IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **16524/2022P**

In the matter between:

SHANNIN AND ULISHA INVESTMENTS (PTY) LIMITED **APPLICANT**
t/a FAST SPARES

and

ASHRAF DAWOOD MAHOMED **FIRST RESPONDENT**
CATHAY COMMERCIAL ENTERPRISES CC **SECOND RESPONDENT**
REG. NO: 2000/064225/23

Coram: Mossop J
Heard: 16 November 2023
Delivered: 16 November 2023

ORDER

The following order is granted:

1. Each party is directed to pay its own costs.

JUDGMENT

MOSSOP J:

[1] The commercial business premises with a street address of 91/93 Church Street, Pietermaritzburg (the premises) are situated in the same street as the High Court. The premises are owned by the second respondent, a close corporation. The first respondent is the guiding mind behind that close corporation and, by all accounts, owns and controls an extremely large commercial property portfolio in this city.

[2] The first respondent, in his personal capacity, entered into a lease agreement in respect of the premises with one Shannin Ponnusami and Ulisha Ponnusami (individually referred to by their full names and collectively referred to as 'the Ponnusamis'). A copy of the lease agreement has, understandably given that this is a spoliation application, not been put up by the applicant but has been put up by the first respondent. The Ponnusamis were to conduct a motor vehicle spares business from the premises. In the event, that business was conducted not under their names, but under the name of the applicant. Nothing turns on this, however, as it is not challenged that the applicant and the Ponnusamis were in occupation of the premises.

[3] On Friday, 2 December 2022, the applicant moved an urgent application before this court arising out of an alleged act of spoliation committed either by the first or the second respondent, or both. The applicant, represented by Shannin Ponnusami, alleged in its founding affidavit that it had been in peaceful, undisturbed possession of the premises on 15 November 2022 when three males attended the premises, threatened those there present with physical violence, removed them forcefully from the premises and then welded shut the front gate to the premises to prevent them from re-entering the premises. It was alleged that this had been done at the behest of the first respondent. Although unnecessary to be stated given the nature of the application, it was alleged that the reason why the first respondent had

caused this to occur was because the applicant was in arrears with its monthly rental for its occupation of the premises.

[4] The spoliation application was opposed by the respondents when it came before Olivier AJ, but a rule with interim relief was nonetheless granted by the acting judge restoring the applicant's possession of the premises pending finalisation of the application. The matter was subsequently adjourned to 7 March 2023. On that date, Mlaba J discharged the rule previously granted by Olivier AJ and adjourned the matter sine die, reserving the question of costs. It does not appear from the order whether this was by consent or not, although Mr Indrajith, who appears for the respondents, asserts in his heads of argument that the order was taken by consent.

[5] After an interregnum of some eight months, the matter is now before me on the issue of costs only. The matter has not been set down by the applicant, who appears to no longer have any interest in the matter, having not delivered heads of argument and having not appeared this morning. It has, rather, been set down by the respondents for the sole purpose of obtaining a costs order against the applicant.

[6] The basic rule on the question of costs was set out in *Kruger Bros and Wasserman v Ruskin*,[1] and is to this effect:

'the rule of our law is that all costs – unless otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.'

The granting of a costs order is therefore a matter for the discretion of the court, regard being had to all the circumstances of the matter in question.[2] Costs are accordingly to be awarded on a fair and just basis.[3]

[7] The discretion possessed by a court to determine the issue of costs is a true discretion as opposed to a loose discretion. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa*,[4] Khampepe J said that:

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[1] *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 69.
[2] *Cronje v Pelser* 1967 (2) SA 589 (A) 593.
[3] *City of Cape Town v Rudolph* 2004 (5) SA 39 (C) 89C.
[4] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC) para 85. This approach was followed in *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) para 28.

'A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found in this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of the Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.'

