IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MIDDLEBURG]

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

20 / 12 / 2017
DATE

SIGNATURE

CASE NUMBER 2716/2017

A RE SHOMENG HODINGS PTY LIMITED	**1ST APPLICANT**
A RE SHOMENG PROJECTS PTY LIMITED	**2ND APPLICANT**
TROLLOPE MINING SERVICES (2000) PTY LIMITED	**3RD APPLICANT**

And

THUTHUKANI BANTU COMMUNAL PROPERTY ASSOCIATION	**RESPONDENT**

JUDGMENT

LEGODI J,

[1] An urgent application launched on 29 November 2017 by A Re Shomeng Holding Proprietary Limited (First Applicant) and two others on the principle of Mandament van spolie against Thuthukani Bantu Communal Property Association (the respondents) resulted in an order being made on 12 December 2017 as follows:

"1. The respondent and/or its employees and/or any of its members and/or any of its agents are interdicted and restrained from interfering with the applicants' mining activities exercised in terms of the mining right MP30/5/1/2/2/10028MR, situate on the remaining extent of Portion 1 of the Farm Kromkrans 208, Registration Division I.S., Mpumalanga, measuring 283,3969 hectares (hereinafter "the property").

2. The respondent and/or its employees and/or any of its members are ordered to forthwith, within 24 hours of service of this court order on the respondent to restore the applicants' possession of, and free and undisturbed access to, the property.

3. The applicants are granted leave to approach this court on the same papers should the respondent and/or its employees and/or any of its members and/or any of its agents contravenes any provisions of this order.

4. The respondent is ordered to pay the costs of this application on an attorney-and-client scale."

[2] I did not give the reasons for the order. I now do so. As a brief background: The second applicant, A Re Shomeng Projects Proprietary Limited was granted mining right on Portion 35, Portion 60 and the remaining extent potion 1 of the farm Witbank 209 IS and portions 1, 2 and 3 of the farm Krogshoop 213 IS, Mpumalanga. The second applicant being a wholly owned subsidiary of the first applicant together with the latter appointed the third applicant to carry out mining activities on the property on their behalf in terms of a written agreement.

[3] During or about September-October 2017, the applicants took possession of the property aforesaid to start with mining activities as per the mining right granted to

the second applicant. During oral argument, the defence incoherently as it might have been, was characterised as follows:

"At no stage did the respondent acted wrongfully or forcefully. Should this Honourable court find that the third applicant took possession, then the defence will be the respondent took back possession immediately. The main defence is that there was no spoliation because no force was used and or actions were not wrongful because of the counter-spoliation."

[4] In motivating the defence as postulated above, the facts upon which the defence is based are said to be the following: On 20 November 2017 the respondent realised that machinery for mining activities were brought on to the property. On 21 November 2017 the respondent engaged the applicants telling them to move out. The respondent then gave the applicants to remove their machinery. When that did not happen, the respondent's representatives then on 25 November 2017 counter-spoiled the applicants.

[5] It is very clear from the background that possession of the property by the applicants cannot be in dispute. Therefore, it is immaterial whether the spoliation took place in September, October and or November 2017. I now find it necessary to revisit the principle of mandament van spolie. It is a possessory act. It is a process whereby the possession of a party is protected and is kept strictly separate from the process whereby a party's right to ownership or other right to the property in dispute is determined. The object of the order is merely to restore the status *quo* ante, the illegal action. It decides no right of ownership. It secures only that if such decision be required, it shall be given by a court of law, and not official by violence...[1]

[6] The reason behind the practice of granting spoliation orders is that no man or woman is allowed to take the law into his own hands and to dispossess another illicitly of possession of property. This applies equally whether the despoiler is an individual or a government entity or functionary[2]. If he or she does so, the court will summarily restore the status *quo* ante and will do that as a preliminary to any inquiry or

[1] Tigon Ltd v Bestyet Investment (Pty) Ltd 2001 (4) SA 112 (T) at 118B-F and 119 A-E

[2] Ngqukumba v Minister of Safety and Security 2014 (5) SA 112 (CC) at 118B-F and 119A-E

investigation into the merits of the dispute[3]. The court hearing spoliation application does not concern itself with the rights of the rights of the parties (whatever they might have been, before the spoliation took place. It merely inquires whether or not there has been a spoliation, and if there has been, it restores the status *quo* ante[4].

[7] In spoliation proceedings the court will therefore neither enter into the lawfulness of the applicant's possession[5]. By its nature, there are very view defences in spoliation application. For example, denial, restoration impossible and counter-spoliation. It is the latter defence which has been fiercely argued in the course of the hearing of this application.

