

**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 2022/6409**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

**[3 MARCH 2022]**

In the matter between:

**OLIVIA KGOMOTSO KOOSIMILE**

Applicant

and

**ASLAM MAHOMED**

First Respondent

**ZAKIR HASSAN KHAN**

Second Respondent

**ZAHID HAJAT**

Third Respondent

**SERENGETI GOLF AND WILDLIFE**

**PROPERTY OWNERS ASSOCIATION (RF)(NPC**

Fourth Respondent

**J U D G M E N T**

**MUDAU, J:**

[1] The applicant seeks a spoliation order in terms of rule 6 (12) (a) of the Uniform Rules of Court. She seeks the restoration of possession of the premises situated at ERF [...] WITFONTEIN EXTENSION 30, REGISTRATION DIVISION IR, PROVINCE OF GAUTENG, known as [...] Civet Place, Serengeti Golf and Wildlife Estate, Witfontein, Kempton Park ("the property"), until the end of February 2022. She was the previous owner of the property. The application is opposed by the first to the third respondents. The fourth respondent has filed a notice and abides the decision of this Court. After hearing closing arguments on the matter, I ordered accordingly but reserved my reasons.

[2] The order reads:

2.1 The applicant's non-compliance with the forms, service and time limits for filing of affidavits provided for in the Uniform Rules of Court is hereby condoned and the matter is heard as one of urgency;

2.2 The First to Third Respondents are ordered to immediately restore to the Applicant, full and undisturbed possession of the premises situated at Erf [...] Witfontein Extension 30 Township, [...] Civet Place, Serengeti Golf and Wildlife Estate, Kempton Park, until the 28<sup>th</sup> of February 2022.

2.3 The Fourth Respondent is directed to give the Applicant immediate and unrestricted access to the Estate where the aforesaid premises are situated, until the 28<sup>th</sup> of February 2022.

2.4 The First to Third Respondents are directed to pay the Applicant's costs of the application.

**These Are My Reasons**

[3] In *limine*, the first to third respondents took issue that the applicant caused this application to be served on their attorneys of record, Gilpin Attorneys and not in accordance with the Rules of Court. Gilpin Attorneys were the attorneys of record for the spoliation application brought on 2 February 2022 in the Tembisa Magistrate' Court by the applicant. They however, admit receiving a copy of the application.

[4] Rule 6(12)(a) provides that: "In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit". This being urgent court proceedings, and in addition that there was effective service, the point in *limine* holds no water and is accordingly dismissed.

[5] The facts are largely common cause. As indicated, the applicant is the previous owner of the property. The property was purchased by the first, second and third respondents on 5 August 2021 at a public auction conducted by the Sheriff of Kempton Park and Tembisa, pursuant to a warrant of execution issued by the Registrar of this Court. On 30 November 2021 the first to third respondents became the registered owners of the property.

[6] After taking transfer of the property, the first, second and third respondents, through GBK attorneys, served the applicant with a notice inter alia, to vacate on 18 January 2022, demanding that she vacates the property no later than the last day of February 2022. There was a standard warning in the notice, that she faced the prospect of an eviction application effective on 1 March 2022.

[7] On 2 February 2022 as indicated above in the Tembisa Magistrate' Court the applicant brought an application in which she sought an order compelling the respondents to restore full and undisturbed possession of the premises, which was dismissed and as the magistrate reasoned, not on merit, but for lack of proper service in terms of section 4 (4) of the Magistrates' Court Act 32 of 1944. The application was aimed at the denial of access to the estate by the fourth respondent.

[8] On the applicant's version, despite the clear instruction that she vacates the property on the last day of February 2022, on 7 February 2022 and whilst she was inside the property a locksmith arrived, who conveyed to her that he had instructions to change the locks to the property. The locksmith, despite her protestations proceeded to change all the external locks of the property. She was forced to leave the property in haste as she is asthmatic. Something that had a foul smell, with the intention of forcing her to leave the house had been diffused.

