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

NOT REPORTABLE

Case No: 2954/2024

In the matter between:

ISLAAM ALLY SALEH BALHABOU

FIRST APPLICANT

HAMIS JOSEPH KAYAMBA

SECOND APPLICANT

PAUL SEPHRINE FERNANDES

THIRD APPLICANT

and

WARWICK MARSHALL BLAMEY

FIRST RESPONDENT

SATRACKTRACKING (PTY) LTD

SECOND RESPONDENT

**UNLAWFUL OCCUPIERS OF THE PROPERTY
SITUATED AT 2[...] S[...] STREET,
SUMMERSTRAND, GHEBERHA**

**THIRD AND FURTHER
RESPONDENTS**

REASONS

MULLINS AJ:

INTRODUCTION

[1] This spoliation application was brought on an urgent basis and was heard by me virtually on 7 August 2024. At the conclusion of the argument, I made the following Order:

‘1. The application is dismissed with costs, such costs to be paid by the First Applicant on scale B.

2. If either party requires reasons for the Order they are to request same from the Registrar of this court in writing within 10 days hereof.’

[2] The Applicants have requested reasons, which reasons follow.

BACKGROUND

[3] Alleging that they had been unlawfully deprived of their peaceful and undisturbed possession of an immovable property, 2[...] S[...] Street, Summerstrand, Gqeberha (the “Property”) the Applicants launched this application on an urgent basis praying for the following relief (excluding prayer 1, which deals with urgency):

‘2.1. That the third respondents vacate the property situated at 2[...] S[...] Street, Gqeberha forthwith;

2.2. That in the event of the third respondents failing to comply with the Order in 2.1 above, the Sheriff be authorised and directed to take all such steps as are required in order to remove the third respondents from the said property and that the Sheriff be authorised and directed to enlist the services of the South African Police Services in order to enable him to do so, if so required.

3. That the respondents be ordered to return forthwith to the applicant¹ full and undisturbed possession of the property situated at 2[...] S[...] Street, Summerstrand, Gqeberha.

4. That the respondents are herewith interdicted from spoliating or removing any of the applicants' possessions situated at 2[...] S[...] Street, Summerstrand, Gqeberha.

5. That the first and third respondents be ordered to pay the costs of this application on an attorney and client scale jointly and severally, the one paying, the other to be absolved, including the cost of counsel on scale C, as provided for in Rule 69 (7).'

[4] Based on the certificate of urgency the duty judge issued the following directions in accordance with rule 12(a)(i) of the Eastern Cape Joint Rules of Practice:

1. The application is set down for hearing at 14h15 on 7 August 2024.
2. The application is to be served and filed on 5 August 2024.
3. Any notice of opposition to be filed by 12h00 on 6 August 2024.
4. Answering affidavits to be filed by 09h00 on 7 August 2024.
5. Replying affidavits and heads of argument to be filed by 14h00 on 7 August 2024.

[5] The matter was opposed by the Respondents and by the time it was due to be heard all the necessary affidavits had been filed as had heads of argument, and the matter was ripe for hearing.

¹ I assume the reference to "applicant" should have been in the plural.

[6] It is evident from the papers that this application is directly related to a much wider on-going commercial dispute between the First Applicant and others, on the one hand, and the First Respondent and others, on the other hand.

THE APPLICANTS' CASE

[7] The First Applicant states:

(a) He was previously the registered owner of the Property. He is in the oil business and he required letters of credit to provide security for a large petroleum transaction he was involved in. Pursuant thereto, in return for the First Respondent providing him with the necessary letters of credit he transferred ownership of the Property to the Second Respondent;

(b) Despite the agreement the First Respondent failed to provide the letters of credit, nor had he received payment for the Property. In the circumstances he intends to seek re-transfer of the Property into his name, which is to be dealt with along with "*numerous other disputes*" in the Johannesburg High Court;

(c) Although the Property had been transferred into the name of the Second Respondent, the First Applicant states that he remained in possession and occupation thereof. He explained the situation as follows. He has two residential homes, the Property in question and another one in Bedfordview, Johannesburg (the "Bedfordview Property"). Because he has business interests in both centres he and his family divide their time between the two properties;

(d) As for the Second and Third Applicants, they live on the Property, the Second Applicant being described as the "*resident chef*" and the Third Applicant merely as a "*resident*", both of whom have been in occupation since 2018.

