IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO: 6458/2022

In the matter between:

X-PHARM (PTY) LTD	**APPLICANT**
and	
EMOYAMED HOSPITAL (PTY) LTD	**FIRST RESPONDENT**
EMOYA PROP MED (PTY) LTD	**SECOND RESPONDENT**

CORAM:	NG Gusha, AJ
JUDGMENT BY:	NG Gusha, AJ

HEARD ON: 13 APRIL 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 12h00 on 25 MAY 2023.

JUDGMENT

INTRODUCTION

[1] This is an application brought within the purview of a *mandament van spolie.* The applicant seeks an order directing the respondents to restore its possession of the premises situated at Suite 14 Emoya Hospital, 7 Frans Klenyhans Avenue, Groenvlei, Bloemfontein (the premises) on which the applicant operates a retail pharmacy.

[2] Pursuant to an urgent application brought by the applicant, the Honourable Mathebula J on the 30th December 2022, issued a *rule nisi* returnable on the 2nd February 2023 ordering the respondents, jointly and severally, to restore the applicant's control and possession of the aforesaid premises.

[3] On the 2nd February 2023 the Honourable Naidoo J postponed the matter to the 9th March 2023 and extended the *rule nisi* to the same date. The Honourable Judge also ordered the respondents to file their application for condonation of the late filing of their opposing papers as well as their opposing affidavits on or before the 16th February 2023. The applicant was in turn ordered to file its replying affidavit on or before the 27th February 2023. The respondents were jointly and severally ordered to pay the costs occasioned by the postponement.

[4] On the 9th March 2023 the Honourable Daffue J postponed the matter to the13th April 2023 and extended the *rule nisi* to the same date and extended the filing of respondents' and applicant's opposing and replying affidavits to the 10th and 24th of March 2023 respectively. The respondents were joint and severally ordered to pay the costs occasioned by the postponement.

THE PARTIES

[5] The applicant is a duly registered and incorporated private company with limited liability and is represented herein by one of its directors, Ms Sandra Wiid. It owns and operates a pharmacy[1] at the aforesaid premises.

[6] The 1st respondent is a duly registered and incorporated private company with limited liability and operates a hospital at the premises and also acts as sub-lessor to various sub-lessees.

[7] The 2nd respondent is a duly registered and incorporated private company with limited liability and the owner of the property known as Phase 3A situated at Emoya Estate which premises it lets to the 1st respondent.

CONDONATION

[8] Prior to the submissions on the merits the respondents sought an order condoning the late filing of their affidavits. Their application for condonation and opposing affidavit was eventually filed on the 8th March 2023 approximately 14 days after the 2 February 2023 order. The reasons advanced for not complying with the time frames as set out in the court orders, spanned some 7 pages[2]. They ranged, amongst others, from the unavailability of the then instructing attorney Mr Seedat, counsel, an application for leave to appeal the 30th December 2022 interim order of the Honourable Mathebula J, an appeal lodged at the Supreme Court of Appeal, the pending provisional liquidation application as well as the " amount of work needed to finalise the answer and heads of argument to be filed in the liquidation application as well as that attorney Janse van Rensburg did not discuss the timelines agreed to with either the respondents or senior counsel. This resulted in the persons with the particular knowledge not being available to finalise the documents and affidavits". This I

[1] Annexure A3 of the founding affidavit comprising of the licence issued to the applicant authorizing it to operate a pharmacy at the premises in terms of section 22A of the Pharmacy Act, Act 53 of 1974, registration of Mr Gerhard Meyer as the responsible pharmacist at the premises with effect from 22 January 2022, a certificate recording the applicant as an institutional pharmacy conducting business at the premises.

[2] Respondents opposing affidavit, pages 55-62 of the paginated papers.

find rather baffling, as it seems to suggests that the respondents prioritized the provisional liquidation application above all else.

[9] Rule 27 of the Uniform Rules provides as follows;

> *(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.*
>
> *(2) …*
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> *(3) The court may, on good cause shown condone any non-compliance with these rules.*

[10] It needs no restating that condonation cannot be had for the mere asking, it is an indulgence which the court has a discretion to grant or not. The party seeking condonation has to furnish the court with a full, detailed and accurate account of the causes of the delay and their effects so as to enable the court to clearly understand how the delay came about[3].

