THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 815/2016

In the matter between:

ABRAHAM PAULUS BISSCHOFF **FIRST APPELLANT**

ABRAHAM PAULUS BISSCHOFF **SECOND APPELLANT**
(in his capacity as representative of the
Trustees of the Paul Bisschoff Trust)

RIETVLUG LANDGOED (PTY) LTD) **THIRD APPELLANT**

DAVID EDUARD BISSCHOFF **FOURTH APPELLANT**

DAVID EDUARD BISSCHOFF **FIFTH APPELLANT**
(in his capacity as representative of the
Trustees of the David Bisschoff Trust)

and

WELBEPLAN BOERDERY (PTY) LTD **RESPONDENT**

Neutral citation: *Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd* (Case No. 815/2016) [2021] ZASCA 81 (15 June 2021)

Coram: WALLIS, DAMBUZA, SCHIPPERS and DLODLO JJA and MABINDLA-BOQWANA AJA

Heard: 19 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the website of the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 June 2021.

Summary: Property Law – *Mandament van spolie* – termination of permission to enter upon leased land – in letter cancelling agreements – not unlawful deprivation of possession – does not amount to spoliation.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Kgoele J sitting as court of first instance):

1 The appeal is upheld with costs.

2. The order of the court a quo is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Dlodlo JA: (Wallis, Dambuza and Schippers JJA and Mabindla-Boqwana AJA)

[1] The appellants own a number of farms in the North West Province, utilised collectively for the production of maize and sunflower. In 2015 they concluded a number of agreements with the Welbeplan Boerdery (Pty) Ltd represented by Mr Gerhard Olivier, in terms of which they sold some 14 portions of the farms to the company. Each agreement was subject to a suspensive condition that the respondent obtain finance to pay the purchase price. The parties agreed that in the event of the suspensive condition not being fulfilled within the period stipulated in the agreements, those agreements would be regarded as contracts of lease for one season, ie 12 months. In the interim the respondent was granted access to the farms for the purpose of cultivating certain portions of the land.

[2] The suspensive condition was not fulfilled because the respondent failed to obtain the necessary finance. The sale agreements were therefore regarded as lease agreements, each for periods of 12 months. Subsequently the respondent breached the lease agreements. The appellants' attorneys sent two letters, both dated 1 February 2016, to the respondent's attorneys in which they were informed that all agreements between the parties had been cancelled and that the respondent should not trespass

upon the land (the letters). Based solely on what was stated in the letters, the respondent obtained a spoliation order as a matter of urgency together with costs in North West High Court, Mahikeng (the high court). The high court refused leave to appeal, which was granted by this Court.

[3] Before addressing the question whether the respondent had made out a case for a spoliation order, it is necessary to briefly deal with a contention by its counsel that the order sought by the appellants would have no practical effect within the meaning of s 16(2)*(a)* of the Superior Courts Act 10 of 2013.[1] We were informed that after the spoliation order had been issued, the respondent's sole director and deponent, Mr Gerhard Olivier, did not return to the land; that he had no intention of doing so; and that the respondent's right of possession was the subject of ongoing litigation. It was therefore submitted that the appeal was moot and concerned only costs – the appeal would have no practical result and the appellants were seeking to avoid payment of the costs order which the high court had granted against them.

[4] These submissions are however unsound. The spoliation order issued by the high court remains extant and there is nothing preventing the respondent from enforcing it, should it so wish. Secondly, the appellant's case is that the high court's judgment is wrong in principle and unless the appeal is heard, it would remain as an authoritative, binding precedent in that province. The appellant's criticism of the high court's judgment, more specifically that a letter of demand instructing a possessor of land not to return to it does not constitute an act of spoliation, must therefore be addressed. In this regard it is noteworthy that in *Three Musketeers Properties*,[2] a case similar to the present one, the Supreme Court of Namibia has held that a threat embodied in a letter to disturb possession, does not constitute an act of spoliation.

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[1] Section 16(2)(a) provides:
'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'.

[2] *The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and Others* [2008] NASC 15.

[5] Turning then to the merits of the appeal. The requirements for the *mandament van spolie* are trite: (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession.[3] The *mandament van spolie* is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands.[4]

[6] It was common cause that when the letters were written the respondent was in possession of various portions of the land and that crops had been cultivated on them. Thus, the only issue in this appeal is whether the respondent was unlawfully deprived of its possession of the land. The *mandament van spolie* is a possessory remedy, aimed at the restoration (return) of possession where a party is unlawfully deprived of its prior peaceful and undisturbed possession of property.[5] What constitutes spoliation or unlawful possession must be determined on the facts.[6]

[7] Where the conduct complained of merely constitutes threatened deprivation of possession, the *mandament van spolie* is not available as a remedy because it is aimed at the actual loss of possession.[7] The remedy for a mere threat of spoliation is a prohibitory interdict.[8] For a spoliation order there must be unlawful spoliation, ie a *disturbance* of possession without the consent and against the will of the possessor.[9] A minimum threshold or degree of actual physical interference or deceit sufficiently grave to qualify as effective deprivation of possession is required. The deprivation requirement

