REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

19/10/2021

DATE SIGNATURE

Case No.: 2021/46077

In the matter between:

MUTALE, BIZWELL	First Applicant
MUTALE, HEMLATA CINDY	Second Applicant
and	
FORTE, ROWAN KEVIN	First Respondent
DAVIS, NICKY	Second Respondent
STRATFORD GARDENS HOMEOWNERS ASSOCIATION (NPC)	Third Respondent
MUTALE N.O., BIZWELL	Fourth Respondent
ABDUL N.O., FRANCIS CECIL	Fifth Respondent

JUDGMENT

This judgment was written by Acting Judge Gilbert. It is handed down electronically by circulation to the parties' or their legal representatives by email and uploading it to the electronic file of this matter on CaseLines.

Gilbert AJ:

1. The applicants brought urgent spoliation proceedings against the first and second respondents. Having heard argument by counsel for the applicant and the first and second respondents on 5 October 2021,[1] and being of the view that the matter was urgent, I granted a spoliation order, together with ancillary relief, in terms of prayers 2, 3, 4, 5 and 6 of the notice of motion. I indicated that reasons would follow. I also reserved judgment in respect of costs and an application made by the applicants to strike out portions of the opposing respondents' answering affidavit.

2. The applicants (who are married) concluded a sale agreement with the first respondent for the purchase of a residential property situated in Broadacres. Pursuant thereto and in anticipation of registration of transfer the applicants together with their family took beneficial occupation of the property during August 2017. Although this sale agreement was subsequently substituted by a

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[1] The third respondent filed a notice to abide and instructed counsel on a watching brief.

subsequent sale agreement that was concluded by the first respondent with a family trust of which the first applicant is a trustee (the family trust substituted the applicants as the purchaser), this is not of relevance to these spoliation proceedings and so I shall for purposes of convenience continue to refer to the purchaser under the sale agreement as the applicants, although more accurately the purchasers are the trustees of their family trust.

3. Various delays arose in implementing the sale, the details which are not of immediate concern. Suffice it to state that there were delays in the applicants making payment of the purchase consideration and various other amounts necessary for registration of transfer, although various aspects of this remain in dispute. What is clear is that the applicants did make various payments towards the purchase price and other costs.[2] The applicants remained in occupation of the property with the consent of the first respondent while the sale progressed.

4. During August 2020 the applicants went to Zambia for work purposes. While the applicants were in Zambia, the first respondent purported to cancel the sale agreement. While the applicants were still in Zambia, the second respondent, who is the first respondent's daughter and who is looking after his affairs as he is presently working in Mozambique, changed the locks to the property. There was also a change to the access system to the residential development in which the property is situated and which ended up in the first respondent, relying upon his contended for cancellation of the sale agreement, refusing that the

[2] The applicants' case is that the full purchase price and all outstanding amounts necessary for registration of transfer have been paid, which the first respondent initially disputed. I deal with this later in the judgment.

applicants be granted new access cards by the homeowners association (cited as the third respondent). Throughout, as appears from the papers, there was and remains a live dispute between the parties whether the sale agreement remains in place, the applicants insisting that it does, but the opposing respondents insisting that it does not (and therefore the applicants' occupation of the property became unlawful).

5. The applicants returned to South Africa on 20 September 2021 and attempted to gain access to the property but were unable to do so because access to the residential development had been denied and the locks to the property had been changed. After making various enquiries, on 23 September 2021 the applicants through their present attorneys demanded access to the residential development and to the property. The opposing respondents' attorneys, who are also the mandated conveyancers for the property transaction, responded that day, recording that the first respondent had taken back occupation of the property and that access had been denied on the basis that the applicants had abandoned the property during or about October or November 2020 and that occupation would not be restored as the sale agreement had been cancelled. After an engagement with the third respondent homeowners association on 27 September 2021, which did not result in the applicants' access to the residential development being restored, the applicants launched these spoliation proceedings on 29 September 2021.

6. Since the applicants return to South Africa on 20 September 2021, they have resorted to staying in hotels as they are unable to gain occupation to what they contend is their residence.

7. Having considered these facts, I found the matter to be sufficiently urgent for it to have been enrolled for hearing on Tuesday, 5 October 2021 and that the truncation of the usual periods for the exchange of affidavits in terms of Uniform Rule 6(5) was commensurate with the urgency of the matter.

