



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO. 2748/17

In the matter between:

COLOUR TECH PANEL AND PAINT (PTY) LTD

APPLICANT

and

CREST INVESTMENTS CC

FIRST RESPONDENT

**THE LIQUIDATORS OF TIRADEPROPS 1187 CC
(IN LIQUIDATION)**

SECOND RESPONDENT

**THE SHERIFF OF THE HIGH COURT,
INANDA AREA**

THIRD RESPONDENT

ORDER

The application is dismissed with costs.

JUDGMENT

HENRIQUES J

Introduction

[1] This was an urgent application which served before me on 13 March 2017. The relief sought in the notice of motion is the following, namely:

‘1.

That a *rule nisi* do hereby issue, calling upon the respondents to show cause, to this Honourable Court, on the ... day of ... 2017, at 9:30 a.m. or so soon thereafter as counsel may be heard why an order in the following terms should not be granted:-

- 1.1 An order that the First and Third Respondents current eviction of the Applicant from certain immovable property, being Erfs 143 and 144 Phoenix Industrial Park, situated at 57 to 63 Hunslett Road, Phoenix Industrial Park, Kwa Zulu Natal is unlawful;
- 1.2 The First and Third Respondents are hereby interdicted and restrained from unlawfully evicting the Applicant from the aforesaid property;
- 1.3 Any Respondent/s who oppose/opposes this application is/are ordered to pay the costs thereof and in the event of there being no opposition thereto, then there be no order as to costs.’

[2] The applicant sought interim relief directing that the orders set out in paragraphs 1.1 and 1.2 will operate with immediate effect, pending the outcome of the application.

[3] The applicant indicates the relief it seeks is a *mandament van spolie*. At the outset I must point out that the order in 1.1 is essentially tantamount to a declarator which in my view, an applicant is not entitled to seek on an interim basis.

The principles relating to the *mandament van spolie*

[4] It is trite that the purpose of a spoliation application is to prevent self-help. An applicant need only prove two requirements to succeed in an application in terms of the *mandament van spolie*, namely:

- [4.1] Proof that it was in peaceful and undisturbed possession of the property; and
- [4.2] That it was unlawfully deprived of such possession.

[5] An applicant must prove that it had actual possession and control coupled with an intention to derive some benefit. No spoliation occurs when the person is lawfully deprived of possession,¹ by for example, a court order authorising such dispossession.

[6] The applicant indicates the following in respect of its possession and being deprived thereof in its founding papers:

- [6.1] that it has been in occupation of the premises since 2012 i.e. before the second respondent acquired any rights over the premises or immovable property on which it is situated;
- [6.2] that the second respondent consented to its occupation of the premises as evidenced by a letter dated 3 June 2013² in which the liquidator required rental payment to be made by the applicant into a specific trust account;
- [6.3] the applicant had paid rent in respect of the premises into the second respondent's nominated bank account;

¹ *AW Burman Holdings (Pty) Ltd v Great Letaba Irrigation Board* 1995 (3) SA 158 (T).

² Annexure KP3.

- [6.4] neither the first nor second respondents have obtained an order for the ejectment of the applicant from the premises;
- [6.5] the first and third respondents are evicting the applicant from the premises pursuant to an order³ dated 24 October 2016 which does not provide for the ejectment of the applicant from the premises;
- [6.6] the applicant acknowledges receiving a letter from the first respondent's attorney enclosing a copy of the court order Annexure KP2 requesting the applicant to vacate the premises. It acknowledges that based on legal advice it received, because the order did not make reference to the applicant and did not grant the first respondent the right to eject the applicant from the premises, it did not at that stage deem it necessary to expend money on legal costs. The applicant submits that the first respondent has proceeded to evict it from the premises without the right to do so. It is for these reasons and the fact that the third respondent attended at the premises on 10 March 2017 that it submits the application is urgent.

[7] On 13 March 2017, the urgent application was opposed by the first respondent, Crest Investments CC. *Mr Harrison* who appeared on the first respondent's behalf submitted an affidavit filed in support of a warrant of ejectment and placed the following facts before the court.⁴

[8] The property which the applicant occupies namely Erf 143 Phoenix Industrial Park and Erf 144 Phoenix Industrial Park formed part of the estate of Tiradeprops1187 CC (Tiradeprops). It is common cause that Tiradeprops was wound up and liquidators were appointed.⁵

³ Annexure KP2.

