



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **A32/2023**

Court a quo Case Number: **2102/2022**

In the matter between:

**GRACEFUL BLESSINGS (PTY) LTD**

Appellant

and

**ZANDER BURGER PROPERTIES (PTY) LTD**

Respondent

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**CORAM:** MBHELE, DJP, VAN ZYL, J et CRONJÉ, AJ

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**HEARD ON:** 21 JULY 2023

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**DELIVERED ON:** 27 SEPTEMBER 2023

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**JUDGMENT BY:** P R CRONJÉ, AJ

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## **INTRODUCTION**

[1] The Appellant (herein referred to as “*Graceful Blessings*”) is the registered owner of a commercial property in Bloemfontein. The Respondent (herein referred to as “ZBP”) leased the premises in terms of a written lease agreement. On 4 November 2021, Graceful Blessings cancelled the lease agreement, which ZBP maintains was not properly done and on 6 May 2022,

Graceful Blessings changed the locks of the premises. ZBP brought a spoliation application to have its possession restored.

- [2] The matter came before Daniso, J on 2 June 2022, and on 25 July 2022, she found that Clause 18 of the written lease agreement does not entitle Graceful Blessings to change the locks without recourse to law. The application for a Mandament van Spolie succeeded, with costs.<sup>1</sup>
- [3] Dissatisfied with the judgment, Graceful Blessings brought an application for leave to appeal against the judgment and on 12 October 2022 Daniso, J dismissed the application with costs.<sup>2</sup> Dissatisfied with the dismissal of the application for leave to appeal, Graceful Blessings obtained leave to appeal from the Supreme Court of Appeal on 10 February 2023.<sup>3</sup>

#### **FIRST GROUND OF APPEAL**

- 4.1 The Court *a quo* should have considered the merits of the substantive right to possession relied on by ZBP and not only the question whether ZBP was factually in possession as would be required generally in a spoliation application and ought to have made a finding in respect thereof;
- 4.2 ZBP was in breach of the agreement and the Court ought to have found that the lease agreement was validly cancelled;
- 4.3 Clause 17 of the lease agreement did not afford ZBP any right to remain in occupation;
- 4.4 No dispute exists between the parties as contemplated in Clause 17 of the lease agreement; and

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<sup>1</sup> Record, p. 98, para [16] – [20]

<sup>2</sup> Record, p. 102, para [3] – [9]

<sup>3</sup> Record, p. 112

- 4.5 ZBP failed to discharge the onus of proving a valid substantive right to remain in occupation of the leased premises and/or to have its possession of the leased premises restored.<sup>4</sup>

## **SECOND GROUND OF APPEAL**

- [5] The Court failed to apply the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>5</sup> in relation to whether ZBP had a substantive right to remain in occupation of the premises.<sup>6</sup>

## **THIRD GROUND OF APPEAL**

- [6] The Court *a quo* ought to have found that the parties set out the result that may follow from a breach of the agreement – the right to retake possession of the property and:
- 6.1 Ought to have found that the parties expressly agreed that Clause 18 of the lease agreement - the consequences which may flow from breach of the lease agreement affording Graceful Blessings the right to obtain repossession and to take whatever action may be necessary for immediate ejectment of ZBP;
- 6.2 Ought to have found that ZBP had contractually agreed to forfeit its rights in the property and Graceful Blessings' conduct was not unlawful;
- 6.3 Erred in relying on *La Familia Street Culture (Pty) Ltd v Amber Brand Investments (Pty) Ltd*<sup>7</sup> ("*La Familia*") as support for the proposition that Graceful Blessings' actions were unlawful; and

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<sup>4</sup> Record, p. 106, para 1.2 – 1.3.5

<sup>5</sup> 1984 (3) SA 623 (A) at 634 E – 635 C

<sup>6</sup> Record, p. 107, para 2

<sup>7</sup> (2019/40696) [2019] ZAGPJHC 520 (2 December 2019)

