

SOUTH AFRICA / JUDGMENT

Spinks v Botha and Others (16669/2007) [2008] ZAWCHC 183 (24 April 2008)

[2008] ZAWCHC 183**COURT**

Western Cape High Court, Cape Town

BEFORE

Louw

CASE / FILE NUMBER

16669/2007

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION) CASE NO: 16669/2007 DATE: 24 April 2008

In the matter between:

YVONNE DOROTHY SPINKS Applicant

And

ELMARIE SUSAN BOTHA First Respondent

ALBE VAN DER WESTHUIZEN Second Respondent

ESSENCE BY ELMARIE CC Third Respondent

LOUW. J:

[1] This is the extended return day of the rule nisi, operating as a temporary interdict issued by Goodman, AJ on 4 December 2007. The final interdictory relief sought is for an order:

"1. Ejecting the respondents from the premises of the applicant's business at Vanilla Body & Beauty Therapy, Unit 3, Gerfa Centre, 6th Avenue, Melkbosstrand, Cape Town.

2. Interdicting and restraining the respondents and any of their employees or agents from harassing, threatening and intimidating the applicant or any of the employees of the business Vanilla Body & Beauty Therapy.

3. Granting such further and alternative relief.

4. Directing the first and second respondents, jointly and severally, to pay the costs of the application".
- [2] Pending the return day, the respondents were interdicted and restrained from entering the premises aforesaid and were ordered to do whatsoever is necessary to allow the applicant to enter and remain at the premises. The Sheriff was authorised to assist the applicant in entering and remaining at the premises should such assistance be necessary or requested.
- [3] The respondents and any of their employees or agents were further interdicted and restrained from harassing, threatening and intimidating the applicant and any of the employees of the business Vanilla Body & Beauty Therapy.
- [4] The applicant is Yvonne Dorothy Spinks who describes herself as an adult female business person who resides at Melkbosstrand and who conducts a beauty therapy business under the name Vanilla Body & Beauty Therapy. The first respondent is Elmarie Susan Botha who resides as No. 4, 20th Avenue Melkbosstrand, Cape Town. The second respondent is Albe van der Westhuizen, an adult male who likewise resides at No. 4, 20th Avenue Melkbosstrand, Cape Town, and who is the first respondent's boyfriend. The third respondent is a close corporation Essence by Elmarie CC.
- [5] The applicant and the first respondent were the members of the third respondent with each holding 50% of the members' interest. The applicant and the first respondent, through the third respondent, carried on the business of beauticians under the name and style Le Salon from 14 August 2007, at Unit 3 Gerfa Centre, 6th Avenue, Melkbosstrand (to which place I shall refer as "the premises")
- [6] The Le Salon business employed three employees; the first respondent, Ms Lahetsa Beukes and Ms Nadine Kraus. The applicant provided the capital to set up the business as investor and concluded a written lease with the owner of the premises in her own name on 31 July 2007, which lease is, in terms of the written contract, to endure for a period of two years, from 1 August 2007 to 31 July 2009 with an option to renew. The third respondent close corporation was registered on 28 August 2007 to serve as a vehicle through which the applicant and first respondent would conduct the aforesaid business.
- [7] It is common cause that the applicant and the first respondent soon fell out and that by October 2007 it was clear that their business relationship would have to be terminated. On 31 October 2007, the first respondent phoned the applicant. The contents of this conversation is in dispute, but as a result the first respondent did not attend at the premises from 1 to 13 November 2007. By a letter dated 8 November 2007 written by her attorney, the first respondent took up the position that the applicant interfered with the running of the business and in terms of the letter "the applicant is required to refrain from entering the premises to avoid a restraining order".

- [8] The applicant's attorney replied on 12 November that the applicant was entitled to partake in the management of the business and, in addition, stated that the third respondent (the close corporation) would be liquidated if the applicant's investment of R80 000 in the business was not repaid by the third respondent.
- [9] On 13 November 2007, the first respondent returned to the premises for the first time since 31 October 2007. It is common cause that a "discussion" arose in regard to certain payments the first respondent alleged were due to her as commission on the sale of certain products. The exact content of this exchange between the applicant and the first respondent is in dispute.
- [10] The applicant considered this encounter with the first respondent to be the "final straw" and as a result, through her attorney, the applicant as tenant of the premises, gave written notice on 13 November 2007 to the first and third respondents to vacate the premises. In the notice to the third respondent, the applicant took up the attitude that the lease for the premises was between her and the owner of the property and that as the only legal tenant of the premises, the applicant gave the close corporation notice to immediately vacate the premises with effect from close of business on 13 November 2007. It is further stated in the notice that the close corporation would be free to conduct its business from whatever other premises it deems fit to do. Notice is further given that no items may be removed from the premises as the applicant claimed that the ownership thereof vested in her.
- [11] In the notice on the same day to the first respondent, the applicant attached a copy of a letter to the corporation and informed the first respondent that in terms of the aforesaid letter, the close corporation is required to vacate the premises. The letter then proceeds as follows: "As a member of the corporation you are hereby formally given notice to refrain from entering the premises with effect from close of business on 13 November 2007. Kindly note that no items may be removed from the premises as ownership of ah equipment, fittings and furnishings vest in our client. Any attempt by yourself to interfere with our client or her rights as a tenant shall result in immediate legal action against you".
- [12] The applicant, after giving the aforesaid notices and still on 13 November 2007, changed the locks to the premises. She also commenced to conduct a new business at the premises under the name and style of Vanilla Body Beauty Therapy. The erstwhile employees of Le Salon, Ms Beukes and Ms Kraus, fell in to work for this new business.
- [13] The first respondent's position is set out in the papers in this application. It is that the applicant "unilaterally elected to dissolve" the business conducted through the close corporation. In a letter by her attorney dated 14 November 2007, the stance is adopted that the business relationship has broken down and that it must be terminated. The first respondent further complained about "the unlawful" changing of the locks to the premises and tendered to continue working in the business. On the same day, 14 November 2007, the applicant's attorneys wrote making it clear that should the first respondent attempt to return to the premises, the applicant would apply for relief to this court.

