

SOUTH AFRICA / JUDGMENT

M.J.D v N.S and Another (5451/2017) [2018] ZAECGHC 5 (30 January 2018)

[2018] ZAECGHC 5

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi

CASE / FILE NUMBER

5451/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

No: 5451/2017

In

the matter between:

M.
J. D.
Applicant
and
N.
S.
First
Respondent
M.
X.
Second Respondent

JUDGMENT

MALUSI J:

[1] This is an application for an interdict and a mandament van spolie. The application is opposed by the first and second respondents (“the respondents”).

[2] For a better appreciation of the issues, it is necessary to set out the relief sought by the applicant. The orders sought were the following:

“2.1 that the first and second respondents be interdicted and restrained from entering the premises at [...] Road, Grahamstown pending the finalisation of an action to be instituted to set aside the transfer of the property Erf [...] Rini with street address [...] Road, Grahamstown;

2.2 that the First and second respondents be interdicted from interfering with the applicant’s possession of the property known as [...] Road, Grahamstown;

2.3 that the first and second respondents be ordered to restore the applicant’s possession of the property described in paragraph 4.1 above.”

I must hasten to add that the reference to ‘paragraph 4.1 above’ was clearly a typographical error by the applicant as there is no such paragraph in the notice of motion. Be that as it may, all the parties understood that the relief related to [...] Road, Grahamstown (‘the property’).

[3] At the centre of the dispute amongst the parties is the control and ownership of the property. The applicant provided an extensive and rather convoluted historical background of the ownership of the property. This approach eschewed the long standing practice in our courts whereby a spoliation application is upon short affidavits dealing only with possession and the deprivation thereof.[1] This historical background was neither necessary nor relevant even for the interdictory relief.

[4] It is apparent from the papers that this is an emotive matter for the parties. The applicant is the estranged father of the second respondent. The first respondent is the wife of the second respondent. The property at issue was previously the matrimonial home of the applicant before his divorce.

[5] The applicant avers that he has been in undisturbed possession of the property since it was registered in his name during 1995.

Despite his divorce, the property later being sold in a sale in execution and subsequent registration in his sister’s name he has remained in possession of the property. The relevant evidence discloses that the applicant leases the various rooms in the property to students of Midlands FET College. He regularly spends time away from the property either at his lover’s residence or at his parental home.

- [6] The applicant stated that on 26 November 2017 he was approached by the second respondent who informed him that the latter was by then the registered owner of the property. The second respondent instructed the applicant to vacate the property. Due to strained relations between them, the applicant did not respond to the instruction. He averred that he did not believe that the second respondent was the owner of the property.
- [7] The respondents state that they approached the student lessees to obtain the key identification number. It appears this allowed them to replicate the key to the property. They gained entry to the property after the students had vacated it for the December vacation. They moved the applicant's personal possessions into one room. They caused minor renovations to be effected on the property.
- [8] At the hearing a number of preliminary points were raised. Mr Coltman, who appeared on behalf of the applicant, moved an application to strike out a number of paragraphs in the answering affidavits. He withdrew the application after it had been pointed out to him that the disputed paragraphs all related to irrelevant material.
- [9] Ms Stretch, who appeared on behalf of the respondents, raised the point that there has been non-joinder of the applicant's sister and his ex-wife as previous owners of the property. I found no merit in this submission as ownership is irrelevant in an application for a mandament van spolie. Furthermore, there was no averment relating to either the applicant's sister or his ex-wife which had a bearing on the interdict relief.
- [10] Ms Stretch further submitted that there was no urgency in the matter, more especially one that would require such abridged time frames as imposed on the respondents by the applicant. The application had been served on the respondents on a Saturday morning. They were required to answer on the following Monday with the hearing scheduled for the Tuesday. In my view there was urgency in the matter though it did not justify the unreasonably abridged time frames. An appropriate costs order is discussed later in this

judgment.

- [11] Mr Coltman, correctly in my view, conceded that a case had not been made out by the applicant for the interdictory relief. The applicant did not allege that there had been violence or hindrance of any right protected in the Constitution by the respondents. He merely stated that the second respondent said there would be 'trouble' if he did not vacate the property. This is insufficient evidence to grant interdictory relief on the facts of the matter. There was no evidence that the respondents had previously been violent to the applicant which would justify a reasonable apprehension of harm. There was only an irrelevant reference by the applicant that the first respondent had faced criminal charges in the past.