[8] What does it mean when a discretion must be exercised judicially, as was stated in the extract from *Kruger Bros*? The answer to this question has been formulated in different ways. It has been held to mean that the decision should not be arrived at 'capriciously but for substantial reasons.'[5] In *Merber v Merber*,[6] the court referred with approval to the English matter of *Ritter v Godfrey*, where the following was said on this issue:

'The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If however there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial and this Court cannot interfere with his discretion.'[7]

The learned judge in *Ritter*, Atkin L.J., went on to state the following:

'In the case of a wholly successful defendant, in my opinion, the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.'[8]

[20] Thus, while the spoliation application is not to be determined by me because the rule nisi has already been discharged, it seems to me that I must nonetheless have regard to the facts relating thereto in order that I should properly, and judicially, exercise my discretion when determining the issue of costs. I make it plain at the outset that I do not adopt the view that because the applicant is not present before me this morning I should automatically award costs against it. I take the view that all the facts must be considered and not just the fact of the absence of the applicant today.

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[5] *Rex v Zackey* 1945 AD 505 at 513.
[6] *Merber v Merber* 1948 (1) SA 446 at 452-3.
[7] *Ritter v Godfrey* (1920) 2.K.B. 47.
[8] Ibid, page 60.

[9] That the premises were occupied at the time that this application was brought is beyond dispute. This is demonstrated by the fact that after the bringing of this application, the first respondent, on his own admission, instituted action against the Ponnusamis out of the Pietermaritzburg Regional Court and included in his action a rent interdict summons pertaining to the premises. That would have been unnecessary had they not occupied the premises. There is some uncertainty on the papers as to who was entitled to be in occupation of the premises: the lease agreement put up by the first respondent indicates that the lease was concluded by the Ponnusamis in their personal capacity and not by the applicant, which is a company. I need not resolve this because of the nature of spoliation proceedings, which are predicated solely upon physical possession and not the right to possession, and the deprivation of that possession other than through legal procedure.[9]

[10] The first respondent has attempted to suggest that he did not send the three men to the premises to evict the occupants in an unlawful fashion, or at all. He has suggested that this is a matter that is best referred to the South African Police Services to resolve by way of an investigation. In my view, that is unnecessary and not in keeping with the resolution of spoliation proceedings in an expeditious manner without undue delay.

[11] The applicant's legal representative, Mr Indrajith, has mentioned five grounds in his heads of argument and in argument this morning as constituting justification for the costs order that the respondents seek. The first is that the applicant ought to have delivered a letter of demand, or complied with Uniform Rule 41A, before seeking the assistance of a court. Had it done so, so the submission continues, this application would have been avoided. The second ground advanced is that the proceedings should have been brought in the magistrate's court and not in the high court. The decision to litigate in the high court has thus increased the costs for the respondents. The third ground advanced is that the costs of litigating have been increased by the applicant when the primary issue ultimately became academic. The thrust of this submission is that the applicant vacated the premises on 24 January

[9] *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) para 8.

2023 but the respondents were compelled to deliver an answering affidavit, and thereby incurred the cost of doing so, only to have the matter partially resolved later by the discharge of the rule nisi. The fourth ground advanced relates to the content of the founding affidavit. The first respondent alleges that he has been referred to in less than complimentary terms by the deponent thereto, Shannin Ponnusami. The final ground advanced is that the applicant would not have been successful had final relief been sought from this court. I shall briefly consider each of these submissions.

[12] As regards the first submission, our society and legal order deprecates self-help. The taking of possession other than in accordance with law is prohibited, based upon the underlying philosophy that no-one should resort to self-help. By prohibiting self-help public order is preserved.[10] Where self-help, or spoliation, occurs, the person despoiled is entitled to take immediate steps to stop it and that may result in an act of counter spoliation but more likely will result in an urgent application to court.

[13] Rule 41A(2)(a) provides as follows:

'In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.'

Rule 41A(2)(b) provides that:

'A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.'

[14] This application was presented as an urgent application with the necessary prayer for the dispensing of the forms and service required by the Uniform Rules in terms of the provisions of Uniform Rule 6(12). This was accepted by Olivier AJ, who granted the interim relief sought by the applicant. The judge thus found the application to be urgent. In the circumstances of an urgent application, it would appear to me to be obvious that the applicant does not agree to the referral of the issues to mediation.

