REPORTABLE

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

Case number: 12525/2022

In the matter between:

OLWETHU SOKANYILE	**First Applicant**
SILVESTER SIWEYA	**Second Applicant**
DARREN RUSSEL	**Third Applicant**

and

KEITH BROAD	**First Respondent**
ALL OCCUPIERS PRESENT AT 18 LIERMANS ROAD, LLANDUDNO, AND WHOSE IDENTITIES ARE UNKNOWNTO THE APPLICANTS	**Second Respondent**

REASONS DELIVERED ON 24 AUGUST 2022

VAN ZYL AJ:

Introduction

1. On 4 August 2022 on the urgent roll, I granted the applicants' application for the restoration of possession to them of the immovable property situated at 18 Liermans Road, Llandudno ("the property"). The first respondent is the registered owner of the property. The second respondent is a group of individuals who are currently staying at the property so as to prevent the applicants from regaining access thereto.

2. I further granted an order interdicting the first respondent from interfering with the applicants' occupation of the property pending the finalisation of the eviction application instituted by the first respondent against the third applicant

in this Court under case number 7902/2022. The eviction application is to be heard on 16 November 2022.

3. The respondents subsequently requested reasons for the order. These are the reasons.

4. The application was brought in reliance upon the *mandament van spolie* and, for the further order, upon the requirements for the grant of interim interdictory relief. This means that the applicants had to prove that they had been in peaceful and undisturbed possession of the property and that they were deprived of possession without their consent. They also had to prove the four requirements for the grant of an interim interdict, namely that the right sought to be protected is *prima facie* established, that there is a well-grounded apprehension of irreparable harm to the applicants if the relief is not granted and it ultimately succeeds in establishing its right, that the balance of convenience favours the applicants, and that the applicants have no other satisfactory remedy (*Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and another* 1973 (3) SA 685 (A) at 691C-G).

5. The first respondent relied on three defences in opposition to the application, namely (1) that the applicants were not in possession of the property as contemplated by the *mandament*, (2) that restoration of the property would be impossible due to illegality, and (3) that no case is made out for the grant of the interim interdict.

6. I deal with each of these defences below.

<u>The first respondent's conduct</u>

7. It is common cause between the parties that the first respondent has prevented the applicants from occupying the property since 24 July 2022. The applicants explained in their founding affidavit how the deprivation of possession came to be.

8. On 22 July 2022 the first applicant was called by short-term accommodation guests at the property. They stated that there were intruders at the property, who were demanding that they leave. On the first applicant's arrival at the property, he encountered about five men, one of whom stated that *"I am here on behalf of Mr Broad. I am a private investigating officer and we are here to remove you from the property*". The first applicant responded by asking what the grounds for the removal were, to which the man responded "*on the grounds that you are occupying the property illegally*".

9. The men proceeded to go through the property, opening drawers and cupboards, telling the occupants to leave. Their demeanour was threatening and aggressive. The applicants subsequently learned that the man in charge of the group was Mr Wouter de Swart of Fox Forensics. The applicants did not know the identity of the other men who were present and they refused to provide them with information regarding their identities.

10. The men threatened to assault the occupants and the first applicant called the private security firm with whom the third applicant is contracted, namely PPA Security. After PPA's arrival the other men left, but indicated that they would return on Sunday, 24 July 2022. The first applicant called the Hout Bay charge office of the South African Police Service ("SAPS") four times, but there was no answer.

11. On the morning of 24 July 2022 the first applicant was making breakfast in the kitchen. He heard a loud banging on the front door. Looking through the windows, he noticed a large number of men walking around the house, attempting to gain access. The second respondent was present, as well as another assistant.

12. One of the men was Mr de Swart, who confirmed that he was there on behalf of the first respondent. The unknown men were attempting to enter the house with a set of keys. The first applicant refused to let them enter, as he feared for

his safety and the safety of the other occupants of the house. He was scared that the men would attempt an unlawful eviction. He accordingly called the Hout Bay SAPS office a number of times, and the officer he spoke to eventually said that officers would attend the scene. Some time thereafter, SAPS members came to the property but they did not remain there for long. While the officers were there, the first applicant mentioned that the applicants were lawful tenants and that the intruders were there to take over the house. He showed the officers the lease agreement. The latter said that they were departing to fetch a detective, and left. They were disinterested in the matter, and did not return.

13. The first applicant called PPA Security, but was told that they were under clear instructions from the first respondent not to become involved in the "*removal of the illegal tenants*" – this despite the fact that the applicants themselves pay PPA's accounts.

