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

CASE NO: 2022/9286

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
14/3/2022

In the matter between:

BARZANI 53 (PTY) LTD Applicant

and

THE BODY CORPORATE WITFIELD RIDGE Respondent

JUDGMENT

MOORCROFT AJ:

Order

[1] The matter was heard on 10 March 2022 and I handed down the following order on 11 March 2022, as corrected.

"1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application."

[2] I set out the reasons for the order below.

Urgency

[3] The applicant satisfactorily set out grounds for urgency and prejudice should the matter be heard only in the ordinary course. I held that the matter was sufficiently urgent on the day to merit a hearing.

The authority of the deponent to the founding affidavit

[4] In the answering affidavit the respondent disputes the authority of the deponent to the founding affidavit who is a director of the applicant. As the applicant correctly points out, the respondent failed to invoke the provisions of Rule 7 of the Uniform Rules and while the allegation of authority is made cursorily without reference to a resolution of the applicant and without elaboration in the replying affidavit, I am satisfied on a reading of the papers that the deponent did have the necessary authority.

The merits of the application: Introduction

[5] The applicant holds a certificate of real right under section 12(1)(e) of the Sectional Titles Act, 95 of 1986, in terms of which it has the right to erect buildings in the Witfield Ridge Sectional Title Scheme at Erf [....], Witfield Ext 46 in Ekurhuleni. It developed phases 1 and 2 of the complex and is at the moment engaged in the building of phase 3. The development commenced in 2016 and the development of phase 3 in August 2021.

[6] The applicant now brings a spoliation application namely that the water supply to the building site of phase 3 be restored to it (an application in respect of the supply of water to unit 188 of phase 2 was abandoned in the replying affidavit), and an order that free access via the main gate to the complex be restored to it. The application takes place against the background of other litigation between the parties.

[7] It is convenient to deal with the two legs of the application separately.

Access to water

[8] The applicant complains that the water supply to the building site was terminated by the respondent by cutting the water pipe leading to the building site on or about 28 February 2022.

[9] The respondent alleges that the applicant unlawfully obtain access to water supply of phase 1 and 2 of the complex when construction commenced of phase 3. There was no water meter in place to record the usage. The applicant ought to have arranged for the installation of its own water meters to monitor its usage and then paid for such usage which it has failed to do.

[10] The respondent also denies that it was in any way involved in disconnecting the water supply or authorising the disconnection. It states that any person attending to such a disconnection would have been acting other than on behalf of the respondent.

[11] The respondent's evidence that the water supply was not disconnected by the respondent is supported out by a letter[1] written by the applicant to the Ekurhuleni Metropolitan Municipality on 21 February 2022 where the applicant stated that *"some residents thought it good to cut our water supply"*. There is no evidence on the affidavits to suggest that the respondent spoliated the water supply and on the applicant's own version in correspondence to the Council, the water supply was disconnected by third parties who were alleged to be residents in the complex.

[12] In the replying affidavit[2] the applicant deals with the respondent's denial by merely stating that *"it was only respondent who would benefit from terminating the water supply which it did."* The only evidence presented by the applicant is that it makes the inference that the respondent terminated the water supply because it was the only party who would benefit. The applicant is therefore unable to satisfy the onus to prove its allegations and also fails to meet the so-called Plascon-Evans test.[3]

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[1] Annexed to the answering affidavit as "KC1 bis" at page 009-68.
[2] Paragraph 17 at page 6-5.
[3] *Plascon – Evans v Van Riebeeck Paints* 1984 (3) 623 (AD) 634.

[13] I was informed from the bar that the respondent advised the applicant on 10 March 2022 that a prepaid meter had now been installed by the respondent for the use of the applicant.

The access gate

[14] It is clear from a reading of the papers that it is not the case for the applicant that it was spoliated and deprived of its occupation of the premises or from access to the premises, but rather that it was spoliated from the use of a specific access gate used by the applicant since the commencement of building operations in 2016.

