In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 6414/21

In the matter between:

P.M **Applicant**

and

R.M **First Respondent**

G.M.M **Second Respondent**

Date of Hearing: *22 November 2021*
Delivered Electronically: *08 February 2022*

JUDGMENT 08 FEBRUARY 2022

LEKHULENI J

INTRODUCTION

[1] This is an application for mandament van spolie. The applicant brought an urgent application against the two respondents for the return of a 2019 Range Rover to her possession and other movable assets which were in the vehicle when she was dispossessed of same. Among others, the applicant also seeks an order for the return of her Mont Blanc sunglasses and the sum of R3 750 which were allegedly in the vehicle when she was disposed of the vehicle. Applicant also seeks a costs order

against both respondents on an attorney and client scale and for disbursements in respect of travelling and accommodation.

FACTUAL BACKGROUND

[2] The applicant and the first respondent are married to each other out of community of property and their marriage is still in subsistence. One minor child was born in the marriage and the child is in the care of the applicant. The second respondent is the father in law of the applicant. It is alleged that the marriage relationship between the applicant and the first respondent has broken down irretrievably and divorce proceedings for the dissolution of their marriage are pending in the Durban High Court.

[3] On 05 August 2019 the second respondent purchased a Range Rover in terms of a hire purchase agreement with Wesbank. At the time this vehicle was purchased, the first respondent and the applicant still resided together as husband and wife. According to the applicant, it was agreed that the second respondent would purchase this vehicle for her as the first respondent did not qualify to buy her a car. The applicant contends that her BMW was traded in when this vehicle was purchased. It was subsequently delivered to her with personalized registration plates PAROSHA – ZN. The applicant further contends that the vehicle in question was given to her as a donation.

[4] The applicant avers that since she took delivery of the vehicle it has remained in her possession for her exclusive use and was for all intents and purposes

regarded as hers. After divorce proceedings were instituted and the marriage relationship between the parties became acrimonious, the first and the second respondent demanded the return of the vehicle from her. The applicant refused to return the vehicle and asserted that this was her only mode of transport. In addition, her erstwhile vehicle was traded in for the Range Rover.

[5] In February 2021 the applicant relocated to Cape Town taking the vehicle with her. She had one key for the vehicle and the respondents had the spare key. The applicant contends that the first and the second respondent threatened on several occasions to institute proceedings against her in the High Court to recover the vehicle but never did.

[6] On 14 April 2021 at approximately 09h00, she parked the vehicle at Tyger Valley Mall in Bellville, Western Cape. She later received a text message from the first respondent to the effect that the second respondent has picked up the vehicle (the Range Rover) that belonged to him. The text message went on to say that the second respondent also opened a case against the applicant and that whatever belongings that she left in the car would be returned to her. On her return to the place where she parked the vehicle, indeed she noticed that the vehicle was gone. She believed that the respondents colluded with each other to remove the vehicle from her possession because the first respondent had the spare key for the vehicle without which it would not have been possible to remove the vehicle.

[7] The applicant asserts that when the vehicle was taken from her she was in peaceful and undisturbed possession of it. With the vehicle, the following items were

also taken: a child's car seat; a Pram; licensing documents, including the applicant's ID document and driver's license; packets containing groceries; Mont Blanc sunglasses worth approximately R15 000; cash in the amount of R3 750; house keys; remote control for her residence and her prescription glasses.

[8] Prior to seeking relief in this court, the applicant invited the first and the second respondent to cure their act of spoliation by returning the vehicle to her and there was no positive response forthcoming from the respondents. As a result, on 14 April 2021 the applicant instituted this application on an urgent basis for an order reinstating her possession of the vehicle. On 16 April 2021 the respondents served a notice of intention to oppose and the application was postponed to the 30 April 2021 for the filing of relevant affidavits.

[9] The relevant affidavits were filed albeit out of time and on 30 April 2021, the parties reached an agreement to the effect that the respondents would return the 2019 Range Rover to the applicant no later than Wednesday the 05 September 2021. The parties also agreed that the respondents would ensure that the child's car seat, pram, applicant's student card and documents, applicant's prescription spectacles and applicant's remote control devices and house keys would be returned to the applicant no later than Monday 03 May 2021. The return of the identity document, drivers licence, Mont Blanc sunglasses and cash in the amount R3 750 as well as costs stood over for later determination as the parties could not reach a settlement on these issues. The matter was then postponed to the 22 November 2021 for argument on the remaining issues in dispute.

