

SOUTH AFRICA / JUDGMENT

Mfuniselwa v Mfuniselwa and Others (2818/2022) [2022]

ZAECQBHC 47 (13 December 2022)

[2022] ZAECQBHC 47

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M M Chithi

CASE / FILE NUMBER

2818/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, GQEBERHA

CASE NO.: 2818/2022

In

the matter between:

MONALISA PUMLA PORTIA

MFUNISELWA

APPLICANT

(in

her capacity as executrix of Estate No.: 4[...])

and

AVIWE

ARTHUR MFUNISELWA

FIRST RESPONDENT

BANDILE

AUBREY MFUNISELWA

SECOND RESPONDENT

PAMELA

BABALWA MFUNISELWA

THIRD RESPONDENT
THE
MASTER OF THE HIGH COURT, GQEBERHA
FOURTH RESPONDENT

JUDGMENT

CHITHI AJ

Introduction

[1] On 29 September 2022, the applicant brought an urgent application for mandament van spolie in which she sought an order inter alia in the following terms:

1. Dispensing with the forms and service provided for 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 Uniform Rules 6 (12);

2. That the first and second respondents be and are hereby directed to forthwith make over and restore the applicants peaceful and undisturbed full possession, occupation, use and control of property described as ERF 9[...] A[...] P[...], situated at 6[...] J[...] Crescent, A[...] P[...], Gqeberha, held by Deed of Transfer T9[...] CTN (hereinafter referred to as “the property”);
3. In the event of the first and second respondents failing to act as directed in paragraph two (2) above, the Sheriff of this Honourable Court be and is hereby directed and authorised to enlist the services of the South African Police to give effect to the order contained in paragraph two (2) supra by removing the first and second respondent from the property and handing the keys to the applicant;
4. That the first and second respondents be and are hereby interdicted and restrained from unlawfully interfering with the Applicant’s possession, occupation use and control of the Property; and
5. That the first and second respondents, or any of the other respondents who oppose this application, are ordered to pay the costs on the attorney and client scale.

[2] The application was enrolled for hearing on 11 October 2022 and on that day Rusi J issued the following directives:

1. The first to third respondents shall file their answering affidavits, if any, by no later than 26 October 2022.
2. The applicant shall file its replying affidavit, if any, by no later than 31 October 2022.
3. The applicant shall file its heads of argument, if any, by no later than 4 November 2022.

4. The first to third respondents shall file their heads of argument, if any, by no later than 12h00 on 11 November 2022.
5. The matter shall be heard, on the opposed motion court roll on 17 November 2022.
- [3] The Master of the High Court, the fourth respondent did not deliver any notice to oppose in this case and therefore did not participate in the proceedings. For the purposes of this judgment, I will therefore refer to the first to the third respondent when I refer to the collectively as the respondents.
- [4] The respondents did not strictly comply with the directives of this court in that the respondents delivered their answering affidavit on 27 October 2022 instead of delivering it on 26 October 2022 and delivered their heads of arguments on 14 November 2022 instead of delivering them on 11 November 2022. At the commencement of the hearing on 17 November 2022 it was argued on behalf of the applicant that the respondents' conduct openly defied the directives of

the court with the result that this conduct impacted on the management of the court file. I however condoned the respondents' non-compliance with the directives as it did substantially prejudice the applicant and proceeded to hear the matter on its merits.

- [5] The respondents are resisting the application inter alia on the following grounds:

5.1 The application is not urgent.

5.2 The applicant does not have locus standi to institute the application in her official capacity as an executrix of the estate of the late Thamsanqa Mfuniselwa when the relief sought is premised solely on the applicant's personal rights.

5.3 The mandament van spolie is not available to the applicant as the first and second respondent have established that the property in question is their residence and home which they are occupying as such. In the circumstances the provisions of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] ('PIE') apply and therefore the respondents cannot be evicted therefrom without compliance with the provisions of PIE.

5.4 The applicant has failed to prove that at the time of the alleged spoliation she was in possession of the property.

Issues

- [6] The court was called upon to determine the following issues:

6.1 whether the application was urgent.

6.2 whether the applicant had the necessary locus standi to institute the application.

6.3 whether the provisions of PIE were applicable to the case; and

6.4 whether the applicant was disposed of the property.

Common cause facts

[7] The following are common cause facts between the applicant and the respondents:

7.1 The applicant is the surviving spouse of the late Thamsanqa Mfuniselwa to whom she was married in community of property.

