IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A3038/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

In the matter between:

MIDVAAL LOCAL MUNICIPALITY Appellant

and

THE MEYERTON GOLF CLUB Respondent

Coram: WEPENER J

Heard: 13 OCTOBER 2014

Delivered: 15 OCTOBER 2014

Summary – Spoliation – rule against self-help – by-laws not authorising local authority to act without an order of court.

JUDGMENT

WEPENER J:

[1] *Spoliatus ante omnia restituendus est.*

[2] This short and succinct statement of the law has been said[1] to mean that:

'. . . before the Court will allow any enquiry into the ultimate rights of parties the property which is the subject to the act of spoliation must be restored, to the person from whom it was taken, irrespective of the question as to who is in law entitled to such property'

or

'the despoiled person must be restored to possession before all else'.[2]

[3] The appellant, a local authority, is the registered owner of land which is leased to the respondent and is used as a golf course. Several advertising signs were displayed on the golf course in contravention of the appellant's by-laws. Sections 14(10) and 55(15) of the Outdoor Advertising By-Law[3] provide:

'Section 14 General Requirements

(10) If advertisements, advertising signs and advertising structures are not removed as contemplated in this policy or not removed by the expiry period specified in this policy of if advertisements, advertising signs and advertising structures constitute in any respect a contravention of the provisions of this policy, the Council shall be entitled, without giving notice to anyone, to itself remove any advertisement, advertising sign or advertising structure.

---

[1] *Greyling v Estate Pretorius* 1947 (3) SA 514 (W) at 516-517.
[2] *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) para 10.
[3] Promulgated in terms of Extra Ordinary Provincial Gazette 149 on 1 July 2009.

Section 55 Erection, Maintenance and Removal of Advertisements, Advertising Signs and Advertising Structures

(15) Notwithstanding the provisions of subsection (2), (4), (5) and (6), if an advertisement, advertising sign or advertising structure;

(a) in the opinion of the Council, constitutes a danger to life or property:

(b) in the opinion of Council, is obscene;

(c) is in contravention of this policy and is erected on, attached to or displayed on Council land,

the Council may, without serving any notice, remove any such advertisement, advertising sign or advertising structure or cause it to be removed at the expense of the person referred to in section 60.'

[4] The respondent was in breach of the by-laws and the appellant gave notice to the respondent on 7 May 2013 that it was so in contravention and ordered the respondent to remove the advertisements within seven calendar days,

'. . . failing which further legal action against you will forthwith be taken. Such legal action may include, but is not limited to, criminal action as well as an order by court forcing you to remove such advertisement. . . all costs of the aforesaid legal action, including removal costs, will be for your account.' (own emphasis)

[5] The respondent failed to heed the notice and the appellant caused the advertising signs to be removed without further notice to the respondent and without obtaining an order from court to do so. The respondent approached the Magistrates' Court at Meyerton and obtained an order to be placed in possession of its advertising signs as they were prior to their removal. The court a quo considered that the appellant failed to apply its own by-law properly, failed to adhere to the principles contained in PAJA[4], offended the rights of the respondent enshrined in the Constitution and spoliated the respondent and ordered the appellant to restore the advertising boards in the same position as they were prior to their removal by the appellant.

[4] *Promotion of Administrative Justice Act* 3 of 2000.

[6] The appellant appeals against that order and, despite the defences raised in the court a quo, nailed its colours to the mast of the by-laws referred to above namely, its legislative right to remove the signs.

[7] The nature of a mandament van spolie is such that a possessor, even if he be a fraud, robber or thief, is entitled to possession prior to issues arising from such possession being determined by a court. By analogy it would also be so in the case of someone breaking the law, such as the respondent, who acted in contravention of a by-law, as the issue of the possessor's fault is irrelevant.[5]

[8] All persons are required to preserve public order and are prohibited from taking the law into their own hands and are required to follow due process.[6]

[9] A spoliation is available against all who resort to self-help including government entities such as the appellant. The Constitutional Court said in *Ngqukumba*[7]:

'This applies equally whether the despoiler is an individual or a government entity or functionary. In *Vena* the then Appellate Division, now the Supreme Court of Appeal, endorsed *Sithole*:

"The Court came to the conclusion that the section was not worded so clearly as to detract from the general principle of law '. . . that there shall be no spoliation by any person, be it an individual, or a government department or a municipality or any similar body. . . .'