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[3] *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-F. See also Lawsa (2 ed 2014) at 113 para 108.
[4] *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) para 22; *Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) paras 10-12.
[5] *Yeko v Qana* fn 3 at 739E.
[6] G Miller, R Brits, JM Pienaar and Z Boggenpoel *Silberberg and Schoeman's The Law of Property* (6 ed 2019 at 345.
[7] *Abbott v Von Theleman* 1997 (2) SA 847 (C) at 852H-I; *Minister of Land Affairs v Gqiba and Another* (Case No 847/2006) 2008 [ZAECHC] 176 (21 October 2008), para 13.
[8] *Abbott v Von Theleman* 1997 (2) SA 847 (C) at 852; *Outdoor Network Limited; Autumn Storm Investments 362 (Pty) Limited v PRASA; Intersite Asset Investment (Pty) Limited* unreported judgment in the Gauteng Local Division, Johannesburg, case number 2013/26064 handed down on 30 May 2014, para 12;
[9] See Lawsa op cit fn 3 at 114 para 108 and the authorities collected in fn 17.

of the *mandament van spolie* entails that the disturbance must be substantial enough to effectively end or frustrate the complainant's control over the property.[10]

[8] The respondent's case was that a statement in the letters that it would not be allowed access to the land, had 'deprived Applicant of [its] possession' and that the appellants had 'taken possession of the property'. Mr Olivier said that neither he, the manager of farming operations nor his labourers were as a result of the letters, allowed access to the land and that he was convinced that if they entered upon the land, the appellants would not hesitate to remove them and charge them with trespassing. (1/14/12-14).

[9] The relevant paragraphs of the letters upon which the respondent relied read as follows:

'Ons kanselleer dus alle ooreenkomste met u kliënt en bevestig dat ons namens ons kliënt u kliënt hiermee aansê om nie ons kliënt se eiendom te betree nie maar enige onderhandelinge via ons kantoor te doen.'[11]

and

'Ons bevestig dat u kliënt hiermee aangesê word om nie die plaas van ons kliënte enigsins te betree nie by versuim waarvan ons 'n dringende aansoek in die Hooggeregshof sal doen om u te verbied.'[12]

[10] The high court rejected the appellants' defence that there was no spoliation. The appellants contended that the letters constituted demands by lawful means. Mr Olivier of his own accord had complied with those demands and left the property. The threat to approach the court for relief in the event of trespass was a far cry from the appellants taking the law into their own hands. However, the court concluded that the appellants' act

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[10] *Minister of Land Affairs v Gqiba* fn 7 pars 13 and 15; AJ van der Walt and GJ Pienaar *Introduction to the Law of Property* (7 ed 2016) at 232.

[11] My translation:
'We therefore cancel all agreements with your client and confirm that we, on behalf of our client, hereby instruct your client not to trespass upon our client's property, but to conduct any negotiations via our office.'

[12] 'We confirm that your client is hereby instructed not to trespass upon our client's property in any way, failing which we will launch an urgent application in the Supreme Court to restrain [him].

in ‘writing the . . . letters to the applicant telling him not to enter the premises amounts to dispossession’. The judge went on to say:

‘[A]lthough a lock was not put in the physical sense, the words used prevented the applicant access to the property by withdrawing/removing the consent it had been enjoying and this equals to putting a lock at the gate physically. Both actions amount to denial of access.’

[11] As to the defence that the appellants had not resorted to self-help, the judge said:

‘On a proper analysis of the letters it is evident that they are not letters of demand as the respondents submitted. They are couched in a form of an interdict instead. The words used therein are too strong and unequivocal to the effect that the applicant should not enter the premises.’

Then, after referring to the content of the letters quoted in paragraph 9 above, the judge said this:

‘The contents of these paragraphs reveal that the letter prohibited the applicant from entering for whatever reasons and threatened . . . to take him to court to stop him if he fails to do that. This action amounts to preventing the applicant to exercise control or put differently, its control is effectively destroyed. In my view, although written by their legal representatives, this amounts to self-help.’

[12] The high court erred. The mere use of ‘strong and unequivocal’ words in a letter that a person should not trespass upon land, does not constitute deprivation, let alone unlawful deprivation, of possession of the land. And the appellants’ statement that they would approach the high court for relief if the respondent did not comply with the instruction not to trespass upon the land, was the clearest indication that they did not take the law into their own hands and had no intention of doing so. The letters must be read in context. By instructing their attorneys to write to the respondent, the appellants did no more than exercise their contractual rights of cancelling the lease agreements. One of the consequences of cancellation, as the appellants saw it, was that the respondent was not entitled to remain in possession of the property.

