

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: **2024/057086**

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

[REDACTED]

SIGNATURE

5 August 2024
DATE

ICONCONSULT HOLDINGS (PTY) LTD

Applicant

and

WORLD MINERALS (PTY) LTD

First Respondent

VUYELA LOGISTICS (PTY) LTD

Second Respondent

JUDGMENT

GOEDHART AJ:

Introduction

[1] On 20 June 2024, I gave an order in the following terms:

- [1.1] The application is heard as an urgent application in accordance with Rule 6(12) and the requirements pertaining to forms and service are dispensed with;
- [1.2] The respondents are ordered to restore possession of the chrome to the applicant;
- [1.3] The applicant is ordered to pay the costs of uplifting the chrome from the second respondent;
- [1.4] The applicant is ordered to pay the costs occasioned by the proceedings before Manoim J on 4 June 2024 (which were reserved) on scale A; and
- [1.5] In respect of the proceedings before Goedhart AJ, the respondents are ordered to pay the costs of the applicant, jointly and severally, on scale A.

[2] The reasons for the order are set out below.

Background

- [3] The applicant launched an urgent spoliation application on 22 May 2024.
- [4] The applicant's case is that on 10 April 2024 it had purchased chrome which it intended to on sell to an entity known as Base Metal Trading in an amount of R432 970.00. It attached the tax invoice issued to Base Metal Trading dated 12 April 2024.

- [5] The applicant hired five trucks from OCG Haulers (Pty) Ltd (OCG) to transport and offload the chrome into slot 594¹ at the second respondent's warehousing premises on 12 April 2024. According to the applicant, slot 594 is the slot held by Base Metals, the intended purchaser of the chrome, at the second respondent's premises.
- [6] A person by the name of Xandre Muller (Muller), who is unknown to the applicant and who represented that he was a buyer of the chrome and a representative of the first respondent, and who was present on the second respondent's premises on 12 April 2024, instructed the truck drivers of OCG to deliver the chrome at slot 616.
- [7] The applicant attached five tickets to the founding affidavit which were issued by the second respondent, and which constitute proof of delivery of the chrome at slot 616 held in the name of the first respondent on 12 April 2024.
- [8] The applicant asserts that the first respondent obtained unlawful possession of the chrome in this manner and that it has retained possession since 12 April 2024.
- [9] Having been unlawfully deprived of its possession of the chrome, the applicant opened a case of theft with the South African Police Services at Alberton under case number 256/04/2024.

¹ The applicant referred in its founding papers to VUY594 and VUY616 and in reply to Slot 594 and Slot 616. Whilst the descriptions differ it is clear from the papers that the parties mean the same thing when reference is made to Slot 594 and Slot 616. The difference in description is therefore not material and I make reference to Slot 594 and Slot 616 for the sake of uniformity.

[10] The applicant alleges that the value of the chrome depreciates and attached what appears to be tests of the chrome to the founding affidavit reflecting that on 10 April 2024 the percentage of chromium oxide (CH₂O₃) was 36.45% which had depreciated to 34.30% on 29 April 2024. It alleges that it will suffer irreparable harm if the chrome is not restored to its possession.

[11] The applicant then launched the urgent spoliation application on 22 May 2024.

Proceedings before Manoim J

[12] The urgent spoliation application initially came before Manoim J who dismissed the application on 4 June 2024 and reserved the costs of the first and second respondent's application in terms of Rule 30(1), (2) & (3) and the costs incurred on 4 June 2024.

[13] Manoim J gave reasons on 11 June 2024.

[14] The reasons reflect that Manoim J upheld the objection raised by the respondents that the application was an irregular proceeding because the notice of motion provided for dates for further filings on dates that preceded the service of the application. It was therefore impossible for the respondents to comply with the time table set out in the urgent application. The merits of the application was not considered and pronounced upon by Manoim J. (at paras 3 and 4 of the reasons)

Events between 4 June 2024 and 18 June 2024

[15] After the dismissal of 4 June 2024, the applicant amended its notice of motion to reflect a hearing date of 18 June 2024. The amended notice of motion further provided that the opposing affidavit was to be served by 10 June 2024 and the replying affidavit would be served by 12 June 2024. The amended notice of motion was served by email on 6 June 2024 at the following email addresses: louis@lwalaw.co.za and/or info@lwalaw.co.za.

