

SOUTH AFRICA / JUDGMENT

Dube and Another v Ninarich Investments (Pty) Ltd and Others (2023/00000054)

[2023] ZAGPJHC 295 (27 March 2023)

[2023] ZAGPJHC 295

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2023/00000054

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023/00000054

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between –

SINETHEMBA DUBE 1st APPLICANT THE TENANTS OF 31 BETTY STREET LISTED IN ANNEXURE “A” OF THE NOTICE OF MOTION 2nd APPLICANT and NINARICH INVESTMENTS (PTY) LTD 1st RESPONDENT NINARICH TRADING 3 (PTY) LTD 2nd RESPONDENT G3 HOLDINGS (PTY) LTD T/A INVESTIGATIONS & SECURITY SERVICES 3rd RESPONDENT CITY OF JOHANNESBURG 4th RESPONDENT

JUDGMENT

MOORCROFT AJ:

Summary

Spoliation – requirements - peaceful and undisturbed possession of a thing, and unlawful deprivation of such possession

Possession not peaceful and undisturbed when it is continuously being resisted

Order

[1] I make the following order:

1. The application by the 1st and 2nd respondents to join third parties to the application is removed from the roll, and no order is made as to costs;
 2. The main application is dismissed;
 3. The applicants are ordered to pay the costs of the application, including the costs reserved on 18 March 2023 on the scale as between attorney and client.
- [2] The reasons for the order follow below.

Introduction

- [3] In this matter I gave judgments and orders on 17, 18, and 21 March 2023. I do not repeat what was stated there except to the extent necessary. I also point to a typographical error in the last paragraph of the judgment on 21 March 2023 where the word ‘not’ was omitted. The paragraph should read: “I therefore make the order in paragraph 1 above. I may add that it was not necessary to make any cost order as there was no appearance for the respondents.”
- [4] On 17 March 2023 I removed the matter from the roll. On 18 March 2023 I stood the matter down for argument on 24 March 2023, and I set time periods for the filing of affidavits. A further application was removed from the roll on 21 March 2023 and the application was then argued on the 24th.
- [5] I am satisfied that the matter was sufficiently urgent to merit a hearing during the motion court week of 17 to 24 March 2023. The applicants allege that they were deprived of possession on 13 March 2023. They were arrested and most of the applicants were released on bail on the 15th. They then sought legal advice and served the application by email on the 17th.

The history of the matter

- [6] The uncontested evidence is that the building owned by the 1st respondent and situated at 31 Betty Street, Jeppestown was standing empty[1] on 8 November 2022 when the applicants arrived at the entrance and announced that they would return that evening to seize control. That evening they arrived, chased off the security guards, and hijacked the building. They vandalised the building by removing roller doors, geysers and piping.
- [7] The 1st respondent laid criminal charges. The 1st and 2nd respondents (“the respondents”) then proceeded with a spoliation application[2] in the part A and part B format against the occupiers of a number of buildings in Jeppestown and Doornfontein owned by the respondents,

including the building at 31 Betty Street owned by the 1st respondent.

- [8] The alleged unlawful occupiers of 31 Betty Street, now the applicants, were cited as the 5th respondent.

- [9] The urgent application was struck from the roll for want of compliance with Rule 6, and specifically with respect to the occupiers of 31 Betty Street, Jeppestown the application was postponed sine die, the occupiers were ordered to file answering affidavits by 13 December 2022, and costs were ordered to be costs in the cause.
- [10] This litigation between the respondents and the occupiers have not been finalised and is ongoing.
- [11] In the answering affidavit[3] the applicants (then the 5th respondent) denied the 1st respondent's peaceful and undisturbed possession, alleged that the building had been abandoned, and alleged that the 1st respondent were attempting to extract rental by way of a spoliation application. The hijacking was not denied.
- [12] The respondents ran out of funds and the application was not set down for hearing by either party during the period December 2022 to February 2023. On 14 March 2023 the respondents brought new proceedings set down for 11 April 2023.[4]
- [13] The trespassing charges also remained active and on 13 March 2023 members of the SA Police Service arrived at the building and arrested 25 occupiers, 23 of whom were released on bail on the 15th.[5] Correspondence followed between the respective attorneys, and the applicants claimed that they had been spoliated while the 1st respondent adopted the view that the hijackers had been lawfully removed by the Police pursuant to the criminal charges laid in

