

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case Number: 22732/17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED

DATE

SIGNATURE

In the matter between:

JOA DA SILVA VIERA

APPLICANT

and

STEPHANUS JAN GABRIEL STEENKAMP
CITY OF TSHWANEMUNICIPALITY

1st RESPONDENT
2nd RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] I encountered this application in the urgent court on 30 March 2017.

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[2] The applicant seeks the following relief:

Ordering the first respondent to cancel the request made to the second respondent for special disconnection of the electricity at the applicant's workplace and to 'reinstate the arrangements between the first respondent and the applicant with immediate effect';

Compelling the second respondent to switch on the electricity at the applicant's workplace with immediate effect alternatively the second respondent is to switch on the electricity and the first respondent is to refrain from interfering with the applicants duties as per the Management Agreement entered into between the first respondent and the applicant.

[3] In the applicant's particulars of claim, the applicant asserts that he has the *locus standi* by virtue of the special power of attorney assign to him. The applicant contend that the matter is urgent as there are seventeen business which lease premises in the building of the first respondent. This is the building for which the first respondent sought a special disconnection of the electricity. Amongst these business is a grocery store, restaurant and a fishmonger.

[4] The applicant submits that he is the manager of the building duly employed by the first respondent from 19 October 2016 in terms of a management agreement duly concluded by the applicant and the first respondent. In addition to the management agreement the first respondent signed a special power of attorney conferring the power of agent upon the applicant and for applicant to act in first respondent's stead.

[5] In the particulars of claim the applicant sets out that the first respondent had advised him that he wished to terminate the management agreement of the applicant. He further sets out that he sought a protection order from the magistrate's court as he was being harassed and threatened by the first respondent. He states in the papers that he assisted in reducing the arrear electricity bill of the first respondent with the second respondent in respect of this specific property that he managed. He documents that he was advised that the first respondent sought special disconnection

of the electricity of the building in question. On making enquiries with the second respondent he was advised that the reconnection of the electricity could only come about by a court order. Of important is the fact that the applicant states as follow:

“5.14 I submit that I do not have any other avenue save for this Application and that failure to grant me [my] orders as prayed in my Notice of Motion appended hereto will make me suffer irreparable harm, as I will not get my payment; and my tenants will also lose their perishable goods, income and some will have to close down their businesses with the attendant job losses...”

The applicant concludes by stating that the first respondent would not be prejudiced and was doing what he was doing out of spite as the applicant had obtained the order from the magistrates court.

[6] From the bar the applicant counsel argued that this was a spoliation and the applicant was being despoiled of the property that was in his possession unlawfully by the first respondent. Counsel for the applicant further argued that the claim for spoliation could be gleaned from the founding affidavit together with the annexures thereto.

[7] Counsel for the first respondent argued, that counsel for the applicant was, for the first time, advancing the mandament dispute from the bar. The latter argument was not on the paper before court. The case that the first respondent was called to answer, and did so, was that which was on the papers filed.

[8] In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 SCA 70 (RSA), Cameron JA, as he then was, stated the following at para [21]:

“It is true that the mandament offered the occupiers an alluring template for the relief they crave. The remedy originated in the canon law,²³ and found its way thence into Roman Dutch law and modern South African law.²⁴ Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the mandament’s protection. The principle is that illicit deprivation must be remedied before the courts will decide competing claims to the object or property.” [Without footnotes]

[9] In *FirstRand Ltd t/a Rand and Merchant Bank and Another v Scholtz NO and Others* 2008(2) SA 503 SCA, Malan AJA, as he then was, at 510B-D stated that :

"The mandament van spolie does not have a 'catch-all function' to protect the quasi-possession of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed. Its purpose is the protection of quasi-possession of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its quasi-possession is deserving of protection by the mandament. Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandament. The right held in quasi-possession must be a 'gebruiksreg' or an incident of the possession or control of the property". [My underlined]

[10] As stated above it is essential for the court to examine the nature of the right professed and thus the nature of the right must be clearly set out for determination and right must be characterised, in order to determine if it is protected from the mandament. *In casu* it is not evident from the papers that the applicants claim is in respect of a mandament. Nowhere in the papers does the applicant set out what the right is that he seeks to protect, this only emerges from his argument from the bar.

[11] I am mindful of the fact that this is the urgent court and the first respondent answers the case as presented on the papers by the applicant. It is trite that a party must set out with particularity the case its opponent has to answer. In this instance this was not done and, it is not correct as contended to by the applicant that one can glean this from the papers, the case must be set with particularity in the papers. See *Trope v SA Reserve Bank and Two Other Cases* 1992 (3) SA 208 (T) at 210G-211A.

[12] In the circumstances the applicant on the papers before me has not made out a case for a mandament. That being the case, what case is then made out from the papers? The simple answer is nought, in my view, from the papers before me it is not clear on what basis the applicant seeks the relief that he does.

[13] Consequently the following order is made:

[a] The application is dismissed with costs.



W. Hughes

Judge of the High Court Gauteng, Pretoria