



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 2020/36040

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED.

**Signed: .....Date: 25 November 2022**

In the matter between:

**KUMARAN MAISTRY**

**First Applicant**

and

**CHARMAINE NEELAMONEY NAIDOO**

**First Respondent**

**NADINE DANIELLE MOODLEY**

**Second Respondent**

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**JUDGMENT**

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**This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy hereof to Caselines.**

Spoliation — *Mandament van spolie* and spoliatory relief — Joinder of non-spoliating and non-possessing owner not required — Onus and determination of requirements of *mandament van spolie* in motion proceedings in absence of referral to oral evidence — Illicit deprivation of against consent of peaceful and undisturbed joint possession of immovable property — Ancillary non-spoliatory interdictory relief — Spoliation defences — Failure to bring application within a reasonable time — Nature of court's discretion refuse spoliatory relief.

## **MOULTRIE AJ**

### Introduction

- [1] The relevant factual background to this application is briefly as follows. The applicant and Veni Naidoo (sister of the first respondent) started a romantic relationship in 2007, following which they lived in a house in Orange Grove together with Veni's two children from her previous relationship: Nadine (the second respondent, now an adult) and a second daughter (still a minor). In 2011, the applicant and Veni were married according to Hindu rites, although the marriage was not recognised in terms of civil law. In 2012, they had a son together.
- [2] In approximately 2016 Veni purchased the house in Lyndhurst, Johannesburg that forms the subject matter of the application. Although the relationship between the applicant and Veni was not always peaceful, it is common cause that the applicant had moved into the Lyndhurst house with her and the two minor children by January 2017. In late 2017 or early 2018, Veni was diagnosed with advanced cancer, following which she and the applicant travelled to India to seek treatment on two separate occasions during 2018. During these absences, the second respondent and the minor children continued to live in the Lyndhurst house, where they were at first cared for by the applicant's parents and subsequently by the first respondent and her parents. Although the affidavits do not precisely disclose the date, it appears to be common cause that the first respondent came to live in the

house at least from a date in “late 2018”, shortly after the applicant and Veni returned from India for the second time, although the respondents contend that it was as early as 18 May 2018.

- [3] Veni passed away on 18 December 2018. All the occupants left the Lyndhurst house and went to Durban for her funeral.
- [4] The applicant returned to Johannesburg and occupied the house with his son on 5 January 2019. On 6 January 2019, he placed locks and chains on the doors and gates of the property. On 7 January 2019, the respondents returned to the house and succeeded in breaking the locks and chains to gain access. Later that day, upon his return to the house, the applicant either (depending on whose allegations are to be accepted) was prevented from accessing the house by the respondents or voluntarily agreed to vacate it.
- [5] On 4 November 2020, almost 22 months later, the applicant launched this application seeking the following relief:

1. *Ordering that the First and Second Respondents, jointly and severally, within 30 days of this order, restore to the Applicant peaceful and undisturbed possession of the [Lyndhurst house] including handing over to the Applicant, at the Applicant's attorneys of record, keys to all the gates and doors at the Property, provided that:*
  - 1.1. *The Second Respondent shall be entitled to reside on the Property, subject to reasonable terms and conditions set by the Applicant, unless a court orders otherwise in any future court proceedings.*
  - 1.2. *To the extent that the Court finds that the First Respondent shared any form of peaceful and undisturbed possession of any portion of the Property with the Applicant immediately prior to 18 December 2018 (when her sister passed away), that she be entitled to retain such peaceful and undisturbed possession, subject to what a court may in any future proceedings order.*
2. *Ordering the First and Second Respondents to pay the costs of this application, jointly and severally.*

[6] While the order sought in prayer 1 is spoliatory relief based on the *mandament van spolie*, the respondents contend that the ancillary relief sought in prayers 1.1 and 1.2 would, in substance, constitute a final interdict declaring the parties' respective rights and entitlements in relation to their possession of the Lyndhurst house following the grant of the spoliatory relief.

[7] Four issues arise for determination:

- (a) whether the applicant's failure to join the executor and heirs of Veni's estate (which has not yet been finally wound up), constitutes a fatal non-joinder, as the respondents contend in their first point *in limine*;
- (b) whether the applicant has discharged the onus of demonstrating the requirements of the *mandament van spolie* in relation to the alleged spoliation by the respondents on 7 January 2019 giving rise to the spoliatory relief sought in prayer 1 of the notice of motion;

- (c) whether the ancillary orders sought in prayers 1.1 and 1.2 are spoliatory or interdictory in nature and (if the latter) whether the applicant has made out a case therefor; and
- (d) whether the respondents are correct in contending that even if the applicant has met the requirements for spoliatory relief, it should nevertheless be refused in view of the delay in launching this application after the alleged spoliation.

Issue (a): Non-joinder of the executor and heirs of Veni's estate

[8] It is common cause that the Lyndhurst house was owned by Veni. In terms of section 11(1)(b) of the Administration of Estates Act, 66 of 1965, those who were in possession of the house at or immediately after her death were required to retain possession until the appointment of an executor. While I assume that Veni's executor would have been entitled to exercise all the rights of an owner upon his or her appointment including potentially taking the Lyndhurst house into their possession, this does not in itself mean that they (let alone the heirs) became the *de facto* possessor of the property upon their appointment. To the contrary, there is no evidence on the papers filed in the application that the executor did actually take possession (i.e. possession in fact) of the property for any period following their appointment. It appears to be common cause that it is the respondents in their own right, and not the executor, who have occupied the property ever since the alleged spoliation.

