

SOUTH AFRICA / JUDGMENT

J.R.K v H.E.K (4711/2020) [2021] ZAFSHC 13 (3 February 2021)

[2021] ZAFSHC 13**COURT**

Free State High Court, Bloemfontein

BEFORE

DAFFUE, J

CASE / FILE NUMBER

4711/2020

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Policy**IN**

**THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN**

Reportable: NO
Of Interest to other
Judges: NO
Circulate

to Magistrates: NO
Case
number: 4711/2020
In

the matter between: J[...]
R[...] K[...]
and
H[...]
E[...] K[...]
Applicant
Respondent

CORAM: DAFFUE, J
HEARD

ON: 28 JANUARY 2021

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 3 FEBRUARY 2021

I

INTRODUCTION

- [1] A husband and a wife involved in acrimonious divorce litigation are the role players in the present application based on the mandament van spolie. After perusal of an alleged urgent application and hearing brief arguments, I made an order which I believed would have contributed to the settlement of the outstanding costs issue, but unfortunately this did not occur. In fact, much more legal fees and expenses have been incurred since then.

II THE PARTIES

- [2] Applicant is Mr J[....] R[....] K[....], a major male residing at 5 Orleans Street, Bayswater, Bloemfontein. This immovable property is registered in the name of the respondent. Applicant is represented in this proceedings by Adv HJ Van der Merwe, duly instructed by Rossouws Attorneys.
- [3] Respondent is Mrs H[....]r E[....] K[....], a major female residing at [....] Bloemfontein, having relocated from 5 Orleans Street to this premises on 1 December 2020. Respondent is represented in the proceedings by Adv HE De la Rey, duly instructed by Honey Attorneys.
- [4] Although perhaps irrelevant to these proceedings, some background facts are recorded. The parties were married to each other out of community property with inclusion of the accrual system on 14 June 2003 and three minor children were born from the marriage. The children are in the care of respondent. The property which is relevant to the application is the main house situated at [....], Bloemfontein (“the property”).

III THE RELIEF GRANTED

- [5] On Friday afternoon, 4 December 2020 and at approximately 16h00, or shortly thereafter, I granted the following order:

“1. The matter is postponed to the opposed roll of 28 JANUARY 2021.

2. The respondent shall restore forthwith to the applicant full access to, and undisturbed possession of the property situated at [...], Bloemfontein, by removing all keyhole blockers from the doors of the property, excluding only those in the doors of the master bedroom and spare room.
3. Respondent to file her answering affidavit on/or before 7 January 2021 on urgency and costs.
4. Applicant to file his replying affidavit on/or before 13 January 2021 on urgency and costs.
5. Heads of arguments to be filed in terms of the uniform rules of court.”

IV THE MANDAMENT VAN SPOLIE

- [6] The requirements to be proven by an applicant relying on the mandament van spolie are well-known. All that the despoiled person needs to prove is that—
- (a) he/she was in peaceful and undisturbed possession of the property; and
 - (b) he/she was deprived of possession unlawfully, ie forcibly or wrongfully against his consent.
- [1]

- [7] The remedy was quite recently discussed in *Ngqukumba v Minister of Safety and Security and Others*. [2] The Constitutional court held that:

“The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.” (Emphasis added).

- [8] A co-possessor such as a spouse or partner, or even a person entitled to partial possession only, is entitled to rely on the mandament van spolie in the event of an infringement of his or her rights. [3]
- [9] The mandament van spolie is an extraordinary and robust remedy. Few defences may be raised and once an applicant has discharged the onus to prove the aforesaid requisites and none of the recognized defences have been raised with success, the court is bound to grant relief, notwithstanding the merits of the dispute between the parties. It is also a speedy remedy and restoration should take place immediately or “dadelik.” [4] I shall later show that this principle does not entail that each and every spoliation application shall automatically be deemed urgent, or even extremely urgent, requiring a flouting of the Uniform Rules of Court.