7.2 The first to the third respondents are the children of the late Mr. Mfuniselwa and the stepchildren of the applicant.

7.3 The property is registered in the name of the late Mr. Mfuniselwa and his late wife, Nomsomi Grace Mfuniselwa to whom he was married in community of property.

7.4 Nomsomi Grace Mfuniselwa passed away on 12 September 2014.

7.5 The late Mr. Mfuniselwa and the applicant were married to each other during January 2015.

7.6 The late Mr. Mfuniselwa passed away on 15 September 2021.

7.7 The applicant was appointed as an executor of the estate of her late husband in terms of the letters of executorship dated 19 January 2022 which were issued to her by the fourth respondent.

7.8 The respondents did not have possession of the property during the period between 01 January and 20 July 2022.

7.9 The third respondent is a resident at 1[...] R[...] Street, Perridgevale, Gqeberha.

7.10 The second respondent is employed as a supervisor with a company known as Ewemzansi and frequently works out of town for extended periods of time.

7.11 On 21 July 2022 the applicant in the company of a locksmith from Joe Davis locksmiths, Neliswa Festile and Sive Wopa went to the property removed the lock on the main gate, removed and replaced the security lock on the front door, and the first respondent disabled the alarm system.

[8] The issues between the applicant and the respondents are largely common cause. The only issue which is not common cause between the parties being whether the respondents have always resided on the property in question since 2005. Generally, in motion proceedings in which final relief is sought, factual disputes are resolved on the papers by way of an acceptance of those facts as averred by an applicant that are either common cause or are not disputed as well as those facts as averred by the respondent that are in dispute.[2] This general rule is subject to the exceptions as adumbrated in *National Director of Public Prosecutions v Zuma*,[3] by Harms DP (as he then was) that:

‘the situation may be different ‘if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious

disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.’

- [9] That is the approach which I adopted in determining the issues which arise in this case. Before dealing with each party's contentions, it is necessary that I should first deal with the issue of urgency and the applicant's locus standi which have been put in issue by the respondent.

Urgency

- [10] A mandament van spolie is designed as a 'speed remedy' which provides summary relief.[4] The fact that mandament van spolie is a remedy which in the nature of things should be a speedy one does not imply that the matter automatically becomes one of urgency.[5] It is trite that an applicant claiming relief under a mandament van spolie is expected to act expeditiously. The general rule is that the possessor who alleges that he has or she has been despoiled should act within a reasonable time. What constitutes a reasonable time naturally will differ depending on the facts of each case.
- [11] In their answering affidavit the respondents deny that this case is urgent and urge this court to dismiss this application with costs. They contend that there was a lengthy delay in the institution of this application which cannot be justified by the applicant's feigned concern for the best interests of the estate as she rejected numerous attempts to resolve the matter in a non-litigious manner. The respondents did not persist with this denial in their heads of argument and during the hearing of the matter. It must therefore follow that by doing so they acquiesced that the case was urgent. In any event even if the respondents did not acquiesce that the matter is urgent, I am nevertheless satisfied that this matter is urgent for the reasons which follow.
- [12] It is common cause that the first respondent took occupation of the property when he entered the premises after enlisting the services of a locksmith by removing the lock to the main gate to the property, removing and replacing the security lock on the front door and disabling the alarm system on 21 July 2022. On 29 September 2022, the applicant instituted this application. Before instituting this application, the applicant contends that she made multiple verbal demands to the first respondent to vacate the property and such verbal demands did not yield any positive results. The first respondent denies this contention. I find the respondents' denial not only highly improbable but also untenable that the applicant would not demand the restoration of the property especially when by the respondents' own admission, the applicant prevented them from accessing the property when she changed the locks to the property when the first respondent visited his girlfriend in Mthatha between 01 and 02 January 2022 and since then until 21 July 2022 they did not have access to it. The respondents' denial is

further untenable because by the respondents' own admission when the applicant visited the property on 24 August 2022, the second respondent provided her with the key to the security gate at the front door of the property. This action could not possibly have been triggered by the benevolence of the respondents but by the demands of the applicant.

[13] It is trite that where an applicant first seeks compliance from the respondent before lodging an application it cannot be said that the applicant has been dilatory in bringing the application or that the urgency thereof was self-created.[6] This is the course action which the applicant first engaged which unfortunately yielded no fruits. On the facts of this case a delay of approximately two months can hardly ever be regarded a lengthy delay. I am therefore satisfied that this case is urgent and had to be adjudicated on that basis.

