



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **13th January 2021** Signature: _____

CASE NO: 446/2021

DATE: 13TH JANUARY 2021

In the matter between:

MEDICROSS HEALTHCARE GROUP (PTY) LIMITED

Applicant

and

EXP HEALTHCARE SOLUTIONS (PTY) LIMITED

First Respondent

DR CORRIE KROON AND ASSOCIATES INC

Second Respondent

KROON, DR CORNELIS

Third Respondent

DU PREEZ, DR HENDRIK GIDEON

Fourth Respondent

ICE BREAKERS 96 (PTY) LIMITED

Fifth Respondent

Coram: Adams J

Heard: 12 January 2021 – The ‘virtual hearing’ of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 13 January 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 15h00 on 13 January 2021.

Summary: Urgent application – interdictory relief – *mandament van spolie* – urgent application for eviction from business premises – application granted –

ORDER

- (1) The matter is urgent.
- (2) The first respondent is directed to:
 - (2.1) vacate and immediately restore the applicant's full and undisturbed occupation and possession in and to the property situated on the ground floor of the building on the premises at the corner of Peter Mokaba and James Moroka Street, previously known as Van Riebeeck and Lombard Streets, Potchefstroom ('the property'), including that area designated for a medical practice;
 - (2.2) replace and restore:
 - (2.2.1) all the applicant's logos, marks and other signage that were previously affixed to the property;
 - (2.2.2) all of the applicant's computer equipment, computer network system, PABX system, printing, accounting and other administrative infrastructure ('the infrastructure');
 - (2.2.3) the applicant's medical equipment and other devices ('the equipment') to its previously installed positions;
 - (2.2.4) all of the applicant's medical supplies removed from the medical supply cabinets;
 - (2.2.5) the applicant's sole and unrestricted access to the property and its medical centre on the property. In this regard the respondents are required to provide the applicant with sole access to all locks which give access to the property, including the access codes;

- (2.2.6) all keys and access codes in respect of all locks on the property and to surrender any keys and access codes which are in their, or their representatives' possession;
- (2.2.7) all the applicant's business operations to the property and to allow the applicant to conduct its business, administering a medical centre, including a medical practice of its choice, on the property under the Medicross name;
- (2.3) not further interfere with or restrict the applicant's use and enjoyment of the property;
- (3) The second, third and fourth respondents are directed to:
 - (3.1) immediately restore the applicant's full occupation and possession in and to the property, including that area of the ground floor making up the medical practice;
 - (3.2) replace and restore:
 - (3.2.1) all of the applicant's logos, marks and other signage that were previously affixed to the property;
 - (3.2.2) the infrastructure;
 - (3.2.3) the equipment to their previously installed positions;
 - (3.2.4) all of the applicant's medical supplies removed from the medical supply cabinets;
 - (3.2.5) the applicant's business operations to the property and to allow the applicant to peacefully conduct its business, of administering a medical practice of its choice, on the property under the Medicross name;
 - (3.2.6) all keys and access cards in respect of all locks on the property and to surrender all keys and access codes which are in their, or their representatives', possession;
 - (3.3) not further interfere with the applicant's use and enjoyment of the property;

- (4) The second respondent is directed to vacate itself, including its assets, from the property within five (5) days of this order;
- (5) In the event of the second respondent not vacating or failing to vacate the property within five (5) days from the date of this order, the sheriff of the court be and is hereby authorised and directed to evict the second respondent, including anybody being in occupation of the property through and by virtue of the second respondent, from the property;
- (6) The applicant is granted leave to join the business rescue practitioner, appointed for the second respondent, and to proceed with the urgent application, insofar it may be necessary, against the second respondent under business rescue;
- (7) The fifth respondent is directed to:
 - (7.1) maintain the *status quo* in respect of the lease agreement entered into between the applicant and the fifth respondent;
 - (7.2) afford the applicant the full and unrestricted use of the property, as is provided for in the written agreement of lease, dated 25 September 2012;
- (8) The first to fourth respondents are directed to jointly and severally, the one paying the other to be absolved, pay the applicant's costs of the application on the attorney and client scale, such costs to include the costs consequent on the employment of two counsel, one being a Senior Counsel.