ISSUES FOR DETERMINATION

[10] What this court is enjoined to consider in this matter is the return of the applicant's Mont Blanc sunglasses, the amount of R3 750 as well as costs.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

Impermissible material in the applicant's heads of argument

[11] At the hearing of this matter, the respondent's counsel argued that paragraphs 6 to 14 of the applicant's heads of argument and the annexures thereto consists entirely of material which was not included in any of the affidavits filed of record. She contended that the alleged damages to the vehicle supposedly alleged by the applicant's counsel in his heads of argument did not form part of the three set of affidavits exchanged between the parties. She implored the court to disregard same.

[12] The applicant's counsel submitted that although the vehicle was returned, it was retuned in a damaged state in that the windscreen was cracked. Counsel contended that the mandament van spolie envisages not only the restitution of possession but also the performance of acts, such as repairs and rebuilding, which are necessary for the restoration of the status quo ante. Despite attempts to contact the first and second respondent's legal representatives to have the motor vehicle's windscreen repaired, alternatively replaced, so the argument went, no response was forthcoming. A quote from PG Glass was attached to the applicant's heads of

argument to the effect that it will cost R15 642, 30 to repair the windscreen. In addition, it was the applicant's contention that although the Range Rover was returned, it was returned with the registration number plate changed to NU 92263 and not PAROSHA-ZN as it was before the spoliation.

[13] It is trite that the purpose of the *mandament van spolie* is to restore unlawfully deprived possession at once (*ante omnia*) to the possessor in order to prevent people from taking the law into their own hands. Its object is merely to restore the *status quo ante* the illegal action. The *mandament van spolie* is a possessory remedy aimed at ensuring that no man takes the law into his own hands. *Makowitz v Loewenthal* 1982 (3) SA 758 (A). If he does so, the court will summarily restore the status *quo ante* as a preliminary step to any investigation into the merits of the dispute.

[14] It is well established in our law that the court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have done) before the spoliation took place. *Top Assist 24 (Pty) Ltd T/A Form Work Construction v Cremer and Another* [2015] 4 AII SA 236 (WCC) (28 July 2015) at para 33. It merely enquires whether there has been spoliation or not, and if there has been, it restores the status quo ante. *Rosenbuch v Rosenbuch and Another* 1975 (1) SA 181 (W) at 183 A-B. In *Makowitz v Loewenthal* (*supra*) at 767 F-G, the court held that a spoliation order is a final determination of the immediate right to possession; it is the last word on the restoration of possession *ante omnia*.

[15] In this matter, the applicant also seeks an order that the respondents be ordered to repair the cracked windscreen and to return the car with the original number plate. I have some difficulty with the approach of the applicant. The applicant is making up her case in this respect in the heads of argument. The applicant attached to her heads evidential materials which were not included in any of the affidavits exchanged and filed of record. The applicant did not prepare a supplementary affidavit or apply for leave to file further affidavit in support of her assertion that the vehicle was returned to her in a damaged state.

[16] Furthermore, the allegations that it will costs R15 642, 30 to repair the windscreen of the vehicle was only dealt with in the applicant's heads of argument. In my view, heads of arguments are not evidence and the applicant's heads of argument cannot therefore be regarded as evidence. In my opinion, it is impermissible for the applicant's counsel to give evidence from the bar under the guise of heads of argument as he purports to do in this matter. To this end, I fully share the views expressed in *Maboho v Minister of Home Affairs* 2011 JDR 104 (LT) at para 13 where it was stated:

> 'Argument is not evidence and it is not given under oath. It is merely a persuasive comment by the parties or legal representatives with regard to questions of fact or law. Argument does not constitute evidence, and cannot replace evidence.'