Applicant's locus standi

[14] The respondents argued that the applicant does not have to locus standi to institute application and that the application was therefore fatally defective. Mr Moorhouse however did not refer to any authority for this proposition.

[15] In *Mars Incorporated v Candy World (Pty) Ltd*[7] it was held that the general rule is for the party instituting the proceedings to allege and prove that he or she has locus standi. The onus of establishing locus standi therefore rests upon the applicant. It must appear ex facie the particulars of claim (founding affidavit) that the parties thereof have the necessary locus standi in iudicio.[8] A person intending to institute or defend legal proceedings must have a direct and substantial interest in the right which is the subject of the litigation.[9] Locus standi concerns the 'sufficiency' and directness of the litigant's interest in proceedings which warrant his or her

title to prosecute to the claim asserted.[10]

[16] The only proper person to litigate on behalf of a deceased estate in the vindication of its assets is the executor even to the exclusion of beneficiaries to the estate.[11] This is so because the estate is not a legal persona, only the executor can sue and be sued on its behalf. [12] In the circumstances I find that the applicant has the necessary locus standi to bring this application in either capacity.

[17] Moreover, the respondents have openly registered their objections to any possible sale of the property.[13] The respondents' actions in taking occupation of the property are clearly calculated to hinder the applicant's ability to liquidate the deceased's estate in particular to sell the property if the respondents were unable to buy the applicant out. The respondents' actions are detrimental to the estate and by all accounts would have been enough and in fact were enough to trigger an action on the part of the executor. This on its own would have clothed the applicant with the necessary locus standi to institute the application in her representative capacity as an executor of the estate.

Factual

background

Applicant's case

- [18] Before the circumstances which have triggered the institution of this application the applicant lived at 6[...] J[...] Crescent, A[...] P[...], Gqeberha. The applicant used to live in this property with her late husband Thamsanqa Mfuniselwa before he passed away on 15 September 2021. The applicant was appointed as an executor to the estate of her late husband in terms of the letters of executorship which were issued to her by the Master of the High Court, Gqeberha the fourth respondent in these proceedings.
- [19] According to the applicant she has been living in the property with her late husband at least since 2020 and the respondent had lived on their own at their own places elsewhere than in the house. The first respondent lived at N[...], M[...], Gqeberha and she attaches a photograph marked “F” depicting such house. The third respondent resides at 1[...] R[...] Street, Perridgevale, Gqeberha. During January 2022, pursuant to the death of her husband the applicant was issued with letters of executorship to the estate of her late husband.
- [20] On 22 February 2022, her agent in the administration of the estate Ms Tasneem Fredricks of Fredricks Incorporated received a letter from the respondents’ attorneys, Nash Vandayar attorneys dated 18 February 2022, annexure “H” to the founding affidavit in which the following was stated:
- 20.1 ‘We refer to the above matter and confirm that we are acting on behalf of the Mfuniselwa Family of Port Elizabeth.
- 20.2 We confirm that they are beneficiaries of the Late Thamsanqa Mfuniselwa who died on the 15th September 2021.
- 20.3 According to the Letters of Executorship issued by the Master of the High Court under Estate Number 452/2022, Monalisa Pumla Portia Mfuniselwa was appointed as an Executor of the above Estate.
- 20.4 We confirm that we are led to believe that you have been appointed to assist in the above Estate.
- 20.5 Our clients Aviwe Mfuniselwa, Bandile Mfuniselwa, Pamela Mfuniselwa and Portia Mfuniselwa are extremely concerned because they are unable to make contact with Monalisa Mfuniselwa. They have tried to communicate with her telephonically and also at the premises situated at 6[...] J[...] Crescent, A[...] P[...], Port Elizabeth, however were unable to get hold of her.
- 20.6 Our clients urgently request a meeting regarding issues around the Estate including:
- 20.6.1 Certain of the family members namely Bandile, Pamela and Aviwe wish to return to the premises of their Late father.
- 20.6.2 Various other issues regarding aspects of the assets of the Estate.
- 20.6.3 Our clients believe that they have a right, as beneficiaries, to be kept informed as to the progress of the Estate as well as live in the premises of their Late father.

20.6.4 We look forward to your urgent advices herein.'

[21] The applicant replied to the letter through her agent by way of an email dated 23 February 2022 in which she stated the following:

21.1 'Blessings is dealing with the file and is on study leave so I am stepping in. We did not report the estate so our only dealings were with the Executor whom we report to regularly. We were advised there are other

heirs and we have requested the next of kin affidavit.

