IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2022/3979

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

18/2/2022
DATE

SIGNATURE

In the matter between:

MASAZIE LOGISTICS (PTY) LTD **Applicant**
(Registration Number: 2017/237353/07)

and

SHOW PAO FAN **Respondent**

Heard: **16 February 2022 (*Via* Microsoft Teams)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and by being uploaded to *CaseLines*. The date for hand-down of the judgment is deemed to be on 18 February 2022.**

Summary: **Trite principles of spoliation restated. *Semble*: A spoliation application lies against the actual person who caused the spoliation.**

A party who acts as a conduit for the spoliation to take place is not the spoliator.

Hearsay evidence – Although hearsay is more readily admitted in urgent proceedings, this does not have the effect of rendering the provisions of Section 3(3) of the General Law of Evidence Amendment Act 45 of 1988 nugatory. The provisions must still be complied with, with due regard to the interests of justice. Deponent to hearsay must also state that there is a belief in the truth of the hearsay statement and the grounds upon which such belief is founded.

JUDGMENT

THOMPSON AJ:

[1] The Applicant launched urgent spoliation proceedings against the Respondent on 2 February 2022. The matter first was on the roll before the Honourable Madam Justice Windell on 8 February 2022. When the matter was finally called on 10 February 2022 it became clear to Windell J that the Respondent requires the services of an interpreter and postponed the matter to the urgent roll of 15 February 2022. It is doubtful whether this matter is indeed urgent due to the fact, as I will demonstrate below, it would seem as if the Applicant's possession of the immovable property situated at 3052 Thomas Road, Vlakfontein 30IR, Benoni ("the premises") was already wholly interfered with on, at the latest, 30 November 2021. However, due to the Applicant's assertion that the alleged spoliation took place on 21 January 2022, I have elected to exercise my discretion to hear the matter as an urgent application in terms of Rule 6(12).

[2] The Respondent (who appeared in person), in response to the application, delivered a rudimentary answering affidavit. The Applicant, in its Replying Affidavit, took issue with the answering affidavit on the basis that the commissioner of oaths could not have been satisfied that the Respondent confirms the truth and correctness of the answering

affidavit as she has no grasp of the English language. At the hearing of the matter, I questioned the Respondent as to the manner in which the affidavit was drafted and commissioned. According to the Respondent the affidavit was drafted with the assistance of her son and a third party. Prior to attending to the commissioning thereof, her son read and explained the contents of the affidavit to her, and she was satisfied as to the contents thereof. I also enquired from her as to whether she understood the nature and import of the oath, and I was satisfied that she did.

[3] As the answering affidavit was prepared without the assistance of a legal practitioner, I exercised my discretion to hear the Respondent by way of *viva voce* evidence as allowed for by Rule 6(12)(a) as read with Rule 6(5)(g). Without descending into a full-blown trial, taking into consideration the nature and purpose of the urgent court, I also permitted Ms Van Der Laarse, appearing on behalf of the Applicant, to pose questions to the Respondent.

[4] Prior to dealing with the facts of the matter I must point out that the Respondent raised issues relating to arrear rental, termination of the lease agreement, protection orders and a fear for her safety during the course of her *viva voce* evidence and closing submissions. As spoliation applications only pertain to the questions (i) whether an applicant was in peaceful and undisturbed possession of the spoliated item and (ii) whether the applicant was dispossessed without its consent or due process of law,[1] I

---

[1] ***Burnham v Neumeyer*** 1917 TPD 630 at 633
"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."

will have no regard to such evidence and/or submissions. For greater clarity, the decision in this matter is not influenced by the extraneous and irrelevant material testified to and/or submitted by the Respondent.