[10] In the circumstances the respondent, qua possessor, has a well-recognised and established right to be protected against the self-help of a spoliator. The appellant's

---

[5] *Ngqukumba* footnote 17:
'In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) ([2007] ZASCA 70) (*Tswelopele*) in para 21, the Supreme Court of Appeal said:
"Under [the mandament van spolie], anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (spoliatus ante omnia restituendus est). Even an unlawful possessor — a fraud, a thief or a robber — is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property."
This court cites *Tswelopele* with approval in *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) (2013 (1) BCLR 68; [2012] ZACC 26) in para 23. In proceedings for a spoliation order one does not have to reach the question whether the person deprived of possession is in fact a fraud, thief or robber, for the simple reason that this is not at issue. That the person might turn out to be one is irrelevant.'

[6] *Ngqukumba* para 11.
[7] Ibid.

defence to the relief granted by the magistrate is based on the wording of the by-laws which, it submits, permits self-help. This, the appellant submits to be the case despite its notice to the respondent indicating legal action and a court order should the advertising signs not be removed. It seems that at the time of the sending of the notice the appellant's officials were well aware of the principles against self-help and that a court order would be required.

[11] In order to justify its self-help the appellant relied on *Surtee's Silk Store*[8] where Margo J said that a tenant could lawfully be ejected from premises due to the provisions of s 18(1) of the *Community Development Act.*[9] It provided that:

'If a tenant or other occupier of immovable property belonging to the board fails-

(a) . . .

(b) to vacate such property on or before the date on which he has lawfully been required by the board to do so,

the Board may, after having given seven days' notice in the case of any such property occupied for residential purposes, or thirty days' notice in the case of any such property occupied for any other purpose. . . without having obtained any judgment or order of Court, by resolution declare that such property may be entered upon and taken possession of.'

Relying on the words which authorise an act without a court order, the learned judge allowed self-help. The case is, however, distinguishable from the present matter where no provision for self-help without a court order is to be found. In addition, the constitutionality of such a self-help provision has not been ventilated before this court.

[12] The appellant also relied on a passage in *Potgieter v Du Plessis*[10] where, by referring to *Sillo v Naude,*[11] the court referred to the fact that the conduct in *Sillo* was lawful in that the respondent was authorised by law to set into motion the machinery of the pound ordinance and the respondent did not take the law into his own hands. The

[8] *Surtee's Silk Store (Pty) Ltd and Others v Community Development Board and Another* 1977 (4) SA 269 (W).
[9] Act 3 of 1966.
[10] 1978 (1) SA 751 (NC) at 754H.
[11] 1929 AD 21 at 26.

actions of the respondent in *Sillo* are to be distinguished from those of the appellant in this matter. The appellant did take the law into its own hands, but attempts to justify its actions by reference to the provisions of the by-laws.

[13] It is apparent that the by-laws do not abolish the duty upon the appellant to obtain a court order should it wish to act pursuant to the provisions of the by-laws. In *African Billboard Advertising (Pty) Ltd v North and South Central Local Councils, Durban*[12], Levinsohn J said:

'The legal principles applicable to a matter such as the present have been clearly laid down in a number of decided cases. In *Sithole v Native Resettlement Board* 1959 (4) SA 115 (W) the Court considered a provision of certain expropriation legislation. The section in question read as follows:

"Upon the service of any such notice the ownership in the land described in the notice shall pass to the board free of all encumbrances and the board may, after expiry of a period of not less than 30 days from the date of such service take possession of and use the land."

