



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

NOT REPORTABLE

Case No: 5250/2016

In the matter between:

YINEBEB GEBISA TADDESE

1st Applicant

KHANISA MLENZANA

2nd Applicant

MAHOMED BILLY

3rd Applicant

And

MOOSA MAHOMED PEER NO

1st Respondent

SORAYA PEER NO

2nd Respondent

ROQUAYYA BIBI MAHOMED TIMOL NO

3rd Respondent

JUDGMENT

Gorven J:

[1] There are four sets of premises which were leased by the MMP Trust (the trust) to Mr Taddese, the first applicant at various times. The three respondents are the trustees of the trust. Mr Peer, the first respondent, is the person who took most of the action of the trust in this matter. The premises are situated at 126 and

128 Umgeni Road respectively. The four premises have been describing the application papers as follows:

- The blanket shop at 126 Umgeni Road (the blanket shop);
- The back of 126 Umgeni Road (the back of 126);
- The back of 128 Umgeni Road (the back of 128); and
- The first floor at 128 Umgeni Road (the first floor).

Mr Taddese claims that, on 31 May 2016, he was unlawfully deprived of possession of the last three of these premises by the trust (the disputed premises). The other two applicants make the same claim.

[2] This application is, accordingly, for spoliatory relief. The law relating to this kind of relief is clear:

‘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 inquiry or investigation into the merits of the dispute.’¹

[3] The application initially cited only Mr Peer as trustee. When it was pointed out that he was one of three trustees, the applicants launched an application to join the other two trustees. This was initially opposed but consented to in argument. Since all trustees must be sued when relief is sought against a trust, their joinder was ordered prior to argument on the substantive point.

[4] There are only two requirements for spoliatory relief; that the applicants were in peaceful and undisturbed possession of the disputed premises and that they were deprived of that possession without consent or recourse to law. The

¹ *Nino Bonino v De Lange* 1906 TS 120 at 122.

fact that the applicants' possession is wrongful or illegal is irrelevant.² The underlying rationale is that persons should not take the law into their own hands. If these two requirements are proved, possession is restored without any enquiry being made into the legal rights of the parties to possession.

[5] What is essentially in dispute in this matter is whether or not Mr Taddese was in possession of the disputed premises. The trust accepts that the disputed premises were leased. It claims that Mr Taddese failed to adhere to the terms of the leases. An acknowledgment of debt was then signed which regulated his further occupation under the leases. The trust claims that he breached the terms of the acknowledgment of debt.

[6] The trust accepts that it placed a lock on the gate and prevented Mr Taddese and the other applicants from accessing the disputed premises when he attempted to do so. If he was in possession, it is conceded that this amounts to spoliation. The second and third applicants are employed by Mr Taddese. There is a denial that Mr Taddese had staff on the disputed premises (although it is admitted that both the second and third applicants were employed by him) but it seems that the denial only goes to their residing on the premises. In any event, it is clear that the goods of the third applicant were removed from the disputed premises and placed outside.

[7] The version of Mr Taddese as to whether he was in peaceful and undisturbed possession of the disputed premises is simple. He says that he had leased all four premises. He says that on 24 February 2016 he handed the keys of the blanket shop to one Ronnie Naiker (Mr Naiker) and relinquished occupation of the blanket shop only. He says that he remained in occupation of the disputed premises pursuant to the leases.

² *Ivanov v North West Gambling Board & others* 2012 (6) SA 67 (SCA) para 19; *Voet* 41.2.16.

[8] His communications around that time have been seized on by the trust to assert that Mr Taddese relinquished occupation of the disputed premises as well as the blanket shop. The trust leads no evidence on the factual situation. What Mr Peer says in this regard is that ‘the key’ was handed to Mr Naiker. In addition, Mr Taddese left a letter with Mr Naiker confirming that he was handing the key to Mr Naiker. Thirdly, that Mr Taddese sent an SMS to Mr Peer stating that he was leaving the building.

[9] The version of the trust is problematic. Mr Taddese asserts, in paragraphs 10 – 13 of the founding affidavit, that he runs commercial enterprises from the back of 126 and the back of 128 and that he sub-lets the first floor to tenants for accommodation. These averments are admitted by the trust. In fact, the trust repeats them in its last answering affidavit. There is no evidence that Mr Taddese relinquished possession of these, the disputed, premises. What is more, the trust asserts that Mr Taddese has, without its permission, sub-let the first floor to some 150 people for accommodation and that those people remain in occupation. It says that the reason that only the blanket shop key was handed to Mr Naiker is that ‘the remaining buildings . . . are illegally occupied by [Mr Taddese’s] sub-let tenants; accordingly these keys were never handed over to the trust.’ The trust also asserts that the reason for this application is to enable Mr Taddese to continue to collect rentals. He asserts that he possesses the portions sub-let for the purpose of securing a benefit for himself. This is admitted. There is no evidence that he has relinquished possession of these premises. This is sufficient to prove possession for the purpose of spoliatory relief.³

[10] In addition, the trust caused its present attorneys to send two letters in mid-March 2016 to Mr Taddese. That of 14 March 2016 said:

³ *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-H; *Nienaber v Stuckey* 1946 AD 1049 at 1057-8.

‘3. Our instructions are inter alia to proceed with eviction of your client from the premises listed as follows:

3.1 126 Warehouse at the back;

3.2 128 1st floor;

3.3 128 Warehouse at the back.

4. Your client has accepted that it is occupying the aforesaid premises unlawfully and his continual use of the premises . . . for commercial use was predicated on payment under the Acknowledgment of Debt being made . . .

5. Accordingly your client can voluntarily vacate the premises or an application will be brought for his eviction.’

When confronted with this letter, Mr Peer simply says that this shows that the occupation of the disputed premises by Mr Taddese is unlawful. That may be so but the letter is a clear admission that the disputed premises were occupied by Mr Taddese. In fact, Mr Peer goes on to say that ‘eviction proceedings will be directed to the First Applicant as the tenants occupy through him.’

[11] All of this, and other evidence which need not be dealt with, proves on a balance of probabilities that Mr Taddese and the other two applicants were in occupation of the disputed premises on 31 May 2016 when the trust had a lock fitted to the gate and refused access to the applicants. It was accepted in argument that the second and third applicants occupied for the purpose of conducting the business of Mr Taddese from the premises. The applicants are accordingly entitled to have occupation restored to them before any enquiry is made into the lawfulness or otherwise of their occupation.

In the result, the following order issues:

1 The respondents are directed to forthwith restore possession of and access to the premises situate at Shop 126 (back) and 128 (back and first floor) at 126-128 Umgeni Road to the applicants.

- 2 In the event of the respondents failing to comply with paragraph 1 hereof, the Sheriff is authorised to take such steps as may be necessary to do so on their behalf.
- 3 The respondents are directed to pay the costs of this application.

GORVENJ

DATE OF HEARING: 4 August 2016.
DATE OF JUDGMENT: 4 August 2016.
FOR THE APPLICANTS: CLL Rodel, instructed by MAK Ameen &
Company.
FOR THE RESPONDENTS: D Ramdhani, instructed by Johnston &
Partners.