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

CASE NO: 2020/12341

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

6/09/2022

In the matter between:

NADINE ORKIN

Applicant

and

BELLISSIMO HOMEOWNERS ASSOCIATION (RF) NPC

First Respondent

**MAFADI MANAGEMENT AND LETTING SALES
(PTY) LTD**

Second Respondent

(Registration Number: 2010/018485/07)

Delivered: This judgment was prepared and authored by the 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 6 September 2022.

JUDGMENT

MALINDI J

Introduction

[1] This dispute arises out of the following basic facts.

[2] The Applicant is the occupier of one of six units in the complex. At the time of occupation none of the other units were occupied. No security had at the time been provided to the complex. The Applicant apparently complained about the lack of security and in her correspondence with the Bellissimo Homeowners Association ("the First Respondent") she received the following correspondence dated 25 January 2018:

"There will not be 24-hour security for the estate at this point, nor any security guard appointed therewith and you are not granted any permission whatsoever to appoint your own security and this issue will be addressed at the next AGM meeting."

[3] Later, the parties had agreed on or about 19 April 2018 that the Applicant may employ her own guard on the premises subject to her being responsible for:

- 3.1. The payment of the guard
- 3.2. The payment of electricity
- 3.3. The payment of water
- 3.4. Interior maintenance of the guard house
- 3.5. Any/or all expenses relating to the said security being present in the guard house.

[4] This is the agreement that the Respondents sought to cancel on 2 September 2020 after receipt of the Community Schemes Ombud Services (CSOS) award which found in their favour that the Applicant had no permission to employ a private security guard and for the security guard to use the First Respondent's premises.

[5] This purported cancellation, if proper, has no bearing on the urgent application and the undertakings made subsequent to its postponement.

Background

[6] On 28 May 2020, the Applicant issued a notice of motion in which the following relief is sought:

- 6.1. Dispensing with their Rules and forms of service as prescribed by the Rules and dealing with this matter as one of agency in terms of Rule 6(12).
- 6.2. That the Applicant be restored of their possession of the guard and ablutions therewith situated on the communal property at [...] A [...] Street, Sandown (“the premises”).
- 6.3. That the Applicant be restored of their possession of the key to the gate motor to the premises.
- 6.4. That the Respondents be ordered and directed to allow the Applicant and her staff, employees, customers and visitors access to the guardhouse.
- 6.5. That, in the event of the Respondents failing to restore the Applicants possession of the aforementioned premises by 18h00 on 2 June 2020, that the Sheriff of the Honourable Court and/or his deputy, in whose area the premises is situated, be and is authorized, mandated and directed to take such reasonable and necessary steps to restore position of their premises to the applicants to give effect to paragraphs one to four above.
- 6.6. That the Respondents pay the costs of this application on the attorney and client scale.
- 6.7. Such further and/or alternative relief as this Honourable Court may deem just, fair and equitable.

[7] The Respondents were required to notify the Applicants attorneys by 17h00 on Friday 29 May 2020 of any intention to oppose the application and to file answering affidavits if any by 17h00 on 29 May 2020. The matter was set down for hearing at 10h00 on 2 June 2020. The first and second Respondents filed their notices of intention to oppose duly on 28 May 2022.

[8] On 29 May 2020 the parties agreed that the matter be removed from the roll and the costs of the application be reserved. This was confirmed by the Respondents’ attorneys’ letter of 29 May 2020. The also undertook that the Applicant will be provided with access to the guard house as well as a copy of the key to the gate motor. This undertaking satisfied the Applicant’s main prayer in the Notice of

Motion. Paragraph 3 of the letter reads as follows, *“Please confirm that the matter will be postponed sine die, with costs reserved.”*

[9] On 21 June 2021, the Applicant launched a new application, an interlocutory application, seeking an order that the Respondents be directed to pay the costs that were reserved on 2 June 2020 as taxed and allowed in the sum of R31 120.26. The Applicant sought further that the costs of that application for enforcing the costs order be paid on a punitive scale between attorney and own client. The application was opposed. The interlocutory application for costs is the subject of this hearing.

Analysis

[10] The parties have agreed that the main issue for determination is whether the Respondents are liable for the costs of the urgent application of 2 June 2020. The Respondents’ main defence against the payment of the costs of 2 June 2020 is that subsequent to that date, that is 15 July 2020, the CSOS adjudicated a complaint laid by the Applicant prior to the urgent application and held that as early as 25 January 2018 the Applicant had been told as follows by the Bellisimo Homeowners Association:

“There will not be 24-hour security for the estate at this point, nor any security guard appointed therewith and you are not granted any permission whatsoever to appoint your own security and this issue will be addressed at the next AGM meeting.”

[11] Further, the Second Respondent submits that it is not bound by the First Respondents undertaking to pay the said costs even if this Court finds that the Applicant is entitled to the costs of the urgent application. This aspect is dealt with below.

[12] In paragraph 24 of the Applicant’s replying affidavit it is stated as follows:

“It is correct that no order was made in the urgent spoliation application due to its omission from the roll but it was nevertheless agreed that costs of the urgent spoliation application including then agreed to reserved costs of the hearing be paid by the Respondents was agreed to or taxed.”

[13] Furthermore, at paragraph 25, the Applicant states as follows:

“As aforesaid, the CSOS award came to the attention of the Respondents on or about 23 July 2020 and the Respondents tender to pay my party and party costs of the urgent application inclusive of the reserved costs of the hearing date was made on 12 and 25 August 2020 in terms of an Annexure “FA4” with no reference at all to the CSOS award, and with no qualifications, other than that I provide the Respondents with a bill costs which they would either settle, if satisfied therewith or require that same be taxed.”