14. At about midday the first applicant received a call from PPA, requesting that the first applicant open the property and come outside to discuss the matter. While under the illusion that PPA would protect the occupants, the first applicant opened the garage door. The men outside immediately stormed the door and forced their way inside. One of them grabbed the first applicant by the jersey and threw him against the floor. Another man later pushed him against the wall. There were about eight burly men present. The first applicant was told that he had to leave the property or be killed. The men kicked the first applicant's dog and threatened to kill the dog should the first applicant return to the property. The second applicant also sustained abrasions on his neck as a result of assaults by the men, and the occupants were forcibly removed.

15. The men have since changed the locks at the property and are currently residing there. The applicants' personal possessions are still in the property, including furniture belonging to the third applicant worth a substantial amount.

16. These events are not seriously disputed by the first respondent. In fact, the first

respondent admits that he had engaged Fox Forensics to remove the applicants from the property. His evidence is telling:

"*I admit that Mr De Swart and/or security staff in the employ of Fox Forensics gained access to the property on 24 July 2022 with the assistance of PPA Security. I was informed by Mr De Swart that he attended on the property several times during the preceding week and that, on the occasions that he had been to the property, there was nobody present or occupying it. I was further informed by Mr De Swart that, apart from a few items of clothing that apparently belonged to Mr Sewiya, there was no trace of the applicants' belongings or any evidence that they reside at the property on a permanent basis.*

Mr De Swart has placed private security personnel at the property to safeguard it. This was done because Mr De Swart was able to establish that Mr Russel was in the process of concluding a sublease in respect of the property in terms of which the property would be occupied by foreign nationals for an extended period of time. I was not informed about this by Mr Russel and I have no insight into what the terms of such sublease would entail. Mr Russel has unlawfully retained the property for a period in excess of 6 months since the lease was cancelled. I fear that if the sublease is concluded, I will continue to be excluded from my property indefinitely without any recourse of control as to who us being placed there or preventing further damage to it.

17. What is clear from this excerpt (and from a reading of the answering affidavit as a whole) is that the first respondent attempts to justify his (and his agents') actions on considerations entirely irrelevant for the purposes of the *mandament*. The essential characteristic of the *mandament* as a possessory remedy is that the legal process whereby the possession of a party is protected, is kept strictly separate from the process whereby a party's right to ownership or other right to the property in dispute, is determined (*Ngqukumba v Minister of Safety and Security and others* 2014 (5) SA 112 (CC) at para [10]).
18. In addition, he recounts hearsay evidence in an attempt to downplay the applicants' averments of possession of the property (I deal with the issue of

possession in more detail further below). The first respondent was not present when the deprivation occurred. No confirmatory affidavit from any of the Fox or PPA employees involved in the matter was produced.

19. There is no doubt that the driving force behind the forcible removal of the applicants from the property is the first respondent's dissatisfaction with the delay in finalising his eviction application. He bemoans the fact that the third applicant is not currently paying rental and that he (the first respondent) thus has an increased financial burden in respect of the property. He states that, because the eviction application has been postponed to November 2022, "*in the interim, I have been left without recourse against the third applicant (which (sic) he is clearly profiting from my property by conducting a short-term rental business)*". These are not issues that are relevant for the purposes of these proceedings. The first respondent has no doubt already placed all of this evidence on record in the pending eviction application.

20. He proceeds to state that it "*is against this background that I engaged the services of Mr Wouter de Swart of Fox Forensics Private Investigators and Security Consultants to assist me in this matter"*. This is ominous. The first respondent clearly contracted with Fox Forensics to get the applicants out of the property prior to the finalisation of the eviction application. He is attempting to render the eviction proceedings nugatory. This is self-help in its purest form.

21. In my view this conduct, and the reasoning that underpins it, also supports the applicants' case for the grant of interim interdictory relief, in particular in relation to the reasonable apprehension of irreparable harm if the interdict is not granted. The first respondent's previous attempts at forcing the applicants from the property, resulting in an interim protection order obtained by the third applicant as a result and the first respondents' actions in breach thereof, strengthen the applicants' case in this respect, even though the first respondent brushes the applicants' recounting of those incidents off as irrelevant for the purposes of this application.

The first defence: the applicants were not in possession of the property

22. The first respondent's first defence was that the applicants did not exercise a sufficient degree of undisturbed and peaceful possession of the property to succeed in their application.

