

SOUTH AFRICA / JUDGMENT

Jenni Button (Pty) Ltd v Hyprop Investments Ltd (65643/2015) [2015] ZAGPPHC 692 (6 October 2015) [2015] ZAGPPHC 692

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Müter

CASE / FILE NUMBER

65643/2015

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case

No: 65643/2015

DATE:

6/10/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

Before:

The Honourable Holland-Müter AJ.
In

the matter between:

JENNI
BUTTON (PTY) LTD
Applicant
and
HYPROP
INVESTMENTS
LTD
Respondent

JUDGMENT

- [1] The applicant brought this application in the urgent court seeking relief against the alleged spoliation committed by the respondent with regard to the premises occupied by the applicant. The matter was argued on 22 September 2015.
- [2] The applicant averred that it was deprived of its possession of the premises situated in the shops 36, 40 and 41 in the Woodlands Boulevard, 100 Woodlake Avenue, Pretorius Park, by the respondent and requests that its possession of the premises be immediately restored by the respondent.
- [3] The parties at the outset informed the court that the outcome of this application will determine the future of four other shops in the Woodlands Boulevard Shopping Mall.
- [4] The mandament van spolie displays the following characteristics

It is a possessory remedy; It is an extra-ordinary remedy; and

It is a robust remedy. In its nature it is a speedy remedy providing “summary relief”. The restoration of possession should take place ‘at once’. This however does not mean that an applicant can unduly delay the bringing of such application. See below where I deal with this aspect. See Erasmus, Superior Court Practice E9-1, E9-5.

- [5] The respondent in limine averred that the incorrect party, Jenni Button, was cited whilst the lease agreement relied upon by the applicant was in the name of Platinum Clothing Woodhill 5 CC, trading as Jenni Button (a close corporation to be formed). Mr Avvakoumides on behalf of the respondent further argued, that in view of the applicant, Jenni Button now being under business rescue, the business rescue practitioners were not joined to the proceedings.
- [6] The respondent, despite raising the name issue here, obtained a order in terms of section 32 of the Magistrate’s Court Act, 32 of 1944 on 4 June 2015, and had a Warrant of Execution issued by the Clerk of the Court on the same day to attach and remove the merchandise from the premises in question. This possession was restored before the application.
- [7] Various letters were exchanged between the parties’ attorneys since June 2015. In these letters the respondent’s attorney informed the applicant’s attorney that he holds instruction to proceed with eviction against the applicant. On 19 June 2015 in annexure MPJ-6E, this was the message to the applicant, only to be confirmed later that on this day (19 June 2015) the respondent forced the locks of the premises.
- [8] The respondent, well aware of the legal requirement to enforce eviction by process of law, threatening the applicant on more than one occasion with eviction procedures, takes the law in own hand and by self-help dispose the applicant of its possession. This is a classic example of parate executie.

- [9] In *Bock and Another v Duburoro Investments (Pty) Ltd* 2004 92) SA 242 SCA on 249 E -250b it was reaffirmed that self-help is unlawful. The Court referred to the case of *Nino Bonino v De Lange* 1906 TS 120.
- [10] The requirements for the Mandament van Spolie is that (i) the applicant was in peaceful undisturbed possession and (ii) he was unlawful deprived of that possession. See *Le Riche v PSP Properties CC* 2005 (3) SA189 CP on 193 F-G and *Harms , Amler's Precedents on Pleading* 6th Ed p 317.
- [11] An investigation into the applicant's lawfulness of possession and the merits is irrelevant for spoliation order, even a thief's possession can be restored under the Mandament van Spolie. See *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 CC on 122 E-G.
- [12] The question of urgency was raised by the respondent, averring that the urgency was self-inflicted by the applicant due to not proceeding with the application soon after 21 July 2015, the date via E-mail when the applicant's attorney of record demanded the restoring of possession when discovering the forcing of the locks at the premises. The applicant's version was that due to the respondent's warrant of execution and removal of its stock from the premises, it was unable to continue trading. A notice displayed on the front door of the premises stating that the store was closed until further notice and apologizing for the inconvenience caused hereby.
- [13] The delay in bringing the application by the applicant in this matter is in my view not due to acquiescence on the side of the applicant. The 'delay' was nothing more than a few days, the time utilized to engage in negotiations with the respondent to resolve the matter. The respondent however, as referred to above, forced the locks of the store on the same day it threatened the applicant with eviction, eviction none else by way of an order of court. The respondent wants to pleas moral high ground on the one hand but forces the locks on the very same day. The delay in each instance should be assessed on its own merits and circumstances. See *Le Riche v PSP Properties CC* 2005 (3) CPD 189.
- [14] In this matter I cannot find that the applicant unnecessary delayed bringing the application. I am of the view that the matter is urgent and that the harm suffered by the applicant due to the actions of the respondent by having the applicant's merchandise removed and the locks forced denying the applicant access to the premises.
- [15] The applicant could not have known of the forcing of the locks before 19 June 2015 as argued by the respondent with reference to the letter of the respondent's attorney on 11 June 2015. The more probable version is that the applicant only became aware of the forcing of the locks during July, probably on 21 July
2015. Even if it is accepted that the applicant should have known earlier, I am satisfied that the delay is not unreasonable to affect the urgency of the matter.

- [16] The respondent argued that the reasonable inference hereof was that the applicant has abandoned the premises and to minimize its losses, the premises was taken back. According to the respondent, the notice displayed on the door by the applicant indicated the applicant abandoning the premises. I disagree with this argument in that it cannot be inferred from the notice that the premises was abandoned. The respondent threatened the applicant with eviction procedures. Such intended eviction proceedings in view of the respondent's 'belief' that the premises were abandoned, indicates the opposite belief. The only inference from the conduct of the respondent was that it self-helped it to "restore" possession of the premises. This is in my view nothing else but spoliation.
- [17] The argument on behalf of the respondent that the applicant's E-mail of 25 March 2015 is consent that the respondent may 'take back' the store is contrary the well established principle against parate executie. See Bock supra on p 247, 249. The seizure of property against the will of the debtor in possession of the property amounts to spoliation, the court's imprimatur is required.
- [18] In the result the following order is made:
- The respondent is directed that the applicant's possession of shops 39, 40 and 41 Woodlands Boulevard, 100 Woodlake Avenue, Pretorius Park, Pretoria (the premises) be restored immediately; Directing the respondent to allow the applicant unrestricted access to the premises; and That the respondent pay the costs of the application.

J HOLLAND-MÜTER AJ

PRETORIA

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Prepared on 10 October 2026 · Esheria