V THE EVENTS ON FRIDAY AFTERNOON, 4 DECEMBER 2020

- [10] When the matter was called on Friday afternoon, 4 December 2020 at 15h00, a week before the end of the 4th term, Messrs Van der Merwe and De la Rey confirmed that they were acting for the applicant and respondent respectively.
- [11] I was informed by Mr De la Rey that there was just not enough time to draft an answering affidavit, bearing in mind that the papers were served on respondent's attorneys at 12h40 and just before lunch. Taking the lunch interval in consideration, there was about an hour to draft papers in response to the founding affidavit which obviously was never sufficient.
- [12] I considered some arguments, but during the course thereof I indicated to Mr De la Rey that I was prima facie of the view that spoliation had occurred, but that I would be prepared to adjourn the matter to later that Friday evening to enable respondent to file answering affidavits and applicant to respond thereto. I did this notwithstanding the fact that I was under serious pressure bearing in mind a difficult week that I had to deal with as duty judge and another urgent application that was due to be heard later that afternoon. The matter stood down for approximately an hour to grant the parties an opportunity to establish whether they could find some common ground, or perhaps even, to settle the matter. Eventually when I was called back into court, I was told that prayer 2 of the notice of motion could be granted, but respondent maintained that the matter was not urgent and wanted to deal with the issue of urgency at a convenient time and after having had the opportunity to respond under oath. Consequently, I postponed the matter to 28 January 2021 with further directives as set out in the order quoted above.

VI URGENCY

- [13] In motion proceedings the affidavits constitute both the pleadings and the evidence and the averments in support of the parties' cases should appear clearly therefrom.[5] The application needs to be considered based on the version of the respondent, unless I am satisfied that she did not raise a real,

genuine or bona fide dispute, or her version is so untenable and false that it should be rejected on the papers.[6]

- [14] A court may dispense with the forms and service provided for in the Uniform Rules of Court in the event of urgent applications, but in order to do so, an applicant must persuade the court under oath that circumstances explicitly stated in the affidavit render the matter urgent. The applicant must also show why he/she could not be afforded substantial redress at a hearing in due course.[7] A spoliation application per se is not automatically urgent.[8] If that was the case, the rules would have catered for urgent relief in each and every case where a party relies on the mandament van spolie. The same applies to any other relief claimed, eg such as rights involving care of and contact to children, contempt of court, trespassing and restraint of trade, to name but a few examples. This is not the law.

[15] Mr Van der Merwe relied on *Matsipe v SAI Group (Pty) Ltd*[9] in support of his submission that an application based on the mandament van spolie is inherently urgent. The court in *Matsipe*[10] relied on the established principle that immediate restitution of possession shall be granted without regard of the applicant's

want of title. It is evident that even a thief's possession of stolen property should be restored if he/she can prove

the aforesaid requisites of the mandament van spolie. Words like "immediately", "forthwith" or "dadelik" must be considered in proper context. The legal process whereby the applicant's possession of property is protected is kept strictly separate from the process whereby another's right to ownership or other right to the property in dispute is to be adjudicated. This is clear from all authorities in this country and reiterated by the Constitutional Court in *Ngqukumba*. [11] In so far as it was held in *Matsipe* that an applicant applying for relief based on spoliation merely has to allege this fact in his/her founding affidavit in order to obtain urgent relief, that judgment is, with respect, clearly wrong. If that was the law, then any applicant dispossessed of property may approach the court *ex parte* and at any time of the day or night, even during weekends to seek relief. In such process the aggrieved party may even insist

that he/she should be allowed an opportunity to present oral testimony as there was insufficient time to draft a founding affidavit. The flouting of the *audi alteram partem* principle is a real cause of concern.

[16] In the case of *Matsipe* the applicant issued a letter of demand before he approached the court, unlike what the applicant did in *casu*. The respondent in *Matsipe* had sufficient time to serve and file an answering affidavit, unlike what occurred in the present matter. The applicant in *Matsipe* also stated two further reasons in support of his reliance on urgency, ie that he was dispossessed of the only vehicle that he

needed to transport his child to school and to travel to work. He needed the vehicle "desperately." In *casu* applicant failed to advance any acceptable reasons for urgency. In fact, his version that the action of respondent was "intended to force me out of my primary residence" is false as I shall show later herein. The facts in *Matsipe* are clearly distinguishable from the facts in the present matter and that judgment can for this reason as well not serve as any authority.

[17] It has been accepted decades ago that a divergence arising from different degrees of urgency can be achieved by different times of set down and/or the abridgement of times prescribed by the rules. Coetzee J's dicta in *Luna Meubel Vervaardigers (Edms) Bpk v Makin* and another *t/a Makin Furniture Manufacturers*, [12] dealing with an analysis of the degrees of urgency and how the rules should be relaxed in suitable situations, have been applied for more than four decades. There can be no doubt that the degree of relaxation of the rules and of the ordinary practice of our courts – accepting that the various divisions of the High Court do not have the same practice directives – depends upon the degree of urgency of the case.

