CASE NO.: 756\07

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

CLOSE-BY SECURITY CC **APPLICANT**

and

HANMAG 52 (PTY) LTD **RESPONDENT**

JUDGMENT

MAKHAFOLA AJ:

[1] This is a spoliation application whereby the applicant claims the restoration of possession *ante omnia* of the premises known as Cashan Terrace, and all the town houses erected on such premises excluding townhouse

numbers 7 and 22.

[2] The Applicant has approached this Court on semi-urgent basis. This is not clearly pleaded but it is apparent from prayer I of the Notice of Motion. This matter first appeared before Court on the 26th April 2007 when the following order was granted:

(a) That the matter be and is hereby postponed to the 15th day of May 2007;
(b) That the Applicant and Respondent are permitted to jointly occupy or possess this property until this application is finalised;
(c) None of the parties will have the right to dispose of this property or put other persons in possession of this property until the application is finalised;
(d) Costs be costs in the application.

CASE FOR THE APPLICANT

[3] The Applicant is a Close Corporation whose two members are the deponent to the founding affidavit

and his wife Marlene Albertyn. She has deposed to a confirmatory affidavit in support of this application.

[4] On or about and during February 2006, the Applicant duly represented by Hendrik Albertyn and Hanmag 52 (Pty) Ltd, the Respondent, duly represented by Etienne Coetzee entered into an oral agreement in terms of which the Applicant was to supply the material, erect and install the following works on the property: steel staircases, balustrades at the stairs and balconies, carports, palisade fencing around and in the property, security gates, garden gates, intercom system, sliding gate motor, and electric fencing.

[5] Whilst the Applicant was working on the premises it took and caused one of its labourers: Division Tlhabanyane (Tautona) to reside on the property. A dispute arose between the Applicant and the Respondent as to performance in terms of the agreement. The Applicant insisted that it has performed in terms of the agreement and that the Respondent owed it an outstanding amount of R439,

696-55. This was disputed by the Respondent.

[6] The Applicant realising that the dispute could not be solved caused its attorneys to write a letter to the Respondent advising that the Applicant is exercising its lien over the works performed on the property with immediate effect. Pursuant to that letter, but on the same date of the 19th April 2007, the Applicant wrote two sign boards in both English and Afrikaans addressed to all third parties notifying them about its right of retention of the work already installed. These two notices were posted at the main gate of the property.

[7] An argument arose between John Cloete – an employee of the Applicant, and Pieter Coetzee – an employee of the Respondent after he had instructed a security guard to remove the notices. Tautona then guarded the notices but was later told by two unidentified members of the South African Police Services to leave the property. The Applicant avers that thereafter it caused a letter to be written to the Respondent marked

Annexure “HA7” wherein it advises the Respondent about an urgent application if the Respondent interfered with its right of retention. The dispute concerning money due and owing remains unresolved between the parties.

CASE FOR THE RESPONDENT

[8] The Respondent filed its notice of opposition and an answering affidavit. The affidavit was deposed to by Etienne Coetzee. These documents together with a confirmatory affidavit by Pieter Coetzee were served on the Applicant.

[9] The Respondent attached to its answering affidavit different quotations for the material for the work to be done. The Respondent also attached a deed of transfer of the property in dispute marked “EC1” and alleged that the property is exclusively owned by Joint Shelf 1175 CC (the developer).

[10] The Respondent averred that it is the main building

contractor employed by the developer and that in terms of the main contract it is even now obliged to control and regulate all building activities on the property.

[11] According to the Respondent, Tautona and other employees of the Applicant were given logistic indulgence to be on the premises on certain dates and times outside formal construction hours.

[12] The Respondent categorically denies that Tautona was given a unit to reside in on the premises. At no time, since completion, was any one unit of the main building left open. The Applicant has not been allowed access to any unit outside the normal construction hours.

