IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D3502/2020

In the matter between:

SHAKILA KASI	**Applicant**
and	
ZACHARIAS PATINIOS	**First Respondent**
MANTIS PROPERTIES CC	**Second Respondent**

This judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 24 July 2020.

ORDER

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1. The application for an interdict in paragraph 1.2 of the notice of motion is dismissed;
2. The application for a mandament van spolie in terms of paragraphs 1.3 to 1.5 is granted;
3. The second respondent is directed to pay the applicant's costs, such costs limited to the day of the opposed hearing.

JUDGMENT

Chetty J:

[1] The applicant launched an urgent application on 5 June 2020 for an order directing the respondents, in their capacity as the entities responsible for the management of the Lakeside Mall, 6 Mark Strasse, Richards Bay ('the premises') to remove padlocks used to lock the applicant out of her business premises at shop

15A, from which she operated a food outlet known as Kasi's Flame Grilled Chicken. The applicant contends that she was allegedly despoiled from the premises on 22 May 2020.

[2] In addition, the applicant sought a final interdict restraining the respondents from unlawfully removing, selling or alienating any of the applicant's stock in trade, including appliances, foodstuff, equipment and furniture on the premises. An order was also sought to interdict the removal of shop signage affixed to the exterior and interior of the applicant's trading premises at the shopping centre.

[3] The matter was brought on less than 24 hours' notice to the respondents who, notwithstanding, were represented by counsel on 5 June 2020. The matter was adjourned to 9 June 2020 with the respondents being afforded an opportunity of delivering their opposing affidavits, together with an undertaking that they would not remove anything further from the applicant's business premises pending the return date of the application. It was then agreed that the matter would be argued on 12 June 2020 at which time it was accepted that the undertaking given by the respondents would remain in place until the finalisation of the application.

[4] Although the applicant initially sought relief in the form of a rule *nisi*, counsel indicated that the applicant was seeking a final interdict, as both parties had been afforded the opportunity of filing papers. The respondents brought an interlocutory application to file a further set of affidavits from persons claiming to have witnessed attempts by the applicant to remove certain property from the leased premises on the evening of 22 May 2020, in breach of the landlord's hypothec which had been granted the day before. When the matter came before me, Ms de Vos who appeared for the respondents, made no mention of these affidavits. In light of the eventual conclusion that I reach in this judgment, the admission of these documents would not have altered that position. The respondents were not prejudiced insofar as no ruling was made in regard to the further affidavits.

[5] The facts giving rise to the application are briefly that the applicant concluded a lease agreement with the second respondent in respect of the leased premises on 21 June 2017. The agreement was to run from 1 July 2017 to 30 June 2020.

Amongst the terms of the agreement, it was specified that the rental would be paid at the beginning of each month. As a result of the crisis caused by the COVID-19 virus and the resultant nationwide lockdown, food outlets like the applicant's business were forced to cease operation. At the same time, they were obliged to continue with their contractual obligations, including payment of rent. The applicant contends that the second respondent granted other lessees in the mall a reduction in rentals, without affording her this opportunity. It is common cause that the applicant did not pay rent for May and June 2020. According to her, on 15 May 2020 the second respondent disconnected the electricity supply to the leased premises, which was reconnected after a demand from her. In her founding affidavit the applicant contends that as a result of a breakdown of negotiations between her store manager and the first respondent, without notice to her, the respondents placed padlocks on the doors to the premises, preventing any of her staff, customers and herself access to the business premises. As will appear from what is set out below, this is hardly a complete picture of what transpired.

[6] A series of exchanges took place between the applicant's and the respondents' attorneys in an attempt to resolve the matter. In response to a demand that the applicant be given access to her shop, the respondents' attorneys advised that they had secured an *ex parte* order in terms of section 32 of the Magistrates' Courts Act 32 of 1944 on 25 May 2020 in the Lower Umfolozi Magistrates' Court, with the approach of the respondents being that they were accordingly not obliged to give the applicant access to the premises.

