

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

Case No: 2931/2021

Heard on: 24/02/2022

In the matter between

R.J MOTORS CC t/a V.W

AUDI CLINIC

Applicant

And

THABO JENNINGS

1st Respondent

SIYASANGA MFINGWANA

2nd Respondent

STATION COMMISIONER, MTHATHA

3rd Respondent

JUDGMENT

PAKATI J

[1] The applicant, R& J Motors t/a VW & Audi Clinic, applies for a mandament van spolie against Messrs Thabo Jennings and Siyasanga Mfingwana, the first and second respondents ("the respondents"), for restoration of possession and occupation of factory Unit 4, Textile Street, Vulindlela Heights Mthatha ("the premises"). It also seeks an interdict restraining the respondents from preventing it and its employees or anyone on its behalf from entering the said premises.

[2] The points in limine raised by the second respondent in his answering affidavit were not referred to during the hearing of this matter as well as in their

heads of argument. I take it that the respondents abandoned same and will not deal with them herein.

[3] The respondents are business partners and directors of Wasteman Group (Pty) Ltd ("Wasteman Group") operating as S & K Panel Beaters, in Vulindlela Street, Mthatha. The Station Commissioner Central Police Station, Mthatha, is cited herein in his capacity as the Police Officer in charge of the South African Police Services, Mthatha Central Police Station purportedly responsible for the execution of and enforcement of lawful orders. Only first and second respondents oppose the application.

[4] The applicant operates a motor mechanic workshop, and stores goods and motor vehicles for repairs at the premises situated at No. 4 Textile Road, Vulindlela Heights, with their offices at 48 Elliot Road, Mthatha. Mr Robert Frank Costell ("Costell") is its managing member. He, on behalf of the applicant, contended that he entered into an oral agreement for the lease of the premises with the late Henry Trower ("Trower"), in November 2020. The said terms of the agreement were that the applicant would occupy the premises for a period of six years and pay a monthly rental of POO 000.00. The applicant paid rent to Trower. It later transpired that Trower, in turn, paid rent to Wasteman Group, Absa Bank account number [....].

[5] Before his death, Trower was in control of the premises and as the respondents put it, 'he was keeping an eye at the workshop'. According to the applicant, after his death it interacted with his wife, Ms Nonzwakazi Trower, as the appointed representative of Trower's estate.

[6] It is undisputed that the applicant was in peaceful and undisturbed possession of the premises since November 2020 until the morning of 17 May 2021 when Costell was prevented from accessing the premises by a security guard placed at the entrance by the 1st respondent. When he told the security guard that he was the lessee of the premises and demanded entry, the security guard prevented him. Minutes later, while Costell was still standing at the entrance, the 1st

respondent arrived and 'forcefully locked the gate against my will,' threatening to shoot Costell if he and the staff entered the premises by force. Costell and the staff left for their offices situated at Elliot Road. Costell's evidence was confirmed by Ms Jennifer Adolf, who added in her confirmatory affidavit that on 17 May 2021 she attended the premises twice when the first respondent prevented her from entering.

[7] The same day, (17 May 2021) Costell was served with a letter dated 6 May 2021 (Annexure "E") by the respondents informing him that he should pay outstanding rental for the months of March, April and May 2021. The last paragraph of the letter reads:

"Should the rent not be paid for March and April 2021 by the 7th May 2021, no member or employee of VW and Audi Clinic Mthatha will be allowed to gain access to the premises or vehicles. Furthermore, should the rent not be paid by the end of the week (Friday the 7th May 2021) we will have no choice but to charge a storage fee for every car still on the premises. We had not and do not wish for things to get to this point, however, we have no other choice as we also have to see to it that the security company is paid, so as to safe guard all parties and their assets."

[8] Costell forwarded the said letter to his attorneys, who in response, forwarded a letter dated 17 May 2021 to the respondents advising them that their conduct was unlawful and wrongful. The latter were further warned that should they continue with their unlawful conduct; legal action would be the course to take. No response was forthcoming from the respondents.

