REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

…… ……

CASE NO 2015/17767

In the matter between:

BAGUMA, ENOCH BONJA **APPLICANT**

AND

VAN WYK, DAVID CHARLES **FIRST RESPONDENT**

VAN WYK, YVONNE **SECOND RESPONDENT**

JUDGMENT

Headnote

Application to put an order into operation pending an application for leave to appeal and possible appeal – section 18(2) of Superior Courts Act 10 of 2013

Spoliation order – an appealable order - effect of an appeal to render order fruitless – save in exceptional cases, a spoliation order ought to be put into operation

The respondent, the owner of a residential property sold it to applicant on deed of sale – applicant to pay off price over 5 years – property let to tenants in terms of leases with applicant - respondent subverted tenants to pay rent to them not to applicant – initial order requiring respondent to desist and to require tenants to pay applicant put into operation

SUTHERLAND J:

1. Modiba AJ, on 22 May 2015, granted an order in which the applicant was restored to possession of the property at portion 1 of […….], Jeppestown. The court had held that the applicant had been spoliated by the respondents. The respondents filed an application for leave to appeal against that judgment on 25 May 2015, thereby staying the order from coming into effect. This application seeks an order putting into effect that order notwithstanding a pending application for leave to appeal or the prospect of an appeal being prosecuted. As such the applicant seeks the relief provided for in section 18(2) of the Superior Courts Act 10 of 2013 (SCact).

2. The relevant provisions of Section 18 (1) (2) (3) are:

> " (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or

> of an appeal, is not suspended pending the decision of the application or appeal.
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

3. The order of Modiba AJ states that:

> "(1) The Applicant's possession of the property ….is hereby restored.
>
> (2) The ….respondents are to instruct all current tenants occupying the property to make payment of the rentals to the applicant in terms of their lease agreements with the applicant and to this effect to dispatch a letter to each tenant advising that the applicant has lawful possession of the property and that the applicant is entitled to enter into lease agreements with the tenants and the tenants are obliged to pay the applicant."

4. To understand the terms of the order the critical common cause background facts are recounted:

4.1. The property is a residential dwelling in which several rooms are let to various people.

4.2. The respondents sold the property to the applicant on 22 June 2012 in terms of a deed of sale. The purchase price was payable over 5 years. Ownership has yet to be transferred.

4.3. The applicant took effective occupation from 1 July 2012.

4.4. The respondents and the applicant are in dispute about whether one or other has breached the agreement and whether the respondents are entitled to cancel the agreement.

4.5. On 30 April the respondents' attorney sent this letter to the tenants.

> "We act on behalf of Mr DC and Mrs Y van Wyk.
>
> Please be advised that the contract between our clients and Mr EB Baguma has been cancelled. Our clients are the legal registered owners of the Property and all rentals are to be paid directly to them or their appointed agent.

> Any queries relating to the Property are to be addressed to our clients or their agent. Proof of cancellation of the contract, ownership papers and electricity accounts may be view by request to Mrs Yvonne van Wyk or her representative. New lease agreements will be entered into between yourself and the legal owners of the property.
>
> Should you pay any rental over to Mr Baguma, his Attorney or any other person claiming ownership of this property, it will be considered as non-payment of rental and a violation of your tenancy. The appropriate action will be taken.
>
> Should you give access to the property to Mr Baguma, his Attorney or representative, this will be deemed as trespassing and breach of your agreement with our clients and your tenancy will be terminated."

4.6. Since then the tenants have acquiesced in the terms demanded by the letter.

5. The facts described above are not recounted to address the merits of the dispute between the parties, but solely to contextualise the factual position claimed by the applicant to now exist (See: *Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) at [26.]*

Furthermore, In *Incubeta,* it was held that: "Necessarily….exceptionality must be fact specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the litigants find themselves."

6. The case for relief advanced by the applicant relies on the implications of being deprived of de facto possession. At the time of the hearing the applicant had been deprived of possession for three months. The date upon which the application for leave to be heard has yet to be determined. If an appeal is authorised the deprivation could last for several months if not longer.

