



REPORTABLE

CASE NO: SA 138/2023

IN THE SUPREME COURT OF NAMIBIA

In the application between:

**TEMPTATIONS FASHION CC
OLIVIA NDAHAF A KANYEMBA-USIKU**

**First Applicant
Second Applicant**

and

**J HENNING PROPERTIES (PTY) LTD
DR. ERASTUS SHIKONGO SHAPUMBA**

**First Respondent
Second Respondent**

In re: The appeal between:

**J HENNING PROPERTIES (PTY) LTD
DR. ERASTUS SHIKONGO SHAPUMBA**

**First Appellant
Second Appellant**

and

**TEMPTATIONS FASHION CC
OLIVIA NDAHAF A KANYEMBA-USIKU**

**First Respondent
Second Respondent**

Coram: MAINGA JA

Heard: IN CHAMBERS

Delivered: 1 March 2024

JUDGMENT PURSUANT TO AN APPLICATION IN TERMS OF S 14(7)

MAINGA JA:

Introduction

[1] This is an application for the summary dismissal of an appeal instituted by respondents (appellants in the appeal). The application is brought by applicants (the respondents in the appeal) in terms of s 14(7) of the Supreme Court Act 15 of 1990 read with rule 6 of the Rules of this Court.

[2] In terms of s 14(7) –

‘(7)(a) Where in any civil proceedings no leave to appeal to the Supreme Court is required in terms of any law, the Chief Justice or any other judge designated for that purpose by the Chief Justice –

(i) may, in his or her discretion, summarily dismiss the appeal on the grounds that it is frivolous or vexatious or otherwise has no prospects of success; or

(ii) shall, if the appeal is not so dismissed, direct that the appeal be proceeded with in accordance with the procedures prescribed by the rules of court.

(b) Where an order has been made dismissing the appeal on any of the grounds referred to in subparagraph (i) of paragraph (a) of this subsection, such order shall be deemed to be an order of the Supreme Court setting aside the appeal.

(c) Any decision or direction of the Chief Justice or such other judge in terms of paragraph (a) of this subsection, shall be communicated to the parties concerned by the registrar'.¹

[3] In terms of s 14(7)(a), I now determine this application for the summary dismissal of the respondents' appeal. For ease of reference, I will refer to the parties as applicant(s) and respondents as they appear in this application.

[4] For determination is this: whether, the respondents' appeal to this court under case number SA 138/2023 is frivolous, vexatious or has no prospects of success.

[5] To contextualise the application, I will briefly set out the factual background.

Background

Spoliation application

[6] This matter first came before the court *a quo* as an urgent application, which later proceeded as an ordinary opposed motion. In that application, the present applicants sought a *mandament van spolie* alleging that the first applicant was evicted from a leased property by the respondent(s) and their legal practitioners without a court order. They therefore alleged that they were despoiled of their peaceful and undisturbed possession of the said property. The second applicant alleged that the first applicant entered into a lease agreement with the respondents and had been in undisturbed and peaceful possession of the rental property from February 2021 to 23

¹ Section 14(7) of the Supreme Court Act 15 of 1990.

February 2023, when the respondents despoiled the first applicant without an eviction order.

[7] The second respondent on his part as well as that of the first respondent filed an answering affidavit as well as a counter-application. In the answering affidavit, the second respondent raised three points *in limine*, namely: (a) vague allegations in the founding affidavit in respect of the spoliation application (b) misjoinder and (c) non-service.

[8] On the first point *in limine*, the second respondent averred that the founding affidavit was vague in that no specific allegations were made setting out the specific conduct of or by the second respondent which resulted in the supposed illegal eviction or dispossession. In the absence of such specificity, the second respondent indicated the difficulty he faced in responding to the vague allegation by the second applicant that the 'respondent and their legal practitioners' despoiled the applicants. According to the second respondent, the allegation was not clear on which of the two respondent's nor which legal practitioner despoiled them. The second respondent denied having acted illegally. He further denied that his legal representatives acted illegally and further alleged that the second applicant was not specific about who the legal representatives were who acted illegally. To this, he pointed out that he and the first respondent make use of the services of different legal practitioners.

[9] As regards the point on misjoinder, the second respondent averred that he and the second applicant were not parties to the lease agreement forming the subject

matter of the spoliation application and therefore should not have been joined. I understand the response of the second applicant to this point to be that the second respondent and second applicant may merely be excluded from any order that will be made. The exact words of the second applicant were 'such error can be cured by excising the second applicant and second respondent from any order that may be made by the court'.

[10] As regards the third point on non-service, the second respondent took issue with the fact that the first respondent was not served with the application at its chosen *domicilium citandi et executandi* as per the lease agreement. Further that he was not personally served as well. The second applicant responded to this point as follows – that the purpose of service is to inform the other party of the proceedings instituted against them. The fact that the respondents became aware of the proceedings and filed answering papers demonstrated that the purpose of service was achieved.

