

SOUTH AFRICA / JUDGMENT

Endtime Christian Association (PE Tabernacle) v Boesak and Others (1530/2022) [2023] ZAECQBHC 60 (3 October 2023)

[2023] ZAECQBHC 60**COURT**

Eastern Cape High Court, Gqeberha

BEFORE

V P Noncembu

CASE / FILE NUMBER

1530/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, GQEBERHA)****CASE****NO: 1530/2022****In****the matter between:**

ENDTIME
CHRISTIAN ASSOCIATION
Applicant
(PE
TABERNACLE)
And
NATHAN
BOESAK
First
Respondent
ANDRE
MARAIS
Second
Respondent
DONOVAN
WHITEHEAD
Third
Respondent
ALFRED
BERG
Fourth

Respondent
MONDE
MATCHES
Fifth
Respondent
ISAAC
VAN LOUW
Sixth
Respondent
DIZNEY
VROLICK
Seventh
Respondent
STEPHEN
NICHOLSON
Eighth
Respondent
AARON
PILLAY
Ninth
Respondent
SIMEON
PILLAY
Tenth
Respondent
PAUL
VA ROOYEN
Eleventh
Respondent
JUDE
KLUIT
Twelfth
Respondent
CLAYTON
KLEYNHANS
Thirteenth
Respondent
SANDILE
SELANI
Fourteenth
Respondent
MICHAEL
NICHOLSON
Fifteenth
Respondent
GLENNY
ESAU
Sixteenth
Respondent
MARCHELLE
VAN VOLLENHOVEN

Seventeenth
Respondent
JUDE
PLAATJIES
Eighteenth
Respondent
THE
MEMBERS OF THE
Nineteenth
Respondent
TRUE
BELIEVERS

REPORTABLE: YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED

JUDGMENT

NONCEMBU J

- [1] The protagonists in this religious warfare are two factions of a church known as the Endtime Light Christian Association (PE Tebarnacle) (the applicant/the church)). The factions are, for identification purposes, referred to as ‘The True Believers’, of which the respondents in casu are said to be members; and ‘The Concerned Believers’ who represent the applicant in the matter.
- [2] The applicant is a voluntary association governed by a written constitution which was adopted in 1978 and amended in 1980. At the crux of the current dispute is a church building which is one of the properties owned by the applicant and situated at 43 Juniper Crescent, Sancto, Gqeberha. The applicant contends that it has been unlawfully and violently dispossessed of its peaceful and undisturbed possession of the church building and its premises by the respondents.
- [3] In resisting the application the respondents raised counter-spoliation as a defence as well as a counter-application

where they seek relief which can be described as conciliatory in nature, where they implore the court to regulate settlement of the matter.[1] Notably, although a notice of opposition was filed on behalf of all the respondents, only the third to the eighteenth respondents filed answering papers.

FACTUAL BACKGROUND

- [4] The longstanding dispute in the church has been characterised by a history of litigation which had as its origin the alleged mismanagement of the church's finances by its erstwhile Pastor, Mr Twynham. Towards the end of 2012, the dispute culminated in a split between the members of the church into the two aforementioned factions. The True Believers were supportive of the erstwhile Pastor, Mr Twynham whilst the Concerned Believers held a contrary position. Mr Twynham has since passed on and the two factions have each appointed a new Pastor.
- [5] It is common cause that after the split the True Believers continued to use the church building for their services whilst the Concerned Believers utilised a different venue. They also (The Concerned believers) opened a separate bank account in order to receive their tithes and offerings since they did not have access to the church's bank account which was being utilised by the True Believers.
- [6] Since then a litany of litigation has ensued which went up until the Constitutional Court. This and the full history of the matter is detailed in the applicant's founding affidavit deposed to by one Stanford Phillip Boucher who is one of the office bearers of the applicant. Given the nature of the relief sought in the current application, I do not intend to traverse this in detail in this judgment as I am of the view that that will only serve to obfuscate the issues.
- [7] Suffice it to say that two judgments are relevant for purposes of the current application. One is by Smith J, where he ordered that the office bearers of the church were to arrange and conduct a meeting of the applicant in accordance with its procedures. Part of the order was that a general meeting of the members of the applicant was to be convened wherein bona fide members of the church were to vote on whether or not disciplinary action was to be instituted against Mr Twynham.[2]
- [8] The meeting was accordingly held but members of the True Believers were not in attendance. One of the resolutions taken at that meeting was to remove Mr Twynham as Pastor of the church. Mr Twynham has since passed away.
- [9] The second judgment, confirming the meeting and resolutions taken therein in terms of the Smith J's judgment is one by Ronaasen AJ. [3] In this matter, Ronaasen AJ held, inter alia that:

"1. The respondents shall deliver to the office of the applicant's attorneys of record, within three days of the date of this order all property belonging to the applicant, which includes but is not limited to:

- 1.1 the proceeds of all offerings received by any of the respondents, in the name of, or on behalf of the applicant;
- 1.2 financial documents held on behalf of the applicant by the respondents;
- 1.3 all of the applicant's movable property in the possession of the respondents;

1.4 all keys and alarm codes to all the applicant's premises in possession of, or within the knowledge of the respondents;

1.5 all bank cards for the applicant's bank accounts in the possession of the respondents;

1.6 all the respondent's bank books and administrative documents in the possession of the respondents.

2. The respondents shall immediately vacate all church buildings belonging to the applicant, which are occupied by them or under their control.

3. The respondents are interdicted and restrained from representing that the church services they hold fall under the auspices of the applicant or from conducting any church services in the name of the applicant.

... ”

[10] Following upon a further application to the Gqeberha High Court, the above judgment was declared to be immediately executable by Dunywa AJ in a judgment delivered on 9 March 2022.[4]

[11] Armed with the order of Ronaasen AJ, members of the applicant (those aligned with the Concerned Believers)[5] proceeded to the church building with a locksmith on 25 January 2022 where they had the locksmith remove and change the locks to allow them access into the building. It appears that some violence erupted during the process when the alarm was activated in the church, resulting in a group of members of the True Believers attending to the church premises. The situation however, was managed when the police were called to intervene.

[12] On 29 January 2022, some 4 days later, around 15h30, a group of people, including the first to the eighteenth respondents attended to the church premises where they forcibly gained entrance without the applicant's consent or permission. A security guard who was placed at the premises fled fearing for his life as he alleged that some of the group members were armed. All the locks were removed and the respondents were in control of the church building and its premises.

[13] It is the latter conduct of the respondents that has led to the current application being lodged. The applicant contends that it was in peaceful and undisturbed possession of the church premises when it was forcibly dispossessed thereof by the respondents.

THE

ISSUES

[15] The issues for determination are quite limited in the matter. They are –

15.1 whether or not the applicant has met the requirements for a mandament van spolie on a balance of probabilities;

15.2 whether or not it has made out a case for a final interdict;

15.3 whether or not the respondents have made out a case for counter-spoliation; and

15.5 whether or not they have made out a case for the relief they seek in the counter-application.

THE LEGAL PRINCIPLES

[16] Mandament van spolie is an extraordinary, robust remedy available to a party who has been wrongfully deprived of his/her possession. It is available to any person who has been wrongfully deprived, entirely or in part, of his or her possession. The object of the remedy is to restore the status quo ante (possession), and as such it does not concern itself with the rights of the parties. ‘...anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (spoliatus ante omnia restituendus est). Even an unlawful possessor ... is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object

or property.’[6] The underlying rationale to the remedy is that no one should resort to self-help to regain possession.

[17] The requirements for spoliation are:

17.1 the applicant was in peaceful and undisturbed possession of the item; and

17.2 was unlawfully and forcefully deprived of such possession without any due legal process or without any consent.[7]

Once the above requirements have been established the court has no discretion to refuse a spoliation order on considerations relating to the merits of the disputes between the parties.[8]

[18] On a similar vein, the aspect of whether or not the respondents are members of the applicant and whether or not they have a right to possess the building in question are irrelevant considerations for purposes of the spoliation application. It is also on the same basis that I make no findings in this regard.

[19] It is trite that spoliation is by its nature a speedy remedy designed to provide summary relief.

[9] The notice of motion in this matter was issued on 2 June 2022, some four months after the dispossession had taken place. The respondents

contend that on this basis alone, the court ought to exercise its discretion and dismiss the application. Such discretion however,

cannot be exercised in a vacuum. The court can only exercise such discretion where it has been established that because of the delay in bringing the spoliation application, the restoration of the status quo will serve no practical purpose or will have no practical value.