[11] In **Van Wyk v Unitas Hospital and Another**[4]**,** the Court held that:

> *"This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."*

[12] As lengthy as the reasons submitted for the non-compliance were, they amounted to nothing more than what I deem to be a plethora of excuses. The aforesaid notwithstanding, I am inclined to grant condonation of the late filing of the respondents opposing affidavit as the delay is not unreasonably inordinate. I

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[3] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA).
[4] 2008 (2) SA 472 (CC) at para [20].

could also find no prejudice to the plaintiff, in any event, even if there were, it is none that could not be cured by an appropriate costs order. I furthermore am alive to the dicta as expressed in **Van Wyk** *supra*[5] and consequently, I hold the considered view that the interests of justice dictate that the present dispute between the parties be adjudicated and determined on the merits. Having said that, it would be remiss of me if I do not remark that the practice of not complying with set time frames and orders of court is to be deprecated.

APPLICATION TO STRIKE OUT

[13] In addition to seeking condonation, the respondents brought a preliminary application to strike out paragraph 31.1 of the applicant's replying affidavit contending that it contained hearsay evidence.

[14] The impugned paragraph reads thus;

> "I mentioned to Loffie that the locks of the pharmacy was changed over the weekend of Christmas. Loffie then informed me that he was instructed by Kobus Greyvenstein to change the lock."

[15] In support of the assertion that the aforesaid amounted to hearsay, the respondents favoured this court with an affidavit from one Mr Rudolph Van Zyl ostensibly also known as Loffie, wherein the latter decries as false the contents of paragraph 31.3 of the applicant's replying affidavit.

[16] The applicant in turn contends that paragraph 31.3 of its founding affidavit does not amount to hearsay evidence as it has appended thereto the affidavit of Mr Henk Stolk[6] to whom the allegation was made. The applicant submitted that it, in any event, had made out a proper case for spoliation in the founding affidavit. It further contends that should the court find that paragraph 31.1 amounts to

[5] Fn. 9.
[6] Annexure J of the replying affidavit.

hearsay evidence, the court in any event has a discretion to admit same in terms of section 3(1) of the Law of Evidence Amendment Act[7].

[17] I hold the considered view that paragraph 31.1 of the applicant's replying affidavit does not amount to hearsay evidence as the impugned statement contained therein was made directly to Mr Stolk who deposed to an affidavit confirming same. I further hold the considered view that the respondents will not be prejudiced in their defence as the applicant's case in any event is that the allegations contained in paragraph 31.1 are not the basis of its case, its case is based on the *de facto* possession it enjoyed of the premises from which it was allegedly disturbed on the 24th December 2022.

FACTUAL BACKGROUND

[18] Having dealt with the preliminary points raised, I now revert to the primary dispute between the parties. It is the applicant's case that on the 1st April 2022 an oral lease agreement was concluded between itself and the 1st respondent for a period of 5 years at a monthly rental of R13 222.40 plus VAT. The parties reached the following agreement with regards to payment of the rental amount; the applicant will with effect from the 1st April 2022 until the 30th September 2022 pay a reduced monthly rental of R6 611.20 which is half of the agreed upon monthly rental of R13 222.40. The full rental amount would then as agreed be payable with effect from the 1st October 2022. During the conclusion of the aforesaid oral agreement the applicant was represented therein by Ms Wiid and the 1st respondent by Mr Hendrik Johan Stolk.

[19] Further, that since the commencement of the pharmacy practice, an agreement existed between the applicant and the 1st respondent for the supply of pharmaceutical products to the 1st respondent. The applicant contends that during the subsistence of this agreement the 1st respondent fell into breach and is allegedly indebted to the applicant to the tune of R22 million.

[7] Act 45 of 1988.

[20] The dispute between the parties seems to have escalated to an extent that, except for the present matter, they are also apparently embroiled in provisional liquidation proceedings in this Honourable Court.

[21] The above disputes notwithstanding, the applicant contends that it enjoyed peaceful and undisturbed possession of the premises since the conclusion of the oral lease agreement. The applicant submits that the basis of its possession of the premises is the lease agreement it concluded with the 1st respondent. It accordingly has no qualms with the 2nd respondent and that the latter was merely cited *ex abudanti cautela.*

[22] On the 14th December 2022, the 1st respondent, in what can only be seen as a precursor to the alleged spoliation on the 24th December 2022, addressed a letter[8] to the applicant wherein it was alleged, amongst others, that the applicant was in unlawful occupation of the premises as there was no valid lease agreement in place as well as that there was no proof that rental for the premises was being paid. The applicant was in the said letter required to provide proof of lawful occupation of the premises as well as proof of payment, failing which they were required to vacate the premises by close of business on the 15th December 2022.

[23] In response, the applicant denied being in unlawful occupation[9]. The applicant contends that it had *de facto* possession of the pharmacy. It submits that the pharmacy it operates at the premises is an institutional pharmacy and as such has to be operated by a registered pharmacist[10]. The said registered pharmacist is Mr Gerhard Meyer who assumed duty as such on the 19th December 2022 after his resignation from the 1st respondent. The applicant contends that it was at all material times the owner of the institutional pharmacy licence as well as all merchandise in the pharmacy and that Mr Meyer as the registered pharmacist and its employee, exercised control over same on its behalf.

