IN THE HIGH COURT

(BISHO)

CASE NO.: 304/2001

DATE: 14 FEBRUARY 2002

In the matter between:

THOBEKA DINDINTO

and

MEC FOR HEALTH, EASTERN CAPE AND

3 OTHERS

JUDGMENT:

EBRAHIM J:

The applicant has launched motion proceedings in which she seeks certain relief from four respondents. The relief that is sought has been set out in the Notice of Motion in the following terms:

"1. Directing the Respondents to restore to the applicant undisturbed possession of an office allocated to her to do her work at Nomphumelelo Hospital, Peddie.

2. Directing the second and/or third Respondent to forthwith handover the keys of the door of the office referred to above to the Applicant.

3. Interdicting and restraining the second and the third Respondents from interfering with Applicant's right to occupy her office at Nomphumelelo Hospital, Peddie.

4. Directing the Respondents to pay the costs of this application jointly and severally, the one paying the

other to be absolved.

5. Further and alternative relief."

The application is opposed by the respondents. The facts of the matter as set out by the applicant in her founding affidavit are briefly as follows: She alleges that since 9 May 1986 she commenced employment at Nomphumelelo Hospital as a typist and was then allocated an office together with another typist in the administration block. Subsequent thereto she was allocated another office which consisted of a wooden structure and she was handed a key to the premises. She carried out typing work while she occupied this office. She alleges that she was in peaceful and undisturbed possession of this office and that on 8 April 2001 when she reported for duty as usual she discovered that the lock of the door of the office had been removed and replaced with another and in consequence thereof she was unable to gain entry to the office.

The applicant makes a number of allegations thereafter relating to various disputes which arose at the institution relating to the purported dismissal of herself and others from the Public Service. For the sake of my judgment I do not consider it necessary to go into any detail insofar as that is concerned, but suffice to say that it appears from the applicant's founding affidavit that although she was dismissed from the Public Service she did not accept the dismissal. Indeed she continued to report for duty after her dismissal and continued to occupy, as she says, the office in the wooden structure. It appears from the documents that the applicant was dismissed in terms of a letter which indicated that her employment was to terminate on 31 July 1998. In consequence thereof as from 1 August 1998 she was not considered to be an employee and

therefore her services at the Nomphumelelo Hospital were no longer required.

The applicant suggests in her founding affidavit that the reason for her being dispossessed of the occupation of the office is as a result of her purported dismissal from employment. Although she was deprived of the use of the office as from 8 April 2001 the applicant only launched these proceedings on 30 October 2001.

In response to the application the respondents have filed an answering affidavit. Here again I do not intend to deal in any detail with all the allegations set out in the answering affidavit, save to say that the respondents admit that the applicant was employed at the particular time and that she was dismissed from service on the date that I have indicated. It is admitted further by the respondents that despite her dismissal the applicant continued to attend at the hospital and occupied the office which is the subject matter of this application. It appears further that the respondents did not allow the applicant to carry out any official tasks, but tolerated her presence there. In addition to attending at the premises, the applicant, for a period of time, also signed a particular register which indicated that she was present at work.

In reply to this the applicant has filed an affidavit in which she then concedes that she was dismissed from employment, but that she was disputing her dismissal. I should mention that the respondents also indicate that despite her dismissal and despite being advised that she was entitled to lodge an appeal against the dismissal the applicant failed to do so. In her reply to the respondents' answering affidavit the applicant now states that she in fact appealed and has annexed a copy of a letter which she addressed to the relevant authorities.

Mr Ndzondo who appears for the applicant has submitted extensive argument in support of the claim that the applicant had enjoyed peaceful and undisturbed possession of the office prior to the locks being changed and that the changing of the locks resulted in her being deprived of such possession. Consequently the applicant was entitled to launch these spoliation proceedings and to obtain an order restoring the status quo ante.

This is the gist of the argument in terms of prayer 1 of the Notice of Motion. In regard to prayers 2 and 3 which are in the form, firstly in regard to prayer 2, of a mandatory interdict and, in respect of prayer 3, of a prohibitory interdict, Mr Ndzondo has conceded that the applicant would rest with an order of spoliation and that the two prayers there do not take the applicant's case any further. For the purposes of this judgment, therefore, the crucial issue is whether the applicant is entitled to an order of spoliation or not.