[5] The Applicant's version is a simple and straightforward one. The Applicant points out that it has been in occupation of the premises since 30 April 2019. The Respondent admits that the Applicant was so in occupation. The Applicant alleges that its peaceful and undisturbed possession of the premises was interfered with on 21 January 2022 when the premises was rendered inaccessible by lock and chain on 21 January 2022 by the Respondent. It is further alleged that the main entrance gate of the premises was also welded shut by the Respondent on this date. The Applicant alleges that this action by the Respondent was wrongful and had the effect of depriving the Applicant of its possession of the premises.

[6] These allegations were sufficient to bring the Applicant within reach of obtaining a spoliation order, but for the Respondent's version. As the Applicant seeks final relief,[2] the matter must be determined on the Respondent's version, unless I can find that the Respondent's version is consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that I am justified in rejected the Respondent's version on the papers.[3] As there are conflicting

---

[2] ***Painter v Strauss*** 1951 (3) SA 307 (O) at 312A – C
"Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were 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."

[3] ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) at para [26]

versions in respect of the alleged spoliation, I must decide the matter on the basis of the admitted facts advanced by the Applicant, together with the facts alleged by the Respondent.

[7] According to the Respondent, the South African Police Services (herein after referred to interchangeably as "SAPS" or "the police"), conducted "*an operation*" at the premises on 30 November 2021 after having conducted surveillance of the premises on 29 and 30 November 2021. Although the Applicant does not admit the "*operation*", the Applicant does confirm in its Replying Affidavit that the police did confiscate alleged stolen property from the premises. This admission is made in direct response to the allegation that "*an operation*" was conducted by SAPS on 29 and 30 November 2021.

[8] According to the Respondent, no business was conducted by the Applicant at the premises thereafter. The Respondent also alleges that the police, by way of the investigating officer Tumi Williams ("Williams"), instructed her to lock the premises, which she duly did. Thus, if the version of the Respondent is to be accepted, the Applicant's possession of the premises was already interfered with on 30 November 2021 by SAPS. Although the Respondent may have caused the locking of the premises, the Respondent did so, on her version, at the instructions of SAPS.

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[9] The Applicant tenders no real evidence to gainsay the Respondent's evidence that the Applicant's possession of the premises did not persist after 30 November 2021. The Applicant relies on, what can best be described, as an interpretative process of a particulars of claim whereby the Respondent is suing the Applicant for arrear rentals, in order to establish continued possession of the premises after 30 November 2021. In this regard the Applicant relies on the following averment in the Particulars of Claim:

> *"Pursuant to the provisions of the agreement of lease as aforementioned, the Defendants took occupation of the premises on the 30th of April 2019* ***and have been in occupation since then****."*[4]

The submission on behalf of the Applicant is that this is a clear indication that the Applicant has been in possession since April 2019 and remains in occupation of the premises after the date of 30 November 2021 when the police allegedly terminated the Applicant's possession of the premises. This submission is based thereon that the summons was issued on 8 December 2021. What the Applicant leaves out of consideration in respect of this submission is that the Particulars of Claim was, *ex facie* the Particulars of Claim, drafted sometime in November 2021. The exact date is unknown as the Particulars of Claim is not finally dated with a day in respect of the November 2021 date. It is more than reasonably possible that the Particulars of Claim was signed prior to 30 November 2021 or, at best for the Applicant, on 30 November

[4] ***My emphasis***

2021 without the Respondent having informed the attorney in the rent collection matter of the most recent developments. This sequence of events, in my view, is quite probable having regard thereto that the combined summons was dated on 1 December 2021.

