

REPUBLIC OF SOUTH AFRICA



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

Case Number: 4979/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
24 APRIL 2023	
DATE	SIGNATURE

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE NOMVULA TRUST Applicant

and

LANGLAAGTE TRUST & CAR HIRE Respondent

NEUTRAL CITATION: *The trustees for the time being of the Nomvula Trust v Langlaagte Trust and Car Hire* (Case No: 4979/2022) [2023] ZAGPJHC 362(24 April 2023)

ORDER

[1]. The application is dismissed with costs on the scale as between attorney and client.

JUDGMENT

Fisher J

- [1] The applicant, Nomvula Trust owned the immovable property which is the subject of the spoliation application before it was sold and transferred to the respondent. The property was sold by way of public auction in execution of a judgment contained by the erstwhile bondholder.
- [2] This is a spoliation application. The applicant claims that it was in peaceful and undisturbed occupation of the property and that it was spoliated by the respondent.

Legal principles

- [3] An applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. (See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C.)
- [4] In order to succeed in the application, the applicant had to establish that it was in peaceful and undisturbed possession of the property and that he was unlawfully deprived of that possession.
- [5] The Trust was previously an owner of the property and lost such ownership by way of execution. This has led to extensive litigation. Thus the Trust's version of events in this case must be seen against the procedural background and the prior litigious engagement of the protagonists in this matter.

Procedural background

- [6] The founding affidavit is made by Mrs Nomvula Jane Dube who is a trustee of the Trust. Her co-trustee is Mr Thabo Pandleton Mabete.
- [7] A main protagonist in this case and other matters which form the lengthy procedural background to the Trust's loss of ownership of the property is Mr Siphso Dube.

[8] Although Mr Dube was a trustee of the Trust and is the husband of the deponent these facts are studiously avoided in the founding affidavit. In fact, there is an attempt to cast Mr Dube as a person who is at a remove from the previous ownership of the property by the Trust.

[9] The Trust purchased the property in November 2006. The existing buildings on the land were demolished to make way for the construction of a new family home. Mrs Dube alleges that more than R15 million has been 'invested' in the property. An apparently independent valuation produced by the respondent suggests that the property has a current value of between R4 and R5 million.

[10] In 2007 a mortgage bond was registered on behalf of the Standard Bank. The applicant fell into arrears on the bond. Summary judgment was obtained by default.

[11] Mr and Mrs Dube on behalf of the Trust then embarked on an intensive process of litigation against the Standard Bank in relation to the judgment which process has spanned nearly a decade.

[12] The history of the litigation is alleged to be as follows:

- The judgment was handed down against the Trust in 2011.
- On 14 March 2012 the Trust brought an application for rescission. This application was subsequently withdrawn and costs tendered on an attorney and client scale.
- On 27 November 2012 there was an application to appeal the 2011 judgment.
- On 15 December there was a writ issued by the Standard Bank against movables of the applicant.
- On 03 June 2014 the application for leave to appeal was dismissed with costs on the attorney /client scale.
- In July 2014 the Sheriff attended on the property to execute the writ against the applicant's movables.

- On 09 July 2014 there were interpleader proceedings instituted by Mrs Dube.
- On 09 July 2014 the applicant brought an urgent application to set aside the writ against the movables. This was struck off the roll for non-appearance of the applicant.
- On 16 July 2014 Mrs Dube sought, in her personal capacity, to intervene as a defendant in the 2011 application.
- On 15 September 2014 Mrs Dube instituted action seeking that the 2011 judgment be declared void.
- On 10 March 2015 Mrs Dube's application for leave to intervene in relation to the 2011 judgment was dismissed with costs *de bonis propriis* against her attorney on an attorney/client scale. I will refer to as the 2015 judgment.
- On 31 March 2015 Mrs Dube brought an application for leave to appeal the 2015 judgment. This too was dismissed with costs *de bonis propriis* against the Mrs Dube's attorney.
- On 05 August 2015 Mrs Dube made application to the SCA for leave to appeal the 2015 judgment.
- On 17 September 2015 this application for leave to appeal was dismissed.
- On 1 October 2015 an application was brought for a stay of the writ against the movables. I will call this the stay application.
- On 26 February 2016 the stay application was dismissed.
- In May 2016 an application for leave to appeal the dismissal of the stay application was dismissed.
- On 07 June 2016 there was a petition to the SCA for leave to appeal the dismissal of the stay application. This was not proceeded with.