[9] The applicant resided in the property for a period of seven years in the course of which she accumulated, on her version, significant items of furniture and other household accessories of high value that one would normally accumulate over a period of that duration. Consequently, she has been denied the opportunity of removing her movables and other fixtures from the property.

[10] To establish urgency, the applicant asserts that, her electrical gadgets (laptops etc.), clothes, jewellery, personal and business documents, glasses, furniture and food remain at the property. Without access to a laptop, personal and business documents, she complains that she cannot attend to her normal business.

[11] According to the applicant, she has not been able to obtain access to the estate via the main entrance. The fourth respondent advised the applicant by email that, upon change of ownership of the property, its system is automated and will remove the previous owner on registration of a new owner.

[12] In opposing the application, the first to third respondents contended in *limine*, that the matter is not urgent on the basis that the magistrate court dismissed an application for the applicant on what the magistrate described as a technicality, but not on the merits, after her access to the estate was blocked. During argument however, counsel for the respondents was constrained to concede that access to a laptop is a necessity and therefore an urgent matter in the current economic period, and may I add, COVID-19 conditions for related activities.

[13] Regarding the merits, the first to third respondents deny that the applicant was given permission to remain in occupation as alleged by her. The first to third

respondents alleged that if anyone changed the locks it was not the respondents, nor had they instructed anyone to do so on their behalf. On the version, it could only have been the applicant herself. They also stress that they have no objection in allowing the applicant to collect her remaining goods.

[14] A key characteristic of a *mandament van spolie* is that it is a possessory remedy (*remedium possessorium*). The essential characteristic of a possessory remedy is that the legal process whereby the possession of a party is protected (*iudicium possessorium*), is kept strictly separate from the process whereby a party's right to ownership or other right to the property in dispute is determined (*iudicium petitorium*). Spoliation requires restoration of possession as a precursor to determining the existence of the parties' rights to the property dispossessed.<sup>1</sup>

[15] In *Firststrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*<sup>2</sup>, the legal principles that apply where quasi-possession is protected by a spoliation order were re-affirmed by Malan AJA as follows:

“The *mandament van spolie* is a remedy to restore to another *ante omnia* property dispossessed 'forcibly or wrongfully and against his consent'. It protects the possession of movable and immovable property as well as some forms of incorporeal property. The *mandament van spolie* is available for the restoration of *quasi-possessio* of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the *status quo ante* and not the determination of the existence of the right.”

[16] The position of our law in opposed motion proceedings is trite. If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent

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<sup>1</sup> *Eskom Holdings SOC Limited v Masinda* 2019 (5) SA 386 (SCA) at para 12.

<sup>2</sup> 2008 (2) SA 503 (SCA) at para 12.

together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.<sup>3</sup>

[17] The denial by the respondents' that the applicant had no permission to be in occupation of the property until the end of February 2022 is not supported by objective facts. It flies in the face of a letter by their own lawyer to the effect that the applicant had permission to do so. That the applicant of her own accord would have changed the locks is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers more so that, they have no objection in allowing her to fetch her remaining goods. Accordingly, the court is satisfied that the respondents' version is not creditworthy.<sup>4</sup>

[18] In conclusion, I am satisfied that the applicant was entitled to a spoliation order that I issued commensurate with the relief sought. The urgency and the harm complained of was ongoing. As to the question of costs, the approaches is trite, costs follow the result.

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**T P MUDAU**

[Judge of the High Court]

Date of Hearing: 22 February 2022

Date of Judgment: 3 March 2022

## **APPEARANCES**

For Applicant: SS COHEN

Instructed by: SP ATTORNEYS INC

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<sup>3</sup> The general rule as stated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 has been followed and applied on numerous occasions; see, for example, *Lubbe v Die Administrateur, Oranje-Vrystaat* 1968 (1) SA 111 (O) at 113.

<sup>4</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C; *South African Reserve Bank v Leathern NO and Others* 2021 (5) SA 543 (SCA) at 24.

For First to Third Respondents:

G GILPIN

Instructed by:

GILPIN ATTORNEYS INC