

SOUTH AFRICA / JUDGMENT

Nieuwoudt v Steyn and Another (2025-002319) [2025] ZAGPPHC 60 (22 January 2025)

[2025] ZAGPPHC 60

COURT

North Gauteng High Court, Pretoria

BEFORE

Labuschagne

CASE / FILE NUMBER

2025-002319

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****CASE NO: 2025-002319****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED.****DATE****22/01/2025****SIGNATURE****In**

the matter between: GEORGE
 SEBASTIAAN NIEUWOUDT
 Applicant
 and
 HESTER
 DANITA STEYN
 First Respondent
 MR
 RONALD RATAIWA
 Second Respondent

JUDGMENT

LABUSCHAGNE J

- [1] The applicant approached the urgent court on 15 January 2025 for urgent relief based on the mandament van spolie. He claimed against the first and second respondents an order restoring to the applicant ante omnia undisturbed possession of the property situated at Portion 5[...] of the farm Haakdoringlaagte 277, Registration Division JR, which the applicant had been occupying since 2015. He also applied for a punitive cost order against the first and the second respondents.
- [2] The applicant and the first respondent were in a romantic relationship and resided at the aforesaid premises (hereafter “the premises”). The premises where the applicant resided was in the market and the first respondent and the applicant decided to buy the property. The applicant owns his own property in Mountain View, and he placed his property on the market for sale. The applicant’s property did not immediately sell, and the parties therefore decided that the first respondent would purchase the premises in her own name, and he would use his funds received from the Mountain View property for renovations on the premises. The applicant paid the transfer duty on the property for the transfer into the name of the first respondent.
- [3] Since taking transfer, the applicant and the first respondent occupied the premises and the applicant made renovations and improvements to the property for which he claims a lien as will be set out later.
- [4] The first respondent has applied in the Gauteng Local Division under case number 2024-074869 for the eviction of the applicant from the premises. As his defence, he asserts a lien arising from the agreement in terms of which the first respondent would pay him the amount of R1 million upon the sale of the property.
- [5] The first respondent placed the premises on the market and the second respondent purchased the property.

- [6] On 24 November 2024 the applicant received a voice note from the first respondent, advising him that the property was sold and contending that the registration had been effected. The estate agent concerned also confirmed such transfer.
- [7] The applicant and the first respondent are involved in a number of pending cases, the first of which has been referred to above. In case number 2021-074869, also in the Gauteng Local Division, the first respondent has applied for the eviction of the applicant from the premises. The replying affidavit of the first respondent

was filed on 5 November 2024, but the matter has not progressed since. The applicant has also issued summons under case number

2024-120652 in this division for confirmation of the agreement between himself and the first respondent and for the recovery of the amount of R1 million. This matter is defended, and the first respondent has filed her plea.

- [8] On 7 January 2025 a telephonic discussion took place between the applicant's attorney and the counsel representing the second respondent. This was followed up by an email dated 8 January 2025 referring to the discussion of the previous date. The email reads as follows:

"Advocate,

Ad discussed yesterday, kindly find the following documentation attached for your attention:

1. Notice of motion: Application for Eviction as initiated by Ms Steyn. This application is opposed but we are yet to receive a date herein.
2. Combined summons: This matter is defended and we received a plea from Ms Steyn. We are proceeding with the formal pretrial notices.

As discussed, we are in possession of a signed agreement wherein Ms Steyn undertook to pay the amount of R1 million to our client when the property was sold. This amount has not been paid by Ms Steyn, and we submit that this agreement gives rise to our client's right of retention of the property, until the said amount is paid to him in terms of the agreement. Ms Steyn now disputes the agreement.

Further to the above, as can be seen from the dates of the proceedings, Ms Steyn was well aware of our client's claim for retention, and we submit that she has a duty to inform your client about such claim before the transfer of the property into your client's name.

We kindly request you to provide us with a copy of your client's offer to purchase in respect of the said property."

- [9] On 10 January 2025 at about 11:15 the applicant received a telephone call from the security guard employed by Ludwig's Roses, a neighbouring property, Mr Edwin Tladi, who advised the applicant that there are approximately 15 people with transport vehicles gaining access to the property where he resided, namely Plot 5[...], Haakdoringlaagte. The first respondent is known to Mr Tladi, and he indicated that she was also there, together with the people he

had referred to. At that time the applicant was in Johannesburg. He telephoned his attorney of record, Mr Anton Rudman who advised him to contact the South African Police. The South African Police, when he contacted them, advised the applicant that they are aware of what they called an interdict permitting the persons to be present on the premises. They further took the view that it was a civil matter, and they would not become involved.

