

CAN MANDAMENT VAN SPOLIE ASSIST WHERE THE OBJECT USED AND POSSESSED BY ONE IS DESTROYED BY ANOTHER?

Moosa v Ramsugit and Others (76/2020) [2020] ZACPEHC 3 (30 January 2020)

An interesting question arose in this matter, namely whether a mandament van spolie could be used to restore possession of a container that had been destroyed. The answer is no, as possession could not be returned and the complainant accordingly has to seek alternative remedies. The question here was whether a constitutional issue arose in that the complainant's rights were infringed upon. Could the mandament then be applied nonetheless?

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

FACTS

Mr Moosa bought a carwash business from the Franca Property Trust ('the Trust'). He also entered into a lease agreement with the Trust in respect of the Trust's property situated at 98 Govan Mbeki from where he conducted the business. An adjacent property was also registered in the name of the Trust and a third party leased this from the Trust from where the latter conducted a second hand car dealership business.

As part of the lease agreement, Moosa had enjoyed the use and occupation of a portion of a large metal container, situated on the adjacent property. He used the container to store certain equipment. (It was common cause that there was a dispute regarding the lease, which was the subject of litigation between Mr Moosa and the Trust.)

Both properties were subsequently sold and transferred to a close corporation (the CC), with sole member Mr Ramsugit.

On 16 January 2020, some workmen arrived at the adjacent property, removed Moosa's items from the container and then dismantled the container by cutting it into pieces. The pieces were then loaded onto a vehicle and removed from the site, apparently to be sold as scrap metal.

Moosa adopted the view that his possession of the container ought to be restored and he commenced the present application in which he sought restoration of possession of the container pursuant to *mandament van spolie*.

Ramsugit opposed the application arguing, amongst other things, that the possessory relief sought was not competent in the light of the fact that the container had been destroyed. To this Moosa responded saying that the common law *mandament* ought to be developed to cater for relief in a scenario as the present; or that the Court ought to grant appropriate constitutional relief to meet the deprivation arising from the destruction of the container.

HELD

- *Mandament van spolie* is a common law remedy available to the possessor of property, whether movable or immovable, who has been deprived of such possession by the conduct of another. There are two requirements, namely that the applicant for the relief was in possession of the property, and that the respondent wrongfully deprived him/her of possession without his/her consent. The remedy is directed at restoring the position as it was (*status quo ante*), irrespective of the merits of any underlying dispute concerning entitlement to possession of the object or right in issue.
- By its nature, a spoliation order will usually operate as no more than a preliminary order for restoration of the

status quo ante until the entitlement to possession of the property is determined. The assumption underlying the order is that the property exists and may be awarded in due course to the party who establishes an entitlement thereto. Viewed from this perspective, the remedy is inappropriate where possession cannot be returned, either because it has been destroyed or alienated or passed into the possession of a third party. There is nothing upon which the order can operate, and accordingly no possessory entitlement left to be adjudicated upon.

- This begged the question whether this common law remedy should be adjusted in the light of the Bill of Rights in our Constitution. This question was addressed in previous case law where the relevant court answered this in the negative, rather granting an order in terms of section 38 of the Constitution. (This section reads: “38. *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are— (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.*”). Examples in our law where a constitutional relief was granted *in lieu* of the *mandament* was where there was unlawful dispossession and destruction of property which had rendered people homeless; and the dispossession itself has been carried out in violation of several protected rights. There was accordingly an interplay between the deprivation of possession and its remedy, on the one hand, and the consequential infringement of constitutional rights on the other: The interplay between the ordinary requirements of spoliation and the demands of section 26(3) of the Constitution (containing the right to adequate housing) that invites the application of constitutional relief.
- In light of the aforementioned case law, Mr Moosa changed tack and argued for relief in terms of section 38 of the Constitution.
- This was also unsuccessful. The Court advised that Moosa’s claim on his papers was twofold. He sought:
 - i. occupation/possession of that piece of immovable property on which the portion of the container he used was located. The property was in possession of a third party tenant; and
 - ii. restoration of possession of a container (which was destroyed).
- Physical possession of the immovable property and/or the container was factually impossible. If an order restoring that which was lost by way of dispossession were to be granted, it would necessarily mean that the Court ordered restoration of the use of some different structure on Moosa’s premises. This is a wholly different arrangement to that to which Moosa was entitled before the spoliation occurred.
- Such relief would extend beyond the reach of relief offered by the *mandament* and would, in effect, provide adjunct constitutional relief in circumstances where no constitutionally protected rights are engaged other than those regulated by the ordinary *mandament van spolie* remedy. This present application is distinguishable from cases where section 38 of the Constitution was invoked.
- Moosa argued, in response, that his constitutional rights were indeed violated because the deprivation of possession of the container violated the Rule of Law. This was no doubt so, but that in itself is not sufficient for the granting of relief outside of the ambit of the *mandament*. In the present matter, an order for restoration of possession at some other location would serve to address no other mischief or constitutional infringement than an unlawful dispossession. Were this granted, it would have the effect of infusing additional constitutional relief in circumstances where no constitutionally protected rights are engaged other than those regulated by the ordinary *mandament van spolie*.

- In the present case, constitutionally entrenched rights were not in issue. Whilst the act of dispossession is in itself an act contrary to the rule of law, neither restoration nor its refusal would constitute a consequential determination of constitutionally protected rights.

CONCLUSION

Mr Moosa therefore did not make out a case for such relief in the circumstances of this case. His application failed.