[10] *Ngqukumba v Minister of Safety and Security and Others* 2014 (7) BCLR 788 (CC) para 10.

[15] The confidence with which the first respondent asserts that the application would have been avoided had a letter first been sent to him, or a Rule 41A notice delivered, or even if he had first been approached, is remarkable. He claims that he was not behind the ejectment of the occupants from the premises so how he could warrant, as he does in his answering affidavit, that the occupants could remain in the premises, and thereby resolve the dispute, is not clear to me. Sight must not be lost of the fact that the applicant believes that the respondents are the cause of it being dispossessed of the premises. The suggestion that the first respondent makes that he should therefore have first been approached to resolve the matter is misplaced.

[16] It does not appear that there is any sanction for non-compliance with Rule 41A, and courts have thus far been disinclined to uphold technical objections of non-compliance with that Rule.[11] That having been said, Rule 41A(9)(b) provides that where an order for costs of the action or application is considered, the court may have regard to the notices referred to in sub-rule 49A(2) or any offer or tender referred to in sub-rule 49A(8)(d) and any party shall be entitled to bring such notices or offer or tender to the attention of the court. The inference is thus where such a notice is not given, there may be a consequence on any costs order granted.

[17] The sincerity and impact of the respondents' submission in this regard is lost when it is accepted that there was service of the papers on them before the application was considered by Olivier AJ. Had the respondents truly believed all was a misunderstanding and was capable of speedy and sensible resolution, why then did the first respondent not simply pick up the telephone after he received the application papers and call the Ponnusamis and explain that he was shocked by what had been revealed in those papers and advise them that the matter could be

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[11] *Growthpoint Properties Ltd v Africa Master Blockchain Company (Pty) Ltd* [2022] ZAGPJHC 836 para 27.

amicably resolved? He makes no suggestion that he did this. While on the subject of the conduct of the respondents, Rule 41A makes it plain that a respondent is also obliged to deliver such a notice, regardless of the applicant's failure to comply with the Rule. Neither party did so and it does not lie in the mouth of the respondents to complain about the applicant's non-compliance. In any event, while the Rules are meant to be complied with, they were meant for the court, and not the other way round.[12] Neither party complied. I am consequently not much attracted by the merits of this submission by the respondents.

[18] The second submission advanced is a complaint about the forum chosen by the applicant. It is contended that the magistrate's court should have been the forum chosen by the applicant. The fact of the matter is that the high court is obliged by law to hear any matter that falls within its jurisdiction and has no power to exercise a discretion to decline to hear such a matter on the ground that another court has concurrent jurisdiction.[13] A litigant is therefore entitled to choose whichever court suits his needs. The applicant chose the high court and it was its right to do so. Had the matter finally been determined, and any costs awarded to the applicant, they may not have been on the high court scale. But all that is speculation. The point lacks any legal merit.

[19] The third submission is that the costs of litigating were increased when the issue became moot. This, presumably, refers to the fact that the applicant vacated the premises after the first respondent commenced legal proceedings against the Ponnusamis out of the Pietermaritzburg Regional Court. The respondents gave the applicant four days to withdraw the application with no order as to costs, being the period from 27 January to 31 January 2023. When it did not do so, the answering affidavit was delivered. The essence of this submission accordingly relates to the costs of preparing the answering affidavit.

[20] It is quite ironic that the first respondent complains about the costs of preparing his answering affidavit for it is he that has peppered his answering affidavit

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[12] *Nomandela v Nyandeni Local Municipality* 2021 (5) SA 619 (ECM).

[13] *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana NO and Another* [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (25 June 2021).

with comments about his wealth: he states that he has a ‘vast’ property portfolio, that due to his ‘affluency’ he is able to employ rental agents and that he is ‘not a man of straw’.