Counter-application for eviction and cancellation of agreement

[11] In their counter-application, the respondents sought an eviction order on account of the applicant's breach of the rental agreement by failing to pay the agreed rental amount. They further sought an order cancelling the rental agreement. In answer, the second applicant denies the allegation that the first applicant did not pay rent. The second applicant averred in reply to the counter-application that, the first applicant was given until 28 February 2023 to either vacate the rental property or to pay the rental amount. Notwithstanding the deadline, the second applicant avers that

the first applicant was despoiled on 23 February 2023, when the respondents illegally 'locked' up the first applicant's stock.

Decision of the court a quo

[12] The court *a quo* found that it was satisfied that the applicants made out a case for the grant of a spoliation order and dismissed the counter-application. That court particularly found that it was satisfied that the applicants proved peaceful and undisturbed possession and dispossession. It refused to grant the counter-application and reasoned that doing otherwise would render the spoliation order that was granted *brutum fulmen* and ludicrous.

On appeal

Spoliation application

[13] On appeal, the respondents hold that the court *a quo* erred in finding that the applicants were in peaceful and undisturbed possession before the alleged spoliation. Further that the court *a quo* erred in failing to properly and fully consider the right(s) accorded to the respondents in the lease agreement upon failure by the applicants to pay rent. Lastly, that the court *a quo* erred in holding that the applicants made out a case for the grant of *mandament van spolie*. According to the respondents, the applicants did not make out a case as described in *Plascon-Evans*.

Counter-application

[14] As regards the counter-application, the respondents aver that the court *a quo* erred in dismissing the counter-application and for holding that it was impermissible or incompetent to institute a counter-application in *mandament van spolie* proceedings.

Application to summarily dismiss the appeal

[15] The applicants have applied for the summary dismissal of the respondents' appeal on grounds that it is frivolous and vexatious and therefore does not enjoy prospects of success.

[16] Firstly, much of the applicants' founding affidavit in support of this application pertains to events which occurred after the judgment and orders appealed against were delivered. Secondly, the founding affidavit contains irrelevant hearsay material that did not feature in the founding affidavit (spoliation application) in the court *a quo*. In a nutshell, the founding affidavit in support of the present application of the applicants does not address the question, why this court should summarily dismiss the respondents' appeal. The applicants allege that the appeal is an abuse of court process and that the respondents instituted the appeal to frustrate and annoy the applicants.

[17] The respondents were served with this application for the summary dismissal of their appeal on 1 November 2023. They then filed an answering affidavit on 28 November 2023. In terms of rule 6(3), the answering affidavit had to be filed within ten days from the date on which they were served with the application. The answering

affidavit is therefore filed out of time as same was due for filing on 15 November 2023. The belatedly filed answering affidavit is not accompanied by a condonation application, as a result the answering affidavit will be disregarded.

[18] It is rather unfortunate that the lay litigant has kept to the timelines and the party represented by experienced legal practitioners failed to do so. To add insult to injury, no condonation application is filed, despite the second respondent raising this in her replying affidavit, which replying affidavit in any event was not necessary in terms of the rules and on account of the fact that the answering affidavit was filed out of time.

Applicable legal principles and discussion

Summary dismissal of appeal in re spoliation application

[19] Section 14(7)(a)(i) of the Supreme Court Act 15 of 1990 provides that –
'(i) may, in his or her discretion, summarily dismiss the appeal on the grounds that it is frivolous or vexatious or otherwise has no prospects of success; or' [My emphasis]

[20] In *Permanent Secretary of the Judiciary v Somaeb & another*², this Court facing a similar application as this and in determining the meaning of 'frivolous or vexatious or otherwise has no prospects of success' applied the definition given by Hoff, J in *Namibia Seaman and Allied Workers Union v Tunacor Group Ltd*³. In

² *Permanent Secretary of the Judiciary v Somaeb & another* 2018 (3) NR 657 (SC).

³ *Namibia Seaman and Allied Workers Union v Tunacor Group Ltd* 2012 (1) NR 126 LC para 15.

Tunacor Group Ltd, Hoff J had the following to say about the meaning of vexatious or frivolous proceedings:

'In its legal sense, "vexatious" means "frivolous improper": instituted without sufficient ground, to serve solely as an annoyance to the defendant.'⁴ [My emphasis]

[21] To determine whether the appeal is indeed frivolous or vexatious or otherwise has no prospects of success, one would have to consider whether on the papers that served before the court *a quo* and the judgment that followed, the respondents' appeal is without sufficient ground and for the sole purpose of annoying the applicant.

[22] To determine this issue, I will turn to the spoliation application(s) before the court *a quo*.

