



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 22 May 2023

Case No. 2023/043354

In the matter between:

NINARICH INVESTMENTS 1 (PTY) LTD

Applicant

and

**THOSE ATTEMPTING TO ASSUME CONTROL OF AND
BLOCKADING ACCESS TO 31 BETTY STREET**

First Respondent

THE STATION COMMANDER, JEPPE POLICE STATION Second Respondent

Neutral citation: Ninarich Investments 1 (Pty) Ltd v Those attempting to assume control of and blockading access to 31 Betty Street (2023/043354) [2023] ZAGPJHC 530 (22 May 2023)

JUDGMENT

WILSON J:

- 1 On 16 May 2023, I dismissed an urgent application for relief restraining the respondents from threatening, intimidating or harassing the applicant's staff or tenants at a property situated at 31 Betty Street, Jeppestown. The

applicant also sought an order authorising the sheriff to do “everything necessary to install the applicant’s security at the building”. I indicated that my reasons would be given in due course. These are my reasons.

2 The applicant, Ninarich, owns the property at 31 Betty Street in Jeppestown, from which it is seeking to remove unlawful occupiers. Judgment in its eviction application is presently reserved before my brother Nel AJ. That application was brought after extended legal proceedings, lasting several months, between Ninarich and a group of people it says first took occupation of the property on 8 November 2022.

3 After that initial occupation, on 16 November 2022 Ninarich brought urgent spoliation proceedings against the occupiers. The fate of those proceedings is not entirely clear from the papers. They appear to have been overtaken by the arrest, on 13 March 2023, of the occupiers of the property on charges of trespass. It seems that the occupiers were kept in police custody until 15 March 2023, when they were released on bail. Although this is not expressly stated on the papers, Ninarich clearly took advantage of that period to secure the property against the occupiers’ return. The occupiers were refused access to the property when they attempted to return on 15 March 2023.

4 That drew a spoliation application from the occupiers themselves. The application was enrolled before my brother Moorcroft AJ on 17 March 2023. After three enrolments and two removals, on 24 March 2024 Moorcroft AJ reserved judgment on that application, but not before refusing what appear on the papers to have been two interim applications for access to the

property pending the final determination of the main spoliation application on the merits.

- 5 On 27 March 2023, Moorcroft AJ handed down judgment on the spoliation application. He refused the application, apparently on the basis that the occupiers had never been in “peaceful and undisturbed” possession of the property, and that they were accordingly not entitled to a spoliation order (see *Dube v Ninarich Investments (Pty) Ltd* (2023/54) [2023] ZAGPJHC 295 (27 March 2023)). I have to say that Moorcroft AJ’s reasoning and conclusions appear to me to be clearly wrong. It seems plain on Ninarich’s version that the occupiers were in possession of the property between 8 November 2022 and 13 March 2023. Even though Ninarich was obviously unhappy about it, I see nothing in Moorcroft AJ’s judgment that leads to the conclusion that this possession was interrupted or significantly interfered with in any way during that period. It was clearly peaceful and undisturbed in the sense that the occupiers physically held the property with the intent to secure a benefit for themselves from doing so. That this is the common law definition of the kind of possession that the *mandament van spolie* recognises and protects has been settled law for over forty years (see *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-F). To hold that arrest and temporary detention by the police in itself serves to bring to an end a person’s occupation of property at which they resided prior to the arrest would be a startling and wholly unjustified conclusion, not least because it would confuse possession of immovable property with continuous presence at it.

6 That was, in any event, a conclusion which Moorcroft AJ avoided – although he left unexplored the issue of whether an arrest for trespass of people clearly using the property as a home could ever be lawful. Moorcroft AJ instead appears to have held that the charges of trespass Ninarich laid and the spoliation application it brought on 16 November 2022 were sufficient in themselves to prevent the occupiers’ possession of the property from becoming peaceful and undisturbed. But that cannot be. Spoliation is all about physical possession of a thing. Even quasi-possession of a right must be backed-up by actual physical possession of a thing of which the right is an incident (*ATM Solutions (Pty) Ltd v Olkru Handlaars CC* 2009 (4) SA 337 (SCA), at paragraph 9). It follows that, whatever juristic steps may be taken to protest about someone else’s possession of property, the fact of that possession remains, and is recognised by the *mandament*.

7 Moorcroft AJ relied on the decision of this court in *Mbangi v Dobonsville City Council* 1991 (2) SA 330 (W), where, at page 338C-D of the printed law report, Flemming J held that something “less than physical resistance is sufficient” to prevent possession of property from becoming stable enough to ground a spoliation application. However, Moorcroft AJ’s reliance on that decision appears to overlook the fact that the “less than physical resistance” in that case was a series of demands made to leave land in Dobsonville which were first issued a matter of hours after the occupiers first set foot on the property concerned. In this case, the occupiers had been left in possession of the property for over a week when Ninarich’s spoliation application was launched, and for over four months before they were arrested on charges of trespass. It is fanciful to suggest that their occupation

did not become sufficiently stable over that time to attract the application of the *mandament van spolie*.

8 To the extent that *Mbangi* can be read to suggest that a person does not possess property they have lived in for several weeks simply because their habitation of it is subject to legal challenge, it is plainly wrong.

9 In any event, on 25 March 2023 – two days before Moorcroft AJ gave his judgment – the occupiers retook occupation of the property. Thereafter, Ninarich appeared to accept the inevitable. It brought a (presumably urgent) eviction application before Nel AJ. As I have said, judgment in that application is pending.

10 Not content to await the outcome of that application, Ninarich asked for interim relief from me that appeared to be aimed at placing its security guards back in control of the property. There were two principal reasons why this relief could not be granted.

11 The first is that I had no idea to whom the relief would apply. Ninarich did not annex a list of the respondents to its papers. The category of persons “attempting to assume control of and blockading access to” the property is meaningless. In its papers, Ninarich in some places suggests that this category includes those in occupation of the building. In other places Ninarich appears to suggest that its relief will only apply to individuals present outside the property who are interfering with access to it. What Ninarich fails to do is set out any basis on which it would be possible to tell who would be bound by the order it wanted. As is clear from the history of this matter, Ninarich could have had no real difficulty in identifying

specifically to whom it wanted its relief to apply. It has been locked in litigation against at least some of them for several months. The failure to set out exactly who is “attempting to assume control of and blockading access to” the property is not explained or justified anywhere on the papers, and it prevented any the relief from being granted.

12 The second reason why I refused the relief was that an order to authorise the sheriff to do “everything necessary to install the applicant’s security at the building” plainly threatens a repeat of the disorder that has characterised the situation at the property over the last few months. Whatever Ninarich’s true intent in framing relief in this way, it clearly has the potential to interfere with the occupiers’ possession and use of the property, and it may constitute the beginnings of another attempt to evict them. I can see no good reason to grant relief that may set the scene for another extrajudicial eviction. Ninarich has now accepted that any eviction from the property will have to be authorised in response to the application with which Nel AJ is presently seized. I do not think that it is wise to risk undermining Nel AJ’s jurisdiction to deal with that application, and to address the dispute between the parties finally and comprehensively in his judgment shortly to be handed down.

13 It was for these reasons that I dismissed the application for interim relief.



S D J WILSON
Judge of the High Court

HEARD ON:

16 May 2023

DECIDED ON: 16 May 2023

REASONS: 22 May 2023

For the Applicant: L Peter
Instructed by Vermaak Marshall Wellbeloved Inc