[7] While locked out from the premises, on 4 June 2020 the applicant received information that employees of the second respondent were in the process of removing items from the premises. The applicant contends that approximately 20% of her stock was removed although there is no basis to verify this. In light of the unlawful removal of her property, the applicant launched the urgent application. No details were provided in the founding affidavit as to the value of the stock left behind in the store or the value of the assets, including furniture and appliances. These only became known in the replying affidavit.

[8] In the short time available to them, the respondents filed their answering affidavit in which Mr Patinios, in his capacity as the managing director of the second respondent, confirmed that padlocks were placed on the premises on 22 May 2020. He contends that the applicant has been less than candid with the court, as she failed to disclose material events leading to the respondents taking the action which they did. Patinios states that the applicant was a 'problematic tenant' who failed to pay her rentals and utility charges timeously, breaching the lease agreement. As at 16 May 2020, according to him, the applicant was in arrears with her rent in the amount of R78 554.23, together with electricity charges of R14 531.25. Matters came to a head around 15 May 2020 when an altercation took place between applicant's brother and a female employee of the second respondent, in which the former allegedly used vulgar language in the argument.

[9] According to Patinios, this led to the applicant expressing her desire to vacate the premises at the end of May 2020. This conclusion is based on an exchange of emails between the applicant and Patinios between 15 and 16 May 2020, and on which the respondents place reliance for the contention that the applicant did not have the necessary mental intention to remain in possession of the leased premises at the time when she was locked out. In this regard, on 15 May 2020 Patinios sent an email to the applicant referring to the incident between her brother and a member of his staff. By all accounts, this was an ugly incident. Patinios reiterated that the applicant was late with her rent payment, and that he had had 'enough of this kind of behaviour'. In response, the applicant disputed the contention that she was a habitual late payer, stating that she was equally frustrated as a tenant and that she too had 'had enough'. On the next day, 16 May 2020, the applicant wrote to Patinios, referring to a discussion between them and records the following:

'As per discussion, with your consent you are cancelling the lease agreement with no damages. . . We will accept that and we will be out of the premises at the end of this month. . . Enough with you'.

[10] Patinios submits that for as long as the applicant was in arrears with her rental, as the landlord of the leased premises and in terms of the lease agreement, the second respondent was lawfully entitled to assert its rights in terms of the landlord's tacit hypothec and prevent the applicant from removing any of her

movable assets from the leased premises. On this basis, the second respondent secured an order in terms of section 32 of the Magistrates' Court Act.

[11] In a joint statement, counsel agreed that the issue for determination was whether a final interdict in terms of paragraph 1.2 of the notice of motion should be granted, in terms of which the respondents are interdicted and restrained from removing the applicant's signage affixed to the outside of the leased premises. The applicant also seeks an order preventing the respondents from removing, selling or alienating her stock, including items on the leased premises. In terms of paragraphs 1.3 to 1.5 of the notice of motion, the applicant seeks her restoration to the leased premises and a removal of the padlocks preventing her access to the store.

[12] At the outset, Ms de Vos disputed the urgency of the application, contending that an applicant seeking to rely on spoliation must do so within a reasonable time,[1] unlike the applicant who waited for two weeks before instituting the application. While that is correct, it is clear that following the lock-out of the applicant, discussions had been held with those representing the respondents in an attempt to resolve the matter. When the respondents failed to give an undertaking to allow the applicant access to the premises on the basis that they had secured a section 32 order, the applicant was left with no alternative but to approach the court for relief. I am satisfied that the application was brought on the basis of sufficient urgency.

[13] As regards the applicant's claim that she had been despoiled on 22 May 2020, it is evident that she chose not to place the full facts in her founding papers as to what transpired on that day. No mention at all is made of the incident in which the respondents contend that the applicant attempted to forcibly make her way into the premises, after the respondents had asserted their right to a tacit hypothec. This omission is glaring, particularly as the applicant attached to her founding affidavit the respondents' application papers in the section 32 application. Despite this, she failed to deal with any of the allegations pertaining to the section 32 application, knowing full well that this formed the basis of the respondents' refusal to grant her access.

[1] *Le Riche v PSP Properties CC & others* [2005] 4 All SA 551 (C).

