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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 19946/2023

In the matter between:

UNATHI SOMHLABA

First Applicant

NKOSIKHONA TAME

Second Applicant

and

BREEDE RIVER MUNICIPALITY

Respondent

Coram: Bishop, AJ

Date of Hearing: 14 November 2023

Date of Order: 21 November 2023

Date of Judgment: 13 December 2023

JUDGMENT

BISHOP, AJ

[1] Two wrongs seldom make a right. When the state unlawfully dispossesses people of their property, those people should be able to come to court to restore their possession. It is always unlawful to take the law into your own hands, even more so if you are the state. But when the dispossessor has already passed possession to a third

party, what must a court do? In some cases – and this is one – a court can right the first wrong only by committing another wrong; evicting an innocent person. In these circumstances, the law does not allow one wrong to cure the other.

[2] While the Respondent (**the Municipality**) has unlawfully dispossessed the Applicants, this Court can do no more than declare the Municipality's conduct unlawful and order it to pay punitive costs. But it cannot restore the possession the Applicants' possession. I gave an order to that effect on 21 November 2023. These are my reasons for that order.

Possession

[3] The dispute concerns Unit 2[...]5 M[...] Street in Zwelethemba. Unit 2[...]5 is owned by the Respondent (**the Municipality**) and is rented out. It allocates Unit 2[...]5 and others like it under its Housing Administration Policy. Two parts of that Policy are relevant to the dispute.

[4] First, access to municipal rental housing stock – like Unit 2[...]5 – is on an application basis. Rental housing is generally allocated on “first come first served” principle. But there are exceptions. Paragraph 6.1.9 of the Policy is an important one. It provides that, “[u]pon the death of a legal occupant, a rental contract must be entered into with the surviving family member/s who at them time of death where [sic] residing in that specific unit.” The principle here is crystal clear – the right to occupy under a lease must be passed on to surviving family members. What is less clear is the

mechanics.¹ Is the obligation on the Municipality to conclude the rental agreement? Or is it on the surviving family members? And what happens if, years later, no rental agreement has been concluded? As will emerge, I need not decide these questions. But the Policy's ambiguity on this score is part of the cause for the present dispute.

[5] Second, the Policy does not explain in any detail what the Municipality must do when a person is occupying a residential unit without its permission, but not residing there. Chapter 7 of the Policy deals expressly with the process for evicting a person, which must culminate, if the person refuses to move, with an eviction application in court. But that does not apply to people who are in possession of a property, but do not reside there as their home. The closest the Policy comes is clause 6.1.11 which reads: "Where a person is in possession of a rental Unit and still has other residential property, the Council will forthright take the rental unit and reallocate it from the waiting list (one person one property)." As I explain below, this cannot be a basis to dispossess a person without a court order, or another basis in law.

[6] Against that policy background, we can turn to the history of Unity 2[...]5. Unit 2[...]5 was originally rented by Siphiwo Tame, the Second Applicant's (**Nkosikhona**²) father. When Siphiwo Tame passed away, the right to occupy Unit 2[...]5 transferred to Andiswa Tame, the Second Applicant's sister. This transfer was recognised by the Municipality. "Ms A Tame" is reflected as the occupier on the Municipality's bills for

¹ Clause 7.1.1.1 suggests that a family member has a right to occupy the property without further process. The clause defines "unlawful occupant" to include a person who "has been left behind by a vacating tenant or when the tenant dies and is not a family member of the original household (includes families living in backyard structures)."

² I use the Second Applicant's first name merely to distinguish him from the other persons with the surname Tame. No disrespect is intended.

Unit 2[...]5. The difficulty arose when Andiswa Tame passed away. It is not apparent when this occurred.

[7] The First Applicant (**Ms Somhlaba**) was the Tame's neighbour. She lived in the neighbouring unit, Unit 2[...]6, which had been allocated to her mother. The Children's Court appointed her as Nkosikhona's (and his brother Fanekhaya's) foster parent in October 2007 when he was a minor. Nkosikhona is currently 25 years old.

[8] The Applicants claim that from 2007, after Nkosikhona's parents died, they lived in Unit 2[...]5. Ms Somhlaba avers that by 2023, she lived there with Nkosikhona and her two children who are 17 and 19 years old. They claim they made monthly payments of levies and rates for Unit 2[...]5.

