

SOUTH AFRICA / JUDGMENT

Tsepitsi v Sebolai (M310/2023) [2024] ZANWHC 218 (27 August 2024)

[2024] ZANWHC 218

COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

M310/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Case No: M310/2023

In the matter between:-

WENLIE TSEPITSI

APPLICANT

AND

CHRISTINAH SEBOLAI

RESPONDENT

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 27 August 2024 at 14h00

ORDER

- (i) The respondent is directed to, within fourteen (14) days from the date of this order, return to the applicant undisturbed and peaceful possession of the farm known as Sebeta Tsapitse Number 899 Registration Division H N, North West Province, and to remove from the said farm the tombstone depicted on the photograph which is an annexure to the founding affidavit in this matter and which tombstone reflects the name: "Kabelo Segomotso Sebolai".
- (ii) That the Sheriff of this Court is authorised and directed to remove the said tombstone from the said farm in the event of the respondent failing to comply with the order in paragraph (i).

(iii) That the respondent is ordered to pay the costs of this application, which shall include the reserved costs in respect of the previous postponements of 12 October 2023 and 2 November 2023.

JUDGMENT

REDDY J

- [1] This is an opposed application for spoliation relief. The applicant seeks an order that the respondent be directed to within fourteen
- (14) days return to the applicant undisturbed and peaceful possession of the farm known as Sebetse Tsapitse Number 899 situated in the Registration, Division HN North West Province and to remove from the said farm the tombstone, which reflects the name “Kabelo Segomotso Sebolai.”
- [2] The applicant is Wenlie Tsepitsi, a Close Corporation, duly registered as such with registration number 9720777/23 with the main business being the Farm commonly known as Kokwaan, within the district of Vryburg, North West Province. Both members of the close corporation reside outside the borders of the Republic of South Africa. Kokwaan is being managed by Mr Lavin George Speedy, (“Speedy”). The respondent is Christina Sebolai, (“Sebolai”).
- [3] During the middle of August 2022, Sebolai arrived at Kokwaan. Sebolai was in search of the gravesite of her grandfather (Mr. Kabelo Segomotso Sebolai) but was uncertain on which farm he was buried. Sebolai further disclosed to Speedy that she had been mandated by her family to locate the gravesite and proceed to provide a proper interment for him.
- [4] At Kokwaan there still exists a small area where deceased employees or relatives of employees who previously used to be employed at Kokwaan had been buried. This small area is referred to as the Graveyard. The passage of time had not been kind to the Graveyard. Whilst the Graveyard still subsists, it has become extremely difficult to establish where in the Graveyard the respective graves are. This is exacerbated by the fact that the graves are unmarked and resultantly unidentifiable.
- [5] Speedy communicated to Sebolai that to the best of his knowledge there existed no grave of her grandfather at Kokwaan, however Speedy suggested that Sebolai engage with the staff that are employed at Kokwaan to ascertain as to whether they had knowledge of the gravesite that she was searching for. Speedy made his contact information available to Sebolai and requested her to revert to him should her search for her grandfather’s gravesite prove positive. What Speedy accentuated was that no ceremonial activities were to be carried out afore returning to him. Subsequent enquiries by Speedy with employees at Kokwaan did not result in the discovery of the gravesite that was being sought by Sebolai.