[23] The underlying, fundamental principle of the remedy of *mandament van spolie* is that no one is allowed to take the law into his own hands and thereby cause a breach of peace. Therefore, 'in a spoliation application the court does not decide what – apart from possession – the rights of the parties to the spoliated property were before the act of spoliation but merely orders that the status *quo* be restored. The onus lies upon the applicant to prove on a balance of probabilities that: [My emphasis]

- (i) he was in peaceful and undisturbed possession of the property in question at the time of the alleged deprivation, and
- (ii) he was unlawfully deprived of such possession.'

⁴ Ibid.

⁵ *Oglodziski v Oglodziski* 1976(4) SA 273 at 247F.

[24] It is true that –

‘(w)hen people commit acts of spoliation by taking the law into their own hands, they must not be disappointed if they find that Courts of law take a serious view of their conduct. The principle of law is: *Spoliatus ante omnia restituendus est*. If this principle means anything, it means that before the Court will allow any enquiry into the ultimate rights of the parties the property which is the subject of the act of spoliation must be restored, to the person from whom it was taken, irrespective of the question as to who is in law entitled to be in possession of such property. The reason for this very drastic and firm rule is plain and obvious. The general maintenance of law and order is of infinitely greater importance than mere rights of particular individuals to recover possession of their property’.⁶

[25] However, the remedy of *mandament van spolie* is not to be had for the asking. The applicants had to, in their application *a quo*, make out a case on the papers (particularly the founding affidavit) for the grant of the application.

[26] Having read and re-read the affidavits in the spoliation application, the requirement of possession of the premises by the applicant is not in issue. The respondents did not, in their answering affidavit to the spoliation application take issue with the fact the first applicant or that both applicants were in peaceful and undisturbed possession of the property in question.

⁶ *Greyling v Estate Pretorius* 1947 (3) SA 514 (W) at 516 – 517.

[27] What the respondents took issue with was that the applicant did not in her founding affidavit (in support of the spoliation application) allege in specific detail how they were despoiled, save for the allegation that they (the two applicants) were 'illegally evicted by the respondent (*sic*) and their legal practitioners'. In any event, the first respondent both on his own behalf as well as on behalf of the second respondent firstly, denied having acted illegally or having instructed their legal representatives to act illegally. Secondly, the second respondent denied that his legal representatives acted unlawfully or illegally.

[28] In her replying affidavit and in response to the point taken by the respondents, the second applicant simply responded that the '. . . specific conduct that the respondents had carried out and which conduct would amount to an illegal eviction are fully cited in the applicants' founding affidavit . . .'.⁷

[29] On the papers before the court *a quo*, as regards the spoliation application, that applicants took possession of the leased premises is not in question. However, what the respondents raised as a point *in limine* and which point, I am of the considered view, the court *a quo* did not interrogate sufficiently or at all is this – whether the applicants' made out a case on the papers, particularly on the founding affidavit for dispossession.

[30] The second applicant did no more than allege that the 'respondent(s) and their legal practitioners' illegally evicted them. It is not clear what exactly happened and

⁷ Page 54 of the annexures bundle.

whether that specific conduct (if it had been alleged) would have constituted illegal eviction and therefore would constitute dispossession. This point should have been interrogated by the court *a quo*, but this was not done. It is not clear to my mind, on what ground the court *a quo* found as it did, that dispossession and therefore the second leg of the test in a spoliation application was satisfied. Snippets of the missing details could doubtless be found in the papers in support of the counter-application of the respondents, but that could certainly not be read into the papers in support of the spoliation application, which is an entirely different application from the counter-application for eviction.

[31] As Van Winsen *et al* so crisply summarised –

‘The general rule, however, which has been laid down repeatedly is that applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavit any fortifying paragraphs in his replying affidavit will be struck out’.⁸

⁸ L De Villiers Van Winsen, J P G Eksteen and A C Cilliers *Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa* 3 ed (1979) at 80. See also A C Cilliers, C Loots and H C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5 ed (2009) at 440.

[32] On the papers before the court *a quo*, I am of the considered view that the applicant had not, on a balance of probabilities, made out a case for dispossession, even less for unlawful dispossession.

[33] On this score therefor, I am of the considered view that the respondents' appeal is not frivolous nor vexatious and has merits which could possibly tilt the scale of justice in their favour on appeal. There are therefore prospects of success.

[34] I am fortified in this finding further because, the founding affidavit in support of the present application is replete with hearsay and in no way, albeit even remotely, attempts to demonstrate why the respondents' appeal will fail in due course and may as well be summarily dismissed. In the same breath I note that the applicants are unrepresented, but even so, they are litigants before this court and the requirements of the law need to be fulfilled. This, the applicants' failed to do. In any event, the founding affidavit for the present application is primarily based on events subsequent to the orders and judgment appealed against by the respondents. The allegations pertaining to these subsequent events are not even confirmed by the family members of the second applicant whom second applicant refers to. Even if such confirmatory affidavits were attached, I cannot fathom how they or the allegations in the affidavit could justify an order for summary dismissal of the respondents' appeal. They in my view, would not change the fact that the court *a quo* was presented with a skeleton case in the founding affidavit.

