THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

CASE NO. A23 / 2023

ERCC NO. 45 / 2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: **15 January 2024**

SIGNATURE

In the matter between:

ANDILE BHUTI DHLADHLA **APPELLANT**

and

LINDY LINDIWE MKHONTO **RESPONDENT**

J U D G M E N T

RATSHIBVUMO ADJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 08H00 on 15 January 2024.

Introduction.

[1] This is an appeal against a spoliation order granted against the Appellant in favour of the Respondent by the Regional Court sitting in Ermelo (court *a quo*), on 03 October 2022. In terms of that order, the Appellant was ordered to return the Respondent's possessions including the Defy Box Freezer, Defy Oven, side by side stove, bar stools, Sealy Argo MK2 bed set, Hisense UHD Smart TV, Hi Sense Hi-fi, three-piece longue suite and Samsung top loader washing machine. He was also ordered to ensure that the Respondent has full and unimpeded access to the Erf 1[...], S[...] 9[...] C[...] Avenue, Ermelo Mpumalanga, by returning the keys and granting her 24-hour access to the property. The Appellant was also interdicted and restrained from unlawfully dispossessing the Respondent of her dwelling and possessions from the above-mentioned residential address. Lastly, the Appellant was ordered to pay the costs.

[2] The Appellant and the Respondent were in a love relationship. It is common cause that all the assets subject to the order above were bought for cash by the Appellant in the names of the Respondent. He also paid cash for the immovable property of which the offer to purchase was signed by the Respondent. They moved in to reside together in the said property pending the transfer of ownership from a third party to the Respondent. Unfortunately, their love relationship turned sour before the completion of transfer of ownership by the conveyancers, and the whole process was stopped by the Appellant. When they ceased being in a love relationship, the Respondent moved out of the house, leaving behind the assets described in the order above.

[3] As to whether she moved out voluntarily or as a result of the threats by the Appellant, was subject of the dispute. Equally, the question whether the Appellant bought all these assets as gifts for the Respondent as she claims, or it was his way of hiding the assets from his wife with whom he was going through a divorce as he claims, was in dispute. Although the parties dedicated much of their submissions to try and prove ownership, this was unnecessary as the question of entitlement is irrelevant in spoliation applications.

Grounds of appeal.

[4] The Appellant submitted that the court *a quo* erred in ordering the return of the movable assets referred to above in that it failed to appreciate that it is the Appellant who was in possession of all these items and not the Respondent. He argued further that the court failed to take into consideration that when the Respondent moved out of the house, she took with her all the items she had brought with, when she moved in with him. As for the immovable property, the Appellant argued that the court *a quo* erred in not accepting the evidence to the effect that the Respondent was only an invited visitor in the house, who was not in undisturbed possession of the property as he was the one responsible for its purchase price and at the time the order was made, they were no longer in a love relationship.

[5] A further ground of appeal was that the court *a quo* erred in dealing with the application as an urgent one despite the Respondent having approached the court after a period of 18 months. The Appellant argued in this regard that the court *a quo* failed to take into consideration that the Respondent had an alternative remedy as she was renting a place from May 2021 to the date of the application.

***Mandament van spolie*: Applicable legal principles.**

[6] As Badenhorst AJ observed in *Khosa v Khosa*[1], three characteristics define the *mandament van spolie* remedy. They are, it is a possessory, extraordinary and robust and a speedy remedy. The applicable principles for the spoliation remedy were summarised in *Scoop Industries (Pty) Ltd v Langlaagte Estate & GM Co Ltd (In Vol Liq)*[2] as follows,

> "[T]wo factors are requisite to found a claim for an order for restitution of possession on an allegation of spoliation. The first is that the applicant was in possession and, the second, that he has been wrongfully deprived of that possession and against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before an order should be granted. (See *Rieseberg v Rieseberg* (1926, W.L.D. 59, at p. 65).) It must be shown that the applicant had had free and undisturbed possession

[1] (32503/2022) [2023] ZAGPPHC 722 (23 August 2023) at para 42.
[2] 1948 (1) SA 91 (W) at p. 98J-99B.

(*Hall v Pitsoane* (1911 TPD 853)). When it is shown that there was such possession, which is possession in physical fact and not in the juridical sense, and there has been such deprivation, the applicant has a right to be restored in possession *ante omnia*. On a claim for such restoration it is not a valid defence to set up a claim on the merits. There must first be restitution and then the merits can be considered. Here applicant claimed that it had been in possession of girders to which fines had adhered and been removed by the respondent, and that it was in possession of other girders to which such fines adhered and from which respondent claimed to be entitled to remove them." [My emphasis]

[7] In *Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd,*[3] Binns-Ward J (with whom Yekiso J and Savage AJ concurred) held,

> "[T]he *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. Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor. The underlying principle is expressed in the maxim '*spoliatus ante omnia restituendus est*'. The fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help. It is available both in respect of the dispossession of corporeal property and incorporeal property."