[9] While I am prepared to accept that the executor of Veni's estate may be a necessary party in relation to the ancillary relief sought by the applicant, which seeks to govern the rights and entitlements of the parties following the grant of the spoliation order prayed for (as to which see below), the respondent does not identify any authority, and I am not aware of any, in support of the proposition that a failure to cite a non-spoliating<sup>1</sup> and non-

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<sup>1</sup> In his concurring judgment in *Monteiro v Diedricks* 2021 (3) SA 482 (SCA) paras 77 and 83, Plaskett JA pointed out that where the alleged non-owner spoliator was in fact not acting as a spoliator in his own right, but was rather acting in a representative capacity on behalf of the owner,

possessing owner of the spoliated property constitutes a fatal non-joinder in a spoliation application. The applicant, on the other hand, refers to the judgment in *T and M Canteen*, in which the court held that it was unnecessary for a party seeking a spoliation order to join the owner of the premises on the following basis:

*There is no evidence that the [owner] was involved in the spoliation of the right of the applicant to occupy the premises where the canteen is situated. The cause of action is not directed at the [owner], and the outcome thereof is not likely to have any impact on it. The [owner] may well have been interested in the lease agreement issue, but as already stated, that issue is not before this court. In other words, the applicant in this matter is not claiming the substantive right of occupation of the premises through the lease agreement but rather seeks to assert its entitlement to a proper and lawful procedure before it can be deprived of its possession.*<sup>2</sup>

[10] In my view, this approach is correct. Given that the spoliatory relief does not determine any of the parties' rights of possession or occupation (but merely restores the factual *status quo ante*) the executor cannot be said to have "a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings".<sup>3</sup> The non-joinder point *in limine* must consequently fail, at least insofar as it relates to the spoliatory relief.

Issue (b): Has the applicant met the requirements of the *mandament van spolie*?

[11] In order to be granted spoliatory relief, the applicant bears the onus of proving (i) that he was in peaceful and undisturbed possession of the Lyndhurst house at the time of the alleged spoliation; and (ii) that the

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then the non-joinder of the (spoliating) owner would be fatal to the spoliation application.

<sup>2</sup> *T and M Canteen CC v Charlotte Maxeke Academic Hospital* 2021 JDR 2489 (GJ) para 35 [emphasis supplied]. See also *Xaba v Mthetwa and Another* 2021 JDR 2775 (GP) para 21 and *South African Human Rights Commission and Others v Cape Town City and Others* 2021 (2) SA 565 (WCC) fn 2.

<sup>3</sup> *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21.

respondents wrongfully deprived him of possession without his consent.<sup>4</sup> Given that there is no application for referral of the matter to oral evidence, these questions of fact must be adjudicated on the basis of the well-known *Plascon-Evans* rule.<sup>5</sup>

[12] The application of this approach in the current matter and in particular the contents of paragraphs 26, 30, 34, 36, 43, 44 and 45 of the founding affidavit and the responses thereto in the corresponding paragraphs in the answering affidavit (which not only tend to talk past the allegations in the founding affidavit but are replete with bare denials and obviously hearsay allegations), leads me ineluctably to the conclusion that from a date shortly after the applicant and Veni returned from India for the second time in “late 2018” and up until 6 January 2019, both the applicant and the respondents had the means to access the Lyndhurst house (apparently using keys) and reside there, which they both did peacefully and without disturbance in the relevant sense (i.e. “*in a sufficiently stable and durable manner for the law to take cognisance of it*”).<sup>6</sup> A person can usually be said to have physical control over a building if they hold a key to it,<sup>7</sup> and the current instance is not one where keys were held by such a large multiplicity of persons that it “*waters down [the applicant’s] possession, and ... becomes so dilute that it ceases to be the sort of possession that is required to achieve the protection of the mandament*” in the sense that it can be regarded as mere access, as opposed to possession.<sup>8</sup>

[13] It has expressly been recognised that the *mandament van spolie* is available

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<sup>4</sup> *Monteiro v Diedricks* (above) para 17; *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) para 5.

<sup>5</sup> *Nienaber v Stuckey* 1946 AD 1049 at 1053 – 1054; *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) at 763A – B; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635C.

<sup>6</sup> *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) para 22.

<sup>7</sup> *Scholtz v Faifer* 1910 TPD 243 at 247; *Malan v Dippenaar* 1969 (2) SA 59 (O) at 62H - 63A; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 26.

<sup>8</sup> *De Beer v Zimbali Est Management Assoc (Pty) Ltd* 2007 (3) SA 254 (N) para 54.

to a dispossessed joint possessor of immovable property,<sup>9</sup> and when one of two joint possessors of a thing illicitly takes exclusive possession of that thing against the will of a co-possessor, the ratio underlying the remedy of a spoliation order is as fully applicable as in the case where a person has been wrongfully deprived of exclusive possession.<sup>10</sup>

[14] As such, I find that the Lyndhurst house was in the joint peaceful and undisturbed possession of the applicant and the respondents for the purposes of residence there during period from a date no later than shortly after the return of the applicant and the deceased from India for the second time up until at least 6 January 2019.

[15] Furthermore, it is apparent that (despite an initial act of spoliation by the applicant on 6 January 2019 when he placed locks and chains on the gates of the property, which served to exclude the respondents from the house, and what appears to have been a counter-spoliation by the respondents when they had those locks on chains broken in order to regain access on 7 January 2019), the applicant's co-possession continued unabated until the time that the respondents allegedly prevented him from re-entering the property when he returned later in the day. The applicant has thus established the first requirement of the *mandament van spolie*.

[16] I am also satisfied that the applicant has discharged the onus of showing on the papers that the respondents wrongfully deprived him of his possession against his consent, bearing in mind that “[v]iolence or fraud is not an essential element of dispossession provided the act is done against the consent of the person despoiled and illicitly ... [by which is meant] ‘in a manner which the law will not countenance’”.<sup>11</sup>

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<sup>9</sup> *Nienaber v Stuckey* (above) at 1055; *Painter v Strauss* 1951 (3) SA 307 (O) at 314C; *Dennegeur Est Homeowners Assoc v Telkom SA SOC Ltd* 2019 (4) SA 451 (SCA) para 9; *Lydall v Roxton-Wiggill* 2019 JDR 1636 (GJ) para 3. Even under Roman law, the interdict *uti possidetis* was afforded to a joint possessor of land: Digest 43.17.1(7) (Ulpian, Edict, book 69): Watson *Digest of Justinian*, vol. 4 (University of Pennsylvania, 1985) at 103.

<sup>10</sup> *Rosenbuch v Rosenbuch and Another* 1975 (1) SA 181 (W) at 183F – J. See also *Manga v Manga* 1992 (4) SA 602 (ZS) at 503 and *Ross v Ross* 1994 (1) SA 865 (SE) at 868E – G.

<sup>11</sup> *Wightman t/a JW Construction v Headfour* (above) para 26.