- 6.4 The *La Familia* did not entail a dispute in which the Respondent alleged that the parties had contractually agreed to forfeit rights to property.<sup>8</sup>

#### **FOURTH GROUND OF APPEAL**

- [7] The fourth ground of appeal is that the Court *a quo* erred in finding that Clause 18 of the lease agreement is in conflict with “*the fundamental principle of the Mandament van spolie*”; and

- 7.1 In considering the validity of Clause 18 of the lease agreement, the Court *a quo* entered the arena of conflict between the parties and decided upon issues which were not in dispute or even raised by either of the parties in the Court *a quo*.<sup>9</sup>

#### **ISSUES TO BE DETERMINED**

- [8] This matter raises three issues to be determined in order to find whether this Court could find that the Court *a quo* was incorrect. The three issues are:

- 8.1 Whether ZBP went further than merely stating the requirements for spoliation – free and undisturbed possession and unlawful deprivation. In other words did it rely on a (contractual) right to occupation. This will provide an answer to the first and second grounds of appeal;
- 8.2 Whether Graceful Blessings, depending on an affirmation of paragraph 4.1 *supra*, showed that it was entitled to cancel the agreement. This will answer the third ground of appeal; and
- 8.3 Whether Graceful Blessings, having regard to the terms of the lease agreement, had the right to change the locks without recourse to the courts.

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<sup>8</sup> Record, p. 107, para 3.1 – 3.5

<sup>9</sup> Record, p. 108, para 4

## ZBP's FOUNDING PAPERS

[9] In its founding affidavit in the application for a spoliation order, it stated:

*"4.1 This application concerns spoliation. Which would have the effect of the Respondent returning the peaceful and undisturbed possession of the Applicant ..."*<sup>10</sup> [my emphasis]

...

*4.4 The Applicant is leasing the premises from the Respondent, and have been so leasing the premises since 27 February 2020. I annex hereto a copy of the lease agreement as annexure "ZB1".* [my emphasis]

*4.5 During or about 4 November 2021, the Respondent [Appellant] sought to cancel the lease agreement – which the Applicant maintains was not properly done – and the Applicant continues to pay rent towards the leasing of the premises."*<sup>11</sup>

[10] It went further to state:

*"6.1 ... I however invite the respondent to in its opposing papers and in anticipation of the return date to show to Court what justification there was for the dispossession."*<sup>12</sup> [my emphasis]

[11] It is clear from this passage that Graceful Blessings were invited to deal with the merits of the cancellation and dispossession of ZBP. The challenge was accepted by Graceful Blessings, in stating:

*"By virtue of the fact that the applicant's application, both in the evidence proffered by the applicant and the relief sought, goes beyond what is permitted under the Mandament van Spolie, it will be argued that a finding it [sic] to be made by the Court, in relation to the applicant's purported '**right**' of occupation of the leased premises*

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<sup>10</sup> Record, p. 5

<sup>11</sup> Record, p. 6

<sup>12</sup> Record, p. 8, para 6.1

and that the application cannot succeed unless the applicant establishes in this regard, a clear right which is enforceable against the respondent."<sup>13</sup> [my emphasis]

[12] Graceful Blessings appended a number of documents, being letters which *inter alia* indicate the basis for the cancellation of the lease agreement. The highwater mark of ZBP's defence is to be found in a letter dated 9 November 2021, stating: "It is our instructions that *our client dispute your client's right to cancel the lease agreement*. We confirm that *in terms of clause 17 of the lease agreement our client is **entitled** to remain in occupation of the premises until the dispute has been resolved.*"<sup>14</sup> [my emphasis] No substance was given to what this dispute is and the continued reliance on clause 17 brought the application within a rights dispute and, no longer merely a possessory dispute. ZBP was now riding two horses to the stable. The court *a quo* was alive to this.<sup>15</sup>

[13] ZBP belatedly attempted to skirt the invitation to deal with the "justification for the dispossession".<sup>16</sup>

