

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 5136/2021

DELETE WHICHEVER IS NOT APPLICABLE

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

Judge Dippenaar

In the matter between:

SHIKA, LONDIWE (NEE MKOMONDE)

Applicant

and

SHIKA, LESIBANA HERBERT

Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 3rd of September 2021.

DIPPENAAR J:

[1] The applicant by way of urgent application sought orders against her husband, the respondent, (i) for urgent redress pursuant to an order granted in the urgent court on 26 July 2021 by Kollapen J ("the order") and (ii) declaring the respondent in contempt of the order as a result of his failure to grant her unfettered access to the matrimonial home and (iii) an order directing the respondent to restore applicant's access to certain items and amenities in the matrimonial home including electricity, wi-fi and cleaning, cooking and laundry services provided by the nanny and the removal of security cameras, together with ancillary relief. The redress sought was an order directing the respondent to provide her with a replacement vehicle of the same or better standard than the 2018 VW Polo which he had spoliated.

[2] It was common cause between the parties that Kollapen J found that the respondent had unlawfully spoliated the applicant of the VW polo motor vehicle which formed part of the accrual assets and which she had been using. The vehicle had been sold to a third party and thus no order was granted for the restoration of possession of the vehicle to the applicant. The order provided:

"1 The First Respondent is to allow the Applicant unrestricted access to the matrimonial home situated at 8 Pelican Island, 1587 Dolce Street, Wilgeheuwel, Roodepoort and to refrain from committing acts of spoliation, dispossessing or otherwise interfering with the Applicant's access to the matrimonial home.

2 The First Respondent is interdicted and restrained from alienating, encumbering, ceding, disposing or selling of any removable, movable incorporeal, incorporeal assets in the accrual estate.

3 The First Respondent is to pay the costs of the application on the scale as between attorney and client”.

[3] Divorce proceedings are pending between the parties as well as maintenance proceedings launched by the respondent in the Roodepoort Magistrates court. The parties have separated but both remain resident in the matrimonial home. It is common cause that their relationship is acrimonious and has become litigious.

[4] The respondent opposed the application on numerous grounds, including a challenge to urgency and points in limine that the matter was *res iudicata* and the applicant was attempting to obtain a variation or reconsideration of the order. The application was also disputed on the merits.

[5] The respondent’s challenge to the urgency of the application lacks merit. In my view, the applicant has illustrated a sufficient degree of urgency to entertain the application on its merits. The applicant was not dilatory in launching the application and in my view sufficiently illustrated that she will not obtain substantial redress at a hearing in due course.

[6] I am further not persuaded that there is merit in the points in limine raised by the respondent. I agree with the applicant that the respondent’s reliance on *res iudicata* or issue estoppel is misplaced. Suffice it to state that the relevant requisites were not established. I further agree with the applicant that the present application does not seek a variation or reconsideration of the order.

[7] I deal first with the applicant’s claim for a replacement motor vehicle and ancillary relief. It is trite that an applicant must make out its case in its founding papers¹.

¹ Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D); Titty’s Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T)

[8] The applicant's case essentially rested on the contention that she is entitled to claim for consequential damages in the form of a replacement vehicle as a result of the respondent's unlawful act of spoliation. In so doing, the respondent had put her to great inconvenience as she must make alternative arrangements to get to work, which has resulted in her incurring substantial costs which she cannot continue carrying and that her employment is in jeopardy as a result. The respondent's case on the other hand rested on the contention that the applicant has not established a clear right to a replacement vehicle and thus faltered at the first requirement for the final mandatory interdictory relief sought.

[9] It is apposite to refer to *Rikhotso v Nothcliff Ceramics (Pty) Ltd*² ("Rikhotso") wherein Nugent J held that where a spoliated article cannot be returned, possession cannot be restored by substitution. It was further held that the *mandament van spolie* is a remedy for the restoration of possession not for the making of reparation. It was not been held that no remedy exists, only that the *mandament van spolie* is not that remedy.

