REPUBLIC OF SOUTH AFRICA

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

CASE NO: 14/31081

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

....
DATE SIGNATURE

In the matter between:

WHEELS AUTO SERVICES CC t/a S A CONVERTING Applicant
(CK193/0024216/23)

And

SSD T1 SPECIALIZED STEEL DIRECT (PTY) LTD Respondent
(Reg No. 2012/046692/07)

SUMMARY

Practice and procedure – spoliation – urgency thereof – requirements – right of applicant to access business premises of respondent through gates – respondent dispossessing applicant of such right unlawfully by locking gate – respondent's reliance on contractual obligations and rights in terms of lease

agreement irrelevant at this stage – applicant succeeding in proving on a balance of probabilities that it was dispoiled unlawfully.

J U D G M E N T

MOSHIDI, J:

[1] This is an application brought on urgent basis, in which the applicant seeks relief in the following terms:

> "*2. Directing that the Respondent immediately restore and return to the Applicant possession of Gate 4 in respect of the premises known as 41 Apex, Benoni;*
>
> *3. Directing that the Respondent pay the costs of the application on a scale as between attorney and own client.*"

[2] The application is opposed strenuously by the respondent who has filed answering papers.

THE BACKGROUND FACTS

[3] The following are either common cause facts or not seriously disputed: The applicant carries on the business of paper and plastic recycling at certain premises situated at 41 Apex Road, Apex, Benoni. The premises comprise of a warehouse measuring approximately 1 060,00 square metres in an area on the ground floor, and the surrounding area as marked, "*Wheels Auto*

Services" on annexure "B" (plan of the premises), ("*the leased premises*"). Redefine Properties was the owner of the leased premises when the lease with the applicant was entered into with effect from 1 April 2013. The respondent, who carries on the business of steel plate cutters t/a Matsway Steel, at the leased premises, became the registered owner, and now the new landlord from March 2014. By this time, the applicant had been occupying the leased premises since about 2012 and enjoyed access to the premises through Gates A, 3 and B as indicated on the sketch-plans. During July 2013 the applicant commenced negotiations with the landlord for additional access. Although it is disputed whether the applicant enjoyed access through Gate 4, and in respect of a fence which was already demarcated as a boundary fence since July 2013, the factual situation is that the applicant had access and usage of Gate 4 since July 2013. The applicant says that the respondent, on 20 August 2014, took the law into its hands and unlawfully locked Gate 4, thereby depriving applicant of Gates B and 4. Whilst Gates A and 3 are operated manually, Gate 4 is connected to an alarm system and the redirection of traffic in the leased property require certain zones of the alarm system to be permanently disarmed. This affects the security and prevents the applicant from enabling the security sensors to the premises. As a result, the applicant contends that it was obliged to shut down the manufacturing side of its premises or business, and is suffering damages on a daily basis for as long as the current situation persists. In the answering papers, the respondent admits that Gate 4 was locked on Wednesday 20 August 2014. However, the respondent denies that it spoliated the applicant by locking this particular gate. The respondent further avers that Gate 4 does not form part

of the original lease agreement and by locking Gate 4, the respondent merely enforced the terms of the original lease agreement entered into between the applicant and the previous landlord. The respondent further contends that the applicant has been using the other gates, i.e. Gates A and 3 now for a substantial period of time, which gates are still available to the applicant.

[4] It appears from the papers, as well as the annexures thereto, that the usage of Gates B and 4, as well as the fence, has been a landlord and tenant feud of tremendous proportions since the respondent later became the owner of the premises. This is also borne out by the exchange of correspondence between the parties. I need not deal with all the correspondence for present purposes. However, a few of the e-mails exchanged require to be mentioned. The applicant contends that in July 2013 it already had commenced negotiations for additional access in terms whereof such access was granted in respect of Gate 4 and of a boundary fence which was already demarcated. In one e-mail addressed by the respondent on 28 August 2013, it was stated that:

> "*I have just spoken to David in regard to the entrance. He says that it is okay and that I should give you something in writing. Therefore, I have attached the addendum again. Could you please have it signed for me and returned?*"