[9] The Municipality has a different story. It agrees that, after Siphiwo Tame's death, Unit 2[...]5 was allocated to Andiswa Tame, who later passed away. But after that, it was not allocated to any other person. Instead, it was unlawfully occupied by various people. In April 2023, Unit 2[...]5 was unlawfully occupied by a Ms Phelokazi Gomba. They served a notice to vacate the property in April 2023, which was accepted by Ms Somhlaba on 20 April 2023. Ms Gomba then vacated the property.

[10] Unit 2[...]6, by contrast was allocated to Ms Somhlaba's mother, Nomphumizile Somhlaba. When she passed away in 2012, the unit was not formally re-allocated to another member of the Somhlaba family. The parties agree that the Somhlaba family continues to occupy Unit 2[...]6. But Ms Somhlaba – the First Applicant – denies that she lived there. She insists that she lived in Unit 2[...]5. Unit 2[...]6, she says, is occupied by other members of the Somhlaba family.

[11] That is the basic background to the dispute that then arose in 2023. The Applicants claim that on 23 May 2023, the Municipality sent them a notice requesting that they vacate Unit 2[...]5. There is no copy of this notice. It is not clear if this is the same notice as the one sent to Ms Gomba in April 2023, or if another notice was sent. Nothing turns on this. It seems to be common cause that, at least from April or May 2023, the Applicants were in possession of the property.

[12] What is in dispute is whether they were using it as a residence or merely to store their goods. The Applicants claim that they were living in the unit, together with Ms Somhlaba's two children. The Municipality denies this. It says that Ms Somhlaba lived next door in Unit 2[...]6, and Nkosikhona lived in the Eastern Cape. Unit 2[...]5 was being used solely to store goods. I address the evidence pointing each way, and resolve the dispute, below.

[13] The Municipality evidently took the view that Unit 2[...]5 was open to be re-allocated to a person who had applied for municipal rental stock. Enter Ms Bushwana. Ms Bushwana applied for the allocation of a municipal rental unit in 2002. By the time of these events, she had been waiting 21 years for housing. On 19 September 2023, the Municipality took a decision to allocate Unit 2[...]5 to Ms Bushwana. Its reasons are interesting. Mr Mqela, the municipal official who completed the allocation form, explains that Unit 2[...]5 is being allocated because "[a]fter several inspections conducted by me and Mr. V, George, we discovered that the rental unit has been vacant for a while and it was rented out by neighbours."

[14] During September, the Applicants claim that a woman called "Nobhingo" came to Unit 2[...]5. She claimed the property was hers and demanded that the Applicants vacate. The Applicants refused and "Nobhingo" left, warning she would involve the

Municipality. There is a debate about whether Ms Bushwana is “Nobingho”. The Applicants claim it is the same person; the Municipality and Ms Bushwana deny it. The timing certainly fits the Applicants’ version. But for reasons that will become clear, nothing turns on this dispute.

[15] After this scare, Ms Somhlaba and Nkosikhona approached the Municipality’s office to request that Unit 2[...]5 be transferred to Nkosikhona as the descendant of Sipiwo Tame. There is no written record of this application. It was likely too late, as the Municipality had already decided to allocate Unit 2[...]5 to Ms Bushwana.

[16] On 3 October 2023, the Municipality delivered another letter to the Applicants at Unit 2[...]5. It is addressed to “Illegal Occupant, 2[...]5 M[...] Street”. It refers to earlier communication requesting that the occupants vacate the property. It then states: “Please see this notification as our final request for you to vacate the rental unit immediately **(WITHIN 7 DAYS)** failing which, an urgent court order will be requested without further notice whereby you, your family and your possessions will be removed from the rental unit.” The Applicants did not vacate.

[17] On 26 October 2023, the Municipality’s law enforcement officials dispossessed the Applicants of Unit 2[...]5 in order to hand the Unit over to Ms Bushwana.³ I use the term “dispossessed” intentionally because of the dispute about whether the Applicants were residing in the Unit or not. The Municipality admits that it did not obtain a court order prior to the dispossession.

³ From photographs, it appears that at least one vehicle of the South African Police Service was also present. It is unclear what role the police played.

