REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 41475/2018

1.REPORTABLE:	YES/NO
2.OF INTEREST TO OTHER JUDGES:	YES/NO
3.REVISED	
21 September 2021 DATE	

In the matter between:

T and M CANTEEN CC	**Applicant**
AND	
CHARLOTTE MAXEKE ACADEMIC HOSPITAL	**First Respondent**
MAKHOSI NYEMBE	**Second Respondent**

This judgment is delivered electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date of issue is deemed to be September 2021.

JUDGEMENT

Molahlehi J

Introduction

[1] This judgment provides the reasons for the order made on 14 September 2021, which reads as follows:

1. The matter is treated as one of urgency, and accordingly, the forms and service provided for in the Rules of the High Court are dispensed with in terms of Rule 6 (12) of the Rules.
2. The first and second respondents are ordered to restore the applicant's peaceful and undisturbed possession of the canteen premises situated at level 5 (Block 2) Charlotte Maxeke Hospital, Jubilee Street, Parktown, Johannesburg.
3. The first and second respondents are to pay the costs of this application on the attorney and client scale, the one paying the other to be absolved.

[2] The order was consequent the urgent application instituted on behalf of the applicant, T and M Canteen CC by Mr Tiller, the sole member of the applicant. The applicant is a closed corporation registered as such in terms of the company laws of South Africa and operating the business of selling food at the hospital premises and had done that for many years.

[3] The second respondent is Mr Makhosini Nyembe, the director of logistics employed by the second respondent, Shallotte Maxeke Hospital. The first respondent, Shallotte Maxeke Hospital, is a healthcare facility providing health care services in the Johannesburg area falling under the Gauteng provincial government.

[4] The essence of the relief sought by the applicant was that the respondents should be directed to restore its peaceful and undisturbed possession of the canteen premises situated at level 5 (Block 2) Charlotte Maxeke Hospital, Jubilee Street, Parktown, Johannesburg.

[5] Initially, this matter served before Vally J as an urgent *ex parte* application. The matter was then removed from the roll, and the time frames for filing the answering and the replying affidavit were agreed upon. Thus all the relevant papers relating to the dispute was properly before the court when the matter was argued.

[6] The respondents opposed the application and raised various grounds of opposition, including two preliminary points relating to lack of urgency and non-joinder of the Gauteng Provincial Government.

[7] It is common cause that the applicant occupied the canteen premises at the hospital in terms of a lease agreement concluded with the Gauteng Provincial Department of Infrastructure. However, the cause of action in this matter is not based on the lease agreement, as will appear later in this judgment but on spoliation.

[8] It is common cause that on 16 April 2021 the hospital experienced a devastating fire outbreak due to which the hospital had to close down. Following the fire outbreak, the applicant was instructed by the department of fire to vacate the

premises. The fire caused extensive damage and the collapse of certain parts of the hospital in the northern side, Block 4.

[9] After some time, a phased-in-approach to the opening of the hospital was adopted in consultation with management and clinicians. The respondents state in the answering affidavit that Phase 1 of reopening the hospital was the radiation oncology department building, followed by blocks 2, 3, 5 and the theatres.

[10] It seems common cause that the hospital closed down for about three weeks, after which the 2nd Block of the Hospital was reopened. After, that the hospital allowed the informal traders to operate from the hospital premises, selling food.

[11] The applicant complained that he was not offered the opportunity to resume his business operation after the block in which it operated in had reopened. The pharmacy which is opposite the canteen was for instance reopened and continues to operate. It accordingly contends that the respondents unlawfully deny it the right of possession of the premises where the canteen is located.

[12] The applicant set out briefly the background to how it was unlawfully disposed of using the premises it occupied in conducting its business in the founding affidavit as follows. It was denied access to the canteen one Saturday at the end of April 2021. Mr Tille, the deponent to the founding affidavit, says that he was denied access to the canteen when he wanted to check on the files, fridges and payments located in the canteen. The security of the first respondent stopped him from

accessing the premises and told him to come the following Monday to meet with the second respondent.