[8] It is trite that in spoliation proceedings the legal entitlement to the property is irrelevant. The Applicant merely needs to prove undisturbed possession thereof even when he/she is not an owner or legally entitled to such possession. Thus in

[3] 2013 (5) SA 521 (WCC) at para 7.

Yeko v Qana[4] Van Blerk JA remarked that even a thief can in some circumstances successfully obtain a spoliation order in respect of the stolen property. That matter was a spoliation application involving a landlord who locked out the tenant from trading in a shop that he rented. The court of appeal confirmed the spoliation order despite the fact that the tenant was operating the shop without the trading license. The court of appeal had this to say,

> "[T]he very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. In order to obtain a spoliation order the *onus* is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. As the appellant admits that he locked the building it was only the possession that respondent was required to establish. If the respondent was in possession the appellant's conduct amounted to self-help. He was admittedly in occupation of the building with the intention of selling his stock for his own benefit. Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. For, as *Voet*, 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the *spoliatus* has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted."[5] [My emphasis].

[9] In this matter (*Yeko)*, the court also had to deal with the question on whether, in allowing the spoliation, it was not encouraging the commission of an offence since the applicant did not have the requisite licence to trade in the shop, to which it held,

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[4] 1973 (4) SA 735 (A) at p. 739G

[5] *Yeko v Qana supra* at 739D-G.

> "[O]bviously an offence would have been committed if the respondent on regaining possession resume trading as neither appellant nor the respondent had a licence to trade on the premises. An order that possession be restored to the respondent is not an order permitting him to trade on the premises and, even if it could be regarded as creating an opportunity of contravening the relative statutory provision, it can hardly be said that the Court will be permitting or countenancing the commission of an offence. Be that as it may, as TINDALL, A.C.J., said in *Kelly v Kok*, 1948 (3) SA 522 (AD) at p. 530: 'It does not seem... that considerations of public policy demand intervention by a civil court; such considerations will be satisfied by proceedings in a criminal court.'"

[10] From the above, it is clear that in considering a spoliation application, the question of legal entitlement is irrelevant. This, however, should not be interpreted as meaning that legal entitlement is not important or that the real right (right of ownership) is of less value. However, in a spoliation application, it is simply inappropriate for real rights or entitlement to be considered. What is pivotal and relevant for determination is the right of possession. In the words of Innes CJ,[6] it is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.

[11] The spoliation is rather the beginning of the litigation between the parties.[7] As Cameron JA held in *Street Pole Ads Durban (Pty) Ltd v Ethekwini Municipality,*[8]

> "an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession."

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[6] See *Nino Bonino v De Lange* (1906, T.S. 120).
[7] See *Khosa v Khosa supra* at para 127.
[8] 2008 (5) SA 290 (SCA) at para 15.

[12] The last legal principle deserving some attention in this case is that the application for spoliation should be brought within a reasonable time. In *Jivan v National Housing Commission,*[9] after reviewing the origins why spoliation has always been available to a party if applied for within one year of dispossession, and not beyond that, the court said the following:

> "All the old authorities are in agreement that no mandament on a petition based on complaints could be brought after a year and a day. *Voet* in 43.16.7 refers to this same limitation of institution of action after expiration of one year if a remedy was sought under the Canon law, from which the *mandament of spolie* was derived. The limitation of action relevant to disturbance of possession which took place within a year preceding the application for a mandament in consequence of the *complainte* process, is clearly derived from the old Germanic rule that undisturbed possession for a year and a day made such a possessor entitled to legal protection of his possession. Conversely it would consequently be illogical to allow action to be instituted for recovery of possession which had been disturbed more than a year previously…
>
> In exercising this discretion, I think the bar imposed after one year in respect of the mandament consequential upon complainte is a guide to modern practice. <u>If an applicant delayed for more than a year before bringing his application for a *mandament of spolie*, there would have to be special considerations present to allow such applicant to proceed with his application, and conversely, if an application was brought within the period of one year after interruption of the possession, special circumstances would have to be present before relief could be refused,</u> merely on the ground of excessive delay. In the present matter the delay of eight months before the petition was launched is not so gross, nor had it such self-

[9] 1977 (3) SA 890 (W) at 892A-892B & 893B-893D

defeating consequences, that, on this ground alone, relief should be refused to the applicant."[10] [My emphasis].

Evaluation.

[13] The insinuation by the Appellant to the effect that the application was dealt with as an urgent one and that the Respondent approached the court for urgent relief after a period of 18 months is not borne out of facts of the case. In her opening remarks, and on 22 July 2022, Ms. Masondo, who represented the Appellant before the court *a quo,* said the following,[11]

> "Your Worship, the applicant in her Notice of Motion is praying before this honourable court to your worship; I will leave order number 1 and 2 as I believe they have lapsed since they are on urgency Your Worship and the application is no longer urgent. I will then start with order number 3."