21.2 Since you are representing them, please would you advise if we can send updates to you directly. Our client is not available to consult but she has sent us a video footage via whatsapp last night which shows she was attacked by some of the heirs a week or so ago, we are unsure of the exact date we are happy to share same with you.

21.3 Under the circumstances, we are not going to meet in person but please send all their queries to us and we will attend to answer everything on behalf of the Executor. Needless to say, sharing the house is not going to work since the attack is a clear indication that they are unable to live together. The Executor is going make a case to the Master to have the house sold and the proceeds split.

21.4 All of the accounting and vouchers will be sent to the Master and we are happy to share with you as well.

21.5 Information like copies of their identity documents and banking account details is kindly requested in the meantime.

21.6 We are more than happy to share information at this stage we have only advertised for debtors and creditors.

21.7 We will send a copy of the draft L&D once advert has expired and sent to you as well.'

[22] On 28 February 2022 the respondents' attorneys replied to the applicant's email by way of an email in which the following was stated:

22.1 I refer to the contents of your email, which are duly noted.

22.2 My clients are 4 children of the deceased.

22.3 My instructions are that issues around the Administration of this Estate by your client are the cause of concern to my client.

22.4 Further my clients have been attempted to contact your client regarding their concerns however your client has avoided such contact. I have been made aware that there was an issue between one of our clients and your client which got a bit heated, however, I do not have instructions that this relates to the remaining siblings. The issues requiring clarification are the following:

22.4.1 Your client recently sold the property belonging to the estate, to her brother.

22.4.2 Certain monies were removed from the deceased's banking account after he passed away, by your client. My clients have proof of the transactions.

22.4.3 Certain household items belonging to the estate were removed recently from the house namely the tv and a fridge.

22.5 Further, at least 2 of the siblings want to reside in the property. I am not certain if your client is residing in the property but if that is the case our clients are willing to 'house rules' in order to prevent any bad behaviour between the parties if necessary. Our clients do all that is reasonable possible to maintain a cordial

relationship with your client.

22.6 I appreciate the relationship between our clients is not presently the best but based on the above I still suggest that a round table or meeting between the parties will help clear the air and resolve some if not all the issues mentioned above.

22.7 Failing the above I anticipate my clients may proceed with litigation which I have advised should be a last resort.

22.8 I am not in a position to take proper instructions on your clients request that the information be forwarded to ourselves in order that our clients may be updated as to the progress of the matter in light of the present state of mind between the parties.

22.9 If these issues can't be resolved, the parties can then proceed with whatever they deem necessary to accomplish their intentions.

22.10 I look forward to hearing from you.'

[23] On 16 May 2022 the respondents' attorneys addressed another letter to the applicant's agent in which they stated the following:

23.1 We refer to the above matter and our previous correspondence of 8 March 2022.

23.2 As per your previous communications the parties agreed to meet with only the logistical issues to be finalised.

23.3 Our clients have at all times wanted access to their father's house and three of the beneficiaries desperately seek the premises for accommodation purposes.

23.4 We urgently request that a meeting be held to discuss the above either virtually or face to face.

23.5 Our clients wish to enter the premises on Monday, 23 May 2022 at 9 am.

23.6 We request that you inform your client to make the necessary arrangements so that our clients have reasonable access to the premises. Alternatively, your clients hand our clients the keys and details of the alarm system.

23.7 It has further come to our clients' attention that your client has vacated the premises and has relocated to Queenstown.

23.8 If this is correct, then clearly there will be no interaction between our respective clients.

23.9 We look forward to hearing from you regarding the above and further your proposed dates and times for a meeting.

23.10 Our clients have indicated that they are frustrated by the lack of progress in this matter and the fact that they have not been allowed to enter the relevant premises of their late father. They have indicated their intention to approach the High Court for relief should this matter not be dealt with reasonable urgency.

23.11 We await your instructions.

[24] On 20 May 2022, the applicant's agent wrote a letter in reply to the respondents' letter of 16 May 2022 in which the following is stated:

24.1 'We confirm that we act on behalf of Mrs Monalisa Pumla Portia Mfuniselwa, the Executrix in Estate Late T Mfuniselwa (4[...]) herein.

24.2 We refer to your letter dated 16 May 2022.

24.3 We confirm that we have conveyed the contents of the aforesaid letter to our client.

24.4 In response, our client has requested that we convey to yourselves that our client is in full occupation of the marital home which remains her primary residence.

