IN THE NORTH GAUTENG HIGH COURT, PRETORIA

APPEAL CASE NUMBER: A809/07

HIGH COURT CASE NUMBER: 32767/07

29/7/2010

In the matter between:

HOWARD G BUFFET N.O	**First Appellant**
N DE BRUYN N.O	**Second Appellant**
S DURANT N.O	**Third Appellant**
R JAMES N.O	**Fourth Appellant**
G MILLS N.O	**Fifth Appellant**

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

28/7/2010 DATE SIGNATURE

and

C M DEGENAAR	**First Respondent**
J ANSELL	**Second Respondent**
C M DEGENAAR (SNR)	**Third Respondent**
M R DEGENAAR	**Fourth Respondent**

JUDGMENT

LOUW J

Introduction

[1] The appellants are trustees of a nature conservation trust (the Trust) that owned a nature reserve on which the four respondents lived, in houses erected on the reserve. The respondents' occupation of the houses was by virtue of their employment by the Trust.

[2] The Trust intended to investigate bringing disciplinary charges against the respondents and sought to have them vacate their homes on the reserve, pending this investigation. On 13 June 2007 the Trust sent its Johannesburg attorney to the reserve, accompanied by two security guards. The first respondent and his common law wife, the second respondent, together with their children lived in the one house whilst the third respondent and his wife, the fourth respondent, resided in another house.

[3] They vacated the houses on 13 June 2007 and were put up in a guest house in nearby Bela Bela.

[4] More than a month later, on 19 July 2007 the respondents launched an urgent spoliation application. This order was granted by Preller J on 6 August 2007. The appellants were ordered to restore the possession of the respondents to their previous residences on the reserve within twenty four hours of that order. The appellants were also ordered to pay the costs.

[5] The following facts are common cause:

(i). The respondents had no inkling that the attorney, Ms van der Linde, was instructed as set out above and would arrive on 13 June 2007 to investigate the bringing of disciplinary charges.

(ii). She arrived with two armed security guards, Schagen and Swart.

(iii). Van der Linde met with the respondents in the dining room of the main guest house. She read out the allegations which were levelled against the respondents in their capacity as employees of the Trust. This meeting lasted for approximately two hours.

(iv). Towards the end of the meeting she presented documents to the respondents for signature. They refused to sign. According to Van der Linde these were letters of suspension,

all four of which are annexed to the answering affidavit, in which each respondent was informed of his/her suspension on full pay pending a disciplinary hearing and were also required to immediately leave the reserve. According to the respondents the documents annexed to the answering affidavit are fabrications. They state that the only documents they were presented with were notices in which they acknowledged their purported misconduct and undertook to leave the reserve immediately. What is common cause however, is that they were presented with documents which they refused to sign.

(v). Later that afternoon, after packing a few personal belongings, the four respondents left the reserve for Bela bela accompanied by Van der Linde and Schagen. There they were booked into a guest house at the expense of the Trust.

(vi). The next day Van der Linde spent the majority of the day communicating with the respondents telephonically.

(vii). On the day thereafter, i.e. 15 June 2007 all four respondents signed identical settlement agreements. The relevant terms of the settlement agreements were the following:

(a) The employment of the respondents were terminated.

(b) The respondents would leave the employ of the Trust immediately and would not be required to work any notice period. They would receive their full salaries for June 2007 including any accrued leave.

(c) On 16 June a removal truck, arranged by the Trust, would accompany the respondents to the reserve in order for them to pack their belongings. They would be relocated to an address elected by them.

(d) In settlement of the matter the respondents received compensation equal to three times their nett monthly salaries. These amounts were paid on 20 June 2007.

> Although clause 3.6 of the settlement agreements reads: "*in lieu* of settlement of this matter...", it is quite clear that the payments were not made "*in lieu*" but indeed in settlement of the matter. This was clearly just an error in wording the clauses.

Matters in dispute

[6] What is in dispute is whether the respondents willingly left the reserve on 13 June 2007 and whether the settlement agreements they signed on 15 June are enforceable.

