

SOUTH AFRICA / JUDGMENT

Comscience (Pty) Ltd and Others v Stanbury and Another (41186/14) [2014] ZAGPPHC 402 (19 June 2014) [2014] ZAGPPHC 402

COURT
North Gauteng High Court, Pretoria

BEFORE
Tuchten

CASE / FILE NUMBER
41186/14

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IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE NO: 41186/14
DATE: 19 JUNE
2014
NOT
REPORTABLE
NOT OF INTEREST
TO OTHER JUDGES
In the matter

between:	COMSCIENCE (PTY) LIMITED.....First Applicant LINDA JOSEPH NYEMBE.....Second Applicant GERHARD BOOYSE.....Third Applicant WARWICK SPENCER LAMB.....Fourth Applicant
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PETER	
ROSS.....	Fifth
Applicant	
and	
JOHN	
STANBURY.....	First
Respondent	
PAUL	
INGLESBY.....	Second
Respondent	

JUDGMENT

Tuchten J:

1 This is an urgent application for spoliatory relief (“the spoliation application”). The second to fifth applicants (“the natural person applicants”) claim that they were denied access to the principal place of business (“the premises”) of the first applicant. All the natural person applicants are employees of the first applicant (“Comscience”). The second applicant (“Nyembe”) claims to be a director and shareholder of Comscience and it is common cause that he is its chief executive officer. The fourth applicant (“Lamb”) claims to be a director of Comscience.

2 All the natural person applicants had offices or otherwise worked in the premises. On 6 June 2014 they were all either told or found out that the first respondent (“Stanbury”) had written them each a letter of that date in which Stanbury claimed to be the sole director of Comscience and, in his capacity as such, was suspending each of them, pending what the letters described as an investigation into alleged acts of wrongdoing broadly identified in the letters, and that the respondents were denying them access to the premises. The second respondent is the chief operating officer of Comscience.

3 The applicants claim that the board of Comscience consists of three directors, Nyembe, Lamb and a Mr Grech. The case for Comscience is that by denying the natural person applicants (all of them employees or directors of Comscience) access to the premises, the respondents had spoliated Comscience which was, through the natural person applicants, were in possession, together with Comscience’s

other employees, of the premises. In addition, the natural person applicants claim to have been spoliated in their personal capacities.

4 The requisite for a mandament van spolie at issue in this case is proof that the applicants possessed the spoliated thing. Our law distinguishes in this context between detentio, the act of exercising physical control over a thing,¹ and possession, ie detentio where the detentor holds with the intention of doing so for himself.² Possession need not be possession in the strict legal sense. It suffices if the applicant factually held (detentio) the thing with the intention (animus) of securing some benefit for himself. The causa of the possession is irrelevant. The mandament is available, in principle and provided the possession was peaceful and undisturbed,

to a thief, a robber, an illegal occupant, a trustee, a pledgee, a precarist, a lessee, a depositary, a hire-purchaser, a borrower, a building contractor and an agent. Possession need not be physical or personal, provided it is effective. It need not be exclusive since there will be a claim at the suit of a person who holds jointly with others. It need not be continuous, nor need it be the whole of the property.

5 The respondents' case is that Comscience remains in possession of its premises and was not deprived of its possession and that the natural person applicants did not occupy the premises in their own rights but only as detentors of Comscience. The occupation by the natural person applicants, it was submitted on behalf of the respondents, was mere detentio and not possession. Detentio is, so it was submitted, not sufficient to ground a mandament van spolie. Only a possessor can claim the mandament.

6 I must first identify the material legitimately before me. The spoliation application is something of a preliminary skirmish, preparatory to the resolution of a wider dispute relating to the identity of Comscience's shareholders and directors, the contractual instruments that bind Comscience and others, including but not limited to the participants in the present dispute, and the validity of certain instruments and actions allegedly effected in relation to or in the name of Comscience.

7 The spoliation application was launched by notice of motion dated and served on the respondents' attorney on 6 June 2014, the day of the withholding of access I have described above. The respondents and a Mr Johan Booysen were on that date preparing another application to this court (which I shall call, for want of a better term, the main application), apparently under the same case number, in the name of Booysen as trustee of a trust, citing the present applicants, together with Grech and Absa Bank, as respondents for relief arising from the allegation that certain of these respondents have tried to take over Comscience (as a "cabal"). The present respondents delivered an answering affidavit in the spoliation application but also delivered the notice of motion and founding affidavit in the founding affidavit, deposed to by Booysen, in the main application as "part of the answering affidavit" in the spoliation application. Nothing in the answering affidavit properly so called identified the passages in Booysen's affidavit upon which the respondents would seek to rely in the spoliation application.

8 This decision to use the founding affidavit in other proceedings, which runs to 70 pages without its annexures, unfortunately caused difficulties in the adjudication of the spoliation application. Counsel for the applicants submit that this procedure, objectively

viewed is abusive. In *Lipschitz v Markowitz*,³ the court held:

Mr. Peart ultimately took refuge in the last paragraph of the founding affidavit which I have quoted, for saying that that allegation is sufficient to negative the point in limine. This is the blanket allegation that perusal of the record of evidence will reveal some prima facie case of misfeasance. I am not prepared to accept this proposition. A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established

practice which is designed and which still evolves as a means of accurately identifying issues and conflicts so that the Court and the litigants should be properly apprised of the relevant conflicts, would be destroyed.