24.5 She has neither "vacated" the premises nor "relocated" to Queenstown as per paragraph 7 of your letter.

24.6 It will be known to yourselves that the parties in this matter are subject to an acrimonious relationship due, in part, to your clients' criminal conduct – as things stand, there is a protection order against one of your clients issued after she assaulted our client.

24.7 We are instructed to advise that access to the premises will not be granted. The parties cannot live nor share the premises as this will be untenable.

24.8 Your clients always had their various places of primary residence elsewhere before and after the deceased's death. While

our client denies your clients' averment that they "desperately seek the premises for accommodation purposes," our clients submit that such desperation is self-created.

24.9 We hold instructions to oppose any approach to the High Court relating to your clients' request and to seek a punitive cost order against your clients in this regard.

24.10 Given the above, we are of the view that any meeting as proposed will not yield any fruitful results.

24.11 Our recommendation is that the Estate proceeds to finalisation and your clients acquire our clients' majority share, alternatively the property is sold, and proceeds distributed in terms of the L&D account.'

[25] According to the applicant on or about the 20 July 2022 the first respondent broke and entered into the property by disabling the alarm system of the property and breaking the door. It is now common cause that the first respondent gained entry on the property on 21 July 2022 and not on 20 July 2022. The first respondent in the company of Neliswa Festile, Sive Wopa and a locksmith from Joe Davis locksmith attended to the property and removed the lock which was installed at the main gate to the property, removed and replaced the security lock on the front door and disabled the alarm system. It is the first respondent's actions which have triggered this application. According to the applicant she made multiple verbal demands to the first and second respondents to vacate the property which verbal demands did not yield any positive results and instead elicited intransigence from the first and second respondents.

Respondents' case

[26] The house which is the subject matter of these proceedings is registered in the name of the applicant's late husband and is late wife, Nomsomi Grace Mfuniselwa. The late Nomsomi Grace Mfuniselwa who was married to the late Thamsanqa Mfuniselwa in community of property. The late Nomsomi Grace Mfuniselwa reportedly passed away on 12 September 2014 and the property was later transferred to the sole ownership of the late Thamsanqa Mfuniselwa.

[27] The first respondent denies that his residential address is Siyaphambili, N[...], M[...] Gqeberha. He denies that he resides in the house which is depicted in annexure "F" to the founding affidavit. He asserts that since 2005 and at all material times thereto he resided at the property. The first respondent goes as far as to say that they as the first to the third respondents and the applicant have all lived together on the property for many years before the present dispute. The first respondent admits that the third respondent's residence is at 1[...] R[...] Street, Perridgevale, Gqeberha. However, he blames the fact that the third respondent no longer resides on the property on the applicant. He asserts that this situation was occasioned by the applicant's actions in unlawfully preventing the third respondent from taking up residence on the property. The first respondent states that the second respondent works as a supervisor for a company known as Ewemzansi. The first respondent contends that the second respondent's work commitments as a supervisor for Ewemzansi dictate that he would frequently work out of town and would therefore be often absent from the property for elongated periods of time. However, his residence has remained on the

property where his belongings are always kept. When the second respondent returned home when he was off duty, he sleeps in one of the three (3) flats which were built by the late Mr Mfuniselwa in 2015 while able to use the main house unhindered with his belongings stored in his bedroom in the main house. When it comes to him, the first respondent asserts that he utilised as his bedroom one of the three (3) flats which were built by his late father while he continued to utilise the main house namely the kitchen, the bathroom, the living room and his bedroom in the main house where his belongings are kept. The third respondent was forced to vacate the property by the police after she had a physical altercation with the applicant on 25 September 2021, and the applicant has a protection order against her.

