

REVOKING A PURCHASER'S ACCESS TO PROPERTY IN DELAYED TRANSFER

Mutale and Another v Forte and Others (2021/46077) [2021] ZAGPJHC 573 (19 October 2021)

There is a continuous recurrence of judgments dealing with spoliation applications. These applications are brought by applicants who allege that their peaceful possession of property was unlawfully disturbed by another. The underlying premise is that, as a general rule, no one - even if he or she is 'in the right' - may take the law into his own hands and disturb another's possession: For example, where a seller that cancels a sale agreement of land, changes the locks to the property to make sure the purchaser who has taken occupation, can no longer gain entry, this is taking the law into his own hands. In such instance, a spoliation application can be successful, as this judgment illustrates.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Mutale concluded a sale agreement with Mr Forte for the purchase of a residential property situated within an estate, and governed by a homeowners' association. Pursuant thereto and in anticipation of registration of transfer, the Mutaless took beneficial occupation of the property in August 2017.

Various delays arose in implementing the sale, in part regarding the payment of the purchase consideration and other amounts necessary for registration of transfer. The Mutaless had made some payments towards the purchase price and other costs, although parts thereof were disputed, and they remained in occupation of the property with the consent of the seller, while the sale progressed.

During August 2020 the Mutaless went to Zambia for work purposes. While they were there, Mr Forte purported to cancel the sale agreement. The locks to the property were changed and he directed that their access card to the estate be revoked.

The Mutaless returned to South Africa on 20 September 2021 and could not gain access to the property. They had since their return had to resort to staying in hotels as they were unable to gain occupation to what they contended was their residence. They maintained that they remained in possession of the property despite their absence when they travelled to Zambia for work. Mr Forte, on the other hand, contended that they had abandoned the property and that the agreement had been cancelled in any event, thus rendering any occupation thereof unlawful.

They approached the Court for an order restoring their possession, by way of a *mandament van spolie* application. (Throughout, there was and remains a live dispute between the parties whether the sale agreement remains in place.)

HELD

- The requirements for a spoliation order are clear: an applicant must prove that he was in peaceful and undisturbed possession (occupation) of the property and that the respondent deprived him of his possession (occupation) forcibly or wrongfully or against his consent.

The 'defence' of cancellation of the agreement and the requirements for a mandament

- The argument of Mr Forte was that he had cancelled the sale agreement and the Mutaless' occupation was unlawful and therefore a spoliation order could not be granted. This argument loses sight of the essence of spoliation proceedings: They are not concerned with whether the applicant who seeks restoration of possession is lawfully entitled to that possession. Rather, the aim of spoliation proceedings is to prevent

The Big Small Firm

stbb.co.za

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town
Claremont
Fish Hoek
Helderberg

T: 021 406 9100
T: 021 673 4700
T: 021 784 1580
T: 021 850 6400

Blouberg
Tyger Valley
Illovo
Fourwavs

T: 021 521 4000
T: 021 943 3800
T: 011 219 6200
T: 010 001 2632

Centurion
Bedfordview
East London

T: 012 001 1546
T: 011 453 0577
T: 043 721 1234

people from taking the law into their own hands, and it requires the property despoiled to be restored as a preliminary to any inquiry or investigation on the merits of the dispute. Thus, whether this occupation was acquired secretly, or even fraudulently is not the enquiry. The fundamental principle of the remedy is that no one is to take the law into his own hands. All that the applicant has to prove is possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully ousted.

- On the face of it, the Mutaes were in possession: The fact that the locks had to be changed and access to the homeowners' estate refused, meant conversely that the Mutaes were in occupation and that they had been deprived of that occupation without their consent.
- Whether or not the Mutaes were in *lawful* occupation is irrelevant in the spoliation proceedings. Any dispute as to whether the sale agreement was validly cancelled was not relevant insofar as Mr Forte asserted that the lawfulness of the occupation affects whether the Mutaes were in peaceful and undisturbed occupation.
- On these facts, they were in possession and their possession was unlawfully disturbed.

Abandonment of the property?

- A related question was whether the Mutaes had abandoned the property. The background facts are important here: The Mutaes took occupation of the property from about August 2017, having concluded a sale agreement to purchase the property. They did so intending to take transfer of ownership of the property in due course and while registration of transfer took place. Although they did leave to go to Zambia on 30 August 2020, for work, Mr Forte did not contend that they at that stage vacated or abandoned the property. This is not surprising because the Mutaes not only left many of their possessions at the property but also domestic staff. This included a gardener and an au pair, who was to look after a child of Mr Mutale. The gardener took over looking after the child for a short period after the au pair resigned, and before the child's biological mother took the child into her care. After the domestic staff left, the garden became overgrown and the swimming pool fell into a state of disrepair.
- The domestic staff had left by October/November 2020 and relying upon this, Mr Forte asserted that they had abandoned the property. Mr Forte also asserted that he had validly cancelled the sale agreement in December 2020, presumably to infer that this would explain why the Mutaes would have abandoned the property, i.e. the sale agreement having been cancelled, the Mutaes no longer had an interest in occupying the property.
- The difficulty with finding that the Mutaes had abandoned the property was evident from a consideration of the following facts:
 - The Mutaes left many movable assets (clothing, wristwatches and jewellery, televisions, home theatre systems, gaming consoles, ornaments, paintings, carpets, golf clubs, a deep freezer, computers and printers) at the premises, which they valued at some R4 million.
 - They also left behind a large collection of personal documents including identity cards, passports and birth certificates for them and their children as well as sets of car keys and ownership papers for a variety of vehicles.
 - Some R4,1 million was already paid towards the purchase price; in addition, although Mr Forte indicated that he had cancelled the sale agreement in December 2020, there had been ongoing communications between him and the purchaser, all along.

- In the circumstances, on these facts it was not shown that the Mutaes had abandoned the property, and so gave up occupation of the property.

CONCLUSION

The Mutaes thus demonstrated the requirements for a spoliation order.