- [14] It is therefore clear that from 13 November 2007, the applicant's intention was to take exclusive possession of the premises and to conduct her own business there, to the exclusion of the first respondent. The first respondent was aware of this intention by the latest on 14 November 2007.
- [15] This was the position until the morning of 19 November 2007 when the first respondent returned to the premises. The first respondent, with the help of the second respondent, forcibly took possession of the keys to the premises from Ms Beukes who was in the process of unlocking the front doors of the premises. In the process Ms Beukes suffered a physical injury and left the premises. The first and second respondent thereupon took possession of the premises and later that morning barred the other employee, Ms Kraus, from working at the premises. The first respondent's contention in these papers are that she on 19 November 2007 gained "lawful access" to the premises.
- [16] Pursuant to these events, the applicant immediately launched the present application, which is a spoliation application, on the same day, 19 November 2007, alleging that she had been unlawfully deprived of her possession of the premises. On 4 December 2007, the order to which i referred to earlier, was granted by this Court. On 20 March 2008, in a separate application, the third respondent was finally wound up by order of this Court.
- [17] In argument, Mr Fisher on behalf of the first and second respondents, opposed the final relief on three bases:

The applicant has not shown that she was in peaceful and undisturbed possession of the premises on 19 November 2007. The first respondent's conduct on 19 November 2007 constituted the regaining of possession by way of lawful counter-spoliation. This is an alternative argument to the first point. In regard to the interdict restraining the first and second respondents from harassing r threatening and intimidating the applicant or the employees of the applicant's business, Mr Fisher contended, the applicant has not made out a case on the

facts.

- [18] In regard to the first point raised by the respondents, the legal position is set out as follows in a Full Bench judgment of this Court in *Ness & Another v Greeff* 1985(4) SA 641 (C) at 647D-G:

"According to the authorities, the applicant for a spoliation order must first of all establish that he was in peaceful and undisturbed possession of the thing in question at the time he was deprived of possession. By the words "peaceful and undisturbed" it is probably meant sufficient, stable or durable possession for the law to take cognisance of it. (See Professor A J van der Walt's article 1983 under 2 SALJ 172 at 177) Two elements are essential for the possession which is protected against spoliation, namely detentio (the physical holding of and control over the thing) and animus (the intention of securing some benefit for oneself). It is not essential for either of these elements for the possession to be of the whole thing or exclusive or continuous or personal. (See *Bennett & Pringle (Ptv) Ltd v Adelaide Municipality* 1977(1) SA 230 (E) at 233G-H). The justice or

injustice of the claimant's possession is irrelevant. The appellant need not prove his right to possession, he need merely prove factual possession. Thus Van Bierk, JA says in Yeko's case, *supra*, at 739F-G that whether occupation was acquired secretly or even fraudulently is not the enquiry and he refers to Voet 21.2.16 which is to the effect that the injustice of the possession of the person de-spoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber.

[19] In my view, it is clear that the applicant was in peaceful and undisturbed possession from 13 to 19 November 2007. The applicant was the lessee of the premises and she was throughout in factual control thereof. She had, to the knowledge of the first respondent, changed the locks on 13 November 2007 and the keys to the premises were under her control, through her employee, Beukes, at the time Beukes was dispossessed of the keys. The applicant held the premises with the intention of gaining an advantage and benefit for herself. She carried on a new business from the premises and it was made clear in the letter of her attorney on 14 November 2007 that if the first respondent should attempt to enter the premises, an application would be made for an order to bar her from entering.

[20] As indicated in the Ness judgment to which I referred earlier, the lawfulness or justice or otherwise of the applicant's possession is not a relevant issue at this stage. The merits of any dispute in regard to who is entitled to be in possession cannot, and does not, constitute a defence to a spoliation application .

[21] The second point raised by Mr. Fisher was that the respondents' conduct amounted to counter-spoliation.