In a later e-mail of 4 September 2013 addressed by one Mandy Botha (the property manager), also regarding applicant's access to the premises, it stated:

> "*The addendum has been signed but (there is always a but) they want to add a clause stating that this arrangement will need to be agreed to by the new owner if and when they sell the property, unfortunately they cannot risk this arrangement preventing a sale.*"

From this, it is reasonable to infer that, pursuant to the negotiations alluded to by the applicant, there were discussions to regularise the applicant's access through Gate 4 by amending the lease agreement. However, when the respondent became the new landlord matters changed. For, on 19 August 2014 an e-mail from the respondent read:

> "*In reference to your Annexure B to your lease agreement, page 40, please note: 'Entry to such area being through Gate A which is a common entrance and then through the gate being installed at 3.' The area being refer to* [sic] *is the demarcated area for use of Wheels Auto. Gate B would not be your access point anymore. Please use Gate A as per your lease agreement and Annexure B.*"

This was followed by the respondent's closure of Gate 4 the next day, and subsequently led to the present proceedings.

[5] I must add that one of the grounds raised by the respondent in resisting the instant application is that the application does not warrant urgent adjudication. I do not agree with this contention as discussed later below.

SOME LEGAL PRINCIPLES

[6] The right to property is protected by the Constitution[1], which provides that no one may be deprived of property except in terms of law of general

[1] Sec 25(1) of Constitution

application, and that no law may permit arbitrary deprivation of property. In order for the applicant to succeed in the present application, it must allege and prove that it was in peaceful and undisturbed possession of the premises in question. In *Amler's Precedence of Pleadings*[2], the following is stated:

> "*Possession is not possession in the strict juridical sense. It suffices if the holding was with the intention of securing some benefit for the plaintiff. The causa of the plaintiff's possession is irrelevant and it is also irrelevant whether the defendant has a stronger right or claim to possession. Actual physical possession, and not the right to possess, is protected.*"

Reference is then also made to cases such as *Yeko v Qana*[3]. The applicant must also prove an unlawful deprivation of possession by the respondent.

[7] In *Jansen v Madden*[4], the applicant sought an order authorising him to remove a fence erected by the respondent across a certain road and to replace a gate removed from the fence by the respondent. In ultimately refusing the application, the Court at 84 said:

> "*A person who claims relief against dispossession by spoliation in a case such as the present will, however, have to prove on a balance of probabilities that he was the holder of a servitutal right and it is not sufficient merely to say that he claims such a right and that he was disturbed in the exercise of the right which he claims …*"

Finally, on the nature and purpose of the spoliation relief, the Court, in *City of Cape Town v Strümpher*[5], had to consider the question whether the spoliation

---

[2] 6ed at 317
[3] 1973 (4) SA 735 (A)
[4] 1968 (1) SA 81 (GW)
[5] 2012 (4) SA 207 (SCA) at para [19]

order was the appropriate remedy in the circumstances of an appeal before it. The Court then proceeded to say that:

> "*A spoliation order is available where a person has been deprived of his or her possession of movable or immovable property or his or her quasi-possession of an incorporeal. A fundamental principle in issue here is that nobody may take the law into their own hands. In order to preserve order and peace in society the court will summarily grant an order for restoration of the status quo where such deprivation has occurred, and it will do so without going into the merits of the dispute.*"

See also more recently, *Ngqukumba v Minister of Safety and Security*[6], and LAWSA First Re-Issue, Vol 27 paras 262-264.

APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

[8] In applying the principles expoused above to the facts of the present matter, the following picture emerges: the applicant undoubtedly had physical possession or possession of access entries to the premises in order to run its business. This had been the situation since about September/November 2012 in spite of the actual commencement of the lease agreement, i.e. on 1 April 2013. The applicant had peaceful and undisturbed possession and control in respect of access to the premises at Gates A, 3 and B. From July 2013, pursuant to negotiations, the applicant had access to use Gate 4 and in respect of a fence which was already demarcated as a boundary. The respondent admits that it locked Gate 4 as appears from the photographs of the sketch-plan of the premises.