[10] The Supreme Court of Appeal in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and others*³ endorsed *Rikhotso* and further held that the *mandament van spolie* did not entitle the dispossessed applicants to vindicate their lost property by its substitution and declined to extend the remedy. The Supreme Court of Appeal however fashioned a constitutional remedy in circumstances where the applicants' constitutional rights were infringed⁴. Those considerations do not arise in the present instance and no case for such relief has been made out.

[11] Although our courts have declined to extend the *mandament van spolie* to provide for reparations, it has been held that the right to reparation, where the spoliation has resulted in the loss or destruction of property, is intrinsically linked to the underlying

² 1997 (1) SA 526 (W) 532H-535B

³ 2007 (6) SA 511 (SCA) paras [18]-[19]

⁴ Endorsed by the Constitutional Court in *Schubart Park Residents' Association and Others v Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).; *Ngomane and Others v City Johannesburg* 2020 (1) SA 52 (SCA)

unlawful act of taking the law into one's own hands without a court order.⁵ Our courts have further recognised that a bona fide possessor who has been unlawfully dispossessed of an item has a claim for damages which flow from the loss of such possession under the *Lex Aquilia*⁶ even though the nature of the damages may be limited⁷.

[12] It is not however necessary to make any findings on this issue or embark on an academic discussion thereof as I agree with the respondent that the applicant has not made out a proper case for relief in her founding papers and trial proceedings would be more appropriate. It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. The applicant's founding affidavit does not contain all the necessary averments to sustain a damages claim. The stance adopted by the applicant that pursuant to the spoliation she is entitled as of right to a substitution vehicle is not supported by the authorities. It follows that no relief can be granted to the applicant on this issue now.

[13] This does not mean that the applicant has no remedy at her disposal and the applicant should be granted an opportunity to institute appropriate proceedings if she wishes to do so. I intend to grant an appropriate order.

[14] Turning to the contempt and ancillary relief sought by the applicant, the respondent opposed such relief on the basis that the requirements for contempt had not been met. It was argued that the applicant had not established non-compliance with the order or that such non-compliance was willful and mala fide.

[15] In support of her case, the applicant complained of certain conduct on the part of the respondent which has hampered her unfettered and unrestricted access to the

⁵ ; Centpret Properties (Pty) Ltd v Gerhardus D Van Loggerenberg & Associates CC 2016 JDR 0886 (GP) paras 28-29 and the authorities cited therein

⁶ Matthee v Shcietekat 1959 (1) SA 344 (C) at 348B-D; 348H

⁷ Griesel v Liebenberg [2008] ZAFSH 39

matrimonial home, which includes unfettered use and enjoyment of the amenities provided therein.

[16] The requirements for civil contempt are trite.⁸ The existence of the order and the respondent's knowledge thereof were not in dispute between the parties. The respondent however disputed that he breached the order and argued that the applicant has not illustrated that he is in willful and mala fide contempt of the order. The respondent bears an evidentiary burden to cast reasonable doubt on whether his non-compliance with the order was willful and mala fide.

[17] It was common cause that the respondent had installed security cameras in the matrimonial home. The applicant contended that they were to monitor and record her, whereas the respondent averred it was for security purposes and preserves the value of the accrual. On the respondent's version, there is one camera facing the door and the kitchen window, which is set to detect motion between 22h00 and 06h00. On the facts, I cannot conclude that the installation of security cameras constitutes a breach of the order, nor am I persuaded to grant an order that the security cameras be removed.

[18] The respondent did not directly dispute the averment that he has instructed the nanny not to cook for the applicant and not to perform any household chores for her. Such conduct impedes on the applicant's use and enjoyment of the matrimonial home and constitutes a deprivation. Depriving her of that benefit would constitute a dispossession as envisaged by the order. The respondent's conduct thus constitutes a breach of the order.