[13] On arrival on that Monday, the second respondent told him that he would not be allowed access into the premises until the premises were inspected and approved for access by the engineers.

[14] On 30 April 2021, the second respondent sent a message to Mr Tille saying that he should report immediately to the hospital. On arrival at the hospital, Mr Tille met with members of the fire department, who advised him that they had conducted an inspection and were satisfied that the premises were compliant with the fire regulations. He then proceeded to the office of the second respondent, where he enquired from the second respondent as to 'what was the next step in the reopening of the premises.' The second respondent avoided answering the question and informed Mr Tille that the hospital needed to take possession of the storerooms to compensate for other areas which the fire had damaged.

[15] Mr Tille informed the second respondent that he should be allowed regular access to the premises in order to check the perishable food items and equipment. In response the second respondent advised the applicant to call him on another occasion to discuss this further.

[16] After the above meeting, the applicant avers that he contacted the second respondent over his cell phone on numerous occasions to no avail. In certain instances, when called by the applicant, the second respondent would send a

message back to the applicant informing him that he could not answer his call because he was in a meeting. He (the second respondent) at no stage called the applicant back. For this reason, the applicant concluded that the second respondent was avoiding him and that he had no intention of allowing him back onto the premises.

[17] In addition to the above attempts at getting permission to enter the hospital premises, the applicant also attended at the hospital and attempted to enter the premises but was denied entry by the security at the gate. His perception was that the security acted on the instructions of the second respondent because before denying him entry, they would call someone and only after that would they tell him that access was not allowed.

[18] On 15 July 2021, the applicant, through its attorneys of record, addressed the letter to the second respondent, which in summary dealt with the following issues:

(a) There has been a gradual reopening of certain sections of the Hospital since the fire incident, including Blocks 1, 2, 3 and 5.
(b) That the second respondent has denied the applicant access to the area of the canteen without furnishing any reason.
(c) That the canteen was stocked with perishable items worth R300 000.00 in value and that the applicant has not been permitted access to remove these items.
(d) That the applicant runs the risk of having to terminate the employment of twenty-four staff members employed in the canteen due to being denied access to the canteen.

(e) That the applicant be allowed access to the canteen 'by no later than 16h00 on Tuesday, 20 July 2021.'

[19] On 26 July 2021 the applicant's attorneys addressed another letter to the second respondent following the failure to respond to the above letter. In that letter, the applicant emphasised the matter's importance and required the respondent to give it the urgency it deserves.

The reasons for urgency

[20] The applicant contends that the matter is urgent for the following reasons:

(a) It has perishable food inside the canteen worth R300 000.00 which will become expired and or perish.

(b) Suffers ongoing financial loss.

(c) Unable to check whether the fridges and freezers are still working properly.

(d) Access to the financial documents related to the business.

(e) The risk of having of retrenchment of the employees and their livelihood.

[21] As stated earlier in opposing the application, the respondents raised the following points:

'9.1. It (the application) is fatally defective. Applicant should not have brought the application by way of an *ex parte* application with a *rule nisi*.

9.2. The application is not urgent.

9.3. The application does not meet the basic requirements of a *mandament van spolie*.

9.4. The Applicant has failed to join a necessary party, being the Gauteng Provincial Government: Department of Infrastructure Development and Property Management, the landlord.

9.5. The Applicant has sued incorrect parties in that the First Respondent is not a legal persona and therefore not capable of being sued and I am merely an employee, employed as a director of logistics at the Charlotte Maxeke Hospital . . . I do not own the Hospital. There is no basis in law to have cited me.'

[22] The other defence raised by the applicant is that the lease agreement between the applicant and the Provincial department had come to an end after it was extended to 31 October 2009 and thus continued on a month-to-month basis.

