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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 631/2024

Heard: 22 March 2024

Judgment delivered electronically: 02 April 2024

Reportable YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

Circulate to Magistrates: YES / **NO**

In the matter between: -

BRIGHT IDEAS PROJECTS 860 CC
(REGISTRATION NUMBER 2005/045268/23)

FIRST APPLICANT

JOHANNES CHRISTIAAN REITZ

SECOND APPLICANT

and

MATSAPA TRADING 647 CC
(REGISTRATION NUMBER 2008/242592/23)

FIRST RESPONDENT

CHESLYN MICHAEL EDWARD MOSTERT

SECOND RESPONDENT

PETRI VAN DER COLFF

THIRD RESPONDENT

JUDGMENT

STANTON J

INTRODUCTION: -

[1] On 12 March 2024, the applicants, Bright Ideas Projects 860 CC (*"Bright Ideas"*) and Mr JC Reitz (*"Mr JC Reitz"*) filed an urgent spoliation application, requesting the following relief, namely that: -

- 1.1 The first respondent, Matsapa Trading 647 CC (*"Matsapa"*), the second respondent, Mr CME Mostert and third respondent, Mr P van der Colff (collectively *"the respondents"*), and all those holding under them, be ordered to immediately restore to the applicants and/or the applicants' representatives, peaceful, undisrupted and undisturbed possession and control of all the businesses and the premises situated at Erf 6[...], K[...] Northern Cape Province (*"the property"*), and better known as the Puma fuel station business, as well as the OK shop conducted from the premises (*"the businesses and the premises"*);
- 1.2 The Sheriff for the relevant district be ordered to do what is necessary to be done and to generally assist the applicants and their duly authorised representatives to immediately procure peaceful, undisrupted and undisturbed control and possession of the premises and the businesses; and
- 1.3 The respondents, jointly and severally, the one paying the other to be absolved, be ordered to pay the applicants' costs on the scale as between attorney and own client, such costs to include the costs of two counsel.

[2] The respondents opposed the application on the following grounds: -

- 2.1 The application is not urgent, and particularly not sufficiently urgent to force a hearing on 22 March 2024;

- 2.2 Numerous disputes of fact exist that cannot be resolved on the papers;
- 2.3 The applicants failed to lay a basis for final relief; and
- 2.4 The applicants failed to establish the two jurisdictional requirements for a spoliation order.
- [3] Two going concern businesses situated on the property, the Puma fuel filling station business (*“the Puma business”*) and the OK grocery business (*“the OK business”*) form the subject matter of this application.

URGENCY: -

- [4] It is common cause that the conduct that the applicants allege constitutes the unlawful spoliation took place on 05 March 2024 and was completed on 06 March 2024.
- [5] Mr JC Reitz contacted the respondents telephonically on 05 March 2024 whereafter Werksmans Attorneys, acting on behalf of the respondents, (*“Werksmans”*) addressed two letters to the applicants, dated 05 March 2024 and 06 March 2024 respectively, the essence of which was to convey that the Mr CME Mostert and Matsapa revoked any and all powers and/or authority granted to Mr JC Reitz and any and all general and special powers of attorney that may have previously been issued to Mr JC Reitz, Mr G Reitz or Bright Ideas; and as a consequence that Bright Ideas may no longer conduct any business operations of Matsapa, including, but not limited to the Puma business.
- [6] On 08 March 2024, the applicants, in writing, requested an unconditional and unequivocal undertaking, to be provided before 13:00 on Monday, 11 March 2024, in terms of which the respondents had to immediately surrender their “annexation” of the business and surrender the return of the business to Bright

Ideas and Mr JC Reitz, failing which, an urgent spoliation application would be launched.

[7] No such undertaking was provided and this application was issued on 12 March 2024. The respondents were called upon to file any answering affidavit by 12:00 on 15 March 2024. The application was, however, only served by the sheriff on 15 March 2024 and the respondents filed their answering affidavit on 19 March 2024. The applicants filed their replying affidavit on 21 March 2024.

[8] The requirements for urgency in applications have been dealt with numerous times by the courts. Rule 6(12)(b) of the Uniform Rules of Court provides: -

“In every affidavit or petition filed in support of any application under para (a) of this subrule, the applicant shall set forth explicitly the circumstance which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course”.

