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

Case No: 2041/2024

Heard on: 23 August 2024

Delivered on: 30 August 2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

H[...] J[...] C[...]

Applicant

and

M[...] C[...] C[...]

Respondent

JUDGMENT

CHWARO AJ:

Introduction

[1] On 2 August 2024, the applicant launched this application and set it down for hearing in the urgent Court on 6 August 2024 where it served before Tlaletsi

JP who postponed the application to 23 August 2024 to enable the applicant to file her replying affidavit and thereafter for the parties to file their respective heads of argument.

- [2] The applicant seeks an order for the immediate restoration of her access to an office through the main gate of the property situated at 6[...] J[...] Avenue, El Toro Park, Kimberley and a costs order against the respondent.

Background facts

- [3] The applicant and the respondent are married to each other out of community of property with the exclusion of accrual. They are the joint owners of an immovable property situated at 6[...] J[...] Avenue, El Toro Park, Kimberley, (“the property”). The parties are no longer living as husband and wife. The applicant left the marital home during June 2020 but returned in August 2021 to reside in the flat, which has a separate entrance but is adjoined to the main house within the property. During 2022, the respondent instituted divorce proceedings that are still pending.
- [4] The respondent lives in the main house on the property. The parties use part of the main house as an office for their insurance brokerage business. The arrangement, as I understand it, is that the applicant uses the front portion of that part of the room in the main house as her office where she mainly deals with short term insurance clients whereas the respondent uses the rear portion of the same room, separated by an inter-leading door, as his office, where he deals with long term insurance clients.

The dispute precipitating this application

- [5] The applicant contends that since her return to the matrimonial property in August 2021 and taking occupation of the flat, she has had free and unfettered access to her portion of the office situated in the main house, through the main gate of the property.

- [6] However, on 15 July 2024, the respondent locked the electrical gate controller of the main gate which made it impossible for her to gain access by opening the said gate either manually or through the use of a remote control. Once again, on 23 July 2024, the respondent erected a fence between the flat and the main house and thus denied her access to the main house and her portion of the office.
- [7] The respondent posits that on 15 July 2024 he had to install a new motor at the main gate. This new motor was fitted with an anti-theft bracket. He did not provide the applicant with the remote control to the new motor and to that extent, acceded that he denied the applicant access into the property through the main gate.
- [8] He further concedes that on 23 July 2024, he had a fence erected between the main house and the flat. This he did, according to him, based on an agreement between them to that effect, which agreement was encapsulated in the WhatsApp communication exchanged between the parties on 23 February 2022, some two years prior to the actual construction of the fence.
- [9] The respondent asserts that his conduct as aforesaid amounted to a lawful counter-spoliation since the applicant had previously gained access to his living space within the main house through the office and took photographs of his furniture which she then advertised for sale through Facebook. The applicant had also replaced a lock on the door of his living unit. However, he approached the Magistrates' Court for the appropriate relief and on 4 July 2024, he was granted an interim order preventing the applicant's conduct as aforesaid.

The issues

- [10] Emanating from the brief outline of the material facts as set out above, it follows that this Court is called upon to determine a preliminary issue relating to urgency and whether the applicant was spoliated by the conduct of the respondent on 15 and 23 July 2024 respectively.

Urgency

- [11] The main dispute regarding urgency centres around whether the mere act of spoliation per se, entitles a party to approach court on truncated time periods. Mr Olivier, counsel for the respondent, vehemently argued that the applicant ought to have complied with the trite requirements of urgency as embodied in rule 6(12)(a) and (b) of the Uniform Rules of Court over and above the alleged act of spoliation.
- [12] On the other hand, Mr Coetzee SC, for the applicant, argued that the applicant did not only allege spoliation as a ground for urgency¹ but further contended that the restoration of access to her office is an urgent matter as her livelihood depends on her ability to access and utilise the office.
- [13] It is correct that the provisions of rule 6(12) requires of an applicant to assert facts that render the matter urgent and why it cannot be done in due course. Though the applicant scantily met the formal requirements of the rule, a proper and robust consideration of the issues raised in the papers requires of this Court to determine this preliminary issue by adopting an approach adumbrated in **Sikwe v SA Mutual Fire and General Insurance Co Ltd**² where the court dealt with an issue of compliance with the requirements of rule 6(12) and stated as follows:
- “[S]pecific averments of urgency must be made and facts upon which such averments are based must be set out in the affidavit where it is not otherwise apparent that the matter is urgent. It does not follow that an application is necessarily defective if the form referred to in the Rule is not strictly adhered to. In my opinion, it is the substance of the affidavit, and not its form, which will weigh with a Court; if an affidavit sets out facts upon which a Court can decide that an applicant is entitled to relief in terms of the sub-rule, the Court

¹ Placing much reliance on the dictum in *Ross v Ross* 1994 (1) SA 865 (E) at 872J

² 1977 (3) SA 438 (W) at 440H-441A. This approach was approved and applied in *Cekeshe and Others v Premier, Eastern Cape and Others* 1998 (4) SA 935 (Tk) at 948A-F

will entertain the application. If the only reasonable inference from the facts set out in the affidavit is that the matter is one of urgency, then an applicant will have complied with the requirements of the sub-rule, even though he does not make a specific averment that it is urgent.”

