

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **27th July 2021** Signature:

CASE NO: 5747/2021

DATE: 27TH JULY 2021

In the matter between:

HUMAIR, RAHEEL

Frist Applicant

KHAN, NABEEL

Frist Applicant

and

**THE NATIONAL COMMISSIOER OF
THE SOUTH AFRICAN POILCE SERVICES**

First Respondent

COLONEL DLOMO (BOOYSENS POLICE STATION)

Second Respondent

EVE, ALAN HILTON

Third Respondent

Coram: Adams J

Heard: 20 July 2021 – The ‘virtual hearing’ of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 27 July 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 27 July 2020.

Summary: Opposed application – *mandament van spolie* – section 31 of the Magistrates Court Act – *Automatic Rent Interdict* not a justification for self-help – Automatic Rent Interdict only attaches property on the leased premises – does not entitle lessor to unlawfully evict lessee – application for reinstatement granted.

ORDER

- (1) The first and second applicants' application against the third respondent succeeds.
- (2) Possession and occupation of the business premises situate at [...], Booyens Reserve, Johannesburg ('the premises') shall be restored to the first and second applicants immediately by the third respondent.
- (3) In the event of the third respondent failing to comply with the order in paragraph (2) above within five days from date of this order, the Sheriff of the High Court is hereby directed and authorised to restore to the first and second applicants' possession and occupation of the premises and to reinstate the applicants in terms of this order.
- (4) Each party shall bear his own costs of this opposed application.

JUDGMENT

Adams J:

[1]. This is an opposed application by the first and second applicants for an order reinstating their occupation and possession of business premises situate

in Booyens Reserve, Johannesburg. The applicants occupied the premises, from which they conducted a recycling plant, where machinery and equipment were housed by them and used in their recycling business. That was until 26 December 2020, when the applicants were locked out of the business premises by the third respondent, who was acting personally and on behalf of his company, which owns the property on which the factory is situated.

[2]. The applicants occupied the premises pursuant to and in terms of a business lease agreement. They were in breach of the lease agreement, whereafter they were sued by the third respondent, and that action was compromised and a settlement reached between the parties. In terms of the settlement agreement, the applicants were to continue occupying the premises, subject to them paying rental of R80 000 per month, which they seemingly did not pay timeously or at all. This is probably why the third respondent wants them out of the premises and which is the real reason why the applicants were locked out of their factory during 2020.

[3]. It is common cause between the parties that the third respondent did not have a court order authorising the eviction of the applicants from the premises, which is what the lock-out during December 2020 in effect amounted to. Of that there can be little doubt. The third respondent's explanation for locking out the applicants from the premises is to the effect that the movable property on the premises, being the applicants' machinery and equipment, was attached by the Sheriff of the Magistrates Court pursuant to and in terms of an *Automatic Rent Interdict* summons issued under case number 1116/2019. The summons was initially served and the attachment made during May 2019 and again during November 2020. On the 26th of December 2020, so the third respondent alleges, it came to his attention that the applicants, in contravention of the judicial attachment of the movable property, were planning on removing the machinery and the equipment from the factory. In order to prevent the foregoing unlawful conduct on the part of the applicants, so the third respondent avers, he himself opted to act unlawfully by locking out the applicants from their factory – this is the very definition of spoliation.

[4]. The very crisp question to be decided in this application is whether the third respondent was justified in his spoliation of the applicants in relation to their occupation of the business premises.

[5]. It may be apposite at this juncture to say something about the general principles applicable to the legal remedy of *mandament van spolie*, which has been part of our law for generations. Its scope and application has been aptly summarised in the old Transvaal Full Bench decision of *Nino Bonino v De Lange*¹. Innes CJ had this to say:

'It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so the court will summarily restore the *status quo ante* and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear'

[6]. It is trite that if one takes the law into your own hands by dispossessing another, the *status quo ante* will be restored summarily and you will be ordered to restore possession to the previous possessor. *Mandament van Spolie* is not an order for Specific Performance – the one is a summary remedy based on free and undisturbed possession of a 'thing' and the other is a remedy based in contract.

[7]. So, as I indicated earlier, the question is whether the third respondent spoliated the applicants. Or was the third respondent justified in 'taking the law into his own hands' by locking the applicants out of their factory without a court order?

[8]. Section 31 of the Magistrates Court Act, Act 32 of 1944 provides as follows: -

'31 Automatic rent interdict

(1) When a summons is issued in which is claimed the rent of any premises, the plaintiff may include in such summons a notice prohibiting any person from removing any of the furniture or other effects thereon which are subject to the

¹ *Nino Bonino v De Lange*, 1906 TS;

plaintiff's hypothec for rent until an order relative thereto has been made by the court.

- (2) The messenger shall, if required by the plaintiff and at such plaintiff's expense, make an inventory of such furniture or effects.
- (3) Such notice shall operate to interdict any person having knowledge thereof from removing any such furniture or effects.
- (4) Any person affected by such notice may apply to the court to have the same set aside.'

