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

Case Number: 2024-137618

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

DATE

SIGNATURE

In the matter between:

MAVAMBO COACHES (PTY) LTD

Applicant

and

ZACAMATE (PTY) LIMITED

First Respondent

SWEET DEAL (PTY) LIMITED

Second Respondent

RICHARD BRIAN COUGHLAN

Third Respondent

MARK MCNAMARA SMITH

Fourth Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 10:00 on 19 December 2024.*

JUDGEMENT

PG LOUW, AJ

Introduction

[1] This is an urgent application premised on the *mandament van spolie*.

[2] The applicant claims that on 22 November 2024, the third and fourth respondents jumped over the fence of the premises, situated at 1[...] V[...] Road, C[...] D[...], Johannesburg (the premises), and co-ordinated the unlawful deprivation of the applicant's possession on behalf of the respondents. The applicant's director (Mr Sibanda) alleges that the applicant was in peaceful and undisturbed possession of the premises at the time.

[3] The fourth respondent (Mr Smith) deposed to the answering affidavit in his capacity as managing director of the first and second respondents, and in his personal capacity as the fourth respondent. The third respondent (Mr Coughlan) is a representative of the owner of the premises, Million Up Investments 86 (Pty) Ltd (Million Up). Mr Coughlan deposed to a confirmatory affidavit in support of the answering affidavit.

[4] At the outset of the hearing the applicant moved for an amendment in respect of the citation of the first respondent. The intended amendment was not opposed.

The first respondent underwent a name change and its citation was amended to AAA Borehole Services (Pty) Ltd.

[5] It was also indicated at the outset of the hearing that the second respondent was in the process of withdrawing its opposition to the application and that the respondents were not persisting with their dispute in respect of the authority of the applicant's attorneys in terms of rule 7(1).

[6] Depending on the circumstances of the matter and provided that the applicant does not unnecessarily drag its feet, an application of this nature is normally (but not necessarily always) urgent. The respondents did not challenge the urgency of the matter and although the applicant only raised the alleged spoliation through a letter of its attorney four days after the alleged spoliation, on 26 November 2024, the matter was heard on an urgent basis on 4 December 2024.

[7] It is not sufficient for an applicant in a spoliation application to make out merely a *prima facie* case. 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 his possession forcibly or wrongfully or against his consent"*.¹

[8] *Van Loggerenberg*,² sets out the position as follows:

"When the proceedings are on affidavit (as they generally will be in the High Court), the applicant must satisfy the court on the admitted or undisputed facts, by the same balance of probabilities required in every civil suit, of the facts necessary for his success in the application. The onus of proving the two requisites for the order is thus on the applicant (or plaintiff). If he fails to discharge it, the parties will be left to their remedy by way of action and a fortiori where the evidence supports the respondent."

¹ See *Van Loggerenberg* in Erasmus: *Superior Court Practice*, Volume 2 at D7-14 and the authorities cited in note 121.

² *Id* at D7-14 and the authorities cited in note 127.

[9] According to Mr Smith, none of the respondents are in possession or occupation of the premises. According to Mr Smith, Million Up is in possession and occupation of the premises and has placed security guards on the premises to secure the remaining assets to protect them from ongoing vandalism and theft. Mr Smith states that he, as the representative of the first respondent (the valid leaseholder in respect of the premises), together with the fourth respondent, in his capacity as a representative of Million Up (the owner of the premises) [I accept that the reference to the “fourth” respondent should be the “third” respondent], attended at the premises on 22 November 2024 to inspect the premises. They found the premises in a state of dereliction and abandonment. The main gate appeared to be broken. It required several people to open it. The only persons on the premises were four Zimbabwe nationals – apparently employees of a company called “*Pioneer Coaches*” and a fifth man from Lesotho. These persons informed Mr Smith and Mr Coughlan that they were sleeping in the busses because they had nowhere else to go. According to Mr Smith, the five “*illegal occupants*” left the premises of their own accord whilst a sixth individual jumped over the wall and ran away on his and Mr Coughlan’s arrival.

[10] Further observations of Mr Smith and confirmed by Mr Coughlan include *inter alia*:

- [10.1] The water and electricity to the premises had been terminated.
- [10.2] Many busses, buss trailers and trucks in various stages of disrepair were found on the premises.
- [10.3] The vehicles and buildings have been effectively abandoned and are being stripped by criminals or are deteriorating from standing out in the open. These observations were corroborated by photographs taken by Mr Smith.
- [10.4] The premises has no signage beyond the address which is painted on the wall and predates the applicant’s occupation thereof.
- [10.5] A large number of vehicles on the premises did not belong to the applicant and were under attachment of Million Up.

[11] According to Mr Sibanda, he was personally present when the respondents deprived the applicant of possession. He states that the applicant's business has come to a standstill and that the applicant is unable to perform its legal obligations to its customers who have already purchased transport tickets to travel with the applicant. The applicant is also unable to sell any further tickets because it would be unable to perform its legal obligations to those customers. In addition, Mr Sibanda states that the applicant uses the premises as a safe halfway rest stop for its drivers.