- [14] I align myself with the above approach and hold that the applicant cannot be faulted for not having acted with speed to seek a remedy, regard being had to the timing between the two incidents of alleged spoliation and the eventual hearing of the matter. No party suffered any actual prejudice to present its case before this Court. Consequently, it is my finding that the applicant made out a case for having approached this Court on an urgent basis.

Was the applicant spoliated?

- [15] The requirements for a successful *mandament van spolie* remedy are trite³. In **Dennegeur Estate Homeowners Association and Another v Telkom SA SOC Ltd**⁴ the court described these requirements, pertaining to movable or immovable property in the following terms:

“In the case of movable or immovable property.....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”.

- [16] It follows that for the applicant to succeed against the respondent, she must demonstrate that she was in peaceful and undisturbed possession of the property and has been deprived unlawfully of the whole or part of her possession of the property.

³ The Law of South Africa (LAWSA), First Reissue, Vol 27, Butterworths, 2002, para 264, p179

⁴ 2019 (4) SA 451 (SCA) at para 10

- [17] The facts of this matter reveal that since her return to the matrimonial property in August 2021, both the applicant and respondent enjoyed co-possession and control to access the main house, where the office space is located, through the main gate as well as unfettered access to the main house from the flat without any physical hindrance.
- [18] All these changed when the respondent, in his own words, decided to change the motor of the main gate and failed to provide the applicant with a remote control to enable her access to the property and by erecting a fence between the flat and the main house.
- [19] Though the respondent's counsel did not pursue the counter-spoliation argument with much vigour, it could not be open to him to successfully rely on counter-spoliation for his conduct as described above since that would have amounted to self-help. In any event, the respondent obtained a remedy, through the granting of an interim order by the Magistrates Court on 4 July 2024.
- [20] The fact that the applicant, on her own, decided to exercise her unfettered access to the property at intervals does not in itself amount to lack of or curtailment of access or control as the respondent sought to suggest. This argument cannot be sustained and falls to be rejected outrightly. It cannot be refuted that the applicant, for whatever period in the day, utilises her office to derive a benefit or livelihood in servicing her clients, regardless of the volume or number of such clients.
- [21] On the conspectus of all facts that are common cause between the parties, it is my finding that by causing the installation of a new motor to the main gate to the property on 15 July 2024 and failing to provide a new remote control to the applicant to enable her continual access to the said property, the respondent unlawfully deprived the applicant of her possession and access to the property which she had enjoyed without hindrance prior to the said date. The unlawful deprivation continued with the erection of the fence

between the two buildings by the respondent some eight days later, on 23 July 2024.

- [22] In conclusion, the applicant has made out a case to be granted immediate access to her part of the office situated at the property through the main gate and from a flat that she occupies without any hindrance.

Costs

- [23] The applicant emerged successful in seeking restoration of her access to the property and the usual order that ought to be granted was to be that the costs follow the results. The particular circumstances of this matter render it necessary for this Court to deviate from the usual costs order and deprive the applicant of the costs of appearance on 6 August 2024.

- [24] It was the applicant who determined the date of set down of her application. The respondent complied and filed its answering affidavit as directed. The applicant then sought time to file her replying affidavit, necessitating the postponement of the matter at no fault to the respondent. In my view, the respondent cannot be left out of pocket at the instance of the applicant under these circumstances.

Order

- [25] In the premises, the following order is made:

1. The respondent is ordered to immediately grant the applicant access to the office situated in the main house, from the flat occupied by the applicant and through the main gate of the property situated at 6[...] J[...] Avenue, El Toro Park, Kimberley.
2. The applicant is ordered to pay the costs occasioned by the postponement of the matter on 6 August 2024 on scale C in terms of rule 67A of the Uniform Rules of Court.

3. The respondent is ordered to pay the costs of the application, except the costs as referred to in paragraph 2 above, on scale C in terms of rule 67A of the Uniform Rules of Court.

O.K. CHWARO
ACTING JUDGE
HIGH COURT, NORTHERN CAPE DIVISION, KIMBERLEY

REPRESENTATION:

For the Applicant:	Adv. WJ Coetzee SC
Instructed by:	Mathewson & Mathewson Inc., Kimberley

For the Respondent:	Adv. JL Olivier
Instructed by:	Engelsman Magabane Inc., Kimberley