

IN THE HIGH COURT OF SOUTH AFRICA  
NORTH GAUTENG HIGH COURT  
(PRETORIA)

~~DELETE WHICHEVER IS NOT APPLICABLE~~

(1) REPORTABLE: YES/NO. NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO. NO

(3) REVISED. NO

Case no.: 20010/11

12/4/2011

2011/04/12

SIGNATURE

In the matter between:

ARTHUR CHURCHILL FISHER

Applicant

and

THE BODY CORPORATE MISTY BAY

Respondent

JUDGMENT

LEGODI J,

1. On the 1 April 2011, I made an order in terms of prayers 1, 2 and 3 of the notice of motion which reads as follows:

- 1.1 *That the application be heard as one of urgency in terms of Rule 6(12) and that, strict compliance with the forms and services provided for in the Rules of the above court be accordingly dispensed with and that the matter be heard as one of urgency.*

- 1.2     *Restoring the applicant's possession of and access to the premises more fully described as Unit B, Misty Body Village (the premises).*
- 1.3     *That the respondent pays the costs of this application on the attorney and client scale".*
2.     The order was made in an urgent motion roll. I indicated at the time that reasons for the order would be given in due course.
3.     I now turn to give reasons for the order. Before that, it might be necessary to give a brief background.
4.     The respondent is a corporate body duly registered and incorporated in terms of the Sectional Tittles Act 95 of 1986 at Vaal Marina, Midvaal.
5.     It manages a residential village complex described as Misty Body Village situated in Gauteng.
6.     The applicant owns Erf 4194 (hereinafter referred to as the house), which falls within the village complex managed by the respondent. The house was registered in the names of the applicant on 4 December 2007.
7.     The applicant has been in peaceful and undisturbed possession of the house since 2007. Access to the village complex and thus to the respective house is controlled at the main gate that leads in and out of the village complex.

8. All owners of the houses within the complex are required to enter into a contract with the respondent in terms of which each one of them undertakes to pay a certain amount of money for rates and levies to the respondent.
9. The applicant is said to be in arrears in the amount of R4208.25. The applicant is said to have defaulted in effecting payments for such levies and rates to the applicant.
10. On 19 March 2011, the applicant attempted to gain access to the scheme by using his access disk at the security gate. It did not activate the security boom and as a result he was unable to gain access to the village complex.
11. When this matter was argued on 1 April 2011, counsel for the respondent argued to this effect: Firstly, that the applicant as a person was not barred from accessing the village complex. It was only his car that was barred or that access was only restricted when the applicant is using his vehicle. Secondly, he contended that the respondent was entitled to impose the restricted access based on the fact that, the applicant is in arrears in respect of rates and levies.
12. In the answering affidavit, the respondent raised the defence as follows:

*"8 AD PARAGRAPH 7*  
*I deny that the respondent unlawfully deprived the applicant of possession of the premises by failing to grant the applicant access to the common property. The common*

*property is enjoyed by the 242 owners of the scheme and not to exclusion of all others.*

*In terms of the Rule of Conduct of the Misty Body Corporate, the Body Corporate is entitled to suspend the access tags of any owner should the owner fail to make payment of the monthly levy which levy is used to maintain the common property.*

*The applicant's failure to make payment of his arrear levies entitled the respondent to suspend the applicant's tag, pending payment of his levy account."*

13. Clear from the quotation that the respondent takes the view that, because of its rule of conduct, it is entitled to suspend the access tag of the applicant based on the latter's failure to make payment of monthly levy.
14. Of course, during argument counsel for the respondent wished to take this point insofar as it related to the applicant's vehicle only. He however, found himself hard pressed to explain why "the vehicle". Insofar as it might have been intended to suggest that such an action did not amount to spoliation, I must immediately indicate it does.
15. The restriction has the following effect. Assuming that the applicant drives from his house to his place of employment, he would drive up to the security gate, then be forced to leave his vehicle there, because the security boom is deactivated for the applicant's vehicle. This has the effect that, he had to stop and park his vehicle at the gate and from

there, exits the gate either to look for a public transport or to arrange for transport to proceed to his place of employment.

