

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 2102/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ZANDER BURGER PROPERTIES (PTY) LTD

Applicant

and

GRACEFUL BLESSINGS (PTY) LTD

Respondent

HEARD ON: 02 JUNE 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 25 July 2022.

[1] On 11 May 2022 this matter served before me as an urgent application in terms of which the applicant sought an order directing the respondent to restore the occupation and possession of a business office including a safe and a filing room situated at 54 Louw Wepper street, Dan Pienaar, Bloemfontein (“the premises”) to the applicant together with the keys on the grounds that the applicant was despoiled of possession of the premises.

[2] The respondent opposed the application. By concurrence of both parties, the application was postponed to 2 June 2022 for hearing on the opposed roll. The applicant was granted leave to file its replying affidavit.

[3] At the commencement of the hearing, I was informed that the urgency of the application had fallen away, the only issue which remained to be determined was the merits of the application.

[4] The salient background facts giving rise to this application are generally common cause: The respondent is the owner of the premises. On 27 February 2020 the parties concluded a lease agreement in terms of which the respondent let the premises to the applicant from 1 February 2020 to 31 May 2024. During March 2021, the applicant breached the lease agreement by failing to pay rentals. On 4 November 2021 the respondent served the applicant with a notice of cancellation of the lease agreement and thereafter on 6 May 2022 gave the applicant notice that the locks of the premises have been changed.

[5] In the founding affidavit the applicant disputes the validity of the cancellation and insists that the lease agreement¹ is extant. The applicant states that prior to 6 May 2022 the applicant was in peaceful and undisturbed possession of the premises. The respondent had no valid reasons to cancel the lease and deprive the applicant the peaceful and undisturbed possession of the premises. The respondent must therefore show justification for depriving the applicant peaceful and undisturbed possession.

¹ The copy of the lease agreement is attached on the founding affidavit as Annexure “ZB1.”

[6] The respondent opposes the application on the grounds that the applicant is not entitled to the relief sought in that: in the founding affidavit the applicant alleges that its occupation of the premises arises from a lease agreement, the applicant is thus claiming specific performance of the lease agreement which is beyond the scope of Mandament van Spolie. The applicant also seeks a final interdict whereas the requirements for a final interdict have not been established.

[7] In response to the applicant's invitation to furnish reasons justifying the dispossession, it is the respondent's case that the lease was cancelled on 4 November 2021 pursuant to the applicant's breach of the terms of the lease by failing to pay the rentals despite demand. Except to dispute the validity of the cancellation the applicant failed to rectify the breach with the result that the respondent invoked the provisions of clause 18² of the lease agreement which entitles the respondent to take possession of the premises after cancelling the lease. The applicant was duly informed on 6 May 2022 that the locks of the premises would be changed³ therefore, the applicant has no contractual right to remain in the premises. The application must be dismissed with a punitive cost order.

[8] The requirements to be proven by the applicant in order to succeed with this application are trite. The applicant must allege and prove prior possession and that it was deprived of that possession unlawfully or against its will: *Yeko v Qana* **1973 (4) SA 735** (A) at 739E-F; *Lawsa* 2nd edition, 2014 at 113 para 108 and *Blendrite (Pty) Ltd and Another v Moonisami and Another* **Case no 227/2020 [2021] ZASCA 77** (10 June 2021).

² Clause 18 provides thus: "Should the LESSEE fails, neglects or refuses to pay any rent and/or other monies herein stipulated within SEVEN days of the date on which payment is due...the LESSOR shall be entitled, notwithstanding any prior waiver, extension or condonation and without prejudice to any other rights the LESSOR may have hereunder, immediately and without prejudice to any other rights and remedies, to give the tenant notice, in in the manner set forth in Clause (14) of this Lease Agreement, specifying the default complained of and if the tenant fails to rectify the default so complained of within SEVEN days of receiving such notice, or should the LESSEE or sub-lessee consistently breach any one or more of the terms of this Lease in such a manner as to justify the LESSOR in holding that the LESSEE'S conduct is inconsistent with the LESSEE'S intention or ability to carry out the terms of this Lease, the LESSOR shall have the right to cancel this contract by written notice sent to the LESSEE by the LESSOR..."

³ Annexures "A01.1, to "A01.3" of the respondent's answering affidavit are copies of a series of correspondences between the parties' legal representatives including letters of demand, the notice of cancellation of the lease and of the change of locks of the premises.

