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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 24383/2024

In the matter between

ENERGY MASTER BUILDERS CC

Applicant

and

ROXANNE IVANICEVIC

First respondent

SUGABIRD (PTY) LTD

Second respondent

JUDGMENT DELIVERED ON 21 JANUARY 2025

VAN ZYL AJ:

Introduction

1. The question in this case is whether the respondents have spoliated the applicant from a building site. The applicant instituted an urgent application to restore its

*“unrestricted possession of the immovable property situated at 7[...] V[...] Estate, Paarl, Western Cape”.*¹

2. The applicant states that its peaceful and undisturbed possession of the property was interrupted on 7 November 2024 when the respondents caused the perimeter fence along the boundaries of the property to be locked, thus denying the applicant’s employees access to the site.
3. The requirements for obtaining of a *mandament van spolie* are well-known:² *“The mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for a mandament van spolie has to show.”*
4. The *mandament*’s focus is thus on possession, not ownership or the right to possess. It seeks to preserve the *status quo ante* and prevent resort to self-help. It is a remedy to preserve orderly judicial process and does not secure substantive rights. To succeed, the applicant must prove two requirements:³
 - 4.1. First, peaceful and undisturbed possession at the time of dispossession: Possession is established by physical control and the intention to possess. In the context of the present case, the degree of control necessary to constitute factual possession is a factual enquiry dependant on the site-specific locations and the completed state of building works.⁴ Temporary absence or partial access given to others does not negate possession if the intention to retain control is evident.⁵
 - 4.2. Second, unlawful deprivation of possession by the respondents: Spoliation

¹ The “property” or the “site”.

² *Van Rhyn and others NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521 (WCC) at para [7].

³ On a balance of probabilities. See *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-G.

⁴ *Scholz v Faifer* 1910 TPD 243 at 247-249.

⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at paras [26]-[29].

occurs when dispossession happens without the consent of the possessor, regardless of how it is effected (for example, by force, deceit, or stealth).⁶

5. As will be discussed below, the respondents deny that the applicant has proved that it was in peaceful and undisturbed possession of the property at the time of the alleged spoliation. Apart from this defence on the merits, the respondents raise two points *in limine*, namely (1) that the matter is not urgent, and (2) that the applicant's affidavits have not been properly commissioned, and therefore do not constitute evidence. I deal with the second of these two issues at the outset.

The applicant's affidavits

6. The respondents contend that the applicant's founding affidavit⁷ has not been properly commissioned, and therefore that it does not constitute evidence. The same complaint is raised in relation to the replying affidavit.⁸
7. The founding and replying affidavits of the applicant's Mr Swart both record, on the final pages thereof, as follows:

"Thus duly signed and sworn before me at Paarl on this the [date] day of November 2024 by the deponent who has stated that:

- a. He knows and understands the contents of the prescribed oath;*
- b. He has no objection to taking the prescribed oath; and*
- c. That he regards the prescribed oath as binding on his conscience."*

⁶ *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and others* 1996 (4) SA 231 (C) at 240B-D.

⁷ Being the affidavit deposed to by Mr Swart on 13 November 2024. The affidavit dated 13 November 2024 of Mr Maree, delivered as part of the founding papers, was excluded from the record by agreement between the parties. Its content has thus been disregarded in the determination of this application.

⁸ Dated 19 November 2024.

8. The Commissioner signed the relevant pages and affixed his stamp.
9. The procedure for the commissioning of an affidavit is set out in the *Regulations Governing the Administering of an Oath or Affirmation*⁹ promulgated under the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. The regulations are peremptory and not directory, but the Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations where substantial compliance with them has not been proved.¹⁰
10. Regulation 1(1) provides that an oath¹¹ *“is administered by causing the deponent to utter the following words: ‘I swear that the contents of this declaration are true, so help me God’.”*
11. Regulation 2(1) and (2) provide as follows:

“(1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation 1 he shall ask the deponent-

(a) whether he knows and understands the contents of the declaration;

(b) whether he has any objection to taking the prescribed oath; and

(c) whether he considers the prescribed oath to be binding on his conscience.

(2) If the deponent acknowledges that he knows and understands the contents of the declaration and informs the commissioner of oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience the commissioner of oaths shall administer the oath prescribed by regulation 1(1).”

⁹ GN R1258 in *Government Gazette* 3619 of 21 July 1972.