[14] In its replying affidavit, ZBP stated that it is immaterial whether it came into possession by means of an agreement or otherwise.<sup>17</sup> Graceful Blessings took repossession of the property without bringing an eviction application.<sup>18</sup> Without ZBP's consent or by means of a Court order, it was dispossessed.<sup>19</sup>

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<sup>13</sup> Record, p. 32, para 9.3

<sup>14</sup> Record, p. 65 - 66

<sup>15</sup> Record, p. 96, para [10] – [13]. The reference to clause 8 in paragraph [13] of Daniso J's judgment is in fact a reference to clause 18

<sup>16</sup> The test in *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984) would apply

<sup>17</sup> Record, p. 83, para 5.4.1

<sup>18</sup> Record, p. 83, para 5.4.2

<sup>19</sup> Record, p. 84, para 5.4.4

*"I submit that this application brought by myself, is not contingent on whether or not my possession was obtained contractually or otherwise, it is simply whether or not the Applicant was in possession at the time of unlawful dispossession."*<sup>20</sup>

[15] It states that it did not invite Graceful Blessings to deal with the lawfulness of ZBP's application but to show what *justification* there was for the dispossession.<sup>21</sup> It further states:

*"I deny that there is any reason sound in law to consider the merits or the validity of the underlying causa."*<sup>22</sup>

[16] Graceful Blessings' argument before the Court *a quo* was that the law is clear that spoliation should be refused where the right to possession is relied upon as contractual rights are purely personal in nature.<sup>23</sup>

[17] The Court *quo* was in my view correct in her conclusion. However, that is not the end of the enquiry as ZBP also rode the horse of spoliation, which it never dismounted.

[18] The second issue is whether Graceful Blessings was entitled, upon cancellation, to retake possession.

[19] Graceful Blessings argues that Clause 18 of the lease agreement provides for the consequences which may flow from a breach of the lease agreement. It would *inter alia* acquire the right to obtain possession and for that purpose take whatever action may be necessary for immediate ejectment. It argues that the court *a quo* ought to have found that the parties had contractually agreed to forfeit the rights and Graceful Blessings' conduct was not unlawful.

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<sup>20</sup> Record, p. 85, para 11.1

<sup>21</sup> Record, p. 88, para 12.3

<sup>22</sup> Record, p. 88, para 12.4; See also: p. 90, para 16.2

<sup>23</sup> Record, p. 45, para 47

[20] In order to answer this, the starting point has to be the relevant provisions of clause 17 of the lease agreement:

*“In the event of the Lessor cancelling this Lease and in the event of the Lessee disputing the right to cancel and remain in occupation of the leased premises the Lessee shall, pending determination of such dispute either by **negotiation or litigation**, continue to pay an amount equivalent to the monthly rental provided in this Lease, ... and the Lessor shall be entitled to accept and recover such payments, and **such payments and acceptance thereof shall be without prejudice to and shall not in any way whatsoever affect the Lessor’s claim of cancellation then in dispute.**”*<sup>24</sup> [my emphasis]

[21] On 15 October 2021, Graceful Blessings placed ZBP in *mora* for payment of arrears.<sup>25</sup> In a letter by the attorneys of Graceful Blessings, dated 4 November 2021, it is *inter alia* stated:

*“... our client shall proceed to take repossession of the leased premises ... on 9 November 2021.”*<sup>26</sup> [my emphasis]

[22] It is of importance to note that ZBP did not rely in its founding affidavit on either Clauses 17 or 18 but Graceful Blessings did in the answering affidavit. The attorneys of ZBP, in its letter dated 9 November 2021, relied on Clause 17 for its entitlement to remain in occupation until the dispute is resolved.<sup>27</sup> The clause, however, does not afford such right.