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant, Medicross Healthcare Group (Pty) Limited ('Medicross'), for an order reinstating it to business premises, which it leases in terms of a written commercial lease from the fifth respondent, Ice Breakers 96 (Pty) Limited ('Ice Breakers'), and which premises Medicross utilises to house the second respondent, Dr Corrie Kroon

and Associates ('Kroon and Associates'). Until the 31st of December 2020 Medicross administered the medical practice of Dr Kroon and Associates, of which the third respondent, Dr Kroon, and the fourth respondent, Dr Du Preez, are shareholders and directors. This Medicross did in terms of and pursuant to a suite of agreements between Medicross and Dr Kroon and Associates, including an administration agreement. Dr Kroon and Dr Du Preez are also shareholders and directors of Ice Breakers, which is the owner of the leased immovable property and the business premises. The administration agreement came to an end at the end of December 2020, which means, so Medicross alleges, that Dr Kroon and Associates no longer had any right to occupy these premises and an order evicting the said company from the premises is also sought.

[2]. The respondents oppose the application on a number of grounds, notably on the basis that there is no urgency in the matter and also on the basis that Medicross was not spoliated.

[3]. As indicated, in this spoliation application Medicross seeks an order reinstating its erstwhile peaceful and undisturbed possession of certain premises situated at the corner of Peter Mokaba and James Moroka Street, Potchefstroom ('the property'). Medicross contends that it has been spoliated by the first respondent, EXP Healthcare Solutions ('EXP'), and the second respondent ('Kroon & Associates') over the weekend of 1 to 4 January 2021.

[4]. The crisp issues in this urgent application is whether the applicant was in peaceful and undisturbed possession of the premises up to and until the 31st of December 2020 and whether such possession was unlawfully interfered with by the respondents. The respondents also contend that in this urgent application the applicant has failed to demonstrate urgency and a need for it not to comply with the ordinary rules of this court. These issues are to be decided against the factual backdrop, which I set out in the following paragraphs.

[5]. Medicross utilises and applies the property for purposes of conducting a medical centre and has done so since 1995 from which time it has been in peaceful and undisturbed possession of the said property. Its occupation of the property is in terms of and pursuant to a written agreement of lease concluded

between Ice Breakers, the owner of the property – acting as lessor – and Medicross, the lessee. The lease at present is extant and enforceable and remains in place for the foreseeable future.

[6]. Medicross carries on business as administrators of medical practices. For purposes of conducting and operating a medical centre, it would lease a building and then, in turn, would make portions of the building available to the medical practices which would form an integral part of a *Medicross Medical Centre*. In the present instance the medical centre situated on the property consists of a medical practice, a dentistry practice, a day hospital and a pharmacy. Medicross uses the remainder of the building and the premises for its own purposes, being the rendering of administrative and other services to the medical and dentistry practices.

[7]. EXP is a competitor of Medicross in the market and it has entered into an administration agreement with Kroon & Associates, seemingly taking over the administration of that practice with effect from 1 January 2021, that is after the administration agreement between Medicross and Kroon and Associates came to an end.

[8]. Up to 31 December 2020 Medicross rendered the service of an administrator to Dr Kroon & Associates, thus attending to the administration of the medical practice and rendering related services, which included the supplying of medical supplies to the practice conducted by Dr Kroon & Associates. Medicross rendered these administrative services in terms of an administration agreement, entered into between the parties. In terms of the administration agreement Medicross was *inter alia* obliged to make available to Dr Kroon & Associates suitable premises from where it could conduct its medical practice. It is by virtue of this arrangement that Dr Kroon & Associates was in lawful occupation of part of the ground floor of the building situated on the property until 31 December 2020, when its right to lawfully occupy that part of the ground floor terminated.

[9]. EXP and Kroon & Associates, assisted by Dr Kroon and Dr Du Preez, however spoliated Medicross of its possession and peaceful occupation of the

entire ground floor of the building. This is borne out by the evidence and all of this happened on the weekend of the 1st to the 4th of January 2021. Kroon & Associates – who previously occupied only part of the ground floor in terms of the administration agreement – now opportunistically refuses to vacate that portion of the ground floor which it occupied in terms of the administration agreement.

