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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case no: 32503/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED: NO

DATE: 23/8/2023

SIGNATURE:

In the matter between:

NYIKO CECIL KHOSA
(ID: 7[...])

APPLICANT

and

TINYIKO NELLY KHOSA
(ID: 7[...])

RESPONDENT

JUDGMENT

*This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. This Judgment is made an Order of the Court by the Judge whose name is reflected herein and duly stamped by the Registrar of the Court. The judgment and order are accordingly published and distributed electronically. The date for hand-down is deemed to be **23 August 2023**.*

BADENHORST AJ

INTRODUCTION:

- [1] This is an application for *mandament van spolie*. The Applicant brought an application against the Respondent for the return of a black 2020 model Land Rover Defender 110 P400, First Edition Station Wagon with registration number C[...], to his possession (herein after referred to as “*the motor vehicle*”).
- [2] The Applicant further seeks an interdict against the Respondent to restrain her from interfering with the Applicant's possession of the motor vehicle in future and costs on attorney and client scale.
- [3] The Applicant issued an urgent application dated 15 June 2022. The Respondent opposed the application.
- [4] On receipt of the Application on 27 June 2021, the Respondent filed her Notice of Intention to Oppose.
- [5] The Respondent filed her answering affidavit and counter-application on 6 July 2022. The Application was removed by notice from the urgent roll of 12 July 2022.
- [6] The Respondent sought the following relief in her counter-application:
 - [6.1] That the counter application be heard in due course.
 - [6.2] That the customary marriage that was revived between the parties during August 2017 be declared marriage in community of property between the parties for all intents and purposes.
 - [6.3] Division of the joint estate.
 - [6.4] That parties be entitled to share half share in each other's pension funds.

- [6.5] Costs of the counterapplication on attorney and client scale.
- [7] The Applicant filed his replying affidavit on 10 October 2022.
- [8] The Applicant applied for a date on the opposed roll in February 2023 and a Notice of Set Down was served on the Respondent.
- [9] On the day of hearing of the opposed spoliation application, the Respondent's counter-application could not proceed because the Applicant still had to answer to Respondent's counter-application and the Respondent still had to reply thereto.
- [10] The parties provided the court with a draft order setting out the time periods within which further affidavits would be filed.
- [11] An Order by agreement was granted on 25 May 2023 in the following terms:
- “1 That the Respondent's counterapplication is hereby postponed sine die.
- 2 That the counterapplication is referred to the Family court on the following terms:
- 2.1 Respondent is granted leave to supplement her answering affidavit used as the founding affidavit in the counter application within 10 days from date of this Order.
- 2.2 That the Applicant shall file his answering affidavit within 15 days from date of receipt of the Respondent's supplementary affidavit.
- 2.3 That the Respondent may file her replying affidavit, if necessary, to the Applicant's answering affidavit.
3. Costs shall be costs in the cause.”

FACTUAL BACKGROUND:

[12] The Applicant and Respondent were married on 18 April 2006 and thereafter legally divorced on 18 July 2012. Two children were born of the marriage.

[13] The counter-application, i.e. whether the customary marriage between the parties has been revived, is postponed *sine die*.

[14] Mr. Widd for the Applicant submitted that that the counter-application should be ignored as irrelevant to the dispute regarding spoliation of the motor vehicle.

[15] The issues to be determined are the following:

[15.1] Whether the Applicant has made out a case for the relief sought in this spoliation application;

[15.2] Whether the Applicant has made out a case interdicting the Respondent to restrain her from interfering with his possession of the vehicle in future;

[15.3] Whether the Respondent raised a valid defence against the *mandament of spolie*;

[15.4] Costs of the application.

EVALUATION OF THE AFFIDAVITS:

[16] The application is brought for the restoration of undisturbed possession to the Applicant of the motor vehicle in question.

[17] It is common cause that the Applicant bought the motor vehicle in terms of a credit agreement concluded between him and ABSA Bank Limited dated 21 August 2020.

[18] The Applicant avers that he is the *bona fide* possessor based on the credit

agreement.