[9] There are thus two requirements that must be set forth in the founding affidavit in order to satisfy the requirements of the rule.¹ Whether an applicant has succeeded in satisfying the requirements for urgency must be determined by the contents of the founding affidavit.²

[10] According to the applicants: -

10.1 There is a risk that cash may be misappropriated and/or not properly accounted for;

10.2 The value of the large quantity of stock in the form of fuel and the items on the shelves of the OK shop, paid by Bright Ideas, cannot be adequately protected by an undertaking from Matsapa that the stock would be satisfactorily accounted for; and

¹ Salt And Another v Smith 1991(2) SA 186 (NM) at 187 A.

² IL&B Marcow Caterers a Greatermans SA 1981(4) SA 108(C) at 111A.

10.3 If the matter is enrolled in the normal course, damages of millions of rands and reputational damage to the Puma fuel business would have resulted, which would lead to irreparable harm.

[11] According to the respondents, the applicants failed to satisfy the requirements that it would suffer real loss or damage if the application is to be heard in accordance with the normal procedure; and that the deviation from the prescribed procedure would not unduly prejudice the respondents. Furthermore they assert that the urgency is self-created.

[12] In ***Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)***,³ Coetzee J held with reference to Rule 6(12)(b) that: -

"Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

[13] In ***Vermaak v Taung Local Municipality***,⁴ the Court confirmed that: -

"The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a Court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the Court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date."

[14] In the matter of ***East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others***,⁵ with regard to the reasons why an applicant

³ 977(4) SA 135(W) At 137F.

⁴ (JR315/13) [2013] ZALCHB 43 (12 MARCH 2013) AT [12]; SEE ALSO EAST ROCK TRADING (PTY) LTD & OTHERS V EAGLE VALLEY GRANITE [2012] JOL 28244 (GJS) AT [7] – [9].

claims that he cannot be afforded substantial redress at a hearing in due course, the Court remarked as follows: -

“It is important to note that the Rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.”

[15] It is trite, as enunciated by the Court in the matter of **Moila v Elaxandra and others**,⁶ that a spoliation remedy is inherently urgent because of the underlying purpose that no resort to self-help should be tolerated to ensure the respect of the rule of law.

[16] Mr KW Lüderitz, on behalf of the respondents, relied on the judgment of the Supreme Court of Appeal in the matter of **Murray and Others NNO v African Global Holdings (Pty) Ltd and Others (“AGH”)** ⁷ in support of his argument that this application was similarly brought on an extremely urgent basis with significant truncated time periods, and should accordingly be struck from the roll. I do not agree. This application is distinguishable from AGH as the applicants therein lodged their application, with extreme truncated periods, after waiting for a total period of 3 weeks.

[17] I am satisfied, despite truncating the period for the filing of the notice of intention to oppose and the answering affidavit, that: -

17.1 The applicants were not dilatory in first attempting to resolve the dispute without immediate legal action;

⁵ [2012] JOL 28244 (GSJ) at [7].

⁶ [2023] JOL 58661 (GJ) at paragraph [13].

⁷ [2020] 1 All SA 64 (SCA) at paragraphs [35] to [40].

17.2 The urgency was not self-created in view of the judgment in the matter of **Nelson Mandela Bay v Greybenhouw**⁸ where the Court held as follows: -

“...In my view it approached its statutory duty of safeguarding the rights and interests of ratepayers in a responsible manner by seeking to persuade the respondents to comply and only then approaching the court for relief. In these circumstances it cannot be said that the first applicant has been dilatory in bringing the application. There is consequently no merit in this point.” and

17.3 The applicants adequately justified the necessity to circumvent the ordinary time periods as set out in the Uniform Rules of Court having regard to the inherent urgency of spoliation applications; and

17.4 The deviation from the prescribed procedure did not unduly prejudice the respondents as they were able to file a comprehensive answering affidavit.

[18] I accordingly condoned the non-compliance in respect of the ordinary forms and time periods and adjudicated the matter on an urgent basis.