[9] On 19 May 2021, Costell and Ms Adolf attempted to gain entry into the premises but were again prevented by the first respondent from gaining access. The latter did not only lock the entrance but also used abusive and intimidating language, which inspired fear on Ms Adolf.

[10] The respondents again addressed the following letter to the applicant's attorney of record on 20 May 2021 :

“.... The position is that client acts as a representative of Wasteman Group Pty Ltd who has a lease with your client. Your client owes Wasteman lease rent in respect of the premises at Textile Street, Vulindlela Heights as follows:

i.	January 2021	RIO 000.00	(paid only POO 000)
ii.	February 2021	RIO 000.00	..
iii.	March 2021	R20 000.00	
iv.	April 2021	R30 000.00	
v.	May 2021	R30 000.00	
	Total owed	RI 10 000.00	

Unless this total owed is paid to our client by 28th May 2021 our instructions are to issue Summons plus costs.

Your letter also threatens to seek an interdict to prevent any blockage to its conduct of removing vehicles either repaired or stored at Wasteman premises. Please be reminded that your clients' vehicles in these premises are held under a lien for outstanding rent and your clients' application interdict will be strenuously resisted in so far as your clients' attempt to remove vehicles without payment of outstanding rental. In addition, our clients will further claim costs."

[11] The respondents dispute that they dispossessed the applicant of the premises and prevented it and its staff from gaining entry into the premises. In paragraph 10 of the answering affidavit, the first respondent averred inter alia,

that the applicant or its employees were not denied entry 'but there has been a beefed up security in the premises following theft of motor vehicles and other motor vehicles following the death of the deceased..”

[12] In response, the applicant alleged that the outstanding rent referred to by the respondents was inaccurate and had been inflated. It further claimed that the respondents took the law into their hands as it was in peaceful and undisturbed possession of the premises and were unlawfully deprived of possession.

[13] In paragraph 4 of the answering affidavit, the second respondent stated:

"The property was started being occupied by me on or around 2015 when there were also a married couple of Chinese origin, they had been occupying a certain caravan in the property and I occupied the workshop structure. I may mention that the property is just next to my business S & K and therefore was convenient place to store my other cars I had been repairing."

[14] The second respondent stated that when the Chinese couple died due to a fire that broke out in their caravan, they asked the late Trower to safeguard the workshop. In the meantime, they searched for the owner of the premises and later established that it belonged to the Eastern Cape Development Corporation ("ECDC"). After establishing a company in 2018, they tried to obtain a lease agreement with ECDC and last communicated with it on 21 April and 31 May 2021 (Annexures "SM 2" & "SM 3") in an effort to enter into a formal lease agreement, which never materialised. It is undisputed that the premises did not belong to the respondents, but to ECDC.

[15] According to the respondents, the applicant, represented by Costell, entered into a verbal lease agreement with Wasteman Group, represented by the second respondent. In terms of the alleged agreement the applicant was to pay R30 000.00 per month; the lease would start in January 2021 and run for a period of six months and thereafter be renewable monthly. The payment was to be made

directly into Wasteman Group's bank account. It is unclear where and when the alleged agreement was entered into. This is, however, disputed by the applicant who alleges that it had nothing to do with Wasteman Group.

[16] The issue to be determined is whether the applicant was unlawfully dispossessed of its occupation of the premises. I consider that it is undisputed that the applicant was in peaceful and undisturbed possession of the premises.

[17] It is trite that an applicant for spoliation must allege and prove that he was in peaceful and undisturbed possession of the thing¹ and unlawful deprivation of such possession. In this context 'unlawful' refers to dispossession without the applicant's consent or due legal process.²

[18] Mr Sintwa, on behalf of the respondents, submitted that the applicant failed to prove on a balance of probabilities that it is entitled to the relief sought because spoliation is unavailable as the issue between the parties is contractual in nature.

[19] In response, Mr Mgxaji, for the applicant, submitted that the applicant managed to prove the requisite elements for the relief sought and that the defence of lien does not arise and is unavailable as a defence in this case.

