

SOUTH AFRICA / JUDGMENT

JJ and Electrical Construction (Pty) Ltd and Another v Home Investment 560 (Pty) Ltd and Another (D27/2023) [2023] ZAKZDHC 37 (27 June 2023)

[2023] ZAKZDHC 37**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Marimuthu

CASE / FILE NUMBER

D27/2023

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****LOCAL DIVISION, DURBAN****Case****No: D27/2023****In the matter between:**

JJ AND ELECTRICAL
CONSTRUCTION (PTY) LTD
First Applicant
REG NO: 2[...]
ARIYO JOHN
OJO
Second Applicant
and
HOME INVESTMENT 560
(PTY) LTD
First Respondent
REG NO: 9[...]
YS

ACCOLLA
Second Respondent
ORDER
The

following order is granted:

1.
The application is dismissed with costs.
2.
The Applicants are jointly and severally ordered to pay the costs of suit, the one paying the other to be absolved.

JUDGMENT

Marimuthu AJ

- [1] The first and second applicants instituted an urgent application for a mandament van spolie on 10 January 2023 against the first and second respondents in which the following relief was sought:
- a) Dispensing with the forms and service provided in the Uniform Rules of Court and condoning non – compliance with the Uniform Rules of Court relating to service and time periods in terms of Section 6(12); and this matter be enrolled for hearing on the basis of urgency;
 - b) Declaring that the Respondent is ordered to forthwith restore the Applicants’ access and/or possession of and/or to the immovable property situated at No.1[...] A[...] T[...] Shop 1,2 & 3, Durban, KwaZulu Natal;
 - c) Directing that should the First and Second Respondents fail to comply with the orders at paragraph 2 above by 12 noon on the 11 Jan 2023, then the sheriff of the court is hereby authorised to do all that is necessary, including obtaining the services of a locksmith, the assistance of the South African Police Service to give effect to the orders in paragraph 2 above.
 - d) Costs of the application to be paid by the Respondents, jointly and severally on an attorney and own client scale.
 - e) Further and/or alternate relief.
- [2] The Applicants contended that in December 2022, they were in peaceful and undisturbed possession of the leased business premises situated at No. 1[...] A[...] T[...] Shops 1, 2 and 3, Durban (“the premises”) and were unlawfully deprived of such possession by the Respondents.
- [3] The issue to be determined is whether the Applicants enjoyed peaceful and undisturbed possession of the premises and if so, were they unlawfully deprived of that possession.

Briefly, a mandament van spolie displays the following three characteristics: -

- (a) it is a possessory remedy;
 - (b) it is an extraordinary and robust remedy;
 - (c) it is a speedy remedy.
- [4] The object of the order is restoring the status quo ante the illegal action. A court hearing a spoliation application does not concern itself with the rights of the parties before the spoliation took place, it merely inquires whether there has been a spoliation, and if there has been, it restores the status quo ante.
- [5] The applicants must firstly prove that they were in peaceful and undisturbed possession of the premises and secondly that they were unlawfully deprived of such possession by the Respondents.
- [6] In the second Applicant's founding affidavit, deposed to on behalf of both Applicants he indicates that he went to the premises on the 23rd December 2022 with the intention of removing air conditioning units and other electrical equipment from the premises. The Applicants' Counsel confirmed at the hearing of the opposed application that the air conditioning units were attached to the building of the premises and formed part of the permanent fixtures of the premises. The applicants aver that the electricity to the premises was disconnected around September 2022, and they have not traded from the premises since the electricity was disconnected. This they aver is evident from the WhatsApp Messages of 16 December 2022.
- [7] The Applicants in their Replying papers confirmed that the second Applicant was removing the moveable property so that he could arrange for a new premises in 2023. Despite this contention in the papers of the Applicants, they launched these proceedings which were set down on the 10th January 2023.
- [8] Counsel for the Applicant was hard pressed to advance any reason as to why the property was being removed during December 2022 if the Applicant was in peaceful possession of the premises and if the Applicant intended to continue trading from the premises.
- [9] The Respondent on the other hand counters this allegation and maintains that the Applicants had vacated the property. The only

items of the applicants which remained behind were the large fridges which the Applicants were unable to transport on vacating the property. The photos annexed to the Respondents papers clearly show that the applicants were not trading from the premises and that the premises were empty save for a few items.

- [10] In opposition, the respondents aver proceedings were instituted against the Applicants in the Durban Magistrate's Court for arrear rental and for their eviction. The papers also contained an Application for Default judgment. At the hearing of the application the

Respondents' counsel confirmed that Default Judgment had been granted for arrear rental and eviction. When the spoliation application served before me, the eviction order remained extant and had not been challenged by way of an appeal. It was only at the hearing of the application, that counsel for the applicants' first intimated that the eviction order would be challenged.