23. The first respondent argues that the third applicant is no longer a lawful tenant of the property. This does not matter for present purposes, as I do not have to determine the lawfulness of his tenancy. The first respondent further submits that the third applicant does not provide sufficient evidence as to his possession of the property. The latter is said "generally" to reside at the property, but nothing is said about what this qualification to the third applicant's residential status means, how often he "generally resides" at the property, when last he accessed the property or had any measure of control over it. Merely having an alleged (and disputed) right to occupy a property without actually maintaining possession thereof is not sufficient to justify the relief that is sought.

24. I do not agree with that the third applicant has failed properly to prove possession of and control over the property. The third respondent is the lessee of the property in terms of a lease agreement concluded between him and the first respondent on 15 October 2021. The lease was to endure until 14 October 2023, and was concluded for the purposes of allowing the third applicant to conduct a short-term rental accommodation business. There are currently various disputes between the third applicant and the first respondent in relation to whether the third applicant had contravened the lease and whether the lease has been validly cancelled (as a result of the alleged contraventions). I do not have to determine those disputes. As mentioned earlier, there is a pending eviction application which is to be head in November 2022.

25. As lessee (whether disputed or not; whether the lease has been cancelled is a matter to be decided in the pending eviction application), the third respondent holds the property in such capacity. A lessee possesses and controls the property in terms of the provisions of the lease agreement. The physical

requirement for possession (*detentio*) does not require continual physical occupation; a person has *detentio* even if he leaves the property but is capable of assuming occupation at any time. What is required is that the person in question should manifest the power at his will to deal with the property as he likes and to exclude others (see *Smith and Others v Stellenbosch Municipality and Others* [2022] ZAWCHC 134 (11 July 2022) at para [90]; *Ex parte Van der Horst: In re Estate Herold* 1978 (1) SA 299 (T) at 301F-G). In the present matter, it appears that the third applicant resides at the property from time to time, and his furniture is in the proeprty. He has also employed the first and second applicants to assist in the running and maintenance of the business so as to exercise control over the property. The first and second applicants in fact reside at the property.

26. In any event, the fact that the first applicant had instituted an eviction application so as to remove the third applicant from the property is in itself a concession that the third applicant is in possession of the property. Whether he resides there on an ongoing basis is not relevant.

27. The first respondent submits that the first and second applicants do not have the *mandament* at their disposal because they hold the property as "mere servants or *quasi*-servants". In *Greaves and others v Barnard* 2007 (2) SA 593 (C) the Court stated the law as follows at para [10]:

"[10] The learned Judge in the Court below referred to a number of cases in which it was decided that a person, who was in possession of property as an employee or as an agent, is not entitled to obtain a spoliation order, namely Mpunga v Malaba 1959 (1) SA 853 (W); Mbuku v Mdinwa 1982 (1) SA 219 (TkS); and Dlamini and Another v Mavi and Others 1982 (2) SA 490 (W). He pointed out, however, that the general rule only applied to an agent or employee who had no interest in the property over and above the right which he held as agent or employee. Thus in Mpunga's case (supra) Steyn AJ said at 861E - F:

'It seems to me that the authorities have established that a servant or a person

who holds no rights on his own behalf, except insofar as such rights derive from an authority given to him by the master, is not entitled to bring proceedings for a spoliation order, but that only the employer can do so. In other words, it seems to me that before a person can bring spoliation proceedings, he must show that the right of which he has been spoliated is something in which he has an interest over and above that interest which he has as a servant or as a person who is in the position of a servant or a quasi-servant.'

In Mbuku v Mdinwa (supra), Hefer CJ said, at 222F - H:

'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. I am in full agreement with the view expressed in Wille's Principles of South African Law 7 ed at 196 - 7 that

". . . if the person who has detentio of a thing has the intention of holding it not for himself but for another person, he does not have possession, he is a custodian merely and the possessor is the person on whose behalf he is holding".'

And in Dlamini and Another v Mavi and Others (supra) at 492E - F, reference was made to Yeko v Qana 1973 (4) SA 735 (A), where Van Blerk JA (at 739D - E) said the following:

'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.'

28. I agree with counsel that this is the general position in law in relation to servants

merely holding possession of a thing on their employer's behalf, but I do not agree that this principle applies to the facts of the present case. Neither *Greaves* nor any of the cases referred to in the quoted extract deals with the situation in which the first and second applicants find themselves, namely that of occupiers of the property in question. The first and second applicants both state expressly in the founding affidavit that they permanently reside at the property, and that they are employed by the third applicant as hospitality providers and house managers.