[13] I also agree wholeheartedly with the remarks of Sutherland J in *South African Airways Soc v BDFM Publishers (Pty) Ltd* [14] pertaining to ineffective service of an urgent

application. The learned judge laid down a detailed procedure to be followed in order to respect the audi alteram partem principle if less than 24 hours' notice is given of an application. I do not want to be understood that if there is

not full compliance with these proposed steps, no court should hear an alleged urgent application; however, it is a salient approach and practitioners acting for applicants should be encouraged to follow suit.

[18] Just as the case with respondent's legal team, I was provided with little time to read the application papers and to consider the relief claimed. However, I was of the view – accepting the correctness of the allegations - that the mere inserting of the keyhole blockers to the front and back doors of the main house on the property was sufficient to constitute a spoliation. This is probably why respondent was advised and eventually conceded that spoliation had taken place. I have little doubt that if respondent's counsel was presented with a letter of demand stating the relevant facts, or a draft notice of motion with an unsigned statement containing the essential averments, and sufficient time was allowed to consider the legal position and advise respondent, the matter would not end up in court. The manner in which the court was approached must be considered in order to deal with not only urgency, but eventually the question as to what costs order should be made. Obviously, I could have struck the application from the roll due to lack of urgency, but that would merely burden one of my colleagues later once the matter was properly enrolled.

[19] I was brought under the impression by applicant in his founding affidavit that:

19.1 he had access to and utilised the property in full and was only barred from entering respondent's bedroom and a spare room;[15]

19.2 he alleged in no uncertain terms his entitlement to the property as follows: "In the premises, the property is my primary place of residence and I view it as such;[16] (emphasis added)

19.3 he emphasised that he "had peaceful and undisturbed possession of the main house" (the whole house except for the master bedroom and one spare room), and that his "factual possession of the property was unlawfully disturbed by the Respondent;"[17]

19.4 he and respondent both used the property "as man and wife, for the purpose of the children's primary care";[18] (emphasis added)

19.5 in order to rely on urgency, it was alleged that respondent "intended to force me out of my primary residence" and "to deprive me of my possession of the property." [19]

[20] Having had more time to consider the founding affidavit, and bearing in mind the filing of the answering and replying affidavits since 4 December 2020, the following observations are made:

20.1 Applicant was informed on 25 November 2020 that respondent would be leasing the property and that he had to look for alternative accommodation.[20]

20.2 Already on Monday, 30 November 2020, applicant noticed that respondent and the children intended to relocate. He noticed various boxes and respondent busy packing.[21]

20.3 On 1 December 2020 a removal truck removed the movable property of the respondent and the children.[22] Also on 1 December 2020 respondent's attorney informed applicant's attorney of the lease agreement with a tenant,

effective from Friday, 4 December 2020.[23]

20.4 Applicant did not respond to either of the two letters, annexures "FA3" and "FA4".

20.5 Although applicant found out during the evening of 2 December 2020 that key hole blockers were inserted in the front and back doors of the property, he must and should have known already on 1 December 2020 that respondent intended to give occupation of the property to a tenant as from Friday, 4 December 2020.[24] The preposterous response of applicant in this regard is that the subject matter of his consultation with counsel is privileged.

How strange as it may sound and contrary to his reliance on privilege, applicant eventually conceded that the letter of 1 December 2020 was "the primary reason for my consultation with counsel on 1 December 2020. Naturally, I was extremely concerned about the fact that the property was leased out without my knowledge and whilst I was residing there." [25] Fact of the matter is that he "elected not to proceed with any legal action against the respondent" as he "wanted to avoid litigation if possible." [26] This allegation is preposterous to say the least. If applicant wanted to avoid litigation, he should have acted in a responsible way in responding first of all to the correspondence to make his views clear, or the very least, by serving a letter of demand before launching an urgent application on a Friday afternoon with just more than an hour's notice.