[13] The deponent of the opposing affidavit avers that he does not have personal knowledge as to whether and where the Applicant allowed Tautona to stay on the property. No one was allowed to stay on the premises.

[14] The Respondent also outlined the dispute between

itself and the Applicant.

EVALUATION

THE FACTS

[15] The first thing is to determine whether the application complies with the requirements of a *mandament van spolie* for it to succeed.

[16] A successful defence to a claim for spoliation need not be a valid claim on the merits or ownership or any other *causa* of the Applicant's possession. It also does not matter whether the Respondent has a better and stronger right to the property or a valid claim to the property or possession of the property.

[17] The founding affidavit makes the necessary allegations for spoliation. See: paragraphs 5 and 6. And it is evident from this affidavit that Tautona was physically placed on the premises by the Applicant and by so doing the Applicant meets the requirement of actual

possession as opposed to the right to possession. In paragraph 20 of the founding affidavit the Applicant avers that Tautona, who is a labourer, was removed unlawfully by two unidentified police officers called by one Pieter Coetzee, the son-in-law-to-be of the deponent to the answering affidavit. He was acting on behalf of the Respondent. From the facts gleaned from the affidavits, it is clear that the removal of Tautona was not with the consent of his employer. Nor was his removal the result of a legal process. By virtue of the contract between the parties the applicant was entitled to be on the property.

[18] On the other hand the Respondent avers that it has no knowledge that Tautona was residing on the premises because no one was allowed to stay on the premises.

[19] The Respondent elects to treat paragraphs 5 and 6 of the founding affidavit together with paragraphs 7, 8 and 9 and in the process fails to challenge the Applicant’s deposition by impeaching its lawfulness or that it was without the consent of the Applicant. The

Respondent does not deny that Tautona was removed from the premises without the Applicant's consent or that he was removed without the due process of the law. Furthermore, the denial that the Applicant was in peaceful and undisturbed possession is a bare denial. There are no tangible averments to support the denial.

[20] Instead of directly attacking the Applicant's compliance with requirements for spoliation, the Respondent refers to the amounts of money paid and says nothing was owing to the Applicant. The allegations made by the Applicant that the police, as instruments of dispossession, were called by Pieter Coetzee are dealt with in passing by the Respondent. The Respondent says that to its knowledge the police were called by the owners of the property.

THE LAW:

[21] I now turn to deal with the law. The law is clear on the two requirements to be met before a party can succeed on a claim for a spoliation order. The two requirements

to be met are stressed in **SCOOP INDUSTRIES (PTY) LTD V LANGLAAGTE ESTATE AND GM CO LTD (IN VOL LIQ)** 1948 (1) SA 91 (W) at pages 98 – 9 where it was stated as follows:

> "Two factors are requisite to found a claim for an order for restitution of possession on an allegation of spoliation."

In **YEKO V QANA** 1973 (4) SA 735 (AD) at 739 G it was stated:

> "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 **NINO BONINO V DE LANGE** (1906 .T.S. 120) at page 122 the Learned Chief Justice stated the following:

> "Spoliation is any illicit deprivation of another of the right of possession which he has whether

in regard to movable or immovable property or even in regard to a legal right."

The legal position is further stated in: **LAW OF SOUTH AFRICA** vol 11 (First Reissue 1998) at paragraph 338 as follows:

"Spoliation is any wrongful deprivation of another's right of possession, whether in regard to movable or immovable property or a legal right, but it is not available where a party seeks to enforce a contractual obligation, specifically so since the respondent would in those circumstances be precluded from adducing evidence to disprove the existence of the obligation. An applicant for a spoliation order is not required to prove, as part of his cause of action, that the spoliator had acquired possession. The remedy is available against co-spoliators as joint wrong doers, even if they merely fulfilled a supportive role. "

In **AMLER'S PRECEDENTS OF PLEADINGS** (5th Edition) by **LTC HARMS** (Judge of the SCA) at page

371it is stated thus:

"Possession: The plaintiff must allege and prove that he was in peaceful and undisturbed possession of the property.