Ms Norman who appears for the respondents at first sought to identify the application as a prohibitory interdict, but correctly qualified this by saying that this applied only in respect of prayer 3. She recognised, therefore, that the issue involved was whether a spoliation order should be granted or not.

In spite of the various allegations in regard to certain activities that took place at the Nomphumelelo Hospital that resulted in the dismissal of the applicant and other employees, the crux of this matter is whether the applicant was despoiled and consequently whether she is entitled to seek relief from this Court. The important issue is whether she enjoyed possession of the office that she had occupied.

Mr Ndzondo's argument is that she clearly did enjoy such

possession. In this regard he has referred the Court to certain cases which in essence identify that even a thief, who is unlawfully in possession of property, who has been despoiled of that property may seek a spoliation order. He is perfectly correct in this regard. As anomalous as it may seem to the average individual a thief who has stolen an individual's property and has obtained it by unlawful means, either by fraud or force or by any other deceptive means and who then finds that someone has forcibly removed that property from his possession may nevertheless approach a Court and seek a spoliation order; the effect thereof would be that the thief would again be placed in possession of such property. The owner who seeks to obtain possession of that property would then have to approach a Court to seek an order on the basis that he or she is the true owner and that the thief has no claim of right in respect of such property.

I have no argument with the submissions as made by Mr Ndzondo. The crux of the matter, however, remains whether the applicant by virtue of her employment had possession of the office or whether her occupation thereof did not amount to possession. If her occupation thereof did not amount to possession then she could not be despoiled and then following thereupon she is not entitled to obtain a spoliation order.

It is necessary, therefore, that I seek an answer in terms of the decisions that our Courts have arrived at over a period of time. In the short space of time that has been available to me since argument was addressed and the delivery of this judgment, namely, the space of something between 45 minutes or an hour, I have not been able to research the position extensively. But, suffice to say that in my view

the authorities that I have obtained clarify the issue sufficiently for me to be able to determine whether in fact the applicant enjoyed possession and was then despoiled or not.

One of the earlier cases in which the issue of possession was dealt with is that of **MPUNGA v MALABA** 1959 (1) SA (WLD) 853. Before I quote from the particular case it is important to note, and again Mr Ndzondo is correct in this sense, that the juridical interpretation of possession is not necessarily the one which the Court should apply. It is possession in a broader sense and in this regard the Court will not adopt the normal strict juridical interpretation. However, it is clear from the authorities, as will appear, that the two elements of animus and detentio are still relevant in an issue of spoliation. Turning to the **MPUNGA** case the learned judge there expressed the following at 861B-862C, and he in turn is quoting from a case of **MEYER v GLENDINNING**, 1939 CPD 84:

> 'Emphasis must be placed on the word 'similes' which indicates that it was not allowed to everyone who had bare physical possession, for instance, mere servants or agents, who held on behalf of their masters or principals. In my opinion the applicant in this case was not a mere servant or agent, but holding as he did under a training contract, would fall under the class of 'similes'. Further, in my opinion, he held the horses entrusted to his charge with the intention of securing some benefit for himself and there is nothing to show that he had no such intention in fact, even if such an intention was not

justified in law.'

It seems to me that the present case is more on all fours with the case of LUNN to which I have referred and that the principles there enunciated by MILLIN, J, apply in the present case, and that even if they are obiter, as pointed out by Mr Bizos, they nevertheless are and remain good law.

It seems to me that the authorities have established that a servant or a person who holds no rights on his own behalf, except insofar as such rights derive from an authority given to him by the master, is not entitled to bring proceedings for a spoliation order, but that only the employer can do so. In other words, it seems to me that before a person can bring spoliation proceedings, he must show that the right of which he has been spoliated is something in which he has an interest over and above that interest which he has as a servant or as a person who is in the position of a servant or a quasi-servant.