- On 01 August 2016 the Bank instituted a Rule 46 application for an execution order against the immovable property.
- On 08 May 2017 the execution order was granted.
- On 16 November 2017 there was an application by Mrs Dube in which relief was sought to the effect that section 15 of the Matrimonial Property Act be declared unconstitutional and that the 2011 judgment be set aside.
- On 21 November 2017 Mrs Dube sought leave to appeal the execution order. These proceedings were withdrawn.
- On 22 November 2017 the property was sold on auction in execution.
- On 27 November 2017 Mrs Dube delivered an application to declare the sale void and sought to interdict the transfer of the property to the respondent. The bank opposed the application. it was not persisted with.
- On 12 December 2018 the constitutional challenge in respect of section 15 was dismissed with costs.
- On 01 august 2019 the Bank was granted an order cancelling the 2017 sale in execution.
- On 22 October 2019 the applicant brought an application to interdict a further sale in execution. The application was struck off the roll for lack of urgency.
- On 11 December 2019 the property was sold to the respondent.
- On 06 August 2020 the property was registered in the Deeds office.
- On 12 august 2020 the applicant brought an urgent application seeking inter alia that the 2011 judgment be declared void. The application was withdrawn on the following day.

[13] Thus it is clear that the applicant and Mr and Mrs Dube embarked on unrelenting litigation since the 2011 judgment was handed down in a bid to stop execution

under the judgment. They appear to have failed in each endeavour. The respondent alleges that they are vexatious litigants. Yet in this application they make bald and sweeping allegations as to the lack of legitimacy of the process of execution. They studiously fail to address the arduous litigation processes.

[14] There is no case made out in this application for any setting aside of the order. Thus, the starting point of the inquiry is that the respondent is the owner of the property.

[15] It seems that the crusade of Mr and Mrs Dube has now been transferred to the respondent as new owner. I now move to deal with the parties' respective versions as to the alleged spoliation.

Facts relating to spoliation

[16] The applicant alleges it took occupation of the property after purchasing it in 2006. Central to the case is the allegation that it has retained such possession up until the date of the alleged spoliation on 10 June 2022

[17] It is alleged by the applicant that during April 2022 the respondent represented by Mr Anbun Naidoo (Mr Naidoo (snr)) was in contact with Mr Dube in efforts to settle the matter. This is put forward by the applicant in support of the fact that there were negotiations afoot and that the applicant was still in occupation during these negotiations.

[18] The applicant states that the home on the property is approximately 90% built. The respondent disputes this and attaches photographs. The photographs depict a substantially incomplete building.

[19] It is common cause that the property has a boundary wall and has three gates. The gate which is a focal point of this case is a pedestrian gate next to a guardhouse.

[20] It is not disputed this is the entrance that is used to enter and exit the property. The other two gates are a gate for vehicles to drive into and a service gate leading to the municipal refuse collection area. The applicant states that the latter gate

is sealed and that the applicant has keys to the driveway gate. There is however no indication that the applicant makes use of the driveway gate.

[21] The applicant alleges that the property has been cleaned and maintained at its instance. This is done, so it is alleged, by a certain Mr Sibusiso Mhlongo who is said to attend the property weekly to clean and maintain the property. There is no confirmatory affidavit provided as to this alleged cleaning and maintenance.

[22] As to the spoliation, Mrs Dube alleges that on 7 June 2022 it came to Mr Dube's attention that there were two gentlemen at the premises. The respondent had engaged their services to value the property at the instance.

[23] It is not disputed that Mr Dube then attended at the premises. It is alleged by the applicant that he was notified by a neighbour that there were people on the property. There was an altercation and he left the premises.

[24] He discovered on 10 June 2022 that security guards had been stationed at the property by the respondent and would not allow him access thereto.

[25] This application was then brought urgently but was struck off the roll due to lack of urgency.

[26] Mrs Dube studiously avoids making reference to the oppressive slew of litigation which has been brought by the Mr and Mrs Dube in relation to the property.

[27] Mr Naidoo (snr) the deponent to the answering affidavit alleges that his son Deheshan Naidoo (Mr Naidoo (jnr)) took occupation of the property on 18 November 2021 on behalf of the respondent. This was pursuant to the respondent taking transfer of the property.

[28] The respondent did not immediately attend to install a lock on the gate. The property was a vacant building site which was freely accessible. It is explained by Messrs Naidoo that it was not deemed necessary to secure the site as it was uninhabitable and had no water or electricity.

[29] The respondent conducts business which entails the buying of properties at auction sales and reselling same. The property in question was purchased on

this basis. Mr Naidoo (snr) is a member of the respondent and Mr Naidoo (jnr) assists him in the conduct of the business.

