

SOUTH AFRICA / JUDGMENT

Du Plessis v Du Plessis and Another (2990/10) [2010]

ZAECPEHC 77 (29 October 2010)

[2010] ZAECPEHC 77

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

B Sandi

CASE / FILE NUMBER

2990/10

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Source record**REPORTABLE****IN THE HIGH COURT OF SOUTH AFRICA****(EASTERN CAPE, PORT ELIZABETH)****Case no: 2990/10****Date delivered: 29 October 2010**

In the matter between:

GIDEON JAKOBUS DU PLESSIS

.....APPLICANT

and

WILLEM JACOBUS DU PLESSIS

.....FIRST

RESPONDENT

WILLEM JACOBUS DU PLESSIS N.O

.....SECOND

RESPONDENT

SUMMARY

Mandament van spolie involving equipment valued at R 4 000 000-00 applicant's father acquired drilling equipment on his behalf. Applicant was to pay the monthly instalments in respect thereof whilst operating his own business. Applicant paid instalments without fail. One day his father refused to release equipment to applicant which was parked in father's premises. Court ordered father to return equipment to applicant.

JUDGMENT

SANDI J:

Applicant has launched this matter on an urgent basis in terms of Rule 6 (12) of the Uniforms Rules of Court seeking the following relief:

That the applicant's non-compliance with the rules relating to time-limits, service and form be condoned and that this application be treated as an urgent application;

That the equipment as stipulated on annexure "B1" attached to the founding affidavit be restored to the possession of the applicant forthwith;

That the first, alternatively, first and second respondents jointly and severally, pay the costs of this application;

Further and/or alternative relief."

The equipment referred to in the notice of motion is the following:

Two samil 100 magirus Deutz 320 trucks,

A super rock 5000 drilling rig mounted on the one truck.

An ingesoll rand ZHP1070 Compressor mounted on the other truck.

The first and second respondents oppose the application.

The applicant is the son of the first respondent. He is a businessman and lives at 67 Bush Willow Street, Wavecrest, Jeffrey's Bay. His business entails the drilling of boreholes in drought-stricken areas in order to access water for his customers. The first respondent is his father whose residential address is 1 Van Riebeck Street, Kareedouw. He is also the sole trustee of the Willem Jacobus Family Trust which trades under the name and style of Countrywide Drilling.

The other son of the first respondent, Jacques, is also carrying on business similar to that of the applicant and the respondents. The Du Plessis family has been involved in the business of drilling boreholes for many years.

In his founding affidavit the applicant makes the following allegations. During March 2009 he accompanied his father and mother to Pretoria where the equipment referred to in paragraph 2 of this judgment was purchased by the first, alternatively, the second respondent. On that occasion the first respondent, his wife and the applicant sojourned at the home of applicant's sister in Johannesburg.

It is common cause that the purchase of the equipment was financed by Nedbank and that the first respondent paid to Nedbank a deposit of R1,129,845.00. The total value of the equipment is about R 4 million.

After the equipment, had been collected from the dealer a meeting was held at applicant's sister's place in Johannesburg. There his father and mother congratulated him on the acquisition of the equipment and told him to use it to "make money".

The applicant and the first respondent agreed orally that applicant would pay the first respondent a monthly amount of R50,000.00 towards the liquidation of the deposit of R1,129,845.00 the first respondent paid to Nedbank. In addition the applicant had to pay the monthly instalments to Nedbank which were agreed to in the sale agreement between Nedbank and second respondent as represented by first respondent.

Subsequent to the above agreement first respondent divorced applicant's mother and is now married to Helen Lillian Du Plessis who has filed an affidavit in this matter in support of the case of the first and second respondents. She is also the bookkeeper of the respondents.

The applicant says that he has been using the equipment for his benefit from the day of its acquisition. According to him Nedbank, through its employee, Ms Stopforth, is aware that the applicant is using the equipment and that he is paying Nedbank for it. Ms Stopforth was introduced to him by the first respondent. She is handling the Nedbank account relating to the equipment.

At the first respondent's residential address there is an industrial yard where, on occasions, the applicant parked the equipment so that it could be washed and cleaned. In addition he would park the equipment there whenever he wanted it to be kept at a safe place. He says that he entered into this arrangement with the first respondent.

