

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-MOT-GEN-2017/00389

In the matter between:

ROSALÉ PRETORIUS

APPLICANT

and

PROFERT CIVILS (PTY) LTD

RESPONDENT

Neutral citation: *Pretorius v Profert Civils (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2017/00389) [2017] NAHCMD 166 (14 June 2017)

Coram: ANGULA DJP

Heard: 5 April 2017

Delivered: 14 June 2017

Flynote: Applications and Motions – Spoliation – Applicant has to prove that he/she was in peaceful and undisturbed possession of the thing and that he/she has been unlawfully dispossessed of such possession by the respondent.

Summary: The applicant was in possession of the property situated at Erf No. 489, Langstrand (Extension 2), Walvis Bay ('the property'). The property was previously owned by the applicant's husband. She and her husband are married out of community of property. The husband sold the property to the respondent. The

husband and the respondent then entered into an option agreement whereby the applicant's husband was granted an option to buy back the property. It was further agreed that the applicant would remain in occupation of the property until the option was exercised or expired. The utility accounts remained registered in her name. Her furniture and household equipment also remained in the property. No rent was payable.

In consideration for the occupation, the applicant was responsible for the maintaining the interior of the property and was further responsible for the payment of security services, rates and taxes as well utility accounts.

The applicant is originally from the town of Walvis Bay, but she and her husband have in the meantime relocated to South Africa where she is practicing as a dentist. Her parents reside at Walvis Bay. She annually visits her parents during the festive season. During such visits, she stayed in the property.

On or about 14 December 2016, after the applicant and her family had arrived in Namibia for their annual holiday, a representative of the respondent removed the security firm that had been monitoring the property, placed a new security firm in charge, and changed the locks at the entry door of the property. The foregoing actions on behalf of the respondent prompted the applicant to launch an urgent *ex parte* application. The court then issued a rule *nisi*. On the return date, the respondent raised two points *in limine*: lack of urgency and the fact that the application was brought *ex parte*.

ORDER

1. The rule *nisi* is confirmed.
2. The respondent is ordered to pay the applicant's costs.

JUDGMENT

ANGULA DJP:

Introduction

[1] The applicant brought an *ex parte* urgent application on 21 December 2016 in which she sought a rule *nisi* to restore possession of the property to her.

[2] Oosthuizen J granted an interim order directing the respondent to restore to the applicant possession of the property, and to remove all locks on the entry door or hand over the keys to the applicant. The court determined the return date of the rule *nisi* to be 27 June 2017, and further ordered that the applicant furnish security for costs in the amount of N\$50,000.00.

[3] The confirmation of the rule *nisi* is opposed by the respondent. The respondent's opposing affidavit has been deposed to by one Sias van Rensburg, in his capacity as the respondent's company secretary.

The parties

[4] The applicant is an adult female who was born and grew up at Walvis Bay. She is practicing as a dentist and currently residing at Lichtenburg, South Africa together with her husband and their children. The applicant is married out of community of property to her husband, Shawn Pretorius. He is a one hundred percent owner of Communard Sixty Nine Close Corporation, which is duly registered in accordance with the Close Corporations Act, Act No. 26 of 1988.

[5] The respondent is Profert Civils (Pty) Ltd, a company duly incorporated under the Company laws of South Africa, with its registered address at 43 Ross Street, Potchindustria, Potchefstroom, South Africa.

Factual background

[6] Communard Sixty Nine CC was the registered owner of the property that is the subject matter of this application. On 15 July 2014, Communard Sixty Nine CC, represented by the applicant's husband, sold the property to the respondent, Profert Civils. The respondent was represented by its managing director, Mr. Abraham van der Walt. Thereafter, the parties entered into an option agreement granting the applicant's husband and or his nominee (the applicant) an exclusive option to buy back the property. In terms of the option agreement, the option would expire on 15 May 2017.

The applicant's case

[7] As mentioned earlier, the applicant was born and grew up at Walvis Bay. Her parents reside at Walvis Bay. The applicant together with her family annually visits her parents during the festive season. It was for this reason that, when the property was sold, it was agreed between her husband and Mr. van der Walt, for the respondent, that she would remain in occupation of the property and not be required to pay any rent for her continued occupation, until the option was either exercised and/or expired. Pursuant to the option agreement, water and electricity accounts remained registered in the applicant's name, and all her personal furniture and household equipment were kept on the property.

