

SOUTH AFRICA / JUDGMENT

V,D.M v V.D.M (16838/2024) [2024] ZAWCHC 210 (6 August 2024)

[2024] ZAWCHC 210

COURT

Western Cape High Court, Cape Town

BEFORE

P Farlam

CASE / FILE NUMBER

16838/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case number: 16838/2024

In the matter between:

Y[...]
V[...] D[...] M[...]
Applicant
and
D[...]
S[...] V[...] D[...] M[...]
Respondent

Coram:

Acting Justice P Farlam

Heard:

31 July 2024
Delivered
electronically: 6 August 2024

JUDGMENT

FARLAM AJ:

- [1] When this application was launched on Tuesday, 30 July 2024, the applicant sought as a matter of urgency an order directing the respondent to vacate the applicant's property in V[...] d[...] V[...], Paarl before 17h00 on Wednesday, 31 July 2024, as well as ancillary orders designed to ensure that he was removed from the property and handed over all keys thereto in the event of his failing to do so of his own accord. In addition, the applicant sought the costs of this application on scale C, as contemplated in Uniform Rule 67A, and that those costs be paid on a punitive, attorney and own client, basis.
- [2] By the time that this application was called in the urgent court on the morning of Wednesday, 31 July 2024, the respondent had vacated the premises. It appears that the respondent left the property around 14h00 on Tuesday, the 30th, slightly more than four hours after his attorneys had been emailed a copy of the unissued and unsigned application papers (at 09h45), and about half an hour after his attorneys' receipt of the issued application (at 13h35).
- [3] The substantive relief sought by the applicant has thus become moot. All that remains for determination is the question of costs (the respondent having refused to make a tender in that respect).
- [4] On the papers before me – which consisted of a founding affidavit from the applicant (with attachments), a supplementary affidavit from the applicant's attorney (with annexures) deposed to on the morning of 31 July 2024 and an answering affidavit from the respondent (with annexures) deposed to later on 31 July 2024 – the applicant clearly made out a case for a mandament van spolie (or spoliation order). That was also, understandably, not disputed by the respondent's counsel in argument. While the respondent's

affidavit contained a very brief and unsubstantiated denial of the merits of the application (in a two-line paragraph), his vacation of the property soon after receiving the application and taking legal advice further supports that conclusion. The consideration of the costs question must thus proceed on the basis that the application was well-founded and would, on the papers, have succeeded.[1]

- [5] The respondent nevertheless disputes that he should pay the costs of the application. In the alternative, he contends that, if an adverse costs order were to be granted, he should not pay costs on a punitive scale and that any party and party costs order should not be on scale C.
- [6] The respondent's main argument in this regard was that, once the applicant had learned of the respondent's occupation of the property on Saturday, 27 July 2024, the applicant's attorney could have resolved the matter expeditiously, and inexpensively, by sending a letter of demand on Sunday, 28 July or Monday, 29 July 2024, instead of instructing counsel to draft a High Court application. According to the respondent, he would have vacated the property

upon being notified of an intention to issue a spoliation application, just as he vacated the property soon after receiving the application papers and taking advice from his attorney. In the circumstances, so he submitted, an application was unnecessary

and, at best, premature.

[7] I am not aware of any authority to the effect that a letter of demand must precede an urgent application in order for the applicant to claim the costs thereof; and I was also not referred to any by the respondent. Every case must in any event turn on its own facts; and so the fact that a demand may have been considered appropriate in other matters[2] does not mean that the applicant in this case should be penalised for not first seeking to address the respondent's unlawful occupation of her property by way of an attorney's letter. The following factors bear particular reference in this context:

7.1. The applicant had warned the respondent in a WhatsApp message on Saturday, 27 July (after he had advised her through that medium that he was not living in the house and that "[y]ou will need to tell your tenants that they will need to find alternate accommodation") that, unless he left the house, she "will get a court order to evict [him]". The respondent replied to that message less than half an hour later with a hostile and insulting WhatsApp which ended with the sentence: "Let's see how the courts [sic] decides on your attempted extortion". The respondent also followed up that communication with a further WhatsApp at 13h31 on Sunday (28 July) in which he inter alia stated: "An estate cannot block your access to the matrimonial home. The court is very reluctant to evict a spouse from the marital home, even if one spouse brings the matters to court." The applicant can thus hardly be blamed for instructing her lawyers to draft, and then bring, the action she had foreshadowed.