[20] A similar conclusion was reached by Binns Ward AJ (as he then was) in *Barnard v Carl Greaves Brokers* where he stated:

“An applicant for relief under the mandament is expected to act expeditiously in claiming it. The rationale for the remedy is undermined when, as in the current case, a lengthy interval and altered circumstances have intervened between the offending dispossessing act and the availment of the remedy. Although it has often been held that the scope for the exercise of judicial discretion to refuse the remedy is extremely limited, the cases show that the remedy will not be granted where it would be impractical or purposeless.”[10] (emphasis intended)

[21] According to the authors of *Silberberg and Schoeman*: [11]

“Although the mandament van spolie is a robust remedy, it does not mean that the court can exercise no discretion at all when considering the order. It merely means that the court has no general or wide discretion. ... It is submitted that the court can exercise its discretion when applying the principles of the mandament when [it] has to consider whether a delay in the application justifies a refusal of the order.”[12]

[22] It must be emphasised that judicial discretion contemplated here is not one to refuse to grant the relief on the basis of the balance of convenience or prejudice amongst the parties; or to refuse the relief on the ground of considerations relating to the merits of the dispute between them; [13] or the like considerations. Rather, it is a discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of such application in the specific sense that such relief would (objectively viewed) not practically advance the underlying rationale that justifies the existence of this unique remedy. [14]

[23] In the present matter, no evidence was presented to suggest any altered circumstances that have intervened since the dispossession which could result in the relief sought being of no practical value. In the circumstances therefore, I am constrained to find that I enjoy no discretion to refuse the relief sought on the basis of the delay in bringing the application alone.

COUNTER SPOLIATION

[24] ‘The mandament van spolie is a common law possessory remedy used to restore possession that was unlawfully lost [15]. It is a robust, speedy remedy [16] and has as its main objective the preservation of public order by preventing persons from taking the law into their own hands and is rooted in the rule of law. [17] Self-help by way of taking the law into your own hands is inconsistent with and undermines the rule of law which is one of the

founding principles of our democracy.[18] However, in limited circumstances, a party may take the law into his/her own hands by using the defence of counter spoliation against

the wrongful disturbance of his/her peaceful and undisturbed possession. In these circumstances counter spoliation would be a continuation or part of the *res gestae* and is *instanter* to the despoiler's unlawful appropriation of possession.[19]

[25] According to Van der Merwe recovery is *instanter* or immediate:

"... if it is still part of the res gestae of the act of spoliation, namely a mere continuation of the existing breach of the peace. If the victim of the first spoliation fails to act instanter and takes the law into his own hands to regain possession after the original act of spoliation has been completed, his conduct is considered to be a new act of breach of the peace or a separate act of spoliation entitling the first spoliator to a spoliation order against him. Counter spoliation is thus a plea admitting the spoliation but alleging that the act was merely to counter the applicant's prior wrongful spoliation."

[26] It appears thus, that counter spoliation is based on the fact that a possessor may resist illegal attempts to deprive him or her of possession. In the result, a person acting under counter spoliation who is deprived or threatened with deprivation of possession, may exercise self-help in order to regain possession if this is done immediately or as it is stated on authorities, *instanter*. The requirement is that it must be done immediately.

[27] It is thus an established principle that counter spoliation is not a stand-alone remedy or defence and does not exist independently of the *mandament van spolie*. [20]

[28] It is not in dispute that the respondents did not follow any legal process nor did they have the consent of the applicant in dispossessing it of the church building and its premises. All that the respondents deny is that they used threats of violence or were armed when the security officer who was guarding the premises fled from the premises. Violence or fraud however, is not an essential element of dispossession, provided the act is done against the consent of the person dispossessed illicitly (by which is meant in a manner which the law will not countenance). It cannot be gainsaid that the applicant was dispossessed of the church premises without consent in an illicit manner, hence the only valid defence in law that the respondents could raise is that of counter spoliation.