Legal principles

[23] It is trite that spoliation is a remedy available to a person who has been unlawfully deprived of his or her possession of a property. The interference with the right can be addressed through *mandament van spolie* whose objective is to prevent people from taking the law into their hands.[1] In a case where the infringement of the possessory right has already happened, the remedy of *mandement van spolie* restores the *status quo*. It may serve as a prelude to any inquiry into the merits of respective parties' right to the thing in question.' [2] Thus in the present matter, whether the lease agreement was valid or had expired is irrelevant. For the applicant to succeed in an application of this nature, he or she has to show that he or

[1] See Ivanov v North West Gambling and Others 2012(6) SA 67 (SCA).
[2] Ness and Another v Greef 1985 (4) SA 641 ( ) at 747B-C.

she was in 'peaceful and undisturbed possession' when the interference with the possessory right occurred.

[24] In Tswelopele Non-Profit Organization and Others v The City of Tshwane Municipality and Others,[3] the court held:

'Under it (Spoliation), anyone illicitly deprived of property is entitled to be restored to possession before anything is debated or decided (spoliation *ante Omnia restituendus est)*. Even an unlawful possessor – a fraud, a thief or a robber – is entitled to *mandeament's* protection. The principle is that illicit deprivation must be remedied before the court will decide competing claims to the object or property.'

[25] In Yeko v Qana, [4] the court held that:

'The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself.'

[26] In Stocks Housing (Cape) (Pty) Ltd v The Chief Executive Director, Department of Education and Cultural Service,[5] the court held that the basic inquiry is whether the person was deprived of possession without his or her acquiescence and consent. The court also noted that spoliation might take place in numerous unlawful ways. In this respect, the court had the following to say:

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[3] 2007 (6) SA 511 (SCA).
[4] (1973) 4 ALL SA 512 (A).
[5] 1996 (4) SA231 (C).

'Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by the threat of force, or by stealth, deceit or theft. Still, in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of possession, since consent to the giving up of property, if the consent is genuinely and freely given, negates the unlawfulness of the dispossession.'

[27] As indicated earlier, the applicant approached the court on an urgent basis. The principles governing the approach when dealing with an urgent application is well established in our law. It is governed by rule 6(12) of the Rules of the High Court. The basic principle accepted in this regard is that matters involving spoliation are considered inherently urgent. However, this does not detract from the need to satisfy the requirements of urgency. In this respect, the court in Matsipe v SAI Group (Pty) Ltd,[6] held that the fact that the matter involves a spoliation should be construed together with the other grounds of urgency to determine whether a matter is urgent.

[28] It is clear from the reading of the above order that this court found that this matter deserved to be treated as one of urgency. In arriving at this conclusion, the court took into account the nature of the application, the facts and the circumstances within which the unlawful dispossession of the property occurred.

[29] The applicant, in my view, provided, in the first instance, why there was some delay in instituting the proceedings. The background facts set out above indicate that he did not rush to court but sought to resolve the matter with the first respondent. There seems to be no doubt that any delay in granting the relief sought by the

[6] (34618/17) [2017] ZAGPPHC 319 (2 June 2017).

applicant would result in financial loss due to inability to trade as a result of the unlawful conduct of the first respondent, including the risk that some stock in the canteen may perish. The court also accepted that the applicant instituted the proceedings at the earliest possible time based on the facts and the circumstances of this case.

[30] The essence of the defence of the respondents as to why a spoliation order should not be granted is set out in the answering affidavit in the following terms: ‘Applicant is not being prevented from being in lawful possession of occupation of the premises. The premises are simply not safe for occupation and the lease agreement between the parties is terminated.’

[31] The issue of termination of the lease agreement was dealt with earlier. To emphasise the validity or otherwise of the lease agreement is not an issue that deserves the attention of this court at the level of considering spoliation.

[32] The applicant's cause action is not based on breach or enforcement of the lease agreement but on restoring its peaceful possession of the canteen, which was disturbed by the unlawful conduct of the respondents.