7.2. In my view, one also cannot infer that, because the respondent left the property shortly after receiving the application and taking legal advice in respect thereof, a letter of demand – which by its nature would have been much less detailed and compelling, and also have posed much less of an immediate threat to the respondent – would have had anything like the same effect. Indeed, the sending of a letter in those circumstances might even have been seen as a sign of weakness or uncertainty, and as evincing an unwillingness by the applicant to seek an order compelling the respondent to vacate, and thus an invitation to continue the dispute by correspondence.

7.3. In addition, the matter undoubtedly required prompt resolution, as, even aside from the fact that these kinds of applications are inherently urgent, the applicant had concluded a lease agreement in respect of the property with a Mr Raphuthing, in terms of which he and his wife and four minor children were permitted to occupy the property from 1 August; and the applicant would therefore be in breach of that lease agreement, and be liable for damages thereunder, in addition to being deprived of the rental income that she claims she needs for her own children's maintenance and housing, were the respondent to remain in the property after 31 July.

[8] The applicant therefore cannot be faulted for instructing her legal representatives to commence with drafting urgent application papers on Sunday, 28 July. Even if a letter had been sent on the Sunday or the Monday, the application papers would anyway have had to be

prepared on those days so that the applicant could proceed to court urgently in the event of the demand not being complied with – as the respondent had already advised by WhatsApp that it would not be. The respondent's attorney's charge that the applicant's attorney was "acting in an unnecessary [sic] litigious manner" by bringing an application was therefore unwarranted.

- [9] The position is consequently that the applicant has brought an application of undisputed urgency, which was justified and well-founded, in order to address unlawful action on the part of the respondent. The respondent, by his actions, has essentially conceded the application. The usual rule in such circumstances is that an applicant should be awarded costs.[3] I see no reason to depart from that.[4]
- [10] What therefore needs to be considered is the scale of costs.
- [11] The applicant has, as mentioned, asked for attorney and own client costs, as well as costs on scale C. As noted above, the notice of motion conflated these by asking for costs on scale C in the context of an attorney and own client order. However, the applicant's counsel acknowledged in argument that the costs scale in Rule 67A is not applicable to punitive costs orders, merely party and party costs ones. It was accordingly common cause at the hearing that the question of whether a costs order should be on scale C would only arise in the event of my not being inclined to grant the applicant attorney and own client (or attorney and client) costs.
- [12] The respondent's counsel submitted at the hearing that, despite attorney and own client costs having been sought in the notice of motion, the founding and supplementary founding affidavits did not motivate that prayer or thus make out a case for punitive costs on that scale. That submission has some merit, although I do not think it can be dispositive in this case, inasmuch as the basis for the punitive costs award was clearly evident from the papers and particularly the allegations in the founding affidavit that the respondent was occupying the property "based upon an ulterior motive" and that he "wishes to be spiteful and wishes to gain a bargain through extorting [the applicant] from [sic] paying him what he perceives he is entitled to".
- [13] Those allegations of the applicant were not disputed by the respondent; nor could they plausibly have been. The respondent's own divorce action indicates that he resides some way away from V[...] d[...] V[...] (in Plumstead, Cape Town) and it was also undisputed that he had been living there for almost two years prior to 27 July 2024. It was further undisputed that the respondent had given no indication in communications with his estranged wife that he wanted to move back to their erstwhile marital home in V[...] d[...] V[...]. As the respondent effectively acknowledged in his

WhatsApp communications, the reason for his sudden occupation of the applicant's property, almost immediately after she had left for Europe with the children, was therefore not because he genuinely believed that he was entitled to live there, but because he saw an opportunity to attempt to improve his bargaining position in the divorce negotiations with his wife.

[14] Had this application proceeded to argument on the merits, I would therefore have had little compunction in awarding the applicant attorney and client costs, to penalise the respondent for his vexatious and vindictive conduct. As noted above, the respondent's show of bravado was however short-lived and there was consequently no prejudice to the applicant other than the legal costs she had incurred in relation to the application. The respondent's WhatsApp communications with his wife could arguably also be considered to be the kind of petulant bluster that, in a pre-electronic communication age, would have been intemperately said in the heat of the moment in a verbal argument without being accorded (or intended to be accorded) long-lasting significance. There is furthermore the question of how to balance the fact that, while attorney and client costs might have been warranted in respect of the merits, a fair portion of the costs will ultimately have related to the costs of the hearing about costs, in respect of which a punitive scale would not appear to be justified. While, as explained above, I do not think that the applicant needed to send a letter of demand in the circumstances of this case, it may be, too, that, given the speed with which the respondent capitulated, the applicant could have limited the costs she incurred in respect of the merits, and that it would accordingly be unfairly punitive to the respondent to allow the applicant to tax her costs other than on the normal scale. In the

circumstances, I have decided not to award costs on a punitive scale, but instead on a party and party basis.

[15] That then leads to the question of whether counsel's costs should be on Scale C (as contended for by the applicant), or on a lesser scale (as asserted by the respondent). This issue can be addressed swiftly. While it is correct, as the respondent's counsel argued, that this matter was ultimately a fairly straightforward mandament van spolie, to which the respondent appeared to have no defence, the applicant was, in my view, justified in employing an experienced and streetwise counsel, given that the respondent had indicated that he was intending to raise a variety of defences and, for example, seek to invoke the protections afforded by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE) and also attempt to cloud the issues by portraying them as interlinked with the pending divorce action. The indications were that the respondent would thus seek to complicate the issues as much as possible, as part of his strategy to improve his bargaining position for the divorce, and at least try to frustrate and delay using PIE, in circumstances where he knew that time was of the essence for the applicant, who had to give vacant occupation to a tenant by 1 August 2024. It must also be borne in mind that the applicant had very shortly before arrived in the Netherlands with their children to start a new job, and needed to be sure that this matter, which was of some importance to her, was in capable hands. In the circumstances, the applicant's briefing of a senior junior counsel

was appropriate, and she is entitled to recover costs commensurate with that counsel's seniority.

[16] I therefore make the following order:

The respondent is to pay the costs of the application on a party and party basis, with counsel's fees granted on Scale C.

ACTING JUDGE P FARLAM

For applicant: Adv A Ferreira

Instructed by: Hannes Pretorius Bock & Bryant (Mr W Bock)

For respondent: Adv Michelle Schoeman

Instructed by: Madelein Wöhler Attorney

[1] It is well-established that, where a decision concerning costs is divorced from the merits because a decision on

the merits may no longer be required, regard must still be had to the merits in determining costs (see e.g., *Erasmus v Grunow en h Ander* 1980 (2) SA 793 (O) at 798D; *Johnson v Minister of Home Affairs and Another* 1997 (2) SA 432 (C) at 434B; *Thusi v Minister of Home Affairs and Another* and 71 Other Cases 2011 (2) SA 561 (KZP) para 64).

[2] For example, the applicant in *Matsipe v SAI Group (Pty) Ltd* (34618/17) [2017] ZAGPPHC 319 (2 June 2017) issued a letter of demand before approaching the court for an urgent spoliation order.

[3] See, e.g., *Ideal Trading 199 CC v Polokwane Local Municipality* (3087/2021) [2023] ZALMPPHC 75 (15 August 2023), where the Court quoted passages from *Ward v Sulzer* 1973 (3) SA 701 (A), before stating at para [9] that: "Although this case was decided against the backdrop of a withdrawal, the reasoning still rings true. The Applicant cannot be deprived of its costs in as far as the conduct of the Respondent rendered the merits

of the application moot."

[4] I have considered the judgment of the Free State High Court (per Daffue J) in *JRK v HEK* (4711/2020) [2021] ZAFSHC 13 (3 February 2021), which the applicant's counsel drew to the respondent's and the Court's attention; and agree with the applicant that the cases are distinguishable. That matter is in some respects the converse of the present one. In *JRK*, like the present case, a husband and wife were embroiled in divorce proceedings and the occupation of the house by the husband appeared to be "to put pressure on [the wife] in divorce litigation" and to "prevent[] [the wife] from earning rental income" on the property (para [24]). However, in *JRK*, the spoliation was done by the wife in attempting to get the husband out of the property, the husband already having established peaceful and

undisturbed possession. It furthermore appeared to the Court that the applicant “to a certain extent abused the legal process in order to obtain a tactical advantage over respondent” (para [23]) and brought a “vindictive application” (para [25]). While Daffue J granted the applicant a spoliation order, he was consequently disinclined to award the applicant costs and even “initially considered ordering applicant to pay respondent’s costs in respect of her opposition to the application” (para [25]). The Court in JRK accordingly decided to make no order as to costs. In the present matter, by contrast, the person who sought to put pressure on the other in the divorce litigation (the respondent) has effectively conceded the application, and would also, on the papers before me, have lost. The considerations which motivated Daffue J to depart from the usual rule that the successful party should be awarded costs therefore do not apply in the present matter. Indeed, the kinds of sentiments expressed by Daffue J in JRK support a costs order for the applicant in this instance.

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Prepared on 11 October 2026 · Esheria