2. That the respondent unlawfully deprived him of possession.

Upon establishing these facts, the applicant is entitled to restoration of possession he exercised prior to the spoliation.

[10] It is clear that the court *a quo* was alive to the principles underscoring *mandament van spolie*. It correctly pointed out:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does the court will similarly restore the status quo ante and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."[13]

[11] In the present instance the question to be answered is whether or not the appellants were in peaceful occupation of their homes in the third defendant's property on the afternoon and evening of 9 August 2010. The answer to this question will depend upon the period, if any, that the appellants were in peaceful and undisturbed possession of their homes in

[13] See Volume 4, p 308, paragraph 2.

the property. It is common cause on the respondents' own showing that the appellants were, at the very least, in peaceful and undisturbed possession of their homes in the property for a period of not less than six weeks prior to the 9th August 2010. The deponent to the answering affidavit alleges that for a period from the end of June 2010 to 9 August 2010 the 253 occupants resided in the building.[14] In addition, the mere fact that the respondents allege that the appellants vacated the building by their own free will, pre-supposes that they were peacefully in possession of the property and that they peacefully vacated the property.

[12] In my view, the common cause facts clearly indicate that the appellants were indeed in peaceful and undisturbed possession of the property.

EVICTION OR CONSENT?

[13] The respondents alleged that the appellants vacated their homes on the property "voluntarily and peacefully"[15] and "without even being asked to do so."[16] The fifth respondent stated that "he was in a state of surprise" and the first respondent "concluded that as implausible as it may have seemed", the appellants indeed vacated the property by their own volition.[17]

[14] The court *a quo* did not decide the issue as to whether or not the appellants vacated their homes voluntarily. In my view, the common cause facts as well as the probabilities would have made a conclusion that the appellants vacated their homes voluntarily, quite fanciful,

[14] See Volume 1, p 50, paragraph 9.3.2.
[15] See Volume 1, p 45, paragraph 5.1.3.
[16] See Volume 1, p 68, paragraph 24.1.
[17] See Volume 1, p 66, paragraphs 23.9 and 23.10.

palpably implausible and far-fetched.[18] I say this, since the respondents' version is totally incompatible with the following evidence:

1. The respondents' own allegations that "people started throwing bricks and bottles and even umbrellas as spears" at the respondents and their agents on the day of the eviction.[19]

2. The respondents' own evidence that the appellants repelled them from the property just three days before the eviction.[20]

3. The respondents' own evidence that while the eviction was taking place, two police vans arrived saying that a call had been logged that there was an illegal eviction in progress.[21] The allegation that the police left can not lead to an inference that they were persuaded that no illegal eviction was being executed. The fact is that they were called to attend an **illegal eviction.** The police do not confirm that they left the scene because they were convinced that no illegal eviction was on the go.

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[18] See **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at 290D – G and 291A – B where Harms DP said the following:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have been admitted by the respondent ..., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.

[27] .....In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies."

[19] See Volume 1, pp 66 – 67, paragraph 23.12.

[20] See Volume 1, pp 63 – 64, paragraph 21.6.

[21] See Volume 1, p 66, paragraph 23.8.

4. The fact that, on the respondents' own version, at least forty people slept outside the property on the night of the eviction which occurred during winter.[22] Many more slept at a shelter for the homeless at the Central Methodist Church that evening.[23]

5. The medical reports annexed to the appellants' replying affidavit which show that at least thirteen of the appellants sustained injuries from assaults committed against them during the course of the eviction.[24]

6. The evidence of Bishop Paul Verryn, who says, on the basis of many months of work with the appellants, that it is "inconceivable" that the respondents would have left the property without a court order directing them to do so.[25] Verryn also confirms that the appellants had "on two previous occasions fought their unlawful eviction from the same premises."[26]

7. The photographs annexed to the appellants' replying affidavit, showing the chaos outside the property on the day of the eviction. The appellants are clearly pictured with their belongings strewn across the pavement outside the property. It is inconceivable that the appellants would have consented to being treated in this way.[27]

8. There is no evidence indicating that the occupants had left the building. The allegation that "some of them began throwing their

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[22] See Volume 1, p 69, paragraph 26.3.
[23] See Volume 4, p 301.
[24] See Volume 4, pp 280 – 292
[25] See Volume 4, p 301, paragraph 13.5
[26] See Volume 4, p 300, paragraph 13.1
[27] See Volume 4, p 293

possessions out of the window"[28] does not induce an impression that the appellants left the building peacefully and voluntarily.

9. The allegation that the appellants suddenly decided to leave the building of their own volition is based on a double hearsay allegation that the fifth respondent received a cellphone call from "those in the building reporting that occupants were informing them that they were leaving of their own accord."[29] According to the respondents, "those" comprised a Flying Squad member by the name of Sergeant Kruger and a few security guards in the employ of the second respondent. Despite an undertaking to do so, the respondents failed to obtain any affidavit from anyone of the group who allegedly experienced the change of heart on the part of the remaining appellants. On the respondents' version this surprising *volte-face* occurred as a result of the respondents having laid a charge of fraud and building hi-jacking against 3 of the appellants' committee members. However, no evidence is presented that the appellants knew that such charges were laid. It is therefore inconceivable that their attitude would have changed if they were unaware of the cause of the absence of the committee members.