[18] According to the Municipality, the dispossession involved removing the goods and furniture found in the Unit. The Applicants claim they were also evicted. There is a dispute about what happened to the goods. The Municipality claims that, with the help of her family, Ms Somhlaba moved the furniture next door to Unit 2[...]6. The Applicants claim that their belongings were damaged or lost during the dispossession.

[19] Ms Bushwana moved into Unit 2[...]5 on the same day. However, she only signed her rental agreement on 31 October 2023, and it took effect from 1 November 2023. Ms Bushwana must pay R415 per month in rental, and lives in the Unit with her eight-year-old daughter.

[20] The Applicants claim they – and Ms Somhlaba's children – now have only tenuous access to housing as a result of the dispossession. The details are somewhat vague – at the time the founding affidavit was deposed to, they seemed to be living with friends or family, but it was unclear how long they would be allowed to stay. The Applicants do not allege they are in fact homeless, but do claim they are likely to be rendered homeless imminently.

The Application

[21] This application was launched on 9 November 2023, 14 days after the dispossession. It was set down for 14 November 2023. The Applicants explain the delay because they were seeking to resolve the matter with the Municipality, and had to raise funds for legal fees. The Municipality contests whether the Applicants unduly delayed and created their own urgency.

[22] The Applicants seek three forms of substantive relief. First, they ask for a declaration that their eviction was unlawful and unconstitutional. Second, they seek an order restoring to them “the occupation, full enjoyment, peaceful and lawful possession” of Unit 2[...]5. Thirdly, they pray for an order that the Municipality “restore/repair/compensate” them for the furniture and belongings that were lost or damaged.

[23] The Municipality’s defence to the declaratory relief is that Unit 2[...]5 was not the Applicants’ home, but a storage unit. Its defence to the restoration relief is that it is impossible because possession has passed to Ms Bushwana. And its defence to the compensation relief is that the Applicants have failed to make a case for compensation.

[24] The damages claim was not persisted with before me. As a result, to my mind, the application raised five issues:

[24.1] Was the application urgent?

[24.2] Was Unit 2[...]5 used as a home or a storage unit?

[24.3] Was the dispossession unlawful?

[24.4] Did the transfer of possession to Ms Bushwana preclude restoration?

[24.5] In light of the answers to the above, who should pay the costs and on what scale?

Urgency

[25] While spoliation proceedings are not inherently urgent,⁴ they are routinely dealt with urgently. The *mandament van spolie* is meant to be a speedy remedy to restore the status quo, not to resolve deeper underlying disputes. If spoliation applications are not heard with some degree of urgency, their fundamental purpose of maintaining the rule of law and speedily restoring possession (more on that to come) will be undermined. Here, additional urgency arises both because the Applicants allege they were deprived of their home and, although they have secured temporary alternative accommodation, they risk homelessness.⁵

[26] The Municipality's objection to the matter being heard urgently was not about the nature of the case. Instead, it complained that the Applicants had delayed too long and had created their own urgency.

[27] To recap, the Applicants were dispossessed on 26 October 2023. They served this application on 9 November 2023, and set it down five days later on 14 November 2023. The Municipality complains that the delay in launching the application is insufficiently explained, and that it was placed under unnecessary pressure to file its answering affidavit.

[28] There was a delay in launching the application. But in the circumstances, it was not so long as to justify refusing to hear an otherwise urgent application. The

⁴ *Mangala v Mangala* 1967 (2) SA 451 (E) at 416D-E.

⁵ Although I conclude that Unit 2[...]5 was not the Applicants' residence, that does not matter for the purposes of urgency. I could only resolve that factual dispute if I decided the matter was urgent. On its face, the application raised the risk of homelessness and was therefore urgent.

Applicants are not persons of means. They had to gather funds, and find an attorney.⁶ While the time given to the Municipality to answer the application was short, it was not unreasonable. And it was able to provide a comprehensive answering affidavit, and to brief counsel who ably argued the matter.

[29] Accordingly, I held that the declaratory and spoliation relief was urgent and dealt with it on that basis.