- [19] It is common cause that the parties attempted to reconcile after their divorce and that the Respondent and minor children moved in with the Applicant. The Respondent and children are still living in the Applicant's house.
- [20] The Applicant submits that spoliation occurred during May 2021. The Respondent allegedly requested the Applicant to borrow the motor vehicle to take the children to school. The Applicant avers that he handed the car keys to the Respondent, however, on return, the Respondent refused to return the keys to the Applicant.
- [21] The Respondent avers that she is in lawful possession of the motor vehicle because the Applicant bought the motor vehicle for her as "reconciliation gift".
- [22] The Respondent further avers that she has been driving the motor vehicle since it was purchased in August 2020 and has been in her undisturbed possession. Attached to the Applicant's founding papers is a vehicle certificate of registration reflecting that the motor vehicle was registered on 2 September 2020.
- [23] According to the Respondent the Applicant was never in undisturbed possession nor was he deprived of possession of the motor vehicle.
- [24] It is common cause that the Applicant left the common home on 4 May 2021.
- [25] The Applicant alleges that he requested the return of the motor vehicle on numerous occasions and the Respondent denies that any demands were made. In reply, the Applicant merely denies the Respondent's allegation.
- [26] The Applicant approached his Attorneys of Record and a letter dated 23 November 2021 was addressed to the Respondent.
- [27] In paragraph 3 of the letter of demand (marked as annexure "NCK4" to the

founding papers), the Respondent was placed on terms to return a Land Rover Defender 110 (2020 model), with registration number J[...] [...].

- [28] The Applicant describes the motor vehicle as a black Land Rover Defender 110, but the Respondent avers in paragraph 59.3.2 of her answering affidavit that the Land Rover is pangea green. In reply, the Applicant merely denies the allegation pertaining to discrepancy of the colour of the Land Rover.
- [29] The Respondent avers that the letter of demand dated 23 November 2021, was the first demand received from the Applicant to return the motor vehicle. The Respondent denies that the Applicant has invited the Respondent to cure the act of spoliation by returning the motor vehicle to him.
- [30] The Respondent further states that she and the Applicant went out for her birthday celebration on 23 May 2021. At that time the parties were not living together as the Applicant left the common home on 4 May 2021.
- [31] The Respondent avers that after the birthday celebrations she dropped the Applicant off at the place where he was staying at the time. The Respondent alleges that the Applicant did not say anything about the motor vehicle, nor did he demand return of same. The Applicant admits being a passenger in the motor vehicle but denies the remaining allegations.
- [32] The Respondent contends further that she used the motor vehicle to attend a family funeral after the Applicant left the common home and the Applicant did not demand the return of the motor vehicle.
- [33] The Respondent alleges that their family and friends know the motor vehicle was a gift from the Applicant. The Applicant denies this and holds that he would not have given the Respondent his motor vehicle if she has two other vehicles to drive with.
- [34] The Applicant further states that he is paying the insurance on the motor vehicle. The Respondent's reply is that she is registered on said insurance as the 'regular driver'. In reply, the Applicant did not deal with this allegation

made by the Respondent.

- [35] The Applicant's case is that he is the bona fide possessor of the motor vehicle in terms of the credit agreement with ABSA Bank Limited and that the Respondent currently has possession of the motor vehicle without his consent.
- [36] The Applicant further states that in terms of the agreement he agreed to keep the asset in his possession and under his control and he can therefore not transfer any more rights to the vehicle than what he has.
- [37] The Respondent's case is in essence that she has always been in undisturbed lawful possession of the motor vehicle and therefore the Applicant does not meet the requirements of a spoliation application.
- [38] The Applicant's version is that the Respondent has been driving the motor vehicle since May 2021. The Respondent's version is that she has been driving the motor vehicle since August 2020 to date.

RESPONDENT'S DEFENCES RAISED TO SPOLIATION:

- [39] The Respondent raises two defences against the *mandament van spolie*.
- [40] Firstly, the Respondent denies that the Applicant was in possession of the motor vehicle at the time of the alleged spoliation. The Applicant was never in peaceable and undisturbed possession of the motor vehicle as the Respondent had physical control over said vehicle since August 2020.
- [41] Secondly, the Respondent raises a defence that there was no wrongful deprivation. The Respondent's possession of said vehicle is with the Applicant's consent as the motor vehicle was a gift after the parties decided to reconcile as a gesture of love.