2022. The respondents then controlled access to the building.

The requirements for the mandament van spolie

- [14] In *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd*[6] Dlodlo JA said:

"[5] The requirements for the mandament van spolie are trite: (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession. [3][7] The mandament van spolie is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands. [4][8]"

The element of peaceful and undisturbed possession

- [15] The respondents deny that the applicants were ever in peaceful and undisturbed possession of the property. The hijacking was always resisted by the 1st respondent as owner, through criminal charges and applications to court.
- [16] A spoliation application failed in *Kgosana v Otto*[9] where the evidence showed that the applicants had occupied the property without consent and that the respondent had immediately taken steps to resist the invasion of the land, and had continuously taken steps to resist the unlawful conduct of the applicants. The possession never became peaceful and undisturbed.

[17] The applicant in a spoliation application does not have a protectable right when all it can show is a lawful or unlawful “self-help grab of possession to which there is continued resistance.” In *Mbangi and Others v Dobsonville City Council*, [10] Flemming J said:

“The applicant for spoliation requires possession which has become ensconced, as was decided in the Ness case.[11] See also Sonnekus 1986 TSAR at 247. It would normally be evidenced (but not necessarily so) by a period of time during which the de facto possession has continued without interference. However, quite apart from evidential considerations, the complainant lacks protectable merit if the best he can prove is a (lawful or unlawful) self-help grab of possession to which there is continued resistance.

The question necessarily arises what type and degree of resistance would cause the requirement to be lacking. I doubt whether it is possible to define that in vacuo. The reason why the requirement exists, cognisance of the reason why the remedy exists, and also the lack of authority for a contrary view, point thereto that less than physical resistance is sufficient. It would be a sad state of the law indeed if only he who is able and willing to help himself by physical resistance or by intimidation or other threat is not dealt with as a spoliator, whilst the Court's assistance is given to him who takes possession despite resistance in a form which pays heed to the undesirability of physical encounters and the proprieties of civilised behaviour.” [emphasis added]

[18] In the present matter the respondents resisted the deprivation of possession by laying charges with the Police and by bringing a court application. They did not opt for physical resistance when the guards they had on site were chased off and the property damaged in November 2022.

[19] The question whether the owner has continuously taken steps to resist deprivation of its property is a question of fact. It was argued on behalf of the applicants that the respondents abandoned the legal process and by mid-March the occupiers were indeed in peaceful and undisturbed possession.

[20] It is necessary therefore to weigh the facts. On the one hand the answering affidavit in the earlier application was filed in the middle of December 2022, over the holiday period. It is that the respondents should have filed a replying affidavit and enrolled the matter in the Urgent Court late in December or early in January 2023. On the other hand, by the time the answering affidavit was filed the urgency had to some extent dissipated and the new term only started in January. The Police investigation was not complete and the respondents were entitled to rely on a Police investigation and the protection of the Police.

[21] The applicants likewise took no steps to stabilise their possession.

[22] It can perhaps be argued that the Police should have acted with more haste. The Police are however not under the control of the respondents and one does not know what priorities over the Festive Season led to the Police only acting in March. No criticism of the Police is intended and the Minister of Police is in any event not cited in the application.

[23] My view of the facts are that the applicants were never in peaceful and undisturbed possession of the building, that the respondents continuously resisted the hijacking, and that for this reason the applicants are not entitled to the order sought.

[24] The decision in *South African Human Rights Commission and Others v Cape Town City and Others*[12] is not authority for the view that peaceful and undisturbed possession is no longer a requirement. In this judgment it was accepted that the possession of vacant land was peaceful and undisturbed,[13] and the local authority's reliance on contra-spoliation was rejected on the facts as it did not react instantaneously, or immediately.