[23] Unless there is a dispute, which off course has to be *bona fide*, and which is not evident on its papers, ZBP cannot rely on Clause 17 for any right (in a contractual sense) to remain in occupation. This was made clear in a letter from Graceful Blessings’ attorney dated 1 March 2022.<sup>28</sup>

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<sup>24</sup> Record, p. 19, Clause 17

<sup>25</sup> Record, p. 51

<sup>26</sup> Record, p. 59, line 36 - 39

<sup>27</sup> Record, p. 65

<sup>28</sup> Record, p. 70



- [24] I need not make a definitive decision on the merits of the cancellation, safe to state that the papers, as they stand, do give a *prima facie* impression that Graceful Blessings was entitled to cancel. There is nothing to show what exactly the dispute is. Clause 17 does not provide for a right to remain in occupation. The answer to the second issue is interlinked with the third issue.
- [25] The third issue is whether Graceful Blessings, having regard to clause 18 of the lease agreement, had the right to change the locks without recourse to the courts. One has to look at the relevant provisions of the clause. It reads:

*“Should the Lessee fail, neglect or refuse to pay any rent and/or other monies herein stipulated within SEVEN (7) days of the date on which payment is due, or if the Lessee or any sub-tenant of either the Lessee or the sub-tenant of the Leased Premises, ... fails, neglects or refuse to comply strictly with or carry out any term or condition of this lease ... the Lessor shall have the right to cancel this contract by written notice sent to the Lessee by the Lessor or his Agent or Attorney in the manner set forth in clause 14 (hereof) and to obtain repossession of the Leased Premises as against the Lessee and any sub-lease and for that purpose to take whatever action may be necessary for the immediate ejectment of the Lessee ... from the Leased Premises.”<sup>29</sup> [my emphasis]*

## ARGUMENTS

- [26] Mr R van der Merwe, who appeared for Graceful Blessings, argues that the Court *a quo*, even though finding that ZBP’s stance was that it had a substantive right to remain in occupation of the premises, failed to consider the merits of the right which Graceful Blessings relied on. It is the primary point on which the Court *a quo* allegedly erred.
- [27] He argues that Clause 18 expressly states what the consequences of a breach would be, namely repossession and for that purpose to take whatever action is needed. It is on this clause that Graceful Blessings exercised its rights. He supports the Court *a quo*’s reliance on *Street Pole Adds Durban*

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<sup>29</sup> Record, p. 20, Clause 18

(Pty) Ltd and another v Ethekewini Municipality<sup>30</sup> (“Street Pole Adds”) where the Court held that:

“[11] A Court must go beyond simply determining whether the elements of spoliation was satisfied and the exception thereto that this is qualified in that where the applicant goes further and claims a substantive right to be in possession that the applicant does not have such right.”

[28] The Court continued:

“[15] This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant: the claim to spoliatory relief arises solely from an **unprocedural deprivation** of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case:

“. . . the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims.”

This is because such an applicant:

“. . . in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered . . .”

[16] The qualification applies here. SPA's application sought classically spoliatory relief in demanding the restoration of the posters the municipality had despoiled (paragraph 1.2). But, as Nicholson J pointed out, its claim went further. It pressed for an **interdict**, not directed only to the despoiled property, but in wide terms embracing all the “various street poles in the Ethekewini metropolitan area” covered by the disputed agreements. That claim spoiled for a fight about its title to those poles, and it was this fight in which the municipality was entitled to and did engage.” [my emphasis]

[29] He argues that the Court a quo erred in then considering the mandament van spolie without the qualifications/exception referred to in *Street Pole Adds*. The

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<sup>30</sup> 2008 (5) SA 290 (SCA)

Court *a quo* ought to have found that no dispute existed between the parties as contemplated in Clause 17 of the lease agreement. The Court erred in finding that ZBP did not discharge the onus of proving a right to remain in occupation. He refers to *Van Rooyen v Hillandale Homeowners' Association*<sup>31</sup> ("*Van Rooyen*").