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[8] Annexure A7 of the founding affidavit the subject of which reads “SUBJECT: PREMISES OCCUPIED BY X-PHARM PHARMACY”.
[9] Annexure A8 of the founding affidavit.
[10] Annexure A3 to the founding affidavit.

[24] On the 24th December 2022 Mr Meyer discovered that the locks were changed and that as a result the applicant's employees could not gain entry into the premises. Consequent to this the applicant addressed a letter to the 1st respondent [11] on the 28th December 2022 wherein it demanded that its possession of the premises be restored.

[25] When the aforesaid letter did not yield the desired result, the applicant approached this court on the 30th December 2022 where it sought and obtained relief as per the 2nd February 2022 *rule nisi*.

[26] Pursuant to obtaining knowledge of the *rule nisi*, the respondents filed a notice for leave to appeal the aforesaid *rule nisi* and further prevented the applicant and or its employees from accessing the premises, seemingly taking the stance that this order, albeit interim in nature, had the effect of a final order and was thus appealable. This prompted the contempt of court proceedings by the applicant, and an order in its favour, was granted on the 31st December 2022. The contempt of court proceedings have since been withdrawn and I only mention them herein for the sake of completeness.

SUBMISSIONS BY THE RESPONDENTS

[27] In their opposing affidavit the respondents submit that the applicant was never in physical possession of the premises as the pharmacy concerned was run as an institutional pharmacy as opposed to a common pharmacy. They further contend that Mr Meyer, a registered pharmacist and the 1st respondent's employee until his resignation on the 19th December 2022, was the person who occupied the premises on behalf of the 1st respondent at all relevant times. Thus the applicant never had control or factual possession of the premises since Mr Meyer possessed same on behalf of his employer, the 1st respondent.

[28] The respondents further contend that no rental agreement, oral or otherwise, was ever entered into with the applicant. They contend that the parties had intended

[11] Annexure A9.

to reach an agreement on the rental of the premises but that the negotiations were never concluded and that no rental was ever paid to it. Consequently they contend that the relief sought by the applicant is not available to it as the applicant cannot rely on a lease agreement as a right to assert its occupation of the premises.

[29] The respondents further submitted that the applicant does not know who spoliated it. Support for this contention, so it was argued, is to be found in the applicant's own papers wherein it is stated that both respondents were cited *ex abudanti cautela*. The respondents further submit that the 2nd respondent is not implicated at all in the alleged spoliation.

ISSUE FOR DECISION

[30] It is against the aforesaid factual milieu that I am called upon to decide whether the applicant had peaceful and undisturbed possession of the premises, and if so, whether the applicant was disturbed in its possession and by whom.

LEGAL FRAMEWORK

[31] The requirements for the *mandament van spolie* are (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession. The *mandament van spolie* is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands[12].

[32] It needs no restating that it is a possessory remedy which is available to a person whose peaceful possession of a thing has been disturbed. It lies against the person who committed the dispossession. The *mandament* is not concerned with the underlying rights to claim possession of the property concerned. It 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. What

[12] *Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd* (Case No. 815/2016) [2021] ZASCA 81 (15 June 2021).

constitutes spoliation or unlawful possession must be determined on the facts. The essential rationale for the remedy is that the rule of law does not countenance resort to self-help[13].

[33] The court in **Ngqukumba v Minister of Safety and Security**[14] succinctly held that

> The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.

[34] The legal principles in regards of the *mandament van spolie* are clear and very few defences thereto can be raised. The applicant's possession must be restored first and foremost (if it would be legal to do so) and thereafter the dispute as to the legality of any right relied upon could be considered[15].

EVALUATION / APPLICATION

[35] On the probabilities it is manifest that the applicant was in occupation of the premises, firstly, as evinced by the tax invoice dated 1 December 2022 issued to the applicant reflecting an amount due for rental[16]. Why else would the 1st respondent invoice the applicant for rental due on the 1st December 2022 if it was not aware that the applicant was in occupation and or possession of the premises?

[36] Secondly, albeit the 1st respondent's stated case is based on the denial of possession and occupation of the premises by the applicant, in reality, if regard is

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[13] *Monteiro and Another v Diedricks* (Case no 1199/19) [2021] ZASCA 015 (2 March 2021) at par 14
[14] 2014 (5) SA 112 (CC) par 10
[15] Harrismith Intabazwe Tsiame residents Association(Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another (567/2022) [2022] ZAFSHC 151 (14 June 2022)
[16] Annexure A6 to the founding affidavit.

had to the communication exchanged between the parties, what the 1st respondent is contesting is rather the underlying reason for such occupation and or possession and not the *de facto* possession of the premises. The heading and the contents of the letter addressed by the 1st respondent to the applicant, after all, manifestly indicate that the 1st respondent is aware of the occupancy but takes issue with the reasons therefor[17].