[16] Ms Masete, the applicant's attorney of record, deposed to a service affidavit on 13 June 2024 reflecting that the spoliation application was served at the aforesaid email addresses.

[17] The respondents entered a notice of intention to oppose on 10 June 2024.

[18] The respondents also filed a second Notice in terms of Rule 30(1), (2) & (3) dated 10 June 2024 (*"the second Rule 30 notice"*), supported by the affidavit of Mr Louis Weinstein, the attorney of record of the first and second respondents, who prepared the Rule 30 notice.

[19] The second Rule 30 notice sets out the following complaints of irregularity:

[19.1] The application was dismissed on 4 June 2024 by his Lordship Justice Manoim;

[19.2] The applicant's amended notice of motion is dated and signed 5 June 2024 and (purported to be) served on the attorneys of

record of the first and second respondents at the time of the dismissal of the application on 6 June 2024;

[19.3] No date is provided for giving notice of intention to oppose;

[19.4] The amended notice of motion has not been served on either of the respondents, there was no consent for service on the attorney of record of the respondents prior to the dismissal of the application having been requested or agreed to;

[19.5] The application having been dismissed, it cannot be revived by notice of amendment of the original notice of motion, or at all.

[20] By the time the matter served before me on 18 June 2024, it was evident from Manoim J's reasons that he had dismissed the application for the irregularity set out in paragraph 3 of the reasons, and that the merits had not been considered. Therefore, the complaints of irregularity in paragraphs 19.1 and 19.5 above cannot be sustained.

[21] The amended notice of motion provided that an answering affidavit was due by 10 June 2024, whereafter a reply would be filed by 12 June 2024. The amended notice of motion had come to the attention of the respondents on 6 June 2024. Despite the complaints about manner of service and that the amended notice of motion did not stipulate a date for noting opposition, the respondents were able to instruct Mr Weinstein, also their attorney of record in the proceedings before Manoim J, to prepare the second Rule 30 notice.

Mr Ascar was again briefed by Mr Weinstein to appear on behalf of the respondents.

[22] Rule 6(12) permits a deviation from the requirements relating to service. As the merits had not been decided by Manoim J, the applicant was entitled to re-enrol the matter having cured the initial defects complained of in the Rule 30 proceedings before Manoim J. There having been substantial compliance sufficient to bring the amended notice of motion and application to the respondents' attention, the respondents were able to instruct their previous attorney of record.

[23] The court is entitled to overlook, in proper cases, any irregularity which does not result in any substantial prejudice to the other party.² In respect of the complaints raised in the second Rule 30 notice, the respondents were not materially prejudiced as they were able to brief attorney and counsel and answer to the application.

[24] Consequently, the complaints in paragraphs 19.2, 19.3 and 19.4 above relating to irregularities in the notice of motion and the timing and manner of service did not result in substantial prejudice to the respondents.

[25] On 18 June 2024, when the matter was first called, I ruled against the respondents on the second Rule 30 notice and directed that the parties were to deal with the substance of the spoliation application. The order of 20 June 2024 contains an obvious error in that it does not include the order dismissing

² Erasmus, *Superior Court Practice*, D1 Rule 30-7, fn 2 and the cases there cited.

the second Rule 30 notice, although it had been so dismissed. This is a patent error which will be corrected in the revised order.³

[26] After the dismissal of the respondents' second Rule 30 notice on 18 June 2024, the respondents were immediately ready to deliver their opposing answering affidavits to the applicant's legal representatives in court. The respondents' answering affidavit was also uploaded onto Caselines on 18 June 2024. The answering affidavit and the affidavits attached thereto were all deposited on 3 June 2024.