[30] He uses those principles and draws it through to Clause 18 of the agreement as justification for dispossessing ZBP. As this was a commercial property, the qualification in *Van Rooyen* regarding illegal clauses in agreements do not find application.

[31] The Court *a quo* therefore erred in applying the provisions of Clause 18 of the lease agreement as being illegal. As Graceful Blessings did not rely on Clause 18, the Court could not have raised it *mero motu*.<sup>32</sup>

[32] In respect of the first ground of appeal, Mr Van der Merwe essentially argues that the Court *a quo* failed in not dismissing the application after she correctly considered ZBP's reliance on substantive rights to possession.<sup>33</sup> My reading of paragraphs [10] – [12] does not show that the Court *a quo* granted the application contrary to this position. The Court *a quo* considered whether parties can contractually agree that Graceful Blessings could take repossession. She merely continued to have regard to clause 18.

[33] He referred to *Afrox Healthcare Beperk v Strydom*<sup>34</sup> (*Afrox*) for the proposition that freedom of contract is a constitutional value and should be enforced judicially. ZBP did not challenge the validity and/or enforceability of the agreement in the Court *a quo*.

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<sup>31</sup> (1603/2014) [2014] ZAFSHC 226 (11 December 2014) at para [45]

<sup>32</sup> This is not correct. It made reference to the clause in two paragraphs of its answering affidavit. See: Record, p, 38, para 21.3.2 and para 23

<sup>33</sup> Record, Judgement p. 96, para [10] – [12]

<sup>34</sup> 2002 (6) SA 21 (SCA) at para [22] – [32]

[34] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (“*Endumeni*”)<sup>35</sup> a warning was sounded that judges must be alert and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. This means, according to his argument, that the Court *a quo* ought to have found that Graceful Blessings was entitled to take whatever action necessary.

[35] He argued that the facts in *La Familia* is distinguishable. It did not involve a dispute similar to the matter before us, and argues that the parties contractually agreed to forfeit rights to a property. The Court considered the validity of Clause 18 and therefore entered the arena of conflict between the parties where it was not in dispute or even raised by any of the parties. As I already stated, this is incorrect. Graceful Blessings twice referred to clause 18.

[36] He also refers to *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and Others*<sup>36</sup> where it was held:

*“... The qualification to the rule that a person who has been despoiled of possession must be restored to possession before any dispute as to who is entitled to possession will be investigated, is that if the applicant goes further than to claim spoliatory relief, and claims a substantive right to possession, whether based upon a vindication or upon contract, then the respondent may answer such **additional claim of right** and may demonstrate, if he can, that applicant does not have the right to possession which it claims. The Court will not order return of possession of the property in such a case if respondent succeeds in refuting the applicant's claim of right to possession.”*  
[my emphasis]

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<sup>35</sup> (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

<sup>36</sup> [1997] JOL 294 (C) at p. 24

[37] He argues that *Van Rooyen* sanctioned the refusal to provide water and electricity vouchers on the basis of the Rules of the scheme. The Court in *Van Rooyen* held:

*"[39] It is trite that parties are free to contract as they please. The law permits perfect freedom of contract. Parties are left to make their own agreements, and whatever the agreements are, the law will enforce them provided they contain nothing illegal or immoral or against public policy. In New Garden Cities Inc Association Not for Gain v Adhikarie 1998 (3) SA 626 (CPD) Rose-Innes J stated that a term in a contract of sale which restricts the use of properties in a township to residential purposes is in the interest of all property owners in the township. It ensures that the residential nature of the area is preserved, without interference by industry or businesses.*

...

*[45] I am satisfied that the trust's failure to adhere to the aesthetical rules triggered the imposition of penalties which remained unpaid. The rules and the contract entered into between the trust and the respondent, are binding on the applicant. The respondent was entitled or had the power to refuse to sell applicant prepaid water and electricity vouchers, or to limit the number of units to be sold to applicant. Respondent's conduct was therefore not unlawful as it acted within the rules and the agreement it entered into with the trust. The conduct of the respondent did therefore not amount to spoliation. [my emphasis]*

[38] Mr C Hendriks, for ZBP, relies on *Yeko v Qana*<sup>37</sup> where the court held that 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 and that he was unlawfully deprived of such possession.

