IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 1645/2014

In the matter between:

LA PILA PHARMA CC Applicant

And

EURO BLITZ LOGISTICS (PTY) LTD First Respondent

YELLOWFIN FINANCE CC Second Respondent

HEARD ON: 18 SEPTEMBER 2014

JUDGMENT BY: G.J.M. WRIGHT, AJ

DELIVERED ON: 2 OCTOBER 2014

INTRODUCTION

[1] All the application papers were drawn up in English. Mr Snellenburg and Mr Els who argued before me, requested leave to argue in Afrikaans. It was convenient to do so in the circumstances. For purposes of judgment, however, I return to the language of the papers before court.

BACKGROUND

[2] The Applicant entered into an instalment sales agreement with the Second Respondent regarding a certain 2006 Freightliner truck ("the truck"). Thereafter the Applicant concluded a sale agreement with the First Respondent for the same truck. (The parties are not in agreement regarding the various terms and conditions relevant to this last contract of sale.)

[3] The truck was duly delivered to the First Respondent who used it on a daily basis. On 4 March 2014 the Applicant removed the truck from the First Respondent's possession. On 17 March attorneys representing the First Respondent in writing demanded that the truck be returned to the First Respondent (see annexure "F" to the Founding Affidavit).

[4] The Applicant failed to return the truck, but instead launched this application. The First Respondent is not only opposing the application, but has filed a counter-application based on the *mandament van spolie*. The Second Respondent at first intended to oppose the main application, but has since withdrawn its notice of intention to oppose. No relief is being asked for against the Second Respondent.

[5] Both applications were argued before me on 18 September 2014. After listening to the arguments I granted prayers 1 and 2 of the Notice of Counter Application. At the time I indicated that the reasons for my decision will form part of

my judgment on the main application. Judgment in the main application was reserved.

[6] I therefore first deal with my reasons for granting the relief claimed by the First Respondent in the counter-application.

COUNTER-APPLICATION

[7] The First Respondent used the *mandament van spolie* to claim back possession of the truck. The Applicant argued that, as this corresponds with the relief claimed by him in prayer 1 of his Notice of Motion, the counter-application was superfluous and ill-conceived. This submission follows the arguments regarding the reason why the Applicant allegedly launched his application, namely to "purge" his act of spoliation.

[8] On a first reading of the application papers the argument raised by the Applicant seems alluring. A proper analysis of the Applicant's papers however reveals that prayer 1 of the Notice of Motion is qualified by the words "subject to the Relief in prayers 2 and 3 *infra*". Prayers 2 and 3 concern a return of the truck to the Applicant as a consequence of his alleged cancellation of the contract of sale following an alleged breach of contract by the First Respondent. This involves an adjudication of the merits of possession which seem to be the main reason why the Applicant approached the court.

[9] The Applicant explains his prayer 1 as purging the act of spoliation. The Applicant admits that he spoliated the First Respondent and proceeds to explain that this was done as a consequence to a breach of contract by the First Respondent in not paying in accordance with the terms of the sale agreement (that is the terms according to the Applicant).

[10] The *mandament van spolie* is a possessory remedy. The essential characteristic of a possessory remedy is that the legal process whereby the possession of a party is protected, is kept strictly separated from the process whereby a party's right to the property is determined. Spoliation orders are granted so as not to allow any man to take the law into his own hands. If he does so, the court will summarily restore the status *quo ante* as a preliminary step to any investigation into the merits of the dispute.

See: **Nino Bonino v De Lange** 1906 TS 120 at 122;
Ivanov v North West Gambling Board 2012 (6) SA 67 (SCA) at 75 B – E.

[11] The requisites for a spoliation order are:

(i) that the applicant was in possession of the property; and
(ii) that the respondent deprived him of the possession forcibly or wrongfully against his consent. The cause for possession is irrelevant and the fact that

possession is wrongful or illegal is likewise irrelevant and goes to the merits of the dispute.

An applicant does not have to show that he was entitled to be in possession, merely that he was in *de facto* possession at the time of being despoiled.

[12] It is common cause that the First Respondent was in *de facto* possession of the truck and that the Applicant unlawfully removed the truck from that possession.

[13] The First Respondent would have been entitled to launch spoliation proceedings (and therefore be the first to approach this court). And both parties are in agreement that he would have been successful with such an application. There is no time period in which to approach the court; a spoliation application should however be launched within ‘a reasonable time’. The Applicant rushed to court first. The Applicant’s pre-emptive strike does not alter the fact that the Respondent is entitled to an order in his favour.

[14] A question that needs to be decided is whether the return of the vehicle should be subject to the further relief claimed by the Applicant. On behalf of the Applicant, Mr Snellenburg argued that the counter-application does not turn the proceedings into proper spoliation proceedings and that the merits of the parties’ right to possession should be dealt with as these have been canvassed fully. He requests the

substantial relief involving questions into the First Respondent's right to possess.

