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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 14780/ 2021

REPORTABLE:**NO**

OF INTEREST TO OTHER JUDGES:**NO**

REVISED

Date: **19 April 2021**

In the matter between:

SALENTIAS TRAVEL AND HOSPITALITY CC

Applicant

and

DEY STREET PROPERTIES (PTY) LTD

First Respondent

THE TSHWANE METROPOLITAN MUNICIPALITY

Second Respondent

JUDGMENT

NYATHI, AJ:

INTRODUCTION

[1]. The Applicant applies on an urgent basis for a spoliation order as well as final Interdictory relief against the First Respondent. The Second Respondent, a Municipality is cited only in relation to its role as the Local Authority and custodian of building legislation, no relief is sought from it.

[2]. The construction of a four - story staircase, by the First Respondent, who is the landlord, right in front of the Applicant's business shop-front, gave rise to the Spoliation Application.

[3]. Through the urgent interdictory relief, the Applicant seeks an order that the Respondent be interdicted from continuing with any construction activities on a property situated at [...]Street, [...], Pretoria, Gauteng, in the absence of an approval obtained from the municipality in terms of Section 4(1) of the National Building Regulations and Building Standards Act, 103 of 1977 ("the Act").

BACKGROUND

[4]. The Applicant conducts the business of dry cleaner and laundromat from the premises situated at [...], [...]Street, [...], Pretoria, Gauteng ("the premises") and has done so successfully since 2013.

[5]. The First Respondent has recently acquired the premises as landlord. The First Respondent commenced with extensive construction on the property without building plans or the Applicant's permission. The effect of the construction is that the Applicant is no longer able to properly conduct business from its

premises due to the illegal construction activities of the First Respondent. The Applicant alleges that access to its shop front has partially been blocked-out due to the "colossal" staircase being constructed.

THE LEGAL POSITION:

Urgency

[6]. Spoliation is inherently urgent. However, the procedure in rule 6 (12) is not there for the taking, it needs proper substantiation beforehand. "The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking". Notshe AJ said in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/ 33767) [2011] ZAGPJHC 196* (23 September 2011) in paras 6 and 7 as follows:

'The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress. It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.'"¹

¹ Quoted per Wepener J, In re: several matters on the urgent court roll 2013 (1) SA 549 GSJ

The requirements for a spoliation order:

[7]. The mandament van spolie or spoliation order is available where a person has been deprived unlawfully, entirely or in part of his or her possession of movable or immovable property ². Such deprivation is termed spoliation.

[8]. The remedy is based on the maxim "*spoliatus ante omnia restituendus est*" - the spoliated person must be restored to his or her former position before all else, i.e. before any question of title can be considered. ³ In *Andries van der Schyff v Webstrade Inv No 45 2006 (5) SA 327 (W)*⁴ the respondents sought to argue (to no avail) that the applicants were 'unlawful occupiers' in terms of section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[9]. **Firstly**, the plaintiff must allege and prove that he or she was in peaceful and undisturbed possession of the property. ⁵ The causa of the plaintiff's possession is irrelevant, and it is also irrelevant whether the defendant has a stronger right or claim to possession. Actual physical possession, and not the right, to possession, is protected.⁶

[10]. **Secondly**, the applicant must allege and prove that he was unlawfully deprived by the defendant of his possession. The "unlawfulness" element is satisfied where the dispossession is without the plaintiff's consent or without due legal process.

THE FINAL INTERDICTIONARY RELIEF SOUGHT

[11]. In terms of the Act and more specifically Section 4(1) thereof it is specifically stated that no person shall without the prior approval in writing of the Local

² Wille's Principles of South African Law 9th Edition p454.

³ Wille p454 referring to Voet 41.2.16, 43.17.7. referred to in

⁴ Per Tshiqi J (as she then was) At 332

⁵ Kgosana v Otto 1991 (2) SA 113 (W)

⁶ Yeko v Qana 1973 (3) SA 735 (A)

Authority in question, erect any building in respect of which plans, and specifications are to be drawn and submitted in terms of this Act.

[12]. The Act defines inter alia "building" as:

"Sub - Article (1) i

iii) (a) any other structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, erected or used for in connection with.."