7. The applicant deposes to the fact that the property was bought on terms that oblige him to pay monthly sums in terms of the deed of sale of R8000 per month. The property was let by him and the rental income is R17,000 per month. That income stream supplies the

funds to pay the sums due to the respondents and the other costs relating to the property including the municipal levies and charges, and to meet other financial needs. The effect of not receiving that income is that the applicant has inadequate funds to meet his obligations under the terms of the deed of sale. Should he default, the respondents would be entitled, validly, to cancel the agreement.

8. What follows logically from these circumstances is the bizarre result that the suspension of the order because of the appeal process puts the applicant at risk of forfeiting the property regardless of the outcome of an appeal.

9. The respondents dispute that the harm, as alleged, exists. They tender to put the rental money into their attorney's trust account, but also say that some of it will be used on the property. These averments are ironic, for in asserting them, the respondents acknowledge the existence of harm and proffer their goodwill as a prophylactic.

10. However the respondents' main argument is that there is no risk of the danger claimed by the applicant because they have already cancelled the sale agreement. This contention misses the point entirely; whether the sale agreement has, indeed, been validly cancelled or not is irrelevant to this case. If the respondents can persuade a court that they have validly cancelled and are entitled to possession and in consequence are entitled to an eviction order against the applicant they can procure de jure and de facto possession lawfully. Such grounds as raised by then respondents are no defence to a spoliation application.

11. It was argued that the initial spoliation application was broader than a pure spoliation and that the applicant sought to invoke a contractual right, based on the deed of sale, to claim occupation. This 'broadening', it was contended meant that the applicant's claim could be

defeated by the respondents demonstrating an extinction of such contractual right. In support of this construction to be placed upon the case, the remarks of Cameron JA in *Street Pole Ads Durban (Pty) Ltd & Another v Ethekweni Municipality 2008 (5) SA 290 (SCA)* at [14] –[16] were invoked:

> "[14] On appeal SPA urged that the High Court should not have engaged with the municipality's counter-application. SPA had gone to court solely to seek spoliatory relief: the orders sought in paras 1.1 and 1.3 of its notice of motion constituted merely adjunct relief necessary to restore SPA's position. It did not go further and seek an order declaring it had a right of possession. The references to the main agreement and the adoption agreement in its prayers merely alluded to facts from which the relief it claimed stemmed. It was therefore not open to the municipality to challenge the adoption agreement in these proceedings.
> [15] This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims'. This is because such an applicant 'in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered.'
> [16] The qualification applies here. SPA's application sought classically spoliatory relief in demanding the restoration of the posters the municipality had despoiled (para 1.2). But, as Nicholson J pointed out, its claim went further. It pressed for an interdict, not directed only to the despoiled property, but in wide terms embracing all the 'various street poles in the Ethekwini metropolitan area' covered by the disputed agreements. That claim spoiled for a fight about its title to those poles, and it was this fight in which the municipality was entitled to and did engage."

12. The respondents' contention fails on the facts. A fair reading of the spoliation application leads to a conclusion that the applicant did no more than allude to the contract between himself and the respondents to describe how he came to be in possession *longa manu*, ie, that the possession was 'juristic', he having not been in physical occupation, and why he never surrendered possession. Such a description does not, by its presence, imply the invoking of a cause of action based on the contract. Moreover the relief sought was purely

related to spoliation. The respondents' answer in the spoliation application does not invoke this idea, and significant by its absence is a counter-claim by the respondents to confirm a cancellation and seek an eviction. The probable reason for its absence is the irrelevance of such a case to resist a spoliation application. (See *Yeko v Qana 1973(4) SA 735 at esp 739E-F*) As is manifest from the passages in *Street Pole Ads*, the two cases are distinguishable, because, among other aspects, in *Street Pole Ads* there was an invocation of a right which the applicant had sought to protect by an interdict and in the present case, spoliation alone is invoked as regards his access to the premises and the de fact seizure of his rental money.

