



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 3667/2018

| | |
|-----|---|
| (1) | REPORTABLE: <input checked="" type="radio"/> NO <input type="radio"/> YES |
| (2) | OF INTEREST TO OTHER JUDGES: <input checked="" type="radio"/> NO <input type="radio"/> YES |
| (3) | REVISED. |

[Signature] 22/10/2020

In the matter between:

MASHA MAKOPOLE
TRADITIONAL COUNCIL

FIRST APPLICANT

KGOSHI LENGWAI AARON MASHA

SECOND APPLICANT

and

PHILLIP MARITZ

FIRST RESPONDENT

NULANE INVESTMENT 106 (PTY) LTD

SECOND RESPONDENT

STRYDKRAAL FARMING COMMUNITY

THIRD RESPONDENT

ELIAS MAHLARE MASHA

FOURTH RESPONDENT

| |
|-----------------|
| JUDGMENT |
|-----------------|

NAUDÉ AJ:

- [1] The Applicants brought a spoliation application against the First to Fourth Respondents in which the Applicants applied that the Respondents vacate, be interdicted and restrained from interfering with and disturbing the Applicants in its possession, control and/or administration of the farms Strydkraal A & B, including its center pivots, situated under Fetakgomo Greater Tubatse Municipality, within Ga-Masha Traditional Authority, Limpopo Province ("the farms and pivots"). Further that the Respondent and anyone acting on his behalf be interdicted,

restrained and prohibited from ploughing and engaging on any agricultural activities on the farms and pivots.

- [2] When the application was initially issued, Phillip Maritz was the only Respondent. The Second to Fourth Respondents were joined as parties to this application by an order of court on 20 November 2018. Subsequent to the joinder of the Second to Fourth Respondents, the Applicants filed a supplementary affidavit. The Applicants allege in their supplementary affidavit that the Applicants were at all material times in peaceful and undisturbed possession and control of the farms and pivots and that the First and Second Respondents took occupation of the farms and pivots during or about 2017. However, from 2014 to 2017 the property was leased to an entity called "Vanlyn". The First and Second Respondents contend that the Second Respondent only took occupation of the property during 2017 after a Lease Agreement was entered into with the Third and Fourth Respondents. The First and Second Respondents

further contend that the First Respondent only signed the Lease Agreement as director on behalf of the Second Respondent and was not personally liable. The Counsel for the Applicant argued that this is in fact a spoliation application. However, during argument in court, the Applicants' Counsel conceded that the Applicants have not been in possession of the farms and pivots since at least 2014 and if any spoliation took place, it took place already in 2014 by the Third and Fourth Respondents. It was further conceded that the First and Second Respondents did not spoliage the Applicants and should the First and Second Respondents not have been parties to this application. Counsel for the Applicants in fact stated that the application should have been withdrawn against the First Respondent. The Applicants Counsel submitted that the relief sought is against the Third and Fourth Respondents.

- [3] The Applicants' cause of action is based on spoliation that took place during 2017. The ground for the Applicant's cause of

action is set out in paragraph 12 of the Applicants' Founding affidavit which states as follows:

"During October 2017 the members of the community approached the members of the applicant and informed them that they saw that the land in question is occupied by [an] unknown unlawful occupier and that he has commenced to plough on the land in question. Upon enquiry as to who the said unlawful occupier is, the applicant discovered that it is the respondent." In referring to "the respondent" the Applicant referred to the First Respondent as the application was initially brought against the First Respondent only and were the Second, Third and Fourth Respondents later joined.

- [4] It is common cause between the parties that ownership is not in dispute, but actual possession. It was argued that ownership is not the issue but the right to deal with the property was the issue. The Applicants' counsel argued that the Third and Fourth Respondents deprived the Applicants of possession, but the

Second Respondent was in actual possession of the farms and pivots. The Applicants' counsel argued that the Third and Fourth Respondents have grabbed the land and that the dignity of the traditional council must be restored. The Applicants have been in constant conflict with the Third and Fourth Respondents since 2014. After the land has been returned to the Applicants, the Applicants will enter into a new lease agreement with the First and Second Respondents.