[10] The second string in Ms Van Der Laarse's bow amounted to an attempt to introduce hearsay evidence. According to the Applicant, its attorney made telephonic contact with Williams, who confirmed to the Applicant's attorney that SAPS did not order that the premises be locked nor that the police locked the premises. The probative value of the evidence tendered depends upon the credibility of Williams and not that of the Applicant's attorney,[5] with only the latter having provided a confirmatory affidavit. Hearsay is, in the absence of an agreement to receive same, to be excluded unless the interests' of justice requires its admission.[6] Its admission, in the interests of justice, must be sought in terms of Section 3(1) of the General Law of Evidence Amendment Act ("the Hearsay Act").[7] Hearsay evidence not so admitted in terms of the Hearsay Act is no evidence at all.[8]

[11] No case, in terms of Section 3(1) of the Hearsay Act was made out in the replying affidavit and no such case was advanced in the Applicant's heads of argument. Ms Van Der Laarse, when I pointed out to her that the evidence sought to be relied upon constitutes hearsay evidence and is therefore inadmissible, submitted that hearsay

---

[5] Section 3(4) of the General Law of Evidence Amendment Act 45 of 1988
[6] ***S v Ndhlovu*** 2002 (6) SA 305 (SCA) at para [12]
[7] See fn 5
[8] ***Ndholvu,*** *supra* at para [14]

evidence is more readily admitted in urgent application. On this score she is correct, however this does not mean that hearsay evidence will be admitted without the requirements of Section 3(1) of the Hearsay Act having been complied with. It merely means that a court, having regard to the purpose of the urgent court, will approach the admission of hearsay, in appropriate circumstances in urgent matters, properly advanced and motivated, with some degree of latitude. Otherwise stated, a proper motivation must be set out in an affidavit by the party relying on the hearsay evidence, having regard to the requirements set out in Section 3(1) of the Hearsay Act, why the interests of justice permit the admission of hearsay.

[12] The belated admission of the hearsay evidence sought must fail on this ground alone as no such application is contained in the Applicant's Replying Affidavit or, for that matter, its heads of argument. Yet this is not the only ground upon which the admission of the hearsay evidence must fail. Prior to the enactment of the Hearsay Act, it was incumbent on a party seeking the admission of hearsay evidence to, *inter alia,* assert that the deponent believes the hearsay to be correct and furnish the grounds for such belief.[9] I can find nothing in Section 3(1) of the Hearsay Act that this requirement has been abandoned. As a matter of fact, Section 3(1)(c)(vii) of the Hearsay Act enjoins the court to have regard to any other factor which, in the opinion of the court, should be taken

---

[9] ***Galp v Tansley NO & Another*** 1966 (4) SA 555 (C) at 559G
"But one important point emerging from the cases which I have enumerated in the preceding paragraph is this, viz., that our Courts have consistently refused to countenance the admission as evidence – for any purpose whatever - of any statement embodying hearsay material, save where such statement has properly been made the subject of an affidavit (or solemn affirmation) of information and belief, i.e., save where the deponent (or affirmer) has not only revealed the source of the information concerned but in addition has sworn (or solemnly affirmed) that he believes such information to be true and furnished the grounds for his belief."

into account. I am of the view that a deponent who seeks to have hearsay evidence admitted must, at least, in terms of this section state that the hearsay evidence is believed to be true and set out the grounds upon which such belief is founded.[10]

[13] As no proper application for the admission of the hearsay evidence is before me,[11] the exercising of my discretion in the admission of hearsay evidence does not even come into consideration.

[14] It must also be pointed out that the Respondent testified in court that she knew no one from the Applicant had attended the premises since 30 November 2021 as her kitchen window looks out over the premises. Despite affording the Applicant an opportunity to question the Respondent on this evidence, this version by the Respondent was not challenged by way of questions being put to her in this regard nor an alternate version put to her for comment.

---

[10] ***PRASA v Swifambo Rail Agency (Pty) Ltd*** (unreported judgment per Francis J – Gauteng Local Division, Johannesburg case number 2015/42219) (3 July 2017) at para [21]
"Hearsay evidence is generally not permitted in affidavits. Once again this is not an absolute rule and there are exceptions to it. ***Where a deponent stated that he is informed and verily believes certain facts on which he relies for the relief, he is required to set out in full the facts upon which he bases his grounds for belief and how he had obtained that information, the court will be inclined to accept such hearsay evidence. The basis of his knowledge and belief must be disclosed and where the general rule is sought to be avoided reasons therefor must be given. Where the*** *source and* ***ground for the information and belief is not stated****, a court may decline to accept such evidence."* [***emphasis added***]