29. Although they are employed by the third applicant, they clearly do not hold the property just in their capacities as "servants". They have an interest over and above that of serving the third applicant. The property is their home for the time being and their personal possessions, including the first applicant's dog, are there. They reside there and is in possession of the property for that purpose and with that intention quite apart from the work that they do for the third applicant in cleaning and maintaining the property. With the salaries they earn they support their families. The third applicant has no other property available at which to provide housing for the first and second applicants. The property is their home at least for as long as the third applicant is the tenant. Quite apart from the lease, and in any event, the first and second applicants would be protected by conduct such as that displayed by the first respondent by the provisions of the Prevention of Illegal Eviction and Unlawful Occupation Act 19 of 1998 ("PIE"). In *Barnett and others v Minister of Land Affairs and others* 2007 (6) SA 313 (SCA) the Court stated as follows:

"Though the concept 'home' is not easy to define and although I agree with the defendants' argument that one can conceivably have more than one home, the term does, in my view, require an element of regular occupation coupled with some degree of permanence. This is in accordance, I think, with the dictionary meanings of: 'the dwelling in which one habitually lives; the fixed residence of a family or household; and the seat of domestic life and interests' (see eg The Oxford English Dictionary 2ed Vol VII). It is also borne out, in my view, by the following statement in Beck v Scholz [1953] 1 QB 570 (CA) 575-6:

> *'The word 'home' itself is not easy of exact definition, but the question posed, and to be answered by ordinary common sense standards, is whether the particular premises are in the personal occupation of the tenant as the tenant's home, or, if the tenant has more than one home, as one of his homes. Occupation merely as a convenience for . . . occasional visits . . . would not, I think, according to the common sense of the matter, be occupation as a "home".'*

[39] Moreover, within the context of s 26(3) of the Constitution – and thus within the context of PIE – I believe that my understanding of what is meant by a 'home' is supported by Sachs J, speaking for the Constitutional Court, in Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) para 17, where he said:

> *'Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world….'"*

30. This aspect distinguishes the present case from the facts upon which *Greaves* was decided. (See also *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (C) at 61E, in which it was held, viewed from the opposite perspective, that PIE trumps the *mandament*: "*As in the case of other common-law remedies which effectively evict an 'unlawful occupier', I find that the mandament van spolie is not available where PIE applies*.")

31. In the circumstances, the *mandament* was at the first and second applicants' disposal and the first respondent was not at liberty to remove them from the property without a court order authorising him to do so. I am satisfied that the applicants have established their possession of the property on a balance of probabilities.

Is restoration to the third applicant impossible due to illegality?

32. The first respondent argued that, should I return possession of the property to the applicants – in particular to the third applicant – I would compel him (the first respondent) to act illegally. This is because the third applicant is a foreign national and citizen of the United Kingdom of Great Britain and Northern Ireland. The third applicant entered the Republic of South Africa on a visitor's visa that was valid from 8 November 2021 until 31 December 2021. The visa was issued for the purposes of conducting a holiday in the Republic of South Africa. The first respondent contends that the third applicant not only overstayed his visitor's visa, but he has also contravened the conditions attached thereto by conducting a short-term rental business while he is here.

33. As a result, the first respondent submits that the third applicant is in the country illegally. In terms of section 42 of the Immigration Act 13 of 2002 ("the Immigration Act"), no person shall aid, abet, assist, enable or in any manner help an illegal foreigner or assist a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable, including but not limited to, assisting, enabling or in any manner helping him to conduct any business or carry on any profession or occupation, harbouring him, which includes providing accommodation or letting or selling or in any manner making available any immovable property in the Republic to him. Doing so constitutes an offence.

34. The first respondent thus argues that it is impossible to return the property to the third applicant because such restoration would oblige the first respondent to act in contravention of the Immigration Act. The first respondent was not aware of the conditions of the third applicant’s visa or the expiry date thereof at the time that the lease agreement was concluded.

35. In reply, the third applicant indicates that he was advised by his immigration practitioner, Ursa Visa Consulting, that there is currently a moratorium in place as declared by the Department of Home Affairs in relation to holders of lapsed

tourist visas, as set out in a letter dated 27 June 2022 from the Department. The letter confirms a blanket extension and a lack of consequence in respect of persons holding lapsed tourist visas, until 30 September 2022. The third applicant is receiving legal assistance in his dealings with and applications to the Department and sees no potential valid challenges to the renewal of the visa. He intends to apply for permanent residency in due course.