[10]. As regards urgency, it is the case of Medicross that it has contracted with another medical practice, Dr A E Smook & Associates Incorporated ('Smook & Associates'), to attend to the administration of their medical practice as part of its medical centre. Similar to Dr Kroon & Associates the medical practice of Smook & Associates will be using part of the ground floor of the building. Not only is Medicross effectively being prevented from operating its medical centre on the property, but it is also prevented from rendering administrative services to Smook & Associates. Smook & Associates is also effectively barred and prevented from taking occupation and establishing itself on the ground floor of the building. As submitted by Mr Stockwell SC, who appeared on behalf of the applicant with Mr Posthumus, the prejudice flowing from the aforesaid is apparent and it is equally apparent that this unfortunate state of affairs needs to be remedied as soon as possible.

[11]. In any event, by virtue of the blatant lawlessness implicit in the conduct of the respondents and the fact that the very nature of spoliation proceedings demands a speedy remedy, I am persuaded that the matter is urgent. It is necessary to prevent members of the public from taking the law into their own hands or to resort to self-help, and do so with expeditiousness. This is exactly what EXP and Dr Kroon & Associates made themselves guilty of in the present proceedings.

[12]. The rule of law requires that the brazen conduct of EXP, on instructions of Dr Kroon and Associates, be frowned upon. They cannot be heard to complain that there is no need for the applicant to have taken this legal action in the face of their unlawful conduct.

[13]. The point is that EXP and Dr Kroon and Associates have no right to be on the property and their attempts to strong arm Medicross and to insist not only on

remaining in occupation of that portion of the premises previously occupied by them in terms of the administration agreement but also to take over the rest of the premises, should be dealt with expeditiously. Such unlawful conduct does not belong in a civilised society.

[14]. What the respondents did was to bypass court processes. This is unacceptable and unless the applicant is granted relief on an urgent basis, the respondents will be allowed to engage in impermissible acts of self-help. The right of access to court is the bulwark against vigilantism and the chaos and anarchy which it causes.

[15]. The flipside of the coin is that Medicross has every right to occupation of the property. It has been in occupation of the property since 1995. In 2012 it entered into a new agreement of lease with Ice Breakers in terms of which Medicross leased the property for ten years. Upon expiration of the initial ten-year period, Medicross has an option to further extend the period of the lease. Medicross can extend the lease for two further periods of five years each. The right of Medicross in and to the property, including its right to be in occupation of the property, cannot be disputed in light of the provisions of the agreement of lease. I am therefore satisfied that the matter is urgent

[16]. As regards Dr Kroon and Associates, which is presently in business rescue and unrepresented in these proceedings, the respondents contend *in limine* that the applicant has instituted proceedings without the consent of the business rescue practitioner or the court in contravention of section 133 of the Companies Act 71 of 2008. There is no merit in this legal point.

[17]. On the 8th of January 2021 Dr Kroon and Associates delivered notice of intention to oppose the applicant's urgent application and on the very same day their attorneys withdrew as attorneys of record. There is no doubt in my mind that the Business Rescue Practitioners are aware of these proceedings and the inference to be drawn is that they will abide the Court's decision. This is also borne out by correspondence from them.

[18]. The fact that the Business Rescue Practitioners have not been specifically cited should also not stand in the way of the granting of the relief, if for no other

reason than on the basis that in the administration of justice form should never be elevated above substance. As was said in *Gainsford NO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) para 14:

‘As stated above, Mailula J was correct ... to have regard to the provisions of s 386(5), which demonstrate that liquidators act in the stead of the company in liquidation. A distinction between the *locus standi* accorded to the company in liquidation and that of its liquidators acting in their representative capacity, is pedantic or illusory. To disqualify liquidators properly appointed from acting on behalf of a company in liquidation would truly be elevating form above substance.’

[19]. Although concerned in that case with liquidators, there is in principle no difference as between a company in liquidation and one in business rescue in these circumstances. The business rescue practitioner in terms of section 140(1)(a) of the Companies Act ‘has full management control of the company in substitution for its board and pre-existing management’.

[20]. In any event, on a plain reading of the Act, section 133 is not applicable *in casu*. Section 133 provides as follows:

‘133 General moratorium on legal proceedings against company

- (1) During business rescue proceedings, no legal proceeding, including enforcement action against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –
 - (a) with the written consent of the practitioner;
 - (b) with the leave of the court and in accordance with any terms the court considers suitable.”