MANDAMENT VAN SPOLIE: -

[19] The policy of the law is neatly summed up in the maxim, *spoliatus ante omnia restituendus est*. In **Nino Bonino v De Lange**,⁹ Innes CJ stated that: -

"spoliation is an illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property or even in regard to a legal right".

[20] In order to obtain a mandament van spolie, the applicant must prove that: -

⁸ CC 2004 (2) SA 81 (SE) at [34].

⁹ (1906 TS 120) at page 122.

20.1 He or she was in peaceful and undisturbed possession of the property or the right;¹⁰ and

20.2 He or she was unlawfully deprived of such possession.¹¹

[21] An applicant who seeks to invoke the Mandament van Spolie is therefore required to establish the two requirements for such relief, subject to test articulated in ***Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd***.¹²

AD PEACEFUL AND UNDISTURBED POSSESSION: -

[22] It is not in dispute between the parties that: -

22.1 Matsapa is the registered owner of the property;

22.2 Mr CME Mostert signed a resolution on 12 March 2018 on behalf of Matsapa in terms of which it was resolved: -

- “1. Dat Johannes Christiaan Reitz ID: 8[...] gemagtig word om as Openbare Beampte en gevolmagtigde van die BESLOTE KORPORASIE, alle sake van die BESLOTE KORPORASIE te hanteer en te bedryf.*
- 2. Hy sal geregtig wees om o.a alle dokumente te teken, ‘n rekening by ‘n finansiële instelling te open en om alle aankope, verkope en kontrakte van die BESLOTE KORPORASIE te onderhandel, te magtig en te onderteken.*
- 3. Hy sal ook geregtig wees om wysigings aan die lederegister van die BESLOTE KORPORASIE te magtig en te onderteken.*

¹⁰ Impala Water Users Association v Lourens NO [2004] 2 All SA 476 (SCA).

¹¹ Nino Bonino v de Lange 1906 T.S 120 at 122.

¹² 1984 (3) SA 623 A at 634E-635C.

4. *Hierdie totale volmag, soos hierin aan hom verleen, sal geldig wees totdat dit skriftelike deur die bestaande Lede van die BESLOTE KORPORASIE herroep word.”*

(“the resolution”);

- 22.3 Matsapa executed a general power of attorney that appointed Mr JC Reitz as its authorised attorney of record and lawful agent *“in performing all necessary actions for managing and transacting the business of the Close Corporation within the Republic of South Africa for and on behalf of the Close Corporation...”*. The power of attorney granted Mr JC Reitz extensive powers of management and control *(“the power of attorney”)*;
- 22.4 During May 2018, Matsapa procured a retail licence (R/2018/0157) to sell licenced petroleum products from the property *(“the retail licence”)* and a site licence (S/2018/0042)*(“the site licence”)*;
- 22.5 Bright Ideas and OK concluded an agreement to conduct a grocery store from the premises under the OK brand. Matsapa, however, alleges that the agreement had to be concluded with Matsapa and not with Bright Ideas;
- 22.6 Purchases made in respect of fuel are administered into a separate bank account designated for that purpose; and groceries or goods that are purchased at the OK business are administered with another different bank account;
- 22.7 Bright Ideas employed all the staff, including Mr van der Colff, at the premises from 2018 until 05 March 2024; and paid their salaries;
- 22.8 Mr JC Reitz’s powers and authority, granted in terms of the resolution and the power of attorney, were unilaterally revoked on 05 March 2024

in writing; and the applicants were informed that Matsapa shall continue to operate the Puma business itself; and

22.9 From 05 March 2024, Bright Ideas' employees are being employed by Matsapa.

[23] According to the applicants they were in undisturbed and peaceful possession of the businesses and station premises until 05 March 2024, which possession was taken away by the respondents without recourse to a court of law; and without any agreement.