36. Should restoration of the property to the third applicant be refused because of his alleged status? In *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) the Constitutional Court stated (at para [14]):

"*[14] The obvious conclusion is that the mandament van spolie is available even against the police where they have seized goods unlawfully. The central question is: are ss 68(6)(b) and 89(1) of the Traffic Act to be read in a manner that alters this position? Do they stand in the way of restoration of possession of the vehicle in terms of a spoliation order in this matter? I think not."*

37. In the *Ngqukumba* case the Constitutional Court indicated that it was not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Consequently, it left open the question (at paragraph [15]) whether the *mandament van spolie* would be available in such circumstances.

38. In *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) the Supreme Court of Appeal observed (at 390G–391C) that the *dictum* in the *Ngqukuma* case raised the possibility of a court refusing to order the return of the property to a person who might not lawfully possess it, but to do so would require a reconsideration of a line of authority in that court which had not hitherto been questioned (including *Yeko v Qana* 1973 (4) SA 735 (A) at 739D-G; *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 512A-B; *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) at paras [23] to [25]). In the light of the view it took on the case it was

dealing with, the Supreme Court of Appeal did not deem it necessary to make a decision on this aspect.

39. Whilst the moratorium by the Department of Home Affairs applies to the tourist visa and the conditions upon which it had been granted, and does not permit the running of a business from the property, I am nevertheless satisfied that third applicant has established possession of the property in that he resides there from time to time. His furniture and possessions are in the property. That is an issue apart from whether he is running a business from the property. I was advised form the Bar that one of the defences to the eviction application is that the first respondent should have instituted proceedings under PIE in order to evict the third applicant from the premises, as the lease provides that the property may be used for residential purposes only and the third applicant's possession and occupation thereof is not purely a commercial one. In terms of a court order dated 19 April 2022, regulating the further conduct of the matter, the third applicant was impliedly permitted to remain in the property until the determination of the eviction application.

40. Given these factual circumstances, and third applicant's explanation in relation to his visa coupled with the fact that there is already a pending eviction application due to be heard in November 2022, I also do not deem it necessary to investigate this issue in detail and reconsider the line of authorities referred to by the Supreme Court of Appeal. I am of the view that the third applicant has established that he had the required possession and control of the property, and that he was despoiled. I am also of the view that possession should be restored to him pending the finalisation of the eviction application.

41. There is in any event no evidence to the effect that the first or second applicant is in the country in contravention of the Immigration Act. There is therefore no basis upon which to refuse the return of possession of the property to them. As they reside at the property it is, moreover, unlawful to evict them without an order obtained under the provisions of PIE. The first respondent has not launched any proceedings under PIE in respect of these applicants.

The interim interdict

42. In all of the circumstances of the matter, I am of the view that the applicants have satisfied the requirements for an interim interdict pending the determination of the eviction application.

43. Counsel for the first respondent argues that the applicants should have identified each requirement specifically by name and have made averments in relation to each such requirement. This is a formalistic approach. One has to consider the applicants' founding papers holistically to see whether the well-known requirements from the grant of interim relief has been established.

44. The papers illustrate that the applicants have a *prima facie* right to remain in the property pending the determination of the eviction application, especially in light of the provisions of PIE that would possibly also have to be extended to the third applicant.

45. I have already remarked on the reasonable apprehension of harm. The first respondent's conduct (confirmed by letters from the applicants' attorney) reeks of a pattern of attempts to circumvent the hearing of the eviction application that may very well recur in the coming months prior to the hearing of that application.

46. The balance of convenience favours the applicants, in particular the first and second applicants, who have nowhere else to live. On the papers before me the third applicant is paying the rental agreed to under the lease agreement on a quarterly basis, and as at March 2022 at least he was not in arrears. I accept that he may currently be in arrears, but the disputes between him and the first respondent are due for determination in the course of the eviction application in any event.

47. I do not regard possible future actions for damages as a satisfactory alternative remedy, and the conduct of SAPS in this matter has illustrated that invoking their assistance is also not a satisfactory remedy.

48. In the exercise of my discretion I regard this as a case where interim interdictory relief should be granted so as to maintain the status *quo* in favour of the applicants pending the finalisation of the eviction application.

Conclusion

49. Following the hearing of oral argument, I agreed with the applicants' submission that this was a classic case of spoliation. I also agreed that the applicants have satisfied the requirements for the grant of an interim interdict. I accordingly granted the order as sought in terms of a draft provided on the day.

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P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicants:	Adv. P. Coston, instructed by Oosthuizen & Co.
For the first respondent:	Adv. L. van Dyk, instructed by Thomson Wilks Inc.