[14] The essence of the applicant's case is that she was in 'peaceful and undisturbed possession' of the leased premises when the respondents locked her out of the premises. In opposition to the spoliation application, the respondents rely on the order which was secured on 25 May 2020 in terms of section 32 of the Magistrates' Court Act[2] which is intended to protect a landlord from losing the security which he or she enjoys by virtue of the hypothec.[3] The tacit hypothec of the lessor exists to secure fulfilment of the lessee's obligation to pay the rent stipulated by the agreement, and ceases to operate as soon as the arrears are paid. One of the grounds for its issue, and as contended for by the respondents in the section 32 application, was a reasonable apprehension on the part of the respondent landlord that the applicant was planning to remove her movables in order to avoid having to pay the overdue rent.[4]

[15] To bolster their argument, the respondents relied on an advertisement by the delivery service, Mr Delivery, suggesting that the applicant was presently closed but would soon re-open. Admittedly, the advert does not provide details of where the applicant was intending to open her business, or whether it was intended to convey a message that it was 're-opening' after a particular event. The message is dated 22 May 2020 - which coincides with the date when she was locked out by the respondents. This lends credence to the applicant's version that she was informing customers that she would not be operational for two days, during which time she hoped that her troubles with the respondents would be resolved. She denies that this notice could be interpreted as a notice to customers that she was setting up business elsewhere.

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[2] Section 32(1) provides as follows: 'Attachment of property in security of rent. —(1) Upon an affidavit by or on behalf of the landlord of any premises situate within the district, that an amount of rent not exceeding the jurisdiction of the court is due and in arrear in regard to the said premises, and that the said rent has been demanded in writing for the space of seven days and upwards, or, if not so demanded, that the deponent believes that the tenant is about to remove the movable property upon the said premises, in order to avoid the payment of such rent, and upon security being given to the satisfaction of the clerk to the court to pay all damages, costs and charges which the tenant of such premises, or any other person, may sustain or incur by reason of the attachment hereinafter mentioned, if the said attachment be thereafter set aside, the court may, upon application, issue an order to the messenger requiring him to attach so much of the movable property upon the premises in question and subject to the landlord's hypothec for rent as may be sufficient to satisfy the amount of such rent, together with the costs of such application and of any action for the said rent.'

[3] *Halstead v Durant NO* 2002 (1) SA 277 (W) at 281B–C.

[4] *Rosner v Nel NO & others* [1996] 1 All SA 322 (W) at 328–329.

[16] The respondents however rely on the notice for their contention that the applicant did not have the intention to remain on the leased premises, and that she had abandoned any intention of remaining. In this regard, they also rely on a WhatsApp message containing the caption 'Officially back in action!! Now trading from Meerensee.' Other than referring to a different location than the leased premises, it is not possible to draw any adverse inference, which the respondents contend for, for this message. In her replying affidavit, the applicant steadfastly contends that she wishes to return to the premises in order to trade and to access her unattached assets. She denies any suggestion that she intended to flee or to remove stock or assets without authority. In reply, she states that the reference to Meerensee is a reference to her trading in the interim from her residential address. There is nothing to gainsay this version.

[17] The respondents contend that as a result of receiving information that the applicant was planning to remove her movables from the leased premises and vacating without paying her rent, it moved urgently to secure an order in terms of section 32. That application on 21 May 2020 was unsuccessful. After the incident on the evening of 22 May 2020, the respondents returned to court and obtained an order in their favour on 25 May 2020. The terms of the order are important as they define, in my view, the ambit of what the respondents were entitled to demand of the applicant. The order entitled the sheriff to attach sufficient property located at the leased premises in order to satisfy the amount of rent due, as well as the cost of the application, subject to the landlord's hypothec. The remaining terms of the order are largely irrelevant to the enquiry.

[18] Mr Khan SC, who appeared on behalf of the applicant, submitted and correctly so in my view, that the order granted on 25 May 2020 did not entitle the respondents to padlock the doors preventing the applicant from obtaining access to her shop. Ms de Vos was constrained to concede to the limitation of the order of 25 May 2020. The padlocking of the applicant's premises occurred in any event even before the respondents had brought their application in terms of section 32. There is nothing before me that clothes the respondents with authority to have deprived the applicant of access to the premises.

