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

Case no: 065931/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE: **11 July 2024**

SIGNATURE

In the matter between:

LISA DOROTHY GIOVANINONI

Applicant

And

FOURIE MATTHYS KRITZNGER N.O

First Respondent

FOURIE MATTHYS KRITZNGER

Second Respondent

LAURENZO MASSIMO GIOVANNONI

Third Respondent

MASTER OF THE HIGH COURT, PRETORIA

Fourth Respondent

J U D G M E N T

MAKHOPA, J

- [1] This is an application in which the applicant seeks an order based on the *mandament van spolie*, restoring her possession of her residence and the use of the storage facility.
- [2] The applicant seeks further an interim interdict preventing the first to third respondent's from entering or instructing others to enter her residence without prior consent. In addition the applicant seeks an interim interdict preventing the sale of the immovable property situated at Erf 1[...] V[...] D[...] H[...] Ext 1, Potchefstroom from being alienated, pending proceedings in terms of section 2(3) of the Will Act, to be instituted within 30 days.
- [3] Furthermore the applicant seeks an order from the deceased estate for her maintenance pending the winding up of the deceased's estate.
- [4] The applicant is the widow of the deceased who died on 19 April 2024. The first and second respondent is the executor of the deceased estate, cited in his nominal capacity and in his personal capacity.
- [5] The third respondent is the son of the deceased, born from a previous marriage. The fourth respondent is the master of the High Court.
- [6] The applicant contends that the application is urgent because she has been unlawfully deprived of access to her primary residence on 7 June 2023 by the first and second respondents.
- [7] She further submits that she is in need of maintenance. The immovable property has been listed for sale on 13 June 2024 and she also has a right to the property and the court should urgently intervene to protect her rights.
- [8] The Respondents submit that the applicant voluntarily vacated the property that belongs to the deceased estate between 18 May 2024 and 27 May 2024.

- [9] It is submitted further that the applicant failed to explain the delay of 4 weeks, that is when the respondent sent the letter to the applicant and the date 14 June 2024 when this application was brought by the applicants.
- [10] It is argued by the respondents further that the application is not urgent and the applicant also failed to attach a certificate of urgency. The other beneficiaries or creditors of the estate have not been joined. Failure to join such other parties makes this application defective and as such must be dismissed.
- [11] The third point *in limine* raised is that the applicant has no clear right to seek the relief and she still has to approach the court to establish any right.
- [12] In reply to the non-joinder the applicant submits that, the applicant is not seeking relief against the beneficiaries of the deceased estate nor against the creditors.
- [13] It was contended on behalf of the applicant that, the applicant has a clear right of possession and was living with other family members while recovering from injuries sustained in the motor vehicle collision where her husband (deceased) died.
- [14] The applicant contends further that the first respondent directed the managing agents of the estate to terminate the applicant's access to the premises without informing the applicant thereof.
- [15] The historical principle underlying the *madament van spolie* were laid down in the judgment of Innes CJ in *Nino v De Lange*¹.

¹ 1906 TS 120 par 122 where the court held that "It is a fundamental principle that no man is allowed take the law into his own hands; no one is permitted to dispose another forcibly or wrongfully and against his consent of the possession of property, whether movable. If he does so, the court will summarily restore the status quo ante and will do that as a preliminary to any enquiry or investigation into the merits of their dispute.

- [16] In order to obtain redress under and evoke the remedy of the *Mandament van Spolie* the Applicant is required to allege and prove that he was in peaceful and undisturbed possession of property or a right² and that he was unlawfully deprived of possession of the property or the right by another.
- [17] The true purpose of the *mandament van spolie* is not the protection and vindication of rights in general, but rather the restoration of the *status quo ante*.
- [18] An applicant must not only allege peaceful and undisturbed possession, but he must prove it.³
- [19] Possession is an important jurisdictional fact because it has legal consequences, one of which is that the party dispossessed is afforded the remedy of the *Mandament van Spolie*.⁴
- [20] In discharging the onus of proving possession, an applicant is required to establish the nature of its possession and as pointed out by Addleson J in *Bennett Pringle*⁵ where the court held that the remedy is available to any person who has control of a thing and exercises such control in his own interest or as agent for another.
- [21] It is also trite 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 will be refused.⁶
- [22] In my view it is clear that the applicant was in possession of the immovable property, and it is not a requirement that she should have been in the house always.⁷

² Impala Water Users Association v Lourens NO 2008 (2) SA 495 (SCA).

³ Impala Water Users Association v Lourens NO [2004] 2 All SA 476 SA.

⁴ Shoprite Checkers Ltd v Pangaborne Properties 1994 (1) SA 616 (W).

⁵ Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E) at 232H-233H.

⁶ Le Riche v PSP Properties CC 2005 (3) SA189 (C).

- [23] She did explain in her affidavit that she was temporarily absent from her house when she discovered that she no longer had access. The same happened to the storage.
- [24] In my view the applicant is correct when she submits that it was not necessary to join creditors, the ex-wife of the deceased and the deceased's daughter, because they do not have substantial interest in the matter.⁸
- [25] It is further my respectful view that the first and second respondents chose to take the law into his own hands by directing the managing agent of the estate in which the property is situated to terminate applicant's access to the house as well as preventing the applicant to access the storage facility.
- [26] The mere fact that the applicant has removed some of her items from the house does not justify the actions taken by the respondents.
- [27] In my view the matter is urgent and meets the requirements set up in Rule 6(12).⁹
- [28] It appears from the papers that the second respondent is disbursing the money in the estate without the permission of the fourth respondent.
- [29] Such conduct by the second responded shows that he is reckless in dealing with the assets of the estate. This conduct by the second respondent justifies an adverse cost order against him.
- [30] I make the following order:

⁷ Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E) at 233, as also referred to in God Never Fails Revival Church v Mgandela and Another (2188/2019) [2019] ZA ECMHC 62 (22 October 2019).

⁸ Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 169H.

⁹ East Rock Trading 7 (Pty) Ltd Another v Eagle Valley Granite (Pty) Ltd and others (11/33767) [2011] ZAGPJHC 196 (September 2011 at Par 5 and 6.

- 30.1 The first to third respondents are ordered to forthwith restore to the applicants full possession and access to the premises situated at Erf V[...] D[...] H[...] Ext 17, by handing over to the applicant's attorneys of record all keys to the said premises, and by instructing the managing agent to restore the applicant's access to the estate and the storage facility.
- 30.2 The first and second respondent is ordered to permit the applicant, or anyone instructed by her to remove her belongings from the storage unit at Potch Storage, unit 138, on 48 hours' written notice;
- 30.3 That pending an action to be instituted within 30 days in terms of Section 2(3) of the Wills Act, to declared amendments to the Will of the late Renzo Giovannoni as valid; the first to third respondents be interdicted and restrained as follows:
- 30.3.1 That the first and second respondent be interdicted and restrained from alienating the property situated at Erf 1[...] V[...] D[...] H[...] Ext 17;
- 30.3.2 That the first to third respondents be interdicted and restrained from entering the premises or instructing or allowing anyone else to enter the premises, without the applicant's prior written consent.
- [31] The issue of maintenance of the applicant is referred to the Maintenance Court.
- [32] The second respondent is to pay the costs of this application on Scale B.

MAKHOB A J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED JUDGMENT: 27 JUNE 2024

JUDGMENT HANDED DOWN ON: 11 JULY 2024

Appearances:

For the Applicant: Adv A. Coertze (instructed by) Chambers Attorneys Incorporated

For the Respondent: Adv Z Schoeman (instructed by) Stopforth Swanepoel & Brewis Inc.