[21]. As rightly contended by Mr Stockwell, the moratorium applies only where the claim is for property lawfully in the possession of the corporation in business rescue. In proceedings for property unlawfully in possession of the corporation, the moratorium does not apply and the proceedings are permissible, without consent. The occupation of the business premises in this matter is unlawful, the legal basis for such occupation – the administration agreement – having been terminated effective the 31st of December 2020, and accordingly the moratorium in section 133 does not apply. This point *in limine* is therefore dismissed.

[22]. As regards the merits of the urgent application, the respondents' main contention relating to the applicant's right to occupy the premises is an averment to the effect that the Ice Breakers would not have concluded the agreement of lease, had it envisaged that a different practice to that of Dr Kroon & Associates would occupy the medical section of the building. There is no merit in this contention, which loses sight of the non-representation and non-variation clauses in the lease agreement. The respondents are clutching at straws.

[23]. In addition, it must be borne in mind that Medicross assisted Ice Breakers by financing the transaction. This enabled Ice Breakers to acquire the property. This was done in order to assist the shareholders to obtain an interest in the property. The fact of the matter is that Medicross had a lease with the previous owner of the building and then financed the acquisition of the building, purely to assist the shareholders as a gesture of kindness and cooperation.

[24]. It bears emphasising that Dr Kroon & Associates had no right to and did not occupy any part of the building other than that portion which housed their practice. More specifically, Dr Kroon & Associates did not occupy the reception area, situated on the ground floor. This area of the ground floor, consisting of a reception area, has since been spoliated from Medicross' possession. Medicross was spoliated by EXP who presently occupies that area, probably with Kroon & Associates. Apart from the reception area, there is also a pharmacy. The pharmacy is able to continue doing business as it did in the past.

[25]. The administration agreement terminated on 31 December 2020. Accordingly, Kroon & Associates' right to further occupy that section of the ground floor, designated for a medical practice, came to an end. In terms of the administration agreement, Kroon & Associates, including the medical practitioners who practice as part of that medical practice, undertook and agreed to vacate the property, particularly the area occupied in terms of the administration agreement.

[26]. The process of spoliation commenced on 1 January 2021, when Dr Kroon threatened and coerced an employee of Medicross to give him access to the building on the property. Once Dr Kroon had access to the building, he, duly

assisted by EXP, once it had gained access to the building, commenced removing Medicross' signage, its telephone system and its administrative infrastructure. This process was overseen by Dr Du Preez. In addition to the aforesaid, EXP started establishing their own telephone system and, one would assume, their own administrative infrastructure. I agree with the applicant that this is conduct unequivocally directed at spoliating Medicross from the building, which property it is leasing from Ice Breakers.

[27]. On Monday morning, 4 January 2021, when Medicross' medical centre was scheduled to reopen, EXP was present on site and its representatives *inter alia* prevented Medicross' staff, who are required to render services to the medical practice, from entering the building and from attending to their duties. In addition to the aforesaid, the receptionist and administrative staff, who worked on the ground floor, were precluded from taking up their posts. This was due to the fact that their working spaces had been either replaced with working stations for the EXP staff, or had otherwise been removed. The aforesaid is the very definition of spoliation.

[28]. Apart from the aforesaid spoliation, EXP also proceeded to change a number of locks on the doors giving access to the building and other areas. In addition to the aforesaid, access was gained, and locks were changed, giving access to cabinets which Medicross used to store medical supplies and confidential papers. The medical supplies are the property of Medicross and was used by Medicross to supply the medical practice and dentistry with medical supplies, if and when required. As mentioned, the administration agreement came to an end. Apart from the fact that Kroon & Associates is required to vacate the property, there is also no further obligation on Medicross to further supply Kroon & Associates with medical supplies.

[29]. EXP and Kroon & Associates however took the law into their own hands. They forcefully opened the cabinets where the supplies were stored and started using these medical supplies, which is the property of Medicross. The aforesaid misappropriation by EXP and Kroon & Associates is nothing short of common theft.

[30]. EXP's forceful opening of a cabinet containing confidential information, unique to Medicross' business model and practice, is yet another example of EXP's unlawful conduct. In that regard, they are probably motivated by a need to compete in the medical practice administration market in which Medicross is a major role player.

[31]. Accordingly, the relief sought by the applicant should be granted.

Costs

[32]. 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, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[33]. I can think of no reason why I should deviate from this general rule.