[30] The claim for damages, on the other hand, was not urgent. Counsel for the Applicants accepted that it would not be possible for the Court to assess the damages claim on the papers as they stood, and did not persist in seeking that relief in urgent court. There was some debate about how to deal with that part of the application – should it be postponed, dismissed or struck from the roll? I ultimately concluded that the appropriate approach was simply to hold that it was not urgent. That will allow the Applicants, if they choose, to persist with that relief. They may also choose to abandon it, and seek it in separate proceedings.

A Home or a Storage Facility?

[31] The central factual dispute is whether Unit 2[...]5 was being used as a residence, or as a storage facility. Before I analyse the evidence, I have two preliminary observations.

⁶ They also allege that they were attempting to resolve the matter without litigation. This is disputed by the Municipality. I conclude the matter is urgent whether those attempts were made or not.

[32] First, these are application proceedings and the trite test for resolving disputes of fact in application proceedings applies.⁷ The version of the respondent prevails, unless it is “so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers”.⁸

[33] Second, while the dispute initially appeared vital to resolving the case, the outcome ultimately made little difference to the order I granted. As I explain below, the dispossession was unlawful whatever Unit 2[...]5 was used for. And restoration remained impossible, whether Unit 2[...]5 was a home or not. Its resolution affected only the terms of the declaration that I made.

[34] It seems convenient to start with the Municipality’s version, and then consider whether that version is so untenable that I can reject it. Its version is that the Applicants live next door in Unit 2[...]6, where Ms Somhlaba is a lawful tenant. Until April or May this year, Unit 2[...]5 was occupied by Ms Gomba. Thereafter, the Unit was used by the Applicants to store goods and furniture. When the eviction occurred, Ms Somhlaba simply moved the goods that were stored in Unit 2[...]5 next door to Unit 2[...]6.

[35] The Municipality relies on the following facts to support its version:

[35.1] Unit 2[...]5 had, until around May 2023, been occupied by Ms Gomba, not by the Applicants. It is unlikely they would then use it as their home.

⁷ Although spoliation is sometimes referred to as an interim remedy – because it does not finally determine the rights between the parties – it is final for the purposes of the rules of resolving disputes of fact in motion proceedings. *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others* 2021 (6) SA 309 (WCC) (“Spoliation is by its very nature in the form of final relief. This being so, I was obliged, in these circumstances, to accept the version of the respondents.”)

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 643G-644C.

[35.2] Its officials visited the Unit before allocating it to Ms Bushwana, who concluded it had been “vacant for a while and was rented out by neighbours”.

[35.3] The furniture and goods that were found there did not indicate that people were living there permanently. There was no bed, and only one couch. The photos of the Unit taken on 26 October 2023 largely confirm the impression the Unit was unoccupied, save that there is a blanket on the couch.

[35.4] The electricity to Unit 2[...]5 had been cut off because of outstanding rates. Some R30 000 was outstanding. When the dispossession occurred, the electrical appliances were not even plugged in.

[36] The Applicants strongly dispute this version. They insist that Ms Somhlaba, two of her children, and Nkosikhona lived in Unit 2[...]5. They rely on a number of facts and documents to attack the plausibility of the Municipality’s version:

[36.1] They point to the notice of 3 October 2023 which was addressed to the “occupants” and asked them to vacate. Why would such a notice be sent, they ask, if the Applicants were not residing there? The Municipality’s counsel explained that it was a standard form notice that would be sent whether the Unit was being used as a residence or for storage. In my view, the notice is consistent with both versions. It could have been sent whether or not the Unit was occupied.

[36.2] Next, the Applicants rely on the notice of a service following the death of Fanekhaya Tame (Nkosikhona’s brother) in 2021. The notice invites people to come to Unit 2[...]5. I am not sure this is decisive. Similarly, the notice of death for Fanekhaya that Ms Somhlaba submitted in 2021 reflects her address as

Unit 2[...]5, not Unit 2[...]6. These documents may accurately reflect the position in 2021, but it is not inconsistent with the Municipality's version which is that, from May 2023, the Unit was not occupied.

[36.3] A municipal account statement for Unit 2[...]5 dated September 2023 is addressed to "Mej AS Tame". This does not take the matter further. The Unit had not been formally re-allocated to Ms Bushwana until 19 September 2023. It is no surprise that the account still reflects the previous registered occupant – Ms Andiswa Tame, Nkosikhona's sister. That does not shed light on the actual use of the Unit in October 2023.