[14] It is common cause that the award of the CSOS came to the attention of the Respondents on 23 July 2020. The First Respondent contends at paragraph 16 of the First Respondent’s answering affidavit that it is on this basis that it does not think that it is responsible to pay the Applicant’s costs. On 12 August 2020 the Respondents’ attorneys’ tendered the costs of the urgent application on a party and party scale. On 25 August 2020 the same attorney confirmed that the tender to pay the costs in terms of the letter of 12 August 2020 “includes the reasonable reserved costs for having the matter postponed *sine die*.”

[15] On 28 May 2021 the Second Respondent wrote a letter to the Applicant’s attorneys stating that the Second Respondent denies that it has tendered any payment towards costs in this matter. The letter is signed by their attorney, Marcel Fourie, now writing under the name of a different law firm. It is clear from the correspondence leading to this denial that Marcel Fourie was at all times writing on behalf of the First and Second Respondents. The Second Respondent cannot deny at this stage that it is bound by the undertaking in which costs were tendered on 12 August 2020 and confirmed on 25 August 2020.

[16] The defence that the Respondents are not liable for costs of the urgent application of 2 June 2020 because the CSOS found against the applicant on 15 July 2020 does not hold water. The question is whether at the time of the urgent application the Applicant was entitled to bring the application. It is clear that the Applicant was entitled to bring the application at the time and that a finding against the Applicant at a later stage was against what they prayed for in the urgent application is irrelevant.

[17] Furthermore, since 29 May 2020 when the parties agreed that the matter be removed from that roll and be postponed *sine die* it was on the basis that the Applicant is entitled to bring the application. The postponement *sine die* only pertained to the question of costs, which costs they subsequently tendered to pay on 12 August 2020. That the CSOS ruling was apparently in favour of the First Respondent does not change the legal position that the Respondents were not entitled to take the law into their own hands by dispossessing the Applicant of the services of the security guard and the relevant premises without following due process. The spoliation remedy would have lost urgency if the Applicant waited for the outcome of the CSOS award which had no set date. The principle is established in our law as was stated in the case of *Street Pole Ads Durban (Pty) Ltd and Another v Ethekwini Municipality*¹ where it was stated: “*That is because good title is irrelevant; the claim to spoliatory relief arises solely from an procedural deprivation of possession.*” Therefore, the Applicant was entitled to approach the court on an urgent basis on 2 June 2020.

[18] I have also considered the submissions by the Respondents to the effect that because the matter had not been placed on the roll on 2 June 2020 and that therefore there was no court order postponing the matter *sine die* and awarding costs to the applicant, the Applicant is not entitled to the costs of the day. Paradoxically, the Respondents do not challenge that fact that the matter had become postponed *sine die*, but only that there was no cost order made against them. In other words, they accept part of the agreement between themselves and the Applicant but reject the part pertaining to costs. I am satisfied that all relevant

¹ 2008 (5) SA 290 (SCA) at 15.

procedures had been followed, including setting the matter down for 2 June 2020 and uploading relevant documents on to CaseLines, save for the fact that the matter was not placed on the roll for 2 June. 2020. This fact is the last step that needed to be taken in an otherwise properly prosecuted case. In addition, the Respondents had agreed with the Applicants on the removal of the matter and that it be postponed *sine die* before 2 June 2020. That agreement governed the relationship between the parties from then up to, and including the undertakings of 12 August and 25 August 2022 regarding the tender of costs for the urgent application and costs of the interlocutory application to enforce the agreement on the costs.

Conclusion

[19] As is apparent from the discussion above, both Respondents are bound by the agreement between the parties that the urgent application of 2 June 2020 be removed from the roll and be postponed *sine die*, costs having been reserved. That the matter did not appear on the roll on the date of hearing is of no consequence in the context of that urgent application. The fact that the CSOS had found in favour of the Respondents regarding the individual utilization of a security guard and use of the First Respondent's premises on 15 July 2020 is irrelevant to the Applicants entitlement at the time to launch an urgent application to set aside the unlawful deprivation of the premises from the Applicant. Furthermore, as stated above, the Second Respondents submission that it is not bound by the undertaking to pay costs as contained in the correspondence of 12 and 25 August 2020 does not avail it. Both parties had been represented by the same attorneys. The relevant correspondence was at all times on behalf of the two Respondents without distinction. The Respondents' conduct after all the undertakings were made requires that the Court express its disapproval of their conduct. Their conduct is solely based on the fact that they were exonerated by the award of the CSOS and that they were entitled to cancel the prior agreement between the parties that the Applicant may engage the services of a private security guard and have access to the premises. They should have been better advised.

[13] In the circumstances the following order is made:

1. The Respondents, jointly and severally, the one paying the other to be absolved, are to pay the reserved costs of the urgent application on 2 June 2022, as taxed and allowed in the sum of R31 120.26;
2. The Respondents, jointly and severally, the one paying the other to be absolved, are to pay the costs of this interlocutory application on the scale of attorney and client.

G MALINDI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

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|---------------------------------------|----------------------------|
| For the applicants: | Adv. RJ Bouwer |
| Instructed by: | Martin-Patlansky Attorneys |
| For the first and second respondents: | Adv. S. Jackson |
| Instructed by: | Hinrichsen Attorneys |
| Date of hearing: | 11 March 2022 |
| Date of judgment: | 6 September 2022 |