¹⁰ *Parys-aan-Vaal Woonstelle (Pty) Ltd v Plexiphon* 115 CC [2022] ZAFSHC 2 (20 January 2022) at para [15].

¹¹ The taking of an affirmation is not relevant to the present case.

12. Regulation 4(1) requires the following:

“(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner,¹² place and date of taking the declaration.”

13. The respondents argue that a consideration of the commissioner's certificate, quoted above, in relation to Mr Swart's affidavits shows that the certificate records that the deponent appeared before the commissioner and stated that he knew and understood the content of oath, had no objection to taking oath and that he regarded the oath as binding on his conscience. There is no express statement of the manner in which the oath was taken as required by regulation 4(1), and no confirmation that the oath was administered in accordance with the provisions of regulation 1(1). It follows, so the respondents argue, that the applicant has failed to place evidence before this Court in the form of properly commissioned affidavits.

14. The effect of a document deposed in a similar manner was considered in *Nkondo v Minister of Police and another*.¹³ In *Nkondo*, despite the document in question containing the words *“Thus done and signed at Johannesburg this 27th day of December 1979, the deponent having acknowledged that he knows and understands the contents of this affidavit. Before me N A Cassim, Commissioner of oaths; attorney”*, the document was found to not constitute an affidavit. The Court held as follows:

“In my view the onus rests upon the person who applies for relief by way of notice of motion supported by an affidavit or affidavits to show on a balance of probabilities that he has placed evidence in a proper form before the Court. In a case where he relies on his own affidavit or affidavits by others he must satisfy the Court that the affidavits have been properly attested; in order

¹² Emphasis supplied.
¹³ 1980 (2) SA 362 (O).

to do so he is obliged to prove that an oath or affirmation was administered to himself or the other deponents concerned.”¹⁴

15. The Court continued:¹⁵

“The requirement that the commissioner of oaths shall state the manner of taking of the declaration means that it must be stated whether an oath has been administered or whether the deponent has affirmed the contents of the declaration as being the truth. The purpose of this requirement is clearly to provide evidence of the fact that an oath has been administered or that the deponent has been asked to affirm the truth of the allegations contained in the documents concerned. A court before which an application is brought must satisfy itself that it is dealing with allegations that have been attested to on oath or affirmed in terms of the regulations, as it is only such averments that can be treated as evidence.”

16. The certificate in the present case does contain the words “*duly signed and sworn...*” Counsel for the applicant argued that the word “sworn” in the commissioner’s certificate is an indication that the oath was in fact duly administered. On the evidence in totality it can therefore be accepted that the affidavit was properly commissioned.
17. In *Nkondo* the Court remarked: “*As stated, it is not a sine qua non for the validity of an affidavit that the commissioner of oaths who administers an oath should state in so many words that he has done so. If it can be gathered from the document as a whole that the oath was in fact administered, that will be sufficient compliance with reg 4(1).*”¹⁶
18. In *Nkondo*, the commissioner did not indicate that the document was “sworn” before him, but simply that it was “done and signed”. Is the inclusion of the word “sworn” in the commissioner’s certificate in the present matter sufficient to

¹⁴ At 367E.

¹⁵ At 364I-365A. Emphasis supplied.

¹⁶ At 367F.

constitute substantial compliance with regulation 4(1)? Notably, the Court in *Nkondo* remarked¹⁷ that the “normal procedure for a commissioner of oaths who administers an oath is to state in his certificate that the contents of the documents were sworn to and signed before him. This would follow naturally from the fact that he had in fact administered an oath”.

19. The Court proceeded:¹⁸

“The essence of an affidavit is that it is a document the contents whereof have been sworn to as being the truth. The absence of a statement by the commissioner of oaths that the contents of the document were sworn to is a strong indication that an oath was not administered, as every commissioner of oaths knows or should know that he is required by the regulations to state that fact. In this case there is no such statement in the certificate.”

20. In *Caldwell v Chelcourt Ltd*¹⁹ the commissioner of oaths did not allude to the document in question having been “sworn” to. His certificate read as follows: “The deponent, Christine Caldwell, of whose identity I have satisfied myself, has acknowledged that she knows and understands the contents of this affidavit which was signed by her at New York on this 15th day of October, 1964, before me P. A. Grobbelaar consul of South Africa in New York.”