[11] it is trite that an applicant must make out its case in the founding papers; see: National Council of Societies for the Prevention of Cruelty to Animals v Openshaw [2008] ZASCA 78; 2008 (5) SA 339 (A) at page 349. A reading of the replying affidavit indicated that the applicants sought to make out a further case in reply. The founding papers were silent as to the fact that they traded. The Applicant never mentioned in its Founding papers that they were trading and that they were hosting events during the December period; this information and the support of this information only found its way before the Court through the Replying papers of the Applicant.

[12] There is no explanation as to why the information contained in the Replying Affidavit of the Applicants did not form part of the Founding Papers of the Applicants. A further concern with the Replying papers of the Applicants lies with the dates contained

therein. The Replying Affidavit of the Applicants were dated and signed on the 9th February 2023; same was issued on the 16th February 2023. There are three Confirmatory Affidavits in support of the Replying Affidavits which are dated, 16th January 2023, 17th January 2023 and 26th January 2023; predating the documents that are intended to lend support to.

[13] The Replying Affidavits of the Applicants also contain Annexures depicting events (posters) that were hosted by the Applicants. Two of the Confirmatory Affidavits mentioned above are from artists that performed at the events. Both these artists are not residents of the Republic of South Africa; they cite their passport numbers in their affidavits. Both artists don't affix copies of their passports to their confirmatory affidavits. The names of the performing artists don't feature on the said posters. If the said performing artists adopted other names under which they perform, they fail to mention such names in their Confirmatory Affidavits. I accordingly can attach no weight to the Confirmatory Affidavits and the posters that are mentioned in this paragraph and paragraph 16 above.

[14] The WhatsApp communication between the second applicant and the second respondent during the period Friday, 16 December 2022 and Friday, 23 December 2022 are attached to the bundle of documents that served before me. In these messages, the second Applicant states that he has not traded since the electricity was disconnected; he had to close down the business (save for the bottlestore). It is also gleaned from the papers that the Applicants did not have access or use of the premises as at the 17th December 2022. In the second applicants whatsapp message of the 17th December 2022, he requests that the second Respondent provide him with the key to the back door so that he can access the generator. He goes on to request that the second Respondent reinstate the water and electricity so that he could trade. If the Applicant had undisturbed and peaceful possession of the premises on

the 17th December 2022, why was it necessary to request the back door key from the Respondent?

- [15] When I consider the content of the whatsapp messages of the 17th December 2022, I consider them against the contention of the Applicants stating that they were hosting an event on the 17th December 2022 from the premises. There is nothing in the messages between them advising of the event of the 17th December 2022 and the need to trade. Not only would it have been reasonable; it would have been expected of the Applicant to advise the Respondent of the planned event.
- [16] It is the submission of the Applicants that the Respondents locked the premises on the 23rd December 2022 to prevent the Applicants from removing their moveable property. The Applicants admit in their Replying Affidavits that they were preparing to remove property so that they could arrange new premises in 2023.

Added to this was the fact that the premises had no water and electricity. The Applicants did not bring an application for the restoration of the water and electricity.

- [17] It is common cause that there is ongoing litigation between the parties and the eviction proceedings mentioned hereinbefore were concluded prior to the institution of these current proceedings.
- [18] The respondents had instituted eviction proceedings and obtained an eviction order against the applicants. Prior to this, on the applicants version, the following occurred:-
- a) The 2nd Applicant commenced removing the moveable property from the premises;
 - b) The premises had no electricity and water;
 - c) The Applicants admit that they hadn't traded since the electricity was stopped; and
 - d) The Applicants were seeking new premises for 2023.

I consider these factors together with the other litigious proceedings between the parties and the 2nd Applicant requesting that the Respondent provide him with the key to access the property from the back door.

- [19] Having considered the application papers and the oral submissions of the parties at the hearing, and on a conspectus of all the evidence before me, I am not satisfied that the applicants have demonstrated that they were in peaceful and undisturbed possession of the premises.
- [20] The Applicants have consequently failed to make out a case for the relief sought.

Costs

There is no reason to depart from the normal rule in relation to costs. In the result the following order will issue;

The Application is accordingly dismissed with costs.

MARIMUTHU AJ

Appearances:

For the Applicant: Mr R.M. Luthuli Instructed by: Samuelson & Associates Inc Suite F202, Lincoln House 30 Dullah Omar Road Durban Tel 031 305 0292 Ref : Mr LIT/A19/22 Email : samonyekere@gmail.com For the Respondent: Miss Z Ploos Van Amstel Instructed by: De Sousa Accolla Attorneys Netcare Education – KZN Building Office Park Unit 3A, Second Floor 95 Umhlanga Rocks Drive Durban North Tel 071 111 1253 Email:devon@dsaattorneys.co.za/sergio@dsaattorneys.co.za Ref: Home560 investments Date of reserved: 23 May 2023 Date of judgment: 27 June 2023

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Prepared on 11 October 2026 · Esheria