

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: A05 / 2024

In the matter between

BEBA ANDRIC

Appellant

(Respondent *a quo*)

and

HEIN FOURIE

Respondent

(Applicant *a quo*)

Coram: Wille, J et Pangarker, AJ

Heard: 15 March 2024

Further Note: 22 March 2024

Delivered: 27 March 2024

JUDGMENT

THE COURT:

Introduction

[1] This is an appeal from the lower court at the instance of the respondent *a quo*. We will refer to the parties as they were cited in the lower court. This is for clarity

and a better understanding of why the relief was granted in the lower court to benefit the applicant.¹

[2] The court of first instance issued an interim order with some of the following wording: (a) that the matter is categorized as a matter of urgency; (b) that the respondent was directed to immediately restore to the applicant his property, which was stored at the respondent's premises, and (c) that the respondent was interdicted from unlawfully dispossessing the applicant of his possessions.²

[3] A *rule nisi* called on the respondent to show cause why a final order should not be granted, together with costs. The restoration order and the restraining orders were issued with immediate effect, pending the return date. The respondent was also afforded the customary leave to anticipate the return date on notice. All costs were held over for later determination.³

Context

[4] The applicant is a builder who, among other things, renovates houses. The respondent employed the applicant to do some renovations to her house. Initially, a verbal agreement was reached between these parties. The applicant agreed to renovate the wooden floors in the respondent's home. This all seemed amicable, which is often the position at the beginning of a renovation project.⁴

[5] In anticipation of the project, the applicant gave the respondent a written quotation, which the respondent accepted, and she paid the requisite deposit. The applicant commenced with the project. He started to repair the wooden floors as these floors (according to him) had suffered some water damage in the past. The applicant told the respondent that the renovation would be somewhat delayed because of the alleged water damage to the flooring in her house.⁵

[6] The applicant also explained that he was engaged with another project, which took longer than anticipated. According to him, he was then given a further extension to complete the respondent's renovation project.⁶

¹ An interim "mandamus van spolie" order was granted to the applicant in the lower court.

² The applicant was restored to the possession of his tools of trade.

³ The costs of the "ex parte" application stood over for later determination.

⁴ It seemed to be an amicable arrangement when the renovation project commenced.

⁵ The applicant started the project on 5 July 2023.

⁶ The applicant was given an extension to 22 August 2023 to complete the renovation project.

[7] Two days after the applicant was granted the alleged extension regarding the revised timeline to complete the renovation project, the respondent refused the applicant and his staff entry into her premises. The respondent also took possession of the applicant's tools of trade, which he had temporarily housed in the respondent's premises.⁷

[8] The respondent advised the applicant that she would retain his tools of trade as the renovation project had not been done according to the agreement struck with her and needed to be completed. The applicant averred urgency because the respondent had unlawfully retained the tools of his trade, and he could not perform any further work at all. The applicant launched an urgent spoliation application, and an interim order was granted in his favour.⁸

[9] The respondent opposed the granting of a final order on the return date. In essence, the respondent denied the extension agreement and averred that she had cancelled the agreement with the applicant through a formal letter from her lawyer. The respondent contended for a contract lien in support of her unilateral retention of the applicant's tools of trade.⁹

[10] In the interim, the respondent also pointed out that she issued a summons out of the Mossel Bay Magistrates' Court against the applicant for damages for poor workmanship and non-completion of the renovation project. This damages action does not include the lien retention contractual claim for damages. The applicant did not participate in the appeal hearing. This led to a further complication of one issue we could have considered on appeal. However, some current information that the respondent's counsel sought to put before us on appeal was not part and parcel of the appeal record, and no agreement on these submissions could be reached in the absence of the applicant. Thus, we ignored this information.¹⁰

Consideration

[11] The applicant used his tools of trade before the respondent dispossessed him of the right to use his tools of trade. The issues to consider are 'possession and

⁷ These are the goods which formed the subject of the spoliation application by the applicant.

⁸ The applicant clearly made out a case for the unlawful spoliation of his tools of trade.

⁹ This is in circumstances where the respondent contends for a cancellation of the contract.

¹⁰ The information was in connection with the practical effect of the appeal.