⁴ I must also add that prior to hearing the opposed application, I requested the court file under Case No. 11269/14 to ascertain the circumstances under which the court order annexed as KP2 was obtained as on the face of it the order did not appear to make reference to the applicant.

⁵ The liquidators being Nicola Cronje and Chavonnes Badenhorst St Clair Cooper.

The sole member of Tiradeprops is Charlene Padayachee and the sole director of the applicant is Kajal Padayachee.⁶

[9] In order to decide this application and whether it is a spoliation application, one must consider the allegations contained in the founding affidavit relied upon by the applicant for the relief, and the principles applicable to such applications.

[10] In such application the applicant (Govindsamy Shanmugam) alleged that on 1 June 2011 he concluded two agreements of lease with Tiradeprops for the immovable property. Such lease agreement granted him the right of first refusal in the event of Tiradeprops wanting to sell the property. As the liquidators had not afforded him a right of first refusal to purchase the property he sought the relief.

[11] He also indicated that he had become aware of the fact that the liquidators had concluded a sale agreement in respect of the property with the second respondent Crest Investments CC. He indicated that he had become aware of the sale of the property to the second respondent after its member visited the property and advised his tenant Colour Tech Auto Centre that it had purchased the property. After informing the liquidator of his right of first refusal pursuant to a lease agreement, Shanmugan contacted the member of Tiradeprops, Mrs Padayachee, who furnished him with copies of the leases.

[12] He intimated in the founding affidavit that after the liquidation of Tiradeprops, he had informed the liquidator that he was the lessee of the property and that he had sublet the premises to Colour Tech Auto Centre. Ms Cronje accepted the position and chose to abide by the leases.

⁶ At the hearing of the urgent application *Mr Khan* acknowledged that they are sisters.

[13] An agreement of sale of the immovable property was in fact concluded between the liquidators of Tiradeprops and Crest Investments CC by way of private treaty on 12 August 2014. Interestingly enough, clause 5 of the private treaty sale agreement reads as follows:

‘The Liquidators herein confirm that to the best of their knowledge they are not in possession of any written lease agreement/s neither are they aware of any existing lease agreement/s that are in place, and they are not collecting any rental from any occupants in terms of a lease agreement/s over the property herein.’

[14] An application was instituted on 29 September 2014 under Case No. 11269/14 by Shanmugam. Shanmugam sought an interim order interdicting the respondents from transferring the immovable properties, pending the determination of legal proceedings to declare the agreements of lease granting him a right of first refusal to purchase the properties mentioned, valid. The respondents in such application were the liquidators of Tiradeprops, Crest Investments CC, Johnson and Partners and the Registrar of Deeds.

[15] As a consequence of Shanmugam’s application, interim relief was granted. In response to the application the liquidators filed an affidavit disputing the existence of the two lease agreements annexed to Shanmugam’s founding affidavit. Interestingly enough the liquidators disputed payment of rental in terms of the alleged lease agreement and placed in issue that Shanmugam had been previously invoiced for such rental, pursuant to the lease agreement.

[16] In opposition, reference is made to the winding-up application and the contents of the founding affidavit deposed to by one Sigamoney Pillay who sought the winding-up of Tiradeprops CC. In such affidavit, Pillay intimates that on a visit to the premises situated on the immovable property he had been approached by Shanmugam who informed him that he was the principal tenant at the premises and had leased the premises from Tiradeprops at the end of December 2012 and had taken occupation of these premises at the beginning of January 2013. The liquidators pointed out that the allegations by Shanmugam in his founding affidavit

conflicted with what Pillay had said in the liquidation application, and it appeared that Shanmugam had taken occupation of the premises long after Tiradeprops had been placed in liquidation and not in terms of the leases annexed to his founding papers from 2011.

[17] In the answering affidavit the liquidators also record that an offer to purchase the property was received from an entity called Colour Tech Panel and Paint (Pty) Ltd and a copy of the agreement is annexed thereto. The liquidators were aware that the director of Colour Tech Panel and Paint (Pty) Ltd was Padayachee who was the younger sister of the Padayachee who was a member of Tiradeprops. Such agreement to purchase was subsequently cancelled. In addition, the liquidators intimated that it was odd for Colour Tech Panel and Paint (Pty) Ltd to make an offer to purchase the property when it would have been aware of Tiradeprops' obligation to allow Shanmugam the right to make an offer on the property and the right of first refusal. The liquidator also indicated that it was apparent that there was an enormous amount of co-operation between the various parties, including Shanmugam to prevent the disposal of the immovable property in the insolvent estate and to finalise and not to hamper the finalisation of the insolvent estate.

