

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

CASE NO: 073195/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 07 August 2024

SIGNATURE

In the matter between:

NASEERAH CASSIM

First Applicant

SUHAIL ESSACK

Second Applicant

and

FADEL NDAME

J U D G M E N T

TEFFO, J:

Introduction

[1] The applicants brought an application by way of urgency for mandament van spolie in terms of which they sought the following orders: that the respondent be ordered and directed to restore to them immediately possession and control of the premises described as Unit 1[...] P[...], 2[...] R[...] Avenue, Waterkloof Ridge, Pretoria (*"the premises"*); that the respondent

be interdicted from interfering with their control and possession of the premises; that the respondent be ordered to provide the keys to the new lock installed in the premises alternatively, to restore the old lock for use with the keys given to the applicants when they took possession of the premises; and provide the applicants with all codes and authority including the cards to enable them to gain access to the said premises electronically. The respondent opposes the application.

The parties

[2] The first applicant is the wife of the second applicant. The applicants have been occupying the premises from 1 March 2024 in terms of a lease agreement entered into by and between them and the respondent. The respondent is the owner of the premises.

Background facts

[3] The lease was for a period of twelve months. In May 2024 the applicants defaulted with their monthly rental payment. In the absence of the second applicant who is currently in custody awaiting trial, on 30 May 2024 the first applicant received a letter from Hopgood Attorneys Inc, the attorneys of the respondent, wherein she was given until 31 May 2024 to settle her rental payment. The letter also notified her that the rental for the month of June 2024 was due on 1 June 2024. Furthermore, she was informed that should she fail or refuse to make the payments of the rental for May and June 2024, the lease agreement is terminated and she should vacate the premises and all other occupants by the close of business of 7 June 2024. The first applicant was also notified that in the event she failed to remedy the breach by settling the rental payments and failed to vacate the premises, the respondent's attorneys held instructions to proceed with an application for eviction, rental interdict and summons against her.

[4] The first applicant did not pay rental for the months of May and June 2024. However, she promised to pay. She remained in the premises. On 11 June 2024 she went to visit her brother-in-law, Mr Sulieman Essack and his

family in Modimolle. While she was in Modimolle, her other brother-in-law, Mr Yousha Essack resided in the premises.

[5] On 12 June 2024, Mr Yousha Essack arrived at the premises and found three African men. They claimed to be plumbers and electricians but they did not have any equipment with them. They remained in the house using the facilities unrestricted when Mr Yousha Essack slept in one of the rooms. Eventually they left and slept in the bakkie and returned every morning.

[6] On 25 June 2024 when Mr Yousha Essack arrived at the premises, he found that the key he was using all along did not work. One of the three African men opened the door for him and advised that the lock had been changed on the instructions of the respondent.

[7] On the same day the first applicant received another letter from the respondent's attorneys which stated that the applicants had vacated the premises and had undertaken to remove the goods.

[8] On 26 June 2024 the applicant received another letter from the respondent's attorneys. The letter stated that the respondent's attorneys had instructions that if the movable property of the applicants was not removed by the close of business of 28 June 2024, the respondent would make arrangements to remove them and place them in a storage facility. The respondent would not accept any responsibility for any losses and/or damages. Furthermore, the applicant would be responsible for the costs of the storage and transportation. The letter also stated that the first applicant should note that the respondent would no longer provide her with access to the premises after the close of business of 28 June 2024.

[9] As a result, the first applicant went to see her erstwhile attorney, Ms Groenewald who responded to a letter from the respondent's attorneys dated 25 June 2024 and explained that the applicants did not vacate the premises and their furniture and personal clothing were never abandoned.

[10] She also lodged a claim against the respondent with the rental tribunal. At the tribunal she was provided with a letter addressed to the Station Commander which she took to the police station. The police were supposed to serve the letter upon the respondent. They did not do so. They felt that the dispute between the first applicant and the respondent was a civil matter. The same letter was sent to the respondent's attorneys but nothing happened.

[11] This prompted the first applicant to consult with her current attorney of record, Mr Brian Clayton on 29 June 2024 and this application was launched.

The parties' contentions

[12] The applicants contend that they were in peaceful and undisturbed possession of the premises until on 25 June 2024 when the respondent changed the locks to the premises and the access codes to the complex in which the premises are situated. The respondent further installed three adult men in the premises to prevent the first applicant to retake possession of the premises. By so doing the respondent has unlawfully deprived the applicants of their possession to the premises without a court order.

[13] The first applicant is homeless. She had to reside with her brother-in-law in Modimolle. The matter is urgent. It cannot wait to be heard in the ordinary motion court.

