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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 01355/2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

22.05.23

In the application between:

MUSA ELPHIS DLAMINI

Applicant

and

SIBUSISO GERALD NCUBE

First Respondent

STEYN CITY MANAGEMENT

Second Respondent

MR NTULI

Third Respondent

Neutral citation: *MUSA ELPHIS DLAMINI v MORGAN, SIBUSISO GERALD NCUBE & OTHERS* (Case No. 01355/2023) [2023] ZAGPJHC 496 (22 May 2023)

J U D G M E N T:

NEL AJ

[1] The phrase “*no good deed goes unpunished*” is a sardonic commentary on the frequency with which acts of kindness or generosity rebound negatively on those who offer goodwill or good

deeds. This urgent opposed application appears to be confirmation that there is certainly some truth in the age-old phrase.

INTRODUCTION

- [2] The Applicant seeks an Order, on an urgent basis, to essentially regain access to an apartment, from which he contends that he was unlawfully evicted.
- [3] The Applicant was introduced to the First Respondent by a mutual friend, who is a lawyer who had represented both the Applicant and the First Respondent in legal matters at various stages.
- [4] The First Respondent, who owns a number of residential properties that are rented out, was informed by the mutual friend that the Applicant required accommodation but was not in a financial position to pay rental immediately. The mutual friend advised the First Respondent that the Applicant was engaged in a civil law suit which “*was about to pay out*”.
- [5] The First Respondent decided that he would assist the Applicant and on 1 February 2021 the First Respondent concluded a written lease agreement with the Applicant in respect of an apartment situated in the Oasis Complex at Steyn City. The written lease agreement was to endure for a period of 11 months, with the monthly rental, being R30 000.00 per month.
- [6] It was recorded in the written lease agreement that upon the expiry of the 11-month rental period, the lease agreement would continue, on a month-to-month basis.

- [7] It was an express term of the written lease agreement that the accrued rental amount would become payable by the Applicant to the First Respondent as soon as the Applicant's legal matter, being dealt with by the attorneys "*matures*".
- [8] The mutual friend had assured the First Respondent that the legal matter of the Applicant would be finalised within a "*maximum*" period of five months.
- [9] The First Respondent stated that he concluded the written lease agreement with the Applicant, with the belief that the Applicant would commence paying rental within a relatively short period of time.
- [10] However, in March 2023, some two years after taking occupation of the apartment, the Applicant was still in occupation, but had not paid any rental at all to the First Respondent, on the basis that the legal claim had not yet "*matured*".

THE PARTIES' ALLEGATIONS

- [11] The First Respondent alleges that he informed the Applicant that the situation in which the Applicant essentially resided rent-free in the apartment could not continue, as at such date the Applicant was indebted to the First Respondent for rental, in an amount of approximately R700 000.00. The First Respondent's business is property rental, and he receives his income from such business.
- [12] The First Respondent alleges that he had informed the Applicant that he intended renting out the apartment to a paying tenant, in

order to earn an income on the apartment. Such information was conveyed to the Applicant during February 2023.

[13] The First Respondent alleges that during March 2023 the Applicant agreed to vacate the apartment, and that he would do so by no later than 30 March 2023.

[14] The First Respondent alleges that he offered the Applicant alternative accommodation at his own cost, for a period of 3 months, after the Applicant vacates the apartment, but that the Applicant declined such offer.

[15] The First Respondent then showed the apartment to potential tenants with the full knowledge and assistance of the Applicant. The First Respondent would obtain the keys to the apartment from the Applicant to show it to potential tenants and then return the keys to the Applicant.

[16] The First Respondent alleges that the contents of the apartment at the time of showing the apartment to a potential tenant, evidenced that the Applicant had already commenced moving out of the apartment. The First Respondent then concluded a lease agreement with new tenants, in respect of the apartment, with effect from 1 April 2023.

[17] On 5 April 2023, the First Respondent attended at the apartment, and it appeared to him that the Applicant was no longer residing in the apartment, as the only items left in the apartment was a couch and some suitcases.

[18] The First Respondent removed the items in the apartment into storage for safekeeping, as the new tenants would be moving in.

- [19] The First Respondent states that he did not have any further communications with the Applicant after 5 April 2023, until the receipt of the urgent application. The First Respondent was under the impression that the Applicant had vacated the apartment, and contends that the Applicant was not evicted or spoliated, but that he had vacated of his own free will and volition.
- [20] The First Respondent also contends that the apartment cannot be restored to the Applicant. There were however no allegations in the affidavit that the new tenants had taken occupation. I was advised by Applicant's counsel that the apartment was not occupied, and by the First Respondent's counsel that the new tenants occupied the apartment. Neither of these allegations were contained in the affidavits.
- [21] The Applicant alleges that on 5 April 2023, he had left the apartment for a meeting, and that upon his return at approximately 20h00, he found out that the First Respondent had changed the locks to the apartment and that he and his son no longer had access to the apartment or the Oasis Complex in which the apartment is situated.
- [22] The Applicant alleges that he and his minor son were effectively evicted from the apartment without any legal process being followed. The Applicant contends that he and his son were accordingly spoliated from the apartment by the changing of the locks and the denial of access to the complex by the Second Respondent's security personnel.