[39] The case is, however, not on all fours with the case before us. The Court in that matter did not have to decide whether the Applicant went further than merely alleging possession and there was no contract with a clause similar to clause 18 which, according to *Graceful Blessings*, provides for repossession without court intervention.

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<sup>37</sup> [1973] 4 All SA 512 (A) at 516

- [40] He supports the distinction that the Court *a quo* applied between the case before us and *Van Rooyen supra* and that no person may take the law into his own hands.
- [41] His reliance on *Stocks Housing supra* is a two-edged sword. In the matter before us, ZBP went beyond merely relying on free and undisturbed possession and unlawful dispossession. It invited Graceful Blessings into the arena to prove valid cancellation.
- [42] He argues that *Street Pole Adds* is distinguishable, as ZBP did not seek relief going wider than the despoiled property. This is correct and can be distinguished from cases where interdicts and declarators were also sought.
- [43] The Court *a quo* correctly applied the test in *Van Rooyen* that the facts in that matter are distinguishable from the facts in the present matter.
- [44] He argues that the words should be interpreted *contra proferentum*.<sup>38</sup> The requirement that the wording must be clear, is borne out by the fact that by agreement, recourse to the Courts are ousted thereby placing a limitation.<sup>39</sup>

## THE LEGAL PRINCIPLES

- [45] It is correct that the freedom of contract is a constitutional value as set out in *Afrox Healthcare Beperk v Strydom*.<sup>40</sup> The decision, however, also refers to

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<sup>38</sup> *Verba fortius accipiuntur contra proferentem* (words are interpreted against/to the disadvantage of the party uttering them). This applies against the drafter of a document/contract. See: *Fedgen Insurance Ltd. v Leyds* (475/93) [1995] ZASCA 20; 1995 (3) SA 33 (AD); [1995] 2 All SA 357 (A) (27 March 1995) para 10

<sup>39</sup> See: *Hypercheck (Pty) Ltd v Mutual & Federal Insurance Company Ltd* [2012] JOL 28277 (GSJ) “Thus, as stated by Smallberger JA in the *Fedgen* case, at 38 B-E: “Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted...” at p. 9

<sup>40</sup> 2002 (6) SA 21 (SCA) at para [22] – [32]

*Brisley v Drotsky*<sup>41</sup> (“*Bisley*”) where the court held: “[T]he Constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint ... contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy also informs the constitutional value of dignity.”

[46] Courts must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. In *Endumeni*, the Court held:

[18] ... In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’,<sup>42</sup> read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the ‘emerging trend in statutory construction’. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges* NO and another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

‘Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.’ [my emphasis]

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<sup>41</sup> (432/2000) [2002] ZASCA 35 (28 March 2002)

<sup>42</sup> In *Street Pole Adds infra* it was held that “[I]t is unnecessary (...) to look beyond the plain meaning of the agreement itself, in its background setting, since it contains no ambiguities or uncertainties.”

[47] Applying the above principles, the matter before us is a commercial contract concluded between commercial entities in respect of commercial property. It can be accepted that the purpose of clause 18 was to terminate occupation by taking repossession. ZBP does not state that it was strong-armed to sign the agreement and raises none of the established defenses to avoid the application of the provision. That answers the contextual factor to which *Endumeni supra* refers.

[48] The next factor is the language and general words used. In *Barkhuizen v Napier*<sup>43</sup> the Constitutional Court held:

*“[15] I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations. That it did not, is apparent from the judgment. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of the parties' relative bargaining positions is an issue. All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control.”*

[49] *Pacta sunt servanda* is therefore still alive and well. Its application has to be moderated by the constitutional values of equality and dignity. The principle of equality, in the context of the matter before us, is tested against s 34 of the Constitution.<sup>44</sup> It provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.