[24] The applicants allege that they were in undisturbed possession and control of all the businesses and the premises for the following reasons: -

24.1 Mr CME Mostert never managed the businesses or the premises, directly or indirectly as same was managed by Bright Ideas;

24.2 The resolution and the power of attorney granted extensive powers of management and control to Mr JC Reitz during 2018 in terms of which he managed the businesses and the premises for a period of more than 6 years;

24.3 Mr CME Mostert made no financial contribution to acquire the property;

24.4 Mr Reitz senior and Mr JC Reitz, as Matsapa's authorised agent, negotiated and concluded the dealer agreement with Puma Energy South Africa (Pty) Ltd ("Puma");

24.5 Bright Ideas employed and appointed Mr P van der Colff as the site manager and paid his salary. Mr JC Reitz, although he was not present at the businesses on a daily basis, was in daily contact and communication with Mr P van der Colff;

24.6 Bright Ideas employed and paid the salaries of all the other employees of the businesses; and

24.7 Puma was aware that Bright Ideas managed the Puma business.

[25] The respondents deny that the applicants were in peaceful possession of the Puma business and the premises based on the allegation that the Puma business, as a going concern, is made up of the following elements, all of which a person is required to possess in order to operate Matsapa's business as a going concern: -

25.1 Matsapa's retail licence and the rights granted to Matsapa by the Department in terms thereof;

25.2 Matsapa's dealership contract concluded with Puma and the rights granted to Matsapa by Puma in terms thereof;

25.3 Matsapa's property, more specifically the portion of the premises from which the Puma business is operated;

25.4 The goodwill attaching to the business; and

25.5 The employees necessary to conduct the Puma business.

[26] The respondents aver that the purported, but terminated, management agreement relied on by the applicants does not create rights of a nature protectable by the Mandament van Spolie. Their reasons for this allegation can be summarised as follow: -

26.1 Matsapa is the possessor of the Puma business and Mr JC Reitz merely managed same; and therefore, Matsapa was never dispossessed of its Puma business;

- 26.2 The applicants cannot be in possession of the right to conduct a fuel retailer business from the premises as the retail licence was issued to Matsapa and not to the applicants; and without the right to sell fuel, there is no fuel station business;
- 26.3 The Puma dealership contract was concluded between Matsapa and Puma and the rights and obligations provided for therein secures fuel for Matsapa to sell, and not to the applicants;
- 26.4 Bright Ideas and Mr JC Reitz have not been deprived of their access to the property or the business premises;
- 26.5 Bright Ideas and Mr JC Reitz never had exclusive access to the property and the business premises, but managed the Puma business of Matsapa “remotely”; and
- 26.6 Bright Ideas and Mr JC Reitz were never in possession of any employees, nor in respect of any right to the employees.

[27] In **Yeko v Qana**,¹³ the Appellate Division reaffirmed that: -

“The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. 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.” (my emphasis).

[28] The Court in the matter of **Bennet Pringle (Pty) Ltd v Adelaide Municipality**,¹⁴ furthermore laid down the following definitive principles with

¹³ 1973 (4) SA 735 (A) at 739D-G.

regard to type of possession that is required to found a claim for a spoliation order: -

- 28.1 The possession which he claims to be deprived of does not need to have been exclusive;
- 28.2 A spoliation claim will lie at the suit of a person who holds jointly with others;
- 28.3 It is not necessary that the possession should be continuous, either by the claimant or his servants, if the nature of the operations which he conducts do not require his continuous presence;
- 28.4 A disturbance of possession, without deprivation of the whole of is, is sufficient;
- 28.5 With reference to ***The South African Law of Property, Family Relations and Succession***,¹⁵ *“the remedies given by this section (including a spoliation order) are “available to any person who has control of a thing and exercises the control; in his own interest or as agent for another.”;* (my emphasis)
- 28.6 Terms as “control”, “use and enjoyment” and “holding” of property should be determined based on the facts of the matter; and
- 28.7 The possession must still consist of the intention of securing some benefit; and the holding for itself.

[29] The following statement made in the letter from Werksmans to the applicants on 05 March 2024 refutes the respondents’ argument that the applicants could and did not have possession of the premises and business: -

¹⁴ 1977(1) SA [E.C.D] 230 At 323H to 33H.

¹⁵ Lee and Honore at page 8.

“10. Matsapa has furthermore resolved to the extent necessary and ex abundante cautela, to notify Bright Ideas, as Matsapa hereby does, that Bright Ideas may no longer conduct any business operations of Matsapa, including but not limited to the Puma Fuel Station Business. Matsapa hereby notifies Bright Ideas that Matsapa will forthwith continue to operate the Puma Fuel Station, itself, with effect from Tuesday 5 March 2024.” (my emphasis)

[30] In applying the above established legal principles, I can come to no other conclusion than that the applicants proved that they were in undisturbed possession of the businesses and the premises on 5 March 2024.

