Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

25 March 2024

DATE SIGNATURE

Case No: 2024-024332

In the matter between:

REAGOMA CATERING & CONSULTING SERVICES CC **1ST APPLICANT**
(Reg. No.: 2005/054968/23)

E[...] K[...] R[...] **2ND**
APPLICANT

and

R[...] M[...] R[...]
RESPONDENT

JUDGMENT

COWEN J

1. This is a spoliation application, which came before me on the urgent roll. The first and second applicants are, respectively, Reagoma Catering & Consulting Services CC and E[...] K[...] R[...]. The respondent is R[...] M[...] R[...], the second applicant's wife, since May 2001. The second applicant claims that he was unlawfully 'evicted' from the erstwhile common home. The second applicant is the sole member of the first applicant. According to the respondent, she has a 50% 'stake' in the first applicant, but she is no longer formally a member, solely for pragmatic reasons, more specifically to facilitate the signing of documents in her absence. The second applicant intends imminently to institute divorce proceedings.

2. On 5 March 2024, the applicants instituted an urgent application, set down for 19 March 2024, when it came before me. The applicants seek the following relief:

   2.1. Restoration of the first applicant's possession of a Mercedes Benz V-class motor vehicle with registration number […] GP and Vin number […] (the disputed vehicle) within 24 hours of granting of the order.

   2.2. Authorising the second applicant to enter the erstwhile common home situated at […] G[…] A[…] E[…], […] K[…] R[…], M[…], Extension 77 to remove the personal property listed in Annexure X1.

3. The applicants mistakenly omitted to attach Annexure X1 to the notice of motion and it was only supplied in reply, which has obvious consequences for fairness and ultimately costs. After hearing the parties, it was confirmed that the items in issue comprise the second applicant's clothes and shoes, underwear and socks, hangers on the clothes, his office keys, his whisky bottles, company car spare keys and chronic medication. The keys of the disputed vehicle are also in issue.

4. The event that appears to have provoked this application is an approach by the respondent to the Pretoria North Magistrates Court in terms of the Domestic Violence Act 116 of 1998 (the DV Act) for an interim protection order on 13 February 2024. The application for an interim protection order was served on the second applicant on that day and he was then advised not to go to the common home to avoid any accusation of a contravention of any order that may be in place. However, no order had at that stage been granted and the matter is only due to be ventilated on 23 April 2024. Nevertheless, the second applicant has left the common home and fears returning as he does not want to be arrested merely for being there. The second applicant contends that the initiation of the protection order process constituted an attempt on the part of the respondent to take control of the common property and his possessions. He contends that despite various requests and efforts by the police, no agreement could be reached whereby he could recover his belongings and the disputed vehicle.

5. The first applicant is the owner of the disputed vehicle, which is the subject of an instalment sale agreement pursuant to which the second applicant is responsible for the vehicle. The second applicant alleges that despite numerous approaches to the respondent, she has refused to provide him with the vehicle keys to remove the vehicle to the first applicant's business premises. The vehicle, the second applicant explains, is used for the business of the first applicant which is a security company.

6. The second applicant says that he sought to resolve the matter on 13 February 2024 when be approached the police to assist him. Shortly thereafter, he and his son, with his attorney's articled clerk, visited the police, but access was denied. On 23 February 2023, after failed attempts with the respondent directly, Col Modise was engaged to assist but he was not available. A Captain was approached who refused to assist and a Sgt Mabusa was assigned to assist with his colleague. Initially, Sgt Mabusa required the applicant and respondent to visit the Magistrates Court to enquire into the status of the protection order as he too was under the impression that it was an interim order. On 24 February 2024, the second applicant and a colleague of his entered the property to perform garden services and maintenance and to remove the disputed vehicle. On that occasion, the respondent told him that she is hiding the keys and he could not have access to it.

7. On 28 February 2024, the second applicant's attorneys sent a letter to the police setting out the history of the matter. The police are said to have refused to assist him and in those circumstances these proceedings were instituted.

8. The respondent denies that the second applicant was unlawfully evicted from the common home. She says that he left of his own volition and repeatedly refused to take his clothing and personal effects. She denies that there have been any measures taken to arrest the second applicant and contends that there is no ulterior motive to her instituting the protection order proceedings under the DV Act. She emphatically contends that she has at no stage prevented the second applicant from removing his personal belongings. In support thereof, she attaches two affidavits from police officials, which record that the second applicant was informed that he could collect his personal belongings and clothing from the common home. However, she says, he refused to do so. A consideration of the statements, indeed, corroborate that version. Moreover, she points out that the second applicant was at the house both on 24 February 2024 and on 1 March 2024 and, indeed, entered the house itself without impediment from the respondent.