[50] In *Brisley* the Constitutional Court continued:

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<sup>43</sup> [2008] JOL 19614 (CC)

<sup>44</sup> 108 of 1996



[30] *In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. ...*

...

[56] *There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause.*

[57] *The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.*

[58] *... What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was a good reason why there was a failure to comply."*

[51] In *Nino Bonino v De Lange*<sup>45</sup> ("Nino") the Court, per Smith J held:

*"I regret that the decision of the court below, which is now appealed against, cannot be supported. I say I regret it, because it does not seem to me, judging from the facts*

<sup>45</sup> 1906 TS 120 at 124 - 125

*deposed to in the evidence, that there can be any doubt that there have been grave breaches of the conditions of the lease, and that mowing [sic] to the peculiar circumstances of the case and the respondent being the license-holder of the premises of which this building formed a part, he was put in some peril of losing his license.*

*But it seems to me that the law applicable to this case is perfectly clear. There is no doubt that this is a case of spoliation, and the law will not allow a man to take the law into his own hands and to take out of the possession of another, who is unwilling to yield it up, property which he thinks he has a claim to or may have a very good and very just claim to. His remedy is to enforce, his rights through the court.*

*But for the presence of clause 18 in the lease this case of course would not be arguable at all. It seems to me that the clause cannot affect the rights of the parties. It is in effect an agreement between the two parties that one of them shall be, permitted to do an act which the law does not allow him to perform. Such an agreement, as was pointed out in the case of Blomson v Boshoff, is contrary to public policy and the Court will not enforce it. It is true that the provisions of the lease there were somewhat different to the conditions in this cases but the practical effect was the same. In that case the lease purported to give the lessor a right to physically eject the lessee from the premises. In the present case the lease only gives the lessor the right to refuse him access to the premises. It seems to me that he did refuse him access in the most practical way; after lessee had left the billiard room for the night, and the lessor saw he had left the premises, he barricaded the room, and when the lessee came the next morning he found the room barricaded against him.*

*Any state of circumstances more likely to lead to a breach of the peace than that, I find it difficult to conceive; because if a man finds property barricaded against him which he thinks he has the right to enter he is extremely likely to resort to force to effect an entrance.” [my emphasis]*

[52] In *First Rand Ltd. t/a Rand Merchant Bank and Another v Scholtz NO and Others*<sup>46</sup> it was held:

*“[13] ... In cases such as where a purported servitude is concerned the mandement is obviously the appropriate remedy, but not where contractual rights are in dispute or **specific performance** of contractual obligations is claimed: ... .” [my emphasis]*

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<sup>46</sup> (373/06) [2006] ZASCA 99; [2006] SCA 98 (RSA); 2008 (2) SA 503 (SCA) ; [2007] 1 All SA 436 (SCA) (9 September 2006)

[53] In *Telkom SA Ltd v Xsinet (Pty) Ltd*<sup>47</sup> it was held:

“[14] ... *This is, however, a mere personal right and the order sought is essentially to compel **specific performance** of a contractual right in order to resolve a contractual dispute. This has never been allowed under the mandament van spolie and there is no authority for such an extension of the remedy.*” [my emphasis]

[54] In *Turner and another v Ntintelo and another*<sup>48</sup> it was held:

“[38] *As discussed above, the mandament remedy is not available for contractual disputes or **specific performance** matters. This remedy is not available where the right to receive is purely personal in nature. In Eskom Holdings SOC Ltd v Masinda (supra) para 22.*”

## DISCUSSION

[55] ZBP approached the Court a quo on the basis of spoliation. It was the only remedy it sought. When it invited a discussion on the merits of termination, it ran the risk that the substantive right to remain in occupation will be canvassed. It had to skirt the invitation in reply but it was too late. It already opened itself up for possible failure when it appended the lease agreement and the letter of termination.