Williamson J (as he then was) said at 117A - B:

"The argument addressed to me on behalf of the applicant is shortly that this right of occupation or use, after a period provided for by s 17(6), is no more than the similar legal right acquired by any such person as for instance a landlord or any other person who has acquired a vested right to possess or repossess certain property; that right always incorporated a further right, if possession or occupation is not given, to enforce his right by legal process. That right is a corollary to the right of any person in possession of property, whether movable or immovable, not to be disturbed in his possession except by legal process."

The learned Judge continued and said (at 117C - G):

"The argument shortly for the respondent is that that position, which is the normal position of persons entitled to possession of property, has been disturbed by the provisions of s 17(6). Of course, Parliament may, if it so deems fit, alter the ordinary principle of law that a person entitled to property is not entitled to enter upon it and take possession himself by force. The right so to act is one which obviously must be conferred in clear language; the clear principle of

[12] 2004 (3) SA 223 (N) at 226I-229B.

our law is that, ordinarily speaking, persons are not entitled to take the law into their own hands to enforce their rights. There is a legal process by which the enforcement of rights is carried out. Normally speaking, it is carried out as a result of an order of Court being put into effect through the proper officers of the law such as the Sheriff, deputy sheriff, messenger of the magistrate's Court or his deputies, reinforced if necessary, by the aid of the police or some such authority; in most civilised countries there exists the same principle that no person enforces his legal rights himself. For very obvious reasons that is so; if it were not so, breaches of the peace, for instance, would be very common. It is clear, therefore, that if you want to enforce a right you must get the officers of the law to assist you in the attainment of your rights.

The principle applies equally to the rights of public bodies such as municipalities or provincial councils or any similar bodies, and even to State Departments. Individual members of a State Department normally cannot, in the interest of their Department, take the law into their own hands and enforce State rights without the State having made use of the assistance of its judicial Department in order to help it to acquire possession of property to which the State may be entitled."(My emphasis.)

Sithole's case supra was approved of by the then Appellate Division in *George Municipality v Vena and Another* 1989 (2) SA 263 (A), especially at 271 - 2.

We were also referred to a decision of Blignault J in the Cape of Good Hope Provincial Division (unreported) delivered on 27 May 1999 where the learned Judge applied the principles in the *George Municipality* case supra, and came to the conclusion that the respondent municipality was not entitled to remove signs in terms of its bylaws without first having obtained an order of Court. Counsel for the applicant in casu relied strongly on the *Ad Outposts (Pty) Ltd v Municipality of Cape Town* judgment although conceding that the by-law in that case differed materially from the present case. However, he argued that in principle the two cases could not be distinguished. We must answer the question posed in this case by applying the canons of interpretation laid down by the authorities. We must interpret the particular legislation in such a way that it interferes as little as possible with the principle that no person may take the law into his/her own hands. I venture to suggest that s 39(2) of the *Constitution of the Republic of South Africa Act* 1996 is also applicable:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport or objects of the Bill of Rights."

The particular provisions of the Bill of Rights are s 25(1):

“No one may be deprived of property except in terms of law, of general application, and no law may permit arbitrary deprivation of property.”

Also, s 34:

“Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.”

I may say in this context that the spirit and objects of the Bill of Rights promote the rule of law in every area of our daily lives and binds everyone including government and local authorities.

The by-law in question confers a discretion on the city engineer to direct any person who has erected a sign either in contravention of the by-laws or without having received permission to erect such sign in the first place to remove the sign within 14 days from the date on which notice is given. In the event of non-compliance s 7(3) empowers the city engineer to remove the sign. I am not persuaded that the framers of the bylaws intended that this should occur without a Court order. It was a simple matter to say that no Court order would be required. Our Courts have in the past applied rules against self-help strictly. For example, a lease may provide that upon cancellation the landlord is entitled to regain possession of the premises. We know that this cannot take place unless the landlord goes to Court and obtains a Court order. In the case of notarial bonds one finds provisions which entitle the creditor to take possession of pledged movables upon a breach by the debtor. Here again, this cannot occur without a Court order. In short the policy of our law has always been to set its face against any form of self-help. In the instant case the city engineer formed a judgment in regard to the legality of the signs and he himself executed that judgment. Mr Chadwick argues that the 14-day period afforded to the offending party to remove the sign cures the problem. He submits that such a party, if he disputed the city engineer's contentions, could move the Court for an appropriate declaratory order. This 14-day window period, without any objection from the offending party therefore clears the way for a removal by the city engineer without an order of Court. I am unable to approach the interpretation of the by-law in this way. The 14-day period in question is not an indication to my mind that the Legislature authorised removal of the sign in question without a Court order. The contention of the respondent appears to place the onus on the offending party to go to Court and his failure to do so amounts to some sort of acquiescence to or acceptance