- [28] The first respondent asserted that in early January 2022 he planned for his girlfriend Nandi Ndleleni who resides in Mthatha to visit him on the property for a short time. However, after the applicant refused to allow him to be visited by his girlfriend in order to avoid any tiff with the applicant, he chose to change the plan and travel to Mthatha on or about 01 or 02 January 2022 to spend time with his girlfriend. At that time the second respondent was away for work purposes. The first respondent asserts that when he returned to the property after a week, he could not gain access as the set of keys he used to access the property were not effective as the applicant had changed the locks to the property. When he contacted the applicant, he could not be able to get through. Consequently, he went to live with the third respondent. Equally, when the second respondent returned during January 2022, he could not be able to access the property due to the changed locks. As a result of being locked out of the property they sought legal assistance from their attorneys of record. The relevant correspondence which was exchanged between the respondents' attorneys and the applicant's agent is as foreshadowed above. In addition, they also wished to obtain advice regarding their rights as beneficiaries in the intestate estate of their father.
- [29] During July 2022, the first respondent asserts that he was contacted by Nawahl May a neighbour who resides at 6[...] J[...] Crescent, A[...] P[...], who informed him that the applicant had left the property vacant for a period of approximately five (5) months. Ms May observed, inter alia, that the grass had grown long and had not been cut, the outside cameras were not turned on, the house lights were never on, the windows and curtains had not been opened for a protracted time. The first respondent asserts that these allegations were confirmed by Themba Wopa, his father's cousin. After he received this report, he sought advice from Alaga Park Police Station and the local Community Police Forum to whom he explained the state of affairs. The advice he obtained was that he was being unlawfully deprived of access to his residence and could remove the lock to the main gate to get access to the property. Acting on this advice on 21 July 2022, in company of Neliswa Festile, Sive Wopa and a locksmith from Joe Davis Locksmiths he attended to the property. He removed the new lock the main gate, removed and replaced the lock to the security gate and he disarmed the alarm system. The first respondent asserts that he was forced into taking this action as he was concerned that the applicant had left the property abandoned.

The first respondent denies that the applicant made any attempts to resolve the issue without resorting to litigation. He asserts that it was only on three occasions when he had interactions with the applicant. The first occasion was on 22 August 2022 when she arrived on the property with an ADT employee on which occasion, she called the police in order to eject him out of the premises. However, after he explained the facts surrounding how he came to occupy the property the police declined to make any intervention as they considered the issue as being purely a civil matter.

[30] The second time she met the applicant was on 28 August 2022 at about 21:50 when she found the applicant on the property in company of four men one of whom was the applicant's brother Andile Joka. When he got on the property a locksmith was attempting to unlock the security gate on the main door to the property and the padlock which was used to lock the main gate had been destroyed. Upon enquiring from the applicant as to what was happening the applicant asserted that she was moving back to the property. The four men then offloaded several items from the truck which included a bed, a refrigerator, microwave, personal computer, printer, washing machine and bags which they left in the lounge and dining room and thereafter left the property.

[31] On the next day 29 August 2022, the applicant again came to the property and they opened the main gate for her. She deposited four bags in the lounge of the property. The respondents provided her with the key to the security gate at the front door of the property. She already had the key of the front door and the remote control to the motorised gate at the boundary of the property. They informed her that they do not have a spare key for the padlock to the main gate as it was a second-hand lock which was provided after she caused the previous lock to be broken. The applicant undertook to replace the said lock and she thereafter left the premises. Approximately on 03 September 2022 the applicant sent three men to the property with her keys. They gained access to the property and moved her belongings which were previously deposited in the lounge and the dining room to the main bedroom and they did not interfere with them until they left the property. The respondents assert that the applicant has been provided with the means by which she can access the property and she can return to the property at any stage that she chooses but has elected not to do so of her own accord.

Has the applicant abandoned the property

[32] In *Papas NO v Motsere Trading CC & Others*[14] the South Gauteng High Court had the following to say on the occasion it considered whether an immovable property had been abandoned:

'An abandonment of property by the owner thereof, with the intention to relinquish ownership, results in the loss of ownership by derelicto. The abandoned property becomes *res nullius* and is open to acquisition by another. (See: *Reck v Mills en 'n Ander* 1990(1) SA 751(A) 757C - D; *Wille's Principles of South African Law* 9th Ed 490/1; *CG van der Merwe Sakereg* 2nd ed 337). For abandonment there must be an intention by the owner to abandon the property (See: *Meintjes*

NO v Koetsee & Others 2010(5) SA 186 (SCA) [16]). Whether a clear intention of abandonment exists is a question of fact to be proved in each case (cf *Salvage Association of London v SA Savage Syndicate* 1906 SC 169 at 17; *Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) at 936/7).'