9 I think counsels' submission is good. I shall only look at evidence conveyed through the founding affidavit in the main application where I am sure that no prejudice is caused to the applicants in the spoliation application in the sense that the applicants were adequately forewarned of the issue in the spoliation application said to arise from that evidence.

10 I intend to begin with the position of Comscience. A company performs juristic acts, including the act of exercising rights and powers of possession, through its organs, most notably its board of directors. The applicant's case is that the members of the board on 6 June 2014, were Nyembe, Lamb and Grech. The respondent's case is that these three men were previously directors of Comscience but that they had been replaced by Stanbury.

11 I agree with counsel for the applicants that the respondents' case in this regard is mere assertion. There is nothing put up by the respondents which demonstrates that any of these three men ceased to be a director of Comscience in circumstances contemplated by s 70 of the Companies Act, 71 of 2008, or was removed as contemplated in s 71 of the same Act. Nor is there any acceptable evidence before me that Stanbury was appointed a director of Comscience.

12 It follows that the contention of the respondents that Comscience is not before the court because those who the applicants claim are its directors are in fact not its directors and that Comscience thus did not resolve to institute the present urgent application cannot be upheld in these proceedings. I come to that conclusion because it is the respondents' case in the answering affidavit that Nyembe, Lamb and Grech were previously Comscience's directors but that they have been displaced. The issue sought to be raised by the respondents in the spoliation application is thus not whether the three men were properly appointed, but whether they were properly removed as directors. I hold further that the allegations made by the respondents in relation to those alleged removals are inadequate to

raise a genuine dispute of fact on the papers.

13 Counsel for the respondents submitted that a person who holds a thing merely as employee of another does not exercise possession but merely detentio. I was referred particularly in this regard to *Mpunga v Malaba* 1959 1 SA 853 W, *Engeling and Another v Bosielo and Another* [1994] All SA 351 BG, *Du Randt en 'n Ander v Du Randt* 1995 1 SA 401 O, *Greaves and Others v Barnard* 2007 2 SA 593 C, *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 3 SA 254 N and *Fisher v Body Corporate Misty Bay* 2012 SA 215 GNP.

14 The other side of that coin, however, is that where the detentor/employee is deprived of his detentio, the employer on whose behalf detentio is held is the possessor, through the employee in question, and is, by the act of depriving its employee of detentio, spoliated. Thus it was held in *Mpunga*, supra, at 861E-G:

It seems to me that the authorities have established that a servant or a person who holds no rights on his own behalf, except insofar as such rights derive from an authority given to him by the master, is not entitled to bring proceedings for a spoliation order, but that only the employer can do so.

15 In the present case, Comscience possessed its premises through (with others) the three men who were claiming to be its directors and whose power to do so has not been successfully challenged in these proceedings. In my view, by denying Comscience's detentors

access to the premises, the respondents deprived Comscience, on whose behalf its detentors were holding the premises, of possession of the premises. It matters not, in my view, that other representatives and organs of Comscience were holding the premises for Comscience equally with the natural person applicants. Comscience was in possession through all its relevant employees and organs. By denying any one of them access to the premises, the respondents have deprived Comscience, *pro tanto*, of possession.

16 As to the natural person applicants: in my view Nyembe and Lamb held some part or parts of the premises notably their offices, in their own rights as directors as well as on behalf of Comscience as employees. It follows that Nyembe and Lamb have been spoliated in their own rights. The third and fifth respondents, Booyse and Ross, have not been spoliated in their own rights because they held the premises on behalf of Comscience only but an order must issue, at the instance of Comscience, restoring the possession of the premises as a whole to Comscience and the detentio of the premises as a whole to all the natural person applicants because that detentio, exercised by the natural person applicants in their capacities as employees of Comscience, is an element of Comscience's possession through each of them of the premises as a whole.

17 It was accepted on both sides that costs should include the fees of both senior and junior counsel and the costs which were reserved on two previous occasions. It was also accepted that an order should issue releasing to the third applicant the things removed and held in secure storage by the sheriff pursuant to paragraph 1 of an order made by Fourie J on 6 June 2014.

18 I make the following order:

1 It is directed that the first, second, third fourth and fifth applicants must be restored to and forthwith given access to the premises of the first applicant at 14 Kastaiing Nook, Highveld Techno Park, Centurion;

2 The sheriff is hereby authorised and directed to release to the third applicant the things removed and held in secure storage by the sheriff pursuant to paragraph 1 of the order under the above case number made by Fourie J on 6 June 2014.

3 The respondents, jointly and severally, must pay the costs of this application, including the costs which were reserved on 6 and 12 June 2014, which in all such cases will include the costs incurred consequent upon the employment of both senior and junior counsel.

NB Tuchten Judge of the High Court

19 June 2014

1Beck v Mills en 'n Ander 1990 1 SA 751 A 757D

2S v R 1971

(3) SA 798 T 801B

3 1976 3 SA 772 W 775H-776A

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