[35] Chitapi J reasoned in *Overflow Zone Enterprises (Pvt) Ltd v Owden Nhimura & others* HH 166-22 HC 8108/17, delivered on 16 March 2022, as follows –:

‘A party that pleads forced dispossession by another party must set out the details of the spoliation. This is a matter of fact. The applicant cursorily glossed over the details of the alleged acts of spoliation. In the founding affidavit, the applicant in para(s) 1-15 and 1-17 simply alleged a spoliation by the respondent on 28 August, 2017 without going into details thereof. The act of spoliation should be described in detail as it occurred and the conduct or actions of each spoliator set out. One way of looking at the requirement to link the conduct of alleged spoliator to the spoliation is to ask the question, “what did the spoliator do in carrying the commission of the spoliation?” in the listed para(s) the applicant simply alleged that the first, second and third respondent unlawfully deprived the applicant of possession and that the law did not allow the taking of possession of the stands without the consent of the applicant. The supporting affidavit of Macline Chandakasarira lacks detail of how the alleged spoliation was committed and thus it is unhelpful to the applicant’s cause. . . [My emphasis]

In casu, the applicant was its own worst enemy. It was coy with facts and did not go into specific detail in relation to how it claims to be in possession of the property and how the alleged spoliation unfolded. Under the circumstances were it a trial cause, the applicant’s case would have qualified for absolution from the instance. In casu, there is insufficiency of evidence and a failure to establish the factors which are necessary to prove a spoliation cause on a balance of probabilities. I do not find any cogent reason to depart from the general rule that costs follow the event. The following order ensues.’

[36] I could not agree more with the reasoning in *Overflow Zone Enterprises (Pvt) Ltd* and associate myself with same.

Appeal against counter-application

[37] In essence the respondents also are appealing against the court *a quo*'s decision not to grant the counter-application for the eviction of the applicants. The applicants' notice of motion however simply prays for the dismissal of the appeal and the appeal referred to includes the appeal against the order in respect of the counter-application.

[38] I will therefore briefly consider the counter-application out of an abundance of caution. Needless to say, the applicants say nothing in their application on the aspect of the counter-application.

[39] The court *a quo* reasoned that, granting the counter-application will render the spoliation order it granted, *brutum fulmen* and ludicrous. I now proceed to consider whether the applicants have made out a case for the summary dismissal of the appeal against the dismissal of the counter-application.

[40] In *Willowvale Estates CC & another v Bryanmore Estates Ltd*⁹ the following was said –:

⁹ *Willowvale Estates CC & another v Bryanmore Estates Ltd* 1990 (3) SA 954.

'The principle enunciated in Burger's case supra and the other authorities to which I have referred is not based upon any Rule of Court; it is that a spoliation must be adjudicated upon ante omnia and thus speedily. Speedy relief is given upon the simple facts of possession and dispossession. This involves, or should involve, short affidavits filed expeditiously on those very limited issues. If a counter-application is permissible the affidavits immediately become prolix and many other issues may be introduced, as they certainly have been in the present proceedings. This would not have occurred if the counter-application had been contained in a separate application with, if needs be, the incorporation therein of the allegations made in the spoliation application. . . . In my view, by virtue of the very nature of a spoliation application, a counter-application should not be countenanced'¹⁰

[41] I agree with the court *a quo* that it would have been pointless to grant an eviction order right after granting a spoliation order. Such an order would truly have been *brutum fulmen*. The very nature of a spoliation application cannot in my view accommodate within the same proceedings an application which will require an inquiry into rights held in the property if any.

[42] It is clear from the above cited passage from *Willowvale Estates CC & another v Bryanmore Estates Ltd* that a counter-application is impermissible in a spoliation application. The very nature of a spoliation application is that it is urgent in nature and should be disposed speedily. On that score, the court *a quo* was justified in not entertaining the counter-application.

[43] The application for summary dismissal in respect of the counter-application could if canvassed in the applicants' papers have succeeded, but in order to prevent

¹⁰ Ibid at 961.

a piecemeal determination of the appeal and particularly because the applicant did not even address the issue in her application for summary dismissal, it is only reasonable for this issue to be heard together with the appeal against the order in respect of the spoliation application.

[44] In the result, it is ordered that:

1. This application is dismissed.
2. There is no order as to costs.
3. The registrar of this Court must comply with s 14(7)(c).

MAINGA JA

REPRESENTATION

First & Second Applicants/ Respondents: In Person

First & Second Respondents/ Appellants: Sisa Namandje & Co. Inc.