

Short notes on

LANDLORDS AND TENANTS – ONCE AGAIN HEAD TO HEAD

Introduction

Since the implementation of the Disaster Management Act 57 of 2002 and the “lockdown” regulations to prevent the spread of COVID-19, landlords and tenants have been head to head. In many instances compromise seems to have been found, but not in all cases.

It is essential, in my view, to have meaningful engagement and professional advice. Also, to learn from the experiences of others, including, *Kasi v Patinios* 2020 JDR 1434 (KZD) (the “Kasi case”). This matter involved the mandament van spolie. In *Ngqukumba v Minister of Safety and Security and others*¹ The Constitutional Court confirmed that ‘the essence of the mandament van spolie is the restoration *before all else* of unlawfully deprived possession to the possessor’.

Facts of the Kasi case

The applicant launched an urgent application on 5 June 2020 for an order directing the respondents, in their capacity as the entities responsible for the management of the Lakeside Mall, 6 Mark Strasse, Richards Bay (‘the premises’) to remove padlocks used to lock the applicant out of her business premises at shop 15A, from which she operated a food outlet known as Kasi’s Flame Grilled Chicken. The applicant contends that she was allegedly despoiled from the premises on 22 May 2020.

In addition, the applicant sought a final interdict restraining the respondents from unlawfully removing, selling or alienating any of the applicant’s stock in trade, including appliances, foodstuff, equipment and furniture on the premises. An order was also sought to interdict the removal of shop signage affixed to the exterior and interior of the applicant’s trading premises at the shopping centre. The facts giving rise to the application are briefly that the applicant concluded a lease agreement with the second respondent in respect of the leased premises on 21 June 2017. The agreement was to run from 1 July 2017 to 30 June 2020.

Amongst the terms of the agreement, it was specified that the rental would be paid at the beginning of each month. As a result of the crisis caused by the COVID-19 virus and the resultant nationwide lockdown, food outlets like the applicant’s business were forced to cease operation. At the same

¹ 2014 (2) SACR 325 (CC)

time, they were obliged to continue with their contractual obligations, including payment of rent. The applicant contends that the second respondent granted other lessees in the mall a reduction in rentals, without affording her this opportunity. It is common cause that the applicant did not pay rent for May and June 2020. According to her, on 15 May 2020 the second respondent disconnected the electricity supply to the leased premises, which was reconnected after a demand from her. In her founding affidavit the applicant contends that as a result of a breakdown of negotiations between her store manager and the first respondent, without notice to her, the respondents placed padlocks on the doors to the premises, preventing any of her staff, customers and herself access to the business premises.

Requirements of the mandament van spolie

The cases of *Nino Bonino v De Lange*² and *Nienaber v Stuckey*³ Which form the foundational basis of courts determining whether the requirements for a mandament has been met. In *Zulu v Minister of Works Kwazulu & others*⁴ Thirion J pointed out that 'the *mandament van spolie* is not concerned with the protection or restoration of rights at all. It aims to restore factual possession of which the *spoliatus* had been unlawfully deprived'. In *Eskom Holdings SOC LTD v Masinda*⁵ the court explained the purpose of the mandament as providing a:

'... remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property "as a preliminary to any enquiry or investigation into the merits of the dispute" as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, to grant relief. But what needs to be stressed is that the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in Eskom v Nikelo is wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.'

As such, possession and unlawful deprivation are the core components. The possessor must exercise possession to derive some benefit from it. In *Shoprite Checkers Ltd v Pangbourne Properties Ltd*⁶ the court referred to the summary of the elements of possession as set out in *LAWSA* as follows:

² (1906 T.S. 122)

³ 1946 AD 1049

⁴ 1992 (1) SA 181 (D)

⁵ 2019 (5) SA 386 (SCA)

⁶ Shoprite Checkers Ltd v Pangbourne Properties Ltd 1994 (1) SA 616 (W)

'It is trite law that possession consists of both an objective and a subjective element, namely the objective or physical element (corpus, detention) and the subjective or mental element (animus).

A possessor must control the article with both the body and the mind. The physical element consists of the factual control exercised over the article. The mental part concerns the state of mind of the possessor. Whereas a minimum of genuine control is required for all classes of possession, the content of the state of mind necessary for possession differs, according to the functions served by the possession in the particular case."

In the Kasi case, the applicant proved upon a balance of probabilities, the necessary element of possession, and that she was wrongfully deprived of possession of the leased premises.

Conclusion

Landlords and tenants should honour their agreed obligations and readjust as required with the appropriate guidance. Contact SchoemanLaw for all your contractual, property law and dispute resolution needs.