[14] The above statement is confirmed by the Learned Magistrate in his reasons for the judgment when he wrote that the court did not 'entertain the matter as a matter of urgency, therefore the court instructed the applicant in the initial application to give notice to the defendant (sic) about the application.' Indeed, prayers one and two referred to as orders in the address by Ms. Masondo, as recorded in the Notice of Motion issued by the Registrar on 21 April 2022, are requests for the court to dispense with the normal rules of the court relating to forms and service of processes and for the matter to be heard on 27 May 2022. It is therefore clear that the application was not dealt with on urgent basis.

[15] I, however, do not understand how the Appellant comes to a conclusion that the application was brought some 18 months later given his admission that the Respondent moved out of the house they occupied together in May 2021. From that period to the date on which the application was issued in April 2022 makes 11 months. There is therefore no merit on this submission.

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[10] See also *Le Riche v PSP Properties CC and Others* 2005 (3) SA 189 (C) where the one-year principle was followed.
[11] See p. 40 of the paginated record.

[16] While on the subject of the period that lapsed from the alleged date of dispossession, it is prudent to deal with the question whether the application for spoliation was brought within a reasonable time. As indicated above, if an applicant delayed for more than a year before bringing the spoliation application, there would have to be special considerations present to grant such application, and conversely, if an application was brought within the period of one year after the interruption of the possession, special circumstances would have to be present for it to be refused.[12]

[17] Just as Mr. Cilliers, who appeared for the Respondent, submitted before the court *a quo*, there was no obligation for her to submit any reason for the delay, for as long as the application was brought within a year from the date of dispossession. She, however, advanced two reasons for the delay, one being her attempts to involve the family to reconcile them, and the other being her initiatives to get the police get involved, all of which failed. There are no special circumstances advanced before the court *a quo* nor before the appeal court as to why the application should be refused based on the delay of 11 months (less than one year). Consequently, there is no reason to interfere with the finding of the court *a quo*.

[18] What remains is the question whether the court *a quo* erred in finding that the Respondent was in possession of the items that the Appellant was ordered to return and that she was unlawfully dispossessed. It is important to note that the court *a quo* referred the dispute on whether the Respondent was unlawfully dispossessed of these items for oral evidence. Under cross examination, the Appellant conceded that he and the Respondent were both in possession of the house (and all the assets therein) as they resided therein and he bought it with the intention for it to be their home.

[19] The allegation that the Respondent was an invited visitor should not have resurfaced on appeal after the concession above. There is accordingly no misdirection in the court *a quo* finding against the Appellant on this aspect. It is unheard of for the

[12] See *Jivan v National Housing Commission supra.*

invited visitors to receive the municipal rates and taxes statements in their names, as happened with the Respondent for the duration of their stay together, instead of such statements being issued in the names of the host. Further, the house was to be registered in the names of the "visitor" and all the household goods were also purchased in her names. These facts confirm that the Respondent could not have been a "visitor" as contended by the Appellant. These simply confirm what he conceded to under oath, that the two of them were in possession of the immovable property and the movable assets therein. Legal entitlement to these is what should be determined in the litigation that may follow between the two ex-lovers.

[20] The court *a quo* also correctly concluded after properly evaluating the evidence, that the Appellant was not a reliable witness. His *viva voce* version substantially differed from that in his answering affidavit. Considering the totality of the evidence before it, it concluded that the Respondent did not consent to being dispossessed of the assets she possessed. It accepted her version that the Appellant called her and informed her that if she did not vacate the house, it would not end well. She left after she felt threatened by those words. There is accordingly no reason to interfere with the court *a quo*'s finding as there is no misdirection in this regard. The appeal therefore stands to be dismissed on this aspect too.

[21] The appeal was not opposed by the Respondent. For this reason, there shall be no costs order.

[22] For the aforesaid reasons, I propose the following order:
The appeal is dismissed.

TV RATSHIBVUMO
ACTING DEPUTY JUDGE PRESIDENT
MPUMALANGA DIVISION

I agree and it is so ordered.

MBG LANGA

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

FOR THE APPELLANT	**:**	**ADV MC MAVUNDA**
INSTRUCTED BY	**:**	**NYAMBOSE & ASSOCIATES INC**
		C/O MOSHIFANE MOSWANE ATT
		MIDDELBURG
FOR THE FIRST RESPONDENT:		**NO APPEARANCE**
DATE HEARD	**:**	**20 OCTOBER 2023**
JUDGMENT DELIVERED	**:**	**15 JANUARY 2024**