[21] Ultimately, what the first respondent sought occurred: the rule nisi was discharged and costs were reserved. It just was not done when he wanted it done. The applicant did not deliver a replying affidavit and, to an extent, costs were thereby curtailed. The respondents have, again ironically, increased the costs of the matter by setting the matter down solely on the issue of costs. I asked Mr Indrajith, who appears for the respondents, why the issue of costs had not been resolved when the consent order was taken on 7 March 2023. He indicated that Mlaba J was not prepared to hear argument on the question of costs on that day. That would explain why the issue was not dealt with then.

[22] I do not intend dealing in any great detail with the fourth ground, namely that the first respondent has been referred to in less than flattering terms by the deponent to the founding affidavit. I refer simply to what was stated in *S v Tromp*:

‘He who enters the lists must be prepared to take verbal knocks; a contest in the courts is not to be equated to the proceedings of a young ladies' debating society.’[14]

[23] The final ground advanced by the respondents is that the applicant was unlikely to obtain final relief had the matter ultimately been argued. I find myself unable to agree with this bold assertion. In my view, the applicant had good prospects of succeeding. When the facts are viewed dispassionately, there is but a single person who would be interested in seeing the occupants vacate the premises, and that is the first respondent. This is rendered even more likely if there was a default in the monthly payment of rental arising out of that occupation.

[24] The arrival of the three men at the premises was not a random act of criminality or an attempt at robbery. What criminals go out to commit a crime carrying with them welding equipment? It is plain that what occurred was a means of getting the occupants out of the premises, for nothing was stolen. The only thing achieved was their ejectment. That the purpose behind the intervention of the three men was

[14] *S v Tromp* 1966 (1) SA 646 (N) at 655-656.

to ensure that the occupants did not return to the premises once they were put out is evidenced by the photographs put up by the applicant showing that the gates to the premises had, indeed, been welded shut by the three men. I asked Mr Indrajith to address me on this aspect this morning. He said that the respondent's version was that it was a set of facts put up by the applicant itself to avoid its area rental payments. I simply cannot accept this to be the case. If it were so, why would they bring the application as an urgent application for it would be in their interests to maximise the time that they were out of the premises and thus increase the quantum of any damages claim that they might contemplate bringing.

[25] The respondent has attempted to muddy the waters, and thereby attempted to improve his position, by making reference to the Pietermaritzburg Regional Court proceedings that he instituted against the Ponnusamis on 14 December 2022. That, in fact, is where his narration of events begins in his answering affidavit. That litigation has nothing to do with the issues before me. The action was, in any event, only instituted after the rule nisi had been granted by this court on 2 December 2022.

[26] I consequently find no merit in any of the grounds advanced by the respondents. On a balanced consideration of the allegations in this matter, it appears to me that the applicant was entitled to approach this court on an urgent basis, as it did. The act of spoliation had been clearly pleaded in the founding affidavit and in my view can only have been carried out at the instance of the first respondent. In my view this conduct falls clearly within the ambit of at least the first category referred to by Atkin L.J. in *Ritter*, in that the first respondent's conduct brought about the litigation. Had the rule nisi not been discharged, the applicant's prospects of obtaining final relief were therefore good, given the very limited defences open to a respondent in spoliation proceedings.[15] The applicant, however, has not appeared this morning and asked for its costs.

[27] In my view, and after a conspectus of all the competing allegations, a just and equitable order would be the following in all the circumstances of the matter:

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[15] *Umcebo Properties (Pty) Limited and another v Mokwena and others* [2020] ZAMPMHC 31, para 44.

1. Each party is directed to pay its own costs.

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MOSSOP J

APPEARANCES

Counsel for the applicant	:	No appearance
Instructed by:	:	Padayachee and Partners 485 Jabu Ndlovu Street Pietermaritzburg
Counsel for the respondent	:	Mr Pranesh Indrajith
Instructed by	:	Pranesh Indrajith Attorneys 41 Lahore Road Pietermaritzburg
Date of argument:	:	16 November 2023
Date of judgment	:	16 November 2023