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SOUTH AFRICA / JUDGMENT

## G and D Refrigeration CC v Mulder (HCA05/2016) [2016] ZALMPPHC 16 (28 October 2016) [2016] ZALMPPHC 16

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COURT

Limpopo High Court, Polokwane

BEFORE

M.G. Phatudi, E.M. Makgoba

CASE / FILE NUMBER

HCA 05/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA 05/2016

Reportable: Yes

Of interest to other judges: Yes

Revised.

28/10/2016

In the matter between:

G AND D REFRIGERATION CC APPELLANT

and

JPB MULDER RESPONDENT

JUDGMENT- CIVIL APPEAL

M.G. PHATUDI J

SUMMARY:

Application-spoliation-factul possession and animus possidendi a requirement to protect possession- the common law corpus abrogated by disuse in modern days paradigm- ius possessionis to be distinguished from ius possidendi – the holder of a thing entitled to factual possession – unlawful deprivation amount to self – help – a party despoiled entitled to restoration ante omnia –

Civil Procedure: Mandament van spolie – possessory remedy aimed at restoration of dispossessed property Appellant committed act of spoliation – appeal dismissed with costs.

[1]

## INTRODUCTION:

1.1. This is an appeal against the judgment of the Regional Magistrate Mr. S.J Reynolds, sitting as Court of first instance. The application was one of Mandament van Spolie (spoliation). For the sake of convenience, I shall refer to the parties as cited in the notice of motion.

1.2. The Applicant (Respondent in this appeal) launched spoliation application in the Court below seeking an order for the restoration to him of possession of the motor vehicle described as Nissan Navara 2.6 DCI XE; with registration plate CLP 409 L. He also asked for a punitive costs order against the Respondent (Appellant in this appeal). The application was opposed.

1.3. The Court below, however, granted judgment in favour of the Applicant, and ordered the Respondent to pay punitive costs for lack of bona fides in opposing the matter purely on its merits.

[2]. It was this adverse order that aggrieved the Respondent, as a result of which it brought about the present appeal.

[3]. The factual matrix that preceded the application may be summed up briefly as follows:-

3.1. The Applicant was employed by the Respondent from 01 April 2012 until 30 August 2014, to manage its affairs. This he did jointly with one Gerhardus Hartman, performing general managerial services on behalf of the Respondent, a close corporation duly registered in terms of the corporate laws of the Republic of South Africa. The registered Member of the Respondent, being Mr Hartman's wife, Mrs Dalema Hartman, was allegedly passive in the day-to-day business management of the Respondent.

3.2. By mutual agreement between the parties, which was verbal, it was arranged that because of the Respondent's financial constraints, the Applicant be offered, and was placed in possession of the said motor vehicle for his use and enjoyment as compensation for the services he rendered. It appears that the motor vehicle ("Navara") was still a subject of an instalment sale agreement with the finance holder MFC, which impliedly, retained the right of ownership thereof, until the purchase price has been fully settled. The Navara would thereafter be transferred into the Applicant's name. The relevant insurance company that covered the risks associated with the use by the Applicant, was accordingly advised of this private arrangement.

3.3. It is common cause that the Applicant acquired possession of the Navara during September 2014. In fact the Respondent blatantly admitted in its Answering Affidavit (“AA”) that “the Applicant was in peaceful and undisturbed possession of the vehicle as from 1 September 2014.”[1]

3.4. It is also common cause that the Applicant was involved in an accident on 29 October 2015, having collided with a stray cow causing extensive damage to the Navara he was driving. The Navara was subsequently taken to Thomson Panelbeaters in Polokwane for repairs. It appears that as at December 2015 roughly two months since the collision, the panel beaters could not attend to the repairs as instructed.

3.5. On 11 January 2016, the Applicant was telephonically contacted by Mrs. Hartman where she informed him that she had “uplifted” the said vehicle from Thomson Panel beaters, and that the Navara will not be returned to the him, citing a breach of the parties’ verbal agreement as a reason.

[4]. It was submitted by the Applicant that the conduct of the Respondent, in particular, Mrs. Hartman, amounted to an act of spoliation as he felt despoiled when she “uplifted” the Navara from the panelbeaters.[2]

[5]. The Respondent conversely, denied having spoliated the vehicle, contending that the Applicant lost possession of the motor vehicle in question on 29 October 2015 when it was taken in for panelbeating.[3]

[6]. It is these conflicting submissions around the question of possession and the manner or circumstances as to how the Applicant’s

possession of the motor vehicle was lost, that calls for a penetrated inquiry, regard being had to the old authorities on this aspect.

