

SOUTH AFRICA / JUDGMENT

Jonker v Van Tonder (1979/2020) [2020] ZAFSHC 139 (19 August 2020)

[2020] ZAFSHC 139

COURT

Free State High Court, Bloemfontein

BEFORE

M.A. Mathebula

CASE / FILE NUMBER

1979/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 1979/2020

In

the matter between:

MICHELLE
JONKER Applicant
and
JOHANNES
PETRUS VAN
TONDER Respondent
HEARD
ON: 30 JULY 2020

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 19 August 2020. The date and time for hand-down is deemed to be 19 August 2020 at 11:00

Introduction

- [1] The parties are neighbours in the small town of Fauresmith. The source of the dispute is the possession of an outbuilding which is a part or not a part of each other's property. As to in whose property it belongs is not an issue that I have to determine. However ownership looms large in this matter.
- [2] In the application which is before me on an urgent basis, the applicant seeks an order to restore the status quo ante regarding the possession of the outbuilding. It is the case of the applicant that she has been spoliated by the respondent. Primarily that the respondent be ordered to remove all obstacles hindering access to it and desist from removing her belongings. The respondent does not only deny spoliation but claims ownership of the outbuilding. The respondent relies on the defence of counter-spoliation.

Background

- [3] On 5 December 2011 the property described as Erf [...]9/2 Fauresmith held under Deed of Transfer T20811/2011 was registered in the name of the respondent. Likewise on 26 June 2018 a property known as Erf [...]9 Fauresmith was registered in the name of the applicant under Deed of Transfer T9641/2018. These two properties are situated next to each other. The respondent avers that the outbuilding is part of his erf [...]9/2. According to the respondent he gave permission that the elderly couple and later Braam Bester to use it because he did not need the space. The only condition was that should they sell their property, they will have to inform him so that he can reconsider his position.
- [4] When the applicant took possession of her property, it included possession of the outbuilding. Prior to concluding the sale as per negotiations with the previous owner she was informed that the outbuilding is part of erf [...]9. She had been using the outbuilding as storage of feed for her horses and other items clearly visible on the photos attached to the opposing affidavit marked "A14.1" to "A14.3". The backdoor of her property opens directly to it. The outer gate to the outbuilding was secured by a chain. There is a dispute between the parties whether it was locked or not.
- [5] On 13 February 2020, the respondent sent an e-mail to the applicant informing her that the outbuilding form part of his property.

He also requested her to vacate the premises on/or before 27 February

2020. Several exchange of several e-mails did not yield any common ground between them.

Instead it created a chasm that led to the proceedings before me. On/or about 1 June 2020 the respondent proceeded to the outbuilding to cut the chain (and lock), replaced it with his own and stored some of his trailers in there. The property of the applicant was put on one side and she was effectively restricted from having access to the outbuilding through the outside gate.

Urgency

[6] The application was issued and served on 12 June 2020, a mere four

(4) days after the respondent unequivocally stated in the letter from his attorneys that he will oppose any application launched against him. Uniform Rule 6(12)(b) provides that in the founding papers “the applicant must set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course”

[7] In the founding affidavit the applicant avers that upon learning that she has been dispossessed of the property she took urgent steps to restore the status quo ante. There is no dispute that it was only a matter of days that her attorney of record wrote a letter to the respondent demanding restoration. She continues that she has no other remedy in the circumstances. The important part is that the actions of the respondent has left her with no storage place for her horse feed and trailers. This can result in her suffering harm in that they may be damaged or stolen.

[8] In his attack of the urgency, the respondent acknowledges that she stored her movable property in the outbuilding. However, he downplays this aspect on what he considers to be their small number and of meagre value. He also allude to the fact that the horse and trailer were stored in the property only once in the past. This will not happen again in the near future because of the prevailing lockdown regulations and that there are no competitions in the offing. As such there is no urgent need on her part for the outbuilding at the moment. The last aspect is that her movable property is safely stored in one part of the outbuilding and that there will be no further damage to it.

[9] On the facts, it is my considered that the urgency is of sufficient degree that deviation from the rules should be afforded to her. At the moment she is denied access to her movable property because the respondent has restricted her access. Even if she was to find a place to keep the horse(s) she will have to incur extra costs to procure horse feed while she has the same but it is kept by the respondent. The urgency is not self-created but arose out of the state of flux of the situation between the parties. This kind of remedy, by its very nature, is a robust and a speedy one. The key issues are possession and dispossession. On these basis, I am satisfied that the applicant has demonstrated that the matter is urgent to the extent that the rules must be relaxed.

Legal Position

[10] This is a common law remedy whose very purpose is to restore the possession of a person who suffered dispossession as a result of the illegal activity of the spoliator. This remedy is available where there has been actual not threatened or anticipated disturbance of possession. In order to succeed with the spoliation order, the applicant must allege and prove that she was in peaceful and

undisturbed possession of the property and the subsequent deprivation of her possession was unlawful.