[19] The respondents fall back on the provisions of the lease agreement and the landlord's hypothec for their actions. Clause 25 of the agreement provides that should rental be in arrears, the lessee (the applicant) shall not remove any furniture, fittings or equipment or stock from the premises without the prior approval of the lessor (the respondents). The applicant concedes that she was in arrears with her rent at the time when the respondents installed a lock on her doors. This was followed by the section 32 order. Neither the lease agreement nor the provisions of section 32 grant the respondents the authority to lock the applicant out of her premises.

[20] On the widest interpretation of the section 32 order, it entitled the respondents to open any locks that the *applicant* may have placed on the doors of the restaurant, and to attach sufficient movable property so as to satisfy the amount of arrear rental. The attachment by the sheriff could only be realised by the physical opening of the doors by the respondents, as they were the ones who padlocked the doors. The respondents are unable to dispute the contention of the applicant that approximately 20% of her foodstuff was unlawfully taken by the respondents' employees. The section 32 order only permitted an attachment of goods. If the respondents went beyond the terms of the order, the applicant's recourse is to institute a claim for damages, alternatively, she could have contested the order on the return date.

[21] Accepting that the respondents had no authority to have padlocked the leased premises and prevented the applicant from access to her restaurant, the issue is whether the applicant is entitled to an order for a mandament van spolie where it is disputed that she was in peaceful and undisturbed possession of the premises. The purpose of an attachment is not only to confirm the hypothec and to render the removal of the goods unlawful but it is also an attachment *in securitatem debiti,* in other words, for a landlord to perfect the hypothec.[5] Ms de Vos submitted that the respondents, having secured the section 32 order, issued a direction to the sheriff to proceed in terms of rules 41 and 42 of the Magistrates' Court rules, to remove certain goods from the premises.[6] In this regard, the provisions of rule 41(7)*(a)-(c)*

[5] Ibid.
[6] *Letsoho Developers (Pty) Ltd v Messenger of the Magistrate's Court, Alberton & another* 1993 (2) SA 634 (W) at 636E.

specifically authorise the sheriff to attach and remove goods.[7]

[22] The respondents contend that they authorised the sheriff to remove such goods to the satisfaction of the amount of their claim for arrear rental and therefore, as I understood counsel's submission, if there was a removal of goods from the leased premises, this was done lawfully and in accordance with an order of court.[8] On that basis, it was contended that the applicant does not have a right to an interdict preventing the movable assets from being removed from the leased premises. The problem is that the goods have already been removed, or at least 20% of them. If that is so, is the relief of a mandament still open to the applicant? In other words, was it not open to the respondents to enforce their section 32 order, but in a manner that did not interfere with the applicant's right to trade from her store? The problem, it seems, is the respondents' belief that the section 32 order granted them a greater entitlement than provided for in law.

[23] The respondents' attorney wrote to the applicant's attorney on 31 May 2020 giving the applicant an 'opportunity' to make arrangements to have her perishable goods released from the store. The point emphasised was that for as long as the goods remained on site, the respondents were obliged to supply the refrigerators with electricity. At the same time, the respondents were being prevented from installing another tenant into the premises. As far as the applicant is concerned, she was still entitled to remain on the premises and disputes the contention that she either cancelled the lease or expressed a desire to vacate by end of May 2020. In

[7] Rule 41(7)(a)-(c) provides that:
'(7)*(a)* The execution creditor or his or her attorney shall, where movable property, other than specie or documents, has been attached, after notification of such attachment, instruct the sheriff in writing, whether the property shall be removed to a place of security or left upon the premises in the charge and custody of the execution debtor or in the charge and custody of some other person acting on behalf of the sheriff: Provided that the execution creditor or his or her attorney may, upon satisfying the registrar or clerk of the court, who shall endorse his or her approval on the document containing the instructions, of the desirability of immediate removal upon issue of the warrant of execution, instruct the sheriff in writing, to remove immediately from the possession of the execution debtor all or any of the articles reasonably believed by the execution creditor to be in the possession of the execution debtor.
(b) In the absence of any instruction under paragraph (a), the sheriff shall leave the movable property, other than specie or documents, on the premises and in the possession of the person in whose possession the said movable property is attached.
(c) Where a sheriff is instructed to remove the movable property, he or she shall do so without any avoidable delay, and he or she shall in the mean time leave the same in the charge or custody of some person who shall have the charge or custody in respect of the goods on his or her behalf.'