KGOSANA V OTTO 1991 (2) SA 113 (W)

"Dispossession: The plaintiff must allege and prove that he was unlawfully deprived by the defendant of his possession. "Unlawful" in this context means a dispossession without the plaintiff's consent or without due legal process."

SILLO V NAUDE 1929 AD 21

Vide: **NIENABER V SKUCKEY**, 1946 AD 1049 at 1055 – 1056."

AD PROBABILITIES AND IMPROBABILITIES

[22] It is improbable that the Applicant knowing it has unpaid sum of monies, as stated, and with the installations in place would not place somebody, like Tautona, to safeguard its property on the premises. I accept that on all the probabilities Tautona was resident on the premises. He had been placed there by the Applicant. That is proof of the Applicant's

possession.

[23] I find it improbable that the police, as alleged by the Respondent, could have been called by the owners of the property to remove Tautona from the premises. The owners show no interest by not applying to be joined as they would if indeed they were involved in the dispossession as alleged by the Respondent. On all probabilities the police were called by Pieter Coetzee as alleged in the founding affidavit. On the Respondent's own version, in paragraph 6.3 of the answering affidavit, the deponent admits that Mr Coetzee instructed Tautona to leave the premises. The deponent does not allege that this ousting was lawful and by consent of the Applicant and/or Tautona.

[24] The deponent to the answering affidavit, in paragraph 4.12, avers that he does not know that Tautona stayed on the premises. By this averment, the Applicant's allegation of physical possession, through Tautona, is not denied. It must, therefore, stand undisputed as proof of peaceful and undisturbed possession of the

property. Paragraph 6.3 of the answering affidavit states that Mr Coetzee had instructed Tautona to leave the premises. This has not been justified as having been done by consent of Tautona or the Applicant or through the due process of the law. Even on the Respondent's version the Applicant's allegation of dispossession is undisputed.

[25] Two elements which are essential for possession which are protected against spoliation are: *animus* and *detentio*. It is clear from the founding affidavit that the Applicant had clearly shown its intention to remain on the premises despite its dispute with the Respondent about payment. After the alleged dispossession by the Respondent on 23 April 2007 (when Mr Coetzee instructed Tautona to leave the premises and the police advised Tautona to leave the premises because if they receive a second call he would be locked up,) the Applicant brought an urgent spoliation application to this Court on 26 April 2007, that is, within four days of the alleged dispossession.

[26] In the result, I make the following findings:

b) The Respondent's averments, in the answering affidavit, do not raise a valid defence against a *mandament van spolie* before this Court;

c) The Respondent's averments are bare denials of the allegations made by the Applicant;

d) The defence tendered by the Respondent falls to be rejected as not amounting to a valid defence against the Applicant's allegations of possession and dispossession;

e) On its papers the Applicant has met the two requisites to found a claim for an order for restitution of possession on allegations of spoliation. The Applicant has done this by establishing and proving possession and unlawful dispossession by the Respondent;

f) The Applicant is entitled to the assistance of

this Court. The prayers per its notice of motion should be granted.

In the result, I make the following order:

g) **The Repondent is to restore possession *ante omnia* of the premises known as Cashan Terrace, Frederick Avenue, Cashan, Rustenburg (hereinafter referred to as "the property") and the townhouses erected on such premises excluding townhouse numbers 7 and 22, to the Applicant;**

h) **The Respondent is to pay the costs of this application.**

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KHAMI MAKHAFOLA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING:	15 MAY 2007
DATE OF JUDGMENT:	21 JUNE 2007
COUNSEL FOR APPLICANT:	ADV ACKER
ATTORNEYS FOR APPLICANT:	SMIT STANTON INC.
COUNSEL FOR RESPONDENTS:	ADV VAN WYK
ATTORNEYS FOR RESPONDENTS:	HERMAN SCHOLTZ ATT.