- [10] Upon the applicant's arrival, he was not permitted to gain entrance to the premises. He noticed that his belongings had been removed from the property and were standing next to the road. The persons present were heavily armed with R-1 rifles. The applicant engaged with the person in charge, Mr Thando Makhathini, who advised him that they are an eviction company and that there are court papers permitting them to remove the applicant's belongings from the premises. Those papers were allegedly with an attorney who would bring them to the property later. It is at this stage that the Police upon their arrival advised the applicant that it is a civil matter, and they refused to open a claim for theft against the people involved. The applicant advised the Police that there is no court papers permitting the removal, but they would not be engaged. Two of the applicant's vintage vehicles which were stored at the premises were transported on a lowbed truck. He was advised upon asking the driver of the truck what his intentions were, to speak to the first respondent.

The applicant contends that these vehicles' keys are now missing.

- [11] The applicant's attorney contacted the applicant, advising him that he had spoken to the legal representatives of the first and second respondents, both of whom denied any knowledge of any court order permitting the eviction. It started raining at about 13:30 and the applicant contends that his possessions were left standing in the rain. At about 17:50 most of the applicant's belongings had been removed to a storage facility rented in the name of the aforesaid Thando Makhathini of the eviction company. The applicant also obtained his own temporary storage for the available

belongings which could not fit into the transport vehicles. The applicant contends that some of his belongings is still on the premises, including furniture, a washing machine, electronics, tools etc.

- [12] The second respondent arrived at the premises during the afternoon and was given access to the property. The applicant saw that someone proceeded to weld security gates and/or burglar bars onto the house. The applicant was however not permitted to speak to the person as he was not given access to the premises. In the course of his discussions at the premises reference was made to the ownership of the property, which was alleged to have passed to the second respondent. The applicant asked his attorney to do a Deed Search, which is annexed to the court papers and dated 10 January 2025 at about 16:00. The owner is indicated on that Deed Search as the first respondent.
- [13] At 17:30 the attorney for the applicant wrote a letter to the legal representatives of the respondents, demanding the restoration of occupation. No reply was received.

[14] On 11 January 2025 the applicant returned to the premises. He noticed a person within the yard which he called over. He would not give his name to the applicant but confirm that he is there upon the instructions of the second respondent. The applicant assumes that he was a security guard or maintenance worker who was starting maintenance on the property. On 11 January 2025 a further letter of demand was written to the legal representatives of the respondents.

[15] In the letter of Anton Rudman, the applicant's attorney dated 10 January 2025, the allegation is made that the applicant's unlawful eviction was orchestrated by the first respondent. This was confirmed by people present as well as the Police officers. The following is stated at paragraph 17:

"17. The remarks made by them raised the suspicion that despite our client being advised by Ms Steyn, your offices as well as Adv Moropene that the property was transferred into the name of the new purchaser, this may not be the case.

18. We immediately proceeded with a Deed Search which confirm that the property is still registered in the name of your client, Ms Danita Steyn, and that no transfer has taken place.
19. Despite knowing that a person can only be evicted from a property by a valid court order, as your offices have proceeded with an eviction application on behalf of Ms Steyn and would most certainly have advised her of the process, she proceeded in unlawfully evicting our client from the property.
20. We have instructions to proceed with an urgent application against your client, restoring our client's possession of the property, the costs of which will be for her account.
21. We will however allow your client time until tomorrow 13:00 to restore our client's possession of the property, and by arranging for the return of all his personal belongings, failing which we will proceed as follows.
22. We also copy the legal representative of the alleged purchaser of the property herein, that he may be fully aware of our client's possession of the property and claim thereto, and confirm that we have forwarded copies of the eviction application as well as our client's summons to him.
23. We also reserve our client's right to claim damages to our client's personal belongings caused by the unlawful eviction."

[16] The first respondent has not opposed the application. It is quite apparent that she has adopted the position that she is no longer in possession of the property as the second respondent has taken possession in the circumstances recounted in the answering affidavit of the second respondent.