[11] As stated above this is a common law remedy that prevents people from taking the law into their own hands. It is designed to be efficient to restore the status quo ante against the illicit action of the spoliator. In *Ntshwaqela and Others vs Chairman, Western Cape Regional Services Council and Others*[1] the court said the following:

“The essence of the remedy is speedy restoration of the status quo. Only thereafter does one go into the parties’ rival claims”.

[12] The defences that can be raised by the respondent are fairly limited in the circumstances. The one that stands out is that the applicant was not in possession of the outbuilding at the time of the alleged spoliation. It is not alleged that restoration of the status quo ante is impossible. What is alleged is that it is not impossible for the applicant to make use of a similar facility elsewhere at a cost. There is no allegation that there is an inordinate lapse of time before the applicant took any action about the dispossession.

[13] It is so that the respondent has raised the defence of counter spoliation. In order to succeed, the respondent must prove that he was in peaceful and undisturbed possession of the property. Secondly that the spoliator committed an unlawful spoliation. Thirdly that he took immediate steps to reclaim possession from the spoliator.

Discussions

[14] I now turn to examine the facts. The applicant took possession of her property including the outbuilding sometime in 2018. Even though she does not stay on the property as her primary residence, the previous owner Braam Bester acts as her caretaker. This means that she has access to it partly through him as well. She has her movable property stored in there and for the past two (2) years she has not heard a word from the respondent. The chain that secured the property was hers and even the respondent admitted that a horse was once kept in there. Initiating the interaction between them, the respondent requested her to move out and even set a date for such a date. This in my view, is indicative of the fact that he was aware that she was in possession of the outbuilding. This is an acknowledgement of her possession of the outbuilding. The dispute between them is about ownership which claim can be dealt with once the issue of who between them was in peaceful and undisturbed possession has been resolved.

- [15] The respondent admits that when the discussions broke down he simply entered the outbuilding and gathered her movable property together and put it safe on the side. He proceeded to move in his trailer and secured the premises with his chain and lock. The point is that in doing so, access to the outbuilding was effectively denied to the applicant. This in plain terms is deprivation of possession which is unlawful. The correct way would have been to institute legal proceedings for eviction against the applicant. Regrettably, he elected to take the law into his own hands which is fundamentally unlawful. Applying the law to the facts, the applicant has satisfied all the requirements to succeed in her application.
- [16] Turning to counter-spoliation, on his own version, the outbuilding was over a period of time utilised by his neighbours apparently on his permission. Initially it was the elderly couple and later Braam Bester. Both of these people were aware that it was his property and he negotiated an arrangement with them. The difficulty with this allegation is that no confirmatory affidavit was filed from any of them to confirm this fact. I am not swayed by his assertion in this regard. The factual situation is that at the time the applicant exercised possession over the outbuilding the respondent did not. I take cognisance of the fact that he is staying next door and was aware that erf [...] has changed hands at least during the end of 2018. As an astute businessman he could at that time have done something to bring to her attention the terms and conditions of his agreement with the previous neighbours.
- [17] It is not alleged in the papers nor suggested that the respondent committed any unlawful spoliation. The respondent despite being aware in 2018 that the property has changed hands and in 2019 that she was storing her movable property in the outbuilding, did not take any action. The first e-mail was sent out well into the second month of
2020. He did not take any tangible action until about six (6) months later. The cause of the delay is not adequately explained in the papers. There can be no talk that he took immediate steps to reclaim any possession from the applicant. There was no urgency whatsoever on his part as required by the law. It stands to reason that there is no merit in his defence.
- [18] Having reached the conclusions that I did, the applicant is entitled to the relief sought. This means that the status quo ante must be restored. There are no reasons compelling me to deviate from awarding the costs to the successful party. There are no cogent reasons that such costs must be on a punitive scale of attorney and client. I could not find anything that will lead me to demonstrate the displeasure of the court by awarding costs in such a manner.
- [19] The following order is made: -
- 19.1 The application is dealt with as one of urgency in terms of rule 6(12) of the Rules of Court;
- 19.2 The Respondent is ordered to restore the status quo ante by restoring possession of the outbuilding to applicant;

19.3 The Respondent must remove any and all obstructions preventing access to the outbuilding, from any and all gates to the outbuilding;

19.4 The Respondent must remove any and all objects placed within and/or on the outbuilding;

19.5 The Respondent is ordered to remove any and all objects placed in the outbuilding;

19.6 The Respondent must comply with this order within forty eight (48) hours of it being handed down.

19.7 In the event of non-compliance, the Sheriff of this Honourable Court, or his duly authorised deputy is authorised and ordered to do and take all steps that are necessary to give effect to paragraphs 19.2 to 19.5 above;

19.8 The Respondent must pay the costs.

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M. A. MATHEBULA, J

On behalf of applicant: Adv. J. Ferreira

Instructed by: Hill McHardy & Herbst

BLOEMFONTEIN

On behalf of respondent: Adv. D.C. Hattingh

Instructed by: Rossouws Attorneys

[1] 1988 (3) SA 218 (C) at 212 J – 222 A

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Prepared on 11 October 2026 · Esheria