- [6] On or about the 08 or 09 September 2022 Speedy received information regarding the erection of a newly constructed tombstone at the Graveyard. Following on this information, Speedy visited the Graveyard and confirmed the accuracy of the report. In respect of the positioning of the tombstone there was no indication that same was erected on a site where there is any grave. Speedy contends that in his capacity as Farm Manager of Kokwaan, he would not have consented to the erection of the tombstone at Kokwaan in respect of an individual who was not an employee or a relative of an employee of Kokwaan. Moreover, Speedy avers that no consent would have been forthcoming unless he had been assured that there was a gravesite of the grandfather of Sebolai, and before a tombstone could be positioned on same.
- [7] The erection of this tombstone despoiled the applicant's undisturbed possession and peaceful position of Kokwaan. Moreover, Sebolai had no right, permission or authority to act in such manner. Resultantly, the applicant seeks that its peaceful and undisturbed possession be restored, and that the tombstone be removed.
- [8] On 21 September 2022, Speedy obtained the contact number of Sebolai, which was forwarded to Mr. Isaac Jocum, ("Jocum") who is a relative of the members of the applicant and who visits Kokwaan occasionally. Jocum inquired from Sebolai as to why the tombstone had been erected without the consent of Speedy. Sebolai conceded to having acted without contacting Speedy as she averred that the contact details of Speedy were unknown to her. Speedy disputes that this is correct as he had provided his contact details to Sebolai. Jocum accented that the tombstone had been erected unlawfully and requested certain pertinent information from Sebolai.
- [9] On 29 September 2022, Jocum forwarded a WhatsApp message to Sebolai in which he retold that Sebolai had erected the tombstone without consent and consequently her conduct was unlawful. Furthermore, Jocum invited Sebolai to provide proof that the location where Sebolai had erected the tombstone was a grave since there was no indication that the tombstone was erected on a grave. Sebolai did not retort to Jocum's request. Jocum persisted with his request for the relevant information, but Sebolai did not acquiesce to the provision of same.
- [10] Sebolai accepts that the applicant is the owner of Kokwaan. To this end she has no intention of contesting ownership rights nor to impede the possession of the applicant. Sebolai asserts that on arrival at Kokwaan, she met with the caretaker. On this occasion the gravesite of her grandfather was located at Kokwaan. Following on this, the caretaker was asked if it was permissible for a tombstone to be erected, to which the caretaker assented. The consent that was provided was subject to the condition that if any unveiling of the tombstone was to be celebrated, the caretaker had to be informed. The concern that underpinned this condition by the caretaker was that he wanted to be au fait with the number of family and friends that may converge on Kokwaan for the celebration of the unveiling of the tombstone.

- [11] Sebolai's version is that in terms of the Extension of Security of Tenure Act 62 of 1997 as amended (ESTA) more pertinently section 6
- (4) which provides that any person shall have the right to visit and maintain his or her family graves on land which belongs to another person, subject to any reasonable condition imposed by the owner or person in charge of such land in order to safeguard life or property or to prevent the undue disruption of work on the land. This legislative provision authorises her conduct and negates any perceived unlawful conduct.
- [12] Finally, Sebolai maintains that the applicant was misguided to premise the relief on the requirements of a mandament van spolie as this application falls shy of this standard.
- [13] The law on spoliation is trite. In *Nino Bonino v De Lange*, 1906 TS 120 at 122, Innes CJ explained the nature of spoliation: '[S]poliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right.' The remedy is a possessory suit based on the maxim *spoliatus ante omnia restituendus est*. In its simplest form, this means that possession must be restored to the dispossessed.
- [14] Although a number of different possessory remedies existed in Roman-Dutch law (the mandament van complainte (which had its origin in Anglo-Norman law), the mandament van maintainue (which had its origin in medieval Italian law) and the mandament van spolie (which had its origin in canon law), only one of these has been received into modern South African law, namely the mandament van spolie. (See: Kleyn "Possession" in Zimmermann and Visser *Southern Cross: Civil Law and Common Law in South Africa* 1996 at 820).
- [15] Spoliatory relief is predominantly founded on application, although it is not unusual that a litigant may favour action proceedings. Fleshing out the intricacies, of spoliatory relief it is incumbent for an applicant to simply prove that he or she was in possession of the thing and that he or she was unlawfully dispossessed or despoiled. (See: *Nino Bonino v De Lange* 1906 TS 120, *Yeko v Qana* 1973 (4) SA 735 (A) 739).
- [16] In the Law of South Africa (LAWSA) Vol 27 par 94 it is stated that the spoliation order or mandament van spolie is available where:
- "(a) a person has been deprived unlawfully of the whole or part of his or her possession of movables or immovable.
- (b) a joint possessor has been deprived unlawfully of his or her co- possession by his or her partner taking over exclusive control of the thing held in joint possession.
- (c) a person has been deprived unlawfully of his or her quasi-possession of a servitural right.
- (d) a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.