- [30] Eventually in January 2022 the respondent employed a locksmith to attend to the securing of the pedestrian gate. To this end, the respondent employed Mr Afzal Shaik of Fast n Furious Locksmith and Security systems. Mr Shaik confirms this. Also in evidence are WhatsApp messages between Mr Shaik and Mr Naidoo (jnr) which evidence that the property was secured by placing padlocks and chains on the pedestrian gate. There are also photographs of the locked gate taken and sent by Mr Shaik on completion of the job.
- [31] On 03 February 2022 Mr Naidoo (snr) went to the property with a friend and discovered that the gate and lock had been broken. The property was once more freely accessible. Mr Dube was on the property and appeared to be showing someone around. There was some discussion relating to the purchase of the property by Mr Dube. The discussion was such that Mr Naidoo(snr) anticipated that Mr Dube would send an offer to the respondent for the purpose of purchasing the property.
- [32] Thereafter, the respondent did not immediately attend to secure the property again. It seems that it was generally accepted that it was a building site and would not be unlawfully occupied.
- [33] Eventually, it was decided again by the respondent that the property should be secured. Mr Shaik was again employed. By this stage the gate had been removed from its hinges entirely. Mr Shaik had to hire a generator to enable him to weld the gate to the wall and reinforce the gate. The property was locked on 02 June 2022. Again, there are WhatsApp messages which confirm the locking of the property.
- [34] On 7 June 2022 the respondent employed Mr Muhammad Soni and Mr Nathan Foukx to obtain a valuation of the property. Messrs Soni and Foukx confirm that on attendance at the property they found that the pedestrian gate was broken again and the property was freely accessible.

- [35] It is admitted that Mr Dube arrived at the property and confronted Messrs Soni and Foukx, that there was a heated exchange and that Mr Dube left the property.
- [36] Once again, the respondent called the locksmith to secure the premises. It also engaged a security company to patrol the property.
- [37] The appointment of the security guards seems to have brought about a change in the approach of Mr Dube. The respondent alleges that he began to harass and attempt to intimidate the security guards. They would not allow him access.
- [38] The Mr Naidoo (snr) speculates that the breaking of the gate may have been the work of vandals. He, however, notes the failure of Mr Dube to deal with the respondents attempts at securing the property of which he (Mr Dube) was well aware
- [39] In reply it is admitted that there were locks applied to the premises by the respondent and the pedestrian gate broken. The background to the litigation and the transfer of ownership of the property is also not denied.
- [40] Mrs Dube baldly denies that the trust has failed in all the litigation over the past 11 years. She does not refer to any success but states vaguely that there 'are still live issues' relating to the property.

Discussion

- [41] It is an important feature of the case that there is direct and inconvertible evidence that after the respondent became the owner of the property it took steps to secure the property. The main point of entry to the property was the pedestrian gate.
- [42] It is significant that the applicant does not engage with the locking of the property in the founding affidavit. This securing of the premises by the respondent is obviously crucial to the narrative and the fact that it is absent from the founding affidavit is important to the determination of whether a case is made out for spoliation.

[43] It is not disputed that the property is a building site and that the partly completed structure is uninhabited and uninhabitable. It is common cause that no person occupied the property.

[44] The applicant contends for possession on the basis that it is alleged that the property is maintained at the instance of the applicant by Mr Mhlongo and yet there is no confirmatory affidavit of Mr Mhlongo.

[45] The failure by the applicant to engage properly with the applicant's ownership of the property and the litigation which forms an important background to the applicant's loss of ownership is of concern as is the attempt to obfuscate Mr Dube's part in such litigation.

Conclusion

[46] The applicant has not established that it held any form of possession of the property. All the evidence suggests that it was the respondent as owner of the property who has secured it.

[47] The version of the applicant bears no scrutiny when reference is had to the answering affidavit. The gaping holes in the case put up by the applicant cannot but detract from the credibility of the applicant's version. (see *Wightman t/a JW construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 SCA).

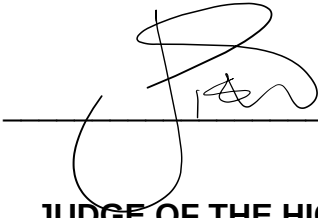
Costs

[48] The respondent seeks costs on the scale as between attorney and client. To my mind the disingenuity displayed by Mr and Mrs Dube merits the imposition of such costs.

Order

I make the following order:

The application is dismissed with costs on the scale as between attorney and client.



D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING: 11 October 2023

DATE OF JUDGMENT: 24 April 2023

APPEARANCES

For the Applicant: Adv. Mpshe SC

Instructed by: Innes Steenkamp Attorneys

For the Respondent: Adv. Van der Merwe

Instructed by: Kaveer Guinness Inc