[18] Subsequently on 13 November 2013, Van Zyl J granted an interim order. On 27 November 2014 Shanmugam instituted an action under Case No. 13802/2014 against the liquidators of Tiradeprops and Crest Investments CC. In such action Shanmugam pleaded the following:

[18.1] He had concluded two written agreements of lease with the liquidators of Tiradeprops in terms of which he was granted a right of first refusal to purchase the property;

[18.2] After Tiradeprops was placed in final liquidation, Shanmugam orally informed Cronje that he was the lessee of the property and he had sublet the property to Colour Tech Auto Centre and Cronje orally, alternatively, tacitly accepted the position;

[18.3] In breach of the lease agreement, the liquidators of Tiradeprops concluded a written agreement of sale with Crest Investments CC on 12 August 2014 and failed to notify Shanmugam of its intention to sell the property and that the liquidators of Tiradeprops dispute the validity of the lease agreement.

[19] In such action Shanmugam sought the following order, namely:

1. An Order declaring the agreements of lease (annexures “A1” to “A15” and “B1” to “B15”) concluded between the plaintiff and the first defendant valid.
2. An Order directing the first defendant to comply with the provisions of clause 24 of each of the lease agreements by notifying the plaintiff that it intends to sell the properties and granting the plaintiff the right of pre-emption to purchase the properties as contemplated by the said clause.
3. Costs of suit against the first defendant including the costs of the application under Case No. 11269/2014 and costs of suit against the second defendant only in the event of the second defendant defending the action in which event such costs order shall operate jointly and severally with the costs order against the first defendant, the one paying the other to be absolved.’

[20] The liquidators filed a plea in the action pleading that *inter alia*:

‘In terms of section 37 of the Insolvency Act 24 of 1936, if the first defendant did not, within three months appointment, notify the lessee of an election to continue with the lease on behalf of the insolvent estate, the first defendant will be deemed to have determined the lease at the end of such three months. In the event of the plaintiff proving the lease alleged, the first defendant did not elect to continue the lease on behalf of the estate and it is accordingly terminated.’

[21] When the matter came before court on the expedited trial roll, Shanmugam and the liquidators of Tiradeprops and Crest Investments CC had concluded a settlement agreement in respect of the action under Case No. 13802/14 and the application under Case No. 11269/2014. The terms of the settlement are the following:

1. The Plaintiff hereby agrees to withdraw the action under case number 13802/2014 and the application under case number 11269/2014, and consents to the discharge of the interdict with immediate effect, with each of the parties to pay their own costs both in relation to the action and the application for the interdict.

2. The Plaintiff consents to the removal of any endorsements against the title deeds of the said immovable properties, and agrees to do all things necessary for any such endorsements to be uplifted and/or removed.
3. The parties agree that neither the Plaintiff, nor the other party acting through or under any purported rights of the Plaintiff to occupy the property are terminated forthwith, the Plaintiff contending that the lease agreements have been validly cancelled and the First Defendant contending that no such lease agreements were ever concluded or in existence. Irrespective of the parties' respective contentions, they agree that no further rights to occupy the properties by the plaintiff or any other party exists.
4. The Plaintiff agrees to vacate the immovable properties immediately, and to do all things necessary to ensure vacant possession thereof to the First defendant with immediate effect.
5. None of the parties to this settlement agreement will have any further claims against the other arising from any purported lease agreements, occupation of the property, or from any delay in the sale and registration of transfer of the said properties to the Second Defendant.'

[22] Pursuant to such settlement agreement, Crest Investments CC took transfer of the property on 27 February 2017. As a consequence of Shanmugam's refusal to vacate the premises, a writ of ejectment was issued on 9 March 2017.

[23] In support of the warrant of ejectment, Crest Investments CC's sole member deposed to an affidavit setting out the terms of the settlement and annexing a copy of the settlement agreement as well as the order. Pursuant to such affidavit and request the warrant of ejectment was issued.

[24] Interestingly enough the warrant of ejectment records the following:

'WHEREAS The Liquidators of Tiradeprops 1187 CC, the First Respondent in the above matter obtained an Order in the High Court, KwaZulu-Natal, Local Division, Durban under case no: 11269/2014, on the 24th day of October 2016, against Govindsami Shanmugam, the Applicant in the matter, ordering him and all persons claiming through him to be ejected from and out of Erf 143 and Erf 144 Phoenix Industrial Park having physical address 57 Hunslett Road, Phoenix Industrial Park, Phoenix, Durban.'