[17] It must be stressed that in deserving cases, the court can order complete restoration of the status quo ante. However, in this case, the alleged damages to the merx were not presented before this court under oath to constitute evidence as

required by the rules of court. The respondents were also not called upon to reply to these allegations under oath. In my view, the respondents would be severely prejudiced if the court were to consider the purported documents that the applicant's counsel seeks to introduce through his heads of argument. In my judgment, the applicant failed to plead and place evidence before this court that the vehicle was damaged when it was returned to her. This leaves me with the main issue concerning the return of the sunglasses and cash as claimed in the application.

Should the respondents be ordered to return the Mont Blanc Sunglasses and R3 750 cash?

[18] The applicant seeks relief for the return of the Mont Blanc sunglasses and the return of R3 750 which she alleges were in the vehicle when it was removed from her possession by the respondents. The respondents deny that these items were in the vehicle when it was removed from the applicant. It is trite that in a case such as this, a final relief can only be granted if the facts as stated by the respondent, together with the facts alleged by the applicant that are admitted by the respondents, justify such an order. See *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[19] It is incumbent upon the applicant to satisfy the court on a balance of probabilities that she is entitled to the relief sought by proving that she was indeed in peaceful and undisturbed possession of the items in question and that the respondent wrongfully dispossessed her of those items. The applicant must satisfy the court on the admitted facts that she is entitled to the relief sought. As explained

above, the respondents deny that the items in question were in the motor vehicle when the second respondent took the vehicle at Tyger valley Mall. Both respondents in their answering affidavits clearly and concisely contradicted the averments of the applicant and denied that they dispossessed the applicant of the disputed items as alleged or at all.

[20] It was argued on behalf of the applicant that the respondent conceded in annexure 'F' attached to the replying affidavit that the Mont Blanc sunglasses and the cash amount of R3 750 were couriered to the applicant. The alleged concession is based on the email that was written by the respondent's erstwhile counsel in which she stated that these items were sent back to Cape Town via courier services. In my view, the applicant's reliance on this email is misplaced and cannot be sustained. It is evident from the exchange of prior emails that when this email (annexure F) was written, the parties were engaged in settlement negotiations. The said settlement negotiations led to the return of the vehicle in question and to the order which was obtained by consent on 30 April 2021.

[21] Most importantly, it is a fundamental principle of our law that a statement which forms part of genuine negotiations for the compromise of a dispute is inadmissible as privileged. This is so, irrespective of whether or not the words without prejudice have been used. In *Venmop 275 (Pty) and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ) the court noted that there are two essential requirements. First, is the existence of the dispute. Second, is that the statement is part of negotiations for the settlement or compromise of such dispute. See *Millwards v Glasser* 1950 (3) SA 547 (W) at 554. It is my considered view, the

email marked ‘annexure F’ to the replying affidavit formed part of settlement negotiations and it is privileged and inadmissible.

[22] I must also stress the fact that the suggestion by the applicant that the respondent conceded that they are in possession of the items in question is misplaced and too opportunistic. This is borne out by the fact that when the order was granted by agreement restoring possession of the vehicle to the applicant, the issue relating to the Mont Blanc sunglasses as well as R3 750 remained in dispute and was postponed to the 22 November 2021 for argument. It does not make sense that the parties could agree on a date to argue an issue that had been conceded by the respondents. For all intents and purposes, the applicant was well aware that the respondents disputed possession of the items in question. In my view therefore, it is glaringly obvious that the erstwhile counsel of the respondents was mistaken when she stated in annexure F that these disputed items were returned to the applicant. This was also clarified by the respondents in their unopposed application for leave to file further affidavits.

[23] Notably, in that application, the applicant did not dispute that the said concession was an error on the part of the respondents’ erstwhile counsel. To this end, I agree with the view expressed by the respondent’s counsel that annexure F, even if it was admitted, is not an unequivocal concession that the respondents dispossessed the applicant of the disputed items. Furthermore, the respondents denied vehemently that the disputed items were in the vehicle when the applicant was disposed. Their denial is not unsupportable or far-fetched.

[24] It should be borne in mind that upon dispossessing the applicant, the respondents immediately undertook to return the applicant's possessions that were in the vehicle. The applicant conceded that she was contacted by a courier company at the respondents' instance to return the items they found in the vehicle. She informed the Courier services that she was legally represented and she never heard from them again. The respondents returned all the items they found in the vehicle on their own volition and they denied rigorously that they are in possession of the disputed items. On a conspectus of all the evidential material place before me, I am of the view that their denial is not implausible. In my view, the applicant's application for the return of the two items stands to be dismissed. This leads me to the issue relating to costs.