[56] *Van Rooyen* has to be understood in the context of legislation, the constitution of the entity and the Manual for Community Participation. Although *Van Rooyen* did not refer to *Barkhuizen*, it does recognise that the law will enforce rules provided they contain nothing illegal or immoral or against public policy. I am willing to accept that there may be situations where policy considerations would not impede actions that would ordinarily constitute spoliation. This would apply when a party “goes further”.

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<sup>47</sup> (92/2002) [2003] ZASCA 35 (31 March 2003)

<sup>48</sup> [2023] JOL 58279 (WCC)

- [57] The Court *a quo's* treatment of *Van Rooyen supra* has also to be understood contextually. Although the principles applicable to spoliation is trite, each case has to be treated on its own facts. I support the reasoning and conclusion in *Van Rooyen*.
- [58] Reliance on *Stocks Housing supra* is a two-edged sword. Where a party goes beyond merely relying on free and undisturbed possession and unlawful dispossession it opens itself up to justify its further occupation. One has to be careful to apply this indiscriminately. It has to depend on how far the party has gone to enforce a right to occupation. This is what happened in *Street Pole Adds*. ZBP did not seek relief going wider than restoration.
- [59] *Yeko v Qana*<sup>49</sup> is not on all fours with the case before us. The Court in that matter did not have to decide whether the Applicant went further than merely alleging possession and there was no contract with a clause similar to clause 18 which, according to *Graceful Blessings*, provides for repossession without court intervention.

## CONCLUSION

- [60] Is there a need that the common law principles applicable to spoliation applications be developed to cater for modern developments in commercial transactions? Section 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. This was not raised before the Court *a quo* and not argued before us. It would therefore be improper to consider it.
- [61] In view of what was stated in *Brisley* there may not be a necessity for such development. It would in my view be manifestly unfair if commercial parties/entities enter into commercial agreements regarding commercial property, which make provision for termination of possession through means

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<sup>49</sup> [1973] 4 All SA 512 (A) at 516

other than court process, especially when it relates to failure to perform in terms of rent, to compel incursion of additional expenses.<sup>50</sup>

[62] There is presently many cases where the Courts have stated that as long as the principle of *pacta sunt servanda* is counterbalanced with the constitutional principles of dignity and equality, the provisions in contracts to regulate extra-curial process, may be justified.

[63] In my view this will be determined by the precise words employed in contracts. Does the choice of words in the present contract pass the bar? I am of the view that it does not. It provides that Graceful Blessings may take any action for the ejection of ZBP. In *Letsoalo and Others v Tepanyekga and Others*<sup>51</sup> the term ejection was used in the context of an action or application for ejection.

[64] If clause 18 was formulated differently there may have been a basis for interference in the Court a quo's conclusion. I align myself with what Smith, J stated in *Nino*, that he regrets the outcome because it does not seem to him, judging from the facts deposed to in the evidence, that there can be any doubt that there have been breaches of the conditions of the lease.

[65] I would dismiss the appeal with costs.

## ORDER

1. The appeal is dismissed.
2. Appellant pays the costs of the appeal.

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<sup>50</sup> *Nino supra*

<sup>51</sup> (19/2018; HCA 14/2019) [2020] ZALMPPHC 74 (28 August 2020) at para [20] – [21]; See also *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA) at para 51 - 52; *C v C and Others* (2013/12732) [2021] ZAGPJHC 432 (17 September 2021); *AJP Properties CC v Sello* (39302/10) [2017] ZAGPJHC 255; 2018 (1) SA 535 (GJ) (8 September 2017)

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**P R CRONJÉ, AJ**

I agree:

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**N M MBHELE, DJP**

I agree:

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**C VAN ZYL, J**

On behalf of Appellant: Adv R Van der Merwe  
Honey Attorneys  
Bloemfontein

On behalf of Respondent: Adv C Hendriks  
Gous Vertue and Associates  
Bloemfontein