[17] In this regard, I consider it significant that it is undisputed that (i) the applicant had during the period between 30 December 2018 and 7 January 2019 made it clear to the respondents in a number of communications and actions that it was his intention to continue to reside in the Lyndhurst house indefinitely despite the fact that he was not the owner; (ii) the first respondent's husband sent the applicant a series of threatening text messages in the same period; and (iii) in a letter dated 11 January 2019, the applicant's attorney alleged that he had been "*forced to leave the house as he felt threatened and believed that his life was in danger*". Furthermore, although the applicant's allegation that the first respondent's husband threatened to kill him during a telephone call on 6 January 2019 is denied in the first respondent's answering affidavit, this denial is at best hearsay since no confirmatory affidavit deposed to by the first respondent's husband was submitted by the respondents.

[18] In those circumstances, I consider the respondents' allegations (i) that they "*never denied the applicant access to the property*"; (ii) that after the applicant "*agreed with the members of the SAPS that he was not the owner of the property*", he "*voluntarily agreed to vacate the property and to then seek redress at a hearing in due course*"; and (iii) that he did so after the first respondent informed him that he was not permitted to exclude the respondents from the property without a court order and he "*came to [the] realization*" that this was correct to be insufficient to raise any material dispute of fact in response to the applicant's allegations. These are that when he returned to the premises on 7 January 2019 and tried to gain access to the house, he was "*stopped*" by the respondents "*who had somehow managed to get the [SAPS] on their side*" and who "*threatened me that, absent a court order, my attempt to enter the property will be visited with a charge of intimidation*". Indeed, the first respondent impliedly concedes the point in her answering affidavit when she states his allegedly "*voluntary*" vacation of the Lyndhurst house took place "*in the face of the admitted existence of extreme animosity and threats of violence (including death threats) between all the parties to this litigation*" and contends that he

“admits that he was not in a position to insist that he be allowed access to the property and this is why he voluntarily left the property” [emphasis supplied].

[19] In the circumstances, I accept that the applicant’s exclusion from the Lyndhurst house on 7 January 2019 was both involuntary and wrongful in the relevant sense, and that the applicant has thus established the second requirement of the *mandament van spolie*.

[20] I pause briefly at this juncture to note that I disagree with the respondents’ contention that to order restoration of the applicant’s joint possession of the Lyndhurst house would be impossible in view of the protection order obtained by Veni against the applicant in 2015. The terms of the protection order prohibited the applicant from assaulting Veni, damaging her property, and entering her residence in Orange Grove and place of employment, but not from occupying the Lyndhurst house – especially not in her absence. In any event, it is clear on the respondents’ own allegations that Veni did not regard the protection order as a hindrance to his moving into the Lyndhurst house, which they say she invited him to do in January 2017.

[21] Subject to what is said below regarding the question of delay, I therefore conclude that the applicant has made out a case for the spoliatory relief sought in prayer 1 of the notice of motion for the restoration of his co-possession of the Lyndhurst house, including an order requiring the respondents to allow the applicant to make copies of keys to the gates and doors of the property.

Issue (c): The ancillary relief in prayers 1.1 and 1.2

[22] In my view, the respondents are correct that the relief sought in prayers 1.1 and 1.2 of the notice of motion is not spoliatory, but interdictory in nature. It does not simply seek to restore the *status quo ante* in relation to the fact of applicant’s joint co-possession (*ius possessionis*) of the Lyndhurst house but goes further and seeks to establish and govern the parties’ respective “entitlements” or rights in relation to the manner in which such possession is

to operate (*ius possidendi*). As such, in order to be granted this relief, the applicant is required to go beyond simply satisfying the requirements of the *mandament van spolie*, but must make out a case for an interdict.

[23] He has failed to do so. Not only do I consider that the respondents' first point *in limine* of non-joinder is well-founded in relation to this interdictory relief, I agree with the contention in their second and third points *in limine* that it is final and not interim in nature. As Van Heerden JA pointed out in *Airoadexpress*, it was laid down authoritatively by Van der Linden in his "*Koopman's Handboek*" that an applicant for an interdict who is unable to prove a clear right may obtain interim relief (to which the *Plascon-Evans* rule does not apply)<sup>12</sup> on the basis of *prima facie* right pending the establishment of his right "*in een volledige Regtsgeding*".<sup>13</sup> This means (at the very least) some process that is capable of resulting in a binding determination "*of the matter substantially in issue between the parties*".<sup>14</sup> That is not the case here. As the applicant himself is at pains to point out in reply, "*there is no application before Court, or even a threatened application, for the determination of the rights of the parties in relation to the property*". In view of the material disputes of fact regarding the parties' respective rights in relation to their possession of the property (for example under Veni's will or in terms of universal partnership which the applicant appears to contend existed between them), the applicant has failed to establish the existence of a clear right to the relief he seeks, such as the right to set "*reasonable terms and conditions*" upon which the second respondent may reside at the Lyndhurst house.

[24] Even if I am wrong in this regard, and assuming that the relief is indeed

<sup>12</sup> *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

<sup>13</sup> Van der Linden *Institutes of Holland*. (1806) 3.1.4.7. Sir Henry Juta's translation 3 ed (Juta, 1897) at 297 renders these words into English as "*by a more complete judicial proceeding*".

<sup>14</sup> *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban* 1986 (2) SA 663 (A) at 681D – F, as approved by the Constitutional Court in *EFF v Gordhan* 2020 (6) SA 325 (CC) para 47. The concurring judgment of Grosskopf JA in *Airoadexpress* at 677B – 678I explains that the difference in opinion between the majority judgment of Kotzé JA and the minority judgment of Van Heerden JA turned on the question of whether an appeal before the National Transport Commission was a procedure that could finally determine the parties' rights or not. See also *National Gambling Board v Premier, KZN* 2002 (2) SA 715 (CC) para 49.

interim in nature and that the applicant has made out a *prima facie* right to it (which I don't accept), the balance of convenience does not favour the grant of this relief. The respondents have been living in the Lyndhurst house and looking after Veni's minor daughter there for over three and a half years while the applicant and his minor son have been living elsewhere. In view of the clearly antagonistic nature of the relationship between the applicant and the first respondent, I cannot but conclude that the grant of this temporary relief would not be in the best interests of either of the minor children, which is an overriding consideration of "*paramount importance*".<sup>15</sup>

[25] In the circumstances, I conclude that the orders sought in prayers 1.1 and 1.2 of the notice of motion must be refused.

Issue (d): The implications of the delay in launching the spoliation application

[26] The respondents contend in the answering affidavit that "*the applicant was obliged to have launched this application in January of 2019 and not in November of 2020 [and that] [f]or all intents and purposes this application is moot since the applicant acquiesced in this regard*".

[27] Acquiescence after dispossession is a recognised defence to a spoliation application. But the mere fact that an applicant does not "*press forward legal proceedings immediately*" is insufficient in itself to give rise to a conclusion of acquiescence.<sup>16</sup> In order to evaluate a defence of acquiescence, it is necessary to consider the applicant's subjective state of mind.<sup>17</sup>

[28] I am unable to reach the conclusion that the applicant has subjectively acquiesced in the respondents' conduct of excluding him from the Lyndhurst house on the basis of the allegations in the affidavits before me.

[29] Immediately after his dispossession of the Lyndhurst house, the applicant approached an attorney, whom he consulted on 8 January 2019 and paid a

<sup>15</sup> Constitution, section 28(2).

<sup>16</sup> *De Villiers v Holloway* (1902) CTR 566 at 569.

<sup>17</sup> *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 893F – I; *Le Riche v PSP Properties CC* 2005 (3) SA 189 (C) paras 41 – 42.

deposit of R30,000. On 11 January 2019, the attorney sent a letter of demand to the first respondent. Although this letter threatened that the applicant would “*shortly approach the High Court to declare a universal partnership, together with ancillary relief*”, it also alleged that the applicant “*was forced to leave the house as he felt threatened and believed his life to be in danger*” and demanded that the first respondent furnish him with the keys to the house and that she should “*vacate the premises together with the [second respondent] and together with your 3 children*” within seven days, failing which “*we shall approach the High Court for the necessary relief*”, which was clearly a reference to a potential spoliation application.

[30] While it is correct that the application was then not launched until November 2020, the applicant describes what occurred in the interim. On 28 February and 4 March 2019, he sent messages to the attorney expressing concern about the delay which was causing him concern since he and his son were having to move “*from house to house*” and were “*living out of bags*”, after which they moved into his parents’ one bedroom house in a retirement village. When he seemingly did not get any response from the attorney, he was unable to afford another, and considered that his only course of action was to lodge a complaint against the attorney with the Legal Practice Council, which he did on 30 October 2019. Although it is not clear when or whether the complaint was investigated or resolved, the applicant states that his endeavours to obtain legal assistance were complicated by the onset of the measures implemented because of the COVID-19 pandemic in March 2020. Ultimately, he was able to secure legal assistance on a *pro bono* basis on 28 July 2020, following which a series of letters were exchanged with the respondents’ attorneys before the application papers were prepared and the application was delivered.

[31] I decline to comment on the conduct of the legal representatives in the absence of further information but I have no reason to doubt the correctness of any of the allegations referred to in the previous paragraph, and am unable to find that the most natural or plausible inference to be drawn from several conceivable reasonable inferences on the basis of the common

cause and proven facts<sup>18</sup> is a state of mind of acquiescence on the part of the applicant. The same conclusion was reached in relation to a similar period of delay by the court in *Le Riche*.<sup>19</sup>

[32] The absence of acquiescence is, however, not the end of the enquiry in relation to delay. The respondents also contend that the spoliatory relief “*is not competent*” because of the “*effluxion of time*” – irrespective of the applicant’s state of mind and the reasons put up by him for the delay. In support of this the respondents’ heads of argument state that the court has a “*discretion*” to refuse to grant a *mandament van spolie* on account of delay, and cite *Jivan* for the proposition that “*as a matter of law*” ... “[*if the delay exceeds one year, the party seeking a spoliation order must demonstrate special considerations to be allowed to proceed with a spoliation application*”, which he has failed to do.

[33] The relevant portion of the *Jivan* judgment held as follows:

*In my view the Court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of such application. In exercising this discretion I think the bar imposed after one year in respect of the mandament consequential upon complainte is a guide to modern practice. If an applicant delayed for more than a year before bringing his application for a mandament of spolie, there would have to be special considerations present to allow such applicant to proceed with his application, and conversely, if an application was brought within the period of one year after interruption of the possession, special circumstances would have to be present before relief could be refused merely on the ground of excessive delay.*

[34] In reaching this conclusion, Steyn J observed in *Jivan* that “*the most pertinent, and really only pertinent authority in South African law on the*

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<sup>18</sup> *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 713E-H.

<sup>19</sup> *Le Riche* (above) paras 44 – 49.

*question whether a spoliation order should be granted only to an applicant who acts promptly*” is the judgment of Greenberg JA in *Nienaber v Stuckey*. In that case, having found that the applicant in the court a quo had established the requirements for the mandament van spolie, the Appellate Division had to consider the respondent’s contention that it should nevertheless not have been granted in circumstances where the applicant had delayed just over four months after the spoliation before delivering the spoliation application. Greenberg JA rejected the submission, holding that “*Wassenaer (Ch. 13, Art 1) makes the remedy available for a year*” and also referring to Voet 43.16.6 and 7, but expressly left open “*the question whether the court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any value can be granted*”.<sup>20</sup>

[35] However, the authorities referred to by Greenberg JA don’t deal with the *mandament van spolie*. The *Wassenaer* passage relates to the *mandament van complainte*, which fell into desuetude before being received into South African law and Kleyn points out that “*the authorities are silent about any time-limit in regard to the bringing of the mandament van spolie*”.<sup>21</sup> As for the Voet passage, it appears in Book 43, Title 16, as part of his discussion of the Roman law interdict *Unde vi*,<sup>22</sup> whereas the true source of the *mandament van spolie* as received into South African law from Roman-Dutch law is probably not Roman law at all but canon law.<sup>23</sup> What is more, in section 7, the portion where Voet expressly compares the much “*fuller*”<sup>24</sup> remedies that were subsequently developed in canon law, he states that the one-year limitation that applied to the Roman law remedies<sup>25</sup> does not apply to the

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<sup>20</sup> *Nienaber v Stuckey* (above) at 1060.

<sup>21</sup> Kleyn (above) at 843.

<sup>22</sup> Digest 43.16.1 (Ulpian, Edict, book 69) Watson (above) at 96.

<sup>23</sup> *Muller v Muller* 1915 TPD 28 at 30 – 31; Kleyn (above) at 835.

<sup>24</sup> See also *Malan v Dippenaar* (above) at 64 – 65; *Ntshwaqela v Chairman, WC Regional Services Council* 1988 (3) SA 218 (C) at 228I.

<sup>25</sup> The same time limitation applied in Roman law to the interdict *Uti possidetis* (dealing with spoliation of immovable property) which was also originally allowed by praetorian edict only “*within a year from when it is first possible to bring*” the proceedings: Digest 43.17.1 (Ulpian, Edict, book 69) Watson (above) at 102.

Roman-Dutch remedies, which are available “*without discrimination of time*”.<sup>26</sup>

- [36] In *Jivan*, Steyn J considered the slightly different proposition (probably advanced on the basis of an overinterpretation of Greenberg JA’s remark in *Nienaber v Stuckey*), namely that there is a bar of one year on the *mandament van spolie*, after which it may not be brought at all. The learned judge rejected this – correctly in my view, given what I have noted above.
- [37] As is apparent from the portion of the judgment quoted above, however, Steyn J found that the court does indeed have “*a discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of such application*”. In addition, he went further and laid down what might be called a ‘rule of thumb’ for the exercise of this discretion, namely that the one-year period should be regarded as a guide to modern practice as regards the *mandament van spolie* in the sense that, while the court is not necessarily bound to refuse a spoliation order sought after a year, or to allow one if less than a full year has elapsed, special circumstances had to be shown before the court would decide otherwise.
- [38] The *Jivan* formulation is commonly repeated in both the caselaw<sup>27</sup> and academic literature,<sup>28</sup> and seems in many instances to have been uncritically accepted as a rule of modern South African law.

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<sup>26</sup> Johannes Voet *Commentary on the Pandects* 1698 (Gane’s translation, vol. 6, Butterworth, 1957) 43.16.7 at 492.

<sup>27</sup> *God Never Fails Revival Church v Mgandela* 2019 JDR 2063 (ECM) para 6; *AC Janse Van Rensburg v Kotze* 2014 JDR 1348 (GP) para 27; *Burger v Oppimex (Edms) Bpk and Others* [2011] ZANWHC 11 para 16; *Khomo v Khomo* 2009 JDR 0410 (FB) para 5; *Dockside Panelbeaters CC v Don Pedro CC t/a Dockside Panelbeaters and Others* 2005 JDR 1181 (E) paras 45 – 47; *Le Riche* (above) para 25; *Gondo v Gondo* [2001] JOL 8585 (ZH) at 5 – 6; *Manga* (above) at 504.

<sup>28</sup> Van Loggerenberg *et al.* *Superior Court Practice*. Looseleaf RS17 (Juta, 2021) at D7-6 and D7-20; Muller *et al.* *Silberberg and Schoeman’s: The Law of Property*. 6 ed (LexisNexis, 2019) at 353; Van der Merwe *et al.* “*Things*” in *The Law of South Africa*. 2 ed. vol. 27 (LexisNexis, 2014) paras 92 and 115; Mostert & Pope (eds) *The Principles of the Law of Property in South Africa*. (OUP, 2010) at 81; Sonnekus (2006) TSAR 392 at 404; Kleyn “*Possession*” in Zimmerman and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa*. (Juta, 1996) at 843; Van der Merwe “*Property*” in *Annual Survey of South African Law, 1977* (Juta, 1978) at 250-251.



- [39] A legal remedy that does not involve the determination of the parties' legal rights must, by its very nature, be discretionary and I agree (for the further reasons and in the specific sense set out below), that the court has the discretion described by Steyn J. I do not, however, support the rule of thumb approach, which is not founded on any clear authority, and for which I have been unable to identify any underlying jurisprudential basis.
- [40] It is in my view inappropriate to lay down either a 'rule of thumb' or a 'hard and fast' rule regarding the time within which the *mandament van spolie* must be brought and the nature of the onus that the applicant is consequently required to discharge. As Professor Sonnekus has observed, reference to the "sogenaamde een jaar-reel" wrongly evokes the concept of prescription of rights of action, with which the *mandament* is not concerned.<sup>29</sup> Once again, it bears emphasis that the *mandament van spolie* is a remedy that "protects bare factual possession (*ius possessionis*) rather than the right to be in possession (*ius possidendi*)".<sup>30</sup>
- [41] A better approach, which in my view accords with both authority and principle, is reflected in a number of judgments and academic writings that treat the question of delay as one that falls to be judged in the specific factual circumstances of each case against the objective standard of reasonableness. It is best stated by Van der Merwe as follows: "*the mandament van spolie must be instituted within a reasonable time*"<sup>31</sup> and has been identified (if not always correctly applied) as the relevant standard in a

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<sup>29</sup> Sonnekus (2006) TSAR 392 at 404: "Die hof se verwysing ... na die sogenaamde een jaar-reel ... wek die indruk asof 'n buitengewone verjaringstermyn buite die verjaringsreg om bestaan waarvolgens 'n remedie kan verjaar asof die remedie self 'n vermoënsbelang is wat kan verjaar of waarvan van regsweë afstand gedoen kan word. In werklikheid is daar geen sprake van dat van 'n remedie afstand gedoen kan word soos via 'n regsontdaningshandeling nie en kom uitwissende verjaring slegs by skuld ter sprake waar die vorderingsreghebbende te lank versuim het om sy vordering geldend af te dwing. Die posisie van die applikant as aanspraakmaker op die vermeende mandament van spolie stem daarmee nie ooreen nie".

<sup>30</sup> Mostert & Pope (above) at 75, referring to *Nino Bonino v De Lange* 1906 TS 120 per Innes CJ at 122.

<sup>31</sup> Van der Merwe *Sakereg.* 2 ed (Butterworths, 1989) at 146; Van der Merwe *LAWSA* (above) para 115. See also Mostert & Pope (above) at 81; Muller *et al.* (above) at 353.

number of judgments.<sup>32</sup>

[42] The time-sensitive nature of the *mandament van spolie* is encapsulated in the maxim that was said to give rise to the remedy in the earliest reported case that I have been able to locate in which it was recognised in South Africa<sup>33</sup> and which continues to be recognised as its animating principle almost 175 years later:<sup>34</sup> *Spoliatus ante omnia est restituendus* simply means that the act of spoliation must be reversed before enquiring into all and anything else, including the legal rights of the parties.

[43] A requirement of objective reasonableness, which is a matter within the discretion of, and judged by the court itself (and is not subject to an overriding prescription-like rule), is consonant with the fundamentally social role that is played by the remedy. This role, which explains the longevity of the remedy in our law and its resilience to change even in the constitutional era,<sup>35</sup> is (albeit in the limited sphere of property) to preserve the rule of law, which is a central aspect of our modern constitutional enterprise. It is this social role of the remedy that explains why it may be granted at the instance even of a thief,<sup>36</sup> and which explains why it may still only be granted where the property is in possession of the spoliator himself, or someone who was involved in or aware of the spoliation and not against a *bona fide* third party possessor.<sup>37</sup>

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<sup>32</sup> *God Never Fails Revival Church* (above) para 6(c) and (d); *Khumalo v Len Smith Investment Holdings CC* 2020 JDR 0304 (LCC) paras 27 – 35; *Kasi v Patinios* 2020 JDR 1434 (KZD) para 12; *Mohamedullah CC v Fundi Capital (Pty) Ltd* 2019 JDR 1642 (FB) para 20; *PA v LA* 2014 JDR 0225 (ECP) para 7; *La Pila Pharma CC v Euro Blitz Logistics (Pty) Ltd* 2014 JDR 2184 (FB) para 13; *Dockside Panelbeaters* (above) para 47; *Le Riche* (above) para 25.

<sup>33</sup> *Executors of Haupt v De Villiers* (1848) 3 Menz 341.

<sup>34</sup> *Monteiro* (above) para 15.

<sup>35</sup> See, for example, the emphasis placed on preserving the essence of the remedy in *Tswelopele Non-Profit Organization and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) paras 20 to 26.

<sup>36</sup> *Yeko v Qana* 1973 4 SA 735 (A) at 739G.

<sup>37</sup> *Monteiro* (above), paras 17 – 21. In *Jivan*, the court observed at 896A – D that “[a] spoliation order against a party other than the spoliator is logically beyond the scope of the purpose of the mandament to prevent persons from taking the law into their own hands”. See also *Builder's Depot CC v Testa* 2011 (4) SA 486 (GSJ) paras 13 – 18.

[44] In 1983, in the aftermath of the controversial judgment in *Fredericks*<sup>38</sup> where Diemont J granted an order under the *mandament van spolie* for the re-erection of squatters' homes where the materials had been destroyed during the spoliation, Professor AJ van der Walt observed that these features of the remedy demonstrate that its primary rationale is not the protection of any possessory subjective right of the applicant (or indeed even the mere fact of possession), but is rather “*om die regsorde teen vredesbreuk te beskerm*” or “*vir die beskerming van die openbare orde*”.<sup>39</sup>

[45] With respect, I am unpersuaded by the criticism of this contention by Professor MJ De Waal on the basis that it ‘put the cart before the horse’ because that is the rationale of all legal remedies and that the *mandament van spolie* is a remedy “*wat besitsverhoudinge beskerm ten einde te verhoed dat die reg in eie hande geneem word en die regsorde sodoende versteur word*”.<sup>40</sup> While it is indeed true that all legal remedies are ultimately intended to protect the integrity of the legal order, it seems to me that what makes the *mandament* unique and distinguishes it from almost all (if not all) other legal remedies, is that it consciously avoids any engagement with the subjective rights of the parties<sup>41</sup> and simply focusses on the restoration of a factual *status quo ante*.

[46] As Van der Walt pointed out in his persuasive reply to De Waal:

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<sup>38</sup> *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (C).

<sup>39</sup> Van der Walt (1983) THRHR 237 at 239 - 240.

<sup>40</sup> De Waal (1984) THRHR 115 at 118.

<sup>41</sup> In *Bon Quelle (Edms) Bpk v Municipality van Otavi* 1989 (1) SA 508 (A) at 512I, the Appellate Division approved the statement that “*Die mandament beskerm kennelik geen reg in die sin van 'n subjektiewe reg nie maar handhaaf 'n feitelike toestand of gegewe*”. Kleyn points out that “*the right not to be unlawfully deprived of possession is not a 'right' in the sense of the word. ... it is a legal principle on which the mandament is based, a principle that is applied once the applicant for a mandament has proved that he was in possession and was spoliated by the respondent. It is therefore not a right in the sense of, for example, a subjective right which is required to satisfy the clear right requisite*”.

*In geen ander regsmiddel word reeds afgehandelde eierigting as sodanig bestry nie; en ... in geen ander regsmiddel word die herstelbevel gemaak afgesien van die regmatigheid van die herstelde regsposisie nie ... [D]ie mandament van spolie as regsmiddel deur sy unieke regspreserverende of regspolitiese funksie gekenmerk word. ... Dit is regs wetenskaplik veel suiwerder om te erken dat die reg wel van die bestaan van [’n onregmatige] verhouding kennis neem, en dit teen onregmatige eierigting in stand sal hou, nie om die verhouding as sodanig te beskerm nie, maar om die regsorde self te beskerm teen die eierigting.<sup>42</sup>*

[47] Although Professor De Waal’s observation that “[d]ie mandament van spolie is nie ’n magiese regsmiddel wat maar ingespan kan word in gevalle waar ’n ander remedie nie gerieflik ter hand le nie” was proved correct 20 years later in relation to the particular subject matter of the debate when the Supreme Court of Appeal in *Tswelopele* rejected *Fredericks* and held that the mandament’s “object is the interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent”, which makes it a “*possessory remedy*”, not a “*general remedy against unlawfulness*”,<sup>43</sup> Professor Van der Walt’s contention that the underlying rationale for the remedy is the protection of the rule of law was never truly in doubt, and it has clearly ultimately been vindicated – overwhelmingly so.

[48] Indeed, Cameron JA himself observed that the “*rule of law dimension*” of the *mandament van spolie* is “*obvious*” – unsurprisingly, given how Innes CJ had described the remedy in *Nino Bonino*, which is usually identified as the first leading case on the remedy in South African law:

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<sup>42</sup> Van der Walt (1984) THRHR 429 at 433 and 434 [emphasis supplied]. See also Mostert & Pope (above) at 77.