‘quasi-possession’ for a spoliation claim. Our jurisprudence also has a history of protecting quasi-possession by way of spoliation. It is a truism that a spoliation claim cannot enforce the specific fulfilment of quasi-possession. The use that triggers this remedy arises from the close connection between the ‘use’ and the ‘possession’ or ‘quasi-possession’ of a thing.¹¹

[12] A close-connected quasi-possessory right is a legal concept that recognizes certain rights and protections for individuals concerning property. It is a term often used in legal discussions and cases where someone has been using a property for a significant period, and their relationship with it has developed beyond a transient or temporary arrangement.¹²

[13] Recognizing a closely connected quasi-possessory right can include the ability to continue using the property and thus the protection against eviction. A closely connected quasi-possessory right acknowledges that persons who have established a long-term connection to a property should be afforded some legal recognition and protection. This recognition varies depending on the specific circumstances of each case.¹³

[14] Two allegations must be made to succeed with a spoliation remedy: (a) that the claimant was in peaceful and undisturbed possession and (b) that the respondent unlawfully deprived the claimant of that possession. This remedy is a remedy to protect from self-help. The applicant temporarily left his tools of trade on the respondent’s premises while completing the renovation project. This is undoubtedly incidental to the applicant’s possession and/or quasi-possession of his tools of trade. Put another way, there is no evidence to suggest that the applicant abandoned any of his rights in and to the property he left at the respondent’s premises.¹⁴

[15] In other words, since the exercise of the right is so closely connected with the thing, the loss of the right is tantamount to an interference with the possession of the thing itself, and thus, the possession of the alleged right lies in the use of the right. By way of illustration, reference may be made to recent case law, which is very helpful. This case concerned the use of a telephone. The parties were involved in

¹¹ *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W).

¹² *The applicant clearly intended to go back to the respondent’s premises to conclude the project.*

¹³ *The applicant’s facts are good, and the respondent’s facts are not good.*

¹⁴ *The amended terms of the contract support the applicant’s facts.*

divorce proceedings. The husband removed the telephone from the matrimonial home. The court ruled that access to the telephone was incidental to the use of the marital home and ordered the return of the telephone through a spoliation order.¹⁵

[16] This case was about the applicant's use (and historical use) of his tools of trade to earn his living as a builder. This right was historic. It was critical to his business, and without this right, the applicant's possession of his tools of trade would have been significantly disrupted. The respondent (in these circumstances) could not legally contend (as she does) that she was the lawful possessor of the applicant's tools of trade based on her alleged contractual lien.¹⁶

[17] We also say this because spoliation is a remedy to restore the status *quo ante*. It emphasizes that it is a robust and extraordinary remedy where the court has limited discretion once the conditions are met. In this case, the distinguishing feature illustrates that the object of the right arises from the use of the tools of trade by the applicant, which was crucial to him. Without this right, the applicant's business would be significantly disrupted.¹⁷

[18] It was previously held that the only occasion an applicant could obtain a spoliation order was if the applicant could show force or stealth in the deprivation of the possession suffered. It is generally accepted (and rightfully so) that any wrongful deprivation, including by force or stealth, now suffices. Wrongful deprivation now means deprivation against the person's will without legal process and taking the law into one's own hands. Most importantly, whether the respondent had a stronger right or claim to possess the applicant's tools of trade in these peculiar circumstances is entirely irrelevant.¹⁸

[19] There were a limited number of shields available that the respondent could have raised in these spoliation proceedings. These were (a) a denial, (b) restoration being impossible, and (c) a counter-spoliation. The respondent raised none of these. The applicant confirmed that he placed his tools on the respondent's property for the specific purpose of the renovation project. The respondent admitted that she refused to return the applicant's tools, albeit that she misconceived the existence of

¹⁵ *Du Randt v Du Randt* 1995 (1) SA 501 (O).

¹⁶ *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 (5) SA 538 (WCC).

¹⁷ *The right to possession consisted in the use of the tools of trade by the applicant.*

¹⁸ *Yeko v Qana* 1973 (4) AS 735 (A).

a contractual lien justifying her actions in the particular circumstances of the matter. He left his tools of trade there at the end of the day's work as a matter of convenience.¹⁹

[20] During the hearing, the respondent's counsel conceded that the arguments for the benefit of a contractual lien (or any lien) in favour of the respondent were without merit. This must be so as the basis for the alleged contractual lien against the applicant is challenging to discern in circumstances where the contract was cancelled at the instance of the respondent. Further, no enrichment lien or repairer lien can be present to the benefit of the respondent in these circumstances.²⁰

[21] The respondent focused on the issue of the applicant's need for possession (or lack thereof) of his tools of trade. The respondent argued that she was always in control of her home where the renovation project was being carried out, and thus, she possessed the applicant's tools of trade during this time. The respondent relied almost entirely on some recent jurisprudence supporting her arguments about possession and access.²¹