13. The remedy of spoliation, the *mandament van spolie*, provides for an especially specific and limited relief. Its function is to address swiftly an unlawful act of dispossession and as such it an important instrument to effect the Rule of law. The remedy decides nothing else but to reverse unlawful dispossession. The elements are twofold: possession and wrongful deprivation. Because of its intrinsic nature it will usually be of use only when implemented at once. Continued deprivation of the thing because of a pending appeal renders the remedy pointless. As long ago as *Pretoria Racing Club v Van Pietersen 1907 TS 687 at 697*, Smith J recognised the conundrum. It was held:

> "We were pressed on behalf of the respondent to say that the order was interloctory, from a consideration of the consequences which would follow if an appeal from it was allowed. It was pointed out that if an appeal from a spoliation order is allowed the result will be to keep the matter in suspense so long that the remedy may become useless. With regard to this argument I would say, in the first place, that if the order is in its nature a final order, the Court would not hold it to be otherwise merely because its execution might be stayed, and the remedy granted by it be delayed. In the second place, the inconveniences spoken of do not seem to me to arise from the fact that an appeal from the order is allowed, but from the staying of execution of the order"

14. Thus, a spoliation order is indeed appealable. However, for the reasons recognised in *Pretoria Racing Club*, there are likely to be few practical examples where an application to implement a spoliation order immediately, in terms of section 18 of the SCact, would not be well founded. The solution to the legitimate concern about a useless order is determined by an evaluation of the *effect* of deprivation not by the *nature* of the relief. A good illustration of circumstances where the effect of waiting out the appeal process without harm occurred is *Mankowitz v Loewenthal 1982(3) SA 758 (AD).* In that matter, a spat between former lovers, the valuable paintings of one party were held to have been spoliated by the other from the former's home where she was resident at the time of the dispossession. The spoliator appealed, lost again, and was thereupon ordered to give up possession. The case turned on the question of proof of possession.

15. The ultimate test that the application must satisfy, as expressed in *Incubeta* at [16] is:

> "…. First, whether or not 'exceptional circumstances' exist; and
> Second, proof on a balance of probabilities by the applicant of
> - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order;
> - and the absence of irreparable harm to the respondent/loser, who seeks leave to appeal."

16. In my view the facts described evidence the 'exceptional circumstances' contemplated by section 18(2). Plainly, the applicant shall suffer irreparable harm if the order is not implemented, because the loss of income stream from his tenants will be lost and in turn his own grip on the right to occupy shall be put at material risk. Moreover, if the appeal fails, the prospects of recovering rental from the notionally defaulting tenants is practically worthless. The applicant might then sue the respondents for interfering in his contractual entitlements but that would mean further litigation and risk. The prevention of the harm of being starved of funds required now cannot suitably be repaired ex post facto.

17. By contrast, the high point of any argument about harm that the respondents might suffer, is the contention that as owners of the property they are vulnerable to claims by the municipality for rates and taxes if the applicant defaults on paying these charges. In my view this places the respondents in no different a position than any landowner who is driven to evict a delinquent lessee or illegal squatter. Indeed, that predicament is intrinsic to any seller of property on a deed of sale. The remedy for the respondents, if legitimately aggrieved about such a breach, is obvious: obtain an order on proper grounds to cancel the agreement and secure an eviction order.

18. The respondents shall experience no harm at all should the order be implemented pending an appeal, and should they choose, they may without waiting for the appeal process to exhaust itself, pursue any contractual remedies which they believe they might have, to wrest back the property from the applicant.

19. An order is made thus:

    19.1. The order of Modiba AJ of 22 May 2015 shall be implemented pending any application for leave to appeal or appeal that is prosecuted.

    19.2. The order shall be satisfied within three days of service of the order.

    19.3. The applicant is given leave to approach the court on these papers duly supplemented, on 48 hours' notice to the respondents or their attorney, to obtain further relief if satisfaction of the order has not occurred.

    19.4. The respondents shall bear the costs of this application.

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ROLAND SUTHERLAND
Judge of the High Court,
Gauteng Local Division, Johannesburg.

Hearing: 29 July 2015
Judgment: 31 July 2015

For Applicant:
Attorney R Zimmerman,
of Rael & Taitz

For respondents:
Adv S Bunn,
Instructed by Nolans Inc