[8] There is nothing on the papers to confirm the issuing of this instruction, in writing, to the sheriff. It took the form of a submission from the bar.

any event, the respondents are unable to explain why they acted to lock-out the applicant before the end of May 2020 other than referring to the events of 22 May 2020.

[24] In *Ngqukumba v Minister of Safety and Security and others*[9] the Constitutional Court confirmed that '[t]he essence of the mandament van spolie is the restoration *before all else* of unlawfully deprived possession to the possessor'. (My emphasis.) Mr Khan submitted that the respondents' conduct in placing padlocks on the door constituted an act of spoliation. Ms de Vos on the other hand contends that the applicant was not in peaceful and undisturbed possession of the premises, and disputes that she had the necessary mental intention to possess the premises for its benefit.

[25] There is an abundance of authority, going as far back as *Nino Bonino v De Lange*[10] and *Nienaber v Stuckey*[11] which form the foundational basis of courts determining whether the requirements for a mandament has been met. In *Zulu v Minister of Works Kwazulu & others*[12] Thirion J pointed out that 'the *mandament van spolie* is not concerned with the protection or restoration of rights at all. Its aim is to restore factual possession of which the *spoliatus* had been unlawfully deprived'.[13] In *Eskom Holdings SOC LTD v Masinda*[14] the court explained the purpose of the mandament as providing a:

'. . . remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property "as a preliminary to any enquiry or investigation into the merits of the dispute" as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. But what needs to be stressed is that the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in *Eskom v Nikelo* is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.' (Footnotes omitted.)

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[9] *Ngqukumba v Minister of Safety and Security & others* 2014 (2) SACR 325 (CC) para 10.
[10] *Nino Bonino v De Lange* 1906 TS 120 at 122.
[11] *Nienaber v Stuckey* 1946 AD 1049.
[12] *Zulu v Minister of Works Kwazulu & others* 1992 (1) SA 181 (D) at 187G-H.
[13] *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W); Shelving Man (Pty) Ltd v Dawood & others [2015] 3 All SA 243 (KZD).
[14] *Eskom Holdings SOC LTD v Masinda* 2019 (5) SA 386 (SCA) para 8.

[26] Ms de Vos submitted that the court was entitled to enquire into the merits of the dispute as the applicant came to court not only to seek a mandament, but also a final interdict in respect of the removal of signage and an order preventing the removal of goods, despite the existence of the section 32 order. Counsel relied on *Street Pole Ads Durban (Pty) Ltd v Ethekwini Municipality*[15] as authority for this court to enquire into the applicant's title to occupy. In para 15 the SCA held that:

'[15] This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because 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."' (Footnotes omitted.)

[27] I do not regard the prayer for relief in paragraph 1.2 as an invitation to the court to widen its enquiry. In any event, very little argument, if any, was addressed by Mr Khan on this relief, and I am not satisfied that a court dealing with a mandament van spolie is to be concerned with issues such as the relief pertaining to the shop signage. With regard to the removal of the foodstuff, cool drinks and other items, the applicant must challenge this in the context of the section 32 application. If the applicant contends that her stock in trade, including food items have perished or were rendered unsuitable for consumption while under the control of the respondents, her remedies lay outside of a mandament van spolie, which cannot restore property that has already been destroyed.[16]

[28] Counsel for the respondents submitted that the applicant failed to prove that she did have the necessary animus to possess the premises, and that she expressed her intention to vacate by the end of May 2020. That version is strongly

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[15] *Street Pole Ads Durban (Pty) Ltd & another v Ethekwini Municipality* 2008 (5) SA 290 (SCA).
[16] *Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan Municipality & others* 2007 (6) SA 511 (SCA) paras 23-24.

disputed by the applicant. The possessor must exercise possession with the intention to derive some benefit from it. In *Mbuku v Mdinwa,*[17] where it was held that an agent who was in charge of looking after cattle for his principle was not possessing the cattle with the intention of deriving some benefit from them, the court stated that:

'In any event, I am of the view that an agent who has no interest in the property which he holds for his principal, or who derives no benefit from holding it, is not entitled to claim the relief of a *mandament van spolie*. One should not forget that it is a remedy which is available to a possessor; it has never, to my knowledge, been extended, except perhaps inadvertently, to a mere *detentor*. But the *animus possidendi* which is required to transform *detentio* into possession is not the intention required of old for so-called civil possession; it is no more than the intention to hold the thing in question for one's own benefit and not for another. And a *detentor* who does not have that intention is indeed merely a *detentor*.'[18]

[29] The decision in *Yeko v Qana*[19] finds application to the enquiry before me as to whether the applicant had the necessary animus. In that matter, the party seeking the mandament had been locked out of the premises from which it was trading, not dissimilar to the facts in the present application. It alleged that it traded according to a lease, but it admitted that the lease was concluded contrary to the relevant statutory prohibitions. The court stated the following at 739D-G:

'The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. In order to obtain a spoliation order the *onus* is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. As the appellant admits that he locked the building it was only the possession that respondent was required to establish. If the respondent was in possession the appellant's conduct amounted to self-help. He was admittedly in occupation of the building with the intention of selling his stock for his own benefit. Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. For, as *Voet*, 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order

[17] *Mbuku v Mdinwa* [1982] 3 All SA 199 (TkS).
[18] Ibid at 202.
[19] *Yeko v Qana* 1973 (4) SA 735 (A).

even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the *spoliatus* has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'

In establishing whether possession had been proved on the facts, the court took into account the following at 739H-740A:

'On the evidence of the appellant's own witnesses the respondent was on 7th August trading in the shop. His stock was on the shelves and two of his employees were behind the counter serving customers. These positive facts standing alone clearly demonstrate possession. . . the fact of his actual trading in the building, does show that as a result of negotiations between the parties the respondent had reason to believe that he was entitled to occupy the building and therefore intended to remain in occupation thereof for his own benefit.' (My underlining.)

[30] Against the backdrop of the exchange of emails, wherein the applicant stated that she had 'had enough' of the respondents' treatment of her, and that she intended to vacate the premises by the end of May 2020, one must not lose sight of the condition imposed on the deal that the cancellation would be with 'no damages'. The respondents say that the emails reflect the applicant's intention to immediately vacate the premises, or at latest, by end of May 2020.

[31] In her replying affidavit, the applicant acknowledges that she was willing to agree to a cancellation of the lease agreement (even though she had signed a further agreement to endure from July 2020 to June 2023), but on the condition that the agreement would be cancelled 'with no damages'. Her understanding was that the respondents would write off any amounts owing by her in the form of arrear rentals. When Patinios responded on 16 May 2020 saying 'Pay your dues and go. . . Good riddance', she considered that he had reneged on the agreement. Her offer to vacate by end of May 2020 accordingly fell away. In my view the applicant's version of the email exchanges seems entirely plausible. On the contrary, there is nothing in the response from Patinios which suggests that he agreed to the applicant vacating the premises, in exchange for a waiver of arrear rental.

[32] The applicant further submits that even if she did agree to vacate the

premises, there is nothing in law which entitled the respondents to bolt her door. As regards the altercation on 15 May 2020, she contends that even if the respondents' version of events is true (which she denies) this still did not entitled the respondents to resort to self-help. If they wished to rid themselves of a troublesome tenant, their recourse lay in eviction proceedings. In *La Familia Street Culture (Pty) Ltd v Amber Brand Investments (Pty) Ltd* [20] the court considered an application for a mandament in similar circumstances to the present application. At paras 20-21 the court held 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 issue 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 decide to take the law into its hands by locking the premises and thus taking possession from the Applicant in an unlawful manner.'