[22] The facts of the case relied upon bear scrutiny. They were entirely different from the facts of this matter. In the former matter, the respondent entered into a lease agreement with one of the applicants. The lease agreement was breached, and the respondent attempted to evict the applicant from his property. He became frustrated with the eviction process and indulged in self-help by re-taking possession of his property. The applicants applied for a *mandamus* remedy and were correctly granted this relief. One of the issues that was engaged with was the issue of access as opposed to the issue of possession.²²

[23] The spoliation remedy is available to any despoiled person who exercises physical control over the property to derive some benefit from it. Possession suffices if the holding is to secure some benefit. In this case, the possession by the applicant was undoubtedly for some benefit to him. Moreover, the applicant demonstrated

¹⁹ The applicant always intended to return to complete the renovation project.

²⁰ The respondent did not contend for an enrichment lien or a repairer lien.

²¹ *Sokanyile and Others v Broad and Another* (12525/2022) [2022] ZAWCHC 156 (24 August 2022).

²² It was emphasized that the right to ownership is discrete from the possession for the *mandamus* remedy.

effective physical control over his property.²³

[24] In some useful, although somewhat dated, practical jurisprudence, the applicant was a builder and alleged that he had possession due to a builder's lien. He needed help completing specific plumbing work and gave over the key he held to enable another plumber to access the property. A plumber and the respondent's father were then given access to the property. Under these circumstances, it was correctly held that no possession was established.²⁴

[25] Issues of access and possession have also attracted attention in matters involving gated estates. The findings indicated below are helpful, namely:

*'...It must be recalled that the real purpose of the "mandament" was to prevent breaches of the peace. If someone is in exclusive possession and exercises such possession, then deprivation thereof can, and often does, lead to a breach of the peace. No such breach would in the ordinary course of events take place where a large number of persons have access, rather than possession, of the property in question...'*²⁵

[26] Thus, in this case, the respondent could not have seriously contended that the applicant was never in physical possession or quasi-possession (or lost possession) of his tools of the trade to complete the renovation project. Further, factually, the applicant only laid claim to being entitled to undisturbed possession. Undoubtedly, this was premised on his reciprocal obligation to complete the renovation project on the respondent's premises. There was no evidence on the papers to suggest that the applicant had at any time abandoned the possession of his tools of the trade. This is precisely why the respondent initially attempted to rely on some contractual lien (which has now been abandoned) over the applicant's tools of trade.²⁶

[27] Finally, the respondent contended that the applicant should have pursued the remedy for returning his tools of trade through the *rei vindicatio* rather than the mandamus remedy. This remedy, however, involves an action *in rem*. To be successful in *rem* the applicant would have to have pleaded that the respondent was

²³ *Yeko v Qana* 1973 (4) SA 735 (A) at 739 H - 740 A.

²⁴ *Shaw v Hendry*, 1927 CPD 357

²⁵ *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 (3) SA 254 at para [54]

²⁶ *The respondent, on her own version, indulged in self-help in the circumstances.*

in possession of his goods. The respondent was not in possession. The entire case by the applicant was that he was in possession of his tools of trade.²⁷

Costs

[28] The spoliation remedy is robust and exceptional if the conditions are met. Even though some rights cannot be ‘possessed’ in the ordinary sense of the word, they can give rise to rights equivalent to spoliation in cases of so-called quasi-possession. The deprivation of possession was undisputed in that the respondent deprived the applicant of using his tools of trade. The costs followed the outcome because the respondent behaved unlawfully despite actively and continuously engaging in litigation to claim damages from the applicant.²⁸

[29] The applicant (the respondent in the appeal) elected not to participate in this appeal because (as we understand it) he needed to possess the financial resources to oppose it. Nevertheless, the applicant must have incurred some costs in connection with the appeal, and it would be appropriate to compensate him for the actual costs he has incurred. This is ultimately an issue for agreement or taxation.²⁹

[30] For all these reasons, the following order is granted:

1. The appeal is dismissed.
2. The appellant (respondent *a quo*) shall be liable for the costs of the appeal (on the scale between party and party) as taxed or agreed.

WILLE, J

PANGARKER, A J

²⁷ *Chetty v Naidoo* 1974 (3) SA 13 (A).

²⁸ *The respondent simply took the law into her own hands pending the litigation process outcome.*

²⁹ *The Taxing Master of the High Court will be in a position to determine the extent of these costs.*