[14] After receipt of the letter from the respondent's attorneys, the first applicant contacted them and advised that she would make payment as soon as possible as it was her intention to do so.

[15] She denies that she had abandoned the movables in the rented property and that the applicants have vacated the premises. She also denies that they use the respondent's premises as a storage facility.

[16] She tendered to make payment for the arrear rental, however the respondent refused it through his attorneys.

[17] The respondent raised the following points *in limine* to the application: He contends that the application was not served on him. He claims that the application is not urgent. Furthermore, he asserts that the application is pending before the rental tribunal. It cannot be heard by the urgent court.

[18] With regards to the merits the respondent denies that the applicants were deprived of possession of the premises. He claims that the applicants secured another residence. The lease was cancelled as a result of the breach which was not remedied and new tenants were secured as per the lease agreement dated 1 June 2024.

[19] The respondent further claims that the applicants were never denied access to the premises and referred the court to Annexure “FD07” to prove that he provided the applicants access to the premises to collect their movables. He contends that in the messages received from the applicants on 18 and 28 June 2024 the applicants confirmed that they needed access to remove their clothes and to arrange for a truck to remove the rest of their belongings.

[20] The respondent further denies that the applicants are entitled to the relief.

[21] He denies that the applicants remained in occupation of the property until 25 June 2024. He asserts that if the applicants were still in occupation, new tenants would not have been secured. The respondent contends that the applicants never indicated that they wanted to remain in occupation. He claims that they confirmed that they were to move out and would collect their movables during June 2024. It was further contended that because the applicants vacated the premises, it was not necessary for the respondent to proceed with an application to evict them from the premises.

The points in limine

The application was not served on the respondent

[22] The respondent contends that the application is not properly before court because it was not served upon him in terms of the Uniform Rules of Court. He also submitted that the time lines given in the notice of motion had passed when the application was served on his attorneys. The application was emailed to his attorneys of record with an undertaking that it will be served upon him by the sheriff. That did not happen.

[23] The applicants contend that their attorneys have been communicating with the respondent's attorneys prior to launching the application. Their attorneys emailed the application to the respondent's attorneys before it was signed and issued and even thereafter to give them time to be able to deal with it. They claim that after the application was issued, the first applicant and later on the sheriff attempted to serve the application on the respondent at his residential address. His wife refused them access to the property.

[24] Although the application was not served on the respondent and/or his wife and despite the time lines having passed, the respondent was able to file his answering affidavit and the applicants also filed their replying affidavit. All sets of papers are before court. I cannot find any reason why the matter cannot be heard by this Court. The court therefore condones non-compliance with the service.

The application is not urgent

[25] The respondent contends that it is not true that the applicants were deprived of possession of the premises. He submitted that the applicants vacated the premises to reside somewhere else and left their movables at his property. They undertook to collect their movables during June 2024 after the lease agreement was terminated and new tenants secured. In the month of June 2024 the applicants were provided with access codes and started to remove some of their movables but not all. In support of this allegation, the respondent attached WhatsApp messages between him and the applicants from 7 June 2024 to 28 June 2024 (Annexure "FD07").

[26] He referred the court to messages received on 18 June 2024 and 28 June 2024 and claimed that in the said messages, the applicants confirm that they needed access to remove their clothing and to arrange a truck to remove the rest of their belongings.

[27] The respondent claims that the urgency is self-created. The elements of spoliation have not been met and reliance on inherent urgency is not applicable. He further submitted that he cannot proceed with an eviction application where the applicants have moved out of the premises.

[28] It is further contended that the applicants agreed to vacate the premises.

[29] The applicants submitted that this is a spoliation application and by its nature it is urgent. They claim that the first applicant was in possession of the premises. She was forcibly evicted and deprived of the enjoyment and benefits of this possession. They further contend that non-payment of rent does not entitle the respondent to lock them out of the premises without a court order.

[30] The issues discussed under this heading go to the merits of this application. I will address them when I deal with the merits of the application. The applicants allege that they were deprived of their possession unlawfully. Spoliation proceedings are inherently I am persuaded that the application is urgent.

Lis alibi pendense

[31] The respondent contends that the applicants referred the dispute to the rental tribunal. The dispute is still pending before the tribunal. It cannot therefore be entertained by this court. He argued that the litigation is between the same parties, the cause of action is the same and the same relief is sought in both matters. In support of this argument reliance was placed on

the decision in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*¹.

[32] The applicants contend that the first applicant was desperate. She had to approach the rental tribunal. A matter before the tribunal takes weeks to be heard and is more than often postponed at a whim. She would have no place to stay pending the delay of months to finalise the matter. It was submitted that the respondent failed to respond to any correspondence of the tribunal.