20.6 It is applicant's case that his counsel was not available on 3 December 2020 and consequently no papers could have been drawn that day in order to apply for relief after having established that key hole blockers had been inserted in the locks the previous night. If this matter was regarded as so urgent as applicant wants me to believe, he could have made use of the more than seventy advocates at the local bar, alternatively, and bearing in mind the simplicity of the matter and the clarity of the legal principle involved, his experienced senior attorney could have done that. If this was done, the application could have been issued on the 3rd and proper notice given to respondent. There is no explanation why this did not occur.

20.7 Counsel was only consulted during the morning of Friday, 4 December 2020 which resulted in the papers being finalised and signed where after the application was issued and served just before lunch. I fail to understand why the matter was so urgent that I had to be approached on a Friday afternoon, taking cognisance of the fact that applicant did not have access to the property on Tuesday, Wednesday and Thursday nights. In fact, applicant and his legal team should have known that if I allowed an answering affidavit to be filed later that Friday afternoon or evening, applicant would require time to respond, causing the opposed application to be heard much later that Friday evening with inconvenience to everybody, including me as the presiding judge.

20.8 There was absolutely no reason why applicant did not serve a letter of demand. I refer to what I stated supra and the remarks of Sutherland J in the SAA judgment. Applicant's allegation that respondent's suggestion in respect of notice is "plainly untenable" and that she had "no legal entitlement to advance notice of the application"[27] must be seen in proper perspective. The mere fact that the respondent conceded Friday afternoon when the matter was called that she had spoliated applicant, also serves as proof that the whole application could have been averted if the two attorneys and their clients did not allow their emotions to run away with them. I say this with a certain amount of hesitation in so far as both attorneys are experienced and highly respected members of the attorneys' profession for many decades. However, the tone of the two letters dated 9 December 2020 and 10 December 2020 respectively,[28] serves as proof of their emotional outcries. If more time was provided for reflection and consideration by respondent's counsel, a concession on the merits would in all probabilities be made without the necessity of approaching the court.

20.9 Applicant contradicted himself by stating that he "moved back into the communal home", but alleged in the very next sentence that "upon my return, the respondent banished me to the garden flat."[29] This version is not only denied by the respondent,[30] but inherently contradictory.

20.10 Applicant tried his best to present a scenario in his founding affidavit that he had total access to the main house except for the two rooms referred to and that he could come and go as he wished. He went further and created the impression in the replying affidavit that he even entertained his friends and family in the main house. I quote: "I presently still use the main house, especially when I am visited by my son, Keenan, or to entertain friends and family... My small room is much too cramped and not

properly equipped for purposes of visitation and entertainment."[31] He never mentioned in his founding affidavit that he used to entertain friends and family in the main house since July 2020 to the date of the application. His version, or the impression created, can safely be rejected as false.

20.11 The fact that applicant entered the main house to have contact with his children, to watch television with them and use the bathroom facilities in the process, might have been accepted to be the truth, but since the respondent and the children moved out of the house, there was no need to enter the house, except perhaps to prepare food in the kitchen. However, there was no reason to bring the application on an urgent basis if he required the property to prepare some dishes from time to time. In any event respondent explicitly made the point that applicant had never prepared or eaten a meal in the main house and never had the need to utilise any of the bathroom facilities in the main house since 20 July 2020.[32] There is no reason to reject her version.

VII COSTS

- [21] The general rule in awarding costs is that the court has a discretion to be exercised judicially upon a consideration of all the facts in the particular case. It must also strive to achieve fairness to both parties. Relevant circumstances and the conduct of the parties may also play a role.[33] In principle the successful party is entitled to his/her costs and the court should not depart from this established principle, except where there are good grounds to deviate, or unless exceptional circumstances exist.[34]
- [22] Just as the respondent, I was provided with little time to read the application papers and to consider the relief claimed. However, I was of the view that the mere insertion of the keyhole blockers to the front and back doors of the main house on the property was sufficient to constitute a spoliation. This is probably why respondent was advised to concede that spoliation had taken place.
- [23] The manner in which the court was approached must be considered in order to deal with the question as to what costs order should be made. I have made it clear in the previous paragraphs that applicant to a certain extent abused the legal process in order to obtain a tactical advantage over respondent. However, respondent should blame herself, and if she has received advice in this regard, her advisor, for the predicament in which she finds herself. She could not take the law into her own hands notwithstanding the fact that she is the registered owner of the property.
- [24] I have a distinct feeling that applicant intends to use his possession of the property to put pressure on respondent in the divorce litigation. In doing this he prevents respondent from earning rental income whilst he, as a single parent who only from time to time exercises contact rights to his children, does not need to stay on in the property consisting of seven bedrooms with on-suite bathrooms, a TV room, a lounge, an open plan kitchen, a lapa with a garden and a swimming pool as mentioned by him.[35] Surely there is no reason why he cannot move into smaller premises pending finalisation of the divorce proceedings. These remarks did not and could not have any bearing on the merits of the application and it will be open to respondent to consider whether she should approach the court for relief to eject applicant, instead of taking the law into her own hands as she has done. Applicant's aforementioned attitude is but one of the aspects to be taken into consideration when I grant a costs order herein and most definitely not the primary consideration.

