



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

REPORTABLE / ~~NOT REPORTABLE~~

Case No: D11631/2023

In the matter between:-

VEXMA PROPERTIES 6 (PTY) LTD

[Registration No: 2000/015263/07]

APPLICANT

and

eTHEKWINI MUNICIPALITY

RESPONDENT

ORDER

1. The respondent is directed to restore unfettered and undisturbed access to the property situate at 184 Sarnia Road, Seaview, Durban, KwaZulu-Natal, to the applicant by removal of the cement barricades placed at the access point to the said property within 24 hours of service of this order upon the respondent's legal representatives.

2. In the event of the respondent failing to comply with the order contained in paragraph 1 *supra*, then the Sheriff of this Court be and is hereby authorised and directed to do all things necessary and take all steps necessary to ensure compliance therewith.
3. The respondent is directed to pay the costs of all reasonable expenses incurred by the applicant in the event of the Sheriff taking any steps to ensure compliance with the order in paragraph 1 *supra*.
4. The respondent is directed to pay the costs of this application.

JUDGMENT

Delivered on: 22 November

2023

R SINGH, AJ

INTRODUCTION

[1] The applicant, Vexma Properties 6 (Pty) Ltd seeks a spoliation order against the respondent, eThekweni Municipality.

[2] The applicant relies on the following facts:-

- 2.1 It is the owner of an immovable property situate at 174 Sarnia Road, Seaview, Durban, KwaZulu-Natal ("**174**") and runs a truck wash business from its premises.
- 2.2 174 only has one access point which was used as the entrance and exit by the applicant's customers. Given that the large trucks patronize the applicant's business, this led to congestion at the access point of 174.

- 2.3 In order to alleviate this problem, the applicant purchased the adjacent property being 184 Sarnia Road, Seaview, Durban, KwaZulu-Natal ("**184**"). Registration of transfer of the property into the name of the applicant has yet to take place. From May 2023, the applicant took occupation of 184. It started using 184 as an entry point for trucks into its business premises and 174 as an exit point.
- 2.4 This situation prevailed until 12 October 2023 when the respondent blocked the sole access point to 184 without notice to the applicant or reasons therefor.
- 2.5 The applicant, via its attorneys of record forwarded a letter to the respondent on 16 October 2023 calling upon the respondent to remove the barricades and restore undisturbed access to 184 to the applicant. The respondent was given until 20 October 2023 to comply.
- 2.6 The respondent neither removed the barricades nor responded to the applicant's letter which culminated in this application being launched on an urgent basis.

[3] The respondent's opposition has been broadly:-

- 3.1 The application lacks urgency.
- 3.2 The boundary walls to 184 were erected contrary to the plans which had been approved by the respondent.
- 3.3 There are no boundary walls on the Sarnia Road side of 184.
- 3.4 It is the issue of the boundary walls which has caused a dispute between the applicant and the respondent. It bears mentioning that until the respondent filed its answering affidavit, there was nothing to suggest that there was a dispute of any type between the parties.
- 3.5 On 10 August 2023, the respondent received a complaint from a community representative that the applicant had caused a hazardous situation to pedestrians and motorists as well as damage to

infrastructure due to the heavy-duty trucks using 184 as an access point.

- 3.6 Pursuant to the complaint, the respondent took emergency steps by placing the barricades as the community was beginning to “*take the law into their own hands*”.
- 3.7 The respondent disputes that the applicant purchased 184.
- 3.8 The applicant has not made any application to the respondent to use the two properties as a thoroughfare.
- 3.9 The use of both properties by the applicant did not alleviate the traffic problems and instead compounded it.
- 3.10 The barricades were placed to protect community members and hence was not the abuse of power by the respondent.

[4] The applicant in its replying affidavit challenged the authority of the deponent to the respondent’s answering affidavit. The applicant alleges that the deponent failed to attach any authority or state on what basis, he was entitled to depose to the answering affidavit. In the absence of a written resolution being annexed to the respondent’s answering affidavit, the answering affidavit is not properly before the Court.

THE ISSUES TO BE DETERMINED

[5] The issues to be determined by this Honourable Court are as follows:-

- 5.1 Whether this application is urgent.
- 5.2 Whether the deponent to the respondent’s answering affidavit was properly authorised to depose to same.
- 5.3 Whether the applicant has satisfied the requirements for a spoliation order and entitled to the relief sought.

URGENCY

[6] The respondent contends that the applicant delayed by twelve days in launching this application and this matter is not urgent. It is trite that this Court has a discretion to refuse an application where there have been delay. The truncated form of Notice of Motion afforded the respondent sufficient opportunity to place its case before this Court. The applicant had no choice, given that there was no response to the letter of 16 October 2023 forwarded to the respondent calling upon it to remove the barricades by 20 October 2023, but to launch the present application. I am therefore satisfied that the applicant acted with the necessary alacrity in launching this application on urgent basis.