Spoliation

[7] The case for the respondents is that they feared that a confrontation would ensue, were they to refuse to adhere to the demands made by the Trust's attorney. They vacated the reserve because they felt frightened and intimidated by the presence of the armed guards.

[8] More specifically, they state that after they had refused to sign the documents the attorney became agitated and told them that if they refused to sign and leave the premises immediately they would suffer the consequences. At that time one of the guards armed with an assault rifle walked into the room where the meeting was taking place and stood in the door "*in a very frightening manner*". They then told Van der Linde that they had no place to go on such short notice. She replied that would be taken care of. It was then that the first respondent advised the other respondents that they should leave before the situation turned violent. He says that he also feared for the safety of his two children who were then at home with their nanny. They were escorted to their homes by Van der Linde and the guards to pack their clothing. After they had done so Van der Linde took

possession of the keys to the homes. They were then taken to the guest house in Bela Bela.

[9] Van der Linde's version, supported by affidavits of Schagen and Swart, differs materially from that of the respondents. She states that after the respondents had refused to sign the documents suspending them on full pay pending the disciplinary hearing, she suggested to them that they be booked into a guest house in Bela Bela at the Trust's expense pending the conclusion of the investigation and the disciplinary hearing. At that stage she stepped outside to give them the opportunity to consider the offer.

[10] She returned to the main house later and was informed by the respondents that they would take up the offer. The respondents appeared angry and sad, but were certainly not acting under duress. The guards at no stage displayed firearms. During the negotiations they were not in the house where the meeting took place but stood about twenty metres away. No one had an assault rifle. She states that she took the guards along as a precautionary measure because the first respondent was known to have a violent disposition. Thereafter she and Schagen accompanied the first and second respondents to their home where they started packing their personal belongings. At that stage the first respondent had a holstered firearm which he swopped from hand to hand a few times. She believed he did this to intimidate her. In the replying affidavit the first respondent states that the allegations regarding a firearm is a blatant lie. He called for that evidence to be tested by oral evidence. In this regard it may be mentioned that the notice of motion contains the following prayer 3: "*In the event of the respondents [the appellants] denying that the applicants [respondents] were forcibly evicted, ordering the 7th respondent [Van der Linde] to attend at court within one week of this application being heard in order to present oral evidence on how the appellants were evicted...*". At no stage did the respondents avail themselves of their rule 6(5)(g) right to have the

appellants' version tested in cross-examination (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 632 (A) at 635A).

[11] On the papers there is a real, genuine and *bona fide* dispute of fact. The court *a quo* stated that it simply did not believe the appellants' version. It then concluded that the respondents had been intimidated into agreeing to vacate their residences and that the appellants' action therefore amounted to a spoliation. By implication therefore, Preller J found that the appellants' version is so far-fetched or clearly untenable that it could be rejected merely on the papers (see *Plascon-Evans* at 635C). This finding on the facts was, with respect, wrong.

[12] A further aspect which casts doubt on the allegations of spoliation is that this application was made more than a month after the events. I find that spoliation was not proved.

The settlement agreements

[13] On 14 June 2007 the respondents laid charges of intimidation and assault with the SAPS in Bela Bela. The rest of the day extensive telephonic negotiations took place. In the founding affidavit the first respondent allege that Van der Linde told him that if he did not withdraw the case he would not receive any money and that it would take anything from one/two years in court before he might receive any money and that the respondents could not afford those legal expenses. She also told him to meet her the next morning at the Wimpy in Bela Bela to sign an agreement accepting the three months' salary offer. On the morning of the 15th she arrived at the Wimpy with security. He further states: "*We were not engaged in normal settlement negotiations. At this stage we had the proverbial gun against the head since we had no money and had we not signed the agreement we would have no money to buy food for our children. We also had to find alternative*

accommodation very urgently... This agreement [the settlement agreement] was signed under duress and through the 7th respondent applying undue influence on us. She had all the Aces and we were desperate."