9. The disputed vehicle, she says, has always been used as a family car and has never been used for any business of the first applicant. When it was purchased, she says, the idea was that it was sufficiently spacious to accommodate all members of the family when taking trips. It was used for holiday trips to Durban during December 2022 and 2023, for trips to visit relatives in Makapanstad, Bethanie, Siyabusa and other places. Furthermore, the respondent says she used it to travel to work at the Tshwane University of Technology and by the second applicant to go to work. The respondent supplies a tracking log for the vehicle which, she says, shows that the vehicle was, for long periods, stationery and is not used on a day to day basis. The mileage to date, however, has been limited and in total amounts to only 27 257 kms.

In short, it is thus contended that there was joint possession of the disputed motor vehicle. Notably, however, the tracking log comprises numerous pages and while the use of the vehicle for the family and visitation trips is confirmed, the log does not self-evidently confirm the remainder of what is alleged.

10. In reply, the applicants seek to plead, in addition to a spoliation, reliance on the *rei vindicatio,* in circumstances where the first applicant's ownership of the disputed vehicle is common cause. In my view this cannot be permitted, because the failure to plead such reliance in the founding affidavit precluded the respondent from responding fairly to the claim, specifically because one can plead, as a defence to that action, a right to possession and one can readily surmise that instead of merely demonstrating joint possession, as she has, she may well have gone further than she has in her answer and concerned herself with such rights to the vehicle she may assert.[1] Responding to the averments relating to access to personal belongings, the second applicant accepts that if the police acted as they say that they did, then the application on that front is not necessary. He does not accept that they did so act and persists in contending that he was constrained to act cautiously in the face of the pending protection order. However, in the replying affidavit, the second applicant accepts that this portion of the application became moot when the answering affidavit was delivered, and he accepts the undertakings from the respondent that he may collect his personal belongings.

[1] *Woerman NO v Masondo* [2002] 2 All SA 53 (A); 2002(1) SA 811 (SCA). In *Nienaber v Stuckey* 1946 AD 1049 at 1053, the then Appellate Division pointed out that a court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place.

11. Nevertheless, he correctly points out that the same affidavits confirm that the respondent intends to retain possession of the vehicle, although they do suggest that the respondent would not deprive the applicants the right to use the vehicle, provided it remains at the common home. The respondent, does not however plead that expressly in her answering affidavit. Her counsel, however, confirmed that she tenders such use after this Court engaged the parties in an effort to facilitate settlement. The second applicant disputes that the tracking log does not evidence use by the CC of the vehicle and points out, correctly, that it evidences multiple trips. He points out that it was used for transporting groups of people or goods at times to the airport and also to the North West Province and in the northern areas of Pretoria where the first applicant services its clients. On a careful reading of the affidavits, the respondent has not effectively disputed the business use of the disputed vehicle.

12. In my view, I must accept, on the principles in *Plascon Evans* and *Wightman*[2] that the applicants and the respondent were in joint possession of the vehicle for the purposes asserted by the respondent *and* that the vehicle was used for the business purposes of the first applicant, through the second applicant. In arriving at this conclusion, I have considered the dictum in *Titty's Bar & Bottle Store v ABC Garage and others* to which the respondent's counsel referred, and I am satisfied that the applicants made their case sufficiently in the founding affidavit.[3]

Urgency

[2] *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) at 634H-635C; *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA), para 13.
[3] 1974(4) SA 362 (T) at 369A-B.

13. I am satisfied that the application should be heard urgently. It is a spoliation application and there is good reason why the applicants seek immediate restoration of the disputed motor vehicle and personal belongings. The urgent need to access personal belongings is self-evident. As for the disputed motor vehicle, it is used for the first applicant's business. In this regard, the respondent submits that any urgency is self-created because the applicant did nothing for ten days after he voluntarily left the home on 13 February 2024. I am not persuaded that this defeats the urgency as the applicants were at that stage seeking to resolve the matter without the need to approach the Court. Moreover, even if the applicants have managed without the disputed vehicle and personal belongings for a period, this does not mean that that situation can be sustained or should reasonably be sustained.

Analysis

14. I would have preferred to have had more time to prepare my reasons for decision, but this is an urgent application and must be disposed of accordingly. In these circumstances I have not detailed every consideration that has informed my reasons nor my response to each point.