[36.4] Nkosikhona signed an affidavit on 9 November 2023 stating that he lost his identity document. The affidavit records his address as 2[...]5 M[...] Street. If he was really resident at Unit 2[...]6, why would he say his address was Unit 2[...]5? But the affidavit was deposed to after the dispossession on 26 October 2023. While it indicates that Nkosikhona clearly regarded Unit 2[...]5 as his home, it is not clear proof that he was in fact resident there at the time of the dispossession. The Unit was plainly his family's home, and he may have regarded it as his, even though he was not living there.

[37] Ultimately, I do not find the Municipality's version so far-fetched that I am justified in rejecting it. That is not to say that its version is unimpeachable. I just cannot reject it on these papers. Both versions seem possible, and therefore the Municipality's prevails. The truth may lie somewhere in the middle – Unit 2[...]5 may have been used both for storing furniture, and occasionally as a residence. But for the purposes of this application, applying the rules for resolving disputes on motion, I conclude that it was not the Applicants' home.

[38] The consequence is that the dispossession was not an eviction, and did not violate s 26(3) of the Constitution. That part of the relief the Applicants sought cannot be granted. That is why the declarator I made referred to the “dispossession” of the Applicants, and not their eviction as the Applicants had sought. I now explain why, even though I conclude Unit 2[...]5 was not their home, the dispossession remained unconstitutional and unlawful.

The Dispossession was Unconstitutional and Unlawful

[39] The *mandament van spolie* originates in canon law.⁹ It is a possessory remedy. Its essence “is the restoration before all else of unlawfully deprived possession to the possessor.”¹⁰ It protects the *fact* of possession, not the legality of possession. “Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the mandament’s protection.”¹¹

[40] Its purpose is linked to the rule of law. By protecting even unlawful possession, the remedy “preserve[s] public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.”¹² The law provides a process for a person to enforce her rights; she can obtain a court order which is then “put into effect through the proper officers of the law such as the sheriff, deputy sheriff,

⁹ *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) at para 21.

¹⁰ *Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) at para 10.

¹¹ *Tswelopele* (n 9 above) at para 21.

¹² *Ngqukumba* (n 10 above) at para 10.

messenger of the magistrate's court or his deputies, reinforced if necessary, by the aid of the police or some such authority".¹³ If it was not a requirement that rights are enforced only through this legal process "breaches of the peace ... would be very common. ... [I]f you want to enforce a right you must get the officers of the law to assist you in the attainment of your rights."¹⁴

[41] Who is ultimately entitled to possession will be determined only once possession has been restored to the original possessor. Even a legitimate owner must return possession before a court will assist her to assert her ownership against an unlawful possessor.

[42] Vitally, the protection of possession "applies equally whether the despoiler is an individual or a government entity or functionary."¹⁵ A legislative body may alter that principle by enacting a law permitting dispossession without a court order; warrantless searches are one common example. But if the lawmaker wishes to depart from that vital, ordinary principle, it must do so in clear language.¹⁶ And when it acts, the government cannot just purport to "act under colour of a law"; it must be "properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law."¹⁷

¹³ Ibid at para 11, quoting with approval *George Municipality v Vena and Another* 1989 (2) SA 263 (A) at 271–2, in turn quoting with approval *Sithole v Native Resettlement Board* 1959 (4) SA 115 (W) at 117D-F.

¹⁴ Ibid.

¹⁵ *Ngqukumba* (n 10 above) at para 11.

¹⁶ *Sithole* (n 14 above) at 117D.

¹⁷ *Ngqukumba* (n 10 above) at para 13.

[43] The mandament has just two requirements: (a) the applicant was in possession, and (b) she was spoliated, or unlawfully deprived of possession. If those requirements are met – and the respondent cannot establish one of the defences – an order restoring possession follows; “[d]iscretion and the considerations of convenience do not enter into it”.¹⁸

[44] The remedy protects possession for any purpose. It does not matter whether the applicant possesses the property as a residence, an office, or a storage facility. There was no debate that the Applicants were in possession of Unit 2[...]5. There was some debate about whether their possession was unlawful. That turns on a proper interpretation of the Policy. It may be that after Andiswa Tame died, Nkosikhona required a new decision allocating the Unit to him before he could lawfully occupy it. Or it may be that his occupation was lawful and the decision to allocate was automatic, a mere formality. It doesn’t matter. What matters is that the Applicants were in possession, whether lawful or unlawful. I express no view on whether their possession was lawful or not.