[14] Once again, Van der Linde's version is different. She states that on the 14th there were numerous telephone conversations with the respondents – she put the Trust's settlement proposal to them. At one stage, when the criminal charges which had just been laid were discussed, the first respondent shouted angrily at her. She then advised them to seek legal advice. The third respondent during that afternoon told her that he had consulted a lawyer. Later that day the first respondent phoned her back and advised her that the second respondent had brought him to his senses and told him to accept the Trust's settlement proposal. He advised her that he and the second respondent accepted the offer and apologised for his behaviour earlier, when he had shouted at her. He also said that he had acted in anger in laying the criminal charges.

[15] Later that day the third respondent also phoned and advised her that he and the fourth respondent accepted the settlement offer.

[16] The settlement offer was meant to provide a clean break between the parties. She at no stage threatened the respondents. She chose a public venue for the signature of the settlement agreements as she did not feel safe and also asked Swart to accompany her. Swart waited outside in a car and at no stage displayed a firearm.

[17] In *Preller v Jordaan* 1956 (1) SA 483 (A) the requirements for avoiding a contract on the basis of undue influence were stated as follows:

> *"Myns insiens blyk uit die aangehaalde regsbronne dat die gronde vir* restitutio in integrum *in die Romeins-Hollandse Reg wyd genoeg is om die geval te dek waar een persoon 'n invloed oor 'n ander verkry*

wat laasgemelde se teenstandsvermoë verswak en sy wil plooibaar maak, en waar so 'n persoon sy invloed dan op gewetelose wyse laat geld om die ander te oorreed om toe te stem tot 'n skadelike transaksie wat hy met normale wilsvryheid nie sou aangegaan het nie."
(at 492H)

[18] To set aside a contract on the basis of duress the following has to be proved:

"Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:

(i) The fear must be a reasonable one.

(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.

(iii) It must be the threat of an imminent or inevitable evil.

(iv) The threat or intimidation must be unlawful or contra bonos mores.

(v) *The moral pressure used must have caused damage."*

(See *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306A-B)

[19] An inequality in bargaining power does not constitute duress. (See *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) at [18])

[20] It is for the respondents to prove undue influence or duress. Where the facts are in dispute I rely on the version of Van der Linde.

[21] The respondents were put up in a guest house at the costs of the Trust. This situation would have prevailed until the finalisation of the disciplinary inquiries. In the meanwhile they would have received their monthly pay as and when that became payable. The whole basis for attempting to avoid the contracts is that they had nowhere to go, no means of survival and, in the case of the first and second respondents, "*no money to buy food for our children.*" There is no merit in these allegations. Van der Linde explicitly states that the respondents were booked into the guest house "*pending the conclusion of the investigation and the disciplinary hearing.*" In the replying affidavit it is stated that the offer was that they would be accommodated in the guest house "*for the time being*" and that Van der Linde did not state for how long. Once again, in the light of the proper approach to applications the allegations in the replying affidavit can not be accepted.

[22] The four respondents are adults. They can be expected to make up their own minds when entering into contracts. It is common cause that there were extensive telephonic negotiations on 14 June 2007. They had sufficient time to make up their own minds. The four respondents are not one entity. Each one of them had to consider the settlement proposals on his or her own and in addition they had the benefit of consulting each other on the matter. They accepted the settlements telephonically. The signing of the agreement on 15 June was a mere execution thereof.

[23] In considering the matter on the basis of undue influence, it can be accepted that the Trust was in a more powerful bargaining position. I can however not find that this made the will of the respondents pliable, that the influence was exercised in an unscrupulous manner and that the settlement agreements were not agreements which they would not have concluded with normal free will. None of the elements of duress were proved.

[24] One last aspect of the judgment *a quo* has to be mentioned. The court found that compromise was not one of the two recognised defences to a spoliation claim and, furthermore that if it were to be allowed as a defence, every claim for a spoliation order could be thwarted by a spurious defence of a settlement. The court then found that the disputed settlement is not a bar to the spoliation claim.