[19] A dispute exists on whether the respondent has removed the applicant's access to the wi-fi or whether the necessary codes are available to the applicant. The respondent

⁸Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) ("Fakie"); Pheko & Others v Ekurhuleni City 2015 (5) SA 600 (CC); Matjhabeng Municipality v Eskom Holdings Ltd & Others; Mkhonto & Others v Compensation Solutions (Pty) Ltd 2018 (1) SA 1 (CC) paras [67] and [85]-[88]

is obliged to provide unfettered access to the wi-fi to the applicant and to provide her with the necessary passwords and access codes under the order. A failure to do so would constitute a breach of the order.

[20] The applicant complains that she has been deprived of access to electricity in her bedroom. It was not disputed that the respondent has failed to effect repairs to her bedroom plugs which has rendered her without electricity. His view that she is to pay the costs of the electrician is obstructive and unreasonable. A deprivation of electricity constitutes a breach of the order.

[21] The applicant further complained in her founding papers that her access to and from the complex was impeded by the respondent removing her cellphone number from the security access system of the complex. In his answering papers the respondent provided proof that the applicant indeed had access to the complex. In reply, the applicant averred that access was only restored after numerous requests. Were the respondent to interfere with the applicant's access to the security access system, such conduct would constitute a breach of the order.

[22] The stance adopted by the respondent is unreasonable and there is merit in the applicant's characterisation thereof as vindictive. The stance adopted in the correspondence of his legal representatives disregards the ambit and tenor of the order and the ambit of the respondent's obligations thereunder. Despite being provided with an opportunity to rectify his breaches and being forewarned of a possible contempt application prior to the launching of this application, the respondent did not avail himself of the opportunity provided.

[23] In my view the respondent has breached the order in the respects referred to above. That of itself does not however mean that the respondent is in contempt of the order as his conduct must be found to be both willful and mala fide⁹. Even if his conduct

⁹ Fakie, paras [8]-[9]

is willful and unreasonable, it cannot be concluded on the papers that he is mala fide and deliberately disobeyed the order with knowledge that he was breaching it.

[24] For that reason, I am not persuaded to grant an order declaring the respondent in contempt of the order. I am however persuaded to grant the ancillary relief sought by the applicant to prevent any further and similar breaches of the order from occurring.

[25] It would be appropriate to reserve the costs of the application to be determined in the proposed proceedings to be instituted by the applicant.

[26] I grant the following order:

1. The respondent is directed to immediately:

- 1.1 Restore the applicant with undisturbed and unfettered access to the matrimonial home situated at 8 Pelican Island, 1587 Dolce Street, Wilgeheuwel, Roodepoort, and to refrain from committing any acts of spoliation, dispossessing, or otherwise interfering, with the applicant's access to the matrimonial home and its amenities;
- 1.2 Restore the applicant's access to electricity in all rooms in the matrimonial home;
- 1.3 Restore and retain the applicant's access to the complex entrance of the matrimonial home and the matrimonial home;
- 1.4 Restore and retain the applicant's use of the wi-fi in the matrimonial home;
- 1.5 Instruct the nanny to conduct all work for the applicant in relation to her needs within the matrimonial home, including cooking, cleaning and laundry.
- 1.6 Retain the settings on the security camera system to monitor movement between 22h00 and 06h00 and not to record the applicant.

3. In the event that the respondent breaches the order in 1 above or breaches the order granted by Kollapen J on 26 July 2021, the applicant is authorised to approach the court for relief on the same papers, supplemented as required, for relief in terms of prayer 5 of the notice of motion dated 12 August 2021.

4. The applicant is authorised to launch appropriate proceedings for damages arising from the respondent's unlawful spoliation of the vehicle within 15 days of date of this order.

5. The costs of this application are reserved, to be determined in the proceedings envisaged in 4 above.

6. In the event that the applicant fails to launch the envisaged proceedings in 4 above, the application may be enrolled to determine the issue of costs.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 26 August 2021
DATE OF JUDGMENT	: 03 September 2021
APPLICANT'S COUNSEL	: Adv. A. Suldalker
APPLICANT'S ATTORNEYS	: Fairbridges Wertheim Becker
RESPONDENT'S COUNSEL	: Mr R. Mokwena
RESPONDENT'S ATTORNEYS	: TM Mahapa Inc.