[33] For a defence of abandonment to succeed the owner of the property must have exhibited an intention to abandon the property. The respondents' defence of abandonment is unsustainable because at no stage did the applicant exhibit any intention to abandon the property. This defence by the respondents is clearly contrived if regard is had to annexure "L" to the applicant's

founding affidavit where the applicant unequivocally states that she is in full occupation of the marital home which remains her primary residence. She has neither "vacated" the premises nor "relocated" to Queenstown as alleged by the respondents. This defence must fail for a further reason and that reason is that when the first respondent took occupation of the property on 21 July 2022, the property was locked and he had to enlist the services of a locksmith to remove the lock to the main gate to the property, remove and replace the security lock on the front door and disabled the alarm system. In any event possession of the keys is equivalent to possession of the building and a temporary absence would not be taken as abandonment.[15] The mere fact that the grass might not have been cut and the lights not lit and the curtains not opened and closed can never sustain a defence of abandonment and the result this defence must fail.

A mandament van spolie

[34] In order to succeed, an applicant for a mandament van spolie is required to establish two requirements namely that he or she was in possession of the property concerned and that he or she was

unlawfully deprived of that possession without his or her consent and against his or her will.[16]

Was the applicant in possession of the property

[35] I have already rejected the respondents' defence of abandonment as unsustainable. It is undisputed that between 01 January and 20 July 2022 the applicant was in peaceful and undisturbed possession of the property. She had full control of the property, and this necessitated the respondents through their attorneys of record to make a specific request for access and to return to the property.

[36] It is not in dispute that on 21 July 2022 the first respondent in company of Neliswa Festile, Sive Wopa and a locksmith from Joe Davis Locksmiths. They attended to the property and unlawfully entered the property by removing a lock from the main gate, removing, and replacing the security lock from the front door with the first

respondent disarming the alarm system. In the circumstances, I find that the applicant has been despoiled of her possession of the property.

[37] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possessions to the possessed. It finds expression in the *spoliatus ante omnia restituendus est* (a 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 retaining persons from taking the law into their own hands and by inducing them to follow due process.[17]

[38] Mr Moorhouse the respondents' counsel relying on the case of *Malan & Another v Green Valley Farm Portion 7 Holt Hill 434 & Another*[18] argued that the applicant was being unnecessarily difficult and unreasonable in that she was given the spare keys to the property.

I disagree with that argument. The applicant has been dispossessed of the property and once that has been proved it is not

up to the respondents to decide in which way must the possession of the property be restored.

Is PIE applicable to the case

[39] This question can be answered if one has reference to the case of *Afzal v Kalim*[19] where Plasket J (as he then was) when confronted with a similar question stated as follows:

‘in the passage that I have cited, Selikowitz J makes it clear that the mandament van spolie cannot be used to circumvent the protection given to occupiers of homes by PIE. The reason for this is that PIE has its origin in s26(3) of the Constitution which states:

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant

circumstances. No legislation may permit arbitrary eviction.”

PIE's preamble after first making reference to the property right in s25(1) of the Constitution, then also makes reference to s26(3). It thus applies only in respect of buildings or structures upon land that are the homes of unlawful occupiers, and it does not cover the case of the eviction of a person from a building or structure on land that is not his or her home.’

[40] The question of whether the property is the respondents' home can be answered if one has regard to the letters which were exchanged between 18 January and 20 May 2022 between the applicant's agent and the respondents' attorneys. From these letters it is clear that at least between the period January and 20 July 2022 the respondents did not use this property as their home. If one has regard to the second last sentence of annexure “J” to the founding affidavit in which the respondents state unequivocally that “if these issues cannot be resolved, the parties can then proceed with whatever they deem necessary to accomplish their intentions. The occupation of this property was therefore premeditated and clearly calculated to hinder the applicant in being able to administer the estate as the respondents

were openly opposed to the property being sold if they were unable to buy the applicant out. Had the respondents been locked out of the property, there would have been no reason why in their correspondence which was directed to the applicant's agent, this issue was never raised. Moreover, there would have been no need for the first respondent to seek the advice of the police and the community policing forum and ignore the correct advice from his attorneys that they would approach a court of law and seek an appropriate relief. Furthermore, the first respondent clearly avoided disassociating himself with the house which is depicted in annexure "F" and which has been attributed to him as his home. While the second respondent is said to be working out of town it has not been indicated where exactly does he reside when he was out of town. This respondents' contentions are therefore not only a smokescreen, they are also far-fetched and were clearly designed as a stratagem to create disputes of fact when there are none in this case.