[23] The Applicant states that he and his minor son had no other accommodation available to them and are currently living under a bridge as the Applicant cannot afford any alternative accommodation.

THE RELEVANT LEGAL PRINCIPLES

[24] The principle of spoliation deals with the wrongful dispossession of property, without the consent of the holder of the property, or without lawful authority. The principle of spoliation is founded on the fundamental principle of the rule of law prohibiting any one from taking the law into their own hands.

[25] The purpose of the spoliation remedy is to restore the *status quo ante*, and not to determine the rights of the competing parties.

[26] The legal process of protecting a person's property is strictly distinct from the legal process of determining ownership of the property.

[27] A Court is obliged, when a person takes the law into his or her own hands, to restore the *status quo ante*, prior to any enquiry, investigation or determination of the merits of a dispute.¹

[28] A party seeking restorative relief in terms of the principle of spoliation must establish two requirements, being:

[28.1] That such party was in possession of the property; and

[28.2] That such party was deprived of the possession of the property without consent or without lawful authority.²

¹ *Nino Bonino v De Lange* 1906 TS120 at 122; *Binelopele NPO and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at para [24].

[29] In satisfying the first requirement of possession, a party need not prove that he or she was entitled to possession, but merely that he or she was *de facto* in possession.

[30] It is, however, not necessary for the possession to be continuous, to enable a party to be entitled to rely on the spoliation remedy. A lessee who has been deprived of his use and enjoyment of premises let to him is entitled to invoke the spoliation remedy to have his use and enjoyment restored, even if he is not a possessor in the strict juristic sense.³

[31] As regards the second requirement of deprivation of possession, proof of any wrongful dispossession will suffice to meet the second requirement.⁴

THE MERITS OF THE APPLICATION

[32] I am satisfied that the Applicant was in possession of the apartment at the time when the locks to the apartment were changed by the First Respondent, or on the instructions of the First Respondent. The Applicant has accordingly established the first requirement to succeed with spoliatory relief.

[33] The First Respondent's counsel conceded that his client was not entitled to take the law into his own hands and submitted that his client only ascertained on the day before the hearing that the Applicant had not vacated the apartment.

² *Yeko v Qana* 1973 (4) SA 735 (A) at 739; *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) at para [6].

³ *Nienaber v Stuckey* 1946 AD 1049 at p 1055; *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at p 232.

⁴ *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) at para [7].

- [34] The changing of the locks at the apartment during the Applicant's temporary absence from the apartment, and the deletion of the Applicant's remote control access device from the Second Respondent's gate control system clearly constitutes a wrongful dispossession of the Applicant's possession of the apartment. The Applicant has accordingly established the second requirement to succeed with spoliatory relief.
- [35] In the circumstances, I am satisfied that the Applicant has proven both requirements, and that he is entitled to the relief sought under the spoliation remedy.
- [36] It is entirely irrelevant that the First Respondent alleged that he believed that the Applicant had vacated the apartment. The Applicant had not returned the keys to the apartment to the First Respondent.
- [37] The fact that the First Respondent changed the locks to the apartment is an indication that he did not want the Applicant to access the apartment. It is doubtful that the First Respondent truly believed that the Applicant had vacated the apartment.
- [38] Even though the continuous occupation of the apartment for a period of approximately two years, without paying any rental appears to be unreasonable, it is not an aspect that in any way impacts on the determination of this Application.

THE ORDER

[39] In the circumstances, I made the following order:

[39.1] The First Respondent is ordered to grant the Applicant access to [...], Oasis, Steyn City, Johannesburg (“the Premises”), by no later than 20h00 on 14 April 2023;

[39.2] The First Respondent is ordered to take all steps necessary to ensure that the Applicant is granted access to the Premises, including the provision of keys and gate remote access;

[39.3] The Second Respondent is ordered to facilitate any requirements for the granting of access by the Applicant to the Oasis Complex;

[39.4] The First Respondent is ordered to provide the Applicant with access to all furniture, goods or other belongings removed from the Premises by the First Respondent and retained in storage by no later than 18h00 on 14 April 2023;

[39.5] Each party is ordered to pay its own costs.

G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

APPEARANCES

For the Applicant: Adv Nase

Instructed by: CSN Inc Attorneys

For the Respondent: Mr Shabangu

Instructed by SMS Attorneys

Date of hearing: 14 April 2023

Date of Order: 14 April 2023

Date of written Judgment: 22 May 2023