[25] It was presumably pursuant to the warrant of ejectment that the third respondent attempted to evict the applicant in these proceedings from the premises. The settlement agreement specifically records that Shanmugam and all persons occupying through or under him are to vacate the premises and more importantly records Shanmugam, as well as the liquidators' views respectively in relation to the validity or otherwise of the lease agreement. Paragraph 3 of the settlement agreement specifically records that Shanmugam's and all other persons occupying the property through or under him rights to occupation are terminated. At paragraph 4 of the agreement Shanmugam specifically agrees to vacate the property and to do all things necessary to ensure vacant possession thereof to the liquidators.

[26] It would thus appear that even though the applicant may meet the first requirement for spoliation, in that it was in peaceful and undisturbed possession of the property, it has not been unlawfully spoliated or dispossessed of the property. A valid warrant of execution has been issued pursuant to a properly concluded settlement agreement and court orders being issued by the court. In addition, during the course of argument, *Mr Khan* for the applicant, acknowledged that the member and director of the corporate entities; Tiradeprops, and the applicant, are members of the same family.

[27] Having regard to all the papers filed in this matter, as well as the pleadings filed under Case No. 13802/2014 and Case No. 11269/2014, as well as the terms of the settlement agreement, it is clear that the consent order ought to have reflected Case No. 13802/2014 as well. This appears to have been an error on the part of the office of the registrar. I indicated to the parties prior to the commencement of the argument that I had called for the respective court files and had same in my possession. I brought it to the attention of *Mr Khan* that the order annexed to the papers was not endorsed on the court file under Case No. 11269/2014 but subsequent investigation has revealed that it was recorded on Case No. 13802/2014. The consent order taken settled the action as well as the application. In addition, the applicant appears to be the sub-tenant of Shanmugam and they have no right of occupation or action against third parties.

[28] Further, the relief which the applicant seeks in paragraph 1 of the notice of motion is a declarator. It is not entitled to any order either on an interim basis or as a final order given the facts of the matter.

[29] In addition, the applicant did not take the court into its confidence insofar as Tiradeprops is concerned and the goings on between Shanmugam, the member of Tiradeprops and the liquidators. The liquidators have already determined a right of occupation. Furthermore, the new owner, Crest Investments CC was substituted *ex lege* as landlord and therefore the first respondent steps into the shoes of the liquidators of Tiradeprops. I agree, even though the case dealt with the principle “huur gaat voor koop”, that the decision in *Genna-Wae Properties (Pty) Ltd v Medio Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) is apposite in that ‘the purchaser (new owner) is substituted *ex lege* for the original lessor and the latter falls out of the picture’.⁷

[30] The warrant of ejectment was legitimately and validly issued and consequently the applicant in these proceedings ought to have applied for the setting aside of the writ should it contend that it was invalid. It must follow then that I cannot agree with the submission of *Mr Khan* that the new owners, being the first respondent, must take steps to eject the applicant.

[31] The payment of rental either by Shanmugam or the applicant appears to be placed in issue. In addition, the applicant contents itself with a payment made in 2013. No other payments are put up confirming that it consistently paid the rental to date. Moreover, it is quite obvious that the applicant had deliberately not been honest with the court and has not alleged specifically the basis upon which it acquired the right of occupation. It must follow that in light of what is herein before set out in the judgment, the applicant has not made out a case for any of the relief it seeks, either on an interim or final basis. No purpose will be served in adjourning the application for purpose of the declarator as this appears to have already been

⁷ At 939B.

decided or resolved in the matters which formed the subject of the settlement agreement.

[32] In the premises the order I issue is the following:

The application is dismissed with costs.

.....

HENRIQUES J

Application heard on: 13 March 2017
Judgment delivered: 16 March 2017
Counsel for the applicant: Adv MS Khan SC
Instructed by: Messrs Kershnie Govender Attorney
39 Umhlanga Rocks Drive
Durban North
KZN
Tel 031 564 9856
Email : kershnie@law.co.za
Reference K Govender

Counsel for the first respondent: Adv GM Harrison
Instructed by: Attorneys Kathija Limalia & Associates
Suite 4, 500 Peter Mokaba (Ridge) Road
Overport
Durban