- [5] When it comes to spoliation applications, physical possession, and not the right to possession, is protected. The claim to relief under the mandament arises solely from deprivation of possession otherwise than through legal procedure. The Applicant must allege and prove that the Applicant was in peaceful and undisturbed possession of the property or other real right at the time of the dispossession. This, the Applicant did not do.

[6] As stated here above, in order for the Applicants to succeed with an application for spoliation the applicants must allege and prove that he or she was in peaceful and undisturbed possession of the property or right. In the **LAW OF SOUTH AFRICA (LAWSA) Vol 27 par 94**, it is stated that the spoliation order or *mandament van spolie* is available where:

- "(a) *a person has been deprived unlawfully of the whole or part of his or her possession of movables or immovable;*
- (b) *a joint possessor has been deprived unlawfully of his or her co possession by his or her partner taking over exclusive control of the thing held in joint possession;*
- (c) *a person has been deprived unlawfully of his or her quasi-possession of a servitotal right*
- (d) *a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.*

In case (c) and (d) the courts have warned that the application of the spoliation principles to incorporeal rights require closer investigation and more subtle treatment and that one must distinguish carefully between rights incidental to the quasi-possession of the right and a mere right to claim specific performance of a contractual or statutory obligation.

Illicit deprivation of possession in any of the ways mentioned above is termed spoliation. "

[7] Mhlantla JA in IVANOV v NORTH WEST GAMBLING AND OTHERS 2012 (6) SA 67 (SCA) held :

"Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is

proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant - that is why a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute. "

[8] ***In Street Pole ads Durban (Pty) Ltd and Another v Ethekwini Municipality 2008 (5) SA 290 (SCA) at para 15 where Cameron JA stated:***

"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."

- [9] The Applicants in this matter did not allege or prove that he was in peaceful and undisturbed possession of the property at the time of dispossession, being October 2017, but according to the Applicant has not been in possession since 2014 as was conceded by the Applicant's counsel during argument in court. The Applicant's counsel further conceded that it was in fact not the First and Second Respondents who dispossessed but the Third and Fourth Respondents who dispossessed during 2014 already. This application was not brought based on the facts of dispossession that occurred in 2014, but the alleged dispossession in 2017 by the First and Second Respondents. There was no case made out of spoliation against the Third and Fourth Respondents. The relief claimed in the Notice of Motion

in fact has a direct bearing on the rights of the First and Second Respondents and not the Third and Fourth Respondents.

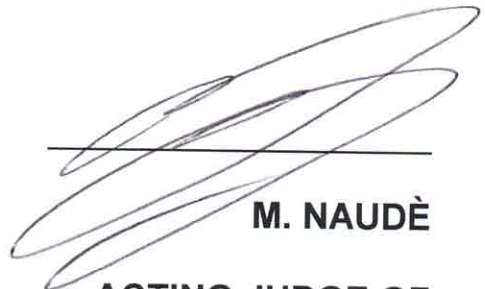
[10] A dispossessed person must act within a reasonable time to have possession restored, otherwise the application for a mandament will be refused. (**Le Riche v PSP Properties CC [2005] 4 All SA 551 (C), 2005 (3) SA 189 (C)**). This application was only issued during June 2018, some four years after the alleged dispossession by the Third and Fourth Respondents and in this court's view does not constitute a reasonable time to have possession restored.

[11] Having regard to the fact that the Counsel for the Applicant conceded that this application should not have been brought against the First Respondent and that it was in fact not the First and Second Respondents who dispossessed in 2017, this court can only then turn to whether a case has been made out for the relief claimed against the Third and Fourth Respondents.

Having regard to what was stated here above, this Court is not satisfied that a proper case has been made out against the Second and Third Respondents either and in the result the application stands to be dismissed.

[12] I therefore make the following order:-

1. The application is dismissed.
2. The Applicants to pay the costs of the First to Fourth Respondents, jointly and severally, the one to pay, the other to be absolved.

A handwritten signature in dark ink, consisting of several overlapping loops and a horizontal line, positioned above the printed name.

M. NAUDÈ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES:

HEARD ON: 2 SEPTEMBER 2020

JUDGMENT DELIVERED ON: 2 SEPTEMBER 2020

For the Applicants: Mr. MH Letsela

Instructed by: M Letsela Attorneys

For the Respondent: Mr. P De Beer

Instructed by: De Beer Attorneys

c/o Le Roux Attorneys