AUTHORITY OF THE DEPONENT TO THE ANSWERING AFFIDAVIT

[7] The applicant is unable to refute that the deponent is a Legal Advisor employed by the respondent. I am satisfied that as a Legal Advisor, the deponent would have the necessary authority and sufficient knowledge about the matter to depose to the answering affidavit particularly as the respondent's case rests on breaches of building regulations and bylaws by the applicant. I accept Mr Magigaba's explanation that this matter was urgent and the respondent was unable to annex the delegation of its deponent's authority timeously.

THE LAW

[8] A mandamus van spolie is a remedy which is aimed at being speedy and robust relief. It is based on the premise that persons are not entitled to take the law into their own hands and also applies to a government department, Municipality or any similar body.¹ In the words of Madlanga J in *Ngqukuma v Minister of Safety and Security*,² "*unfortunately excesses by those entities occur*". The remedy is therefore deeply entrenched in the rule of law and a government entity must therefore act within the ambit of the law.

¹ *George Municipality v Vena & Ano*. 1989 (2) SA 263 (A) at 271 H to 272 B

² 2014 (5) SA 112 (CC) at para 12

[9] Consequently, all a person seeking a spoliation order has to prove is that he or she was in possession of the property and was wrongfully or forcibly deprived of such possession.³ The court hearing a spoliation application therefore does not concern itself with the rights of parties before the spoliation took place. It merely enquires as to whether or not there has been a spoliation, and if there has, it restores the status quo ante. The question of ownership is not a factor to be taken into consideration.

THE APPLICATION OF THE LAW TO THE FACTS

[10] The applicant has been in possession of 184 since May 2023. The respondent contends that there is no genuine purchase and sale agreement. The confirmatory affidavit by the owner of 184 and the purchase and sale agreement have however been attached to the applicant's papers. In my view, this constitutes sufficient proof that the applicant was in possession of the property as at 12 October 2023.

[11] The respondent justifies the erecting of the barricades at the access point of 184 by alleging that there were no boundary walls on the Sarnia Road side of 184 and that the boundary walls which were erected to 184 were not in accordance with the building plans approved by the respondent. In this regard, the necessary legislation as well as the respondent's by-laws makes provisions for steps to be taken by the respondent in the event of there being a contravention of building regulations and by-laws. The respondent has not furnished any evidence to show that any steps were taken by it to ensure compliance with the plans which had been approved by it in respect of 184. It also does not state how long it has been aware of the boundary walls not being erected in accordance with the plans that were approved by it.

[12] The next ground of opposition by the respondent was that it received a complaint on 10 August 2023 by a community representative that the conduct of the

³ Yeko v Qana 1973 (4) SA 735 (A) at 739E

applicant in using 184 as an entry point to its business constituted a hazard. The respondent however, has not supported this ground of opposition with any evidence on its papers of the details of any motor vehicle collisions which it alleges occurred. Reliance is placed on certain photographs depicting a damaged pavement and water metres but likewise, there is no evidence as to when these events occurred. Further, the respondent has not explained on its papers why it waited some 2 months on its version from the time the complaint was received to when the barricades were erected if the complaint received, was such a cause for concern.

[13] Like the ground of opposition for the complaint about the boundary walls, it is evident that the respondent took no steps to call upon the applicant to desist from using the access point at 184. It merely took the law into its own hands and placed barricades to the entrance with no advance notification or opportunity for the applicant to make representations to it. The respondent, in my view, acted with complete impugntiy in placing the barricades at the access point to 184. It wrongfully despoiled the applicant of access to 184. I am thus satisfied that the applicant has made out a case for a spoliation order.

COSTS OF THE APPLICATION

[14] As I am satisfied that the applicant has made out a case for a spoliation order, it follows that costs must follow the result and the applicant is therefore entitled to the costs of the application. This application was further necessary due to the respondent failing to meaningfully reply to the applicant's letter of 16 October 2023 hence necessitating this application.

CONCLUSION

[15] In the circumstances, I make the following order:-

- 15.1 The respondent is directed to restore unfettered and undisturbed access to the property situate at 184 Sarnia Road, Seaview, Durban, KwaZulu-Natal, to the applicant by removal of the cement barricades

placed at the access point to the said property within 24 hours of service of this order upon the respondent's legal representatives.

15.2 In the event that the respondent failing to comply with the above order, then the Sheriff of this Court be and is hereby authorised and directed to do all things necessary and take all steps necessary to ensure compliance therewith.

15.3 The respondent is directed to pay the costs of all reasonable expenses incurred by the applicant, in the event of the Sheriff taking any steps to ensure compliance with the order of this Court.

15.4 The respondent is directed to pay the costs of this application.

R SINGH, AJ

Date of hearing : 22 November 2023

Date of judgment : 22 November 2023

APPEARANCES

For Applicant: Mr B.S Jackson

Instructed by : Salomon McIntyre & Company

Unit 4 Doncaster Park

10 Derby Place

Derby down Office Park

WESTVILLE

Tel: 031 – 001 6896

Email: peter@smcattorneys.co.za

For Respondent: Mr M.T Magigaba

Instructed by : Dwarika Naidoo & Company

3rd Floor, Tower B

The Ridge

8 Torsvale Crescent

UMHLANGA

Tel: 031 – 306 4809

Email: june@dwarikanaidoo.co.za