21. The Court held²⁰ that:

“So far as the word 'deponent' is concerned, it seems to me that it does not take the matter very far, for one can have a deposition which is not sworn to. The word 'affidavit' certainly does contain in it a suggestion that the document is a sworn document and the reference to the Act also can be said to suggest that the document may have been sworn and that the consul may have been acting as a commissioner of oaths. But the omission to add the words 'sworn to' or 'solemnly declared' before the words 'and signed', seem to me to point the other way.”

¹⁷ At 368A.

¹⁸ At 369F-G.

¹⁹ 1965 (1) SA 304 (N).

²⁰ At 307A-E. Emphasis supplied.

... there is nothing to show that the applicant understood what form of oath had to be administered to her and the information which I have before me, it seems to me, is at least equally consistent with the deponent merely having been asked to say that she acknowledged that she knew and understood the contents of the document and then being asked to sign it. If that is what happened, then this document was never sworn and it is not an affidavit such as is required by the Rules of Court....”.

22. A similar approach was taken in *Engineering Requisites (Pty) Ltd v Adam*,²¹ and in *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk*²² the Court was satisfied on a consideration of the document as a whole that it had been duly sworn to, even in the absence of express wording to that effect.
23. It seems to me, on these *dicta*, that the word “duly sworn” in the commissioner’s certificate in the present matter tips the scales in the applicant’s favour. The inference can be drawn therefrom (if only just)²³ that an oath was duly sworn before the commissioner. I am accordingly inclined to accept for the purposes of this matter that the applicant’s founding and replying statements do in fact constitute affidavits, and that the applicant’s evidence is properly before the Court for the determination of this application.

Was the applicant in peaceful and undisturbed possession of the property?

24. As I have heard full argument, I proceed to consider the issue that is in dispute on the merits, namely the applicant’s alleged undisturbed possession of the property.
25. The respondents deny that the applicant was in peaceful and undisturbed possession of the property at the time of the alleged spoliation. They contend, further, that the applicant’s founding papers do not support an assertion of peaceful and undisturbed possession, as the applicant is silent on how such

²¹ 1977 (2) SA 175 (O) at 176H.

²² 1979 (3) SA 391 (T) at 396B-398E.

²³ It is not clear why the applicant did not, in the face of the respondents’ objection, procure an affidavit from the commissioner of oaths to explain how the oath had been administered.

possession was maintained throughout the various periods into which the parties' relationship can be divided.

26. Despite these being spoliation proceedings, the degree of proof and the onus on the applicant remain unchanged:²⁴

“Where a final order is sought in an application and there are disputes of fact on the papers, then the matter can be resolved on the facts stated by respondent together with the admitted facts in the applicant's affidavits... In the first paragraph of the headnote in the case of Nienaber v Stuckey 1946 AD 1049, the test is set out as follows:

‘Where the applicant asks for a spoliation order he must make out not only a prima facie case, but must satisfy the Court on the admitted or undisputed facts, by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in the application.’”

27. On the respondents' version, the applicant had access to and took possession of the property during August 2023 after its appointment in accordance with the building agreement concluded between the parties. The applicant points out that building works up to the walls were completed by 8 March 2024. On 22 April 2024, following what was a (and seems to be an ongoing) dispute regarding payment for the construction work done, the applicant ceased the works, during which time the second respondent had free and unfettered access to the site.
28. The applicant's empty site office, storage container and portable toilet remained on site, and were removed on 30 October 2024. From 30 October 2024 onwards there were, therefore, no longer any of the applicant's equipment on the site. The applicant removed its signage from the site notice board.
29. It is common cause between the parties that the construction agreement has been cancelled.

²⁴ *Chopper Worx (Pty) Ltd and another v WRC Consultation Services (Pty) Ltd* - 2008 (6) SA 497 (C) at para [12].

30. Notably, however, for the period April 2024 until October 2024 the applicant had not proceeded with the building work. During this time, the site was not locked. The second respondent allowed sub-contractors onto the property to continue with various works, including the erection of the roof of the building.
31. On 30 October 2024 the applicant, having removed its property, locked the site. When the first respondent attended at the property on the afternoon of 7 November 2024 she met the applicant's representative there, who informed her that he had been instructed to ensure that a worker attend at the site every day, if only to sweep the ground. This occurred, on the respondents' version, out of the blue. On the same date the respondents' attorneys therefore directed correspondence to the applicant's attorneys demanding that the locks and chain be removed from the entrance gate to the property. Later that afternoon the first respondent placed her own padlock on the chain on the gate.
32. Having considered the affidavits as a whole I agree with the respondents that the applicant's version is lacking in specificity. The facts contained in the founding affidavit do not set out the circumstances of the applicant's alleged continuous occupation of the property since April 2024 – the applicant relies on a bare assertion in this respect. It focuses, instead, on the dispute between the parties as to the issue of interim payment certificates and payments made over this period, and the correspondence exchanged during that time.
33. There is no evidence as to how the applicant exercised control over the property for the period April 2024 to 7 November 2024. It does not say that there was a physical presence on the site for the entirety of this period or that the property was fenced off with a lock allowing only the applicant entry for the entirety of the relevant period. On the contrary, the applicant acknowledges that the respondents had access to the property in that applicant accuses the respondents of having locked the containers used by the applicant (the respondents allege that the applicant's own site manager placed a lock on the containers).