8. 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. Bristowe J in *Burnham v Neumeyer* 1917 TPD 630 at 633 is typically cited as authority:

> "*Where the applicant asks for spoliation he must make out not only a* prima facie *case, but he must prove the facts necessary to justify a final order – that is, the things alleged to have been spoliated were in his possession and they were removed from his possession forcibly or wrongfully or against his consent.*"[3]

9. Greenberg JA in what is perhaps the *locus classicus* of *Nienaber v Stuckey*[4] agreed as to the level of the proof required:

> "*Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were*

[3] See, for example, *Nienaber v Stuckey* 1946 AD 1049 at 1053 and also *Painter v Strauss* 1951 (3) SA 307 (O).

[4] Above, at 1053.

> *before the act of spoliation and merely orders that the* status quo *be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict, and not of a temporary interdict.*"[5]

10. What this means is that if there are two *bona fide* but conflicting factual versions, the respondent's version is effectively to be preferred in terms of the usual *Plascon-Evans* rule. But, as will be seen below, this matter can be decided on the common cause facts with facts that cannot be seriously disputed.

11. It is appropriate at this relatively early stage of the judgment to dispel a defence strongly proffered during argument on behalf of the opposing respondents that because the first respondent as seller had cancelled the sale agreement, the applicants' occupation was unlawful and therefore a spoliation order could not be granted. When pressed on this during argument, the submission on behalf of the opposing respondents was that there could no longer be peaceful and undisturbed occupation once the sale agreement had been cancelled, and so that requirement for spoliation relief had not been established. These submissions are contrary to the trite legal principle that spoliation proceedings are not concerned with whether the applicant who seeks restoration of possession is lawfully entitled to that possession. Neither would it avail the respondent to raise a defence of title to a spoliation order, as appears from *Painter v Strauss*:[6]

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[5] See too *Painter* above at 312A-C.

[6] Above at 314.

> "*The* mandament van spolie *is employed to prevent 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.*"

12. As graphically described in *Yeko v Qana* 1973 (4) SA 735 (A) at 739G:

> "*Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. Or, as* Voet *41.2.16 says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is 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.*"

13. Whether or not the applicants are or would be in lawful occupation is irrelevant. It follows that any dispute as to whether the sale agreement was validly cancelled is not relevant, at least insofar as the opposing respondents assert that the lawfulness of the occupation affects whether the applicants were in peaceful and undisturbed occupation.

14. The opposing respondents admit that the second respondent changed the locks to the property and that continued access to the property through the security regulating access to the residential development was refused. There is therefore no dispute that the applicants have established that if they were in

occupation, they have been deprived of that occupation without their consent. As stated in *Yeko v Qana*[7]:

> "*In order to obtain a spoliation order the* onus *is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. As the appellant admits that he locked the building it was only the possession that respondent was required to establish. If the respondent was in possession the appellant's conduct amounted to self-help.*"

15. The central issue to be determined is whether the applicants were in possession of the property when the opposing respondents admittedly changed the locks and denied access to the residential development. The applicants contend that they were and that they had only gone to Zambia for work. The opposing respondents contend otherwise, asserting that during October or November 2020 the applicants abandoned the property.

16. Before turning to the facts, something should be said of the kind of possession that is required and is protected by spoliation proceedings.

17. Professor Price writes in his book *Possessory Remedies in Roman-Dutch Law*[8] that for the purposes of a spoliation order:

> "*Possession is somewhat widely interpreted; it has been allowed to an agent, a trustee, a lessee, a depository, a bona fide possessor who is legally incapable of owning the property in dispute, and, to any person*

[7] Above, at 739E/F.

[8] At p 107, as cited with approval in *Painter v Strauss* at 313H-314A.

holding property with the intention of securing some benefit to himself, either as agent of the owner, such as a borrower, or even as against the owner, such as one claiming a lien …"

18. Particularly apposite is the reminder in *Painter v Strauss*[9] that "*[t]emporary absence from the property does not amount to a vacation or abandonment of it.*"

19. The applicants 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 the applicants did leave to go to Zambia on 30 August 2020, for work, the opposing respondents do not contend that the applicants at that stage vacated or abandoned the property. This is not surprising because the applicants 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 the first applicant's youngest child. 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.

20. These domestic staff had left however by October and November 2020 and relying upon this, the opposing respondents assert that the applicants had abandoned the property. The opposing respondents further rely upon the fact that after the domestic staff left, the garden became overgrown and the swimming pool fell into a state of disrepair. The opposing respondents also

[9] At 316A-B.

contend that at some point when they attended at the property they found some of the doors unlocked and what looked like certain movables having been removed, and that this too demonstrated that the applicants had abandoned the property. The opposing respondents state that this is when the locks were changed. The opposing respondents also rely on what they contend was the lawful cancellation of the sale agreement in December 2020, presumably to infer that this would explain why the applicants would have abandoned the property, i.e the sale agreement having been cancelled, the applicants no longer had an interest in occupying the property.

