IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO (2) OF INTEREST OF OTHER JUDGES: NO (3) REVISED 23/4/2022 DATE SIGNITURE

CASE NUMBER: 2022/438

In the matter of

MONICA BARBARA MOSSOP **APPLICANT**

AND

DEREK CRAWFORD **FIRST RESPONDENT**

INSUMBI TECHNICAL BUSINESS CC **SECOND RESPONDENT**

INSUMBI DRIFTERTECH (PTY) LTD **THIRD RESPONDENT**

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] On 11 April 2022 the applicant launched on an urgent basis application requesting the following:

1. Dispensing with the forms and service provided for in the rules of court and that the matter be treated as urgent in terms of Rule 6(12)(a);
2. Directing the first respondent to forthwith restore the applicant's possession of, and access to, the second and third respondents' business premises situated at 16C, 24A and Yard 51, Imbali Training Campus, 162 Range View Road, Apex Industrial, Benoni.
3. That the applicant is authorised, if it becomes necessary, to enlist the services of the Sheriff of the Court to give effect to order (2) above.
4. That the first respondent and any other respondents who may oppose this application pay the costs of the application, jointly and severally.

[2] The applicant, Ms Mossop brought an urgent spoliation application against the first respondent, Mr Crawford.

[3] The applicant avers that she was in peaceful and undisturbed possession and had access to the business premises if the second and third respondent situated at 16C, 24A and Yard 51, Imbali Training Campus, 162 Range View Road, Apex Industrial, Benoni ("**the premisses**").

[4] She alleges that she was unlawfully lock out of the premisses by the first respondent.

[5] No relief is claimed against the second and third respondents.

Relevant background facts

[6] The applicant and the first respondent are sister and brother.

[7] During September 2011 the applicant and the first respondent decided to jointly pursue and conduct a business in the repair and maintenance of machines and implements used in the mining industry. The decision was made to conduct the business through the second respondent (**"Insumbi Technical"**).

[8] The applicant and the first respondent are both members of Insumbi Technical, each holding an equal 50% members' interest in it.

[9] The applicant and first respondent has conducted business through Insumbi Technical since its incorporation in 2011 and the business continues to operate to this date.

[10] During 2018 it became apparent that, due to its composition and turnover at that time, Insumbi Technical would not have been able attain the requisite B-BBEE accreditation, as contemplated by the Broad Based Economic Empowerment Act 52 of 2003. Upon receiving advice from various third parties, the applicant and the first respondent decided to incorporate the third respondent ("**Driftertech**"). Driftertech operated as a sales wing, from which sales would be conducted and it would operate in conjunction with Insumbi Technical, which rendered the services. Driftertech was also responsible for invoicing on behalf of Insumbi Technical. Together, Insumbi Technical and Driftertech rendered a complete service offering, while maintaining a competitive B-BBEE accreditation.

[11] The applicant and first respondent are both directors of Driftertech.

[12] The Shareholders Agreement and resolution confirm, amongst other things, that:
1. The applicant and the first respondent each have 50% shareholding in Driftertech;
2. The applicant is the Public Officer of Driftertech;
3. The applicant and the first respondent are both Executive Directors of Driftertech;
4. The day-to-day affairs of the company would be managed by the applicant;

5. The relationship between the applicant and the first respondent was that of a quasi-partnership; and
6. By signing the Shareholders Agreement the applicant and the first respondent agreed that the Shareholders Agreement will governing their relationship and roles within Driftertech on the terms contained therein.

[13] The applicant has been in charge of the administrative and financial affairs of both Insumbi Technical and Driftertech. She also attended to all of the quotations, invoicing, bookkeeping and human resource issues.

[14] The first respondent attended to all of the technical and mechanical issues involved in the operation of the workshop.

[15] During the latter part of 2019, the first respondent raised certain queries regarding the financial management of Insumbi Technical and Driftertech. These queries culminated in a meeting with the attorney of Insumbi Technical and Driftertech, Mr Craig Scott ("**Scott**").

[16] During the meeting the sale of the applicant's member's interest and loan account in and to Insumbi Technical, and her shares in and to Driftertech were discussed. At the said meeting the first respondent advised the applicant that he sought a forensic audit of the books of account of both Insumbi Technical and Driftertech. The applicant had no objection to a forensic audit, on condition that the first respondent funded the audit.

[17] The first respondent thereafter commenced with the forensic audit and investigation.

[18] The applicant thereafter formally notified the first respondent of her intention to sell her member's interest and loan account in and to Insumbi Technical. Scott replied confirming that he had relayed the offer to the first respondent and that he had

received a request for a valuation. The applicant consented to the valuation, on the basis that the first respondent covers the costs thereof.

[19] On 14 September 2021, the applicant received a demand from Insumbi Technical to make payment in the sum of R1,747,891.82 and further demanded that she resign as a member of Insumbi Technical.

[20] The applicant responded to the letter on 17 September 2021 and denied any wrongdoing or that she was indebted to Insumbi Technical, as demanded. In addition, she requested a copy of the forensic audit report.

[21] The applicant was thereafter contacted by a Warrant Officer Mavuso, who requested her to attend an interview with the Hawks at the Germiston Commercial Crimes Division. The applicant agreed to meet Warrant Officer Mavuso in the company of her attorney. After the requisite arrangements were made, on 5 October 2021 she attended the scheduled interview at the office of the Hawks at Germiston Commercial Crimes Division. At the meeting they were met by Warrant Officer Mavuso and were introduced to a Private Investigator, Mr Gregory Beck ("**Beck**").

[22] Beck confirmed that he was appointed by the first respondent and that he had conducted an investigation into the applicant's alleged acts of fraud and misappropriated funds at Insumbi Technical and Driftertech. Warrant Officer Mavuso stated that a complaint had been laid against the applicant by the first respondent and that there was overwhelming evidence that supported the wrongdoings complained of.

[23] Mavuso further stated that the charges against applicant would be withdrawn if she agreed to pay to the first respondent the sum of R2,500,000.00 and immediately resign as member of Insumbi Technical and director of Driftertech.

[24] On 30 October 2021, the applicant received a letter from the first respondent's attorney, Charl Van Der Merwe ("**Van Der Merwe**") in terms of which the first

respondent had procured the change of the registered address of Insumbi Technical to what appears to be Van Der Merwe's office.

[25] On 2 March 2022 a notice to attend a disciplinary hearing to be held on 7 March 2022 was handed over to the applicant. The disciplinary charges involved were; theft/suspected theft and fraud. The notice further stated the following:
"All computer equipment, files, ledgers, accounting records and all equipment of both the closed corporation and the company is to be handed to the bearer of the notice. Should you refuse to hand over the equipment the employer shall take such action necessary. You are herewith also placed under precautionary suspension and are not to attend at work or deal in any way with the business of both Insumbi Technical Business CC and Insumbi Driftertech (PTY) Ltd. You are entitled to object to the suspension and are to provide reasons thereto within 24 hours after receipt of this notice where after the suspension will be considered."

[26] The applicant did not attend the disciplinary hearing on 7 March 2022 and was subsequently dismissed as employee and director of Insumbi Technical Business CC and Insumbi Driftertech.

[27] On 4 April 2022 the first respondent advised the landlord of the premises to stop the applicant from entering the business premises as she has been dismissed from Insumbi Technical and Driftertech.

[28] On 5 April 2022 the applicant wrote a letter to the first respondent informing him that his conduct in locking her out of the premises and preventing her from accessing the premises was unlawful. The applicant further demanded her access to the business premisses to be restored by 10h00 on 6 April 2022.

[29] The first respondent failed to adhere to the latter request and this application was launched on an urgent basis.

Respondent's points in limine

First Point in Limine

[30] The application is not brought under the correct procedures, the applicant should have opted to apply for an interdict. The argument raised was that the Mandament van Spolie is only used to protect possession and not access, and it is primary for the purpose to prevent parties taking matters into their own hands in respect of property they have been unlawfully dispossessed. In order to claim back possession, one has to have physical possession thereof and an applicant must prove actual dispossession, other than that, the dispossession had to be unlawful. The first respondent argued that this is clearly not the case and the facts in the present matter before court. It was the contention of counsel for the first respondent that the facts in this matter finds itself in the Law of Contract and/or Company Law and not in the Property Law.

Second Point in Limine

[31] That the application is premature an ill-founded as the applicant is aware of the forensic and criminal investigations against her. Furthermore, should the applicant succeed with the application, there is a very real likelihood that she will interfere with the investigation and that she will access accounts and/or documents which might be of importance to the investigation. It is therefore submitted that this application is premature and solely based on the premises that the applicant could ascertain herself with the progress of the pending investigation.

Third Point in Limine

[32] That the application is not urgent as the applicant for a prolonged period- 12 months- prior to the application work from home. It was argued that the "*so called urgency"* is averred by the applicant with ulterior motives.

Submissions by the applicant

[33] Counsel for that applicant argued on the first *point in limine* that the first respondent accepts that an application under the Mandament van Spolie is in itself urgent relief. However, he argued that the Mandament van Spolie is not properly brought. It was argued that the Mandament van Spolie is designed as a *"speedy remedy"* which provides *"summary relief"* and as such the possession should take place "*at once*".

[34] The applicant referred to principles set out in the case of *Greaves and Others v Barnard 2007 (2) SA 593 (C),* an appeal in which the Full Court held that the relief sought, by the directors of the company, was competently sought under the Mandament van Spolie. The Court found that a director can bring spoliation proceedings, the requirement is that he must show that the right of which he has been spoliated is something in which he has an interest, over and above that interest which he has as a servant or as a person who is in the position of a servant or a *quasi-servant*, in other words, he must hold the property with the intention of benefiting himself and not another. Therefore, the applicant contended that the correct procedure was followed and on the above mentioned ground the first *point in limine* should be dismissed.

[35] Counsel for the applicant argued that the applicant acted timeously and expeditiously. The first respondent locked the applicant out of the premises on 4 April 2022, whereafter a letter of demand was forwarded to the first respondent to retore her access by 6 April 2022. The first respondent failed to adhere to her demand, and the application was launched on 8 April 2022, as such the matter should be treated as urgent.

[36] It was further argued that the forensic and criminal investigations are outstanding for the last 2 years. The applicant requested copies of the said reports without avail. The applicant asserted that the first respondent has no basis to deny her access to the premises and he has resorted to self- help by locking her out from the premises, which action is unlawful. Therefore, the second and third *points in limine* should be dismissed.

[37] The applicant argued that the relief sought should be granted, because the applicant asserts her right to possession of the premises in her position as member, director and shareholder of the second and third respondents. The applicant is a member of the second respondent, and she is a director of/and shareholder in, the third respondent.

[38] The argument was made that the applicant's rights as member, director and shareholder are being infringed by her unlawful lockout from the premises by the first respondent. The applicant contended that her spoliation of possession and access to the premises, and effectively to her business, is clear. The actions by the first respondent are unlawful and without a Court Order, and therefore the order must be granted.

Submissions by the respondent

[39] Counsel for the respondent argued that the applicant never had peaceful and undisturbed control or possession of the business premises, and as such cannot rely on the Mandament van Spolie. The applicant failed to proof the elements for *"control"* which are the following*:*

1. The dispossessed person needs to proof actual dispossession, and;
2. The alleged dispossession must be unlawful.

[40] The first respondent argued that the applicant could never have had control of the property, as the said property is the workshop of the second and third respondents and

numerous other employees, also have access to the property, thus resulting in the applicant to only have access and not possession

[41] The first respondent asserts in applying the principles for Mandament van Spolie, it is abundantly clear that the application falls far short of the requirements in as far as proving undisturbed and peaceful control over the said property. This then results in having no possession and ultimate control and resulting in no disturbance; therefore the application should be dismissed.

Urgency

[42] In the case of *Mangala v Mangala*[1] the following was said;
"It does not follow that, because an application is one of a spoliation order, the matter automatically becomes one of urgency. The applicant must either comply with the Rules in the normal way or make out a case of urgency in accordance with the provision of Rule 6(12)(b)."

[43] The applicant argued that she was deprived of her possession and access to the business premisses of the second and third respondent on 4 April 2022 and the application was launched on 8 April 2022.

[44] I am satisfied that the applicant sets out satisfactory grounds for urgency and prejudice should the matter be heard in the ordinary course. I, therefore, find that the matter is sufficiently urgent to merit a hearing in the urgent Court.

Case law and evaluation

[45] Spoliation is the possessory remedy. In the case of *Yeko v Qana*[2] , it was held that an applicant for spoliation remedy must satisfy the court that –

1. they were in possession or had *quasi* possession of the property; and

[1] 1967 (2) SA 415 ECD at 416 at paragraph F.
[2] 1*973 (4) SA 735 (A).*

2. that the respondent deprived them of the possession forcibly or wrongfully against their consent.

[46] In principle, all that the spoliated person needs to prove is that they were in possession of the object; and they were deprived of possession unlawfully[3] The object of the order is merely to restore the *status quo ante* the unlawful action. The remedy is there to guard against instances where a person takes the law into his/her own hands and resorts to self-help instead of using due legal procedure.

[47] In the case of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* [4], it was held that since an incorporeal right cannot be possessed in the ordinary sense of the word, the possession is represented by the actual exercise of a right. Therefore, refusal to allow a person to exercise the right will amount to a dispossession of the right. Possession need not have been exclusive possession. A spoliation claim will lie at the suit of a person who holds jointly with others

[48] In the case of *Telkom SA Ltd v Xsinet (Pty) Ltd*[5] Jones AJA said;

"Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has "quasi-possession" of it, when he has exercised such right. Many theoretical and methodological objections can be raised against this construct, inter alia that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of "quasi-possession" has passed into our law. This is all firmly established."

[49] As mentioned in the case of ***Bon Quelle (Edms) Bpk supra,*** one must possess the article with the intention of securing some benefits for themselves. Pertinently, one

[3] Ivanov v North West Gambling Board and Others 2012 (6) SA 67 (SCA) at 75C.
[4] 1989 (1) All SA 416 (A).
[5] 2003 (5) SA 309 (SCA) at paragraph 9.

needs to determine that if in the circumstances where the director's access to the workplace is denied without following the process, spoliation can be utilised as remedy.

[50] The above was confirmed in the case of *Greaves and Others v Barnard*[6] namely, that the first requirement for the spoliation remedy is proof of undisturbed possession, in the sense of exercising effective physical control over the property for one's own benefit (as opposed to merely as a representative or servant of the person who is actually in possession).

[51] Proof of possession for this purpose does not require physical control, the lesser intention to hold for one's own benefit is sufficient. This decision confirmed the position that denial of access to workplace can be cured through the recourse of spoliation provided one can prove physical possession of the article or physical enjoyment or exercise of right in case of incorporeal and; unlawful dispossession thereof.

[52] In *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another*[7] the court explicitly remarked that ;

"To succeed, an applicant for a spoliation order must prove:

a) that he or she was in de facto possession of the property (which includes physical possession of movable and immovable property, and, in the case of incorporeal property, the physical exercise or enjoyment of the right in question which is sometimes called quasi-possession …); and

(b) that he or she has been despoiled of that possession without recourse to the courts."

[6] 2007 (2) SA 593 (C).

[7] [2009] JOL 23849 (ECG) at paragraph 5.

[53] In the matter of *Blendright*[8], Gorven AJA the repeated the prerequisites of the mandament and confirmed that the principle accords that no right need to be proved. He referred to Du Plessis where this was summarized as following;

"[T]he actual use or the exercise of powers which would normally flow from the named rights are exercised by the spoliated person. In those circumstances, it is then not considered whether the spoliated person obtained those rights, only whether they actually used or exercised the powers associated with that right."[9]

[54] The applicant in the matter before me is a member of the second respondent, and she is a director and shareholder of the third respondent.

[55] With regard to the second respondent, the applicant has always attended to the management, administrative and financial affairs of the corporation. She was responsible for managing the day-to-day affairs of the third respondent, and she did so in accordance with the terms of the Shareholders Agreement. She has always been in charge of the administrative and financial affairs of both the second and third respondents. She attended to all of the quotations, invoicing, bookkeeping and human resource issues.

[56] A Shareholders Agreement was concluded between the applicant and the third respondent which sets out their rights and obligations.

[57] As stated in the above mentioned case law, a director or shareholder can acquire recourse of spoliation in the event of being barred from entering the place of employment by establishing he/she were *de facto* in possession of the property or in

[8] [2021] ZASCA 77.

[9] P Du Plessis 'Bulletin van die Fakulteit Regte PU vir CHO (1976) 27 30-31. Referenced in A J Van der *Walt (1984) 47 THRHR 429* at 430. The original reads:

"[D]ie daadwerklike gebruik of die uitoefening van bevoegdhede wat normaalweg uit die genoemde regte voortspruit, deur die gespolieerde uitgeoefen is. Daar word dan in sodanige gevalle nie gekyk of die betrokke reg aan die gespolieerde toegekom het nie, maar of die gespolieerde wel daadwerklik die bevoegdhede wat uit sodanige reg sou voortspruit, gebruik of uitgeoefen het."

physical exercise or enjoyment of a right. The applicant must therefore, establish that she were in possession of the second and third respondent's property with the intention of securing some benefits for herself.

[58] In *Scholtz v Faifer*[10], Innes CJ set out the position as follows:
"*Here the possession which must be proved is not possession in the ordinary sense of the term – that is, possession by a man who holds pro domino, and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner"*

[59] I am therefore satisfied that the applicant, in being a director and a shareholder of the second and third respondents, also performed work and has occupied the office of the second and third respondents with the intention of securing some benefit for herself. She derives the benefit from being on the premisses and by the fact that she was under a duty for being there. As such rights have accrued to her not only from it being her workplace, but because of her official office as shareholder and director of both the second and third respondents respectively.

[60] The first respondent has set up an entire stratagem to prevent the applicant from entering the premises and participating in the company business as before. It was incumbent of him to approach court for the necessary relief to prevent her further access to the premises and participation in the business. He has had in possession various forensic reports made available to the HAWKS, but not to her. His unilateral and high handed conduct in this regard is lamentable.

[61] The very person he accuses, that is the applicant, is left in the dark as to what the case is against her. It is unclear if the HAWKS were given all the reports or only some of them. It is indeed surprising that a senior police officer, Warrant Officer Mavuso advised her to pay R2 500 000 to make the case go away. This is clearly a civil dispute and it is perplexing that the South African Police Services (**"SAPS"**)

[10] 1910 TPD 243 at 246.

became involved. This conduct of the SAPS and that of the applicant threatening that she pay monies to make the case go away is indicative of a nefarious strategy.

[62] In addition, he devised a further stratagem to dismiss her as an employee and director. It is correct that she was called to a disciplinary hearing. In the light of the intense acrimony, she was entitled perceive the hearing as another ruse to get rid of her.

[63] On 7 March 2022, the applicant was dismissed as an employee and director of Insumbi Technical Business CC and Insumbi Driftertech. The outcome of the hearing is, that she was found guilty of theft and fraud pertaining to the second and third respondent's business and as a result she was dismissed.

[64] The first respondent has not made available the record of the disciplinary proceedings to the applicant. He has also not attached the charge sheet to his answering affidavit and any documentation reflecting her guilt. The CCMA or the Labour Court can determine the matter in due course if necessary

[65] The first respondent argued that if the relief in this matter is granted, the applicant could derail the forensic and criminal investigations lodged at the HAWKS. The case was reported in terms of section 34 of the Prevention and Combatting of Corrupt Activities Act, Act 12 of 2004 (**"POCA"**), to the Police.

[66] In terms of section 34(1) of the POCA the duty to report rests on a person who holds a position of authority and who knows or ought reasonably to have known or suspected that an offence has been committed. The definition of a person holding a position of authority includes the manager, secretary or a director of a company and includes a member of a close corporation. Which is of cause an important consideration in the matter before me. No preservation order is in place, nor has it even come close to moving for a forfeiture order on the alleged fraud charges.

[67] The question has to be raised, since the applicant was dismissed on 7 March 2022, was she still in *quasi possession* of the business and therefore access has to be restored.

[68] I am of the view that the her possession did not terminate on the various strategies devised by the first respondent right to access to the premisses, which right is founded as *quasi possession*, and on that basis the relief sought should be granted.

[69] In the premises of the above reasons the *points in limine* by the first respondent are dismissed.

Order

[70] In the premises I make the following order;

1. The application is enrolled as an urgent application and, insofar as is necessary, the usual forms and time periods prescribed by the rules of court are dispensed with. This application is heard as one of urgency under Rule 6(12);
2. The first respondent is directed to restore the applicant's possession of, and access to, the second and third respondents' business premises situated at 16C, 24A and Yard 51, Imbali Training Campus, 162 Range View Road, Apex Industrial, Benoni;
3. The applicant is authorised, if it becomes necessary, to enlist the services of the Sheriff of the Court to give effect to order 2 above;
4. The first respondent is ordered to pay the costs of this application.

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CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 20 APRIL 2022

JUDGMENT DELIVERED: 24 APRIL 2022

Appearances:

For the applicant:

Adv. Naidoo

Instructed by Biccari Bollo Mariano Inc

For the first respondent:

Adv. Venter