[7]. The legal issues in the present application are whether the Applicant was in “peaceful and undisturbed possession” at the time when he placed the motor vehicle he had possessed in the hands of the panelbeater for repairs, or put differently, whether by despoiling the said motor vehicle, did the Respondent’s conduct not constitute unlawful deprivation of Applicant’s possession.

[8]. With deference to the legal principles on the matter, I consider it apposite to analyse briefly the old authorities and relevant case law on the subject so as to put into lucid context, the notion of “possession” in our law.

[9]. According to the commentator Mansdorp[4] possession can be described as a “compound of physical situation and mental state involving the physical control (corpus) of a thing by a person and that person’s mental attitude (animus) towards the thing.

[10]. Although our system of rights was foreign to Roman law, it appears that Roman law, however, recognised possession as a factual

relationship that attached consequences, for instance, the protection thereof.[5] The weight of old authorities in our law seem to favour the view that the possessor enjoyed a real right as a holder.

[11]. However, other commentators hold a different view,[6] suggesting that possessor should be regarded as an adjunct of the law of property, or should be classified as a right sui generis.

[12]. Possession often constitutes an entitlement flowing from some or other right that a possession has, for instance, ownership, pledge ,or lease. A borrower for use may, therefore, possess the thing on account of the respective real or personal rights they acquire.

[13]. The protection afforded by the Mandament van spolie against any person, including the owner, in instances of unlawful deprivation of possession (spoliation) presupposes an underlying right which the law serves to protect. It is the unlawfulness in the deprivation of the thing which, in my view, constitutes the violation of a right to possess a thing. The position of an unlawful possessor of a thing would, however, not fit in the foregoing proposition.

[14]. The preferred approach, therefore, seems to be the Roman law one, where possession as a factual relationship gives rise to certain consequences. If this has to be explained within the paradigm of “right” and “entitlements”, then possession within the context of protection thereof can therefore be explained as an “entitlement” (“bevoegheid”) conferred by objective rules of law on a person to remain in “free and undisturbed” possession, until lawfully ousted, and not through self-help.

[15]. The right of possession is often referred to as the ius possessionis and must be distinguished from ius possidendi, that is, the entitlement to demand control or custody over a thing. A good example of the latter is the owner of a motor vehicle who keeps it in his or her garage and drives it daily, has ius possidendi as owner and ius possessionis as a possessor.

[16]. However, where the true owner of it enters into a contract in terms of which he or she lets the car on hire to a third party for a certain duration of time, on delivery thereto, the hirer acquires ius possessio in terms of the contract.

[17]. According to traditional approach, the common law required possession to be acquired Corpore et animo only. In other words physical control with a particular mental element was essential to constitute possession. However, Silberberg

supra, is of the view that physical control is in itself not sufficient to constitute possession. It must be accompanied by a particular

intention.[7]

[18]. On the other hand Wille has expressed the view that:-

*“A person with a right to possession (ius possidendi) based either on a contract (e.g. loan or a lease) or a real right (usufruct) is entitled to factual possession, and if deprived thereof, can claim it from anyone in possession.”[8]*

The foregoing passage appears to have been applied in *Bester v Grundling*[9]

[19]. As stated elsewhere herein, there are divergent views as to whether possession is a fact (factual possession) or a real right. Will, *supra*, suggests that it should not be seen as a real right, but as an adjunct to the law of things. However, he intimated that the key solution to this paradox lies in maintaining a clear distinction between the fact of possession and the right flowing from the possession (*ius possessionis*). I subscribe to this approach, in as much as Silberberg's view is that physical control is no longer sufficient

*per se* to constitute possession.

[20]. In my view therefore, emphasis on the fact of possession more often than not leads to the logical conclusion that possession is a fact, and the *animus possidendi* (intention to possess) would also be an indispensable requirement for protection of possession.