[17] The second respondent in his answering affidavit indicates his awareness of the applicant's claim to a lien. However, in the absence of a court order confirming that lien, he disputed it. The second respondent has attached a photograph of the access point to the

property, indicating that the applicant had locked it with a padlock. This evidence confirms to my mind that the applicant was in possession of the premises on the day concerned. The second respondent contends that the first respondent, who had sold the property to him, and who was obliged to give him occupation, called the second respondent on 10 January 2025 around midday, advising him to take occupation of the property. Upon his arrival after 17:00 he was given access to the property. The second respondent states:

“I never deprived the applicant of the peaceful and undisturbed possession of the property in question as the property was mine after I bought it.”

[18] The second respondent states the following:

“Prior to being called to come and access the property, the first respondent initially informed me that the applicant has locked the property that I bought claiming that the first respondent owes him R1 million for the money allegedly spent to improve the property whilst still being in a relationship with the first respondent.”

[19] The second respondent contends that he was not part of the team that is alleged to have evicted the applicant, and he contends that he can therefore not be held at ransom for things that he did not do. He states:

“All what I need is to enjoy undisturbed possession and use of the property that I bought, which property the applicant cannot stay in or access it for free while I have to pay monthly insurance, premium and bond repayment on a monthly basis whilst he pays nothing.”

[20] The defence raised by the second respondent is that he did not spoliage the applicant. Further, he contends that the applicant cannot claim spoliation on property that does not belong to him.

[21] This is clearly no defence as the mandament is aimed at protecting possession. The issue of ownership is not relevant to the mandament.

[22] In addition to the defence that the second respondent was not a party to the spoliation, he contends as follows.

“I raise a defence that it-(presumably the applicant)- was no longer in possession of the property which has been disposed of bona fide to an innocent third party simply because much of the items had been removed during my absence to the storage and others were taken by the applicant as stated by him under oath and therefore such cannot be attributed to me.”

LEGAL PRINCIPLES: IS THE SECOND RESPONDENT A BONA FIDE THIRD PARTY?

[23] In *Builder's Depot CC v Testa* 2011 (4) SA 486 (GSJ), a full court of the then Johannesburg Local Division dealt with a similar scenario where a third party was in possession of property after an act of spoliation by another party. In that action, the property spoliated was sold by public auction by the sheriff to the respondent and the court held that the remedy of the mandament was not available where position had passed to a bona fide third party.

[24] At that time there was case law to the effect that the remedy would even be available against a person who obtained possession bona fide from the spoliator (see: *Ibid* at paragraph [14] and the authorities there cited). Those authorities were however not followed, and the full court states the following at page 491:

"I respectfully agree with FS Steyn J that the reference to Ntai's case is without obvious reference. The learned judge declined to follow Malan's case in these terms.

'I associate myself with the positive attitude taken by Roper J, and prefer this view to that of De Villiers J in *Malan v Dippenaar* quoted above. Without exhaustive reference to the old authorities who are divided and who have no direct relevance to the point in question, I am persuaded to support the view put forward by Bristow J and Roper J, because it has been the operative law of the Transvaal for sixty years and because it fits in with the overriding principle and purpose of the mandament van spolie: that wrongful dispossession by a person taking the law into his own hands can promptly be cured by an order against the spoliator to restore the goods in dispute to the peaceful possessor. A spoliation order against a party other than the spoliator is logically beyond the scope of the purpose of the mandament to prevent persons from taking to law into their own hands. Where possession has passed to a new possessor who became such in good faith, the status quo ante cannot be restored by remedial action against the disturber of the status quo. Unfortunately for the original possessor, the dispute has at that stage moved from the realm of possessory remedies to that of a vindicatory action. Delay on the part of the original possessor in recovering his possession, especially after he is aware of the advent of a new possessor in good faith, would, in my view, further exclude the right to such a spoliation order."

[25] The question arises whether the remedy of the mandament van spolie is available against a third party who has knowledge of the spoliation.

[26] The facts of this matter demonstrate that the applicant's attorney had notified the second respondent before the act of spoliation on 10 January 2025, that there were pending proceedings between the applicant and the first respondent in which the first respondent seeks the eviction of the applicant and where the applicant asserts a right to possession by virtue of a lien. The circumstances upon which the second respondent obtained possession from the first respondent on 10 January 2025 are not consistent with a lawful transfer of possession. The pending court proceedings had not been finalised and there was no court order authorising the first respondent, in the face of the litigation pending, to take possession of the premises from the first applicant for purposes of handing the premises to the second respondent. The facts demonstrate that the second respondent, while not being

the spoliator or as such, was aware at the time of obtaining his possession that he obtained it in the face of pending litigation as set out supra.