[15] One can easily be confused by the Applicant's view of the matter and be drawn into his way of thinking. However, by carefully scrutinizing the papers it becomes clear that the Applicant mainly approached the court for substantial relief revolving around the contract and the First Respondent's alleged breach thereof. The question that needs to be answered then is whether this court is entitled to deal with the merits of the dispute between the parties in the main application in the form brought by the Applicant and on the papers as it were placed before the court.

[16] The essence of the *mandament van spolie* finds expression in the maxim *spoliatus ante omnia restituendus est*. Where possession was unlawfully deprived, it should be restored before all else. In **Nggukumba v Minister of Safety and Security** 2014 (5) SA 112 (CC) at 118 B this sentiment was expressed as follows:

> "The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."

[17] In **Tswelopele Non-profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others** 2007 (6) SA 511 (SCA) at 520 B - C the Supreme Court of Appeal said:

> ". . . . anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided . . . . . The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property."

[18] In **Burger v Van Rooyen en 'n Ander** 1961 (1) SA 159 (OPD) the court referred to the following dictum in the matter of **Wait v Wait** 1929 E.D.L. 342 at 345:

> "It is possible that respondent may yet satisfy the Court that he is entitled to the exclusive possession which he claims, of the farm . . .; but this he can do only in subsequent proceedings."

Potgieter J then comments as follows:

> "Die rede vir hierdie standpunt deur die gesaghebbendes ingeneem, lê voor die hand. Dit is 'n eeue oue grondbeginsel dat niemand die reg in sy eie hande mag neem nie en, indien hy dit doen, moet hy dadelik *ante omnia* die gespolieerde in die status quo terugplaas. . . . Die stelreël is *spoliatus ante omnia est restituendus* – met ander woorde, voordat enige geding aangaande die onderwerp waaroor die geskil gaan aanhangig gemaak kan word, moet die gespolieerde eers in die posisie geplaas word waarin hy was voordat die spoliasie plaasgevind het."

[19] The Applicant did not need to approach the court for the purpose of purging his act of spoliation; he could, and should have, returned the vehicle himself. Mr Els representing the First Respondent argues that he should have done so before

even launching this application. This argument is in line with the principles enunciated in the cases referred to above.

[20] Despite the manner in which the Applicant approached the court and the way in which he clothed his application, the act of spoliation needs to be addressed first and foremost. As prayer 1 of the Applicant's Notice of Motion is qualified, it makes more sense to grant the relief as prayed for by the First Respondent in the counter-application, that is the proper spoliation application, (and to do so first before dealing with the rest of the relief claimed in the main application).

[21] As the successful party the First Respondent is entitled to his costs. Costs should follow the result. No arguments were presented as to why that should not be the case.

[22] It is against this background that I granted the relief claimed by the First Respondent in its counter-application.

MAIN APPLICATION

[23] It is now necessary to properly consider the Applicant's argument that the merits of the right to possess have been ventilated fully and should be adjudicated.

[24] Against the background of the *dictum* in **Nggukumba** referred to above, Mr Snellenburg suggested that adjudication of the further prayers in the Applicant's Notice of

Motion be postponed and argued at a later stage. This, so the argument goes, will then properly take care of the maxim *spoliatus ante omnia*. Mr Els however argued that this will amount to a condonation of not only the act of spoliation but also the principle that a party who spoliated another should come to court with clean hands.

[25] The approach suggested by Mr Snellenburg appears artificial. It will assist the Applicant by 'correcting' the fact that he should have returned the vehicle first. I am of the view that the *dicta* in the cases referred to above should be interpreted to mean that the Applicant should first have returned the truck and only then issued the application. I repeat that the Applicant did not need the assistance of the court in purging his wrongful conduct.

[26] Mr Snellenburg is however correct in pointing out that the First Respondent went further than merely relying on the Applicant's act of spoliation; he responded to the merits of his (as opposed to the Applicant's) right to possess. We need only turn to relevant case law in order to unravel this argument.

[27] In **Street Pole Ads Durban (Pty) Ltd v Ethekwini Municipality** 2008 (5) SA 290 (SCA) the respondent in spoliation proceedings went further than merely defending the relief prayed for – in a counter-application he requested substantive relief relating to his right to possession. On appeal it was argued that the court should not have engaged

with the counter-application. This argument was dealt with by the Supreme Court of Appeal in the following manner:

> "This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant: the claim to spoliatary relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims'. This is because such an applicant 'in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered."

See also: **Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services and Others** 1996 (4) SA 231 (C) at 244 C – E;

Minister of Agriculture and Agricultural Development and Others v Segopolo and Others 1992 (3) SA 967 (T) at 971 B.

[28] The facts *in casu* are different. It is indeed the Applicant who is the spoliator and who insisted on dealing with the merits of the parties' right to possession. It is the First Respondent who brought the spoliation application proper. He also had

no choice but to respond to the various allegations in fear of seeming to concede the facts as presented by the Applicant.

[29] The Applicant as spoliator had no right to deal with the merits of the right to possession in a pre-emptive manner. The situation might have been different if the First Respondent went further than merely claiming relief with the *mandament van spolie*.

[30] I am satisfied that it would not be proper to assist the Applicant by postponing the remainder of the application for argument at a later stage after it has been established that the Applicant did in fact adhered to my order and returned the truck to the possession of the First Respondent.