[15] In support of its application the applicant relies on an email[4] message from the respondent's attorney dated 28 February 2022 where it was stated that:

"We further wish to advise/remind you that the security company appointed by the Body Corporate (DA6 Security) has been instructed not to allow any of your contractors or staff on site at the complex. Should we receive any further communications from the Trustees in this regard, we will have no option but to take further action."

[16] Reading this correspondence the impression is clearly created that the respondent might have been spoliated. However, the letter is not a model of clarity and it continues as follows:

"Your contractors/staff are instructed to make use of the building site entrance only, in the continuance of building phase 3. Any further tampering with the water supply or electricity supply will be met with swift legal action, as this will be deemed trespassing on the common property at the complex."

[17] The correspondence informs the applicant that access would be provided to the site but through a designated entrance, the *'building site entrance.'* Any uncertainty could have been discussed in a phone call or dealt with in further correspondence seeking clarification but this never happened.

[4] Annexure "B" at page 3-3.

[18] The relationship between builders and bodies corporate are usually dealt with in contracts that deal with issues such as access, but in the current instance no such contracts are relied upon by either party.

[19] It is common cause that the complex was developed in three phases. Phases 1 and 2 are complete and the applicant is building in phase 3. It stands to reason that an access gate that was suitable when the land was completely vacant might no longer be suitable when houses have been built and people are now living in the complex. Circumstances when phase 1 was commenced with, would be very different to circumstances when two phases are complete and a third is being embarked upon. A body corporate such as the respondent would be within its rights to regulate access to the premises for the sake of the convenience and safety of residents and owners, and for good management.

[20] When it is no longer feasible in the opinion of the body corporate to use a specific entrance gate, there cannot be any objection in principle to access being granted to contractors through another access gate. Regulating access is one of the prime purposes of the management of a body corporate such as the respondent. Regulating access does not amount to spoliation. To use just one obvious example, a person who habitually enters premises can not complain of spoliation when told that access will henceforth be controlled and he would have to present proof of his identity when entering the premises, or that his temperature will be taken to limit exposure to disease.

[21] It is unrealistic to expect the management of the busy complex to continue to provide access to the complex through a gate that might have been eminently practical in 2016 but no longer serves the needs in 2022 after the completion of phases 1 and 2 of the complex. The use of a *'residents' entrance'* and a separate *'contractors' entrance'* is not uncommon and a contractor is not spoliated by having to use an alternative entrance.

[22] The applicant's statement in the replying affidavit[5] that the use of an alternative entrance would be an act of trespass is made with reference to a letter

[5] Paragraph 22 of the replying affidavit at page 6-6.

dated 2 March 2022.[6] In the letter it is said that the site entrance referred to is adjacent to privately owned property and not in a good condition. No further information or evidence is provided and it is impossible to evaluate this statement meaningfully. The bald and unsubstantiated statement that the alternative access is over private land and is not in a good condition takes the matter no further.

[23] The application is solely based on the fact that the applicant has enjoyed access since 2016 through the main gate and now insists on such access through that gate and no other. The spoliation argument does not get out of the starting blocks as the applicant was never in possession (either on its own or with others) of the gate and has not been denied access to the building site. To the contrary, the applicant was always allowed to access to the complex and is still allowed access. The Court need not decide whether the complained-of instruction amounted to spoliation on the facts of the case. In deciding such a question the specific contractual arrangements or the absence of any contractual arrangements would have been relevant.[7]

[24] I therefore granted the order as set out above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **14 March 2022**

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[6] Annexure E to the founding affidavit at page 3-7.
[7] *FirstRand Ltd t/a Rand Merchant Bank v Scholtz NO* 2008 (2) SA 503 (SCA) 510; *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd* 2021 (6) SA 309 (WCC) paragraph 26; *Blendrite (Pty) Ltd v Moonisami* 2021 (5) SA 61 (SCA) paragraphs 13 to 19.

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DATE OF THE HEARING:	10 March 2022
DATE OF ORDER:	11 March 2022
DATE OF JUDGMENT:	14 March 2022