On Thursday, 23 September 2010, and in the absence of the first respondent, the applicant parked the equipment in the said yard. His team of workers proceeded to clean and wash the equipment under the supervision of his foreman. Once the cleaning had been done the drill rig would have proceeded to Mosselbay to execute a contract. The applicant would have taken the Compressor to Johannesburg for repairs.

On Sunday, 26 September 2010, the applicant returned to the yard in question in order to collect the Compressor in preparation for his trip to Johannesburg. The first respondent approached him and called him to his office. There the first respondent produced a handwritten contract which he required the applicant to sign. The contract stated that the applicant was an employee of Countrywide Drilling, the second respondent. The first respondent informed the applicant that he would be paid a salary of R30,000.00. In addition he would receive a percentage of the profit generated by the use of the equipment.

It appears from the applicant's papers that at that time the first respondent's business manager had resigned from his employment and the first respondent wanted someone to run his business.

Because the applicant was taken by surprise by the first respondent's attitude he requested a copy of the handwritten document so that he could obtain legal advice. According to the applicant, the first respondent informed him that if he refused to sign the contract "the truck was going nowhere."

The applicant realised that the first respondent was not going to allow him to remove the equipment from the yard. He then consulted his attorney who sent a letter of demand to the first respondent demanding the return of the equipment.

After service of the letter, the first respondent telephoned applicant's attorney advising that the equipment was not going to be given to the applicant and denied the terms of the agreement as alleged by the applicant.

In reply to that letter the first respondent's attorney wrote to applicant's attorney advising that the applicant was at all relevant times an employee of the second respondent and that he used the equipment in question in that capacity only. First respondent's attorney also stated that at all relevant times the second respondent was in possession of the equipment and that it never relinquished such possession to anyone.

In his founding affidavit the applicant challenged the respondent to produce documentary evidence that he was being paid a salary as an employee of the second respondent. He reiterated what is contained in paragraph 9 above. He pointed out that he had 10 (ten) persons under his employment who were paid by him from the income generated by his business referred to above.

The letter from the first respondent's attorneys also stated that the applicant had voluntarily delivered the truck to the second respondent in order for repairs to be effected to it. The applicant vehemently denied this statement and reiterated that the truck was merely stored at the second respondent's yard.

In conclusion the applicant states that at all relevant times he has been in free and undisturbed possession of the equipment in question until 26 September 2010 when the first respondent despoiled him of its possession.

The applicant states that he entered into a number of contracts with customers which needed to be executed by means of the equipment that has been unlawfully taken from him by the respondent. He says that the conduct of the first respondent was causing harm to his business and that as a result of the respondent's conduct he lost business from three customers.

The applicant states that by refusing him to remove the equipment from the yard in question the first, alternatively, the second respondent acted unlawfully by taking the law into their own hands. Hence he seeks an order that the equipment be returned to him forthwith.

The first respondent has filed an answering affidavit. In addition the second respondent has filed a counter-application. In the counter-application the second respondent seeks an order in the following terms;

“(1) ‘n Bevel wat verklaar dat Tweede Respondent die reghebbende op die gebruik en besit is van die masjieneenhede, beskryf in Aanhangsel “B” tot die Funderende Beedigde Verklaring,

- (2) ‘n Bevel wat Applikant gelas, in soverre hy kragtens ‘n Spoliasiebevel in besit geplaas mag word van die eenhede, om die eenhede aan Tweede Respondent terug te besorg,
- (3) Alternatiewe regshulp.
- (4) Gedingskoste.”

The counter-application is supported by the first respondent who is the sole trustee of the Willem Jacobus Du Plessis Family Trust (the second respondent). The affidavit filed on behalf of the second respondent states that the equipment was purchased by the second respondent by means of finance obtained from Nedbank. Though registered in the name of the second respondent as reflected on the certificates annexed to the counter-application, marked “P7” and “P8”, ownership of the equipment vests in Nedbank. The trust is the legal possessor of the equipment. If the trust relinquishes possession of the equipment to the applicant it would be breaching clause 12(1) of the hire-purchase agreement. According to the affidavit the trust is the only lawful possessor (reghebbende) in respect of the said equipment.

The clauses of the agreement relevant to the issue raised in the counter-application are the following:

“6: OWNERSHIP

6.1) ownership in the goods shall remain vested in the

Bank until the Client has paid all amounts due in terms of the Agreement.

6.2) All risks in the Goods from whatever cause arising shall pass to the clients upon delivery of the goods or signing of this agreement, which ever occurs first.”