[27] The matter stood down to 20 June 2024, to afford the applicant an opportunity to deliver a replying affidavit.

The respondents' answer

[28] Mr Kevin Wentworth Eugene Thyse (Thyse) deposed to the opposing answering affidavit on 3 June 2024.

[29] The affidavits of Mr Azande Sokhela (Sokhela) and Mr Wayne Johnson (Johnson) which were also deposed to on 3 June 2024, are attached to Thyse's affidavit.

[30] Thyse is the managing director of the first respondent. Thyse denies that:

[30.1] The matter was urgent;

[30.2] Ownership or the right to sell by the applicant;

³ Rule 42(1)(b); *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-H.

[30.3] The applicant has “at any stage” been in possession of the chrome ROM (run of mine); and

[30.4] That the chrome depreciates in value. According to Thyse, the value of the ROM is not more than R60 000 on the basis that he has, through various companies, transacted in chrome and chrome ROM for many years and he is therefore able to express an expert opinion.

[31] Thyse also denies that the chrome had been booked into slot 594 and asserted, with reference to the second respondent’s operational rules, that once the chrome had been booked into a slot, it could not then be delivered into another slot. These operational rules have not been provided.

[32] Thyse further asserts that there is a dispute of fact in that he had advised Ms Masete, the applicant’s attorney, that the first respondent had nothing to do with the transactions referred to in the application and that the chrome ROM stored in Slot 616 was stored there on behalf of Sokhela Coal (Pty) Ltd (Sokhela Coal) and that the first respondent is not aware of the owner of the chrome ROM.

[33] Thyse attaches an affidavit by Sokhela, the sole director of Sokhela Coal. Sokhela avers that Sokhela Coal is a trader in and chrome products and also acts as a middleman selling such products on behalf of third parties.

- [34] Sokhela states that on 10 April 2024 one of the regular suppliers of chrome to his company, one Xandre Muller (Muller) contacted him to advise that he has five truckloads of chrome ROM available in Johannesburg, which is approximately 43% quality, and requires his company to purchase the chrome from him and to arrange transport and storage “pending the purchase”.
- [35] Sokhela advised Muller that he had a regular purchaser, being the first respondent, who will purchase it was R2 300 per ton provided the quality is not less than 43%. Muller agreed, whereafter Sokhela passed the information on to Thyse.
- [36] Sokhela also requested Thyse for consent to utilize the storage facility, slot 616 of which the first respondent had exclusive use at the premises of the second respondent. Thyse permitted use of slot 616 by Sokhela. Sokhela arranged for the transport of five truckloads of chrome ROM to Slot 616 and Sokhela made payment of R30 000. Proof of the alleged payment by Sokhela of the R30 000 is not provided.
- [37] The five truckloads of chrome ROM were duly delivered to slot 616 at the second respondent’s premises.
- [38] Sokhela avers that slot 594 is for the storage of chrome concentrate and not suitable for the storage of ROM. Slot 616 is booked for the chrome ROM which Sokhela alleges he arranged with the second respondent.

[39] Thyse also attaches the affidavit of Johnson, who is a director of the second respondent. Johnson confirms the content of Thyse and Sokhela's affidavits and confirms that the first respondent is the holder of the sole and exclusive rights and use of slot 616 on the second respondent's premises. He denies that the chrome ROM was booked by or on behalf of the applicant either in slot 616 or slot 594 or at all. Slot 594 is only for the storage of chrome concentrate and not chrome ROM.

The applicant's reply

[40] In reply, the applicant states that the applicant's attorney had received a letter from Maubane Incorporated (Maubane) dated 24 May 2024, in which Maubane indicated that it acted on behalf of the first respondent, that the first respondent had received the urgent application pursued by the applicant against the first respondent and proposed that the matter be settled on the basis that the applicant could collect the chrome, that the first respondent would forfeit the incurred logistics costs of R30 000.00 and that a conditional release of the chrome or from the warehouse would be provided and that the application was to be withdrawn and each party to pay their own legal costs.