[12] According to Mr Smith, on 22 November 2024, after Million Up had taken possession and occupation of the premises, Mr Sibanda drove his vehicle towards the entrance of the premises and forced himself onto the premises. Mr Sibanda then alleged that he was the owner of the premises, parked his vehicle inside the premises and refused to leave. According to Mr Smith, Mr Sibanda slept in his vehicle for the entire night of 22 November 2024 but left the premises on 23 November 2024 and abandoned his vehicle by leaving it at the premises. Mr Sibanda alleges (in reply) that Mr Smith chased him away from the premises and that he abandoned his vehicle "*out of fear*".

[13] The applicant relies on *Million Up Investments 86 (Pty) Ltd v Mavambo Coaches (Pty) Ltd and Another*.³ Million Up lodged an urgent application against the applicant during September 2024 seeking an order that the applicant be ordered not to prevent Million Up's duly authorised employees and the new tenant, being the first respondent herein, from entering and occupying the remaining portion of the premises, and further that the applicant restores possession and occupation of a portion of the premises to Million Up. In the judgment of Strydom J it is stated that the applicant "*has been in possession of the premises or a portion thereof since 2017*", and the applicant never vacated the premises although further leases were entered into in circumstances where the applicant was, according to Million Up, in unlawful occupation of a portion of the premises. This led to a summons being issued against the applicant wherein Million Up sought the ejectment of the applicant from the premises. That litigation has not yet been finalised, but Million Up brought an application on an extremely urgent basis for similar relief on the basis that it had

³ (2024/107226) [2024] ZAGPJHC 1053 (16 October 2024).

entered into a lease agreement with a tenant who wants to occupy a portion of the premises. The matter was struck off the roll for lack of urgency.

[14] Mr Marx, who appeared on behalf of the applicant, submitted that the pending litigation, the September 2024 application and a recent change in the name of the first respondent, together with the events on 22 November 2024, are indicative of a serious misuse of the justice system.

[15] As tempting as the adoption of this contention may be, Mr Smith states that he is informed by Mr Coughlan, who was the deponent to the founding affidavit in the urgent application before Strydom J, that Million Up *“believed that the applicant was in occupation of the premises when the application was launched. It was only afterwards on inspecting the property, as I set out above, that it was discovered that the property and its contents had been abandoned by the applicant”*. This version does not stand to be rejected as being far-fetched or clearly untenable.⁴ In my view, this allegation is corroborated by the evidence put up by the respondents in the answering affidavit.

[16] Mr Sibanda, in the replying affidavit, again states that he was personally present on 22 November 2024 *“to witness the respondents’ unlawful deprivation of the applicant’s possession”*. He relies on a screenshot of a WhatsApp conversation between himself and a driver, Mr Gurumombe, wherein Mr Gurumombe apparently informed Mr Sibanda of Mr Smith and Mr Coughlan’s attendance at the premises. No confirmatory affidavit by Mr Gurumombe is before the court.

[17] In addition, Mr Sibanda, in reply, relies on *“updated photographs”* taken by him on 22 November 2024 depicting the busses, trucks and the electricity connections. He confirms that there is solar power to the property. These photographs, in contradistinction to the photographs relied upon by the respondents, depict, on the face of it, mobile and operating trucks and busses. On the face of it, the premises where these photographs were taken appears to differ from the premises where the respondents’ photographs were taken. I make no finding in this

⁴ *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at para 24.

regard. However, the question does beckon why this evidence, particularly the (uncorroborated) evidence pertaining to the WhatsApp conversation was not put up in the founding affidavit. Mr Sibanda refers to a photograph he took of himself and Mr Smith and Mr Coughlan (FA9), however this photograph does not form part of the papers before the court.

[18] From a conspectus of all the evidence placed before the court, I am of the view that the applicant has not discharged the onus of showing that it was in possession when it was allegedly spoliated.

[19] Even if this finding is wrong, there is another reason why the application ought to fail: Million Up is in possession and occupation of the premises, but is not a party to this application. The first respondent is not in occupation of the premises. The second respondent is not in occupation of the premises. Mr Smith and Mr Coughlan, in their personal capacities, are not in possession of the premises. The respondents' version in this regard has not been rebutted. There is accordingly force in the submissions of Mr Heher, who appeared on behalf of the first, third and fourth respondents, that this is not a case where the alleged spoliator has parted with the possession of the premises to a third party, and that, factually, none of the respondents are in possession of the property. By implication, none of the respondents are in a position to restore possession of the premises to the applicant, even if the applicant had been spoliated. In my view, an order directing any of the respondents to restore possession to the applicant cannot be enforced and is therefore not competent.

[20] Insofar as the issue of costs is concerned, I am of the view that the general rule that costs should follow the event should not be departed from.

[21] In the circumstances, I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the first, third and fourth respondents' party and party costs, including cost of counsel of Scale C.

PG LOUW
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

Counsel for applicant: Adv P Marx
Instructed by: Schickerling Incorporated

Counsel for first, third and fourth respondents: Adv J M Heher
Instructed by: Khupane Attorneys

Date of hearing: 4 December 2024
Date of judgment: 19 December 2024