[45] The Municipality could only lawfully dispossess the Applicants if they had a legal basis for doing so. The Municipality could only dispossess the Applicants on the authority of a court order, or a clear legislative provision permitting dispossession without court sanction. It had neither.

[46] Mr Braun admitted that there was no legal provision that permitted the Municipality to remove people occupying their rental stock, even if they were not using

¹⁸ *Runsin Properties (Pty) Ltd v Ferreira* 1982 (1) SA 658 (E) at 670G. See generally G Muller, R Brits, J Pienaar & Z Boggenpoel *Silberberg and Schoeman’s The Law of Property* (6th ed) at 331, arguing that courts have only a limited discretion to refuse restoration.

it as a residence. Clause 6.1.11 of the Policy could not provide a legal basis for dispossession for two reasons. One, it is a mere policy, not a law. Policies are executive instruments and cannot alter the law or afford the makers rights in law they do not already have.¹⁹ Two, it is ambiguous. It does not expressly permit dispossession without a lawful basis – it merely empowers the Municipality to take the unit. That must be interpreted as taking it *lawfully*.

[47] So the Municipality was required to obtain an order compelling the Applicants to vacate. If they refused to do so, the Municipality could employ the ordinary means for enforcing the law to compel them. If Unit 2[...]5 was a residence, that would have been an eviction order. If it was merely a storage facility – as I hold for purposes of this application it was – then it would be an ordinary application for restoration of possession under the common law. But the Municipality did neither. It took the law into its own hands.

[48] The Applicants therefore established both requirements for a spoliation order – possession and spoliation. They also established the requirements for the declarator that they had been unlawfully and unconstitutionally dispossessed. The dispossession was unconstitutional because it violated the rule of law, and the prohibition on self-help in s 34 of the Constitution.²⁰ Section 172(1)(a) compels an order declaring the Municipality's conduct unconstitutional. It is also appropriate and just and equitable

¹⁹ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59 at para 7.

²⁰ See *Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

relief in terms of ss 38 and 172(1)(b) of the Constitution to vindicate the rule of law and the right of access to court.²¹

[49] But I did not grant the order that would ordinarily follow; an order compelling the Municipality to restore possession to the Applicants. That is because despite acting unlawfully, the Municipality had a valid defence: transfer of possession to an innocent third party.

Ms Bushwana's Possession

[50] The Respondents defence is that a third party – Ms Bushwana – is now in possession and therefore it is not possible for it to restore possession to the Applicants. This is a well-recognised defence to a spoliation application.

[51] There is, however, some uncertainty about the scope of the defence. There is a debate about whether what matters is the ability of the spoliator to restore possession, the good faith of the spoliator, or the good faith of the possessor.²² Some cases hold that where possession has transferred to a third party, all that matters is whether the spoliator can “regain possession without much trouble or delay”.²³ Another

²¹ See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 106-8.

²² See Muller et al (n 18 above) at 351-2 and the academic authorities discussed in *Jamieson and Another v Loderf (Pty) Ltd and Others* [2015] ZAWCHC 18 at para 50.

²³ See *Painter v Strauss* 1951 (3) SA 307 (O); *Malan v Dippenaar* 1969 (2) SA 59 (O).

line holds that the remedy will only be available where the spoliator transferred the property in bad faith.²⁴

[52] In *Jamieson*²⁵ a Full Court in this Division considered the issue. Rogers J did not decide between the competing lines of judgments. He expressed the view that rather than the good faith of the spoliator, “the emphasis ... falls on the third party’s knowledge. If the third party had notice of the spoliation when taking possession, there is much to be said for the view that spoliation relief should be granted, not because the third party is a spoliator but because he had notice of the spoliation when taking possession.”²⁶ But this was not ultimately decisive in the case.