[34]. Mr Stockwell has also urged me to grant a punitive costs order on the scale as between attorney and client to show the court's displeasure with the conduct on the part of the respondents. I am not persuaded that in this matter a case has been made out for punitive costs

[35]. I therefore intend awarding cost against the first, second, third and fourth respondents in favour of the applicant.

Order

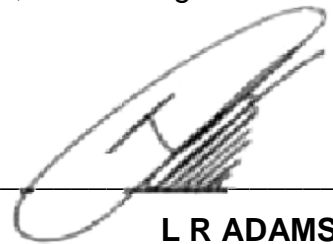
Accordingly, I make the following order: -

- (1) The matter is urgent.
- (2) The first respondent is directed to:
 - (2.3) vacate and immediately restore the applicant's full and undisturbed occupation and possession in and to the property situated on the ground floor of the building on the premises at the corner of Peter Mokaba and James Moroka Street, previously known as Van Riebeeck and Lombard Streets, Potchefstroom ('the property'), including that area designated for a medical practice;

- (2.4) replace and restore:
 - (2.2.1) all the applicant's logos, marks and other signage that were previously affixed to the property;
 - (2.2.2) all of the applicant's computer equipment, computer network system, PABX system, printing, accounting and other administrative infrastructure ('the infrastructure');
 - (2.2.3) the applicant's medical equipment and other devices ('the equipment') to its previously installed positions;
 - (2.2.4) all of the applicant's medical supplies removed from the medical supply cabinets;
 - (2.2.5) the applicant's sole and unrestricted access to the property and its medical centre on the property. In this regard the respondents are required to provide the applicant with sole access to all locks which give access to the property, including the access codes;
 - (2.2.6) all keys and access codes in respect of all locks on the property and to surrender any keys and access codes which are in their, or their representatives' possession;
 - (2.2.7) all the applicant's business operations to the property and to allow the applicant to conduct its business, administering a medical centre, including a medical practice of its choice, on the property under the Medicross name;
- (2.3) not further interfere with or restrict the applicant's use and enjoyment of the property;
- (3) The second, third and fourth respondents are directed to:
 - (3.1) immediately restore the applicant's full occupation and possession in and to the property, including that area of the ground floor making up the medical practice;
 - (3.2) replace and restore:

- (3.2.1) all of the applicant's logos, marks and other signage that were previously affixed to the property;
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- (3.2.4) all of the applicant's medical supplies removed from the medical supply cabinets;
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- (3.3) not further interfere with the applicant's use and enjoyment of the property;
- (4) The second respondent is directed to vacate itself, including its assets, from the property within five (5) days of this order;
- (5) In the event of the second respondent not vacating or failing to vacate the property within five (5) days from the date of this order, the sheriff of the court be and is hereby authorised and directed to evict the second respondent, including anybody being in occupation of the property through and by virtue of the second respondent, from the property;
- (6) The applicant is granted leave to join the business rescue practitioner, appointed for the second respondent, and to proceed with the urgent application, insofar it may be necessary, against the second respondent under business rescue;
- (7) The fifth respondent is directed to:
 - (7.1) maintain the *status quo* in respect of the lease agreement entered into between the applicant and the fifth respondent;

- (7.2) afford the applicant the full and unrestricted use of the property, as is provided for in the written agreement of lease, dated 25 September 2012;
- (8) The first to fourth respondents are directed to jointly and severally, the one paying the other to be absolved, pay the applicant's costs of the application on the attorney and client scale, such costs to include the costs consequent on the employment of two counsel, one being a Senior Counsel.

A handwritten signature in black ink, appearing to be 'L R ADAMS', written over a horizontal line.

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

HEARD ON:	12 th January 2021 – in a ‘virtual hearing’ during a videoconference on the <i>Microsoft Teams</i> digital platform
JUDGMENT DATE:	13 th January 2021 – judgment handed down electronically
FOR THE APPLICANT:	Adv R Stockwell SC, together with Advocate I L Posthumus
INSTRUCTED BY:	Whalley & Van der Lith Inc, Randburg
FOR THE FIRST, THIRD, FOURTH & FIFTH RESPONDENTS:	Adv E Theron SC
INSTRUCTED BY:	Mashabane Liebenberg Sebola Incorporated, Roodepoort
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance