



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

CASE NO: 2022-010670

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- DATE: **29/08/2022**
- SIGNATURE:

In the matter between:

SAMUEL EZE

First Applicant

PALESA YEKO

Second Applicant

IFEANYI CHUKWU SAMUEL BENERT

Third Applicant

And

NATIONAL SAVINGS AND INVESTMENTS (PTY) LTD

First Respondent

SHERIFF OF THE HIGH COURT, BOKSBURG

Second Respondent

JUDGMENT

SENYATSI J:**Introduction**

- [1] This is a reconsideration application after order granted by Wepener J on 4th August 2022 in favour of the applicants for restoration of possession of unit 184, Eveleigh Estate, 16 Edgar Road, Boksburg, Gauteng to the applicants following an urgent *mandament van spolie* application.
- [2] The reconsideration of the order was brought in terms of Rule 6(12) (c) of the Uniform Rules which permits that:

"a person against whom an order was granted in such persons absence application made by notice set down the matter for reconsideration of the order."

- [3] The applicants oppose the order on the grounds that the first respondent was present as it filed notice of intention to oppose but failed to file answering papers and had briefed counsel who was present at court.

BACKGROUND

- [4] The first respondent National Savings and Investments Pty Ltd ("National") seeks an order dismissing the relief sought by the applicant in their notice of motion and the urgent application.
- [5] The common facts are that National is the registered owner of unit 184, Eveleigh Estates (the property") since March 2017 but has never enjoyed the beneficial occupation of the property. It was instead occupied by Mr Izu Makuo ("Izu") only or by the applicants since then.

[6] The applicant launched a spoliatory application on the 3 August 2022 to be adjudicated on 4 August 2022 on an urgent basis following the execution of the warrant of eviction issued by Bokako J in this division. In their urgent application for spoliation, the applicants contend that they were unlawfully evicted because:

6.1. They were in undisturbed possession of the property when National sought to execute the warrant of eviction.

6.2. The eviction was unlawful in that the eviction order does not cite their names and is not applicable to them, and

6.3. They occupy the property in terms of a valid lease agreement concluded in June 2021 with Lake Estate Agency Limited.

[7] National contends that the applicants failed meet the requirements of *mandament van spolie* because:-

7.1. The eviction was lawful and in terms of an eviction order granted by Bokako AJ on 4 March 2020. In terms of that order, Izu and the unlawful occupants under him were ordered to vacate the property within 21 days failing which they would be evicted.

7.2. The applicants were not in undisturbed possession of the property when National sought to execute the warrant of eviction as demonstrated by the Sheriff's return of service in another matter pertaining to the property. The return of service in that other matter states that a notice of motion was served to Izu personally after

the original document was displayed and the nature and contents thereof explained to him. National contends that is Izu and the applicants were jointly occupying the property as contemplated in the court order by Bokako AJ;

7.3. No lease agreement was ever completed between the applicant and national and this is the reason Izu was in occupation of the property during January 2022 as reflected in the Sheriff's return of service.

7.4. The applicants, if in occupation of the property, have had sufficient time to obtain alternative accommodation, have the means to pay rent and the means to secure the services of a private legal representative.

ISSUE FOR DETERMINATION

[8] The issue for determination is whether or not the application had met the requirements for *mandament van spolie* to be entitled to relief sought.

LEGAL FRAME WORK AND REASONS FOR THE JUDGMENT

Rule 6 (12) (c)

[9] The urgent application was launched on 3rd August 2022 in response to Nationals' execution of the warrant of eviction on 2nd August 2022 and set down for 10h00 on 4 August 2022.

[10] It was served on National's attorneys of record after close of business on 3rd August 2022. The application came to the attention of Mr Les Freeman of Levine and Freeman at about 07h 35 on 4 August 2022.

[11] The Counsel who dealt with this matter from inception, including an opposed eviction application was Advocate Schulenburg ("Ms Schulenburg"). Ms Schulenburg was not available for the time that the matter was set down for, which was 10h00 but could only be available at 12h00 as she was in another matter at 10h00.

[12] The instructing attorney, Mr Freeman, penned an email to the registrar of Wepener J and requested the matter to stand down until 12h00 to allow Ms Schulenburg to appear in court and to request the opportunity for National to deliver an answering affidavit. The request was refused with the instruction that the matter would proceed at 10h00 as scheduled.

[13] National was unable to retain the services of an alternative counsel.

[14] At 10h23, Freeman received an email from Wepener J's registrar that the court was waiting for National's Counsel to come online as the court would be making the order in a few minutes.

[15] National managed to locate a junior counsel, Adv N. Ndlovu who agreed to appear to note the order on behalf of National. The court granted a final order in the absence of National declaring the eviction unlawful and unauthorised and directing National to immediately restore the applicants occupation of the property.

[16] The evidence adduced on behalf of National is a perfect fit for the reconsideration of the application in terms of Rule 6 (12) (c) Uniform Rules.

[17] The final order by Wepener J in the absence of National has the effect of effectively dispossessing national of its property.

[18] It is in the interest of justice and fairness that the final order should be reconsidered.

Lease Agreement

[19] The applicants allege that they concluded a lease agreement with Lake Estate Agency Limited ("Lake") , represented by Mr Rudie Smith on 1 June 2021 in terms of which they are in lawful occupation of the property.

[20] The respondent argues that Lake is not the owner of the property and they were not appointed by National to act as its agent in the respect of the property.

[21] National contends that it embarked on an internet search on Lake and Mr Rudie Smith to determine if the two in fact existed and the outcome was negative in that neither existed. Having regard to the negative outcome of the search, the inescapable conclusion is that the so-called lease agreement, is nothing but a fake document aimed to mislead this court.

[22] The applicants also contend that they are paying their monthly rental on time. No evidence was adduced to prove the alleged payments except for what appears to be invoices issued by Lake to Mr Eze. On closer inspection of the invoices, the documents do not appear to be genuine but rather contrived to deceive the court. I say so because for instance on the invoice dated 28 July 2022, it is reflected as invoice number 19.

There is no reference or account number on the invoice, no email address, no postal details of Lake, no named person in the accounts department in the event of a query of the invoice. This in my considered view, is a hallmark of a document prepared to mislead the court.

[23] At the hearing of this application, counsel for the applicant was asked to explain why the applicants have provided little information as to who they were. For instance Me Eze simply describes himself as a father of two minor children. He does not provide this court with any further details about who he is. Counsel for the applicant was asked by this court if he would have allowed the poorly drafted papers on who the applicants were if he was asked to settle the papers before issue and conceded that he would not have allowed the papers to be issued in the format they were because he did not settle the papers before issue

[24] Counsel for National further contended that the applicant did not come before Court with clean hands because for instance, the third applicant is an illegal immigrant in that his temporary study permit expired in 2020. The submission is not far-fetched for reasons that will follow below.

[25] As stated before, Mr Eze describes himself as the father of two minor children. He does not provide adequate evidence in support of this claim, but has instead provided what seems to be two school report covers, with the name and the surname Eze. A father of a child will prove that the minor children are his by providing the court with birth certificates which will clearly show that he is the father if issued in South Africa. It is therefore highly likely that the so-called school reports are also contrived documents.

- [26] The second applicant Palesa Yeko, has not provided any evidence as to who she is. Nothing is known about her identity or nationality.
- [27] The third applicant is a Nigerian national whose temporary student visa expired during March 2020. He is therefore not with clean hands before the court because of his status as an illegal immigrant.
- [28] The lease agreement relied on by the applicants as the basis for their possession of the property is without factual and legal basis and is therefore rejected. The applicants are unlawful occupiers as envisaged by the Bokako AJ order.

Mandament van Spolie

- [29] The requirement for the relief of *mandament van spolie* is that during the proceedings the applicant only needs to prove that he or she was in possession of a thing and that he or she was dispossessed of that thing. This is trite in our common law.
- [30] *Mandament van spolie* as a possessory remedy only offers temporary and is regarded as a robust and speedy remedy, and is not aimed at the restoration of rights.¹
- [31] In *Muhanelwa v Gcingca*² the Constitutional Court had to determine whether a builder who was owed money by the home owner could successfully bring a spoliation proceedings to evict the owner and till he was paid for building work done. The court held that:

"(5) and this court has approved that it is conducive to clarity to retain the

¹ See *Plaaitjie v Olivier* 1993 (SA) SA 156 (O) at 159.

² (CCT 117/18) [2019] ZACC 21 (17 May 2019)

'possessive focus' of the remedy of spoliation and keep it distinct from constitutional relief.³ It is only when spoliation proceedings seek to serve as foundation for permanent dispossession or eviction in terms of section 26(3) of the constitution that alarm bells start ringing."⁴

[32] In this case, National followed due process by launching an eviction application in compliance with the law. When the warrant of eviction was executed it was as a result of having followed a due process. The court properly considered the eviction application to evict Izu and all those occupying the property under him. There can be no question that the applicants were not in undisturbed possession. Their possession of the unit did not overpower the warrant of eviction which was preceded by a due court process.

Peaceful and undisturbed possession

[33] One of the requirements to succeed in a spoliatory relief is to allege and prove that the applicant was in peaceful and undisturbed possession of the thing.

[34] The applicants allege that they only took occupation of the property during June 2021 in terms of the lease agreement and were not in occupation when the eviction order was issued. They contend that the warrant of eviction is not applicable to them.

[35] As already stated, the evidence from the return of service of the process by the sheriff during January 2020 demonstrates that Mr Izu was in occupation of the property.

³ See *Schubort Park Residents Association v City of Tswane Metropolitan Municipality* [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC) at para 29

⁴ See Section 26(3) of the Constitution reads as follows: " No one may be evicted from their home, or have their home demolished, without an order court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[36] From the evidence before this court the access application to install prepaid electricity meters to the property was before Court on 24 January 2022 and Mr Izu personally appeared at court where he was represented by counsel.

[37] It is highly unlikely that the applicants were in occupation of the property and if they were, it was through Mr Izu. It must therefore follow that when the eviction warrant was executed, the applicants were not in peaceful and undisturbed possession of the property. Consequently, they have failed to prove the requirement.

[38] It is not the requirement of our law that all the unlawful occupier of the property must be cited by name. This is so because property hijacking is endemic in our society and our courts have held that to root out the increasing prevalence of this illegal act, it is not necessary to cite all the illegal occupiers by name. The identities of such occupiers are usually not known. In the present case, the applicants have clearly withheld vital information about who they truly are. The reason is not hard to find. They are probably doing that to avoid paying legal costs in the event a finding is made against them.

[39] The eviction warrant executed against Izu and any unlawful occupiers is lawful and enforceable until set aside through a lawful appeal process. The alleged undisturbed possession by the applicant cannot subvert a duly issued warrant of eviction

Just and Equitable

[40] The final order on 04 August 2022 forces National to restore the applicants occupation of the property indefinitely.

- [41] The spoliatory relief is interim in its nature and restores possession until the merits of the possession are argued.
- [42] The effect of Prevention of Illegal Evictions Act ("PIE") is not to effectively expropriate the rights of the land owners in favour of unlawful occupiers. It is a constitutional imperative that the land owner retains the protection against arbitrary deprivation of the property. The aim of PIE is to serve to delay or suspend the exercise of the land owners property rights and until a determination has been made whether it is just and equitable to evict the unlawful occupiers and under what conditions.
- [43] National embarked on two costly proceedings to evict Mr Izu and all those unlawful occupiers under him. It also embarked on bringing an action to force Mr Izu to allow access to the property so that prepaid electricity meters could be installed. Those steps came at a huge cost to National. The court considering eviction must, as already stated, determine whether it is just and equitable to evict the unlawful occupiers under and what circumstances.⁵
- [44] A court when considering whether it is just and equitable to grant an eviction order shall be guided by the spirit of Ubuntu, grace and compassion; however this does not mean that "just and equitable" trumps illegality.⁶
- [45] A court hearing the eviction application may, in appropriate circumstances, stay or suspend an eviction so as to give an occupier reasonable time to vacate the property.⁷ In exercising its discretion, the court takes into account the core realities underlying the balancing of the parties competing interests. If the immediate execution of an eviction order will result in the occupiers' financial ruin, justice demands that the eviction be stayed for a reasonable period to

⁵ See Occupiers of

⁶ See Occupiers of Erven 87 and 88 Berea, supra para 61

⁷ See Lan v OR Tambo International Airport; Department of Home affairs; Immigration Admissions and Another 2011 (3) SA 641 (GNP)

afford the occupier and opportunity suitable alternative accommodation.

[46] All the applicants contend that they are the occupiers of the property, I am not persuaded that this is true. I have already found that the so-called lease agreement with Lake is contrived. I have also found that the evidence before this court points to Mr Izu as the occupier.

[47] If the court accepts the evidence that they pay R 5500 rental per month, it is evident that they can in fact be able to find alternative accommodation. This is so because the evidence before me is that Eveleigh Estates consists of more than 200 units. Their eviction will not lead to homelessness and hardship.

[48] The applicants that have been aware of the eviction proceedings as far back as April 2022. This is the reason Mr Eze brought an application which he later withdrew regarding the eviction.

[49] Having considered the merits of this case, I am of the view that it will not be just and equitable to afford the applicant a reasonable time to find alternative accommodation.

COSTS

[50] National contends that a cost order should be made against the applicants on a punitive scale. The ground advanced for the submission is that the applicants are engaged in vexatious and the court process.

[51] The documents, namely lease agreement and the cover, of school reports that are relied on to prove that the first applicant is a father to two minor children indicates that they are hatched as an attempt by the applicants to mislead this court.

It cannot be interpreted as anything else but a clear abuse of the court process.

[52] The applicants were not willing at all to afford National any chance to provide an answer to the case and indeed the fact that National was given less than 24 hours to file an answer to the application, is in my view malicious and vexatious if regard is had that they were not in occupation of the property.

[53] Consequently, I am persuaded that National has succeeded to prove the requirements to award costs on a punitive scale.

ORDER

[54] The following order is made:

- (a) The application for *mandament van spolie* is dismissed.
- (b) The applicants are ordered to vacate the property by 30 September 2022.
- (c) In the event they fail to vacate the property the Sheriff of this court is authorized with the assistance of the members of South African Police Service where the property is located to execute the warrant of eviction issued by Bokako AJ attached to this order.
- (d) The applicants are ordered to jointly and severally pay the costs of this application between attorney and client scale including the costs of two counsel the one paying the others to be absolved

GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 25 August 2022

DATE JUDGMENT DELIVERED: 29 August 2022

APPEARANCES

Counsel for the applicant: Adv Mhlanga

Instructed by: Dike Attorneys

Counsel for the first respondents: Adv S Schulenburg

Instructed by: Livine & Freedman Attorneys