[8] In certain circumstances, the law allows a despoiled possession to return possession from his spoliator without first obtaining authority of the court to do so[6]. As a defence, it amounts to a confession and avoidance. That is, while admitting that he or she has despoiled the applicant, in the present case, the respondent avers that its act of spoliation amounts to a lawful counter-application[7]. The counter-spoliation if it is to be relied upon, must be effected instantly. That is, it must be 'there and then' following immediately upon the spoliation and forming part of the *res gestae* of that occasion[8].

[9] If the possessor is despoiled, but 'then and there' ousts the spoliator, he is regarded as never having lost possession and the original spoliator cannot maintain any spoliation proceedings against him or her. The act of counter-spoliation 'is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery[9].

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[3] Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality 2007 (6) SA 511 (SCA) at 520B-521E

[4] See Ngqukumba *supra* at 117D

[5] Schubart Pack Residents' Association v City of Tshwane Metropolitan Municipality 2013 (1) SA 323 (CC) at 331A

[6] Mthimkulu v Mahomed 2011 (6) SA 147 (GSJ) at 150D.

[7] Van der Merwe 1977 Annual Survey 250 compares counter-application to the 'not pursuit'

[8] Yeko v Qana 1973 (4) SA 735 (A) at 739

[9] De Beer v Fire Investments Ltd 1980 (3) SA 1087 (W) at 1090

[10] Whether or not the counter-spoliation was effected instantly, will depend upon the circumstance of each individual case. Once the situation has stabilised, no counter-spoliation should be permissible[10]. The respondent knew as on 20 November 2017 that the machinery were moved onsite. Instead of counter-spoliation, it decided to negotiate. For example, on 21 November 2017 the person onsite was approached and that person informed the respondent that the third respondent has been appointed to be on site. On behalf of the respondent, the machinery was allowed to be stored onsite until negotiations were completed. In the opposing affidavit to these proceedings, a statement is made as follows: "... *He made it clear (referring to the representative of the applicants) that his bosses would not start if everything was not in place with the community."*

[11] So, as on 21 November 2017 possession was allowed to continue. The fact that mining activities were to take place in January 2018 as indicated in the respondent's opposing affidavit, has no relevance to the defences now sought to be relied upon by the respondent as a counter-spoliation defence. Repossession or counter-spoliation has to be immediate like application of 'hot pursuit' principle. That is, taking possession back as it happens. After 21 November 2017 the applicants never lost possession. This is supported by the following statement made by the respondent in answering affidavit as follows:
"The site manager said he was going to leave and asked if he could leave a guard onsite to look after the machinery"

[12] Subsequent to the discussion on 22 November 2017, a meeting with the members of the respondent was arranged for 25 November 2017. Clearly the respondent seemed to have been more occupied with securing an agreement with the applicants regarding mining activities and not much about possession of the property by the applicants. This appears from paragraph 88 of the answering affidavit, wherein for example, is stated:
"Mr Booysen informed us that upon their site manager Mr Wicus Evert, arrival at the property on the 21st November 2017 he was verbally advised to stop mining as there

[10] Sonnekus 1986 TSAR 243-7

was no agreement between the community and their client. He once again requested us to confirm in writing on or before the close of business on the 22nd November 2017 to cease with our unlawful behaviour and refrain from further unlawful conduct".

[13] Counter-spoliation as a defence on 25 November 2017 cannot succeed. On its own version, the respondent was informed on 21 November 2017 to cease its unlawful actions complained of by not later than 25 November 2017. Instead, it did exactly the opposite. This is tantamount to taking the law on its own hands, something that is exactly intended to be curbed by the principle of mandament van spolie. The defence of counter-spoliation is therefore found unsustainable and must fail.

[14] Other peripheral defences raised as points *in limine* in my view, were doomed to fail from the onset. Lack of authority to institute the present proceedings by the deponent to the founding affidavit and for not having given notice as contemplated in section 5A of the Water Act have sufficiently been dealt with in the replying affidavit. Not abandoning the points *in limine*, surely displays the hopelessness by which the respondent is litigating. This together with the conduct of the respondent, that is, resorting to take the law into its own right and thus causing the applicants to approach this court, has a bearing on the order of costs against the respondent been made on a punitive scale.

[15] Consequently an order granted on 12 December 2017 framed as quoted in paragraph [1] of this judgment is hereby reaffirmed as per the reasons in the preceding paragraphs.

M F LEGODI
JUDGE OF THE HIGH COURT

DATE OF HEARING:	12 DECEMBER 2017
DATE OF JUDGMENT:	20 DECEMBER 2017
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