MANDAMENT VAN SPOLIE: APPLICABLE LEGAL PRINCIPLES AND THE LAW:

- [42] The *mandament van spolie* has three characteristics:

[42.1] It is a possessory remedy;

[42.2] It is an extraordinary and robust remedy;

[42.3] It is a speedy remedy.

[43] It is necessary to briefly set out the law relating to the *mandament van spolie* insofar as it is applicable to this matter. This is succinctly summarized in the following passage taken from **Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co** 1948 (1) SA 91 (W) at page 98:

“Two factors are required to find a claim for an order for the restitution of possession on an allegation of spoliation. The first is that the applicant was in possession and the second, that he has been wrongfully deprived of that possession and against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before an order should be granted... It must be shown that the applicant had had free and undisturbed possession.”

[44] The essential character of possessory remedy is that the legal process whereby the possession of a party is protected is kept strictly separate from the process whereby a party's right to ownership or of the right to property in dispute is determined.

[45] The objective is merely to restore the status quo and that the court hearing a spoliation application does not concern itself with the rights of the parties before the spoliation took place.

[46] In **Makowitz v Loewenthal** 1982 (3) SA 758 (A) the *mandament van spolie* is described as a remedy to restore unlawfully deprived possession at once to the possessor.

[47] The court held in **Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd** 2013 (5) SA 521 (WCC):

“The mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned, and the unlawful despoilment thereof are all that an applicant for a mandament van spolie has to show”.

ONUS ON APPLICANT TO PROVE BOTH THE REQUIREMENTS:

[48] **Mankowitz v Loewenthal** 1982 (3) SA 758 (A) at 767 F-H stated that it not sufficient for the applicant merely to make out a *prima facie* case, he must prove his case on a balance of probabilities as in any other civil case.

[49] In **P.M v R.M and Another** (6414/21) [2022] ZAWCHC 12 (8 February 2022) the court held at para 19 that:

“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 at the times 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.”

[50] The question as to who bears the onus of proving spoliation was settled in the case of **Yeko v Qana** 1973 (4) SA 735 (A) at page 739E:

“In order to obtain a spoliation order the onus is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. The applicant must prove the facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in its possession, and that they were removed from its possession forcibly or wrongfully or against its consent”.

[51] The Applicant has the onus to prove on a balance of probability that:

[51.1] He was in possession of the motor vehicle immediately prior to spoliation; and

[51.2] The Respondent deprived him of possession forcibly or wrongfully against his consent. In other words, the Applicant was unlawfully ousted.¹

[52] **Ivanov v North West Gambling Board** 2012 (6) SA 67 (SCA) at 75 B – E the SCA observed that an applicant upon proof of two requirements, he is entitled to a *mandament van spolie* restoring the status *quo ante*. The Court noted that first is proof that the applicant was in possession of the spoliated thing and secondly, the wrongful deprivation of possession. The onus rest on the applicant to prove these two requirements.

[53] It is stated in **Mbangi v Dobsonville City Council** 1991 (2) SA 330 (W) at 335 that the applicant must not show he was entitled to be in possession but that he was in *de facto* possession at the time of being despoiled.

[54] The Court stated further that when the proceedings are on affidavit the Applicant must satisfy the Court on the admitted or undisputed facts, by the same balance of probabilities required in every civil suit, of the facts necessary for his success in the application.

[55] The Applicant has the onus to prove on a balance of probability that:

[55.1] That he was in *de facto* possession of the motor vehicle prior spoliation; and

[55.2] That the Respondent deprived him of possession forcibly or wrongfully against his consent. In other words, the Applicant was unlawfully ousted.

¹ **Yeko v Qana** 1973 (4) SA 735 (A) at 739 and **Boomporet Investments (Pty) Ltd v Paraverbal Concession Store (Pty) Ltd** 1990 (1) SA 347 (A).

[56] The second requirement to succeed in the spoliation application is that the Applicant was deprived forcibly or wrongfully against his consent.