“12: USE OF THE GOODS

12.1) The client shall at all times, keep the goods under his care, possession and control and shall exercise proper care in the use thereof and not use or cause the goods to be used for any purpose for which they are not intended to be used or in contravention of any law in force for the time being.”

The third issue raised by the respondents is that at all times the second respondent has been in possession of the said equipment and that if it is found that spoliation took place, the court should order, in terms of the counter-application that the equipment be restored to the second respondent. In support of the allegation that the second respondent has always been in possession of the equipment, in his affidavit the first respondent selectively referred to a sentence taken out of paragraph 31 of the applicant’s founding affidavit, which reads as follows, “it became apparent that the equipment was not going to be returned to me as a consequence of which my attorney of record wrote a letter of demand to the first respondent dated 28 September 2010.” This sentence has been taken out of context and ignores the rest of the evidence placed

before me. Reliance on it by the respondents is obviously intended to justify the allegation that the equipment has always been in the possession of the second respondent and that the applicant was an employee.

Respondent's counsel, Mr Smit SC, submitted that if the court were to order the return of the equipment to the applicant, such an order would be contrary to the provisions of clause 12(1) of the agreement quoted above. Counsel submitted that Nedbank should have been joined in these proceedings and given an opportunity to waive its rights in terms of the agreement. Counsel submitted that I should not adjudicate this matter until Nedbank has been joined in these proceedings.

I do not think that there is merit in this argument. Through Ms Stopforth, Nedbank has always been aware that the applicant was in possession of the equipment and that he was paying for it. This is not denied by any of the respondents. The evidence placed before me shows that the applicant has been paying the requisite instalments to Nedbank in respect of the hire-purchase agreement. As stated above the applicant is also paying R50,000.00 to the respondent.

I am here concerned only with the issue of spoliation and not the agreement between the second respondent and Nedbank. Nedbank is not a party to these proceedings and neither is it a party to the agreement entered into between the applicant and the first respondent relating to the use of the equipment.

Mr Smit submitted that the applicant has failed to prove that he was in actual possession of the equipment at the relevant time. He submitted that the applicant may have had a right to possess the equipment but failure to prove actual physical possession is fatal to the applicant's case. Counsel also submitted that there is no allegation in applicant's papers that he was in actual possession. Mr Smit submitted that in the event I find that there is a conflict of fact on the papers I should adopt the approach laid down in *Plascon-Evans Paints Ltd v Van Riebeeck (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623(A) and accept the respondent's version on this issue. Counsel also referred me to the matter of *Ngqumba en 'n Ander v Staatspresident en Andere*; *Damons NO en Andere v Staatspresident en Andere*; *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 260J- 261B where the following was said:

“Die algemene reël, soos in die Plascon-Evans -saak vermeld, het te doen met die wyse waarop 'n Hof 'n saak benader waar 'n applikant 'n finale bevel in mosieverrigtinge aanvra en daar 'n geskil uit die stukke blyk. Dit vloei nie daaruit voort dat 'n applikant wat 'n Hof by wyse van 'n kennisgewing van mosie J nader die onus dra en derhalwe genoodsaak is om in die geval van 'n feitegeskil die bewerings van die respondent te aanvaar as hy sy aangevraagde bevel wil verkry nie. Die grondslag van die algemene reël skyn te wees dat 'n party wat besluit om mosieverrigtinge aanhangig te maak normaalweg weet dat daar 'n gevaar bestaan dat sy feitebewerings betwis kan word en dat hy dan gedwing kan word om die respondent se bewerings te aanvaar indien hy 'n finale bevel op die stukke wil verkry.

In this matter there are a number of important and material allegations made by the applicant which are not disputed by the respondents. They are the following:

applicant has been in free and undisturbed possession of the equipment;

applicant had left the equipment at respondents yard as per long-standing arrangement;

applicant never had any problems before when collecting the equipment from the said yard. A problem arose when he refused to sign an employment agreement with second respondent;

that first respondent's refusal to allow applicant to remove the equipment is unlawful and first respondent has taken the law into his hands;

that the court should restore possession ante omnia and allow applicant to remove the equipment;

applicant uses the equipment in his business on a daily basis;

applicant has a number of contracts to execute and that the conduct of the respondents is harming his business. The result of the unlawful conduct is that applicant has lost some of his customers;

some of applicant's customers are threatening to take legal action against him;

applicant has 10 employees whom he pays from the income generated by the equipment. He pays Nedbank and the first respondent;

the conduct of the first respondent in attempting to force him to enter into the aforesaid agreement is unlawful.