- [27] Knowledge of these proceedings transforms the state of mind of the second respondent from a bona fide third party to one who has knowledge of the unlawful conduct of the first respondent. In those circumstances, the second respondent cannot be rewarded as the receiver of the spoils of an unlawful spoliation, particularly where he had advance notice of the disputed right to possession. In these circumstances, the spoliation by the first respondent and the immediate delivery of possession by the first respondent to the second respondent, renders the position of the second respondent no different to that of the spoliator. He is not a bona fide third party.
- [28] To find otherwise would be to reward the first and second respondents with self-help and to leave the applicant without a remedy, despite acting promptly to have his possession restored.
- [29] I accept as correct the authorities that a mandament van spolie cannot be granted against a bona fide third party. The facts of this matter however indicate that the second respondent had knowledge of the applicant's claim to possession based on a lien.
- [30] This does not mean that he does not have a bona fide claim to possession as against the first respondent arising from the purchase of the immovable property. No doubt he has such a right to occupation. However, the method in which he was given occupation on the facts of this matter bear the hallmarks of a spoliation of which he was aware. He therefore cannot be treated as a bona fide third party. The applicant's cause of action against the second respondent is however not the mandament van spolie. It is the doctrine of notice.
- [31] In *Hassam v Shaboodien and Others* 1996 (2) SA 720 (C), a full bench of the Cape Provincial Division dealt with consequences of a purchase of immovable property at auction where the purchaser had knowledge of personal rights of the judgment debtor. The court had to decide whether the purchaser had obtained an unassailable title by virtue of the purchase of the property at auction.
- [32] The court found that the doctrine of notice (*kennisleer*) applies not only where land has been sold to successive purchasers. It applies also where the purchaser had knowledge of a third party's personal rights in the property, for example of an unregistered servitude or a right of pre-emption (at 725 F – G).
- [33] The reasoning of the court was that a purchaser of a property who buys with knowledge of a third party's rights is bound thereby. It is regarded as a species of fraud on his part if he attempts to defeat such third party's rights. The critical question which arises is whether, for the doctrine of notice to apply, it is sufficient if the purchaser merely has knowledge of the existence of the third party's personal right to property, or whether it is necessary for a purchaser to be bound by such personal right (at 726 F – H, read with 727 A – B).

- [34] The full bench found that there is no justification for the limitation on the doctrine of notice (i.e. that the doctrine did not apply where the real right is acquired by virtue of an attachment in execution) and for excluding a sale in execution from its operation. If a judgment creditor has knowledge of the personal rights of a previous purchaser, his claim to transfer of the property is tantamount to a species of fraud and he does not obtain an indefeasible right to the property by the registration of transfer into his name (at 728 E – F, read with 725 A – B).
- [35] The notification by the applicant's attorneys to the second respondent's attorneys of the pending litigation pertaining to possession of the property confirmed knowledge on the part of the second respondent of the applicant's de facto possession of the property. He was further aware of pending eviction proceedings and the fact that the applicant was asserting a lien, which is a real right in property.
- [36] In such circumstances, the second respondent's knowledge of the applicant's right to possession and his assertion of a lien is destructive not only of his bona fides. Based on the above authorities it would be a species of fraud to permit the second respondent in such circumstances to benefit from the spoliation of the property by the first respondent.
- [37] Regardless of whether transfer has been effected to the second respondent or not, he is bound to restore possession to the applicant as he has taken transfer of the property with knowledge of the rights of the applicant to possession of the property.
- [38] In the premises I grant the following order:
1. The first and second respondents are ordered to restore to the applicant undisturbed possession of the immovable property situated at Portion 5[...] of the farm Haakdoringlaagte 277, Registration Division JR, which has been occupied by and under the control of the applicant, thereby restoring his free and undisturbed access and control to the said property.
 2. The aforesaid restoration is to be effected by the respondents at their cost.
 3. In the event of possession not being restored forthwith, the sheriff is authorised to take all steps necessary to give effect to this order.
 4. The first and second respondents are ordered to pay the costs of the application on Scale B.

JUDGE OF THE HIGH COURT

Counsel for Applicant: Adv Alexia Vosloo De Witt Counsel for Respondent: Adv Moropene

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Prepared on 11 October 2026 · Esheria