[9]. A lessor has under the common law a tacit hypothec over the *invecta et illata* on the leased premises for the rent due to him by the lessee. The hypothec is complete without judicial attachment, but operates only as long as the goods remain on the premises. The hypothec is lost as soon as the goods are removed. The lessor is however not entitled forcibly to prevent the lessee from removing the goods from the leased premises. Therefore, the machinery provided by law for the purpose of preventing removal of the goods is an attachment. And that is the total effect of an automatic rent interdict – it does not entitle the lessor to self-help. Section 31 most certainly did not convert the third respondent's unlawful spoliation of the applicants into lawful conduct.

[10]. In any event, it is the case of the applicants that the action under which the Automatic Rent Interdict summons was issued, that being under case number 1116/2019, was compromised and settled during May 2019. No provision was made in the settlement agreement for a retention of the attachment made of the property in terms of the automatic rent interdict. The attachment of the property therefore appears to have been invalid.

[11]. The simple fact of the matter is that the applicants were in free and undisturbed possession of the business premises until 26 December 2020. On that day the third respondent and his company dispossessed the applicants by locking them out of the premises and by denying them access thereto. This the third respondent and his company did without a court order. The foregoing entitles the applicants to a *mandament van spolie*.

[12]. The third respondent has also raised a number of legal points in his opposition to the applicants' application. Most notable of these points *in limine* is

the third respondent's defence based on *lis alibi pendens*. Generally, this special defence requires that there be pending litigation in two competent forums between the same parties, over the same subject matter or cause of action and for the same relief. It may very well be that the requirements for *lis pendens* are met *in casu*. The applicants have instituted applications similar to this application in this court and in the Magistrates Court.

[13]. However, a court retains an overriding discretion not to uphold the plea because of the specific circumstances of a case. I am of the view that, in the circumstances of this case, I should exercise my discretion in favour of the applicants. The pending applications in this Court were brought by the applicants on an urgent basis and they have been unsuccessful mainly because of a lack of urgency. That is not the case with the matter before me, which is simply an opposed application, in which the applicants appear in person. The applicants are accordingly lay pleaders and I am enjoined to construe their papers and the manner in which they conduct the litigation generously and in the light most favourable to them. In that regard, see: *Xinwa v Volkswagen of South Africa (Pty) Ltd* [2003]²;

[14]. The applicants have however placed facts before me, which indicate that the third respondent has acted unlawfully by evicting them without a court order. Such conduct cannot and should not be countenanced as it would undermine the rule of law, which is already under threat. This point *in limine* therefore stands to be dismissed.

[15]. As for the rest of the legal points, which are for the most part of an overly technical nature, and do not detract from the common cause fact that the third respondent has acted unlawfully, there are no merit in any of the points. They similarly stand to be rejected.

[16]. As for the second and the third respondents, they played no part in this opposed application and have indicated that they will abide the decision of this court. They were cited by the applicants because, so the applicants contend, they assisted the third respondent in having the applicants evicted from the

² *Xinwa v Volkswagen of South Africa (Pty) Ltd* [2003] ZACC 7; 2003 (4) SA 390 (CC), para 13;

premises. I do not intend granting any orders against these respondents as they were acting on instructions of the third respondent.

[17]. Accordingly, the applicants' application against the third respondent should succeed and the applicants' occupation of the premises should be restored.

Costs

[18]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[19]. In this matter, the applicants would therefore have been entitled in the normal course of event to an award for costs in their favour. However, the applicants are not legally represented in these proceedings and therefore are not entitled to recover any legal fees other than actual expenses and expenditures incurred in the litigation.

[20]. I am of the view that no order as to cost shall be fair, reasonable and just to all concerned. Therefore, in the exercise of my discretion I intend granting no order as to costs.

Order

[21]. Accordingly, I make the following order: -

- (1) The first and second applicants' application against the third respondent succeeds.
- (2) Possession and occupation of the business premises situate at [...], Booyens Reserve, Johannesburg ('the premises') shall be restored to the first and second applicants immediately by the third respondent.
- (3) In the event of the third respondent failing to comply with the order in paragraph (2) above within five days from date of this order, the Sheriff of the High Court is hereby directed and authorised to restore to the first and second applicants' possession and occupation of the premises and to reinstate the applicants in terms of this order.

(4) Each party shall bear his own costs of this opposed application.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	20 th July 2021 – in a ‘virtual hearing’ during a videoconference on the Microsoft Teams digital platform
JUDGMENT DATE:	27 th July 2021 – judgment handed down electronically
FOR THE FIRST AND SECOND APPLICANTS:	In Person
INSTRUCTED BY:	In Person
FOR THE FIRST AND SECOND RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance
FOR THE THIRD RESPONDENT:	Adv C Armstrong
INSTRUCTED BY:	J B Attorneys