10. The 3 committee members were arrested on Friday 6 August. If, on the other hand, the appellants did know of such arrest, it is inexplicable that they repelled the respondents' representatives from the building on Friday 6 August but did not do so on Monday 9 August. If the arrest and absence of their leaders did not restrain them from violently resisting eviction on Friday, why

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[28] See Volume 1 p 67 paragraph 23.13.
[29] See Volume 1 p 65 paragraph 23.5.

the *volte-face* just a mere 3 days later? The respondents' version just does not pass muster.

11. The respondents allege that the commotion on 9 August was instigated by committee members who incited the people to violence. According to the first respondent the "fifth respondent was informed" of this. There is no allegation from whom this information came or how it was established. It is a bald statement unsupported by any credible evidence. The only reasonable inference to be drawn is that the violence was not instigated by committee members and/or the appellants and that it ensued from the forcible eviction of the appellants.

[15] It must therefore be accepted that the appellants did not vacate their homes in the respondents' property, voluntarily but were forcibly evicted by the respondents.

CONTEMPT OF COURT

[16] In this regard the court *a quo* found that it was "unable to draw the inference that the respondents wilfully and *mala fide* disobeyed the court order." This finding was based on the fact that the court order had not been served personally upon the respondents. Civil contempt requires proof beyond a reasonable doubt of (i) the existence of the court order; (ii) service of the order upon the respondent **or that the respondent had knowledge thereof;** and (iii) that non-compliance was wilful and *mala fide*.[30] The court *a quo* misdirected itself in stating that lack of service of the order ousted a conclusion of civil contempt.

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[30] See **Fakie NO v CCII Systems (Pty) LTD** 2006 4 SA 326 SCA at p 344 par {42}(c).

[17] Once an applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden ("weerleggings las") in relation to wilfulness and *mala fides*. All that is required of the respondent is to advance evidence which establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*.[31] The rationale for this requirement is to prevent committal (loss of liberty) to be established preponderantly rather than conclusively.[32]

[18] Where however, enforcement of a court order is sought civilly without any criminal sanction, proof of contempt of court may be established on a preponderance of probability. A court may issue a *declarator* that a respondent is in contempt of court, established only on a balance of probabilities, together with associated civil relief such as barring a contemnor from access to civil courts until the contempt is purged.[33] In the present case the appellants did not seek a committal, only a suspended fine. The respondents' liberty is not at stake.

[19] The order of Kgomo J handed down on 12 October 2009 was clearly brought to the respondents' attention. They do not dispute this fact and they dealt with the order in some detail in their answering affidavit.[34] In my view, it is clear on the established facts that the first, third, fourth and fifth respondents did violate the order of Kgomo J by evicting the applicants without a court order on 9 August 2010. These respondents therefore bore an evidentiary burden to establish a reasonable doubt that they did not act wilfully or *mala fide*. They failed altogether to discharge this burden of proof.

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[31] See **Fakie** supra at par [42](d).
[32] See **Fakie** supra at p 337G, paragraph [19].
[33] See **Fakie** supra at p 336H, paragraph [16].
[34] See Volume 1, p 10, paragraph 15 read with Volume 1, pp 57 – 58, paragraphs 18.1 – 18.2.

CONCLUSION

[20] In these circumstances the court *a quo* should have granted the contempt order as prayed for. As to the appropriate costs order, cognisance should be taken of the fact that the 4th respondent did not oppose the application in the court *a quo*, or the appeal. It would be unfair to mulct the 4th respondent in an order for costs.

[21] For the reasons set out above I am of the view that the appeal should be upheld and the following order is issued:

1. The appeal is upheld.
2. The 1st, 2nd, 3rd, and 5th respondents are ordered to pay the costs on appeal, including the costs of two counsel.
3. The order of the court *a quo* is set aside and replaced with an order in the following terms:

   "1. The eviction of the applicants is declared to be unlawful.

   2. The respondents are ordered *ante omnia* to immediately restore to the applicants undisturbed possession of their homes at the premises situated at 191 Jeppe Street, Erf 1298, Johannesburg ('the property').

   3. Following upon the restoration of the property to the applicants, the respondents are interdicted and restrained from taking any steps or performing any conduct, whether acting personally or through the agency of any other person, with the intention or effect of evicting the applicants from the property without a court order entitling them to do so.

   4. It is declared that the first, third, fourth and fifth respondents are in contempt of the order of court handed down by Kgomo J in this court on 12 October 2009.

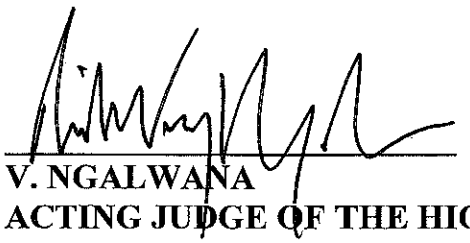
5. The first, third, fourth and fifth respondents are each ordered to pay a fine of R100 000.00, suspended on condition that they shall not within the next twenty years evict the applicants from the property without a court order.

6. The first, third and fifth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application on the scale as between attorney and client."

DATED THE 3rd DAY OF DECEMBER 2010 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT
I agree

P. BLIEDEN
JUDGE OF THE HIGH COURT
I agree



V. NGALWANA
ACTING JUDGE OF THE HIGH COURT

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Attorney for the Fourth Respondent:	The State Attorney

The appeal was argued on 1 December 2010