Should the respondents be ordered to pay costs on an attorney and client scale?

[25] As far as costs are concerned, it is a trite principle of our law that a court considering an order of costs exercises a discretion. *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC). The court's discretion must however be exercised judicially. *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A. Costs are ordinarily ordered on a party and party scale. In the exercise of its discretion, and only in exceptional circumstances, a court may grant costs on a punitive scale. The exercise of that discretion depends upon the facts and circumstances of the matter.

[26] At the hearing of this application, the court was informed that the respondents have tendered the applicant's party and party costs of the application. The applicant in her notice of motion sought an order for costs on an attorney and client scale including costs for disbursements incurred for travel and accommodation. It was argued on behalf of the applicant that due to the respondents' unlawful actions by taking the law into their own hands, an award of punitive cost is justified in the circumstances which includes all reasonable disbursements.

[27] It is trite in our law that attorney and client costs are used by the court to mark its disapproval and show its displeasure against the litigant's objectionable conduct. There must be special grounds in the conduct of the litigation that warrants such a costs order. See *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 655C – 655J.

[28] It must be stressed that an award of attorney and client costs will not be lightly granted, as the courts look upon such orders with disfavour and are loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have. See *Ridon v Van der Spuy and Partners (wes-Kaap) Inc* 2002 (2) SA 121 (C) at 140C. I have considered the conduct of the parties in this matter and am not persuaded at all that the conduct of the respondents in these proceedings is reprehensible or objectionable to attract the court's displeasure. In my view, there are no exceptional circumstances in the conduct of these proceedings that warrants an order of costs on an attorney and client scale.

[29] This leads me to the last issue for determination which is the applicant's prayer that the respondents be ordered to pay her disbursements in respect of travelling and accommodation, inclusive of her instructing a correspondent attorney. The respondents' counsel argued that the applicant resides in Cape Town and from her notice of motion it appears that the applicant instructed an attorney in Durban who in turn instructed two correspondent attorneys, one in Worcester and one situate within the seat of the court. It was contended that the applicant should ordinarily not be permitted to recover costs for employing an attorney in Durban whilst she resides in Cape Town.

[30] In my view, each case must be considered in the light of its own merits and circumstances. I agree with the principle that the existence of very strong reasons is a prerequisite for the allowance of fees for the attendance of an attorney not practicing at the seat of the court. In my opinion, the circumstances of this case are novel. The parties are engaged in an acrimonious divorce proceedings. There are a number of correspondences that have been exchanged between the applicant and the respondents' legal representatives who are all based in Durban. Some of the correspondences relate to the vehicle forming the subject matter of this litigation and the divorce proceedings pending between the parties. Both parties wisely instructed their attorneys based in Durban to assist them in these proceedings.

[31] The taxation of counsel's fees is a matter for the taxing master to deal with in the exercise of his discretion and it is not for this court to interfere with that discretion. However, taking into account the totality of all the evidence in this case, I am of the view that the applicant was justified to employ his attorney in Durban

notwithstanding that she resided in Cape Town. In my view, the applicant should be indemnified of these costs including the travelling and accommodation costs of his Durban attorney. Notwithstanding the above, the costs incurred by the Worcester correspondent in my judgment, must be borne by the applicant.

ORDER

[32] Consequently, the following order is granted:

32.1 The applicant's application for the return of the Mont Blanc sunglasses and the cash amount in the sum of R3 750 is hereby dismissed.

32.2 The respondents are ordered to pay the applicants' costs on a party and party scale as taxed or agreed jointly and severally the one paying the other to be absolved.

LEKHULENI J

JUDGE OF THE HIGH COURT

WESTERN CAPE HIGH COURT

APPEARANCES

For the Applicant	Advocate A. Samuels
Instructed by	Pravda & Knowles Attorneys C/O Van der Spuy Attorney – Cape Town (ref: Mr. S. Macris)
For the 1st and 2nd Respondent	Advocate A. Du Toit
Instructed by	Dianne Moodley Attorney C/O De Klerk & Van Gend Attorneys (ref: Ms R Visser)