[53] The Supreme Court of Appeal discussed the issue in *Monteiro*.²⁷ It did not decide on the role of the knowledge of the third party. Rather, it focused on impossibility: “Where the order cannot be carried into effect it cannot, competently, be granted. Whether the order can be carried into effect is a question of fact to be determined by the court asked to grant an order.”²⁸

[54] In these urgent proceedings, without full argument, I too prefer not to try to resolve these issues. For what it is worth, it seems to me that impossibility must ultimately be the criterion. A third party may act in bad faith, yet it might remain impossible to restore possession. Courts should not grant orders that cannot be

²⁴ See the authorities quoted in *Jamieson* (n 22 above) at para 47.

²⁵ Note 22 above.

²⁶ *Jamieson* (n 22 above) at para 51.

²⁷ *Monteiro and Another v Diedricks* [2021] ZASCA 15; 2021 (3) SA 482 (SCA); [2021] 2 All SA 405 (SCA).

²⁸ *Ibid* at para 21.

carried out, even when the litigants before them have acted abhorrently. There are other remedies to show the Court's disapproval of reprehensible conduct. That may be different where the third party's conduct makes them a co-spoliator, and they are cited as a respondent. But that is not the case here.

[55] In this matter, whether the key issue is the good faith of the third party possessor, or the impossibility of restoration, the outcome is the same. I deal first with the good faith of Ms Bushwana.

[56] I mentioned earlier that there was a debate about whether Ms Bushwana was the "Nobingho" the Applicants claimed visited Unit 2[...]5 in September. The Applicants relied on this fact to support the claim she acted in bad faith when she accepted possession. To me it does not matter. It is common cause that she was present on 26 October 2023 when the Applicants were dispossessed and immediately took possession. She must have known that another person was dispossessed. Whether she also demanded the Applicants vacate a month earlier is immaterial.

[57] The difficulty is that there is no evidence Ms Bushwana knew that the dispossession was unlawful. Ms Bushwana applied for municipal housing and, after 21 years, was allocated a house. The Municipality told her she could now move into her house. It was not her duty to secure possession of Unit 2[...]5 – it was the Municipality's duty to regain possession and transfer it to her. In these circumstances, she could quite reasonably have believed that the Municipality acted lawfully when they removed the furniture from Unit 2[...]5, and handed possession to her. She may have had knowledge of the dispossession, without appreciating that the dispossession was unlawful. If she did not know the dispossession was unlawful, she did not have

knowledge of a spoliation (which is an unlawful dispossession). Consequently, she cannot be regarded as a bad faith third party, or a co-spoliator.

[58] Looking at the case from the perspective of impossibility, the outcome is the same because the Municipality could only restore possession to the Applicants by evicting Ms Bushwana. This raises several obstacles to restoration.

[59] Spoliation proceedings cannot be used to achieve an eviction. In *Betlane v Shelly Court CC* the Constitutional Court addressed a situation where a person had been evicted in terms of an invalid warrant of execution.²⁹ The property was subsequently occupied by a third party. The evicted occupant had sought spoliation to return his possession. The Constitutional Court refused to grant it. Mogoeng J (as he then was) explained that, normally, an “evictee would ... be entitled to restitution” of possession.³⁰ But “when the premises are already occupied by a bona fide third party, they are as a matter of fact not available, and restitution is impossible. It is for this reason that an order reinstating a tenant to premises cannot be granted when the premises are no longer available for occupation.”³¹

[60] Similarly, in *Schubart Park* the Constitutional Court held that “spoliation proceedings, whether they result in restoration or not, should not serve as the judicial foundation for permanent dispossession – that is, eviction – in terms of section 26(3) of the Constitution.”³² A restitution order in this case would, in effect, constitute an

²⁹ [2010] ZACC 23; 2011 (1) SA 388 (CC); 2011 (3) BCLR 264 (CC).

³⁰ Ibid at para 36.

³¹ Ibid.

³² *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC) at para 30. See also *Muhanelwa v Gcingca* [2019] ZACC 21 at para 5 (“when spoliation proceedings seek to serve as the

eviction of Ms Bushwana and her child. But it would be an eviction granted outside of Prevention of Illegal Eviction and Unlawful Occupation of Land Act.³³ That is expressly precluded by *Betlane* and *Schubart Park*.