[33] The issue of the premises not being safe for occupation is also unsustainable in the context of the circumstances of this case. In this respect, the respondent's version in the answering affidavit is that it adopted a phase-in-approach towards the reopening of the Hospital. The applicant's version that the respondent has not seriously disputed is that the canteen's block has reopened. In this respect, the

respondent does not explain why the canteen cannot open when the other parts of the block in which it is situated has reopened.

[34] In my view, it is clear from the reading of the papers before this court that the applicant never abandoned its intention to continue exercising its possessory right when it vacated the premises soon after the fire broke out. It also does not appear to be the understanding of the respondents. It is not in dispute that at the time of vacating the premises due to the fire, the applicant left its stock in the canteen and the same remain therein.

[35] The defence of non-joinder of the Department of Infrastructure is also unsustainable. The test to apply in determining non-joinder is well established in our law. The issue in this regard is whether the department has a direct and substantial interest in these proceedings. See Absa Bank Limited v Naude NO and Others.[7] There is no evidence that the department was involved in the spoliation of the right of the applicant to occupy the premises where the canteen is situated. The cause of action is not directed at the department, and the outcome thereof is not likely to have any impact on it. The department may well have been interested in the lease agreement issue, but as already stated, that issue is not before this court. In other words, the applicant in this matter is not claiming the substantive right of occupation of the premises through the lease agreement but rather seeks to assert its entitlement to a proper and lawful procedure before it can be deprived of its possession.[8]

[7] 2016(6) SA 540 (SCA).
[8] See Street Pole ads Durban (Pty) Ltd and Another v Ethekwini Municipality 2008 (5) SA 290 (SCA).

[36] About the respondents, there is no doubt that they have a direct interest in the matter. It is common cause that the second respondent is an employee of the first respondent and is the person whom the applicant engaged with regarding his access to the premises following the reopening of the block where the canteen is situated. It is not in dispute that he denied the applicant access to the premises, and he has also not contended that he had no authority to do so. In the answering affidavit, he deals with the situation soon after the fire broke out when everybody was expected to vacate the premises for health and safety reasons. He does not deal with what happened after the hospital embarked on the phased-in-reopening of the canteen's section.

[37] The other point raised by the respondent in the heads of argument is that the applicant is seeking specific performance through spoliation proceedings. This argument seems to be based on the issue of the lease agreement. In support of this argument, the respondents referred to the case of Eskom v Masinda.[9] The issue, in that case, is different to that in the present matter. In that case, the SCA dealt with the issue of electricity disconnection, which is categorised as an incorporeal right. Whilst accepting that electricity supply, as an incorporeal right, may in certain circumstances be protected by *mandament van spolie* it found on the facts of that case that it could not because in the circumstances of the case it was not incidental to the possessory right.[10]

[9] 2019 (5) SA 386 (SCA).
[10] See also *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA).

Conclusion

[38] In my view, it is evidently clear from the conduct of the second respondent, particularly after the letter of the applicant dated 26 July 2021, that he had decided not to allow the applicant to continue its use of the canteen. It is also clear that the issue of health and safety that applied due to the fire were no longer applicable at the time the applicant sought to assert his right of access to the property.

[39] The fact that the applicant vacated the premises due to fire did not deprive the applicant of its possessory right. The conduct of the applicant in vacating the premises due to the fire does not evidence any intention of abandoning its undisturbed, continuous and peaceful occupation of the canteen. It has not been disputed that all its equipment, including the food it sells are still in the canteen.

[40] As concerning urgency, I am of the view that that is predicated on enforcing the rule of law and the other interests of the applicant, including the commercial interests.

[41] It was in light of the above reasons, that the above order was made, in essence directing the respondents to restore the peaceful and undisturbed possession of the premises where the canteen is situated to the applicant.

E Molahlehi

Judge of the High Court,

Gauteng Local Division,

Johannesburg

Representation:

For the Applicant: Adv B Bhabha

Instructed by: SALI Attorneys

For the Respondent: Adv FJ Nalane

Instructed by: Mogaswa and Associates Inc. Attorneys

Date heard: 27 August 2021

Order made: 14 September 2021

Reasons: 21 September 2021.