- [12] The applicant further stated he anticipated the respondents would install new locks in the property which would prevent him gaining access. There is no basis for him to have anticipated such a course of action. At no stage have the respondents barred his access in anyway. They have repaired the locks but not changed them. All the parties have the keys to the property.
- [13] The requirements for the grant of a spoliation order is for the applicant to prove that:
- 13.1 she was in possession of the object;
- 13.2 she was deprived of possession unlawfully.
- [14] It has been held that 'the essence of the mandament van spolie is the restoration, before all else, of unlawfully deprived possession to the possessor. The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. The main purpose of the relief is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.'^[2]
- [15] Ms Stretch submitted that the applicant was not in possession of the property as it was occupied by the students who were his tenants. The respondents had averred that the applicant resides at his parental home and had recently moved into a rented property at an unspecified address in Grahamstown.
- [16] Mr Coltman submitted that the possession which needs to be proved is not possession in the juridical sense. It is enough if the holding by the applicant was with the intention of securing some benefit for himself accompanied by the physical element of corpus or detention.^[3]
- [17] In my view the applicant was in possession of the property. It is common cause that the students who occupied the rooms paid rental to the applicant. He utilised the rental for his own needs. The applicant also had personal possessions in the property. I am satisfied that the applicant held the property with the intention of advancing his own interests. It was not necessary, as contended by the respondents, for the applicant to be in continuous possession of the whole property.^[4]
- [18] Mr Coltman submitted that the act of moving applicant's personal possessions into one room amounted to dispossession.
- He argued that this has to be understood in the context of the respondents having 'surreptitiously' replicated the key to the property. The other factor is the installation of new burglar gates and an alarm system to the property.
- [19] Ms Stretch submitted that the respondents could not have deprived applicant possession as they lacked the knowledge and intent to act unlawfully.

- [20] In my view, the applicant has not been deprived of possession of the property. It appears to me the applicant's personal possessions were moved as the respondents effected minor renovations to the property. The renovations appear to have been necessary as the property was in a state of disrepair according to the respondents. At best for the applicant there has only been disturbance of his possession and not deprivation thereof. A mandament is not the appropriate remedy for a mere disturbance of possession.
- [21] The applicant has not proved that he has been denied access to any area of the property. He has not alleged that the respondents hindered him from placing his personal possessions back to their original position. The applicant appears to have anticipated that he would be deprived of possession in due course. Mr Coltman inadvertently argued as much when he said 'the respondents are inexorably moving towards depriving applicant of his possession.' I am satisfied that the applicant has not yet lost control and possession of the property. It is also clear he has unhindered access to the property and the mandament is not available to an applicant who anticipates a deprivation that has not yet occurred.
- [22] It is necessary to consider the issue of the reserved costs relating to Tuesday, 19 December 2017. I had already found that the applicant had unreasonably abridged the time frames. It appears the matter had been ripe for the application to be launched on 4 December 2017 when applicant consulted his attorneys. At the time the applicant elected to proceed by way of a domestic violence interdict in the magistrate's court. Only when the magistrate on 9 December 2017 averted to the Domestic Violence Act not being an appropriate remedy in the circumstances did the applicant revert to his attorneys.
- [23] He consulted his attorney on 11 December 2017 but the application was only issued on 16 December 2017. There has been no explanation provided for the delay. The application was not complex as it ought to have been 'on simple facts in short affidavits filed expeditiously on very limited issues.' The applicant served the application on a weekend precipitating the postponement on the following Tuesday. The applicant was not ready on Tuesday as counsel was still settling the replying affidavit. In fairness, it is my considered view that on the facts the applicant must pay the wasted costs of 19 December 2017.
- [24] In the result the following order will issue:
1. The application is refused;
 2. The applicant is ordered to pay the costs of the application including the wasted costs of the 19th December 2017.

T MALUSI

JUDGE OF THE HIGH COURT

Appearances:

Applicant:

Adv Coltman instructed by

Enzo Meyers Attorneys

100 High Street

GRAHAMSTOWN

1ST and 2nd Respondents: Adv Stretch instructed by

Netteltons Attorneys

118A High Street

Heard on:

20 December 2017

Delivered on:

30 January 2018

[1] see Willowvale Estates CC & Another v Bryanmore Estates Ltd 1990(3) SA 954 (W) at 961E-F

[2] see Ngqukumba v Minister of Safety & Security & Others 2014

(5) SA 112 (CC) para 10

[3] see Reck v Mills 1990 (1) SA 751 (A) at 755G-I; Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977

(1) SA 230 (E) at 233B-C

[4] See Bennett Pringle ibid at 233A-B

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Prepared on 11 October 2026 · Esheria