

SOUTH AFRICA / JUDGMENT

Pheme v Kgatle and Another (39500/2020) [2020] ZAGPPHC 509 (14 September 2020) [2020] ZAGPPHC 509

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

39500/2020

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Policy**IN**

**THE HIGH COURT OF S
(GAUTENG
DIVISION, PRETORIA)
(1)**

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

Case

Number: 39500/2020

In

the matter between: ANDREW
 PHEME
 APPLICANT
 and
 LEKOGOLO
 REUBEN KGATLE
 FIRST
 RESPONDENT
 MAKOSA MARTHA RAMATHOKA
 SECOND
 RESPONDENT

JUDGMENT

KUBUSHI J

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

- [1] This is a spoliation (mandament van spolie) application heard in the urgent court.
- [2] The applicant relies on the following factual background as gleaned from the founding affidavit for his case:

"

5.

5.1 I have been living at the premises situated at [...], since 1994.

5.2 I had been staying there with my late brother and had at my own costs improved the property by adding 5 rooms.

5.3 My late brother Klaas had received the stand from the local Municipality in 1990.

5.4 He passed away and my nephew Elliot PHEME had, acting as executor of the estate, sold the house to Lekogolo Reuben Kgatle and his spouse Makosa Martha Ramathoka.

5.5 Elliot PHEME had, as executor agreed to reimburse me for the improvements I had affected to the property.

5.6 My intention was to vacate the property in due course as the reimbursing to me of the improvements

would enable me to obtain another place to reside.

6.

6.1 On the 17th of April 2020 at approximately 8h00 the Respondents arrived at the house with people who appeared to be bouncers.

6.2 They removed me and my wife and 3 (three) children from the house and also removed my household goods and furniture and placed them on the pavement. See photos hereto B1 - B5.

6.3 They ripped the sink from the wall, damaged a wall unit and replaced the locks of the house.

6.4 After we were evicted from the house, I called my present attorney of record for assistance.

6.5 He arrived and discussions took place between him and the parties as well as the police.

6.6 It was finally arranged that a meeting would be held later that day after 18h00 which did not occur.

6.7 My family and I have nowhere to stay and slept on the pavement.

7.

7.1 The Respondents had no court order to evict me nor had I received any such notification.

7.2 The eviction was apparently done after they had filed an affidavit with the police at Rabie Ridge

7.3 My wife's confirmatory affidavit is annexed hereto as A

8.

I had the undisturbed and unhindered possession and occupation of the house preceding the Respondents' unlawful actions."

[3] In an affidavit deposed by the applicant's attorney filed separately from the founding papers titled affidavit regarding urgency the following is stated:

" 2.

It is submitted that the matter is of such urgency that the matter should be heard today being 18 August 2020.

3.

On Sunday 16 August 2020, the applicant was forcefully evicted from the house he had been living since approximately 1995.

4.

This caused him and his family and their possessions to be in the pavement outside of the property. The Court is respectfully referred to the photos in the application.

5.

Sunday evening the Applicant and his wife with their (3) three children slept outside in the pavement as they had no other place to stay.

It is submitted with respect that the "eviction" was done without any legal court order.

It is submitted that the above scenario is with respect of the utmost urgency and that it cannot be delayed.

Attempts were made to launch an application on Monday but the required information was obtained late and by the time we were ready to approach the Court it was felt that it was too late at that stage."

[4] There is a disjuncture between the evidence of the applicant and that of his attorney in regard to when the applicant and his family were evicted from the house. According to the applicant they were evicted on 17 April 2020 whereas the attorney's affidavit states 17 August 2020. I cannot say from the papers whether this was a typo or not.

The photos attached to the founding affidavit do not have a date. The respondents' reply thereto is a bare denial. Both counsel do not raise it in their heads of argument. I, therefore have to accept it as a typo and that the eviction occurred on 17 August 2020.

[5] The respondents in opposing the application are raising two points in limine, namely, on non-joinder and urgency. I deal with the two points in turn.

Is the matter urgent?

[6] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of uniform rule 6 (12). An applicant must in her or his founding papers set forth explicitly and concisely the circumstances under which she or he avers the matter is urgent. More importantly the applicant must state the reasons why she or he claims that she or he cannot be afforded substantial redress at a hearing in due course. That the application is for a spoliation order does not detract from the requirements of rule 6 (12).

[7] The facts of this matter makes it inherently urgent. The evidence is that the applicant has been dispossessed of the property in question and that he together with his family have nowhere to go and are sleeping on the pavement.

[8] The policy of the law underlying the procedure in applications for a mandament van spolie is speedy relief envisaged on short affidavits dealing with essentials of possession and dispossession. The result is that mandament is a speedy remedy and the restoration of possession should therefore happen at once.

Is there a misjoinder?

[9] A point of non-joinder of the seller, Elliot PHEME and the bouncers is taken by the respondents in the answering affidavit and heads of argument. According to the respondents, the seller and the bouncers ought to have been joined as interested parties who have a direct and substantial legal interest in this application.

[10] In support of this argument counsel for the respondents referred me to the decision of the Supreme Court of Appeal in *Absa Bank Ltd v Naude NO*[1] where the court restating the test for non-joinder expressed itself in these terms:

"The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."

[11] This being an application for a spoliation order, I do not think that the seller and the bouncers have any direct and substantial interest in the subject matter of this litigation and will as such not be prejudiced if an order is granted with them not cited in the papers. The order, if granted in favour of the applicant will be sustained without prejudicing the interests of the seller and the bouncers.

[12] The respondents are raising this point on non-joinder mainly because in their answering affidavit they aver that what the applicant seeks is reimbursement of the renovations/improvements done to the house. The applicant's case in these papers is however, very clear. He is not claiming reimbursement but he wants the status quo ante to be maintained because he has been evicted illegally from the house.

[13] Both points in limine stand to be dismissed.

Has the applicant made out a case for spoliation?

[14] The object of a spoliation order is to merely restore the status quo ante the illegal action. A court hearing a spoliation order does not concern itself with the rights of the parties, whatever they might have been before the spoliation took place. It enquires whether there has been a spoliation and if so, it restores the status quo ante. The court will not enter into the lawfulness of the applicant's possession nor into the question of ownership.

[15] The requisites of a spoliation order are that:

15.1 The applicant was in possession; and

15.2 The applicant must have been de facto in possession at the time of being despoiled.

15.3 Deprivation of possession finds spoliation order even in cases of quasi possession.

15.4 The respondent deprived him of the possession forcibly or wrongfully against his consent.

15.5 The applicant must prove its case on a balance of probabilities.

[16] It is not in dispute that at the time he was evicted from the house the applicant was in de facto possession of the house. It is also not in dispute that he was evicted together with his family without a valid court order and without his consent, that is, he was forcibly and illegally removed. It is on this basis that I have to hold that the applicant has, on a balance of probabilities, been able to prove spoliation and that the status quo ante has to be maintained.

Order

[17] The Draft Order marked “xx” is made an Order of Court.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Applicant’s Representative

: MR M. Maremane

Applicant’s Attorneys

: Maremane Attorneys.

First Respondents’ Counsel

: Adv. L. Ndou

First Respondents’ Attorneys

: Nemavhola Inc.

Date of hearing

: 28 August 2020

Date of judgment

: 14 September 2020

[1] 2016

(6) SA (SCA)

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Prepared on 14 October 2026 · Esheria