[29] Whilst I accept that the applicant has legal rights over the church premises in terms of the court order granted by Ronaasen AJ, it cannot be gainsaid that the manner in which its members /office bearers took possession of the property from the respondents cannot be countenanced in law. It is only the sheriff who is authorised to execute court orders. The applicant's representatives elected not to follow the legal process of execution and resorted to self-help when they came and changed the locks from the premises. Such conduct amounts to a breach of the peace and an act of spoliation entitling the dispossessed party to counter spoliation.

- [30] The question however, is whether or not the repossession of the church premises by the respondents was done instanter. The respondents in the matter placed reliance on *Ness and Another v Greef*[21] where counter spoliation had taken place almost 11 days after the initial act of spoliation.
- [31] Whether or not the conduct of a respondent was a lawful counter spoliation is an issue which must be determined on the facts of each individual case. On the facts of the present matter, the counter spoliation by the respondents took place four days after the initial act of spoliation by the applicant. The applicant had by then changed the locks to the church premises and even removed some of the furniture inside. In my view, the initial act of spoliation had been completed by then. I do not see therefore how it can be said that the spoliation by the respondents was part of the *res gestae* of the initial spoliation.
- [32] The initial act of spoliation had been completed when the respondents despoiled the applicant. Their conduct therefore amounted to a new breach of the peace and a new act of spoliation, as such it cannot be said to constitute lawful counter spoliation. They should have followed the legal process in order to regain possession. Having failed to do so, the remedy/defence of counter spoliation therefore cannot avail them.

THE INTERDICTORY RELIEF SOUGHT

- [33] The requirements for a final interdict are trite. They are[22]:

33.1 a clear right;

33.2 an injury actually committed or reasonably apprehended; and

33.3 the absence of an adequate alternative remedy.

- [34] By virtue of the court order by Ronaasen JA which was declared immediately enforceable I am satisfied that the applicant has established a clear right for the final relief it seeks.
- [35] Given the level of intimidation that was displayed when the respondents retook possession of the church premises from the applicant's control, and the history of violent threats between the two factions, I am satisfied that the second requirement of a reasonable apprehension of injury has been met.
- [36] In the premise, I cannot find that an alternative satisfactory remedy is available to the applicant other than the interdict it seeks. Therefore, the application for the final relief sought must succeed.

THE COUNTER-CLAIM

- [37] I cannot find any legal basis upon which the relief sought by the respondents in their counterclaim is premised. As stated elsewhere in this judgment, it seems to me that the respondents seek some sort of reconciliatory remedy that is to be regulated by this court. That in my view, similar to Smith J's finding in his judgment referred to above, would be tantamount to this court interfering in the applicant's internal affairs and in violation to the

doctrine of entanglement.[23] Any form of mediation or reconciliation that is contemplated is something that the affected parties themselves would need to engage in.

COSTS

- [38] The only issue remaining is that of costs. The applicant is seeking a punitive cost order in the form of attorney and own client scale against the respondents. The reasons advanced for such an order are that the events set out in their papers or rather the conduct of the respondents constitute a material break down of the rule of law and a deep down contemptuousness towards the court.
- [39] Costs are a matter for the discretion of the court and the general rule is that costs follow the result. Indeed, the conduct of the respondents in taking the law into their own hands smacks of contemptuousness and poses a serious threat to the rule of law. It is for that same reason that spoliation is available to the applicant as a remedy in the circumstances.
- [40] One however, must be careful not to lose sight of the fact that the respondents' conduct was in reaction to the conduct of the applicant which, despite having a court order, decided not to follow the legal processes and resorted to self- help in executing same. Such conduct is no less contemptuous than that of the respondents. As I have found above, two separate acts of spoliation were committed by the parties, with the only difference being that counter spoliation could not avail the respondents as a defence on the facts of the matter. In my view therefore, a punitive cost order is not warranted under the circumstances.
- [41] I do take into account however, that the applicant was substantially successful in its application, for that reason therefore, there is no reason why it should not be awarded costs. However, given the role that it played and its level of culpability in the matter, and to reflect the court's censure of thereof, I deem it appropriate that it be awarded 50% of the costs occasioned by the application.[24]

ORDER

- [42] In the premise, the following order shall issue:
- (a) The respondents are to immediately restore to the applicant's possession, control and use, the church and premises situated at 43 Jupiter Crescent, Sanctor, Gqeberha.
 - (b) The respondents are hereby interdicted and restrained from coming within 100 metres of the church and premises situated at 43 Juniper Crescent, Sanctor, Gqeberha.
 - (c) The respondents are hereby interdicted and restrained from holding forth that they represent the applicant or holding forth that any meeting they arrange is for or on behalf of the applicant.
 - (d) The respondents are to pay the applicant 50% of the costs of the application jointly and severally, the one paying, the others to be absolved.