[61] And for good reason. At least as a general principle, evictions should only happen not only following a court order, but following a court order for eviction.³⁴ An eviction order – unlike spoliation – is discretionary. It is granted only if, after considering all the facts, it is just and equitable. Restitution, by contrast, flows directly if the applicant establishes the two requirements with little if any discretion. Even if I had some discretion, I know none of the facts about Ms Bushwana that a court would ordinarily consider in deciding whether an eviction is just and equitable. I could never be satisfied that an order that would evict Ms Bushwana would be just and equitable.

[62] So I cannot grant an order that would evict Ms Bushwana – that case is not before me, nor is Ms Bushwana. And an order that required the Municipality to do so would be unimplementable and would extend far beyond the permissible scope of spoliation. The Municipality could only evict her by obtaining a court order in terms of PIE for her eviction. It is uncertain whether it could obtain an eviction order. Ms Bushwana was allocated Unit 2[...]5, and has signed a lease. Her occupation appears to be lawful. It could only become unlawful if the allocation and the lease were set

judicial foundation for ... eviction in terms of section 26(3) of the Constitution ... alarm bells start ringing.”)

³³ Act 19 of 1998.

³⁴ See the concurring judgment of Van der Westhuizen J in *Zulu and Others v eThekweni Municipality and Others* [2014] ZACC 17; 2014 (4) SA 590 (CC); 2014 (8) BCLR 971 (CC) at paras 43-5. I do not say that an eviction could never be ordered outside of an application under PIE. I leave that question open. But it must at least be the default position.

aside. Unless and until that happens, any eviction application will fail. Even leaving aside the special character of eviction proceedings, in previous cases, courts have held that restoration is impossible where the spoliator would need to institute a vindication action to restore possession.³⁵

[63] The result is that the Applicants were unlawfully dispossessed. But the Court cannot restore their possession. It could do so only by doing something the Constitutional Court has said cannot be done – using spoliation to evict. I cannot order restoration.

[64] That is not the end of the road for the Applicants. It is open to them to seek to undo what has been done, and restore their possession. They can review the decision to allocate Unit 2[...]5 to Ms Bushwana, and ask that the resultant lease is set aside. They can also seek to compel the Municipality to allocate Unit 2[...]5 to Nkosikhona as the family member of the previous lawful occupant. Having achieved that, if Ms Bushwana refuses to vacate, they can seek to evict her. This is a far more laborious path. But it is the path the law requires them to follow. And it is a path that, if they can follow it to its end, would afford not just the temporary restoration of possession, but permanent rights of occupation.

Costs and Conclusion

[65] This is an unfortunate result. The Municipality's brazen illegality has been effective. It has broken the fundamental prohibition on self-help and, in a sense, gotten

³⁵ *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 896F.

away with it. The declaration that they have acted unlawfully and unconstitutionally is important and goes some way to vindicating the rights at stake. But more is required.

[66] I decided to order the Municipality to pay the Applicants' costs on the attorney and client scale. There is no winner or loser in this application. The Applicants succeeded in obtaining the declaration of unconstitutionality they sought, albeit in slightly different terms. The Municipality successfully defended the prayer for restoration. And the claim for damages will stand over.

[67] But the root cause of this application is the Municipality's patently unlawful dispossession. The Applicants were entirely entitled to approach the Court to restore their possession. While they knew that Ms Bushwana was in possession, I do not view that as a reason it was inappropriate to approach this Court. It remained important to declare that the Municipality had acted unlawfully and unconstitutionally.

[68] A punitive costs award ensured the Applicants are not out of pocket, and expressed this Court's displeasure at the Municipality's unlawful conduct.

[69] Those, then, are the reasons I made the following order:

1. That the relief sought in prayers 2 and 3 of the Notice of Motion is urgent.
2. That the Respondent's dispossession of the Applicants from the property situated at Unit 2[...]5 M[...] Street, Zwelethemba, Worcester (**the Property**) on 26 October 2023 is declared to be unconstitutional and unlawful.

3. That the relief sought in prayer 3 of the Notice of Motion for the Respondent to restore possession of the Property to the Applicants is dismissed.
4. That the relief sought in prayer 4 of the Notice of Motion is not urgent, and is postponed *sine die*.
5. That the Respondent shall pay the costs of the application on the scale between attorney and client.

M J BISHOP
Acting Judge of the High Court

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