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| Reportable: | YES / NO |
| Circulate to Judges: | YES / NO |
| Circulate to Regional Magistrates: | YES / NO |
| Circulate to Magistrates: | YES / NO |

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

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| Case Number: | 610/2024 |
| Date Heard: | 15 March 2024 |
| Date Delivered: | 5 April 2024 |

In the matter between:

MORIBE TOMBSTONES (PTY) LTD

APPLICANT

and

THE SHERIFF BALJU (KURUMAN)
MORIBE ATTORNEYS
DE WAAL GROBBELAAR & FISCHER ATTORNEYS

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

Coram: Tyuthuza AJ

JUDGMENT

Tyuthuza AJ

INTRODUCTION

1. The applicant launched this urgent application on 7 March 2024 wherein the applicant was granted interim relief in the form of a rule *nisi* stipulating:
 - 1.1 *“That the First Respondent release all goods attached and removed at the Applicant’s address of 16 Seodin Road, Kuruman, 8460 on 05 March 2024, inter alia, a compressor into the Applicant’s possession.*
 - 1.2 *That the Respondents are interdicted and prohibited from proceeding with the sale of the attached and removed goods and/or any other goods in the possession of the First Respondent belonging to the Applicant on 08 March 2024;*
 - 1.3 *That the First Respondent bear all costs relating to the removal and return of the goods forcibly removed and possessed on 05 March 2024 at 16 Seodin Road, Kuruman, 8460;*
 - 1.4 *That the First Respondent pay costs on an attorney and own client scale for this application.”*
2. The return day of the rule *nisi* was 15 March 2024, and I had to determine if the applicant satisfies the requirements for a final order. The first respondent, the Sheriff, who executed the warrant of execution, opposed the application.
3. The first respondent raised a point *in limine* in relation to the urgency of this application.
4. The applicant essentially sought a *mandament van spolie* for the return of its goods which were attached and removed by the Sheriff on 06 March 2024 and further to interdict an auction for the sale of the goods on 08 March 2024.

BACKGROUND

5. From the evidence it is to be gleaned that on 8 December 2022, judgment was granted against the second respondent (Moribe Attorneys (Pty) Ltd) under case number 368/2022 in the Kuruman Magistrates Court. The court thereafter issued a warrant of execution against the goods of the second respondent on 31 January 2023, which goods were attached by the first respondent on 10 February 2023. The warrant of execution was re-issued on 17 October 2023 and the Sheriff attached the goods on 20 November 2023.

The second respondent was informed on 14 February 2024 that the Sheriff was instructed to proceed with the removal of the goods and that the auction would take place on 08 March 2024. The auction was advertised in the local newspaper on 15 February 2024 and 22 February 2024. On 04 March 2024, the Sheriff again attended at the second respondent's office and advised that the auction was scheduled for 08 March 2024. The applicant informed the third respondent (De Waal Grobbelaar & Fischer Attorneys) that the property belonged to the applicant and requested the third respondent to provide an undertaking that the property would not be removed. No such undertaking was forthcoming. On 06 March 2024, the Sheriff removed the property housed at 16 Seodin Road, Kuruman.

6. The applicant launches this application in its capacity as the 'owner of the goods' which were judicially attached and removed. It is the applicant's case that the Sheriff was not authorised by a court order or empowering provision to attach the goods and unlawfully dispossessed the applicant of its goods. The applicant avers that the Sheriff was obliged in terms of the warrant of execution to remove goods from 6 Seodin Road Kuruman and not 16 Seodin Road Kuruman, and as a result thereof the Sheriff removed goods from the wrong address, goods which belonged to the applicant and not the second respondent.
7. The warrant of execution issued in January 2023 reflects the address of the second respondent as 6 Seodin Road, Kuruman, whilst on the return of service of the warrant of execution, the address is reflected as 16 Seodin Road Kuruman. It is now common cause that the second respondent operates its business from 16 Seodin Road Kuruman. This address is also the principal address of the applicant and the address wherefrom the applicant operates its business. The applicant contends that by virtue of a subletting agreement, the second respondent is leasing the premises together with all the furniture at 16 Seodin Road from the applicant. The applicant avers that the Sheriff exceeded his powers in that there was no court order authorising him to attach and remove goods from 16 Seodin Street. He was only entitled to execute in terms of the re-issued warrant at 6 Seodin Street.

8. The first respondent alleges that despite being aware of the attachment of goods since at least 06 March 2023, Mr Moribe, who is the sole director of both the applicant and the second respondent, never indicated that the goods attached on 10 February 2023 and 2 November 2023 actually belonged to the applicant. It was further contended that the applicant failed to take any steps in terms of rule 44(2)(a) of the Magistrates' Courts Rules to claim ownership of the goods. The first respondent disputes that he acted unlawfully in the removal of the goods and alleges that he complied with the requirements of Rule 41 of the Magistrates' Courts Rules.