34. The important issue is, however, that the respondents accessed the property over a period of half a year and caused work to be done there, without the applicant's permission (and without the applicant insisting on its permission being sought) and without its control.²⁵ The applicant was, so it appears, fully aware of the position. There is no case made out in the founding papers for an argument to the effect that the applicant had given the respondents access to the site for a limited purpose in accordance with an understanding between them, as was the case in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*²⁶ where the Supreme court of Appeal held that:

"The appellant retained the main set and delivered the duplicates for a limited purpose which was not broad enough to justify the second respondent in taking a more extensive physical control nor did it warrant a belief on his part that the appellant intended to abandon any of the control which he had hitherto exercised exclusively. The appellant only delivered the duplicates because he had come to an accord with the second respondent. The second respondent ostensibly received them on the same basis.

[29] Physical possession of the premises was only lost when the second respondent used the duplicate set to obtain entry and, in doing so, manifested a state of mind to possess the premises in spite of the terms of the understanding. ..."

35. In my view, the fact that previous correspondence from the respondents over the preceding months did not squarely emphasize the question of possession of the property (an issue first explicitly raised by the respondents' current attorneys, and an aspect upon which the applicant relies heavily) does not detract from the reality, which was that the applicant was no longer in possession of the site. The fact that the applicant had not been on site had nevertheless been raised by the respondents' principal agent on 16 October 2024, when the respondents pointed out that the applicant had not progressed with the work since April 2024, and

²⁵ The situation is accordingly different from that which pertained in *Stocks Housing (Cape) (Pty) Ltd v Chief Director, Department of Education and Culture Services, and others* 1996 (4) SA 231 (C) at 241G-J.

²⁶ 2008 (3) SA 371 (SCA) at para [28]-[29]. Emphasis supplied.

again on 21 October 2024, when the principal agent placed on record that the applicant had not “*maintained the continuous presence of a competent person*” on site.

36. Even if it were to be accepted that the only relevant period for the purposes of this application was the time between the end of October 2024 (when the applicant locked the gate to the property) and 7 November 2024 (when the first respondent put a lock onto the gate, giving rise to this application), the founding papers are devoid of particulars. And even if, during that time, the temporary fence between the site and the neighbouring construction site was reinstated, as the applicant says it was, then the applicant cannot contend that it was in peaceful and undisturbed possession of the property prior to such reinstatement, as it had no control over access thereto. That the applicant wished to resume possession of the site in early November 2024 is clear; whether it in fact had possession prior to 7 November 2024 is not, and its actions from 30 October 2024 onwards amounted to “too little, too late”:

“... mere temporary absence for a short time would not destroy the physical element which is necessary to constitute possession. ... But where work is suspended for a considerable period of time, then it seems to me that if the builder desires to preserve his possession he must take some special step, such a placing a representative in charge of the work or putting a hoarding around it, or doing something to enforce his right to its physical control. If he chooses to leave the work derelict, then, no matter what his intention may be, the physical element is absent, and he loses possession, even though he may say he intended to resume it or never abandoned it; the animus may be there but the detentio is absent. It seems to me that a builder who has ceased work, and whom the owner has warned that it will be completed by another if he does not continue it, should take some special step to define his position and assert his control, if he wished to ask the Court to regard his possession as still existing.”²⁷

²⁷ Scholtz v Faifer 1910 TPD 243 at 247-248.

37. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*²⁸ the following was stated (in the context of an answering affidavit) as regards the making of allegations which fall within a party's knowledge:²⁹

"When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

38. I agree with the respondents' submission that the applicant's papers are oblique. There is no explicit contention given as to for which period, and by which method, the applicant contends that it was in peaceful and undisturbed possession of the property over the past months. It mentions works continuing up to April 2024, and then alleges that it returned to the property and recommenced works during October 2024 (which the respondents deny). The applicant is silent as to what happened during November 2024.
39. I agree, too, with the respondents' argument that it appears that when settlement attempts as to the payment dispute were unsuccessful, the applicant took steps

²⁸ 2008 (3) SA 371 (SCA) at para [13]. Emphasis supplied.