The requirement of unlawfulness and the actions of the members of the South African Police Service

[25] The arrests were carried out by the members of the Police Service pursuant to criminal charges laid by the 1st respondent. The Police act independently and are not the mere agents of a complainant when member of the Service arrest people for trespassing.

[26] There is also no case made out to suggest that the arrests were not lawful arrests and therefore no case that the deprivation of possession was unlawful. A complaint was made to the Police late in 2022 and in March 2023 the Police carried out arrests.

The applicants' movables

[27] The applicants allege that their movables are still on the property. The respondents have given an undertaking that any applicant who wished to remove his or her movables will be assisted to do so.

Children

[28] Reference was made in argument to children affected by the litigation and at a very late stage the applicants provided some details of the identity of these children. The children are in the care of four of the applicants and their names were disclosed under oath on 21 March 2023.

[29] The respondents called on the applicants to bring applications against the relevant government departments[14] and I mentioned in court that should the attorneys (who have access to facts I do not have access to) deem it wise, I would make an order in terms of section 47 of the Children's Act, 38 of 2005. I have not been requested to do so.

Costs

[30] The applicants set the application down on very short notice on Saturday, 17 March 2023. It was removed from the roll. They then set it down again the very next day (the 18th) on equally short notice. They chose not to set it down with sufficient time for the respondents to file affidavits.

- [31] In order to guide the matter I determined times for filing of affidavits and stood the application down to 24 March 2023.
- [32] The applicants chose not to abide this order and set it down for 21 March 2023 ostensibly an interim order for the period 21 to 24 March, ignoring the fact that the whole application (including the prayers for interim relief) was standing down for the 24th.
- [33] This constitutes an abuse and I am of the view that a punitive cost order is justified as prayer for by the respondents.

Conclusion

- [34] I therefore make the order in paragraph 1 above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 27 MARCH 2023.

COUNSEL FOR THE APPLICANT: L MOELA INSTRUCTED BY: SITHI AND THABELA ATTORNEYS
COUNSEL FOR THE 1st & 2nd RESPONDENTS: L HOLLANDER INSTRUCTED BY: VERMAAK
MARSHALL WELLBELOVED INC DATE OF THE HEARING: 17, 18, 21 AND 24 MARCH 20 DATE OF JUDGMENT: 27 MARCH 2023

- [1] The building was and is earmarked for social housing in a project involving the respondents and the authorities responsible for social housing.
- [2] Under case number 2022/047559 (CaseLines 02-22).
- [3] CaseLines 12-78.
- [4] This may give rise to a *lis pendens* argument, but at present both applications are pending applications before the Court
- [5] The bail applications by the remaining two persons arrested were postponed to the 24th.
- [6] *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA). See also *Van Loggerenberg DE and Bertelsmann E Erasmus: Superior Court Practice RS20, 2022, D7-1. (Mandamenten van Spolie)*

- [7] “Yeko v Qana 1973
- (4) SA 735 (A) at 739E – F. See also Lawsa 2 ed (2014) at 113 para 108.”
- [8] “Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007
- (6) SA 511 (SCA) ([2007] ZASCA 70) para 22; Ngqukumba v Minister of Safety and Security and Others 2014
- (5) SA 112 (CC) (2014 (2) SACR 325; 2014 (7) BCLR 788; [2014] ZACC 14) paras 10 – 12.
- [9] Kgosana v Otto 1991
- (2) SA 113 (W).
- [10] Mbangi and Others v Dobsonville City Council 1991 (2) SA 330 (W) 338B-D.
- [11] The reference is to Ness and Another v Greef 1985
- (4) SA 641 (C).
- [12] South African Human Rights Commission and Others v Cape Town City and Others 2022 (6) SA 508 (WCC).
- [13] Para. 30.
- [14] The respondents prepared their own application but it was not proceeded with at the hearing, and in the order I make the
- respondents’ application is removed from the roll without making an order as to costs.

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