[8] As consideration for her rent-free occupation of the property, it was agreed that the applicant would maintain the interior of the property, pay for the security services, rates and taxes as well as water and electricity.

[9] The applicant points out that prior to the event which gave rise to this application, she had installed tiles, painted the interior of the property, and further installed lights in the property for which she expended a sum of N\$46,900.00.

[10] It is the applicant's case that on 14 December 2016, the respondent through its representative unlawfully took possession of the property by cancelling the service of the security firm appointed by the applicant to monitor and protect the property, changing the locks of the entry doors, and appointing a security firm to monitor the property. The foregoing events happened just before the applicant and

her family came to Namibia to commence their annual holiday. The applicant and her family were physically locked out of the property and their possessions kept under lock and key by the respondent. The applicant immediately instructed her legal practitioners to negotiate with the legal practitioner acting for the respondent in order to return possession of the property to the applicant. This was, however, without any success.

[11] The applicant points out that the dispossession of the property from her by the respondent took place without the applicant's consent and without due process of law, and that she has been unlawfully deprived of her peaceful and undisturbed possession of the property.

[12] The events described in the preceding paragraphs prompted the applicant to launch this application on 21 December 2016 on urgent *ex parte* basis.

The respondent's opposition

[13] The opposing affidavit filed on behalf of the respondent does not dispute the applicant's main allegations. The deponent took issue with the applicant's assertion that she was in 'lawful possession'. In this respect, the applicant responds in her replying affidavit that she meant to say that she was in 'peaceful and undisturbed possession' of the property. The applicant referred to paragraph 7 of her founding affidavit, in which the applicant stated, '*At all relevant time I was in peaceful and undisturbed possession of the property*'.

[14] It is admitted on behalf of the respondent that the respondent cancelled the appointed security firm, placed its own security guard at the property, and changed the locks. It is further admitted that the applicant and her husband were physically locked out of the property, and finally that the respondent took possession of the property without the applicants consent or permission.

Points raised in limine

[15] The respondent raised two points *in limine*, under the headings 'urgency' and 'ex parte'. The court was requested by counsel for the parties to only rule on these two points and leave the merits out.

[16] I have given consideration to counsel's request. As far as the merits are concerned, there is no dispute that the respondent committed spoliation. The overriding objective of the rules of this court is to facilitate the resolution of real issues of dispute between the parties. Taking into account that the only remaining issue between the parties is the issue of costs, it would appear to me that the points *in limine* are being pursued solely to determine the issue of costs. There is no indication to what extent the parties have endeavoured to settle the issue of costs. I gained the impression that judicial time and resources are not being put to good use by the parties in this matter.

[17] Furthermore, it is fair to assume that the applicant and her family have long returned to South Africa after the short festive holiday in Namibia during December 2016. It is further common cause that the applicant's husband has in the meantime been placed under provisional sequestration prior to him exercising the option to buy back the property. The issues of whether the matter was urgent when it was originally launched and whether it should have been brought on notice to the respondent are in my view academic at this stage.

[18] In light of what I have stated in the preceding two paragraphs and in the view I take on the points *in limine*, I do not intend to devote a great deal of time to these points.

No urgency

[19] It is the respondent's case that no case for urgency has been made out and that the matter should be struck from the roll as both the certificate of urgency and the founding affidavit fall short of the necessary requirements. In this respect, the respondent contends that the applicant failed to comply with Rules 73(1) and 73(4) as well as with Practice Directive 27(4). The said rules and practice directive respectively read as follows:

Rule 73(1)

“73. (1) An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter is so urgent that it should be heard at any time or on any other day.”

Rule 73(4)

“In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly - ... (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.”

Practice Directive 27(4)

“(4) Where an urgent application is brought to court on a court day at a time other than the time determined by the rules or on a day not being a court day, the applicant must in addition to filing the certificate of urgency contemplated in rule 73(1), make out a case that the application be heard at any other time than at 9h00 on a court day.”

[20] In summary, the respondent argues that the applicant failed to explicitly set out the circumstances which she avers renders the matter urgent and the reasons why she claims she could not be afforded substantial redress at a hearing in due course.

[21] It is now accepted that an application for spoliation is urgent by its very nature¹. Furthermore, the self-admitted spoliation conduct by the respondent has been held to constitute a ground for urgency². In my judgment, the argument that the applicant did not give reasons why she could not be afforded substantial redress in due course is without merit. It is common cause that the applicant was in the country only for a limited period of time, being the December 2016 seasonal holiday with a duration of about three weeks from 20 December 2016 to 9 January 2017. The Applicant and her family had made arrangements to spend the holiday in the property. After she was unlawfully despoiled of possession, she had nowhere else to

¹ *Mark Thomas Wylie v Greg Villiger and 3 Others* Case Number A42/2012 delivered on 13 February 2013.

² See *Government of the Republic of Namibia vs Matjila and 5 Others* Case Number a 35/2015 delivered on 8 March 2016.

stay. Counsel for the respondent argues that the applicant could or should have found alternative accommodation or stayed with her parents. Reliance for this argument is placed on *Salt and Another v Smith*³.

[22] In the *Salt* matter (supra), the applicants applied for urgent relief on a Wednesday that a rule *nisi* be issued ordering the respondent to deliver three motor vehicles to the applicants. It was alleged that the delivery of these vehicles was necessary to meet their deadline for publishing a newspaper by Friday of the same week. The applicants argued that it would be impossible to meet such a deadline if the vehicles were not at their disposal on that the day, being the Wednesday. In his judgment, Muller AJ, dismissed the application, holding that there was no doubt that other vehicles could fulfil the same functions that these three vehicles served. The applicants could simply rent other vehicles and then claim the rent from the respondent.

[23] By parity of reasoning, counsel for the respondent argues that the applicant in this matter could also have had made alternative arrangements such as finding other accommodation. This submission loses sight of the notorious fact that during the December festive season, which is the peak holiday time in Namibia, accommodation, particularly at the three coastal towns (Swakopmund and Henties bay) including Walvis Bay, would not be available. Booking is required well in advance, sometimes as early as June.

[24] It is fair to say that the applicant would not have been be able to find alternative accommodation at that juncture. Furthermore, it is common knowledge that the holiday season is short on about three weeks. Once the applicant lost the prior secured accommodation, she would not be able to find other accommodations. She would have been forced to go back to South Africa. In my view, it stands to reason that if it was possible for the applicant to stay with her parents, she would not have made alternative arrangements for accommodation at the property.

[25] In light of the foregoing. I am of the view that there is no merit on this point, and I am satisfied that the applicant made out a case that the matter was urgent. Accordingly, this point *in limine* is dismissed.

³ 1990 (NR) 87.

Lack of certification

[26] I move to consider the second point, namely the alleged non-compliance with rule 73(1) in that the certificate of urgency by the legal practitioner for the applicant does not contain a certification that '*the matter is so urgent that it should be heard at any time or on any other day*'. Again, I should immediately state that, in my judgment there is no merit in this point. It is a red herring. Even if counsel were correct in his argument, he does not point to any prejudice which has been suffered by the respondent as a result of the alleged non-compliance. Counsel for the respondent correctly in my view points out that although the matter was not heard at 09h00, it was heard during normal court hours, on that day. The point is dismissed for lack of merit.

Ex parte

[27] Finally the respondent takes issue with the fact that the application was brought *ex parte*. In this connection the respondent contends that the applicant failed to disclose all the material facts which might have influenced the court in coming to its decision. The deponent to the respondent's answering affidavit set out the long history of the transaction for the sale of the property, and the applicant's husband's estate being placed under provisional sequestration. In my view, those facts were not material or relevant to the determination of the confined issues before court, namely whether the applicant had been in peaceful and undisturbed possession of the property and whether she had been unlawfully disposed of such possession by the respondent. As I have pointed out earlier in this judgment, the respondent did not dispute those allegations. In fact it is admitted. I agree with the submission by counsel for the applicant that the applicant had fully disclosed all the material facts necessary for the court to grant the order. I have come to the conclusion that this point must equally fail. I accept applicant's assertion that she was in peaceful and undisturbed possession of the property and that she was unlawfully disposed of such possession by the respondent. Accordingly, this point is similarly dismissed.

[28] In the result, I make the following orders:

1. The rule *nisi* is confirmed.
2. The respondent is ordered to pay the applicant's costs.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT:

C J J VAN VUUREN

Of Krüger, van Vuuren & Co., Windhoek

RESPONDENT:

J JACOBS

Instructed by Koep & Partners, Windhoek