

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

Case no: 1022/2024

In the matter between:

NALEDI MNTONGA

Applicant

and

**SILMA HAMDULAY obo EXECUTOR OF THE
DECEASED ESTATE OF SICELO VICTOR MNTONGA**

First

Respondent

PENROSE RESTAURANTS (PTY) LTD

(Registration No. 2022/759561/07)

Second Respondent

REASONS FOR JUDGMENT

Zilwa AJ

[1] This matter came before me as an urgent application in which the Applicant sought the following orders:

- 1.1 That the Respondents be and are hereby ordered to restore possession of premises known as Wimpy and Debonairs Pizza situated at BT Ngebs and Circus Triangle Malls in Mthatha forthwith.
- 1.2 That the Respondents and any person acting at the instance of the Respondents are interdicted from entering and/or causing anyone to enter

premises referred to in 16.2 pending finalisation of the application in Makhanda High Court under case number 430/ 2024.

- 1.3 That the Applicant is authorized to take control of Wimpy and Debonairs Pizza premises situated at BT Ngebs and Circus Triangle Malls forthwith with assistance of Sheriff of the High Court and/or police officers if Respondent is refusing to comply with this court order.
- 1.4 That the Sheriff and/or police are authorized to do all that is necessary to enforce this court order, and to ensure that possession of the premises referred to in 16.2 is restored to Applicant.
- 1.5 Applicant to serve papers in terms of rule 4 of the uniform Rule 4 as well as by e-mail provided in the certificate of urgency by 13H00 on Friday, 01st day of March 2024.
- 1.6 The Respondents file their opposing papers, if any, on or before 16H00 on Friday, 01st day of March 2024.
- 1.7 That the Applicant files her replying affidavit, if any, on or before 09H00 on Saturday, the 02nd day of March 2024.
- 1.8 That that Respondents be and are hereby ordered to pay the costs of this application, on an attorney and client scale.

[2] Sequel to the granting of the order, the Respondents delivered an application for leave to appeal on 6 March 2024 and in the same notice, request for reasons for the order was also incorporated.

[3] From the reading of the papers it appears that on 5 March 2024 an application for interdict was brought against the Applicant and other Respondents before the Makhanda High Court. The Applicant was cited as the First Respondent in that application whereas the Respondents were the Applicants. The Makhanda application was still pending when this application served before me.

[4] I may mention at this stage that there are two confirmatory affidavits that the Respondents rely on, namely, the one deposed to by Mr Williams and the other one by Mr Tarr. The one deposed to by Mr Williams records that it is confirming the contents of the replying affidavit deposed to by Mr Pumelele Balfour. Unfortunately, I did not have before me any replying affidavit deposed to by this deponent. On the other hand, the one allegedly deposed to by Mr Tarr was not before me at the time of hearing of this application. During the hearing I sought to establish from both the Registrar and the Applicant's legal representatives whether they were in possession of this affidavit and their response was in the negative. In a nutshell the matter was argued to finality without the affidavit by Mr Tarr.

[5] This being an application for spoliation, it is trite that it is in its very nature urgent. In any event I am also satisfied that the Applicant's listed grounds of urgency sufficiently render the matter urgent.

[6] The Supreme Court of Appeal held in *Ivanov v North West Gambling Board*¹ that an Applicant is entitled to a *mandament van spolie* restoring the *status quo* upon

¹ 2012 (6) SA 67 (SCA) at para 21

proof that he was in peaceful and undisturbed possession of the spoliated thing and that he was wrongfully deprived of possession.

[7] Spoliation is correctly described as a wrongful deprivation of another person's right. In spoliation applications the lawfulness of the possession of the Applicant for the spoliation order is irrelevant. Therefore, spoliation remedy protects peaceful and undisturbed possession against unlawful actions.

[8] In *Ngqukumba v Minister of Safety and Security*², the Constitutional Court held as follows:

"Self-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any inquiry into the lawfulness of the possession of the person despoiled."

Common cause facts

[9] The following facts are common cause:

9.1 The Applicant is one of the parties in the pending application before the Makhanda High Court where the Respondents are seeking to interdict her from trading and conducting business at the premises in question.

² 2014 (5) SA 112 (CC)

9.2 On 21 February 2024 the Applicant was given the keys to the premises and at the same time received and signed for the notices to vacate the premises in question.

9.3 The Applicant, together with so called 'other unlawful occupants', left the stock, which included perishables at the premises in question.

[10] In opposition of the reliefs sought, the Respondents have challenged the Applicant's *locus standi* to bring this application. The Applicant, so the argument goes, is not in possession of the premises in question on the basis that she has abandoned the premises. They further argue that the correct person to bring the application should have been an entity called Rhweba Phumalanga Trading (Pty) Ltd ('*Rhweba*'). Paragraph 10 of the answering affidavit referred me to paragraphs 82, 84 and 87 of the affidavit deposed to by one Naledi but such affidavit has not been placed before me and does not form part of the indexed bundle serving before me.