[8] The First Applicant was not present when the alleged spoliation occurred, which is described by the Second and Third Applicants in their confirmatory affidavits (in identical terms). According to them:

(a) On 31 July 2024 the First Respondent arrived at the Property with four men, who forcibly gained entry thereto by cutting the locks and chains. The First Respondent advised them that he was taking control of the Property;

(b) The Third Applicant contacted the police who, on arrival, instead of coming to their assistance, assisted the First Respondent in taking control of the Property;

(c) New locks and chains were placed on the three gates to the Property. The First Respondent gave one of the men who had accompanied him the keys to the Property and then he (the First Respondent) left, leaving two individuals behind;

(d) The Second and Third Applicants were “*permitted*” to stay the night, but because they feared for their safety they left the next morning, leaving their clothes and belongings behind.

[9] As a result of these developments the First Applicant contacted his attorney who in correspondence with the Respondents’ attorney tried to arrange for the return of the *status quo*, to no avail. In the result this application was launched based on the *mandement van spolie*.

[10] The First Applicant states that he and the Second and Third Applicants have been unlawfully spoliated of their peaceful and undisturbed possession of and use of their residence and movable assets.

[11] As for urgency the First Applicant states that Applicants were being severely prejudice, in that:

(a) He and the Second and Third Applicants had been forced to take up alternative accommodation at considerable expense;

(b) Their clothing and personal possessions were still at the Property, as were those of his wife and children, which personal possessions “*might well*” be disposed of or damaged;

(c) There could be no prejudice to the Respondents if the matter was heard as one of urgency.

[12] It is relevant that although it is the registered owner of the Property, the First Applicant states that the Second Respondent is cited as an interested party only and no relief is sought against it, save in the event of it opposing the application.²

[13] In conclusion it was submitted that as a mark of disapproval the First and Third Respondents should be ordered to pay the costs of the application on the scale as between attorney and client and counsel’s fees on scale C.

THE FIRST RESPONDENT’S CASE

[14] The First Respondent states:

(a) He is a businessman and that via another entity (which is not before the court in this application) he is the owner of the Bedfordview Property, and via the Second Respondent he is the “*owner*” of the Property in question;

(b) Both properties are currently the subject of litigation in the Johannesburg High Court, which issues are accordingly *lis pendens* this application;

(c) In addition to *lis pendens* the Respondents took a number of points *in limine*, namely:

² The notice of intention to oppose is filed on behalf of the First and Second Respondents, the Third and Further Respondents not entering the foray (save to file confirmatory affidavits).

(i) The eviction of the Third Respondents (the Unlawful Occupiers), who had taken up occupation at the behest of the First Respondent, was not competent as the provisions of the PIE Act had to be followed;

(ii) The matter was not urgent;

(iii) The First Applicant had no *locus standi* as he did not reside on the Property;

(iv) There are disputes of fact on the affidavits, which disputes the First Applicant was aware of, which cannot be resolved on the papers.

(d) With regard to the merits it is the First Applicant's case that the Property was in need of maintenance and that this was why he and the Third Respondents had gone to the Property that day;

(e) He denied that the locks and chains had been cut and that there was anyone else (the Third Respondents) residing on the Property. This is confirmed by confirmatory affidavits by two individuals who state that they are employed by another entity which has been contracted by the "Respondents" to attend to maintenance work at the Property. They deny that they reside there, nor that they spoliated the Applicants, nor that they removed their property.

THE PIE ACT

[15] The PIE Act point has no merit. While the notice of motion may not be a model of clarity, the intention is clear: to immediately restore possession of the Property to the persons who have been unlawfully dispossessed thereof. If an occupier/possessor of immovable property had to resort to the PIE Act on every occasion he/she is unlawfully dispossessed of his/her property it would completely negate the purpose of the spoliation remedy, which is designed as a remedy, usually on an urgent basis, where a respondent has resorted to self-help and all that is being

sought is a return of the *status quo*.³ Having said that, there may well be circumstances where the PIE Act would be the more appropriate remedy, but this is not such a case.

LOCUS STANDI IN IUDICIO

[16] The *locus standi* argument is equally without merit. The First Respondent's case in this regard is that the First Applicant does not reside on the Property. Actual physical presence is not a requirement. The test is whether the First Applicant was in possession of the Property at the time, not whether he was actually physically in occupation. I am satisfied that on the evidence he was in possession, not only in the legal sense, but through the Second and Third Applicants who, it is not in dispute, were living on the property at the time.

[17] That the First Applicant was in possession of the Property is evidenced by the fact that on a prior occasion the First Respondent's attorney had delivered notices in accordance with the PIE Act calling upon him to vacate the property.