[31] Even if I err in coming to this conclusion, it is clear that the application as it currently serves before court cannot succeed in the Applicant's favour. Even a perfunctory perusal of the application papers reveals a multitude of factual disputes between the parties. To name but a few:

(i) The date on which the contract was concluded;
(ii) The terms relating to payment;
(iii) Terms relating to defects and the repair thereof;
(iv) Ownership and registration of the truck;
(v) Payment of license fees;
(vi) Whether either party breached the contract.

[32] It is a well-established principle that an application may be dismissed if an applicant should have realised when launching an application that factual disputes exist.

See: **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1162 and 1168.

[33] Where the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by a respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.

See: **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at 235;

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634.

[34] As a general rule an application for the hearing of oral evidence must be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers.

See: **Law Society, Northern Provinces v Mogami** 2010 (1) SA 186 (SCA) at 195 C.

The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter

to be referred to evidence should the main argument fail. Neither party requested me to refer the matter for the hearing of oral evidence.

[35] In his replying affidavit the Applicant avers that the factual disputes are not real, genuine or *bona fide* and have been created artificially by the Respondent. I do not agree. The allegations made by the First Respondent are not vague and insubstantial. It goes further than a mere denial of the Applicant's allegations. (I do not have to believe the assertions of the First Respondent in order to come to this conclusion.)

[36] The letter dated 17 March 2014 (annexure "F" to the Founding Affidavit) presented the First Respondent's version to the Applicant. It was at that stage already clear that the parties are not *ad idem* as to the terms of the contract. The Applicant took a risk in approaching the court on affidavit for adjudication of the right to possession.

[37] The factual disputes are such that the application cannot be adjudicated on the papers. A postponement will only result in another court having to wade through the papers and all the factual disputes it contain, only to come to the same conclusion.

[38] Mr Els correctly pointed out that a trial in this case is inevitable – whether to claim damages as the Applicant is anticipating or to claim specific performance in favour of one

of the parties. I agree. But that forecast does not alter the nature and format of the application before me now.

[39] Mr Snellenburg urged me to at least grant the alternative relief whereby the truck will be held in safekeeping by the sheriff pending further proceedings (prayer 4.2). He argues that such relief will operate as an *interim* interdict. This argument again suffers in the face of the multitude of factual disputes between the parties.

[40] In essence both parties insist that they are entitled to not only possess the vehicle but to use it. In fact, the Applicant has been using the truck on a daily basis since his spoliation. He never intended to keep the truck in safekeeping pending the finalization of the application. The last sentence of paragraph 52 of the Founding Affidavit therefore rings hollow. Also, safekeeping by the sheriff is only requested as an alternative - it was never the real intention behind the Applicant's approaching the court.

[41] Both parties are fearful that use of the truck by the other party may result in damage to such truck. However, the First Respondent is not requesting safe-keeping by the sheriff. Relenting to Mr Snellenburg's request seems to be the easy way out of the maize of probabilities in this case. I prefer the robust, common sense approach to proceedings. On the papers before the court, the Applicant is not entitled to any order in his favour – not against the background of the following:

(i) failing to rectify his own act of spoliation,

(ii) approaching the court before replacing the truck into the possession of the First Respondent,

(iii) approaching the court on affidavit whilst knowing that there are various factual disputes between the parties.

[42] The Applicant did not make out a proper case for the alternative “interlocutory interdict”, at least not in regard to the balance of convenience. Both parties agree that the Applicant sold the truck to the First Respondent. And until such time as a court pronounced on the correct terms of that contract, the First Respondent is entitled to the possession of the truck as he had before the Applicant’s spoliation. The First Respondent offers to pay the outstanding amount in terms of the sale agreement. Placing the truck in possession of the sheriff will deny the First Respondent the undisturbed possession that he had before the spoliation and to which he is entitled to in terms of my order in the counter-application.

[43] At this juncture it may be prudent to highlight the fact that the Applicant did not cancel the contract with the First Respondent. In this application he is also not requesting a declaratory order in terms whereof the contract will be considered to be cancelled. Paragraph 20 of his Founding Affidavit seems to indicate that he is still considering his options. Other than a few sms messages (that the First Respondent denies ever receiving), the Applicant has also failed to demand specific performance from the First Respondent. This matter could have been finally resolved if

the Applicant acted properly from the start (excepting for the sake of argument his version that it is the First Respondent who breached the contract).

[44] The Applicant will of cause always be entitled to approach the court again in a proper manner and in a fresh application for any relief he feels entitled to. I cannot pronounce on what his success will be then.

COSTS

[45] No specific arguments were advanced regarding costs. The parties seem in agreement that costs should follow the result. I can find no reason to depart from the general approach.

ORDER

[46] In the premises the main application is dismissed with costs.

G.J.M. WRIGHT, AJ

On behalf of applicant:	Adv N. Snellenburg Instructed by: Botha De Jager BLOEMFONTEIN
On behalf of first respondent:	Adv J. Els Instructed by: EG Cooper Majiedt Inc BLOEMFONTEIN

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