



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

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|------------------------------------|-------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE | |
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED |
| DATE: | 23/7/2019 |
| SIGNATURE: | <i>[Handwritten Signature]</i> |

Case No. 50134/2019

In the matter between:

YUEN FAN LAU

APPLICANT

And

REAL TIME INVESTMENTS 165 CC

RESPONDENT

JUDGMENT

MILLAR, A J

1. It is common cause that the applicant is a commercial tenant of shop premises situated in a building owned by the respondent. There is a written lease. The applicant leased the premises to operate an internet café. On 3 June 2019, the electricity supply to the premises was disconnected by the respondent as a result of a dispute regarding the manner in which the respondent was billing the applicant for this. The applicant attended the premises that day and realizing that without electricity she would be unable to open for trade with the public locked the premises and left.
2. Sometime thereafter the respondent, without any court order authorizing it to do so, changed the locks to the premises and in so doing deprived the applicant of access to and possession of the premises. The applicant discovered this on 20 June 2019. Following this discovery attempts were made to regain access and possession and to resolve a dispute between the parties relating to the applicant's electricity account, without resorting to court action. In consequence of these failed attempts, the applicant has now brought an application by way of urgency for a *mandament van spolie*.
3. The relief sought by the applicant is in the main aimed at the restoration of access and possession. The applicant also seeks an order, in the alternative, that the electricity supply also be restored.
4. The respondent did not file any affidavit in the matter and elected instead, to give notice of its intention to raise various point of law¹. The respondent's challenge to the application was firstly technical, in respect of urgency and non-compliance with the practice directives

¹ In terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court

of this court and secondly on the basis that the applicant had failed to make out a case for the relief sought.

5. In order to establish the right to claim a mandament van spolie, the applicant needs to demonstrate that firstly she was in peaceful and undisturbed possession and secondly that she was unlawfully deprived of that possession².

6. It was held in **Stocks Housing (Cape) (Pty) Ltd v Executive Director, Department of Education and Culture Services, and Others**³ that:

"The element of unlawfulness of the dispossession which has to be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft, but in all cases spoliation is unlawful when the dispossession was without consent of the person deprived of possession, since consent to the giving up of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the dispossession."

7. It is not disputed that the applicant was in possession of the premises or that she was dispossessed by the respondent. It is furthermore not in issue that the applicant did not consent to being dispossessed or that the respondent did not obtain a court order authorizing the dispossession.

² Yekiso v Qana 1973 (4) SA 735 (A) and Knox v Second Lifestyle Properties (Pty) LTD [2012] ZAGPPHC 223² (11 October 2012)

³ 1996 (4) SA 231 (C) at 240B-D

8. The respondent argued that the order sought by the applicant was not one for the granting of a mandament van spolie but rather for the enforcement of her rights in terms of the lease agreement. This argument is misplaced. The applicant was in possession of the premises at the time that the respondent dispossessed her and so the order sought is for the restoration of possession, not for the enforcement of any of the rights which she has or may have in terms of the lease.⁴
9. In *Naidoo v Moodley*⁵ a full court of this division held that: “ *the use of electricity was an incident of occupation which the respondent had*” and “*by cutting off the electricity appellant had substantially interfered with the respondent’s occupation and had performed an act of spoliation.*”
10. The respondent in the present matter thus committed two separate acts of spoliation – the first when it disconnected the electricity supply and the second when it changed the locks to the premises. The first act of spoliation had the effect of denying the applicant the use of the premises – a limitation of her rights as a possessor, but it was the second act which dispossessed her entirely.
11. The respondent argued that the application was not urgent given the passage of one and a half months from when the electricity supply was disconnected at the beginning of June until the application papers were issued on 15 July 2019. This overlooks the fact that the applicant only became aware of the dispossession *in toto* on 20 June 2019 and thereafter attempted to resolve the matter without resort to court. I am satisfied that the matter is urgent.

⁴ *Kotze v Pretorius* 1971 (4) SA 231 (NC)

⁵ 1982 (4) SA 82 (T) at 83A, see also *Froman v Herbmere Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W)

12. The respondent argued that given the amounts involved, the applicant should in any event not have brought this application in this court but should have brought it in the Magistrates Court. The decision to bring proceedings in a particular court is one which is made by the litigant having regard to all the circumstances of the matter. Each case is determined on its own facts.
13. The respondent was given an opportunity to resolve the matter and declined to do so. This court has inherent jurisdiction to deal with matters such as the present one, subject of course to costs which is a discretionary matter. I find that the applicant was entitled to bring this application in this court and that she is entitled to an order for costs. I am not satisfied that a punitive order for costs should be granted.
14. Having considered the matter in totality I am satisfied that the applicant is entitled to the order sought and is furthermore entitled to her costs.
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15. In the circumstances I make the following order:
- 15.1 The applicant's possession of the Internet Café at the Constantia Park Ridge Shopping Centre located at 546 Douglas Scholtz Street; Constantia Park is to be restored.
- 15.2 The respondent and/or its directors or employees are ordered to forthwith remove all chains or locks preventing access to the Internet Café by the applicant.
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- 15.3 The respondent is ordered to immediately restore the electricity supply to the Internet Café.
- 15.4 The respondent is ordered to pay the costs of this application.



**A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 23 JULY 2019

JUDGMENT DELIVERED ON: 23 JULY 2019

COUNSEL FOR THE APPLICANT: ADV. H WORTHINGTON

INSTRUCTED BY: COETZEE ATTORNEYS

REFERENCE: MR B CILLIERS

COUNSEL FOR THE RESPONDENT: ADV. J LE ROUX

INSTRUCTED BY: JACQUES CLASSEN ATTORNEYS

REFERENCE: MR J CLASSEN