[57] It is not sufficient for the applicant merely to make out a *prima facie* case, he must prove his case on a balance of probabilities as in any other civil case.² The Applicant must satisfy the court on the admitted or undisputed facts, by the same balance of probabilities required in every civil suit, of the facts necessary for his success in the application.

[58] The onus of proving the two requirements for the order rest on the Applicant. If the Applicant fails to discharge the onus, the parties will be left to the remedy by way of action.

APPLICANT'S RIGHT OR GOOD TITLE IS IRRELEVANT:

[59] In possessory proceedings for the protection of a right, the question whether the Applicant has the right is irrelevant. What is relevant in such proceedings and needs to be proved, is that the Applicant has exercised (possessed) the right.

[60] In the matter of **Street Pole Ads Durban (Pty) Ltd v Ethekekwini Municipality** 2008 (5) SA 290 (SCA) the court held that:

“Good title is irrelevant in a spoliation application. But if the applicant goes further and claims a substantive right to possession based on contract, the respondent may answer the additional claim of right and may demonstrate that the applicant does not have the right.”

[61] Referred court to **Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd** 2013 (5) SA 521 (WCC):

² See **Mankowitz v Loewenthal** 1982 (3) SA 758 (A) at 767 F-H

“It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue”.

[62] **Top Assist 24 (Pty) Ltd T/A Form Work Construction v Cremer and Another** [2015] 4 All SA 236 (WCC) (28 July 2015) at para 33 the court stated that the court will neither enter into the lawfulness of the applicant's possession nor into the question of ownership.

[63] The Applicant submits that the credit agreement provides him with the right to possess the motor vehicle as ABSA Bank Limited is the owner of said vehicle. The Applicant further states that in terms of the credit agreement the asset would be in his possession and under his control and may not be transferred to any other person without prior consent from ABSA Bank Limited. Thus the Applicant could and did not transfer his rights to the vehicle contrary to the credit agreement, to the Respondent.

[64] As stated in the case law referred above, a court will not enter into the question of the Applicant's ownership. The merits of the Applicant's entitlement, his good title or his right to possess the vehicle, are irrelevant in a spoliation application.

APPLICATION FOR SPOLIATION TO BE BROUGHT WITHIN REASONABLE TIME:

[65] As a general rule the Applicant who alleged that he has been dispossessed of a right was obliged to act within a reasonable time to have his possession restored. If he delayed for more than 1 a year before bringing an application, there would have to be special circumstances present to allow him to proceed.³

[66] In **Jivan v National Housing Commission** 1977 (3) SA 890 (W) it held that a possessor who alleged that he had been dispossessed of a right was obliged to act within a reasonable time to have his possession restored. If

³ **Jivan v National Housing Commission** 1977 (3) SA 890 (W).

he delayed for more than one year before bringing the application, there would have to be special circumstance present to allow him to proceed.

[67] Considering the facts of the matter is to determine whether there was in the instance an inordinate delay in bringing the application to justify refusal of the relief sought.

[68] In **Jivan v National Housing Commission** 1977 (3) SA 890 (W) at 893A Steyn J said the following at 893H:

“It is conceivable that the delay of an applicant to bring his petition (application) either confirms or displays a state of mind in which the applicant acquiescence the alleged disturbance of his possession and, in such an event, I am satisfied that he would not be entitled to a mandament van spolie. The delay in the present application cannot in my view, by any means be interpreted as acquiescence in the alleged spoliation.”

[69] Accepting something reluctantly, but without protest the state of mind and other circumstances ought to be considered in determination of whether there was an inordinate delay in bringing an application for *mandament van spolie* and whether the applicant, would be entitled to the relief sought.

[70] The Applicant does not say with certainty when the alleged spoliation occurred.

[71] In paragraph 6.3 of the Applicant’s founding papers it said that during May 2021 the Respondent requested to borrow the motor vehicle and on upon her return she refused to return the keys of the motor vehicle.

[72] According to the Applicant he made several requests for the return of the motor vehicle since the alleged spoliation.

[73] The Respondent denies this and states that the only request she received was the letter dated 23 November 2021.