<sup>43</sup> *Tswelopele* (above) paras 20 to 26

*It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. ... [The law cannot] allow one of the two contracting parties to take the law into his own hands, to do that which the law says only a court shall do, that is, to dispossess one person and put another person in the possession of property. It purports to allow the lessor to be himself the judge of whether a breach of contract has been committed, and having decide in his own favour to allow him of his own motion to prevent the lessee from having access to the premises. Only a court of law can do those things. The parties cannot stipulate to do them themselves.*<sup>44</sup>

[49] As the underlined portions indicate, I consider that the specific references to the role of courts in protecting the rule of law are of particular significance here.

[50] Up until the most recent judgments in modern times, in seeking to explain the apparent anomaly of the existence in a legal system of a remedy that is not founded on any legal rights, our courts have repeatedly returned to and reiterated the rule of law justification for its existence.<sup>45</sup> The point was

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<sup>44</sup> *Nino Bonino* (above) at 122 and 123 [emphasis supplied].

<sup>45</sup> *Yeko v Qana* (above) at 739G: “The fundamental principle of the remedy is that no one is allowed to take the law into his own hands”. *Ness v Greef* 1985 (4) SA 641 (C) at 647B: “The underlying, fundamental principle of the remedy is that no one is allowed to take the law into his own hands and thereby cause a breach of the peace”; *Boompret Inv (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) at 353C: “The philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should be discouraged”; *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W) at 532H: “The principle underlying the remedy is that the entitlement to possession must be resolved by the Courts, and not by a resort to self-help”; *Bock v Duburoro Inv (Pty) Ltd* 2004 (2) SA 242 (SCA) para 14: “Our common law has always recognised that self-help is unlawful. That is why the mandament van spolie developed and judgments such as Nino Bonino v De Lange have stood the test of time”; *De Beer v Zimbali Est Management Assoc (Pty) Ltd* 2007 (3) SA 254 (N) para 54: “The real purpose of the mandament was to prevent breaches of the peace”; *Ivanov v NW Gambling Board* 2012 (6) SA 67 (SCA) paras 19 and 20: “The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands and the principle underlying the

perhaps most memorably and effectively emphasised by Price J in *Greyling v Estate Pretorius* as follows:

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*mandament van spolie*” was enunciated by Innes CJ in *Nino Bonino; Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd* 2013 (1) SA 239 (KZD) para 8: “The remedy is designed to prevent self-help, and to promote social cohesion by requiring disputes as to possession to be resolved only by lawful means”; *Van Rhyn NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521 (WCC) para 7 “[t]he fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help”; *Afzal v Kalim* 2013 (6) SA 176 (ECP) para 18: “the *mandament van spolie* ... is premised on the ‘fundamental principle that no man is allowed to take the law into his own hands’”; *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) para 10: The remedy’s “underlying philosophy is that no one should resort to self-help to obtain or regain possession” and “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” and “Acts of self-help [whether by individuals or government entities] may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose”; *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) para 8: “[t]he *mandament van spolie* (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent”; *Monteiro v Diedricks* 2021 (3) SA 482 (SCA) para 14 and 16: “[t]he essential rationale for the remedy is that the rule of law does not countenance resort to self-help” and this the “doctrinal basis” of the remedy; *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) para 5: “[t]he *mandament van spolie* is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands”; *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) para 6: “[t]he *mandament van spolie* is designed to be a robust, speedy remedy which serves to prevent recourse to self-help”.

*When people commit acts of spoliation by taking the law into their own hands, they must not be disappointed if they find that Courts of law take a serious view of their conduct. The principle of law is: Spoliatus ante omnia restituendus est. If this principle means anything it means that before the Court will allow any enquiry into the ultimate rights of the parties the property which is the subject of the act of spoliation must be restored, to the person from whom it was taken, irrespective of the question as to who is in law entitled to be in possession of such property. The reason for this very drastic and firm rule is plain and obvious.*

*The general maintenance of law and order is of infinitely greater importance than mere rights of particular individuals to recover possession of their property.*

*If it became an established practice for the Court to fail to enforce a spoliation order because it was made to appear that in the ultimate result the rightful owner of the property in dispute would be injured in his enjoyment of that property, we should very soon find that the slender paradise our toil has gained for us of an ordered community had been lost and the dreadful 'reign of chaos and old night' would be upon us. The modern Montagues and Capulets who resemble those famous and ancient families only in the single respect that they are equally prone to violence, would soon make our streets and thoroughfares hideous with their disputes, their fighting and their brawls - turbulence and civil commotion would soon replace the law of order and decency. ... if it were possible to allow the respondent to remain in possession of the property he has acquired by the acts of spoliation mentioned, I would certainly do so, but a far more important principle is at stake.*

*This being the rule and these being the very weighty reasons for its existence, much as I disapprove of the applicant's general conduct, I have no option but to grant the application.<sup>46</sup>*

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<sup>46</sup> *Greyling v Estate Pretorius* 1947 (3) SA 514 (W) at 516 – 517 [emphasis supplied]. This passage was subsequently approved by the Appellate Division in *Bon Quelle* (above) at 511J.

- [51] A further societal justification has more recently been posited by the authors of a student textbook on the subject: it is “*rational and morally right to benefit society by protecting bare, possession*”, “*a successful application for the mandament van spolie has the consequence of ... creating an opportunity to hear the other side, albeit not immediately during those application proceedings*” and this means that “*general societal welfare is improved even though, sometimes, individual wrongdoers might benefit from the delay in having to return the disputed thing to the entitled person*”.<sup>47</sup>
- [52] All of this must be added to the critical consideration that (in part because it is supposed to be simple and not fact-intensive), the *mandament* is “*designed to be a robust, speedy remedy*”<sup>48</sup> which “*ensures that repossession is effected without unnecessary delays*” and “*reinforces the rationale behind the remedy, which is that no person is entitled to take the law into his own hands, and if he does, possession should be restored (speedily) before all else is decided upon*”.<sup>49</sup>
- [53] In my view, it is the essentially public, court-driven and procedurally expeditious character of the *mandament van spolie* that justifies and explains why a court may in its discretion refuse the remedy on the grounds of unreasonable delay. The remedy does not exist to protect the applicant’s legal rights, but operates in the interests of society more broadly, and in particular its interest in the maintenance of an orderly legal system whose procedures the courts are constitutionally empowered to protect and regulate.<sup>50</sup> If in a given instance those interests would not be advanced by the grant of the remedy due to the passage of time, then the justification for the grant of the remedy quite simply falls away. In seeking to give effect to this nuanced principle, a ‘bright line’ such as that drawn in *Jivan* (even with the exceptions that it allows for) is liable to be arbitrary, which is the very

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<sup>47</sup> Mostert & Pope (above) at 75 [emphasis supplied].