This issue is fully dealt with by Van der Merwe:LAWSA (1 st reissue) Vol. 27 pages 199-201. Counter-spoliation is, so it appears, based on the fact that a possessor may resist illegal attempts to deprive him or her of possession. In the result, a person acting as a counter-spoliator who is deprived or threatened with deprivation of possession, may exercise self-help in order to regain possession if this is done immediately or, as it is stated in the authorities, *Instante*. This is the requirement, it must be done immediately.

[22] Van der Merwe points out that recovery is considered to be *instante* or immediate:

"...if it is still part of the *res gestae* of the act of spoliation, namely a mere continuation of the existing breach of the peace. If the victim of the first spoliation fails to act *instante* and takes the law into his own hands to regain possession after the original act of spoliation has been completed, his conduct is considered to be a new breach of the peace or a separate act of spoliation entitling the first spoliator to a spoliation order against him.

Counter-spoliation is thus a plea admitting the spoliation but alleging that the act was merely to counter the applicant's prior wrongful spoliation". Later on, the author remarks with reference to the decision of *Mans v Loxton Municipality* 1984(1) SA 966 (C) as follows;

"This case shows that the instanter requirement could be perceived from two inter-related angles, namely whether the counter-spoliator has acted immediately and consistently to regain his possession and whether the spoliator has become ensconced in his possession".

- [23] The author then refers to and discusses a number of decisions in which the requirement of instanter was considered and applied. In the case of *De Beer v Firs Investment Ltd* 1980(3) SA 1087 (W)p the applicant had taken possession of shop premises against the will of the owner of the premises and had installed three extra locks on the door. A few hours later, after the applicant had left, the maintenance engineer of the owner replaced the locks. On the basis of these facts, Coetzee, J held that since no appreciable time had elapsed between the first spoliation by the applicant and the act of recovery by the owner and since the applicant for spoliation had never been firmly ensconced in his possession, the owner's act of changing the locks was part of the *res gestae* of the original act of spoliation.
- [24] Coetzee, J held that to insist that immediately after the applicant had installed his own locks, the transaction was complete and that the action of the owner/respondent to regain control of its property was a fresh spoliation, would be an unrealistic evaluation of the situation. In the Court's view, this smacked of an overly detached armchair view, as the occurrence could not be too closely equated to a brawl where a quick exchange of blows is of the essence.
- [25] Mr Fisher relied heavily on the judgment in *Ness v Greeff* to which I have referred earlier. In that case the Court found on the facts, that the recovery of possession by the owner after a lapse of nearly 11 days did not amount to a new breach of the peace but was a justifiable act of counter-spoliation.
- [26] It is clear that each case must be determined on its own facts to decide whether or not the conduct of the respondent was a lawful counter-spoliation. In my view whatever the factual position may have been in the case of *Ness*, it is clear on the facts of this case, that the conduct of the first and second respondents did not amount to a lawful counter-spoliation. The applicant's position, after five days of being in possession, conducting a business and holding the keys to the premises had, in my view, become stabilized. The applicant had in my view, become ensconced in her possession of the property. The conduct of the respondents cannot in my view, be described as a mere continuation of an existing act of spoliation by the applicant.
- [27] Having delayed for a number of days the recovery of possession by the respondent was not instanter. It constituted, in my view, a new breach of the peace. The first respondent should, if she wanted to be reinstated in possession of the premises, have applied to Court for appropriate relief and not have resorted to self-help.

- [28] Turning to the relief sought to interdict the harassment and other conduct against the applicant and her employees, Mr Fisher submitted that the applicant has not made out a case for a final restraining interdict in this regard. In particular, he emphasised that since the applicant was seeking final relief, the approach set out in the Flascon-Evans case should be applied to the disputes of fact which he says have arisen in this regard.
- [29] The question to be asked is whether the applicant has established that the facts, objectively viewed, show that there is a real apprehension that the first and second respondents will resort to such conduct in future. The facts are mostly common cause. The only real dispute is the amount of force used by the second respondent on 19 November 2007. The injuries Beukes suffered, in my view, show that the first and second respondent's version cannot be correct and that the dispute raised in this regard is not a genuine dispute. The respondents' version of the events is in my view, not tenable. Having regard by the respondents¹ to all the facts in the application for a restraint, I conclude that on balance the applicant has made out a case for the restraint.
- [30] Mr Spamer, on behalf of the applicant, asked for a punitive costs order on the basis that the respondents' conduct has resulted in unnecessary trouble and expense which the applicant ought not to bear. In my view, a punitive costs order is not called for. One should guard against censuring a party with such an order when, with the benefit of hindsight, the course taken by the respondents turned out to be a lost cause. In my view, a costs order on the ordinary basis should be made.
- [31] I therefore make the following order:

The rule nisi issued on 4 December 2007 is made final.

1. The respondents are ejected from the premises of the applicant's business at Vanilla Body & Beauty Therapy, Unit 3, Gerfa Centre, 6th Avenue Melkbosstrand, Cape Town.
2. The respondents are interdicted and restrained, together with any of their employees or agents, from harassing, threatening and intimidating the applicant, or any of the employees of the business Vanilla Body & Beauty Therapy.
3. The first and second respondents are ordered, jointly and severally, to pay the costs of this application.

LOUW. J

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