[21]. The context of physical control (*corpus*) of a thing should for the purpose of modern juridical development of the common law, be widely interpreted as opposed to a narrow interpretation in its historical context. In my view, factual or legal possession should be adopted thereby abrogating by disuse the outdated, strict, narrow, and conservative requirement of actual physical control (*corpus*). The intention to possess should, in my view, be sufficient to complement the factual possession for which an intention to possess a thing would be paramount.

[22]. Applying the above stated proposition to the facts in the present appeal, it follows that when the Respondent took the Navara to the panelbeater, he had not intend to relinquish possession thereof, nor did he lose control over it. He being placed in possession thereof by agreement with the Respondent, the Applicant, no doubt, still enjoyed factual possession with intention to acquire a benefit thereon. He had acquired the right of entitlement thereto coupled with the right of use thereof.

[23]. The submission by the Respondent that by handing in the said vehicle to the panelbeaters, the Applicant thereby deprived himself of physical possession of the vehicle is untenable. The Respondent by his conduct did not evince an intention to lose possession of the said vehicle.

[24]. The fact that the Respondent, without the knowledge or consent of the applicant "uplifted" the Navara from the panelbeaters with no intention to restore possession, clearly amounted to an act of spoliation and, therefore, self-help. Spoliation is a mischief precisely designed to obviate self-help.

[25]. The applicant who was a possessor before his motor vehicle was involved in an accident, had been unlawfully despoiled by the

Respondent. He is therefore entitled to be restored to his possession *ante omnia*.

[26]. In *Shoprite Checkers Ltd v Pangbourne Properties Ltd*,<sup>[10]</sup> it was stated that the Mandament van spolie as a possessory remedy, is regarded as a robust and speedy remedy aimed not at the restoration of rights, but dispossessed property.

[27]. In spoliation proceedings, the applicant who is despoiled only has to prove that:

27.1. He or she is in possession of the thing, and

27.2. That he or she was illicitly ousted from such possession.<sup>[11]</sup>

[28]. In casu, there is no dispute that prior to his unlawful deprivation, the Applicant was in free, “peaceful and undisturbed possession”. As indicated, the submission that the Applicant lost physical control when he surrendered the vehicle to panelbeaters for repairs, lacks merit and falls to be rejected. The rights of the parties do not enter the picture in proceedings of this nature. The evaluation of such rights fall within the province of the suit on the merits.

[29]. The Applicant need not establish *ius possidendi* and therefore the lawfulness of his or her possession is an immaterial consideration. In fact, the existence of *ius possidendi* does not imply actual physical possession.

[30]. In the light of the facts in this matter, the decision of the Court a quo in granting the Applicant the relief sought, cannot be faulted. The learned Magistrate was quiet apt when he said that “vehicles

are routinely left unattended in parking lots, in parking bays at airports for example, even for relatively long periods. You cannot

keep it in your pocket like a diamond.<sup>[12]</sup>”

[31]. In the result, the appeal falls to be dismissed with costs. The following order is pronounced.

#### ORDER

1. The appeal is dismissed with costs.
2. The order made by the Court a quo including the costs on a punitive scale is confirmed.

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M.G PHATUDI J

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA LIMPOPO

DIVISION, POLOKWANE

I agree.

E.M MAKGOBA JP

JUDGE PRESIDENT OF THE HIGH

COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Representations:

1. For the Appellant : Mr. N. Bosman

: c/o Bosman Attorneys

Polokwane

2. For the Respondent : Mr. J.F. Moolman

: c/o Pratt, Luyt & De Lange Attorneys

3. Date heard

: 14 October 2016

4. Date delivered : October 2016

[1] P51, Para: 11, “AA”.

[2] P28, Para: 7.8, “FA”.

[3] P 51, Para 11, “AA”.

[4] “Institutes” P12, Silberberg and Schoeman “The Law of Property “ (4th Edition) P 253.

[5] De vos, 1959 Acta Juridica PP 190-194

[6] Kleyn and Boraine - “The Law of Property” at p.111, see also 1989 TSAR 138-140.

[7] “The law of Property” 4th Edition, p 259.

[8] “Wille’s Principles of South African Law” – 9th Edition.

[9] 1917 (TPD) 492 at 495

[10] 1994(1) SA 616(W)

[11] Ross v Ross 1994(1) SA 865(SE) & Du Randt v Du Randt 1995(1) SA 401 (SE)

[12] Par 35, Judgment.(P15,Record)

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