15. The dispute in respect of the second applicant's personal belongings has become moot. However, provided suitable provision is made for costs, I can see no difficulty regulating their access by court order and indeed, provision was made for this relief in the draft order supplied. Indeed, it would seem to assist the parties and both parties were ultimately willing to settle this part of the dispute. However, I am of the

view that the respondent has demonstrated that it was not necessary for the Court to be approached in this regard because she had at no stage refused access to, at least most of, the personal belongings, which can be viewed as one of two legs of the application. The only disputed item is the keys of the disputed vehicle which I deal with shortly. In the result, the second applicant should, in principle, be held responsible for 50% of the respondent's costs.

16. The dispute regarding the disputed vehicle raises different considerations because, notwithstanding the respondent's tender to enable joint access, she insists on keeping the vehicle at the premises despite the fact that the second applicant has understandably vacated the common home. Moreover, the respondent refuses to acknowledge the applicant's business use of the vehicle and the fact that the second applicant is ultimately responsible for it and could exercise such responsibility under the erstwhile possessory arrangement. Furthermore, there was no clear tender to supply the applicants with the vehicle keys which are in respondent's possession and I must conclude on the evidence that access to the keys has effectively been denied. In these circumstances, I am of the view that the first applicant has been wrongfully been deprived of its joint possession of the disputed vehicle,[4] which must be restored.

17. The peculiar feature of this case is that it is contended here that in order to restore the *status quo*, the vehicle must be moved from the marital home to the business premises of the first applicant. The cases to which I have been referred do not

[4] *Rosenbuch v Rosenbuch and another* 1975(1) SA 181 (W) at 183F-J; *Manga v Manga* 1992(4) SA 502 (ZS) at 503*; Ross v Ross* 1994(1) SA 865 (SE) at 868E-G*; Oglodzinski v Oglodzinski* 1976(4) SA 273 (D) at 276B.

address this issue and on first blush it may appear counter-intuitive. However, I am satisfied that in the circumstances of this case that is indeed what is required. Given that it is the first applicant which seeks restoration of possession, the animosity between the parties, the current proceedings under the DV Act and the clearly problematic nature of the relationship at this stage, justice would not be served if the disputed vehicle remained at the marital home, which the second applicant has understandably vacated. The vehicle has not only been used by the parties to the marriage but by the first applicant, for its business. The respondent does not suggest there is any need for its daily or regular use, in fact she says it often stands stationary. On the other hand, while it may not be the primary business vehicle of the first applicant, the first applicant uses it, through the second applicant, for business purposes and the travel log suggests multiple trips. Both parties should be permitted to retain a set of keys if there are two as there appear to be, but if not the keys should remain with the second applicant. However, the applicants must continue to permit the respondent to possess the vehicle for purposes of her use pursuant to the historical arrangements on reasonable notice and if need be permit it to be parked at the marital home during such periods.

Costs

18. I have concluded above that the second applicant should, in principle, pay 50% of the respondent's costs. In my view, the respondent should pay the first applicant's costs primarily due to its substantial success in respect of the disputed vehicle. Given that its costs will only constitute approximately 50% of the costs of the application, the representation of the parties, and because I am satisfied that despite

the protestations of the parties this is a case where party and party costs is appropriate, I make the order that each party pays its own costs.

Order

19. I make the following order:

19.1. The forms, service and time periods prescribed in terms of the Uniform Rules of Court are dispensed with and the matter be heard as one of urgency in terms of rule 6(12) of the Uniform Rules of Court.

19.2. The second applicant is hereby authorised to remove his personal property kept at the erstwhile common home situate at […] G[…] A[…] E[…], […] K[…] R[…], M[…], Extension 77, specifically his clothes and shoes, underwear and socks, hangers on the clothes, his office keys, his whisky bottles, his company car spare keys and chronic medication.

19.3. The first applicant's joint possession of the Mercedes Benz V-class motor vehicle with registration number […]GP and Vin number […], must be restored within 24 hours after granting of this order:

19.3.1. By supplying the second applicant with one set of the car keys and permitting the second applicant to keep the vehicle at the business premises of the first applicant; and

19.3.2. Granting the first applicant possession of the vehicle from time to time on reasonable notice.

19.4. Each party shall pay its own costs.

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S J COWEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Date of hearing: 20 March 2023

Date of judgment: 25 March 2023

Appearances:

Applicants: Adv Jacobs instructed by GP Prinsloo Attorneys

Respondent: Mr KP Seabi of KP Seabi & Associates