LAW

9. Rule 41 (3) of the Magistrates' Courts Rules provides as follows:

When the sheriff is instructed, by any court process, to recover any sum of money by execution against the goods of any person, the sheriff shall proceed forthwith to the residence, place of employment or business of such person, unless the execution creditor or the instructing attorney gives different instructions regarding the location of the assets to be attached, and there—

- (a) *demand satisfaction of the warrant and, failing satisfaction;*
- (b) *demand that so much movable and disposable property be pointed out as the sheriff may deem sufficient to satisfy the said warrant, and failing such pointing out;*
- (c) *search for such property.” (own emphasis)*

10. In the matter *Wilken and Others NNO v Reichenberg*¹ Goldstein J, in response to the submission that rule 45(3) of the Uniform Rules of Court requires service of a writ to occur at the dwelling-house or place of employment or business of the judgment debtor, stated the following:

“In my view, it could not possibly have been the intention of the Rule to disallow personal service in circumstances where the debtor was not at his home or at his place of employment or business. What the Rule allows is service at such places in the absence of the debtor. The Rule even allows service at some other location if the assets to be attached are there and presumably if the debtor is not. It would be absurd, however, to deduce from these provisions that the best of all service, namely personal service, was being sanctioned only if the debtor was at one of the places mentioned in the Rule and was otherwise not to be permitted. If this were so a debtor attempting to evade his creditor and having left all addresses known to the latter could not be served with a writ under Rule 45(3) if he were found staying temporarily in an hotel as the respondent says was the case with himself. It would require very clear

¹ 1999 (1) SA 852 (W) at p 859

language for me to be persuaded that this was the intention of the Rulemaker.” (own emphasis)

11. In terms of Rule 44(2)(a) of the Magistrates’ Courts Rules:

“Where any person other than the execution debtor (hereinafter in this sub-rule referred to as the “claimant”) makes any claim to or in respect of property attached by the sheriff in execution of any process of the court or where any such claimant makes any claim to the proceeds of property so attached and sold in execution the sheriff shall require from such claimant to lodge an affidavit in triplicate with the sheriff within 10 days from the date on which such claim is made, setting out—...”

ANALYSIS

12. The applicant has conceded in its founding affidavit that the second respondent conducts its business from 16 Seodin Road Kuruman. I find no merit in the applicant’s case that the removal of the goods was contrary to the law on the basis that the goods were not removed from 6 Seodin Street as per the warrant of execution. It is clear that the second respondent conducts its business at 16 Seodin Street, thus the Sheriff was authorised in terms of the law to execute on the goods at the business address of the second respondent. The empowering provisions of Rule 41 make it clear that the Sheriff was entitled to execute the warrant at the business of the second respondent, alternatively, at any other location so instructed by the third respondent.
13. It was submitted and argued on behalf of the applicant that the applicant seeks a spoliation remedy, but this was not very clear in the applicant’s papers, as the applicant based its claim on its alleged ownership of the goods and not possession of the goods. The applicant’s reliance on spoliation only became clear in its replying affidavit and heads of argument.
14. The first respondent understood the applicant’s case to be based on *rei vindicatio*. It was contended that it was clear from the founding affidavit that the applicant was claiming for the return of the goods in terms of *rei vindicatio* and had not made out a case for spoliation. The first respondent argued that

the applicant had failed to make out a case for *rei vindicatio* and even if the applicant's case was based on spoliation, the applicant has failed to prove such a case.

15. The *mandament van spolie* and *rei vindicatio* are distinguishable. It is not often that these remedies are mentioned by name in a notice of motion. However, it is from what is pleaded and from the factual evidence in the affidavits which distinguishes the one from the other.²
16. It is trite that the *mandament van spolie* primarily seeks to prevent individuals from taking the law into their hands. It prevents the unlawful dispossession of property without consent, a court order or any other legal basis. It is about protecting and restoring peaceful and undisturbed possession before the merits of the case can be considered. Therefore, there must be actual possession and actual unlawful dispossession of the property.³
17. The court held in ***Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd*** 2013 (5) SA 521 (WCC), thus:

“The mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned, and the unlawful despoilment thereof are all that an applicant for a mandament van spolie has to show”.
18. It is trite that mere possession is essential in the case of the *mandament van spolie*. On the applicant's own version, the possession of the goods rested in the second respondent and not the applicant. Furthermore, it is clear from the warrant of execution that the goods were judicially attached and removed from the second respondent's possession in terms of the court order granted in December 2022.