AD DISPOSSESSION: -

[31] In the second instance, an applicant must prove an act of spoliation, namely that he or she has been wrongfully deprived of his or her possession.

[32] It is trite law that violence, stealth, fraud or force is no longer necessary for an act of spoliation.¹⁶

[33] Deprivation is wrongful if it takes place without undue process of law¹⁷ or without a special legal right to oust the possessor.¹⁸

[34] The Court in the matter of **Elastocrete (Pty) Ltd v Dickens**,¹⁹ with reference to Maasdorp,²⁰ provided the following valuable and succinct explanation of when dispossession can be regarded as wrongful: -

“...I think that the construction to be placed on the word “wrongfully” where it occurs in Bonino's case and in the other authorities dealing with this subject

¹⁶ Sillo v Naudé 1929 AD 21; Nino Bonino v de Lange *supra* at 122. See also Ntai v Vereeniging Town Council 1953 4 SA 579 (A) at 588.

¹⁷ Dönges v Dadoo 1950 2 SA 321.

¹⁸ Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education & Culture Services [1997] JOL 294 (C) at page 15.

¹⁹ [1953] 2 All SA 105 (SR) at page 112.

²⁰ Institutes of South African Law, Volume II, 7th Edition at page 31.

means nothing more than "without any special legal right to oust the possessor from possession"..."

[35] Should a respondent deny that what it did amounted to spoliation it can "...*claim that in doing what he did was legally justified.*"²¹

[36] I do not agree with Mr JG van Niekerk SC, on behalf of the applicants, that the revocation of the resolution and the power of attorney is irrelevant to the determination of the application. The resolution specifically provided for unilateral revocation thereof. In my view, this granted the respondents a legal right and a legally justifiable basis to oust the applicants from the possession of the Puma business. I accordingly find that the applicants failed to prove the second requirement to obtain a spoliation order in respect of the Puma business.

[37] With regard to the OK business, the respondents submit that: -

37.1 The OK business is not in issue *in casu* as the respondents made clear at the outset that they did not assume sole management of the OK grocery business;

37.2 The OK business is operated by the applicants in terms of a separate dealer / franchise agreement concluded between Bright Ideas and OK, and not between OK and Matsapa;

37.3 The Puma business and the OK business are not inseparable intertwined and commercially distinct;

37.4 The applicants are not deprived of their lawful access to the property, nor of their management and control of the OK business; and

²¹ Scoop Industries (Pty) Ltd v Langlaagte Estate and GN Boerdery Company Ltd (In Voluntary Liquidation) [1948] 1 All SA 181 (W) at page 188.

37.5 Matsapa's conduct does not impede Bright Idea's operation of the OK business and Mr JC Reitz is not deprived of his rights to lawfully access the premises for this purpose.

[38] In support of these allegation, the respondents provided a site plan that portrays the layout of the commercial outbuildings that house the two distinct retail enterprises. It is also common cause that the revenue generated by the Puma business and the OK business always had, and remains deposited in 2 separate bank accounts, operated by Bright Ideas and Matsapa respectively.

[39] Applying the Plascon-Evans test, I am not persuaded that the applicants were dispossessed of the OK business.

COSTS:-

[40] The convention is that costs are awarded against the unsuccessful party.

[41] The respondents request that a cost order should be granted on an attorney and client scale against the applicants.

[42] In my view, there was any vexatious or *mala fide* conduct on behalf of the applicants that warrants a punitive cost order.

WHEREFORE I MAKE THE FOLLOWING ORDER:-

The application is dismissed, with costs, including the costs attendant on the employment of two counsel.

STANTON J

On behalf of the applicants:

Adv. JG van Niekerk SC

Adv. JL Olivier

On instruction of Oosthuizen Sweetnam Reitz & Fourie
Care of Van de Wall Incorporated

On behalf of the respondents:

Adv. KW Lüderitz SC

Adv. P Lourens

On instruction of Werksmans Attorneys

Care of Engelsman Magabane Incorporated