

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF BOKSBURG

HELD AT BOKSBURG

CASE NO. 8117/2010

In the matter between:

MATSHIDISO MOKEBE

APPLICANT

And

JEFFREY JANUARY

RESPONDENT

JUDGEMENT

BACKGROUND

On 28 October 2010 the Applicant brought an application in terms of Section 30(1) of Act 32/1944 (as amended) for a *mandament van spolie* and other relief in the following terms:

“Ordering the Respondent *ante omnia* to immediately restore to the Applicant undisturbed possession of her home at the premises situated at 2752 Indwe Street, Ramaphosa, Reiger Park, Boksburg.”

THE FACTS

1. The Applicant since 3 October 2007 resided at the property with her two children Palesa, 12 year old daughter and Given, 17 year old son in term 1 of an oral lease agreement with the Respondent at a rental of R500,00 per month.
2. During October 2009 the Applicant due to personal reasons fell into arrears with the rental which persisted until February 2010 when Respondent demanded the new rental in the amount of R600,00 per month which she could not afford.

3. Respondent told Applicant to leave the property but the Applicant remained on the property as she was unable to obtain other place to stay.
4. On 2 October 2010 at about 15h20 Respondent together with his wife came to the property and according to the Applicant she was told to leave the house immediately and move out. Which she did, leaving some of her personal belongings in the house.
5. According to the Respondent the Applicant agreed to move out (consented) and he had obtained alternative accommodation for her.

MANDAMENT VAN SPOLIE AS A FORM OF RELIEF

The *mandament van spolie* is in the first place a possessory remedy (*remedium possessurium*). The essential characteristic of a possessory remedy is that the legal process whereby the possession of a party is projected (*indicium possessorum*) is kept separate from the process whereby a party's right to ownership or other right to property in dispute is determined (*locucium petiturium*). The reason for the practice of the Court granting a Spoliation Order is that no man is allowed to take the law into his own hands and to dispossess another illicitly of possession of property.

Two factors are requisites to found a claim for an order for restitution of possession on an allegation of spoliation. The first is that the Applicant was in possession and the second that he had been unlawfully deprived of that possession and against his/her wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before an order should be granted (Rieseberg versus Rieseberg 1926 WLD 89 at 65). The onus is on the Applicant to prove his/her case on a balance of probabilities.

Advocate Wilson, Counsel for the Applicant argued that there is no dispute of fact and that the Applicant was unlawfully evicted from her home by the Respondent without her consent and by duress for the following reasons:

- (a) The Applicant left most of her personal belongings at the property when she was told to leave by the Respondent;


- (b) Respondent who is a police officer was in possession of his service firearm at the time of the eviction and threatened to use the gun should the Applicant not leave the property;
- (c) Applicant protested during the eviction that she had no where to go and was not ready to leave the property;
- (d) Applicant was sleeping and was awakened while she was in her nightdress and her baby had a nappy on and was bare-chested;
- (e) That the Respondent told her that he is a police officer and that he knows the law and that should she complain to whomever, no one could do anything to him;
- (f) Applicant did not hand the keys to the Respondent, she was terrified and intimidated by the Respondent in leaving the house.

Respondent's Counsel, Mr Sampson on the other hand argued as follows:

- (a) The Applicant agreed to move (by consent) and that the Respondent provided her with alternative accommodation which the Applicant was not satisfied with;
- (b) That the Applicant handed the keys to the Respondent and freely and voluntarily left the house;
- (c) Respondent denies that he as a police officer intimidated the Applicant with his firearm;
- (d) Respondent relies on several supplementary affidavits deposed to by the members of the so called "Street Committee" that the Applicant vacated the house freely and voluntarily and was not evicted from the house.

The task this Court has to decide is whether the Applicant consented to leave the house or not. The Court finds the following facts irreconcilable with common sense and logic, should it find that the Applicant left by consent (freely and voluntarily):

- (a) Why would the Applicant leave all her personal belongings and property especially her medication if she agreed to move from the property?
- (b) Why Applicant did not hand over the keys of the house to the Respondent if she left freely and voluntarily;
- (c) That the Applicant would have left the house long before as she was unable to pay the increased rental and was already in arrears with the rental;
- (d) That she was in a nightdress at the time of the eviction and would not leave dressed in such clothes if she consented to move out;
- (e) That after the eviction she sought assistance from the police, legal aid and clinic to launch this application so as to vindicate her rights;
- (f) That the affidavits of the so called Street Committee members filed by the Respondent in fact corroborate the Applicant's case in that:
 - (i) she did not want to vacate the property and wanted to remain on the property;
 - (ii) she would spend the sum of R60 000,00 for a lawyer to fight the Respondent (Affidavit of Siphon Vangra).
- (g) Respondent tenders alternative accommodation to the Applicant but it is not stated when and where it is offered to the Applicant.

 The Court finds that Respondent's defence that Applicant agreed to move (by consent) and that he provided Applicant with alternative accommodation is made ^{in a} bald ^{affidavit}, no primary facts are alleged to substantiate the defence. The Court therefore does not uphold the Respondent's defence of consent. Further in this case, the "alleged consent" in fact amounts to a waiver of Constitutional Rights, that is the right not to be evicted without a Court Order. The Respondent has failed to discharge the onus that the Applicant with full knowledge of her right of occupation

of the property and right not to be evicted without a Court Order decides to abandon it whether expressly or by conduct inconsistent with the intention to enforce it (Laws v Rutherford 1924 AD).

The Court finds that the Applicant has complied with the two factors required for, as stated above, granting of a Spoliation Order and has proven her case on a balance of probabilities.

FACTS OF CASE SIMILAR TO THAT OF SIMMA MUTHILWU & OTHERS V PROPERA MOUNDA ESTABL (SCIP) CASE NO. 17502/2010 (VANDERHOEF) IS REFERRED TO PARAGRAPH ORDER BY COURT

The Court therefore grants the *mandament van spolie* (Spoliation Order) Prayer 2 of Notice of Motion as well as Prayers 3 and 4 thereof.

REGARDING COSTS Regarding costs, the Order of Cost should follow the ^{*ORDER*} save in special circumstances. The Court finds the following "special circumstances" in the matter to award cost otherwise:

- (i) That the application is no longer urgent being that urgency has elapsed;
- (ii) The delay caused by the various postponements in the matter;
- WJ* (iii) The Applicant is assisted by the ^{*SENI SA*} Law Clinic and has not personally incurred cost.

The Court therefore orders that each party pay their own costs.

[Signature]
 Y M SURTYLAND
 ADDITIONAL MAGISTRATE : BOKSBURG