[37] Furthermore, it is common cause between the parties that Mr Meyer was at all material times in physical control of the pharmacy, the only dispute being on whose behalf he was exercising control of the premises. It follows that as Mr Meyer was with effect from the 19th December 2022 in the employ of the applicant, he held control of the premises and the inventory therein on behalf of the applicant. The applicant as a legal entity could not hold physical possession of the pharmacy it had to do so through its employee and pharmacist, Mr Meyer.

[38] It follows therefore that there could be no other finding other than that the applicant was in *de facto* possession of the premises. How and why it came to be in such possession is a matter irrelevant to these proceedings, because good title is irrelevant to the just determination of the issue before this court. All that this court is seized with determining is whether the applicant was in *de facto* possession of the premises, and having found as I did, the next question is whether the respondents unlawfully disturbed such possession.

[39] To fortify their argument that the applicant was not disturbed in its possession, the respondents referred the court to **Street Pole Ads Durban v Ethekwini Municipality**[18] and asserted that the applicant could not rely on the lease agreement to assert its possession. The court in the Street Pole case *supra* as per Cameron JA (as he then was) expressed the following remarks;

> [15] "This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant: the claim to spoliatory relief

[17] Annexure A7 to the founding affidavit dated 14 December 2022.
[18] (06/07) [2008] ZASCA 33 (28 March 2008).

arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case,

> 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims.'

This is because such an applicant –

> '… in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered …'

[16] The qualification applies here. SPA's application sought classically spoliatory relief in demanding the restoration of the posters the municipality had despoiled (para 1.2). But, as Nicholson J pointed out, its claim went further. It pressed for an interdict, not directed only to the despoiled property, but in wide terms embracing all the 'various street poles in the Ethekwini metropolitan area' covered by the disputed agreements. That claim spoiled for a fight about its title to those poles, and it was this fight in which the municipality was entitled to and did engage.

[40] The reliance on the Street Pole case, in so far as the legal principle articulated therein, is correct. I however hold the considered view that the present matter is distinguishable from the Street Pole case. *In casu* all that the applicant is doing is asserting that it was in peaceful possession of the premises until unlawfully disturbed therein by the respondents. I did not understand the relief sought by the applicant to extend to asserting that it had a right to possession, it merely asserts its *de facto* occupation of the premises and seeks relief that restores the *status quo ante*. The applicant does not seek an order directing that it has a right of possession. As I understood its case, reference to the lease agreement alludes only to the facts from which the relief sought stemmed.

[41] Consequently I hold the considered view that the qualification in the principle articulated in Street Pole *supra* does not apply in the present case as the

applicant merely asserts *de facto* possession and does not go further to also assert a substantive right to said possession.

CONCLUSION

[42] Resultantly, I hold that the applicant was in peaceful and undisturbed possession of the premises until disturbed therein by the respondents on the 24th December 2022. I am fortified in this finding by the following; albeit that the applicant conceded that it had no dispute with the 2nd respondent, the fact is there is a clear nexus between the 1st and 2nd respondent. The latter being the owner of the premises in question and the former acting as sub-lessor of the premises. It is furthermore particularly illuminating that neither of the respondents disavow locking and or issuing the instruction to lock the premises, choosing only to focus on the fact that the applicant stated in its papers that it did not know who of the 2 respondents spoliated it. In view of the nexus between the respondents, the dispute between the applicant and the respondents the most plausible inference to draw is that they are co-spoliators.

ORDER

[43] Resultantly, I make the following order:

43.1 The 1st and 2nd respondents are ordered to restore forthwith to the applicant full access to and undisturbed possession of the premises situated at Suite 1[..] Emoya Hospital, 7 F[…] K[…] Avenue, Groenvlei, Bloemfontein.

43.2. The 1st and 2nd respondents are ordered to pay the costs of this application, the costs occasioned by the application for condonation and the costs occasioned by the application for leave to appeal the 2nd February 2023 *rule nisi*, on a party and party scale the one paying the other to be absolved.

43.3. Each party to pay its own costs occasioned by the contempt of court application.

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NG Gusha, AJ

On behalf of the applicant	Adv. DM GREWAR
Instructed by:	HJ BOOYSEN ATTORNEYS INC.
	BLOEMFONTEIN
On behalf of the respondent:	Adv. M SNYMAN SC
Instructed by:	SYMINGTON & DE KOCK
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