[13]. It can thus not be disputed that the building activities by the Respondent falls within the ambit of the definition of building and as such approved building plans is required as prescribed in Section 4(1) of the Act.

[14]. On being challenged by the applicant in its founding affidavit the First Respondent fails to provide the Applicant with proof that it is in fact in compliance with the Act, more specifically that approved Building plans exists for the construction activities.

[15]. In terms of the Act and more specifically Section 4(1) thereof it is specifically stated that no person shall without the prior approval in writing of the Local Authority in question, erect any building in respect of which plans, and specifications are to be drawn and submitted in terms of this Act.

[16]. The First Respondent also does not gainsay the serious allegations of illegal conduct in the construction.

ISSUES TO BE DECIDED

[17]. The issues to be decided in this matter are:

- 17.1 whether or not the applicant has made out a case for the matter to be heard as one of urgency; and if yes,
- 17.2 whether the requirements for spoliation were proved; and
- 17.3 whether the requirements of an interdict have been met, on a balance of probabilities, to be granted the relief sought.

[18]. The applicant states in its affidavit that the construction is a hindrance to its normal business operations and poses a safety hazard in that fire escape routes are blocked. Applicant submits that it will suffer irreparable prejudice should the relief as requested not be obtained on an urgent basis. The respondent denies that the matter is in any way urgent. Respondent's Counsel submitted that the respondent is exercising its contractual rights to effect improvements to its property and that the applicant was at all material times aware of this provision in the lease agreement. What is common cause between both parties is that the building works have commenced and are ongoing. Photographs of the works were presented, and submissions made on their strength during the hearing.

[19]. The respondent raised as a defence the fact that there was a rental dispute over rental payments between the parties and that therefore, the applicant cannot succeed due to its defective title over the premises.

[20]. As regards the issue of official approved building plans as an issue of contention between the parties, it is worth recording that none were presented. It was not even argued that same existed. The issue to be decided here is whether the applicant has a clear right to the interdictory relief it seeks. If the respondent is acting in contravention of the Building Standards Act, and in so doing prejudices the applicant, then it follows that the applicant has a right to seek relief based on the same statute.

[21]. Is the harm irreparable ? The answer lies in the fact that the activity complained of is a structure forming part of a building, and obviously permanent if completed.

CONCLUSION

[22]. A perusal of the applicant's founding affidavit reveals a clear situation of urgency over which the applicant has no control at this moment. I am satisfied that the applicant has made out a case for the matter to be dealt with as one of urgency.

[23]. Relief by way of the *mandament van spolie* is rarely initiated by way of action proceedings. This is due to the inherent urgency of such matters⁷. "In view of the facts that the merits of the plaintiff's possession and the defendant's right to possession are not justiciable in proceedings for a mandament van spolie, there are no defences available which do not amount to a denial of the plaintiff's allegations"⁸.

[24]. The only inference to be drawn from the respondent's failure to provide the approved building plans is that the respondent is acting in contravention of Section 4(1) of the Building Standards, which states that: "No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this act." The applicant's application for interdictory relief should also succeed.

Accordingly, I make the following order:

⁷ Reck V. Mills 1990 (1) SA 751 (A)

⁸ LTC Harms – Amler's precedents of pleadings (5ed); Willowvale Estates CC v Bryanmore Estates Ltd 1990 (3) SA 954 (W)

1. That the First Respondent with immediate effect, restores the Applicant's access to its business premises situated at [...], [...], [...], Pretoria , Gauteng by removing or demolishing the staircase which has been erected directly in front of the entrance to the said business premises.
2. That the First Respondent is interdicted and restrained from proceeding with any building work and construction activities on the property situated at [...], [...], Pretoria, Gauteng until such time as approval is obtained from the Second Respondent in terms of Section 4(1) of the National Buildings Regulations and Building Standard Act, Act 103 of 1977.
3. That the First Respondent is ordered to pay the Applicant's cost on an attorney and client scale.

JS NYATHI

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

HEARD ON:

8th March 2021

DATE OF JUDGMENT:

19th April 2021[

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ADV DR DU TOIT

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