[20] The respondents' denial that the applicant was prevented from gaining access to the premises cannot stand in the face of their allegation contained in paragraph 10.2 of the answering affidavit that "the premises are only kept locked at night for safe keeping of the goods inside the premises. Due to the applicant's non-payment of rent we informed him that the cars in our premises are a lien for the outstanding rental. The deponent was never prevented from working and accessing cars to an extent that he was given keys for the gate to allow him access as the sub-lessee of the premises. If the respondents' assertion is correct, then Costell and the applicant's employees would not have left the premises for the other office at Elliot Road on 17 May 2021. Their defence can also not stand

¹ Impala Water Users Association v Lourens NO [2004] 2 All SA 476 (SCA), 2008 (2) SA 492 (SCA).

² George Municipality v Vena [1989] 2 All SA 125 (A), 1989 (2) SA 263 (A).

in the face of paragraph 3 of their letter dated 06 May 2021 (see para 7 above). I find this paragraph contradictory to what the respondents stated in paragraph 10.5 of the answering affidavit that it was in their best interest that they be paid. I say so because it was undisputed that the applicant still had not been able to access the premises at the time the matter was heard, which showed that the respondents' conduct persists.

[21] I further consider that the certificate issued by the Commissioner and Intellectual Property Commission on 21 April 2021 shows the status of Wasteman Group (Annexure "SM1 ") attached to the answering affidavit, as having been deregistered on 23 September 2020. The address of Wasteman Group in that document is No. 6 Textile Street, Southernwood, Mthatha and not No. 4 Textile Street Vulindlela Heights as opposed to what is alleged by the second respondent that he started to occupy the premises around 2015. It is also clear that no lease agreement exists between the respondents and ECDC. What is significant from the papers is that the respondents have been collecting rent for premises that did not belong to them. I am alive to the fact that a good title at this stage is irrelevant and the applicant also did not claim so. The arrear rental referred to by the respondents cannot be justification for preventing the applicant from access to the premises. That is so because the purpose of spoliation is to prevent self-help and the cause for possession is irrelevant.³

[22] The respondents refer to Annexures "SM2" and "SM3" in an attempt to prove that they were finalising a lease agreement with ECDC. However, there is no stamp on both documents showing that they were received by ECDC. It is also strange that Annexure "SM2" requesting ECDC to enter into a lease agreement with the respondents is dated 21 April 2021 and yet the application form titled 'Letting Application and Take on Form: Commercial Premises' to ECDC is dated 31 May 2021.

[23] The applicant's allegation that "I never had anything to do with the 1st and 2nd respondent at all" confirms the lack of connection between the respondents,

³ Ivanov v North West Gambling Board and Others 2012 (6) SA 67 (SCA) at para [19].

the applicant and the premises. The facts of this case clearly show that the respondents had nothing to do with the premises. There is no evidence that the applicant could have known that the late Trower had anything to do with the respondents especially since it paid rent to him directly and not to Wasteman Group. The respondents also acknowledge that Trower kept an eye on the premises on their behalf, which fact was unknown to the applicant. The respondents admit that Trower had a sub-lease agreement with Wasteman Group, which was also unknown to the applicant. So, if the applicant paid rent to Trower, who in turn deposited it into Wasteman Group's account unbeknown to the applicant, it is not surprising that the applicant insisted that the respondents, as well as Wasteman Group, were not the lessors. The respondents' defence of lien cannot stand as no contractual link between them and the applicant existed at least on the papers.

[24] Mr Sintwa argued for the first time in the supplementary heads of argument filed on 23 February 2022 that the relief sought by the applicant is based on a contract as between the lessee and lessor. For this assertion, he relied on *ESKOM HOLDINGS SOC LIMITED V MASINDA* (1225/2018) [2019] ZASCA 98 2019 (5) SA 386 (SCA) (18 JUNE 2019) where the SCA held that where the applicant approaches court for spoliation order for a dispute of a contractual nature, the remedy is unavailable to him/her. Mr Sintwa urged me to dismiss the applicant's application on this basis. This was disputed by the applicant.