²⁹ In amplification of the rule as set out in *Syntheta (Pty) Ltd (Formerly Delta G Scientific (Pty) Ltd v Janssen Pharmaceutica NV and another* 1999 (1) SA 85 (SCA).

to repair the fence around the property which had fallen into disrepair, and then sought to place an employee on the property so as to put itself in a position that it could claim possession of the property, and thereby force the second respondent to comply with its demands. The placing of an employee at the property daily to sweep, in respect of a contract which has been terminated, seems to be a somewhat transparent attempt at regaining what had been lost months ago.

40. In these circumstances, I am unable to find that the applicant had peaceful and undisturbed possession of the property at the relevant time, entitling it to invoke the *mandament* in the face of the respondents' actions.

The issue of urgency

41. I have dealt with the application on the merits, but I nevertheless discuss the issue of urgency because there is merit in the respondents' argument in relation thereto in the context of this application.
42. There is no dispute that in considering the grant or otherwise of a *mandament* a court does not investigate the underlying transaction giving rise to the alleged possession of the property. As appears from the principles referred to earlier, the applicant does not have to demonstrate that it has a legal right to retain possession. The principal enquiry is whether the person in possession was deprived thereof without his consent or acquiescence.³⁰ The respondents emphasize that there is, however, no such rule relating to urgency. An applicant still needs to establish, beyond the bare assertion that a *mandament* is inherently urgent, that the application should be heard as one of urgency.
43. It is incumbent upon the litigant wishing to dispense with the ordinary rules of procedure of this Court to stipulate the reasons why the matter is indeed urgent, and further to stipulate specifically why it will not be afforded redress in due course should the ordinary procedures not be followed.³¹ The second leg of the

³⁰ *Stocks Housing (Cape) supra* at 239H-240E.

³¹ Rule 6(12)(b) stipulates that: "In every affidavit or petition filed in support of any application under paragraph (a) of the subrule, the applicant shall set forth explicitly the circumstances which he

enquiry is frequently overlooked. In *Salt and another v Smith*³² the Court held as follows:

“In this submission Mr Botes overlooks the fact that Rule 6(12)(b) requires his clients to provide reasons why they claimed that they should not be afforded substantial redress at a hearing in due course. With reference to Rule 6(12)(b) it has been said by Coetzee J in Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F: 'Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'”

44. As indicated, it is common cause in the present matter that the agreement as between the applicant and the second respondent has been cancelled. The applicant alleges no need to be in occupation of the property, no prejudice that is being suffered because of the lack of possession of the property, and no reason why it cannot obtain redress in due course. In this regard, the applicant relies only on the argument that spoliation proceedings are generally regarded as urgent, and the bare assertion that it *“would not be able to obtain substantial redress if the application had to be brought in the normal course.”*
45. Such bare assertion does not have any significant probative value. In *Syntheta (Pty) Ltd (formerly Delta G Scientific (Pty) Ltd) v Janssen Pharmaceutica NV and another*³³ the Supreme Court of Appeal held that a *“bald assertion does not establish facts necessary for a legal conclusion.”*
46. The respondents contend that it is not sufficient in matters such as the present merely to state that they are inherently urgent. A proper case for urgency still

avers render the matter urgent and the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course.” (Emphasis added.)

³² 1991 (2) SA 186 (NM) at 187E-H. See also *Modack v The Regional Commissioner, Western Cape, of the Department of Correctional Services and another* [2022] ZAWCHC 139 (21 July 2022) at para [23].

³³ 1999 (1) SA 85 (SCA) at 91C.

needs to be made out. Counsel referred to *Mans v Mans*³⁴ where this Court discussed the issue of urgency in the context of spoliation proceedings as follows:

"[6] ... it is trite that a litigant who relies on urgency in order to justify a departure from the strict provisions of the Rules is required in terms of Rule 6(12)(b) to "set forth explicitly the circumstances which he avers render the matter urgent and the reasons he claims that he could not be afforded substantial redress at a hearing in due course". It is also true that there are numerous examples in our case law where applications have been dismissed because a party has failed to comply with these provisions.