[11] In an old case of *Scholtz v Faifer*³, Innes CJ had the following to say:

"Here the possession which must be proved is not possession in the ordinary sense of the term – that is, possession by a man who holds pro domino, and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner" (underlined for emphasis)

³ 1910 TPD 243 at 246.

[12] I am satisfied that the Applicant, in being an employee of Rhweba and also performing work with the intention of securing some benefit for herself, she has a legal standing to bring this application. By being involved in a day to day running of the business, she has accrued some rights that are protected in law. The conduct of the Respondents appears to me to be a set up stratagem seeking to prevent the Applicant from entering the premises and participating in the company business as before. It was therefore incumbent of her to approach court for the necessary relief to prevent her further access to the premises and participation in the business.

[13] It does not make sense to me as to how the Respondents, in their own version, contend that the Applicant lacks the necessary *locus standi* on the basis that she is not in possession but on the same breath cite her as one of the Respondents in the Makhanda application who is being interdicted from trading and conducting business at the premises in question. This is the same person, as per the Respondents' version, who was given keys to the premises and signed notices to vacate. There is further no distinction drawn, insofar as the Applicant and other co-Respondents is concerned, regarding the leaving of stock and perishables at the premises in question. For this reason alone, it is reasonable to conclude that the Applicant has been recognized by the Respondents themselves to be in possession of the premises.

[14] It is my view that this ground of opposition cannot be sustained, and I accordingly find that the Applicant had the necessary legal standing to bring this application.

[15] Another issue that the Respondents raised is that the action of locking of the premises was not performed by them but by one Mr Tarr. I have already indicated that I was not placed in possession of his confirmatory affidavit at the time of argument and even as at the date of these reasons, no such affidavit has been placed before me. The allegations made by the Respondents therefore remain unsubstantiated hearsay which no reliance can be placed.

[16] Accepting for a moment that there was such affidavit, the next question that one would need to answer is why did the Respondents have to oppose this application if no order was sought against them, save for the order of costs. It could have been better if Mr Tarr had brought an application to intervene for purposes of placing on record that he is the one who performed the action of locking the premises. Absent such version I was unable to find in favour of the Respondents.

Circus Triangle business outlets

[17] The Respondents contended that these premises did not have any locks changed but the electricity was switched off. They further made reference to the events of 1 February 2024 as narrated in the Makhanda proceedings but, as I have already indicated, no affidavit(s) serving before Makhanda High Court have been placed before me notwithstanding the fact that the Respondents have contended that that application is inextricably linked to this matter and that it should be read together with their affidavit. It was made clear during argument that the papers that were before court were not as bulky as the Respondents made them to be so as to incorporate the Makhanda High Court proceedings. That notwithstanding no action

was taken by them to ensure that all the necessary papers and annexures were placed in the court file.

[18] In any event the act of switching off electricity from the shops is another form of spoliation and the Applicant was entitled to the relief he sought for a *status quo ante*. The Respondents have not contended that they were not the ones responsible for this disconnection. Nothing has been said about that.

Non-joinder of Resilient (Pty) Limited, Mthatha Malls (Pty) Limited and Rhweba Phumalanga (Pty) Limited

[19] A point *in limine* was raised on the basis that the above entities had not been cited, even though they have a direct and substantial interest in the outcome of this application. This was said to be a material non-joinder.

[20] The question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties.⁴ The test is whether or not a party has a "*direct and substantial interest*" in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.⁵ The mere fact that a party may have an interest in the outcome of the litigation does not

⁴ *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226F–227F; *Sikutshwa v MEC for Social Development, Eastern Cape* 2009 (3) SA 47 (TkHC) at 56I–57A.

⁵ *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168–70.

warrant a non-joinder plea.⁶ The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party.⁷

[21] The present application concerned restoration of the Applicant's possession of the premises and prevention of further efforts by the cited Respondents and anyone acting at their instance to interfere with the Applicant's occupation of the premises in question.

[22] Accordingly, the above narrated disposition of the law suggests that the point *in limine* based on the alleged material non-joinder of the listed entities falls to be dismissed.

Conclusion

[23] Resultantly, I was satisfied that the Applicant has made out a proper case for the reliefs sought and therefore I stand by the order I granted in terms of the notice of motion.

H ZILWA
ACTING JUDGE OF THE HIGH COURT

Date of hearing : 02 March 2024

⁶ *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176I–177A; *Lawrence v Magistrates Commission* 2020 (2) SA 526 (FB) at para 27

⁷ *One South Africa Movement v President of the RSA* 2020 (5) SA 576 (GP) at para 22.

Date of reasons of judgment : 26 March 2024

Appearances:

For Applicant: Mr W. Quluba

Instructed by: W. Quluba Inc., 28 Sprigg Street, Mthatha

For Respondents: Mr Kroon

Instructed by: Van Wyk Matabane Inc., Edenburg, Sandton c/o JA Le Roux
Attorneys, 56 Leeds Road, Mthatha