[25] The court in Eskom had to decide whether the respondent was entitled to a spoliation order when the appellant disconnected an illegal supply of electricity to immovable property owned and possessed by the appellant. The court held that in order to justify a spoliation order, the right must be of such a nature that it vests in a person in possession of the property as an incident of such possession. In seeking restoration of her electricity supply, Ms Masinda's claim could hardly have been terser. She had no more than that Eskom's officials had unlawfully disconnected the supply of electricity to her house and the prepaid meter and asked that it be reconnected to the national grid. There was no attempt to show

that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a spoliation order. This was misplaced and insufficient to establish her right to such an order.⁴

[26] In *Fisher V Body Corporate Misty Bay* 2012 (4) SA 215 (GNP)⁵ the court applied mandament van spolie to protect the applicant's access because it was intended to retain possession and use of the property in the estate. Therefore, any limitation of access that would curtail the applicant's possession or use of the house or motor vehicle should be found to amount to spoliation. A right of access to a property is an incident of the possession or control of that property.⁶

[27] In my view, Eskom is distinguishable from the instant case where the relief is sought to protect the applicant's access in order to retain possession and use of the premises. I say so because in the present case, access is an incident of the applicant's possession of the premises. I am satisfied that the applicant was unlawfully despoiled by the respondent thereby curtailing its possession and use of the premises.

[28] The second respondent argued that if Costell was threatened with physical violence he should have laid a criminal charge against the second respondent. However, he admitted that there was no obligation on him to do so. Importantly, it is the first respondent who is alleged to have been on the scene and not the second, who deposed to the answering affidavit. The second respondent is therefore not in a position to attest to the conduct of the first respondent, as he was not at the scene.

[29] Regarding the interdictory relief, the applicant seeks a final interdict restraining the respondent from any further unlawful preventing it, its employees or anyone on its behalf from entering the premises. The requirements for the right to claim a final interdict are as follows:

⁴ At para [24].

⁵ At para [24].

⁶ See *Bill v Waterfall Estate Homeowners Association NPC and Another* 2020 (6) SA 154 (GJ) at para [50].

29.1 A clear right;

29.2 An injury actually committed or reasonably apprehended; and

29.3 The absence of similar protection by any other ordinary remedy.

[30] Mr Sintwa argued that the applicant did not manage to prove that it is entitled to the interdictory relief. In response, Mr Mgxaji submitted that the applicant has proved the requisites for the relief sought and urged that I find in favour of the applicant.

[31] Mr Mgxaji submitted that the respondents' conduct caused the applicant's company great financial loss.

[32] It was undisputed that the applicant had suffered financial loss as it could not attend to repair work of its clients' motor vehicles as a result of the conduct of the respondents. It added that it also could not meet its overheads by paying the salaries of its employees in order for them to take care of their personal basic necessities. In this regard, Ms Adolf's confirmatory affidavit is attached to the founding affidavit, as alluded. In my view, the applicant satisfied the requirements of a final interdict.

In the circumstances I grant the order as follows:

1. The first and second respondents or anyone acting on their behalf are ordered and directed to restore possession and occupation of Factory Unit 4, Textile Street, Vulindlela Heights Mthatha, to the applicant, forthwith.

2. The first and second respondents or anyone acting on their behalf are interdicted and restrained from interfering with the applicant's peaceful possession, occupation and operations of the applicant's premises at Factory Unit 4, Textile Street, Vulindlela Heights, Mthatha.

3. The first and second respondents or anyone acting on their behalf are interdicted and restrained from preventing the applicant's employees or anyone on behalf of the applicant to enter the premises at Factory Unit 4, Textile Street, Vulindlela Heights, Mthatha.

4. The first and second respondents are ordered to remove their security guards from the premises at Factory Unit 4, Textile Street, Vulindlela Heights, Mthatha, forthwith.

5. The first and second respondents are ordered to pay costs of this application.

BM PAKATI

JUDGE OF THE HIGH COURT, EASTERN CAPE LOCAL DIVISION,
GQEBERHA

FOR THE APPLICANT : MR MGXAJI
INSTRUCTED BY: MGXAJI A TTORNEYS

FOR RESPONDENT: ADVSINTWA
INSTRUCTED BY: CHRIS BODLANI A TTORNEYS
DELIVERED: 21 APRIL 2022