In case (c) and (d) the courts have warned that the application of the spoliation principles to incorporeal rights require closer

investigation and more subtle treatment and that one must distinguish carefully between rights incidental to the quasi-possession of the right and a mere right to claim specific performance of a contractual or statutory obligation. Illicit deprivation of possession in any of the ways mentioned above is termed spoliation. "

[17] In *Ivanov v North West Gambling and Others* 201 2

(6) SA 67 (SCA), "Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant - that is why a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute. "

[18] Tellingly in *casu*, only two affidavits have been filed. The applicant has not filed a replying affidavit. It is settled law that in motion proceedings

there are normally three sets of affidavits. In terms of Rule 6(5) (e) of the Uniform Rules of Court(" the Rules"), the court may in its discretion permit the filing of further affidavits. In motion proceedings the affidavits constitute both the pleadings and the evidence. The issues and averments in support of the parties' cases should appear clearly therefrom. See: *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008

(2) SA 184 (SCA) at 200D.

[20] It is indisputable that the applicant is the owner of the farm Kokwaan. Moreover, it is incontestable that the applicant was in peaceful and undisturbed possession of same. These findings are dispositive of the averment that the application falls foul of the fundamentals of a mandament van spolie. Sebolai concedes to the erection of the tombstone at Kokwaan but proffered that this was done with what I surmise to be the consent of the caretaker, probably Speedy (although Jocum's What's app messages refer to one Robin).

[21] Advocate Moloto contended that there is a bona fide factual dispute on the core issue germane to whether Sebolai had the requisite consent. This being so a referral to oral evidence was peremptory, so he continued. Advocate Pistor SC asserted a contrary view. The general rule is that final relief in motion proceedings may only be granted if those facts as stated by the respondent, together with those facts as stated by the applicant, that are admitted by the respondent, justify the granting of the application, unless it can be said that the denial by the respondent

of the facts alleged by the applicant is not such as to raise a real, genuine or bona fide dispute of fact. See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1964

[3] SA 623 (A) at 634 E-I and 635 A-C.

[22] Rule 6(5)(g) of the Rules of court provides a mechanism for the resolution where a material dispute of fact occurs:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[23] An ordinary reading of Rule 6(5)(g) provides that where there is a material and bona fide dispute of fact that cannot be decided on the papers, a court is faced with three alternatives: it may dismiss the application, or direct that oral evidence be heard on specified issues or refer the matter to trial. In application proceedings, where a dispute of fact has emerged and is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial will generally be appropriate. See : Mamadi and Another v Premier of Limpopo Province and Others [2022] ZACC 26 at paragraph 44. the CSS.

[24] In my view, there is no bona fide dispute of fact. Speedy dispels this. Speedy underscored his interaction with Sebolai and confirms her uncertainty in respect of where her grandfather had been buried. Sebolai fell short of providing facts to confirm that her great grandfather had been buried at Kokwaan. All investigations yielded not an iota of information that Sebolai’s grandfather was indeed buried on the farm Kokwaan. When requested by Jocum to provide certain specific facts inter alia that where the tombstone had been erected was gravesite of her grandfather. Sebolai was unable to. Speedy provided Sebolai with his contact details with a specific proviso that she had to contact him regarding any positive information regarding the gravesite and that no activities were to be pursued without his explicit consent. Sebolai did neither.

[25] As I see it, the applicant has demonstrated a proper cause of action for the relief sought.

[26] Costs are at the discretion of the court. There are no justifiable reasons to deviate from this practice.

Order

In the premises, I make the following order:

- (i) The respondent is directed to, within fourteen (14) days from the date of this order, return to the applicant undisturbed and peaceful possession of the farm known as Sebetse Tsapitse Number 899 Registration Division H N, North West Province, and to remove from the said farm the tombstone depicted on the photograph which is an annexure to the founding affidavit in this matter and which tombstone reflects the name: “Kabelo Segomotso Sebolai”.

(iii) That the respondent is ordered to pay the costs of this application, which shall include the reserved costs in respect of the previous postponements of 12 October 2023 and 02 November 2023.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES For the Applicant Advocate J.H.F Pistor SC Instructed By C/O Maree & Maree Attorneys 11 Agaat Street Riviera Park Mahikeng For the Respondent Advocate T.P Moloto Instructed By Tau Matsimela Attorneys Inc 1206 Barolong Street Mmabatho Date reserved: 01 August 2024 Date of judgment: 27 August 2024

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2024/218.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tsepitsi-v-sebolai-unknown-topic-anwhc-2024--6a3ea5123b1caa912980a551>

Prepared on 12 October 2026 · Esheria