Evaluation

[41] The *mandament van spolie* is available where:

[41.1] A person has been deprived unlawfully of the whole or part of his/or her possession of movables or immovables;

[41.2] A joint possessor has been deprived of his or her co-possession by his or her partner taking over exclusive control of the thing held in joint possession;

[41.3] A person has been deprived unlawfully of his or her *quasi*-possession of a servitural right; or

[41.4] A person has been deprived unlawfully of his or her *quasi*-possession of other incorporeal rights.⁴

[42] The remedy is available to a person who has been deprived of his or her actual physical possession or co-possession of the subject property. In order for such possession to be established two requirements have to be met: (i) the person needs to be in effective physical control of the thing; and (ii) needs to have the intention to derive some benefit from the possession.⁵

[43] To obtain a spoliation order, the applicant has to demonstrate, on a balance of probabilities, that it was in possession of the chrome and that it was wrongfully deprived of possession against its consent.⁶ Possession must first be restored before the merits can be considered. It is intended as a unique and summary remedy.

⁴ Dennegeur Estate Homeowners Association and another v Telkom 2019 (4) SA 451 (SCA) (**Dennegeur**) at para 9; Bill v Waterfall Estate Homeowners Association NPC and another 2020 (6) SA 145 (GJ) at paras 31-34.

⁵ Dennegeur, Id, at para 10.

⁶ Nino Bonino v De Lange 1906 T.S. 120.

- [44] On the facts, and given that the mandament is intended as a unique and summary remedy, I considered that the matter could appropriately be heard as one of urgency in terms of Rule 6(12).
- [45] The applicant, through OCG, was in possession of the chrome on 12 April 2024 with the view of securing a benefit for itself, being the on sale of the chrome to Base Metals.⁷
- [46] The applicant's case is that Muller represented himself as a buyer of chrome and representative of the first respondent at the premises of the second respondent. Muller directed the OCG drivers to offload the chrome into slot 616 held by the first respondent and not slot 594, held by Base Metals.
- [47] The first respondent, relying on Sokhela's affidavit, asserts that Muller was a regular supplier of chrome products to Sokhela Coal. Through Muller, the first respondent came to be in possession and is holding the chrome on behalf of Sokhela Coal.
- [48] The crux of the first respondent's defence is that it was not the spoliator and therefore the relief against it is not available.
- [49] A dispute of fact exists where the court is satisfied that the party who purports to raise the dispute has in the answering affidavit seriously and

⁷ Yeko v Qana 1973 (4) SA 735 (A) at 739D-F.

unambiguously addressed the fact said to be disputed.⁸

[50] In assessing whether the respondents raise a genuine dispute of fact in relation to the issues which the applicant has to prove to obtain its summary remedy, the following is relevant:

[50.1] The respondents and Sokhela, upon whose evidence the respondents rely, attached no objective documentary evidence of their assertions, under circumstances where such objective evidence ought to have been readily available to them;

[50.2] Although Muller is apparently known to Sokhela as his regular supplier, Sokhela does not attach a confirmatory affidavit by Muller;

[50.3] Sokhela attaches no proof of the R30 000 which was allegedly paid for “logistics”;

[50.4] The respondents contend that if a delivery is intended for a particular slot at the second defendant’s premises, it cannot then be changed to another slot. However, the operational rules of the second respondent upon which the assertion is based was not provided;

[50.5] Sokhela stated that he had informed Muller that he had a regular buyer, being the first respondent. Sokhela is however silent on

⁸ Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 2 All SA 512 (SCA); Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd 2008 3 All SA 383 (SCA).

what transpired between 12 April 2024 and 3 June 2024 regarding the proposed sale to the first respondent. The first respondent too is silent on the issue of the proposed sale to it;