[25] There is venerable authority to the contrary. In 1891 Kotzé CJ had to resolve a dispute about the possession of a church in Zeerust. Both the "Ned. Gereformeerde of Hervormde" Church (generally known as the United Church) and the "Hervormde" Church claimed ownership of the church building and church property. For purposes of that application it was accepted that the United Church was in peaceable possession of the church building at Zeerust and that it was ejected therefrom on 19 July 1890 by members of the "Hervormde" Church. A committee was then appointed by the Government to endeavour, if possible, to arrive at an amicable settlement of the matter. Subsequent thereto both churches, by separate resolutions, agreed to submit the matter to the High Court for decision by the court as to which of the two churches is entitled to the *ownership* of the church and church property, on the understanding that the losing party would receive compensation in the form of four erven from the Government. The report then goes on to state:

> *"Why the applicants have not abided by this agreement does not appear, and they certainly erred when they decided to depart from their own agreement and to make an application of a provisional nature, viz., to obtain possession again of the church as a preliminary step, as they are now doing, entirely at variance with their agreement to leave the matter as it was until the Court had given a decision in the principal case --- that is, with regard to the right of ownership. It therefore speaks for itself that under the circumstances brought to light in this case the Court cannot grant the request to be*

> *provisionally placed in possession, as the applicants bound themselves to go into the principal case, and to submit that for judicial decision. The view which I take of the facts is not only in accordance with common sense, but is also in accordance with law, and if any authority is desired on the point, I refer to Wassenaar, Jud. Practyck, vol. i., ch. 14, § 7, which is precisely applicable to this case.*
> (See *Otto v Viljoen and Others* (1891-1892) 4 SAR TS 45)

[26] The court in *Jivan v National Housing Commission* referred to this case as authority for the "*self-evident proposition that a settlement between the party allegedly spoliated and the spoliator, precludes the party whose possession has been interrupted from seeking a spoliation order after the settlement was arrived at.*" (See *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 893)

Other issues raised by Respondents

[27] In regard to the onus of proof in spoliation proceedings, Mr Vorster for the respondents presented the following interesting argument:

> "In light of the provisions of section 25 and 26 of the Constitution and the legislation promulgated to give effect to these sections, it is submitted that, the common law, in respect of the *mandament van spolie* should be developed to provide as follows:
>
> > *'Where a person deprives an occupier of his home forcibly or wrongfully against his will, and the spoliator relies on a settlement or compromise as a defence in subsequent spoliation proceedings, a court shall have regard to, but not be bound by the settlement or compromise in so far as that settlement or compromise seeks to limit the rights of the occupier to claim for restoration of possession of his home, and the onus shall be on the spoliator to prove on a balance of*

probabilities that the settlement or compromise was entered into freely and willingly, while the occupier was aware of his or her rights.' "

[28] The argument is that in terms of s 39(2) of the Constitution of the Republic of South Africa, 1996, the common law should be so developed in accordance with the spirit, purport and objects of the Bill of Rights.

[29] In the light of my finding that no spoliation took place, it is not necessary to decide this point. However it seems to me that our law of evidence can adequately deal with such cases, especially where the compromise is in writing.

[30] Counsel further attempted to argue that the Extension of Security of Tenure Act, 1997, is applicable to the second to fourth respondents and that the procedures prescribed by ESTA were not followed.

[31] The insurmountable problem is that ESTA was never raised on the papers and thus the jurisdictional elements to render this Act applicable were not pleaded. For instance, it has not been established that these respondents were "occupiers" as defined. It seems probable that their income, taking fringe benefits into account, exceeded the statutory limit.

Conclusion

[32] I therefore find that no spoliation had taken place and, that even if so, any right to rely on spoliation was compromised by the settlement agreements.

[33] The appeal therefore has to succeed. The complexity and importance of the case warranted the employment of two counsel.

[34] I make the following order:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and substituted with: "The application is dismissed with costs, including the costs of two counsel".
3. The costs of the appeal shall include the costs of two counsel.

AA LOUW
JUDGE OF THE HIGH COURT

I agree

E BERTELSMANN
JUDGE OF THE HIGH COURT

I agree

MF LEGODI
JUDGE OF THE HIGH COURT

ADV FOR APPELLANTS: CE WATT-PRNGLE SC

MF WELZ

ATTORNEYS FOR APPELLANTS: VAN DER LINDE ATTORNEYS

ADV FOR RESPONDENTS: A VORSTER

I OSCHMAN

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