Now the position of the plaintiff in my view is the following: the evidence given by him in this respect, that is, all the evidence, shows no right on his own. He had the keys in question in his possession because he had been given them by his Deacons' Court, and because his house was near the church. Now I think that the fallacy in the plaintiff's case has arisen because of a failure to distinguish between the physical position of the key, and what was actually spoliated. The position is that the plaintiff could not use,

and I stress the word 'use' the key for any purposes of his own. It was only by the use of the key that he exercised the rights of control over the church building, and those are the rights, that is, the rights of control, that have been spoliated. It is not his physical possession of the key that has been spoliated, but the rights of control over the building which are represented by the use of the key, which were spoliated by the defendant and others.

This use of the key for the purposes of control of the building was entirely at the discretion of the Deacons' Court, whose orders the plaintiff had to obey. He had no independent or any other right to the use of the key - as opposed to his right to physical possession of the key. In regard to physical possession of the key, he may have had his own interest and his own right, but insofar as the use of that key was concerned, that was in effect what was spoliated by the substitution of a new lock. That is so because the use of the key was removed by this act of spoliation. And this user, or right of user in no way rested with or was controlled by the plaintiff. In view of that, in my view, he did not in any sense possess any right of user. Such right of user was at all times possessed by the Deacons' Court and subject to the latter's sole discretion and control. In other words, and to use the language used in LUNN's case, the possession of the right of user was not in the plaintiff, and he had no claim to hold such right of user by virtue of any interest he had in it against the

Deacons' Court, which had merely handed to him the instrument by which such right of user had to be exercised in accordance with the Deacons' Court's instructions, that instrument being the key.

At all times the rights spoliated, that is, the user of that key, rested clearly, on the evidence, with the Deacons' Court."

In **DLAMINI AND ANOTHER v MAVI AND OTHERS** 1982 (2) SA 490 (WLD) at 492D the following is said:

"The respondents take up the attitude that the applicants were never in possession of a type which would be recognised as a possession from which one can be spoliated. The type of possession which is necessary for the remedy of a spoliation order had been laid down by the Appellate Division in **YEKO v QANA** 1973 (4) SA 735 where VAN BLERK JA sets out the position as follows at 739D-H:

'The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. In order to obtain a spoliation order the onus is on the applicant to prove the required possession, and that he was unlawfully

> deprived of such possession. As the appellant admits that they locked the building it was only the possession that respondent was required to establish. If the respondent was in possession the appellant's conduct amounted to self-help. He was admittedly in occupation of the building with the intention of selling his stock for his own benefit. Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. For, as Voet 41.2.16 says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'

In this quote:

> 'it may be enough if the holding by the applicant was with the intention of securing some benefit for himself,'

is in my view the key to the wider interpretation given to possession."

Then in **BENNETT PRINGLE (PTY) LTD v ADELAIDE MUNICIPALITY** 1977 (1) SA 230 at 233G-H it was said:

> "In terms of all the authorities cited, the 'possession', in

order to be protected by a spoliatory remedy, must still consist of the animus - 'the intention of securing some benefit to' the possessor; and of detentio, namely the 'holding' itself. From a consideration of the cases referred to above, it seems to me to be clear that both these elements, and especially the detentio, will be held to exist despite the fact that the claimant may not possess the whole property or may not possess it continuously. If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is (a) making physical use of the property to the extent that it derives a benefit from such use; (b) intends by such use to secure that benefit to himself; and (c) is deprived of such use and benefit by a third person. Such a definition may obviously be incomplete but it seems to me to comprise the essentials derived from the authorities referred to, which are necessary to a decision in this case and which were relied on by Mr Howie, for the applicant."

Lastly, it was said in the case of **RECK v MILLS EN 'N ANDER** 1990 (1) SA 751 at 759C-D:

> "'The factum must be such as to place the person who desires to obtain possession in a position which shall enable him, and him only, to deal with the subject at pleasure; that is, to exercise ownership over it.'

En op 147:

> '...viz, the physical power of dealing with the subject immediately, and of excluding any foreign agency over it.....This physical power, therefore, is the factum which must exist in every acquisition of possession....'"

It is clear from these authorities that the person who claims to have been spoliated must have more than a simple use of the item or the premises from which he or she has been despoiled; but, most importantly, the possession which the person had must be of a nature in terms of which there is some benefit which the person acquires from such possession.