<sup>48</sup> *Blendrite* (above) para 6.

<sup>49</sup> ZT Boggenpoel *Property Remedies*. (Juta, 2017) at 100.

<sup>50</sup> Constitution, section 173.



antithesis of the rule of law.

- [54] A similar conclusion was reached by Binns Ward AJ (as he then was) in *Barnard v Carl Greaves Brokers*:

*An applicant for relief under the mandament is expected to act expeditiously in claiming it. The rationale for the remedy is undermined when, as in the current case, a lengthy interval and altered circumstances have intervened between the offending dispossessing act and the availment of the remedy. Although it has often been held that the scope for the exercise of judicial discretion to refuse the remedy is extremely limited, the cases show that the remedy will not be granted where it would be impractical or purposeless.*<sup>51</sup>

- [55] According to the authors of *Silberberg and Schoeman*:

*Although the mandament van spolie is a robust remedy, it does not mean that the court can exercise no discretion at all when considering the order. It merely means that the court has no general or wide discretion. ... It is submitted that the court can exercise its discretion when applying the principles of the mandament when [it] has to consider whether a delay in the application justifies a refusal of the order.*<sup>52</sup>

- [56] It must be emphasised that judicial discretion contemplated here is not one to refuse to grant the relief on the basis of the balance of convenience or prejudice amongst the parties;<sup>53</sup> or to refuse the relief on the ground of considerations relating to the merits of the dispute between them;<sup>54</sup> or to impose conditions on the spoliation order that are not related to the question

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<sup>51</sup> *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (C) paras 59 to 62. See also *Beetge v Drenka Investments (Isando) (Pty) Ltd* 1964 (4) SA 62 (W) at 66G – 67A.

<sup>52</sup> *Muller et al.* (above) at 331.

<sup>53</sup> *Runsini Properties (Pty) Ltd v Ferreira* 1982 (1) SA 658 (E) at 670G.

<sup>54</sup> *Malan v Green Valley Farm Portion 7 Holt Hill* 434 CC 2007 (5) SA 114 (E) para 25.

of bare possession;<sup>55</sup> or to grant relief other than restoration of possession of the specific spoliated property when that is not possible;<sup>56</sup> or to refuse relief where the applicant has subjectively acquiesced.<sup>57</sup> Rather, it is “a *discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of such application*”<sup>58</sup> in the specific sense that such relief would (objectively viewed) not practically advance the underlying rationale that justifies the existence of this unique remedy.

[57] In the current case, I am of the view that the application has not been brought within a reasonable time. So much ‘water flowed under the bridge’ after the time of the spoliation that even if an order could have been granted on the day the application was launched 22 months later, it could not truly be described as one that would have been made “*ante omnia*”. Plainly, this is even less true at this stage, a further two years down the road.

[58] In the first place, it is abundantly clear from the applicant’s own affidavits that the familial living arrangements as they existed prior to Veni’s death had been dramatically altered by the time the application was launched. The applicant and Veni had previously lived together with Veni’s two children and their son. By November 2020, this family had entirely broken up. With Veni having passed away, the applicant and their son eventually moved in with his parents in an old age home, and Veni’s minor daughter and the second respondent were being cared for by first respondent and her husband, together with their three children in the Lyndhurst house. In view of the seriously antagonistic relationship between the parties, including the making of death threats, the reinsertion of the applicant and his ten-year-old son into the house as co-residents<sup>59</sup> would in no way accord advance the rule of law.

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<sup>55</sup> *Yeko v Qana* (above) at 740.

<sup>56</sup> *Tswelopele* (above) paras 20 – 26.

<sup>57</sup> *Le Riche* (above) paras 40 to 49.

<sup>58</sup> As expressly left open by Greenberg JA in *Nienaber v Stuckey* (above) at 1060 and as found by Steyn J in *Jivan* (above) at 893B.

<sup>59</sup> The applicant’s suggestion that “[i]f necessary, the First Respondent and her immediate family can

To the contrary, it would in my view, be a recipe for chaos.

[59] Secondly, I am not satisfied that the restoration of joint possession of the Lyndhurst house in this matter would constitute an expeditious remedy that would serve the purpose of preserving the *status quo ante* in advance of the determination of the rights of the parties pursuant to an opportunity being given to each of them to state their case. As indicated above, the applicant himself observes that “*there is no application before Court, or even a threatened application, for the determination of the rights of the parties in relation to the property*”. Had the application been brought sooner and the applicant’s joint possession been restored soon after it was lost, it may be expected that the respective rights of the parties to occupation and the correct legal position would have been determined (i.e. “all else” would have been enquired into and decided upon) according to appropriate processes under the rule of law many months ago.

[60] Thirdly, it is abundantly apparent that the parties are in dispute with each other as to who should care for the two minor children. That is a matter to be resolved carefully by a court armed with all information necessary to ensure that the best interests of the children themselves remain paramount. It appears to me that the grant of the spoliatory relief in this application would be likely to undermine a proper consideration of that matter, which could hardly be considered as being consistent with a vindication of the rule of law.

[61] I conclude that the spoliatory relief sought in prayer 1 of the notice of motion must be refused on the basis that the application was not brought within a reasonable time: the order sought would have no practical effect in advancing the underlying rationale that justifies the existence of the *mandament van spolie*.

#### Costs and order

[62] The usual principle is that a successful party should be awarded their costs.

*occupy the large granny flat on the Property*” is unhelpful. There is no suggestion that her rights of occupation were limited to the granny flat and there is no reason why they should be limited in that way pursuant to a mandament van spolie brought by the applicant.

[63] Although the respondents have been successful in resisting the relief sought by the applicant, their success has been of a procedural nature. What is more, the implication of the factual findings that I have made above regarding their conduct in excluding the applicant from the Lyndhurst house is that they appear to have contravened section 26(3) of the constitution, which provides that no-one may be evicted from their home without an order of court made after considering all the relevant circumstances. In the circumstances I do not consider it appropriate to make a costs order in the respondents' favour.

[64] The application is dismissed.

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RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 5 October 2022

JUDGMENT SUBMITTED FOR DELIVERY: 25 November 2022

#### APPEARANCES

For the Applicant:

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For the Respondents:

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