VIII

CONCLUSION

- [25] Bearing in mind all the allegations and the established facts as contained herein, the principles applicable to the issue of costs and applicant's vindictive application, he should be penalised for the manner in which he approached the court, notwithstanding the fact that he was successful on the merits. I initially considered ordering applicant to pay respondent's costs in respect of her opposition of the application, but in so far as respondent's unlawful action caused applicant to respond, this is an appropriate case to order the parties to pay

their own costs. In my view such order is fair to both parties who are not strangers to each other. Both are saddled with the maintenance of their three minor children and, no doubt, both have incurred huge legal costs thus far in the defended divorce action and other litigation between them.

IX ORDER

[26] Therefore the following order is made:

1. Each party shall pay his/her own costs of the opposed application.

J P DAFFUE, J

On behalf of Applicant : Adv HJ Van der Merwe

Instructed by : Rossouws Attorneys

Bloemfontein

On behalf of Respondent : Adv HE De la Rey

Instructed by

: Honey Attorneys

[1] Yeko v Qana 1973 (4) SA 735 (A) 739E CG Van der Merwe, Sakereg, 2nd ed p 129 and further with authorities quoted

[2] 2014 (7) BCLR 788 (CC) para 10

[3] Nienaber v Stuckey 1946 AD 1049 at p 1056; Du Randt v Du Randt 1995

(1) SA 401 (O) p 406B – D and Sakereg loc cit

[4] Burger v Van Rooyen 1961 (1) SA 159 (O) at p 161G

[5] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at p 200D

[6] Wightman t/a JW Construction v Headfour (Pty) Ltd and another [2008] ZASCA 6; 2008

(3) SA 371 (SCA) para 12

[7] Sub-rules 6(12)(a) & (b)

[8] Mangala v Mangala 1967 (2) SA 415 (ECD) at p 416E

[9] (34618/17) [2017] ZAGPPHC 319 (2 June 2017)

[10] Paras 18 - 21

[11] See para 7 supra

[12] 1977

- (4) SA 135 (W) at p 136H – 137F; see also the more recent judgment of Wepener J in *In re several matters on the urgent court roll 2013 (1) SA 549 ((GSJ) paras 18 & 19*
- [13] See also Van Loggerenberg, Erasmus: Superior Court Practice 2nd ed at D1-84 and authorities quoted
- [14] 2016
- (2) SA 561 (GJ) at 571C – 573B and para 26 in particular
- [15] Founding affidavit para 5.14 p 8
- [16] Ibid para 5.16 p 9
- [17] Ibid para 7.1 pp 10 & 11
- [18] Ibid para 7.2 p 11
- [19] Ibid para 8.4 p 12
- [20] Ibid para 6.1 p 9 as well as Annexure “FA3” p 21
- [21] Ibid paras 6.3 and 6.4
- [22] Ibid para 6.4
- [23] Ibid para 6.4 read with annexure “FA4” p 22
- [24] Ibid para 8.3 p 12 and para 11 of the replying affidavit
- [25] Replying affidavit para 25.2 p 96
- [26] Ibid para 25.3 p 96
- [27] Ibid paras 12.1 & 12.2 p 90
- [28] Answering affidavit, annexures A & B pp 72 - 77
- [29] Founding affidavit para 5.8 p 7
- [30] Answering affidavit para 53 p 66
- [31] Replying affidavit para 9.4 p 87
- [32] Answering affidavit para 30 p 61
- [33] Erasmus loc cit at D5-6 and authorities quoted.
- [34] Ibid D5-7
- [35] Para 5.5 of the founding affidavit p 6

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