[13] The first letter annexed to the founding affidavit, written on behalf of the fourth and fifth appellants, stated that all agreements were being cancelled (specifically the lease

agreements that came into existence when the suspensive condition in the sale agreements had not been fulfilled) on account of various misrepresentations by the respondent through Mr Olivier that they qualified for finance to purchase the relevant farms. He was instructed not to trespass on the land and that any negotiations had to be done via the appellants' attorneys. The respondent was thus entitled to take up the matter with the appellants' attorneys: the letter did not deprive it of possession of the land and could not be construed as tantamount 'to putting a lock at the gate physically'.

[14] In terms of the second letter on behalf of the first to third appellants, the relevant lease agreement was cancelled also on the ground that the respondent and Mr Olivier had made various misrepresentations concerning the respondent's ability to obtain finance. The letter further stated that Mr Olivier had made virtually no input in the planting of crops which other persons had done as a result of his misrepresentations; and that he had not arranged for a debit order to pay the appellants' electricity accounts, despite his assurance that he had done so. As stated, Mr Olivier was instructed not to trespass on the land, failing which the appellants would approach the court to prohibit him from doing so, which was perfectly legitimate. That there is a link between the two letters is clear. They were drafted by the same attorney, Mr Frikkie Pretorius; the factual background to and reasons for the cancellation of the relevant lease agreements referred to in the letters were essentially the same; and it can thus safely be accepted that Mr Pretorius would have approached the court for relief in the event of trespass on behalf of both sets of clients.

[15] The threat to approach a court for relief in the exercise of a contractual right, as in this case, could never constitute unlawful deprivation of the respondent's control of the land, nor self-help. The essence of the *mandament van spolie* is the maxim *spoliatus ante omnia restituendus est*: the person deprived of possession must first be restored to its former position before the merits of the case can be considered.[13] And where there has

[13] Lawsa op cit fn 3 at 97 para 93; *Nienaber v Stuckey* 1946 AD 1049 at 1053; *Tswelopele* fn 7 para 21; *Ngqukumba* fn 7 para 10.

been no unlawful deprivation of possession, there is nothing to restore and the maxim cannot apply.

[16] The decision in *The Three Musketeers Properties*[14] is therefore not surprising. The first appellant was the owner of a farm in Tsumeb, Namibia. The respondent held a mining licence over a portion of the farm. A letter by the respondent dated 28 August 2006 to the appellant informing it that the respondent intended to commence mining operations in an area known as the fenced off Tschudi Mining Area, in respect of which the appellant had possession and control, stated inter alia the following:

'The mine area and buildings, which I understand are being used (unofficially) by Uris Lodge, will be immediately vacated, and secured by Rubicon [a security company engaged by the respondents].'

[17] The appellant contended that the court a quo had erred when it found that the appellant had not been 'dispossessed of its free peaceful and undisturbed possession' of the fenced off mining area, in respect of which it had exclusive control and possession. This possession, so it was contended, 'was unlawfully disturbed by the letter'.

[18] Mtambanengwe AJA, writing for a unanimous court, rejected this contention. He said:

'Describing the contents of the letter . . . of 28 August 2006 or the addressing of that letter to appellant as an act of spoliation is, in my opinion, stretching the meaning of the word spoliation beyond permissible limits, grammatically speaking, or is an interpretation beyond what common sense would allow. The most one can say of that letter is that it constitutes a threat and appellant's remedy for that would be no more than to seek an interdict against Respondent, as nothing done by the letter makes the principle *spoliatus ante omnia restituendus est* applicable.'[15]

[14] Footnote
[15] *The Three Musketeers Properties* fn 2 para 24.

[19] This reasoning, it seems to me, is guided by common sense and is correct. The Constitutional Court in *S v Williams and Others*,[16] has recognised the importance of Namibian precedents. Langa J said:

'The decisions of the Supreme Courts of Namibia and of Zimbabwe are of special significance. Not only are these countries geographic neighbours, but South Africa shares with them the same English colonial experience which had a deep influence on our law; we of course also share the Roman-Dutch legal tradition.'

[20] The high court erred in its interpretation and application of the requirement of unlawful deprivation of possession for a spoliation order. In the process it extended the scope of the *mandament* beyond its intended purpose, scope and limits. Its order, if allowed to stand, would mean that a strongly worded letter threatening deprivation of possession, or a threat to approach a court to restrain possession, would found an application for the *mandament van spolie*. That is not the law.

[21] In the result the following order is made.

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following order:
   'The application is dismissed with costs.'

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DLODLO DV

JUDGE OF APPEAL

[16] *S v Williams and Others* 1995 (3) SA 632 (CC) para 31.

APPEARANCES:

For the appellants:	M G Hitge
Instructed by:	Van Velden-Duffey Inc, Rustenburg
	Phatsoane Henney Inc, Bloemfontein
For the respondent:	Q Pelser SC
	Instructed by: Hurter Spies Inc, Pretoria
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