- [74] **AMLER'S PRECEDENTS OF PLEADINGS** (7th Edition) page 358 and reference to *Le Riche v PSP Properties CC* 2005 (3) SA 189 (C) that a possessor who alleges that he or she has been dispossessed should act within a reasonable time to have possession restored otherwise the application for a *mandament* will be refused.
- [75] The Respondent states that if the Applicant was unlawfully dispossessed of his motor vehicle, he could have approached the court for the recovery thereof immediately without any delay.
- [76] The court has a discretion to refuse an application where on account of the delay in bringing it. Failure to take immediate action will preclude the application from successfully claiming a spoliation order.⁴
- [77] On the Applicants' version the Respondent had possession and enjoyment of the Motor vehicle since May 2021. The Respondent has been in possession of the vehicle for more than two years.
- [78] The issue which I need to determine is whether there are special circumstances present which warrants the granting of the main relief sought despite a period of more than a year having lapsed before the Applicant instituted the proceedings.
- [79] To answer this question, I will have to look at the events which occurred after the alleged act of spoliation, and, to determine whether such events constitute special circumstances justifying the granting of the main relief sought.
- [80] A letter of demand dated 23 November 2021 was sent to the Respondent claiming back the motor vehicle. A period of six months lapses from the date of alleged spoliation to sending the letter of demand.

⁴ See: **Jivan v National Housing Commission** 1977 (3) SA 890 (W) at 893

- [81] The Applicant lodged an urgent application dated 15 June 2022 and only served the urgent application on 27 June 2022. Almost seven months lapsed from the letter of demand to serving the application on the Respondent claiming for the return of the motor vehicle.
- [82] The Respondent filed her answering affidavit dated 6 July 2022 and the matter was subsequently removed from the urgent roll.
- [83] The Applicant filed its replying affidavit on 10 October 2022, three months after receipt of the answering affidavit, in a matter he is seeking urgent relief.
- [84] The Applicant served the index to the opposed motion on the Respondent's attorneys of record on 3 February 2023 and uploaded same on 7 February 2023, four months after filing of its replying affidavit.
- [85] The Applicant initially approached the urgent court more than a year after the alleged spoliation occurred. After removal of the application from the court roll, it was only re-enrolled seven months later.
- [86] On the Applicant's version the Respondent has been in possession of the motor vehicle for two years and three months.
- [87] Spoliation is by nature a remedy for immediate restoration of possession.
- [88] To revert to the question posed earlier, can it therefore be said, in the light of the circumstances, that there was an inordinate delay in bringing the spoliation application to justify refusal of the relief of the *mandament van spolie*?
- [89] The Applicant does not provide any explanation in his founding affidavit why the delay was due to special circumstances and why it justifies a final order.
- [90] The Applicant merely states in his replying affidavit that that it was his intention to try and settle the matter amicably and he therefore did not pursue the matter on an *adversarial approach*.

- [91] One year and five months lapsed from the time of the alleged spoliation to the date on which the Applicant filed his replying affidavit. A further four months lapsed from filing the replying affidavit to filing the application in February 2023.
- [92] The Applicant does not provide any detail of his alleged efforts given that the Respondent denies same.
- [93] As stated in the **Jivan** matter *supra*, the court has a discretion to refuse an application where the failure to take immediate action will stop the Applicant from successfully claiming a spoliation order.
- [94] I am of the view the inordinate delay before launching the urgent spoliation application, amounted to acquiescence on the part of the Applicant, and therefore justify the refusal of the *mandament van spolie*

APPLYING THE LAW ON THE FACTS:

- [95] I will now continue to evaluate whether the Applicant has met the requirements of a *mandament van spolie* application.
- [96] The Supreme Court of Appeal held in **Ivanov v North West Gambling Board** 2012 (6) SA 67 (SCA) that an applicant is entitled to a *mandament van spolie* restoring the status quo upon proof of two requirements.
- [96.1] The Applicant must prove that he was in possession of the spoliated thing; and
- [96.2] The Applicant must prove that there was wrongful deprivation of possession.
- [97] It is evident that the Applicant bears the onus of proving on a balance of probabilities that he was in *de facto* possession of the motor vehicle at the

time of the alleged spoliation and that the Respondent wrongfully deprived him of possession without his consent. It is not sufficient for the Applicant merely to show a *prima facie* case.

