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

**CASE NUMBER: 2023-075234
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
NOT REVISED**

In the matter between:

LE ROUX VAN NIEKERK KONSTRUKSIE (PTY) LTD

APPLICANT

AND

LUFUNO ABEL TSHITANGANO

FIRST RESPONDENT

MAITE BRIDGET TSHITANGANO

SECOND RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 11th of AUGUST 2023.

DIPPENAAR J:

[1] This is an urgent application in which the applicant sought restoration of its possession of an immovable property situated in the Serengeti Golf and Wildlife Estate,

owned by the respondents. The applicant's case is squarely predicated on the *mandament van spolie*.

[2] The background facts are not contentious and were common cause. The parties concluded a JBCC construction contract in terms of which the applicant performed construction work for the respondents pertaining to the building of a house on the property. The applicant established itself on site during June 2020 and remained in undisturbed possession thereof until the events which triggered the application occurred. Contractual disputes have arisen between the parties.

[3] The respondents opposed the application on various grounds. They disputed the urgency of the application on the basis that any urgency was self-created, given that the trigger event was the expiry of the contract on 5 July 2023, after which the applicant should have vacated the property.

[4] The respondents argued that the applicant failed to satisfy the elements of spoliation as the unlawfulness and factual dispossession aspects were lacking. Reliance was extensively placed on the contents of the JBCC contract in opposing the application. The respondents contended that there was no dispossession as they had terminated the contract and never took possession of the property. It was further argued that the principal agent in terms of the JBCC agreement was in possession of the property rather than the respondents and that the application should thus be dismissed with costs. The respondents further argued that the principal agent and the quantity surveyor should have been joined to the application.

Urgency

[5] According to the applicant, on 26 July 2023, the first respondent attended the property to inspect the building progress. He spoliated the applicant by removing the applicant's keys and locking the applicant's representatives off site, ordering them to

leave immediately and to remove all enclosures and noticeboards to the perimeter of the site. The applicant had been exercising possession of the property by exercising complete and unfettered access and possession of the site and retaining keys to the newly constructed house and surrounding enclosures.

[6] The respondents baldly denied the applicant's version but did not meaningfully grapple with the applicant's version or present any countervailing evidence. Instead, it was contended that the applicants did not present corroborating evidence such as photographs of the events which occurred and that there was no evidence who forcefully removed the applicant. That argument does not pass muster.

[7] The respondents' bald denial does not create any *bona fide* dispute¹ regarding the applicant's version of the events which transpired. The applicant's evidence was corroborated by confirmatory affidavits and there is no reason to reject that evidence.

[8] The respondents' contention that urgency was triggered when the contract came to an end, also does not bear scrutiny, given the undisputed version of the facts.

[9] On a conspectus of the facts, I am persuaded that the applicant has illustrated that the application is urgent and that it will not obtain substantial redress at a hearing in due course ². Moreover, the *mandament van spolie* is an extraordinary and robust possessory remedy of a speedy nature.³ The applicant acted with due speed in launching the application on 28 July 2023, after its demand for an undertaking by the respondents to restore its possession on 27 July 2023 was not acceded to and complied with the relevant practice directives pertaining to urgent applications.

Has the applicant met the requirements for spoliatory relief?

¹ J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para [12]

² East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

³ Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd 2010 (2) SA 59 (N) para 13

[10] It is trite that the *mandament of spolie* is not concerned with the underlying rights to claim possession of the property concerned, but seeks only to restore the *status quo ante*. It does so by mandatory order, irrespective of the merits of any underlying dispute regarding the rights of the parties. The essential rationale for the remedy is that the rule of law does not countenance a resort to self-help⁴.

[11] Inasmuch as the respondents rely on the underlying contractual provisions and issues between the parties, such reliance is thus misconceived.

[12] The applicant is required to show peaceful and undisturbed possession which has been unlawfully ousted.⁵ There are two requirements that must be met. First, the party seeking the remedy must at the time of the dispossession have been in possession of the property. Second, the dispossessor must have unlawfully deprived it of possession without its consent. Unlawful in this context pertains to possession without the applicant's consent or without due legal process.⁶

[13] The assumption underpinning the granting of the remedy is that the property exists and is capable of being restored to the possession of the party that establishes entitlement thereto.⁷

[14] It was undisputed that the applicant has been in peaceful and undisturbed possession of the property since June 2020, when the applicant established itself on site in terms of the contract. It exercised possession through its site manager and employees. It was undisputed that the first requirement has thus been met.

⁴ Monteiro and another v Diedericks 2021 (3) SA 482 SCA paras [14]-[17] and the authorities cited therein.

⁵ Yeko v Qana 1973 (4) SA 735 A at 739 G

⁶ Npai v Vereeniging Town Council 1953 (4) SA 579 (A); George Municipality v Vena 1989 (2) SA 263 (A)

⁷ Monteiro para [17]

[15] Regarding the second requirement, the respondents relied on *Monteiro*⁸ in arguing that the property is not presently in the possession of the respondents but in the possession of a bona fide third party, the principal agent, being the practical position in terms of the JBCC contract.