² *Motlhasi v Standard Bank of South Africa* (5460/22) [2022] ZAGPPHC 488 (4 July 2022); [2022] JOL 54701 (GP) para 19

³ *City of Ekurhuleni Metropolitan Municipality v Unknown Individuals Trespassing and/or Attempting to Invade and/or Settle on the Immovable Property Described as Farm Rietfontein 153 (and also known as Palm Ridge Extensions 10, 18–30) and others* [2023] 2 All SA 670 (GJ)

19. The applicant has, on the facts, failed to prove that it was in possession of the goods on 06 March 2024 and that there was unlawful deprivation of its possession. This remedy focuses on protecting possession and not ownership. The applicant therefore cannot succeed on the grounds of spoliation.
20. The *rei vindicatio* is based on ownership of the property. It is about restoring ownership of the property, which is in existence and is identifiable and which is in possession of a third party. These facts must exist when the application is launched. In **Chetty v Naidoo**⁴, the legal position in relation to what is expected of an owner relying on this remedy is as follows:

“It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res --- the onus being on the defendant to allege and establish any right to continue to hold against the owner.”

21. The applicant’s ownership was put into dispute and despite being requested to provide proof that the goods belonged to it, the applicant failed to do so. In order to succeed with the remedy, the applicant ought to have proved that (a) it was the owner of the goods removed on 06 March 2024; (b) that the Sheriff was in possession of the goods at the time of the commencement of the application; and (c) that the goods in question are still in existence and clearly identifiable. Despite the fact that it was proved that the Sheriff was in possession of the goods on 07 March 2024 when the application was launched and that the goods are still in existence and clearly identifiable, the applicant has failed to prove that the goods removed from the premises on 06 March 2024 is the property of Moribe Tombstones (Pty) Ltd. On this basis, I find that the applicant has failed to make out a case based on *rei vindicatio*.

URGENCY

⁴ 1974 (3) SA 13 (A) 20 B-C

22. It is trite that our law recognises spoliation applications to have an element of inherent urgency.

“That inherent urgency underlies a claim for the return of property (a vindication claim) is inferred from the importance our law attributes to this remedy. Firstly, in a claim for vindication our law factually presume that the owner will suffer harm if an interdict is not granted. Secondly, the judgment of Chetty v Naidoo has confirmed that ‘it is inherent in the nature of ownership that possession of the res should normally be with the owner. . . . Our law supports an approach that in respect of a claim where a litigant pursues vindication then the proceedings always have an element of inherent urgency to it. Particularly in circumstances where the applicant complies with the legal requirements for a right of vindication and the respondent offers defences that does not defeat the heart of the vindication claim.’⁵

23. The first respondent contends that the application is not urgent in that the applicant was aware of the attachment of the goods and the intention to sell the goods at a sale in execution since at least 06 March 2023, alternatively, 19 May 2023. The first respondent argues that the applicant launched this urgent application approximately ten months after the seizure and furthermore, the applicant never informed the Sheriff on 06 March 2024 that the property belonged to the applicant. It was further contended that the applicant failed to take any steps to set aside the judgment of 06 March 2023. The first respondent takes the view that the urgency is self-created.
24. I find the matter to be urgent. I am of the view that if the matter was not heard on an urgent basis, the applicant would not have been afforded substantial redress at a hearing in due course because the auction was to be held on 08 March 2024, the day before the application was launched.

INTERDICT

25. The applicant must satisfy the following requirements before the grant of a final Interdict:
- a) a clear right;
 - b) an injury actually committed or reasonably apprehended; and
 - c) the absence of similar protection by any other ordinary remedy.

⁵ *Jacobs v Mostert* (16942/2021) [2021] ZAWCHC 213 (25 October 2021) para 14-15

26. Whether that right is clear is a matter of evidence. In order therefore to establish a clear right, the applicants have to prove on a balance of probability, facts which in terms of substantive law establish the right relied on.⁶
27. In my view, the applicant failed to establish that it had a clear right to the goods removed from the premises on 06 March 2024. The *onus* was on the applicant to prove that it was in possession of the goods or alternatively that the applicant was the owner of the goods. The applicant has failed to do so.

As a result, I make the following order:

1. The *rule nisi* issued on 07 March 2024 is discharged with costs.



TYUTHUZA, T
ACTING JUDGE, HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES

On behalf of Applicant:
Instructed by:

Adv J Mongala
Moribe Attorneys

On behalf of First Respondent:
Instructed by:

Adv AS Sieberhagen
De Waal Grobbelaar & Fischer Inc.

⁶ LAWSA Vol. 11, 2nd Ed. 397.; see also *Hartland Lifestyle Estate (Pty) Ltd and another v APC Marketing (Pty) Ltd and another* [2023] JOL 59643 (WCC) para 40