21. The difficulty with finding that the applicants had abandoned the property is evident from a consideration of the following facts, which are either common cause or cannot be seriously disputed:

21.1. the applicants attach to their founding affidavit a comprehensive and detailed list of movable assets that they left at the property including clothing, wristwatches and jewellery, televisions, home theatre systems, gaming consoles, ornaments, paintings, carpets, golf clubs, a deep freezer, computers and printers, and alcohol, which they value at R4 210 000.00. This is not seriously disputed by the opposing respondents other than to assert that it appears that some of the electronic equipment had already been removed by the time they arrived at the property and changed the locks, although they cannot say by whom;

21.2. also left behind was a large collection of personal documents including identity cards, passports and birth certificates for the applicants and their children as well as sets of car keys and ownership papers for a variety of vehicles including various BMWs, a Toyota Land Cruiser, a Bentley, a Mercedes Benz, a Pajero and Toyota Hilux. The opposing respondents admit that they did remove a briefcase and car keys when they attended at the property, which are in safe-keeping;

21.3. the opposing respondents admit that when they attended at the property they found a BMW parked in the garage;

21.4. the applicants also contend that they have made payment of the purchase price of some R4.1 million. Although at one point the opposing respondents deny that payment was made of the purchase price, this is admitted both in the answering affidavit in paragraph 28 as well as in an item of correspondence. The relevance of the payment of the purchase price is that having paid the purchase price the applicants are unlikely to have simply abandoned the property.

22. The opposing respondents, apart from what has already been said, seek to counter this by way of unsubstantiated denials, by asserting that the applicants had not taken care in safeguarding their movables and personal effects given that they, the opposing respondents, found the property unlocked. But, as the applicants point out, they could not have been expected to do much more than lock-up of the property, particularly as it is in a secure residential development.

23. In the circumstances, I cannot find on these facts that the applicants abandoned the property, and so gave up occupation of the property.

24. The extent and value of the movables that were left behind, which included a motor vehicle and an array of personal documents are in the absence of an alternate explanation irreconcilable with an intention to abandon. Throughout the period the applicants continued to correspond with the opposing respondents or the appointed conveyancers, who are now the attorneys representing the opposing respondents. Although the relationship between the parties deteriorated to the extent that the first respondent purported to cancel the sale agreement in December 2020, the communications persisted throughout. The opposing respondents' attorneys continued demand for payment of occupational rental throughout is irreconcilable with their assertion of an abandonment of the property and so that the applicants were not in occupation.

25. As stated above, temporary absence from the property does not amount to an abandonment of occupation. As was the case in *Painter v Strauss*[10] the applicants deny that they had abandoned their occupation of the property and their denial is supported by undisputed facts.

26. A comparison with the facts in *Nienaber v Stuckey* is instructive. In that matter the applicant had the right to plough and cultivate a piece of land although the respondent was entitled to exercise other rights over the land at the same time.

[10] Above, at 316A-B.

It appeared that after ploughing the land in July, the applicant removed his implements from the land and that from that time until September when he was prevented from gaining access to the land by the respondent, neither he nor his staff or any property belonging to him was on the land. The respondent contended that because the applicant had left the land and had removed all his implements and had left no staff behind, this constituted the applicant giving up possession of the land. The Appellate Division found against the respondent, finding that there was nothing to show that there was any need for the applicant to be on the land between ploughing and planting, and that therefore he had not given up physical possession of the land during the months between July and September.

27. *A fortiori* in the present instance. Numerous movables of considerable value, including a motor vehicle, many sets of car keys and important personal documents remained on the property. So did a BMW, in the garage. Although the property is a residential property, it does not follow that the applicants had to reside continuously at the property failing which they must be taken to have abandoned the property.

28. I emphasise that I am not making a finding that the applicants remained in occupation throughout based upon a balance of probabilities as that would be amiss in application proceedings of this nature seeking final relief. I do so based upon the common cause facts and those facts that cannot be seriously disputed. Those facts demonstrate the mindset of the applicants throughout to retain possession (*animus*) and such facts as there are, even those sought to

be relied upon by the opposing respondents, do not give rise to an inference that the applicants had abandoned the property.

29. I therefore found that the applicants had demonstrated the requirements for a spoliation order, and which order was granted on 5 October 2021.