[33] A tribunal cannot take away the constitutional right of a litigant to approach the court. Reliance of the respondent on the *Caesarstone* matter is misplaced in that the decision refers to matters that are before the courts. A tribunal is not a court of law. It is within the rights of a litigant to choose any forum he wants to approach for resolution of disputes. This point *in limine* has no merit. It is therefore dismissed.

The merits

Applicable law

[34] The mandament van spolie has three characteristics; it is a possessory remedy; it is an extraordinary, a robust and a speedy remedy.

[35] The court in *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co*² had this to say:

“Two factors are required to find a claim for an order for the restitution of possession on an allegation of spoliation. The first is that the applicant was in possession and the second, that he has been wrongfully deprived of that possession and against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before an order should be granted ... It must be shown that the applicant had had free and undisturbed possession.”

¹ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA)

² 1948 (1) 91 W at page 98, *Ivanov v North West Gambling and Others* 2012 (6) SA 67 (SCA)

[36] The question as to who bears the *onus* of proving spoliation was settled in the case of *Yeko v Qana*³ where the court had this to say:

“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. The applicant must prove the facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in his possession, and that they were removed from its possession forcibly or wrongfully or against its consent.”

[37] It is incumbent upon the applicant to satisfy the court on a balance of probabilities that she is entitled to the relief sought by proving that she was indeed in peaceful and undisturbed possession at the times in question and that the respondent wrongfully dispossessed her of those items. The applicant must satisfy the court on the admitted facts that she is entitled to the relief sought.⁴

[38] In *K2017427913 South Africa (Pty) Ltd v Du Plessis*⁵ the court held that the court *a quo* erred by finding that the respondent did have undisturbed possession of the property before he was spoliated. The court *a quo* failed to enquire whether the effective physical control over or possession of the property had not been lost by the respondent when he left the property on the premises, which enquiry was necessary in order to determine whether the respondent had indeed been spoliated. Had the court *a quo* enquired into this aspect it would and should have found that the respondent on his own version, had lost effective physical control over, or possession of the property at the material stage which control or possession was a requirement for a spoliatory relief to be granted to him. The appellant’s point *in limine* in this regard should accordingly have been upheld by the court *a quo*.

³ 1973 (4) SA 735 A at page 739E

⁴ *P.M. v R.M. and Another* (6414/21) [2022] ZAWCHC 12 (8 February 2022)

⁵ *CIV APP FB 24/2022; UM223/2021* [2023] ZANWHC 115 (3 August 2023)

Discussion

Were the applicants (in particular, the first applicant) in peaceful and undisturbed possession at the time of spoliation?

[39] On their own version the applicants allege that they defaulted with their rental payments for May and June 2024. The respondent through his attorneys sent a letter to the first applicant on 30 May 2024 where she was given until 31 May 2024 to pay. She was also reminded that their rental for June 2024 was due on 1 June 2024. She was notified that should she fail to settle the payments, the lease agreement is cancelled and she should vacate the premises and all other occupants by 7 June 2024.

[40] The first applicant did not settle the arrear payments. However, she alleges that she continued to remain in the property. As and when she was in the property, she knew that the agreement of lease came to an end as a result of her breach as a result of non-payment of rent. She also knew that she had to vacate the property. There was therefore no basis for her and the other occupants to remain in the premises. She knew she was not in lawful possession. It cannot be correct for her to contend that she was in peaceful and undisturbed possession of the premises.

[41] Put differently at the time of the alleged spoliation the first applicant was not in possession of the premises. Payment of rental was demanded from her on 30 May 2024. She failed to pay and the contract was cancelled. At the time when her brother-in-law came to the premises, the applicants had long lost possession of the leased premises. The fact that the applicants' movables are still at the premises does not revive their possession of the premises. At that time the applicants did not enjoy a peaceful and undisturbed possession of the premises.

Were the applicants unlawfully deprived of the possession of the premises?

[42] At the time of the spoliation the applicants did not possess the premises. They could not, therefore, have been deprived of possession.

[43] Under the circumstances the applicants have failed to prove that they are entitled to the relief sought on a balance of probabilities.

[44] Based on this conclusion I do not find it necessary to deal with the ancillary relief sought.

Costs

[45] It is trite that costs should follow the result. The respondent's counsel asked for punitive costs against the applicants. I am not inclined to grant such costs.

Order

[46] Consequently, the following order is made:

1. The application is dismissed.
2. The applicants are ordered to pay the costs of this application.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the applicants

Clayton BC

Instructed by

Brian C Clayton & Co

Counsel for the respondent

Instructed by

Hopgood Attorneys Inc

Heard on

17 July 2024

Handed down on

7 August 2024