[11] ***PRASA****, supra at para* [23] and [24]
"23. A court has a wide ***discretion in terms of section 3(1) of the Evidence Amendment Act to admit hearsay evidence. The legislature had enacted the provisions of section 3 to create a better and more acceptable dispensation in our law relating to the reception of hearsay evidence. The wording of section 3 makes it clear that the point of departure is that hearsay evidence is inadmissible in criminal and civil proceedings.*** *However, because the legislature was conscious of various difficulties associated with the reception of hearsay evidence in our courts, it brought a better dispensation and created a mechanism to determine the circumstances when it would be acceptable to admit hearsay evidence.*
24. The legislature also decided that the test whether or not hearsay evidence should be admitted would be whether or not in a particular case before the court that it would be in the interest of justice that such evidence is admitted. The factors that the court should take into account are those set out in section 3(l)(c)(i to vii) of the Evidence Amendment Act which includes any other factor which in the opinion of the court should be taken into account." [***emphasis added***]

[15] Turning to the date upon which the Applicant contends the spoliation occurred, 21 January 2022, the Respondent has a diametrically opposed version to that of the Applicant. According to the Respondent an incident occurred at her residence where the deponent to the Applicant's founding affidavit, together with two other persons jumped over the locked gate and threatened her. This resulted in the police attending at the Respondent's abode which is adjacent to the premises. According to the Respondent the main gate to the premises, which was found to have been broken open, was then welded shut by an employee of the Respondent at the instance of the police. Again, as much as the Respondent, represented by her employee, caused the physical act of welding the gate shut, the decision to interfere with the alleged possession of the Applicant was not taken by the Respondent. The Respondent was, on her version, acting in accordance with the instructions of the police, which instructions she could assume was lawful.

[16] The Applicant made much of the fact that two employees of the Applicant is being, as the Applicant termed it, held hostage on the premises due to the main gate having been welded shut. The Applicant sought to confirm this aspect by reference to a video that was recorded evidencing that the person who made the video was, in fact, trapped inside the premises. Various problems exist for the Applicant in this regard.

[17] Firstly, the Respondent contends that there are no persons, employed by the Applicant, at the premises. There is no direct evidence from the Applicant to contradict this version by the Respondent and on the *Plascon Evans*-rule the version of the Respondent is to be accepted. It must also be borne in mind that the Respondent has testified that

ingress and egress to the premises can be obtained from her kitchen, thus any person employed by the Applicant can seek the permission of the Respondent to leave the premises via her residence. Secondly, in so far there are employees of the Applicant at the premises, a *mandament van spolie* is not the appropriate nor the correct remedy to ensure their liberty is restored. One would rather expect a *habeas corpus*-type application to secure such persons' liberty.

[18] A third issue arises from the video evidence presented by the Applicant, unrelated to the two employees-issue, but directly relevant to the Respondent's version that the main gate was welded shut at the instance of the police. Identifiable in the closing seconds of the video, a member of SAPS is to be seen at the premises, in the presence of, *inter alia*, the Respondent whilst the main gate to the premises is being welded shut by the Respondent's employee in full view of the SAPS member. In my view, the presence of the SAPS member whilst the gate is being welded shut in his full view give credence to the version of the Respondent that the premises was secured at the instance of the police. The Respondent and/or her employee was no more than a conduit for the police's instructions to secure the premises. I do not have to find that this version is true in order to find for the Respondent. However, in order to find for the Applicant, I need to find that this version by the Respondent is either false or untenable. I can do neither. Her version is, in my view, neither far-fetched nor does it constitute bald or uncreditworthy denials.