- [41] In my view in bringing this application as she did, the applicant was not acting contrary to the injunction adumbrated by Selikowitz J in *City of Cape Town v Rudolf & Others*[20] that mandament van spolie should not be used to circumvent the protection given to occupiers of homes by PIE as this case does not fall in such a category of cases. In the circumstances, I find that PIE does not apply to this case because the property in respect of which the applicant seeks the restoration of her possession from the respondents is not their home as the correspondence which was exchanged between the respondents' attorneys and applicant's agents amply demonstrates.
- [42] In conclusion, I am also satisfied that the applicant has discharged the onus of showing on the papers that the respondents wrongfully

deprived her of her possession of ERF 9[...] A[...] P[...], Gqeberha, held by Deed of Transfer T9[...] CTN against her consent.

Costs

- [43] The general rule regarding costs is that the costs follow the event. I do not see any reason why I should depart from that rule. Both counsel urged me to award costs on a punitive scale in this case. Mr Jongwana the applicant's counsel urged me to award costs against the respondents on a punitive scale as between attorney and client if the applicant was successful. While Mr Moorhouse urged me to award costs on a punitive scale as between attorney and client on a *de bonis propriis* basis against the applicant if the respondents were successful. This is not an appropriate case in which to award costs on a punitive scale. I will therefore award costs on a party and party scale.
- [44] In the result, I make the following order:
1. The first and second respondents be and are hereby directed to forthwith make over and restore the applicant's peaceful and undisturbed full possession, occupation, use and control of the property described as ERF 9[...] A[...] P[...], Gqeberha, held by Deed of Transfer T[...]
CTN (hereinafter referred to as "the property");

2. In the event of the first and second respondents failing to act as directed in paragraph two (2) above, the Sheriff of this Honourable Court and if needs be, duly assisted by the members of the South African Police Service, be and is hereby directed and authorised to give effect to the order contained in paragraph two above by removing
the first and second respondents from the property and handing the keys to the applicant;
3. The first and second respondents be and are hereby interdicted and restrained from unlawfully interfering with the applicant's possession, occupation, use and control of the property; and
4. The first, second and third respondents are ordered to pay the costs this application jointly and severally one paying the other to be absolved on a party and party scale.

M.M. CHITHI

ACTING JUDGE OF THE HIGH COURT

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Ref: NV/Is/MF22

Heard on

:17 November 2022

Delivered

:13 December 2022

[1] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[2] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E - I.

[3] National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26; Plascon-Evans (note 2) at 634I-635D.

[4] Blendrite (Pty) Ltd v Moonisami 2021 (5) SA 61 (SCA) para [6]; Mangala v Mangala 1967 (2) SA 415 (E) at 463D - F.

[5] Silberberg & Schoeman's, The Law of Property 4th Ed p271.

[6] Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others 2004 (2) SA 81 (SE) at 94 C-D; Transnet Ltd v Rubenstein 2005 (3) All SA 425 (SCA) at 434 - 435; Lau v Real Time Investments 165 CC (50134/2009) [2019] ZAGPPHC 313 (23 July 2019).

[7]

[1990] ZASCA 149; 1991 (1) SA 567 (AD) at 575H - I.

[8] Kommissaries Van Binnelandse Inkomste v Van de Heever 1990 (3) SA 1051 (SCA) para [10].

[9] Jacobs & Another v Waks & Others 1992(1) SA 521 (A) at 534 A-E.

[10] Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & Another

[2008] ZASCA 104; 2009 (1) SA 317 (SCA).

[11] Jele NO v Ngcango & Another 1951

(2) SA 151 (T).

[12] Jacobus v Brumann NO 2009

(5) SA 432 (SCA) at 437G - H.; Gross & Others v Pentz 1 996

(4) SA 617 (SCA) at 70H - 71A

[13] Index 2: (Pleadings Cont.): page 97 paragraph 80; page 115 paragraph 209

[14] [2014] ZAGPJHC 144 (6 June 2014) at para 4 and the authorities cited therein.

[15] Wightman t/a JW Construction v Headfour (Pty) Ltd & Another

[2008] ZASCA 6; 2008

(3) SA 371 (SCA) para [26].

[16] Yeko v Qana 1973(4) SA 735 (A) at 739 E - F; Nino Bonino v De Lange 1906 TS 120 at 122.

[17] Ngqukumba v Minister of Safety and Security & Others 2014

(5) SA 112 (CC) para [10]; George Municipality v Vena & Another 1998

(2) SA 263 (A) at 271H - 272B.

[18] [2007] JOL 19243 (C).

[19] 2013

(6) SA 176 (ECP) para 24.

[20] City of Cape Town v Rudolf & Others 2004

(5) SA 39 (C).

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