16. Similarly, assuming that the applicant comes from outside the village complex driving his vehicle, because the security gate boom insofar as it relates to the applicant's vehicle cannot be activated, it would mean that the applicant must leave his vehicle outside the main security gate and thereafter walk to his house.
17. All of these suggest that the applicant could no longer have peaceful and undisturbed possession and or use of his vehicle. This is spoliation.
18. Coming back to the defence, counsel for the respondent referred me to clauses 17.11 and 19 of the standard agreement. They read as follows
 

*"17.1 The trustees operating on behalf of Body Corporate reserve the right to disconnect and lock out electricity supply or perform any other action deemed necessary to any owner or tenant where the owner, family or the owner tenant, friends or domestic staff continue to disregard these Rules and continue to do so after receiving written notice in this regard.*

*19. The purpose of a levy is to pay for electricity, effluent, maintenance, employees, salaries, garden etc. Failure to pay these accounts by the Body Corporate simply results in suspension of a service for which all suffer".*
19. It looks like I was referred to these clauses in search of a justification for the statement that was made in paragraph 6 quoted earlier in paragraph 12 of this judgment. The statement suggests the existence of Rule of Conduct in terms

of the respondent's Rules, which entitles the respondent to suspend the access tags of those owners who fail to make payment of the monthly levies. Of course, the two clauses referred to above, make no reference to such a "rule of conduct" for such entitlement, neither anywhere in the agreement. Even if it was in my view, the respondent would not have been entitled to spoliation without due process of the law. In other words, it could not have taken the law into its own hands as it is the case in the present case.

20. The respondent for its action, sought also to rely on what was said in the case of **De Beer v Zimbali Estate Management Association (PTY) Ltd and Another 2007 (3) SA 254 NPD** for its action.
21. I do not understand what was said in **De Beer's** matter as supporting the respondent's contention. An estate agent was residing within a complex managed and controlled by the respondent. She applied for unrestricted access to the whole complex based on spoliation as it impedes on her ability to access other areas within the complex for the purpose of viewing houses for sale. The issue was raised as follows in **De Beer's** case:  
  
"Whether the applicant had possession of the whole estate?"
22. The contention to the question was that, she had a key or disc allowing her access to the whole estate. That by giving her the disc, the respondents were in effect giving her possession of the whole estate.

- 22.1 The court found that the applicant failed to establish the sort of possession required for a *mandament* for the whole area of the estate, that is, for the remaining parts of the estate.
23. In the instant case, it is the possession and not just access that is in issue. Access that was required in De Beer's case was in respect of two parts of the beach estate. It was not aimed at retaining possession or use.
24. Access that is intended to retain possession or use of property should be found to be protected under the principle of *mandament van spolie*. Therefore, any limitation of access that would curtail the applicant's possession or use of the house and or motor vehicle should be found to amount to spoliation.
25. Before I made the order on 1 April 2011, I enquired from the applicant's counsel as to whether he had anything to suggest with regard to the order as prayed for in paragraph 2 of the notice of motion. I raised this in the light of the fact that, in the notice of motion, the applicant is not asking for unrestricted access, but solely, for restoration of the applicant's possession and access to the house or Unit B Misty Bay Village. Secondly, I raised the issue on the basis of the contention by the respondent's counsel. As I said, he sought to argue that the respondent was entitled to bar the applicant's vehicle in and out of the main security gate.
26. When I raised the issue as I did, one would have expected the applicant's counsel to want to amend the notice of motion to

reflect the applicant's protection with regard to the possession and or use of his vehicle in and out of the main gate. The applicant's counsel was adamant that the applicant did not as I understood him, want such amendment. It is because of his persistence to the prayers as set out in the notice of motion that I made the order as prayed for in the notice of motion.

27. Lastly, in the order that was made on 1 April 2011, the respondent was further ordered to pay the costs of the application on an attorney and client' scale.
28. Spoliation is a robust remedy. It is intended to secure the status quo, that is, to restore possession that was taken away by an action or conduct that amounted to one taking the law into his or her own hands.
29. It is a somewhat summary remedy, that is intended to express displeasure at taking the law into one's hands. The displeasure as I see it could also be expressed in making a punitive order for costs. In the present case, I have made such an order seen in the light of the respondent's insistence till up to the hearing of this matter that it was entitled to deny the applicant's access that was required for both possession of his house and in a somewhat way of his motor vehicle.
30. Before I conclude, I may mention something which I found to have been very strange. Immediately after the order was given on 1 April 2011, counsel for the respondent stood up to say his instructions were to appeal or to apply for leave to appeal.

31. I found this to have been uncalled for. The least the respondent's counsel could have done was to wait for reasons for the order as one would not expect a party to appeal or ask for leave to appeal before reasons are furnished. The nature of the dispute and order by this court did not warrant such an attitude.
32. Consequently, the order that was made on 1 April 2011, is hereby confirmed.

  
M F LEGODI  
JUDGE OF THE HIGH COURT

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