30. Although the applicants sought costs on an attorney and client scale, in my discretion costs on the ordinary scale will suffice. Although I found that the opposing respondents had spoliated the applicants, it is not disputed that the applicant were not present upon the property for several months and that the property for some or other reason ended up unlocked after the gardener left and by the time the opposing respondents changed the locks. It is also not disputed that the garden was overgrown and the swimming pool had fell into a state of disrepair. I cannot find that the opposing respondents' mindset might not have been that they believed they had some or other entitlement to take back occupation of the property, misplaced as that belief may be.

31. What remains is the applicants' application to strike-out parts of the founding affidavit on the basis that they are irrelevant, and were vexatiously and maliciously made with no intention other than to harass and/or annoy. Those averments relate to whether the applicants are legally permitted to be in the country.

32. I invited opposing respondents' counsel to submit what the relevance is of the impugned averments. The submission was that they are relevant as it may be problematic for the property to be transferred to someone who may be illegally

in the country. As appears earlier in this judgment, the lawfulness or otherwise of the applicants' occupation and whether effect can be given to the sale agreement are irrelevant to spoliation proceedings. The opposing respondents have not proffered an acceptable explanation for including the averments in their answering affidavit, which are justifiably described by the applicants as vexatious and scandalous, and included to muddy the waters. The applicants are prejudiced in having to deal with these averments, which if answered do not advance the determination of the application.[11] Given the scandalous nature of the averments, the applicants are prejudiced if they leave the averments unanswered. A failure to answer the allegations may be seen as acquiescence in their truthfulness. But to address them leads the court into determination of unnecessary issues.

33. I agree that the impugned averments are to be struck out.

34. The applicants seek costs on an attorney and client scale in respect of the striking-out. Again, I am of the view that costs on the ordinary scale will suffice. The answering affidavit was prepared in a short period, and an overly critical approach should not be adopted. The inclusion of the averments, which were confined to two paragraphs, and their striking out did not unduly delay a determination of the matter.

[11] *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566J – 567B

35. For good order, I incorporate the order I made on 5 October 2021 in my order below on the striking-out application and on costs.

36. The following order is made:

36.1. The substituted service of this application on the first respondent by way of service on the second respondent is authorised and condoned.

36.2. The substituted service of this application on the first and second respondents on their attorney, De Jager Du Plessis Attorneys, care of Sandy de Jager, at email address sandy@djdp.co.za and physical address Unit 2, Stellenberg, 363 Pretoria Avenue, Ferndale, Randburg is authorised and condoned.

36.3. The first and/or second respondents are ordered and directed to restore the applicants' possession of the immovable property situated at 3 Troy Close, Stratford Gardens, Valley Road, Broadacres ("the immovable property") forthwith, including but not limited to:

36.3.1. providing the applicants with the keys to the immovable property; and

36.3.2. instructing the third respondent to provide the applicants with the necessary access cards and/or tags in order to enter and exit the development known Stratford Gardens.

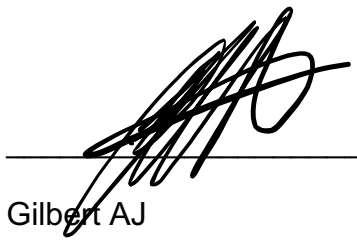
36.4. In the event of the first and/or second respondents not complying

with the order in paragraph 36.3.2 above within 1 hour of the granting of this order, the third respondent is ordered to restore the applicants' access to the development known as Stratford Gardens and to do all things necessary, insofar it is able, to ensure that the paragraph 36.5 of this order is complied with.

36.5. In the event of the first and/or second respondents not complying with the order in paragraph 36.3.1 hereof within 1 hour of the granting of this order, the Sheriff of the High Court is authorised and directed to assist the applicants in gaining access to the immovable property, including to employ the services of a locksmith and to cause the locks of the immovable property to be changed and to hand the keys of the changed locks to the applicants.

36.6. The first and second respondents, jointly and severally, are to pay the applicants' costs of the application.

36.7. Paragraphs 36 and 37 and all annexures related thereto are struck out from the answering affidavit, the first and second respondents to pay the costs, jointly and severally.



Gilbert AJ

Date of hearing:	5 October 2021
Date of judgment:	19 October 2021
Counsel for the applicants:	Charles E Thompson
Instructed by:	Aka Attorneys Inc
Counsel for the first and second respondents:	E Raubenheimer
Instructed by:	Martin Pike Inc
Counsel for the third respondent:	C van der Linde (Ms)
Instructed by:	Allan Levin & Associates