(e) The respondents' counter-application is dismissed.

V P NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES Counsel for the applicant : R Crompton Instructed by : D Malgas & Associates C/O Boqwana Burns Gqeberha Counsel for the 3rd to the 18th respondents : L Gagiano Instructed by : D Gouws Inc. t/a Gouws Attorneys Gqeberha Date of hearing : 20 April 2023 Date judgment delivered : 3 October 2023

[1] See para 15.1 to 15.5 of the answering affidavit (AA).

[2] The judgment was handed down on 9 February 2016 under case no. 2931/2012 in the Gqeberha High Court.

[3] Gqeberha High Court case no. 3606/2016, delivered on 20 October 2020.

[4] The application was in terms of section 18 of the Superior Court's Act, (10 of 2013).

[5] I say this because the respondents in their papers also claim to be members of the applicant, that of course is not an issue for

determination before this court.

[6] Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA).

[7] Van Rhyn and Others NNO v Fleurbaix Farm (PTY) Ltd 2013 (5) SA 521 (WCC).

[8] Malan v Green Valley Farm Portion 7 Holthill 434 CC 2007 (5) SA 114 (ECD).

[9] See Minister of Agriculture and Agricultural Development and Others v Segopola 1992(3) SA 697 (T) at 971 J - 972 A; also Burger v Van Rooyen and Another 1961 (1) SA 159 (O) at 161 F - G.

[10] Barnard v Carl Greaves Brokers (Pty) Ltd

[2007] ZAWCHC 2; 2008 (3) SA 663 (C) paras 59 to 62. See also Beetge v Drenka Investments (Isando) (Pty) Ltd 1964

(4) SA 62 (W) at 66G – 67A.

[11] As referred to in Maistry v Naidoo and Another (2020/36040) [2022] ZAGPJHC 937 (25 November 2022).

[12] Muller et al. (above) at 331.

[13] Malan v Green Valley Farm Portion 7 Holt Hill 434 CC 2007 (5) SA 114 (E) para 25.

[14] See Maistry v Naidoo and Another supra.

[15] Eskom Holdings SOC Ltd v Masinda 2019

(5) SA 386 (SCA).

[16] Blendrite (Pty) Ltd and Another v Moonisami and Another 2021

(5) SA 61 (SCA).

[17] Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd 2021

(5) SA 54 (SCA); Voet 41.2.16.; See also The Selective Voet, being the Commentary on the Pandects, translated by Percival Gane, Butterworths Paris Edition, Book 6 Section 7(d) 442, 485-488 and 499 (referred to in South African Human Rights Commission and Others v City of Cape Town and Others [2022] 4 All SA 475 (WCC); 2022 (6) SA 508 (WCC).

[18] Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989

(1) SA 508 (A); Section 1(c) of the Constitution which reads that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: . . . (c) Supremacy of the constitution and the rule of law.'

[18] Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989

(1) SA 508 (A); Section 1(c) of the Constitution which reads that:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

. . .

(c) Supremacy of the constitution and the rule of law.'

[19] Yeko v Qana 1973

(4) SA 735 (A), referred to with authority in South African Human Rights Commission and Others v City of Cape Town and Others

[2022] 4 All SA 475 (WCC); 2022 (6) SA 508 (WCC).

[20] Ngqukumba v Minister of Safety and Security and Others 2014

(5) SA 112 (CC).

[21] 1985

(4) SA 641 (C) at 647 D – G.

[22] See Setlogelo v Setlogelo 1914 AD 221 at 227.

[23] See De Lange v Presiding Bishop of the Methodist Church of South Africa for the Time Being

[2016] JOL 34752 (CC).

[24] Huge Networks (Pty) Ltd v Telexmax (Pty) Ltd (A56/21; 89823/19) [2022] ZAGPPHC 300 (6 May 2022).

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