[19] I do not know on what basis SAPS allegedly instructed the Respondent to secure the premises. In terms of Section 20 of the Criminal Procedure Act[12] ("the CPA"), the police may certainly seize anything which is concerned in the commission or suspected commission of an offence, which may afford evidence of the commission of an offence or is used in the commission of an offence. Section 20 of the CPA is phrased widely to include anything which is used or intended to be used or suspected to be used, or on reasonable grounds are so suspected to have been used or intended to so be used. I can see no reason why SAPS cannot enlist the services of a third party to ensure that Section 20 of the CPA is given effect to.

[20] Ms Van Der Laarse submitted that the premises could not be seized upon by the police in such manner and that taking possession of the property by the police had to take place in terms of Prevention of Organised Crime Act[13] ("POCA"). This submission is, in my view, misplaced. There is a vast difference between seizing *anything* for the purposes of procuring or securing of evidence in terms of the CPA and a preservation order sought for the purposes of confiscation of such property to the State in terms of POCA.

[21] The *onus* rested on the Applicant to prove that it was in possession of the premises of the alleged spoliation, with the alleged spoliatory incident relied upon being the

---

[12] 51 of 1977
[13] 121 of 1998

welding of the main gate on 21 January 2022. The Applicant also had the *onus* to prove that the dispossession is unlawful[14] and at the hands of the Respondent.[15]

[22] In light thereof that the

i. attendance of the police at the premises at the end of November 2021 and the confiscation of alleged stolen goods is common cause, or at least not seriously disputed;

ii. Respondent's version that she could see no one from the Applicant attending at the premises after 30 November 2021 not being seriously disputed;

iii. Applicant only relies on interpretative inferences to be drawn from terse pleaded averments in the particulars of claim for the recovery of arrear rental in order to established continued possession of the premises past 30 November 2021;

iv. Evidence that the main gate was locked from 30 November 2021 and found broken on 21 January 2022, which was also not seriously disputed,

---

[14] ***Yeko v Qana*** 1973 (4) SA 735 (A) at 739E
"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."
[15] ***Painter,*** *supra* at 312A – C
"The mandament van spolie is employed to prevent the 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."

I am of the view that the Applicant has failed to establish that it was in peaceful and undisturbed possession of the premises on 21 January 2022.

[23] Even if I am wrong in the aforesaid findings of fact, the Applicant also failed in proving that it was the Respondent who interfered with the Applicant's possession of the premises. The Respondent's version that the Applicant's possession of the premises was disturbed by the police is not far-fetched nor can it be found, on the papers, to be false. As a matter of fact, the video introduced by the Applicant showing the attendance of the police at the premises whilst the main gate was being welded shut lends credit to the version of the Respondent.

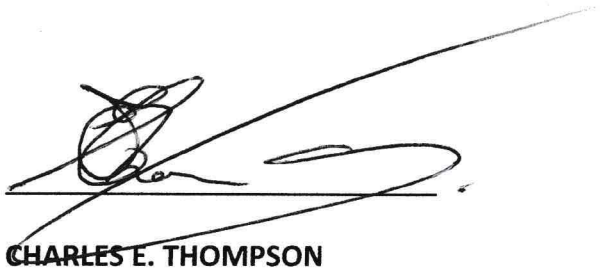
[24] On the evidence before me I cannot venture an opinion on the lawfulness of the police's alleged actions and, in the absence of a challenge thereto, there is no need for me to comment on the lawfulness or otherwise of the police's actions.

[25] The Respondent was unrepresented throughout these proceedings and I therefore need not consider the issue of costs.

[26] In the premises, I make the following order:

1. The Application is dismissed.

2. No order as to costs.



CHARLES E. THOMPSON

Acting Judge of the High Court

Gauteng Local Division

Appearances:

For the Applicant:	Adv. Yolandi van der Laarse Pretoria Society of Advocates Instructed by McKenzie Van Der Merwe & Willemse
For the Respondent:	In person
Date of hearing:	16 February 2022
Date of Judgment:	18 February 2022