[7] The grounds for urgency advanced by the husband in casu are the following:

'12.1 At the present time, I am surviving in the property with the bare essentials. It is, however, imperative that the goods as listed in annexure "A" be returned to the property in order that I can resume a normal daily life. Furthermore, I have no curtains in the property other than in the bedroom. This makes living conditions intolerable for me.

12.2 I have been advised that if I were to institute this application using the Long Form Notice of Motion, this application would only be heard in approximately one year's time. By virtue of the nature of the goods removed by the Respondent, this would make life totally intolerable for me, as it is imperative that possession of the said goods be restored to me as soon as possible.'

[8] I agree with Mr Gamble, who appeared on behalf of the wife, that these allegations in support of urgency are somewhat sketchy and unconvincing, to say the least. Nevertheless, I am of the view that a court is entitled to look at the facts of the case as a whole in deciding whether a particular matter is to

be treated as urgent or semi-urgent, as the case may be. The facts may be such that the urgency of the matter is self-evident, for instance where someone's personal liberty or safety is involved, or where a child is likely to suffer physical or psychological harm. In such circumstances it would be pedantic, in my view, to non-suit an applicant merely for failing to spell out explicitly and in detail in the founding affidavit all the reasons why the application is alleged to be urgent.

[9] It was pointed out by MUNNIK J (ADDLESON J concurring) in Mangala v Mangala 1967 (2) SA 415 (E) at 416F that "it does not follow that, because an application is one for a spoliation order, the matter automatically becomes one of urgency." Nevertheless, as a broad generalisation and not as an absolute rule I incline to the view more recently expressed by ERASMUS J in Ross v Ross 1994 (1) SA 865 (E) at 872J, that ordinarily "spoliated victims" are "entitled to approach the Court... on an urgent basis". The mandament van spolie is by its very nature a speedy and a robust remedy, which should, in my view, ordinarily be afforded some degree of urgency, depending on the facts of the particular matter, in order to be effective.

[10] Having regard to the facts as a whole, I am satisfied that the husband was entitled to bring the present application before court on a slightly abridged timeframe, as he did. Not only is this a spoliation application, but the goods allegedly spoliated (or most of them) are items of household furniture which are ordinarily in daily use. He was entitled, in my view, to obtain certainty as soon as reasonably possible as to whether he was going to obtain return of those goods or whether they may have to be replaced. Moreover, the wife cannot, nor does she, claim to have been prejudiced by the fact that the matter was treated on an expedited basis. It would be unfair, in my view, to compel a litigant in these circumstances to conduct the litigation at the more leisurely pace dictated by the Rules relating to non-urgent matters."

47. This extract is instructive. Clearly the Court in *Mans* found the matter to be urgent not only on the acceptance that the remedy is inherently urgent, but on

“the facts as a whole”.

48. In the present matter, the applicant advances no facts as to why it cannot obtain redress in due course. There is no reason why it needs to be in occupation of the property. It does not allege that it will continue working on the property (on the contrary, the construction agreement has been terminated), and it does not allege that it has movables on the property that need protection, or any other factor that would necessitate its possession of the property on an urgent basis. The applicant requires possession of the site merely for the enforcement of its monetary claim against the respondents.
49. There was accordingly no reason why the matter could not have been dealt with in the ordinary course, or on a semi-urgent basis. The contract that regulated the parties' relationship, too, contained provisions for the determination of the ongoing payment disputes between them. These were not employed. Instead, this application was launched on extremely truncated timelines following a clear hiatus in the applicant's possession of the site. This strengthens the impression that these proceedings were aimed at forcing a settlement of the main bone of contention between the parties, namely the alleged non-payment of the work done by the applicant at the property.
50. On the facts as a whole, it cannot be said that the application – albeit a spoliation application – was urgent. As indicated, however, I have nevertheless considered the merits, and have found the applicant's case to be lacking.

Costs

51. There is no reason why costs should not follow the result. Each of the parties seeks costs on the scale as between attorney and client, but I do not regard this matter as justifying punitive costs. In the exercise of my discretion under Rule 67A I am of the view that the applicant should pay the respondents' costs on a party and party scale, with counsel's fees taxed on Scale B.

Order

52. In the circumstances, the following order is granted:

52.1. The application is dismissed, with costs, including counsel's fees taxed on Scale B.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant:

Mr D. M. Lubbe, instructed by Allardyce &
Partners

For the respondents:

Mr L. Wilkin, instructed by MDA Attorneys