of the removal without an order of Court. The canons of construction laid down by our Courts require the statutory provision to stipulate in clear language that the dispossession of an individual's property can take place without an order of Court. The by-law in the present case does not do so and I am of the view that the removal in question ought not to have been done without an order of Court.'[13]

[14] The matter before us is on all fours with the *African Billboard Advertising* matter. The appellant is not exonerated from obtaining a court order: the by-laws do not absolve the appellant and when interpreting the appellant's rights with due regard to the words of Levinsohn J in *African Billboards Advertising,*[14] the appellant's purported justification to resort to self-help must fail. Indeed in *George Municipality,*[15] the Supreme Court of Appeal approved a statement by Friedman J, in the court of first instance, which read as follows:

'It is a fundamental principle of our law that a person may not take the law into his own hands and a statute should be so interpreted that it interferes as little as possible with this principle.'

[15] In *Minister of Finance and others v Ramos,*[16] *Cleaver J said:*

'In this connection it should also be borne in mind that where a party opposing an application for a mandament van spolie relies upon a statutory provision in order to support an averment that he was entitled thereby to deprive the applicant of his possession, without recourse to due process of law, and that such deprivation or possession was therefore lawful, such statutory provision must be restrictively interpreted. A person who invokes the protection of such a statutory provision will need to establish that he acted strictly within its terms. (See *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (W) at 530F; *George Municipality v Vena and Another* 1989 (2) SA 263 (A) at 271E--F.)'

[16] Wrongful deprivation in this context means deprivation against the will of the person and without resort to the legal process.[17]

---

[13] Also see Ngqukumba para 11.
[14] At 228B-D.
[15] At 271E-F.
[16] 1998 (4) SA 1096 (CC) at 1101G-I.
[17] *Wightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 27.

'A person cannot under colour of right dispossess another, and that is what the respondent in this case did; because by so doing he takes the law into his own hands, and this is something the Court cannot and the law will not permit. Nor can a person take advantage of his own wrong and act as if he were the judge in his own case.'[18]

[17] There is nothing in the by-law which empowers the appellant to avoid the law against self-help. The reference in the by-law to a notice is irrelevant to the question of self-help. The appellant acted unlawfully by removing the advertisements without having resorted to a legal process.

[18] In *Elastocrete (Pty) Ltd*[19] it is stated that wrongfulness in this context means nothing more than 'without any special legal right to oust the person from possession.'

I conclude therefore that the court a quo correctly found that the appellant acted in violation of the respondent's rights and properly ordered that the respondent be restored to possession of the advertising boards.

[19] *Spoliatus ante omnia restituendus est.*

[20] The appellant prosecuted the appeal late. There is an application for condonation for its failure to act diligently which application is opposed by the respondent. Having come to the conclusion that the appeal cannot succeed, I need say no more about the application for condonation.

[21] I propose that the appeal be dismissed with costs.

_____

Wepener J

[18] *Anderson v Anderson* 1919 EDL 57 at 60.
[19] *Elastocrete (Pty) Ltd v Dickens* 1953 (2) SA 644 (SR) 650.

I agree and it is so ordered.

_____

Makhanya J

Counsel for Appellant: D.L. Williams

(Heads for Appellant drawn by H P West)

Attorneys for Appellant: Malherbe Rigg & Ranwell Inc.

Counsel for Respondent: A. Le Roux Stemmet

Attorneys for Respondent: Daniel S Goosen Attorneys