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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2021/30440

Date of hearing: 8 August 2022

Date delivered: 6 September 2022

REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED

In the application between:

MILLS, KEITH ANDREW

Applicant

and

THREE TRICK PONY PROPERTIES (PTY) LTD

First Respondent

IAN MILLS

Second Respondent

SAHARA McVICAR

Third Respondent

JUDGMENT

SWANEPOEL AJ:

[1] Applicant seeks an order that his possession of the immovable property situated at [...] R P [...] Road, Kyalami Agricultural. Holdings, Kyalami, Midrand be restored. He also seeks an interdict that respondents may not interfere with

his use of the property, not may they interfere with any tenants that might occupy the property with his consent from time to time.

[2] First respondent is the owner of the property. Second and third respondents are the directors of first respondent. Applicant and second respondent are brothers.

[3] First respondent purchased the property during 2007. At that stage applicant was residing in the United Kingdom, and was apparently experiencing financial difficulties. Second and third respondents suggested to applicant that he should return to South Africa. They offered to allow him to erect a residence on the property where he would be able to live indefinitely. Applicant accepted the offer and returned to South Africa with his family.

[4] The parties identified a site on the property where applicant could erect his residence. Second and third respondents lent applicant R 60 000.00 towards the building costs, and so the initial residence was erected. Applicant has added to the residence, finally finishing the house in 2010.

[5] During April 2021 applicant demanded that respondents should purchase "his" property for the sum of R 2 500 000.00. When they refused he threatened to rent the property out as an AirB&B. Respondents believe that he did so in order to scare them into paying for the improvements that applicant had brought about to the property. Whether this disagreement was the galvanizing factor or not, applicant gradually started moving his belongings from his residence, and on 7 May 2021 applicant and his family finally moved out, with the intention of residing in a property in Muldersdrift. Applicant alleges that he left the residence fully furnished, but respondents say that only certain items of furniture were left behind.

[6] Applicant says that he moved out of the property with no intention of returning. However, he had intended to rent the property out to secure an income for himself. On 10 May 2021, when applicant's employee arrived to clean the house,

the remote controls on the gate had been reset, and there was a lock on the gate. Applicant was unable to gain access to the property. Applicant enquired from third respondent about the changed locks, and was told that respondents' attorney would address a letter to him. Respondent's attorney duly wrote to applicant. In the letter it is stated that applicant has left the property permanently, that he has relinquished his possession of the property, and that he may collect the furniture that he had left behind. Applicant, on the other hand, says that he has retained possession of the property by retaining the keys, and by leaving some of his possessions in the house.

[7] It is common cause that applicant was in possession of the property until he vacated it on 7 May 2021. The crisp question for determination is whether applicant relinquished his possession by moving out permanently, even if his subjective intention was to rent the property to third parties.

[8] A person is possessed of property if he/she retains physical control thereof ("corpus"), and if he/she has the intention of remaining in possession ("animus possidendi"). Both elements must be present for possession to be established. It is possible for a person to possess a portion of an immovable property, as was the case in this matter.¹ Once possession is lost, the mandament van spolie is no longer available to the erstwhile possessor.

[9] As I have stated above, applicant had left the property never to return personally. He apparently intended to make the property available to guests through the Airbnb service. That intention, however, was doomed to fail as respondents would not have allowed applicant to do so, and he had no right to enforce his intentions. The question to be answered is whether applicant retained sufficient control of the property to maintain possession thereof.

¹ Nino Bonino v De Lange 1906 TS 120

[10] In the matter of Muller and Another, NNO v Bryant & Flanagan (Pty) Ltd¹ a builder purported to exercise a lien over a portion of a building in order to enforce payment of his bill. He had left the premises for some months before returning to claim a lien. He had, in his absence, left some equipment in the premises, and he had retained the keys to the premises. The question was whether he had retained sufficient control of the premises to establish possession thereof. The Court referred with approval to the following passage in Insolvent Estate of Israelson v Harris and Black and Others²:

"There can be no retention by a person of anything which is not in his actual possession, and such actual possession the defendants never had until they asserted their right by closing up an outer door leading into the premises. Even then their possession was only symbolical, and it certainly was not rightful. "

[11] In Muller (supra) Shearer J said:

"There is, on its own allegations, no doubt that it had left the premises on 6 March. The only sense in which it was physically or symbolically present to exercise physical control was the presence of certain of its property in the liquor store, which was locked and to which it had keys. Taikyo also had keys. The property in that room was of apparently insignificant value. In my judgment there was certainly not a sufficient exercise of physical control of that room to be described as 'retention'. Symbolic possession is insufficient- there must be actual possession. "

[12] In Cape Tex Engineering Works (Pty) Ltd v S.A.B Lines (Pty) Ltd³ the Court said:

¹ 1976 (3) SA 210 (D)

² 22 S.C. 135 (at 141)

³ 1968 (2) SA 528 (C)

"I know of no principle whereby a party claiming a lien can substitute for real and actual control of the subject matter of the lien something in the nature of a symbol. "

[13] In *Dezzo Development Holdings (Pty) Ltd v Seven Sirs Group (Pty) Ltd and Another*¹ the court spoke of "effective possession", pointing out that "effective possession" was a question of fact in each case.

[14] One must therefore consider whether applicant retained sufficient control of the property to establish effective possession. In my view the facts in this matter are similar to the facts in *Muller* (supra). Applicant left behind furniture in the house, and retained the keys, without the intention of ever returning himself. He had no right to rent out the property to third parties. In my view the control that applicant retained was merely symbolic. Applicant did not have effective possession of the property.

[15] However, even if I am wrong in this finding, there is a stumbling block to the granting of the relief sought. Applicant says that the property has been rented out on a long-term basis. It is consequently impossible for the respondents to restore possession to the applicant. In such

circumstances a Court will not grant an order which is unenforceable.² It follows then that the application must fail.

[16] I make the following order:

[16.1] The application is dismissed with costs.

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

¹ Unreported Eastern Cape Division, Grahamstown case no. 5344/2016

² *Potgieter and another v Davel* 1966 (3) SA 555 (O); *Moleta and Another v Fourie* 1975 SA 999 (O)

COUNSEL FOR APPLICANT:	Adv. L de Wet
ATTORNEY FOR APPLICANT:	Martin Pike Inc.
COUNSEL FOR RESPONDENT:	Adv P Strathern SC
ATTORNEYS FOR RESPONDENT:	Strauss Scher Inc.
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