[16] The reliance on *Monteiro* does not avail the respondents for various reasons. Considering the present factual matrix, *Monteiro* is distinguishable on the facts. Moreover, as explained in *Monteiro*⁹, our courts have from an academic perspective held different views as to whether the remedy may be granted in circumstances where the property is no longer in possession of the spoliator but is held by a third party. It is thus by no means clear that even if possession has been given to a third party, the remedy is not competent. On the present facts, it cannot be concluded that the order, if granted, would not be effective, enforceable and immediately capable of enforcement.¹⁰

[17] The respondents further did not make out any proper case that as a fact, restoration of possession was impossible.¹¹ The undisputed facts point to the contrary position. In addition, the principal agent would not have been ignorant of the relevant facts and the contractual disputes between the parties.

[18] It can moreover not be concluded that possession of the property has passed to the principal agent or that the respondents are not in possession of the property. The respondents as owners of the property, have free and unfettered access thereto and ultimately control the property. The fact that the first respondent ordered the applicant off the property, renders credence to the contention that the respondents were indeed in possession and control of the property, albeit not on an exclusive basis. It was not contended by the respondents that the principal agent was in exclusive control and possession of the property. The respondents rather relied on a theoretical construct of

⁸ Fn5 supra

⁹ Paras [19]-[21]

¹⁰ Monteiro paras [23]-[24]

¹¹ Monteiro para [85]

the terms of the JBCC contract, which ignores the relevant facts and delves into the underpinning contractual rights and obligations of the parties.

[19] The undisputed evidence established that the possession of the site was not exclusive to any one party, including the respondents as owners, the applicant as contractor, the specialist team involved in the construction, including the quantity surveyor and principal agent, and the various contractors performing work on the property, throughout the period of the applicant's possession. The various contractors and professionals involved in the construction of the respondents' residence were acting in a representative capacity.

[20] That is also dispositive of the joinder issue raised by the respondents. The point lacks merit and the principal agent and quantity surveyor do not have a direct and substantial interest in the application, requiring their joinder to the application.

[21] In addition, it was not contended by the respondents that it was impossible for possession to be restored to the applicant. On the facts, it cannot be concluded that the order cannot be carried into effect, if granted¹². The converse is true.

[22] It cannot on the facts be concluded that the first respondent did not unlawfully deprive the applicant of possession of the property. The applicant's version is destructive of the proposition that it elected to vacate the property based on the termination of the JBCC agreement. It was undisputed that the applicant remained in possession well after the termination date and until the events which occurred on 26 July 2023.

[23] It was not the respondent's case that its conduct was sanctioned by a court order and it cannot be concluded that the applicant agreed to vacate the property. On the

¹² Monteiro para [21]

respondents' version, it was simply disputed that the events of 26 July 2023 described by the applicant, took place.

[24] The contents of the JBCC contract as to what the theoretical contractual position would have been does not override the actual factual position and does not avail the respondents. As stated, it is trite that the underpinning merits of a party's possession is irrelevant to determining spoliatory relief and the contents of the JBCC contract as to possessory rights are irrelevant to the present enquiry.

[25] The defences raised by the respondent in essence relate to the merits of the disputes between the parties and the contractual rights and obligations in terms of the JBCC agreement. The approach adopted by the respondent is in my view misconceived as the underlying disputes are not relevant to the relief sought.

[26] For the reasons advanced, I conclude that the applicant has met the second requirement of the *mandament of spolie*. Considering all the facts, I further conclude that the applicant has made out a proper case for relief.

[27] There is no reason to deviate from the normal principle that costs follow the result. The applicant sought costs on the scale as between attorney and client on the basis that the conduct of the respondents was unlawful. I am however not persuaded that such an order is warranted.

[28] I grant the following order:

1. The forms and service provided for in the Rules of Court are dispensed with and this application is to be heard as one of urgency in terms of Rule 6(12);
2. The respondents are directed to forthwith restore to the applicant undisturbed, free, vacant possession and access to the property described as:-

ERF [...] WITFONTEIN EXT 43, TOWNSHIP, PROVINCE OF GAUTENG, MEASURING 1226 SQUARE METRES IN EXTENT, HELD UNDER DEED OF TRANSFER NO T64947/2021 situated within the Serengeti Golf and Wildlife Estate (“the property”).

3. Should the respondents fail to comply with the order in 2 above, then the Sheriff of the Court and the South African Police Services are authorised to take all steps and measures necessary to provide the applicant with possession and access to the property.
4. The Respondents are directed to pay the costs of the application, jointly and severally, the one paying, the other to be absolved.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

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| DATE OF HEARING | : 9 August 2023 |
| DATE OF JUDGMENT | : 11 August 2023 |
| APPLICANT’S COUNSEL | : Adv J C Viljoen |
| APPLICANT’S ATTORNEYS | : Cronje Attorneys Inc |
| RESPONDENT’S COUNSEL | : Adv O Mokgotho |
| RESPONDENT’S ATTORNEYS | : Lekgwhati Attorneys |