LIS ALIBI PENDENS

[18] I turn out to the issue of *lis alibi pendens*. The First Respondent states that:

(a) On 14 June 2024 the First Applicant "*and others*" launched an urgent application in the Johannesburg High Court in the case number 2024 – 066094 citing the First Respondent and others (the "first application"). The relief sought in the first application deals in the wider dispute I alluded to above. Of relevance to this matter, albeit indirectly, is a prayer for the re-transfer of the Property into the First Applicant's name. In any event, the first application was struck of the role, apparently due to lack of urgency;

(b) Then, during the last week of July 2024 the First Applicant launched another urgent application in the Johannesburg High Court, this time citing

³ See the very helpful summary in *Erasmus: Superior Court Practice*; Vol 2; D7 – 1 to D7 – 20

only the First Respondent, to be heard on 6 August 2024 (the “second application”). Although the second application also deals with the Bedfordview Property, and another property hitherto not referred to, the relief sought in respect of the Property in question is relevant. It reads:

‘2. That the respondent be ordered to return to the applicant full and undisturbed possession of the property situated at [...] G[...] Street⁴ Summerstrand, Cqeberha (sic) Eastern Cape Province, alternatively 2[...] S[...] Street, Summerstrand Cqeberha, (sic) Easter (sic) Cape and that the sheriff be ordered to do anything necessary to ensure that the property is returned to the applicant and/or his family members;

...

4. That the respondent is hereby interdicted from spoliating or using any such third party to spoliage or remove any of the applicant’s possessions situated in any of the properties situated at ... [...] G[...] Street, Summerstrand, Cqeberha (sic) Eastern Cape Province, pending finalisation of the pending application in this court under case number 2024/066094.’

(c) Thereafter, on 1 August 2024, a “fresh” notice of motion was issued in the same terms, apparently because the First Applicant’s attorney had “*problems*” enrolling the second application. Significantly, the second application was still pending when this matter was argued, the 27 August 2024 having been allocated for the hearing thereof;

(d) In opposition to the plea of *lis pendens* it is the First Applicant’s case that when the present application was launched in this court no case number had been allocated to the second application. Therefore, it was argued, there was no case pending in the Johannesburg High Court;

⁴ The Property is situated on a corner and it is also referred to as being situated on a street of that name.

(e) The Respondents dispute this and point out that the application had been issued and an answering affidavit filed. The allocation of a case number was merely an administrative formality, and a case number was in fact duly allocated, albeit after this application was launched. The case number is 2024-089220 and it was allocated on 8 August 2024 and, as already alluded to, it was set down for hearing on 27 August 2024.

[19] The requirement for *lis pendens* are trite. There must be pending litigation between the same parties based on the same cause of action.

[20] It is so that the second application cites only the First Applicant and the First Respondent as parties thereto, whereas the present matter cites multiple parties on both sides, and includes other relief. However, insofar as the First Respondent in this matter is concerned the relief sought against him is exactly the same as that sought in the second application, albeit worded somewhat differently.

[21] It is also so that even where a court finds that the matter is *lis pendens* before another court it retains the discretion to entertain the later proceedings. See *Geldenhuys v Kotze* 1964 (2) SA 167 (O). In my view this is not a case for the exercise of that discretion. It will result (or will have resulted) in the piecemeal adjudication of a much wider dispute, which dispute was already before the Johannesburg High Court when the present proceedings were instituted. It could also result in conflicting decisions with regard to the fate of the Property. In the circumstances, insofar as the First Applicant is concerned, I am of the view that the plea of *lis pendens* was well taken.

[22] Even if I am wrong in this regard, there are two further aspects to consider, namely, urgency, and disputes of fact.

URGENCY

[23] As a general rule a *mandament van spolie* is treated as inherently urgent, but this is not automatically the case. See *Magala v Magala* 1967 (2) SA 415 (E).

[24] Insofar as the First Applicant is concerned, it can never be argued that the matter was urgent. In his founding affidavit he states that up until 31 July 2024 he resided at the Property. This is denied by the First Respondent, who alleges that he resides at the Bedfordview Property. In reply the First Applicant makes the following equivocal allegation:

‘43. Save to admit that I am resident in both the Bedfordview property and the Gqeberha property on different times of the year, the remainder of these paragraphs are denied.

44. I did state in an affidavit⁵ that I resided 4[...] B[...] Road, Bedfordview. That is correct. I resided there as well as at the property, as stated in my founding affidavit.’

[25] That the First Applicant was clearly not in residence on 31 July 2024 is evidenced by the fact that he had to rely on the Second and Third Applicants’ account for what had allegedly occurred. In the circumstances it can never be argued that the First Applicant had been deprived of a roof over his head and that he urgently required that it be restored. See *Magala*.

[26] On this basis alone the application insofar as the First Applicant is concerned stands to be dismissed.

[27] That leaves the Second and Third Applicants. Their situation is clearly distinguishable in that they were physically in occupation of the Property. I have already dealt with their version of what transpired.