---

[6] 2014 (5) SA 112 (CC) at para [12]

[9] In my view, the above admission by the respondent should put to rest the respondent's contentions to the contrary that there was no spoliation, and that the applicant merely had *quasi*-possession and not physical possession. The respondent factually resorted to self-help and took the law into its hands. This, the Court cannot countenanced. It is immaterial whether it was Gate 4 only and/or the others that were locked. There were clear attempts to normalise the applicant's access to the premises by way of the addendum referred to above. It is equally irrelevant that the addendum was not yet signed as contended for by counsel of the respondent. The question of contractual rights and obligations in terms of the lease agreement are not for consideration at this stage. The applicant, I find, has succeeded to prove on a balance of probabilities that it had the right to access through the gate in question.

URGENCY

[10] The other issue raised by the respondent is that the application was not urgent at all, and that the respondent was pressured into preparing opposing papers in limited time and appear in court. In my view, the latter contention has no merit at all. At the time the matter was heard the Court had three sets of affidavits, including a replying affidavit. The respondent clearly misunderstands the functioning of the Urgent Court in this regard. I am satisfied that the applicant in fact met the requirements of Uniform Rules 6(5)(b) and 6(12)(b) as well as the requirements of service in matters of this nature.

[11] It is trite that an application for spoliation is not automatically urgent on itself. Each case must however be considered on its own merits. In *Mangala v Mangala*[7], the Court said:

> "*It is true that a spoliation order is a remedy which in the nature of things should be a speedy one, but the fact that there has to be restitution before all else simply means that, once an applicant has proved that he was in peaceful possession and his possession was disturbed, the respondent must restore that possession before entering into the merits of the ownership or otherwise of the subject matter. It does not follow that, because an application is one for 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 for urgency in accordance with the provisions of Rule 6(12)(b).*"

In my view, this is precisely what the applicant in the present matter has done. If the applicant had elected to serve the papers on the respondent through the sheriff, there would have been an obvious delay. In that event, the applicant would have faced the challenge such as that which was raised in *Juta and Co v Legal and Financial Publishing Co Ltd*[8], where the Court held that the relief sought by the applicant requires the maximum expedition on the part of an applicant. In *20th Century Fox Film Corporation v Black Films*[9], the Court held that the urgency of commercial interests might justify the invocation of Uniform Rule of Court 6(12) no less than any other interests. In the instant matter, the interests of the applicant are such interests as it is a running business which has been interrupted by the unlawful conduct of the respondent. As argued by the applicant, and quite correctly so in my view, the respondent's opposition based on the absence of urgency, is an

[7] 1967(2) SA 415 (ECD) at 416D-F
[8] 1969 (4) SA 443 (C) at 445E
[9] 1982 (3) SA 582 (W)

unsubstantiated denial and red-herring. The respondent was in fact warned timeously before the application was launched.

COSTS

[12] The costs ought to follow the event[10]. There was no compelling argument advanced not to do so. The applicant has argued for costs on a punitive scale. I do not agree. This is an issue of a discretion vested in the Court. In the circumstances of the matter, costs on the party and party scale would be just and equitable.

ORDER

[13] I make the following order:

1. The respondent is ordered to immediately restore and return to the applicant possession of Gate 4 in respect of the premises situated at 41 Apex Road, Benoni.

2. The applicant is authorised, if it becomes necessary, to enlist the services of the sheriff of the Court or other law-enforcement agencies, to give effect to the execution of order 1 (one) above. \

[10] *Ngqula v SAA* 2013 (1) SA 155 at 160 para [22]

3. The respondent shall pay the costs of the application on the party and party scale.

_____

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT	S B FRIEDLAND
INSTRUCTED BY	BEDER-FRIEDLAND INC
COUNSEL FOR THE RESPONDENT	E LE ROUX
INSTRUCTED BY	STEYN, STEYN AND PARTNERS
DATE OF HEARING	27 AUGUST 2014
DATE OF JUDGMENT	5 SEPTEMBER 2014