The allegations made in subparagraphs (a)-(j) above are not disputed by the respondent. In addition thereto on 28 September 2010 respondent's attorney wrote to applicant's attorney in the following terms:

"In die opsig is dit verder insiggewend dat u Klient vrywilliglik die trokke aan ons Klient besorg het ten einde die nodige herstel werk aan die trokke te deon (die bots Klaarblyklik met u klient se bewering dat u klient fer alle relevante tye besit gehad het oor die trokke."

However in his answering affidavit the first respondent stated the following:

"Applikant het geweier om die kontrak wat voorheen aan hom aangebied is te teken, waarna ek te kenne gegee het datek nie die masjiene aan hom sou vrylaat indien hy nie in diens van die Trust is ooreekomstig die voorgestelde kontraks depaling nie".

The two versions referred to above are contradictory of each other. The second version set out in first respondent's answering affidavit corroborates applicant's case, namely, that when applicant refused to sign the agreement the first respondent told him that he was not going to release the equipment to him. This version taken together with applicant's version that up until that date he was in free and undisturbed possession of the equipment; that he had parked it in the said yard

(as per arrangement with first respondent) for the purpose of it being washed and cleaned; that his staff indeed proceeded to do so;

that he used the equipment for his benefit ever since its acquisition; from the income generated he paid Nedbank and his staff

and utilised the rest of the income for his personal use; is more probable than the version of the respondents.

I do not find that there is a conflict of fact which warrants the application of the principle set out in the Plascon-Evans case. In my view the applicant's case is clear and straightforward and is the more probable version in the circumstances of this case. I cannot rely on the respondents version and I am satisfied that I can reject it on the papers.

The version of the respondents that the applicant voluntarily delivered the equipment to the respondents is unacceptable. I do not accept that it is the correct version. The applicant was at all relevant times in actual physical possession of the equipment. He never relinquished such possession when he parked the equipment in the industrial yard for the purpose of washing and cleaning. He subsequently went to collect it, as he used to do in the past, when the first respondent prevented him from doing so.

In *Yeko v Qana* 1973 (4) SA 735(A) at 739 D-G the following was stated:

"The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. In order to obtain a spoliation order the onus is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. As the appellant admits that he locked the building it was only the possession that respondent was required to establish. If the respondent was in possession the appellant's conduct amounted to self-help. He was admittedly in occupation of the building with the intention of selling his stock for his own benefit. Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. For, as Voet, 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even

if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted."

Furthermore in *First Rand Ltd t/a Rand Merchant Bank and another v Scholtz No and Others* 2008(2) SA 503 (SCA) at 509 paragraph 12. The following was stated:

"The mandament van spolie is a remedy to restore to another ante F omnia property dispossessed 'forcibly or wrongfully and against his consent'. It protects the possession of movable and immovable property as well as some forms of incorporeal property. The mandament van spolie is available for the restoration of quasi-possession of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is G the restoration

of the status quo ante and not the determination of the existence of the right. The quasi-possession consists in the actual exercise of an alleged right.”

In the circumstances I am satisfied that the applicant has made out a case for the relief he seeks.

It follows from what I have stated above that the counter-application should fail.

Lastly, Mr Smit submitted with reference to *Parker v Mobil Oil of Southern Africa (PTY) Ltd* 1979

- (4) SA 250 (NC) that to grant the applicant the order he seeks would be of no use to the applicant and inconvenient to the respondents.

Counsel submitted that if applicant is given possession of the equipment he will not be able to use it because the Compressor is

not functioning.

The applicant's case is very clear. One truck was going to execute a contract in Mosselbay whilst he was going to transport the compressor to Johannesburg. The equipment would certainly be of use to the applicant once he is placed in possession of it.

The following order is made:

- (1) The first and second respondents are ordered to restore possession to the applicant of the following equipment forthwith:

A Samil 100 Magirus Deutz 320 truck with engine number 686 0822.

A Samil 100 Magirus Deutz 320 truck with engine number 706 1257

A Super Rock 5000 drilling rig

An Ingesoll Rand HP 1070 compressor

The first and second respondents are to pay the costs of this application jointly and severally.

The counter-application is dismissed with costs.

B Sandi

Judge of the High Court

Eastern Cape, Grahamstown

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