[50.6] It is common cause that on 12 April 2024, the first respondent came to be in possession of the chrome and remains in possession. According to the first respondent, it lays no claim to the chrome, is holding the chrome on behalf of Sokhela Coal and does not know who the rightful owner is;

[50.7] The first respondent, having offered to return the chrome on 24 May 2024 through its erstwhile attorney Maubane, has failed to do so. Whilst, on the face of it, the second respondent would have no real interest in the dispute, it has made common cause with the first respondent in resisting the relief sought by the applicant;

[50.8] Despite the respondents apparently having no claim to, or interest in, the chrome they have not issued interpleader proceedings. Instead, on the papers before me, the first respondent, supported by the second respondent, has actively resisted relinquishing possession of the chrome; and

[50.9] Sokhela Coal, which apparently has an interest, has not intervened as a party to the proceedings despite being the purported on-seller of the chrome which it says it acquired from

Muller. As stated, Sokhela does not attach a confirmatory affidavit Muller, despite the assertion that Muller is known to him as a regular supplier. He also attaches no documents evidencing a commercial transaction between Sokhela Coal and Muller.

[51] In my view, the respondents have not seriously and unambiguously raised a dispute of fact in relation to the two requirements for a spoliation order that the applicant has to prove on a balance of probabilities.

[52] The applicant has demonstrated that it was in possession of the chrome with a view to obtaining a benefit for it from the possession, and that it was unlawfully deprived of possession by Muller, a person purporting to act as a representative of the first respondent, through whose intervention the applicant lost possession of the chrome in favour of the first respondent.⁹ In *Stockshousing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services*¹⁰ it was held that:

“The element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft,

⁹ *Stockshousing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services* 1996 (4) SA 231 at 240A-D.

¹⁰ *Ibid* at 240B-D.

but in all cases, spoliation is unlawful when the dispossession is without the consent of the person deprived of possession, since consent to the giving up of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the dispossession.”

[53] The first respondent has retained possession of the chrome into slot 616 of which it has exclusive use at the second respondent's premises. The respondents are the correct parties against whom an effective spoliation order is to be granted.

[54] The disputes regarding what the nature of the chrome and what the value of the chrome are not directly relevant to the issues to be decided in the spoliation application. It is however clear from the initial correspondence that the dispute now raised by the respondents as to the difference between chrome concentrate and chrome ROM, did not feature. Further, despite Thyse's contentions regarding the alleged low value of the chrome, the first respondent has not been willing to release the chrome, nor has it instituted interpleader proceedings on the basis that it does not know who the chrome, alleged to be of low value, should be released to.

[55] The applicant has therefore met the requirements for a spoliation order.

Revised order

[56] As set out above, the order of 20 June 2024 contained an obvious error in that the dismissal of the respondents' second Rule 30 notice was not included in the order.

[57] Consequently, the order of 20 June 2024 is revised in the following terms:

[57.1] The application is heard as an urgent application in accordance with Rule 6(12) and the requirements pertaining to forms and service are dispensed with;

[57.2] The respondents' complaints of irregularity as set out in the notice in terms of Rule 30(1)(2) & (3) dated 10 June 2024 are dismissed;

[57.3] The respondents are ordered to restore possession of the chrome to the applicant;

[57.4] The applicant is ordered to pay the costs of uplifting the chrome from the second respondent;

[57.5] The applicant is ordered to pay the costs occasioned by the proceedings before Manoim J on 4 June 2024 (which were reserved) on scale A; and

[57.6] In respect of the proceedings before Goedhart AJ, the respondents are ordered to pay the costs of the applicant, jointly and severally, on scale A.



GOEDHART AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 18 and 20 June 2024
Date of order: 20 June 2024
Date of judgment and revised order: 5 August 2024
(This judgment was handed down electronically by circulation to the parties' representatives via email.)

For the Applicant: Adv H Horn

Instructed by: Masete Attorneys Inc.

For the Respondents: Adv C Ascar

Instructed by: Louis Weinstein & Associates