[9] With regard to possession, it is not disputed that the applicant was in possession of the premises until the respondent changed the locks. The mere fact of possession generates a right which is generally referred to as the *jus possessionis*, the applicant's legal right to possess the premises is irrelevant to a claim for spoliatory relief. See *Sithole v Native Resettlement Board* **1959 (4) SA 115** (W) at 117C-G; *Ngqukumba v Minister of Safety and Security and others* **2014 (2) SACR 325** CC at para 10.

[10] In this matter, the applicant has however gone further and alleged a substantive right to occupy the premises based on the lease agreement and implored the respondent to provide reasons justifying the dispossession.

[11] In *Street Pole Ads Durban (Pty) Ltd & Another v Ethekwini Municipality* **2008 (5) SA 290** (SCA) at para 15 it was held that:

"... good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case, 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims'. This is because such an applicant 'in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered."

[12] The court is thus behoved to also consider the issues raised by the respondent relating to the lawfulness of the possession when considering the ordinary requirements of possession and unlawful deprivation of possession.

[13] According to the respondent, in terms of clause 8 of the lease agreement the applicant agreed that in the event of default the respondent would be entitled to take possession of the premises simply based on the cancellation of the agreement.

[14] It was argued by counsel for the respondent that parties are entitled to contractually agree to forfeit their rights to property and to bolster his argument he relied on *Van Rooyen v Hillandale Homeowners Association* **(1603/2014) [ZAFSHC 226]** (11 December 2014) where Moeng AJ held that the respondent's conduct in limiting the applicant's right to purchase pre-paid water and electricity did not amount to spoliation as it was in line with the provisions of the estate rules and the agreement entered into by the parties.

[15] I do not agree with the respondent's contentions. The reliance on *Van Rooyen* is misplaced as the facts in that matter are clearly distinguishable from the facts of this case. See paragraph 37 thereof where the court held that:

"It is common cause that in terms of proclamation 16 of 2004, the Estate was declared a township in terms of section 14(1) of the Townships Ordinance of 1969 and authority was granted to respondent, as a company in terms of section 21 of the Companies Act, to govern the township. Its administration of the Estate should logically be in accordance with national and provincial legislation as provided for in the Constitution. The trust, by its ownership of the erf is a member of the respondent and is bound by its rules. The applicant, as occupant and lessee is likewise bound by the rules. The provisions of rule 13.11 of the Manual for Community Participation and paragraph 10.3 of the water and electricity provision agreement, falls squarely within the Constitution of the respondent and is therefore binding on both the trust and the applicant. One of the conditions of title agreed upon by the trust, and registered against the title of the property, were that the trust would be bound by the statutes and rules of the respondent. This position therefore differs from illegal clauses in lease agreements wherein a lessee consents to the termination of the supply of his water and electricity (my underlining).

[16] The lease agreement, specifically clause 18 does not grant the respondent a right to change the locks of the premises thereby evicting the applicant from the premises without recourse to law. See *La Familia Street Culture (Pty) Ltd v Amber Brand Investments (Pty) Ltd* **[2019] ZAGPJHC 520** at paras 20-21 the court stated that:

“[20] In the present matter the respondent has not denied the allegation of dispossessing the applicant of the premises. It sought to justify its action on the basis that the applicant was in arrears in payment of the rental and that it issued a notice of termination of the lease agreement.

[21] There are two ways in the circumstances of this case through which the respondent could have obtained possession of the premises. The first is by way of consent by the Applicant. And the second is by way of an eviction order. The Respondent did none of these. It decides to take the law into its hands by locking the premises and thus taking possession from the Applicant in an unlawful manner.”

[17] It is my view that such a clause would in any event be in direct conflict with the fundamental principle of Mandament van Spolie that no one is entitled to take the law into their own hands and enforce their rights without legal process.

[18] I don't regard the relief sought in prayer 2.2. as an interdictory relief which goes beyond the scope of mandament but an adjunct relief to the necessary restoration of the occupation and possession of the premises to the applicant.

[19] It is for these reasons above that I conclude that the applicant has succeeded in establishing that it was in peaceful and undisturbed possession of the premises and that it was unlawfully deprived of that possession. There is no reason why the costs should not follow the result.

[20] I accordingly make the following order:

1. The application for a Mandament van Spolie in terms of paragraphs 2.1 to 2.2 of the notice of motion is granted;
2. The respondent to pay the costs of this application.

APPEARANCES:

Counsel on behalf of Applicants:

Instructed by:

Adv. C.J. Hendricks

Gouws Virtue Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondent:

Instructed by:

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