[98] The court also held that when the proceedings are on affidavit the Applicant must satisfy the court on the admitted or undisputed facts, by the same balance of probabilities required in every civil suit, of the facts necessary for his success in the application. Once the Applicant has discharged the onus resting upon him and no recognised defense has been raised, the order shall be granted.

[99] A bare denial of the Applicant's allegations by the Respondent will not in general be sufficient to generate a genuine or real dispute of facts. The court should take a robust, common-sense approach to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so.⁵

[100] Deriving from the judgment of Corbett JA in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) in summary:

"In motion proceedings final relief may be granted where the disputes of fact have arisen on affidavits if those facts averred in the applicant's affidavit which had been admitted by the respondent, together with the facts averred by the respondent, justify such a final order provided the denial by the respondent of a fact alleged by the applicant does not raise a real, genuine or bona fide dispute of fact. In such a case final relief may be granted if the court is satisfied as to the inherent credibility of the applicant's factual averment."

[101] Where disputes of fact have arisen on affidavits in motion proceedings, final relief may nonetheless be granted if the allegations or denials of the

⁵ **Erasmus Superior Court Practice** B1 refers to *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154H.

respondents are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.⁶

[102] It is incumbent upon the Applicant to satisfy the court on a balance of probabilities that he is entitled to the relief sought by proving that he was indeed in peaceful and undisturbed possession of the motor vehicle in question and that the Respondent wrongfully dispossessed him.

[103] The Applicant must satisfy the court on the admitted facts that he is entitled to the relief sought. The Applicant must not show that he was entitled to be in possession but that he was indeed in *de facto* possession at the time of being despoiled. It is not clear from the founding affidavit when exactly in May 2021 spoliation occurred.

[104] The colour of the motor vehicle is also placed in dispute. Surely if the Applicant had undisturbed possession of the motor vehicle he would have been able to describe the spoliated vehicle with precision and proof same. However, the Applicant merely denies the Respondent's allegation that the Land Rover is pangea green and not black.

[105] It was argued for the Applicant that considering the probabilities, no person will give a motor vehicle to another as a gift if the latter already owns two other motor vehicles.

[106] The case law is clear on this point. In motion proceedings it is impermissible to consider and decide the issues based on the probabilities or improbabilities inherent in the conflicting factual allegations.

[107] It is irrelevant if the Respondent has other motor vehicles at her disposal. This does not assist the Applicant to prove the requirements to succeed in a spoliation application.

⁶ **Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (AD) at 634H – 635C.

- [108] In examining the factual allegations for and against the Applicant's versions and the Respondent's versions and defences raised, it cannot be argued that the Respondent's denials are so far-fetched and untenable to justify their outright rejection. The defences raised by the Respondent are recognised and valid defences in spoliation proceedings.
- [109] In **P.M v R.M and Another** *supra* it was stated that the Applicant must satisfy the court on the admitted facts that he is entitled to the relief sought.
- [110] The Applicant merely denies the Respondent's allegations and defences raised. The Applicant put the Respondent to the proof of her defence, but it is the Applicant who bears the onus of proof on a balance of probabilities.
- [111] **Blendrite (Pty) Ltd and Another v Moonisami and Another** (case no 227/2020) [2021] ZASCA 77 (10 June 2021) it was held that the Applicant must provide clear proof of possession and of the illicit deprivation before an order should be granted.
- [112] Proof of actual possession is needed and a right of possession of the thing is irrelevant. I reiterate, there is no proof of *de facto* possession to be found in the Applicant's application nor any evidence of exactly when the Respondent spoliated him by taking the motor vehicle without his consent.
- [113] The Applicant's aforesaid failure to meet the two requirements is fatal to the application.
- [114] After considering the facts as stated by the Respondent together with the facts alleged by the Applicant that are admitted by the Respondent, this court is not satisfied that the Applicant is entitled to a final order.
- [115] I have set out the principles governing the granting of the relief of *mandament van spolie* where such relief is sought after a period of a year since the act of spoliation. The Applicant did not lodge the application within a year after the alleged spoliation occurred and provided no explanation for

his default. No special circumstances are evident from the founding papers to substantiate the final relief sought.