[28] The First Respondent takes issue with their version. He alleges that.

(a) A business had been employed by him to attend to maintenance of the Property, as it is in a bad state of repair;

⁵ In the second application.

(b) That maintenance work was planned is confirmed in a letter to the First Applicant, dated 2 July 2024. This letter does not require the Property to be vacated;

(c) Two individuals (the Third Respondents) are not staying on the Property, which they confirm in their confirmatory affidavits. They have merely been assigned by their employer to do maintenance work;

(d) Neither the locks nor chains were cut, nor did anyone force their way onto the Property.

[29] It is also relevant that on their own version the Second and Third Applicants remained on the property on the night of 31 July 2024, although to be fair the First Applicant does allege that they were “*permitted*” to do so due to the lateness of the hour.

[30] It is also relevant that the Second and Third Applicants say they vacated the Property on the following morning because they feared for their safety. This raises two issues:

(a) Firstly, they were not forcibly evicted, but left out of choice, albeit because they claim to fear for their safety;

(b) Secondly, they do not say why they feared for their safety, which is a bald allegation. This aspect is so fundamental to the matter that one would have expected details of the nature of the threats to their safety.

[31] Finally, the First Respondent does not say that the Second and Third Respondents may not return to the Property.

[32] In addition, and it is also relevant to urgency as far as they are concerned, the Second and Third Applicants do not say that they have nowhere else to stay. In the circumstances, not only is the spoliation of the Second and Third Applicants in doubt, it was certainly not urgent as far as they were concerned.

DISPUTES OF FACT

[33] There are numerous disputes of fact on the papers, many of which have been already been dealt with above. These disputes have to be decided in the Respondents' favour, unless it is clear that the Respondents' version can safely be rejected. Thus, the First Applicant's allegation that he and his family were forcibly evicted is clearly false; that the Second and Third Respondents were forcibly evicted is also not true. They chose to leave of their own accord, albeit based on an alleged fear for their safety; it is also denied that the locks and chains were changed; it is denied that anyone else has moved on to the Property. Whatever the truth thereof may be these disputes cannot be resolved on the papers before me.

[34] I am alive to the fact that this application is but one aspect of a much wider dispute involving the First Applicant and the First Respondent, and others. That, in my view, requires that I adopt an even more caution when considering the allegations and counter-allegations.

[35] It is of further relevance that the First Applicant makes conflicting allegations in the second application. For example:

(a) He describes himself as a ... "major male businessman currently resident at 4[...] B[...] Road, Bedfordview, Johannesburg"; (my underlining).

(b) The purpose of the second application is described as follows:

'5. This application is being brought to restore the undisturbed use and enjoyment of the property situated at [...] G[...] Road / 2[...] S[...]d Street, Summerstrand, Cqeberha, Eastern Cape Province, by myself and my family, and to interdict the respondent from further spoliating the property situated at 4[...] B[...] Road, Bedfordview, Johannesburg from myself or any of my family members.

6. The respondent has attempted on 23 July 2024 to forcefully spoliates me and my family members resident there, from the property situated at 4[...] B[...] Road, Bedfordview, Johannesburg. It was prevented with the assistance of the SAPS.

7. On 31 July 2024, the respondent has now succeeded in spoliating the property situated at [...] G[...] Street / 2[...] S[...] Street, Summerstrand, Cqeberha, Eastern Cape Province, from me and my family.

8. All of my and my family's possessions are still currently in both the properties. Some family members live in the one property and others in the other.' (Underlining provided)

The allegation that some of the First Applicant's family members were resident on the Property is simply not true. Only the Second and Third Applicants were.

(c) The result of the alleged spoliation is described thus:

'41. My family members were left destitute and stranded in Cqeberha, as they were simply by force thrown out of the house. The respondent refused to let them back in to collect a jacket or warm blankets for the winter evening in Port Elizabeth.' (Underlining provided)

Again, simply not true.

[36] The impression one is left to is that the First Applicant is prepared to go to any lengths to achieve his ends and in the process plays fast and loose with the truth.

CONCLUSION

[37] In the circumstances, after hearing argument, I was not satisfied that a case had been made out for the relief claimed and handed down the order as set out at the commencement of these reasons.

N J MULLINS
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv L A Schubart SC
 Faizel Kara Attorneys
 c/o Goldberg & De Villiers Inc
 GQEBERHA

For 1st & 2nd Respondents: Adv F J Labuschagne
 Kern Armstrong & Associates
 c/o Pagdens Attorneys
 GQEBERHA

Date Heard: 7 August 2024

Reasons made available: 12 September 2024