The applicant was an employee, her use and occupation of the particular office derive from her employment. It is not alleged by the applicant in any way whatsoever that apart from the use of that office for her employment that she derived any additional benefit from it, for example, that she was carrying out her own work there, that she was earning an income from that and was now being deprived of that. On the contrary the applicant's case rests entirely on the fact that she would like to obtain repossession of the premises so that she may continue her employment or to carry out her work.

It is clear to me, on the authorities, that an employee has no greater right than simply the use of the premises at the behest of the employer. It is the employer who is the real possessor of the office or the premises. In much the same way an individual who is employed at some premises as a mechanic and is given a set of tools with which to repair cars cannot claim on determination of his employment that he has

been despoiled of the particular tools. The ownership and the control of those tools rest with the employer and the employee obtains no rights of possession in that respect whatsoever.

It follows from what I have said that unless the applicant had obtained possession, as required in law, then the fact that she may have been prevented from occupying the office by the locks being changed or being prevented from entering there, did not vest in her the possession which, as the authorities indicate, she should have enjoyed. Consequently she could not have been despoiled. On the facts as they are before me I am unable to find in favour of the applicant.

Mr Ndzondo has argued that I should determine the facts, not simply on the basis of the approach set out in the case of **PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) 620 (AD), but determine it on the basis that the applicant has filed a replying affidavit denying that she has been properly dismissed and made certain other allegations.

I have grave difficulty with this. The respondents' affidavit clearly raises disputes of fact. It is so that Ms Norman has not presented this in argument. The fact remains, however, that it is patently clear that there are disputes of fact and the essential dispute of fact is whether she was in possession of the office prior to the alleged despoiling. Even on those facts it is not possible to find in favour of the applicant since the respondent has disputed that at time the locks were changed the applicant was not in occupation or possession, so to say, of the office. Even if I adopt a magnanimous approach, as Mr Ndzondo has tried to persuade me, the undisputed facts are such that it weighs against the applicant.

A third problem that the applicant has been confronted with is the delay in bringing the application for spoliation. Now it is so that a Court should perhaps not adopt too strict a legal interpretation of knowledge of the law and ascribe that to an individual. On the other hand, it is not enough for an applicant simply to claim ignorance of the law and on that basis to expect a Court to come to her rescue. There is no doubt, from a totality of the facts before me, that the applicant is an intelligent person. She knew that she had certain rights, she was disputing that she was being dismissed when she was deprived of the use of the office. I am at a loss to understand why at that stage she did not seek the necessary legal counsel in order to establish whether she had been despoiled and whether she had a right to seek relief from the Court. In my view at the stage that this occurred there was no doubt in the mind of the applicant that she had not been despoiled. She accepted that situation although she did not accept the fact that she had been dismissed.

On whichever approach I adopt the facts and the legal issues that are to be determined do not favour the applicant in any way whatsoever. I need to mention that both the facts as presented by the applicant and those as presented by the respondent leave much to be desired. My reading of the affidavits left me with the impression that neither of them felt it necessary to place all the relevant facts before the Court. That has obvious problems for a Court being able to determine the issues. Unfortunately in this instance the authorities are such that I am unable to come to the rescue of the applicant.

I am at a loss to understand why she was permitted to report for duty, why she was permitted to go and sit in an office, why no attempts

were made to ensure that an order of Court was obtained to prevent her from continuing to do so. I have the feeling that the full facts have not been placed before me, that there were undercurrents that prevailed and, for one or other reason, no-one wanted to take the step of preventing the applicant from coming to the premises as they feared wider ramifications. I do not understand why that has not been specifically stated, but it is clear from the papers that there was turmoil and that the situation that prevailed there resulted in this matter now coming before Court.

I can understand that the applicant feels that she has been hard done by, but my sympathy for her does not permit me to ignore what the correct legal approach is that I have to adopt.

In view of this, as I have indicated, I am unable to find in favour of the applicant.

I have not heard any particular argument from either counsel in regard to costs and I can assume with safety, therefore, that there is no reason why costs should not follow the course.

In the circumstances the application is dismissed with costs.

Y EBRAHIM

JUDGE : BISHO HIGH COURT