[116] In the circumstances, I find that the Applicant has failed to prove on a balance of probabilities that he was in undisturbed possession of the motor vehicle and that the Respondent unlawfully and without his consent spoliated him of said motor vehicle.

[117] In result, the application stands to be dismissed firstly, due to an inordinate delay and secondly, failing to prove on a balance of probabilities the requisites to succeed in a spoliation application.

INTERDICT AGAINST THE RESPONDENT:

[118] The Applicant further claims relief in the form of a final interdict against the Respondent, restraining her from interfering with his possession of the motor vehicle in future.

[119] The legal requisites relative to the grant of a final interdict in motion proceedings should be considered.

[120] The Applicant must show that he has a clear right, an injury actually committed or reasonably apprehended and the absence of a similar protection by any other ordinary remedy.

[121] **Dyalo v Mnguma Local Municipality and Another** (8490/2016) [2016] ZAECHMHC 36 (9 September 2016), the court stated in order to obtain a final interdict in addition to his *mandament van spolie* the applicant must establish the following:

[121.1] That there is a clear right on the part of the Applicant;

[121.2] An injury actually committed or reasonably apprehended; and

[121.3] The absence of any other satisfactory remedy.

- [122] A clear right is established when an applicant, on a balance of probabilities, proves facts, which in terms of substantive law, establish the right relied on. It is incumbent upon the Applicant to prove a clear right in order to obtain a final interdict against the Respondent.
- [123] The Applicant seeks a final interdict to have the Respondent prohibited and restrained from interfering with his possession of the motor vehicle in question.
- [124] It is trite to obtain a final interdict, the Applicant must prove all the requisites of a final interdict. If one of the requisites is not established, then an interdict cannot be granted.
- [125] It is clear on the papers that the Applicant does not make out a sustainable case to justify the grant of a final interdict against the Respondent. Although relief for a final interdict is sought, the Applicant makes no averments regarding the requisites of a final interdict and why such an order should be granted.
- [126] The Applicant does not address any of the requisites for obtaining a final interdict therefore the relief sought cannot be granted.

PENDING LITIGATION BETWEEN THE PARTIES:

- [127] The spoliation application is but the beginning of the litigation process for the parties.
- [128] The counter-application for a declaratory order for the revival of the customary marriage is still pending and will be adjudicated in due course.
- [129] Should the Respondent succeed with the relief sought, the parties will be deemed to be married in community of property and the motor vehicle in question will *ex lege* form part of the joint estate.

[130] Should the Respondent be unsuccessful with her counter-application, the Applicant has other remedies at his disposal.

COSTS:

[131] All that remains is the issue of costs. Both parties seek an order for costs on an attorney and client scale.

[132] The principle regarding the award of costs in civil courts is well settled. It is entirely a matter for the discretion of the court which is to be exercised judicially upon the consideration of the facts of each case and in essence it is a matter of fairness to both sides.

[133] The general rule is that costs follow the event, that is the successful party should be awarded its costs. The rule should be departed from only where there are good grounds for doing so.

[134] 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.

[135] The exercise of that discretion depends upon the facts and circumstances of the matter.

[136] 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.⁷

[137] I have considered the conduct of the parties in this matter and I am not persuaded that are exceptional circumstances in the conduct of these proceedings that warrant an order of costs on an attorney and client scale.

⁷ See: **De Sousa v Technology Corporate Management (Pty) Ltd** 2017 (5) SA 577 (GJ) at 655C – 655J

[138] When it comes to the merits of this matter there can be no justification to deviate from the general rule that costs should follow the event.

ORDER:

In the result the following order is made:

1. The spoliation application is dismissed with costs.
2. The Applicant is ordered to pay the Respondent's costs on a party and party scale.

L BADENHORST

Acting Judge of the High Court

Gauteng Division, Pretoria

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Matter heard on : 25 May 2022

Judgment delivered on :23 August 2023