[33] As regards the events on the evening of 22 May 2020, the respondents contend that the applicant attempted to 'unlawfully' gain access to the leased premises to remove certain movable assets without the authorisation of the respondents, and to avoid the consequences of the hypothec. The applicant denies this. Even if the respondents' version is accepted, it still raises the question whether they were entitled to padlock the doors. Our law is clear - parties should not resort to self-help. The respondents were in possession of a section 32 order. Neither that order nor any subsequent instruction for the removal of movable assets pursuant to rules 40 or 41 of the Magistrates' Courts rules gave the respondents authority to resort to self-help. In those circumstances, the applicant was entitled to come to court to acquire redress for the wrongful dispossession. The court in *La Familia Street Culture* said the following where the lessor claimed cancellation of the leased property to resist a mandament:

'[24] I say the above recognising that the respondent asserted that the lease agreement has lapsed and notice of cancellation has already been issued. However, even then the

[20] *La Familia Street Culture (Pty) Ltd v Amber Brand Investments (Pty) Ltd* [2019] ZAGPJHC 520.

respondent was not in law entitled to do what it did. Accordingly the Applicant deserves protection for is possession of the premises through *mandament van spolie.*'[21]

[34] The question as to whether the applicant had the necessary intention to possess the leased premises must also be seen against the backdrop of advertisements by the WhatsApp messenger service and Mr Delivery, which the respondents contend is indicative of the intention of the applicant to set up business elsewhere. This, it was submitted, is vital to determine whether she had the necessary animus to possess, as required for a mandament. On the other hand, the applicant in her reply does not deny the notices issued via social media. She states that when she discovered that the premises had been padlocked on 22 May 2020, she assumed that the problem would be resolved within a few days. For that reason, she issued a message to customers that the shop would re-open on 25 May 2020. She contends that the messages via social media do not support the version of the respondents that she intended to flee without paying her rent, nor did it justify the locking of her premises by the respondents.

[35] In *Shoprite Checkers Ltd*[22] the court referred to the summary of the elements of possession as set out in *LAWSA* as follows:

'"56. It is trite law that possession consists of both an objective and a subjective element, namely the objective or physical element *(corpus*, *dententio)* and the subjective or mental element *(animus)*.

Literally, a possessor must control the article with both the body and the mind. The physical element consists in the factual control exercised over the article. The mental element concerns the state of mind of the possessor. Whereas a minimum of factual control is required for all classes of possession, the content of the state of mind required for possession differs, according to the functions served by the possession in the particular case."' (My emphasis.)

[21] *Ibid* para 24.
[22] *Shoprite Checkers Ltd* fn 13 at 620G-621A.

[36] The mandament van spolie protects the fact of possession, regardless of whether there is an underlying right to possess. See *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd & others:*[23]

'[22] As the late Prof Silberberg pointed out in the first edition of his work *The Law of Property* (1975) at 72 – 3, the mere fact of possession generates a right which is generally referred to as the *jus possessionis*. The content of that right does not proceed beyond the right to the assistance of the courts to restore factual possession when dispossession against the will of the possessor takes place without the sanction of law. It is only to that extent that the spoliation remedy is a reflection of a right. It is not a right which is acquired from any person; it is automatically generated by a state of affairs — ie the fact that the property is possessed.'

[37] In light of all of the facts before me, I satisfied that the applicant has proved upon a balance of probabilities, the necessary element of possession, and that she was wrongfully deprived of possession of the leased premises. I am not inclined to grant the interdictory relief set out in paragraph 1.2 of the notice of motion.

[38] The applicant has been largely successful in securing a return to the leased premises, but did not succeed with regard to the first part of the relief sought. This relief could not have formed part of the mandament.[24] Although the matter came before court on 9 and 12 June 2020, it did not proceed on those days through no fault of the parties. An undertaking operated since then to preserve the status quo. In the exercise of my discretion, I deem it fair that the second respondent be held liable for the applicant's costs, such costs limited to the day of the opposed hearing.

[39] I make the following order:

4. The application for an interdict in paragraph 1.2 of the notice of motion is dismissed;
5. The application for a mandament van spolie in terms of paragraphs 1.3 to 1.5 is granted;
6. The second respondent is directed to pay the applicant's costs, such costs limited to the day of the opposed hearing.

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[23] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd & others* 2016 (6) SA 448 (KZD) para 22.

[24] *Jigger Properties CC v Maynard NO & others* 2017 (4) SA 569 (KZP) paras 24-25.

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M R CHETTY J

Appearances

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Date of hearing :	**15 June 2020**
Date of judgment :	**24 July 2020**