



**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: 3 April 2023

Case No. 2023/018054

In the matter between:

**HILLBROW CONSOLIDATED INVESTMENTS CC**

First Applicant

**SOSENGWASE TRADING CC**

Second Applicant

and

**266 BREE STREET JOHANNESBURG (PTY) LTD**

First Respondent

**TUMISANG KGABOESELE NO**

Second Respondent

**MAFADI PROPERTY MANAGEMENT (PTY) LTD**

Third Respondent

**G3 HOLDINGS (PTY) LTD**

Fourth Respondent

**JOHANNESBURG METROPOLITAN POLICE DEPT**

Fifth Respondent

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**JUDGMENT**

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**WILSON J:**

- 1 On 1 March 2023, I granted the applicants a spoliation order. I directed the fourth respondent, G3, to restore the first applicant, HCI, and the second

applicant, Sosengwase, to peaceful and undisturbed possession of a property known as “Metro Centre”, situated at 266 Bree Street, Johannesburg. I indicated that my reasons for making that order would be provided in due course.

- 2 To obtain a spoliation order, the applicants had to prove that they were in peaceful and undisturbed possession of Metro Centre, and that they had been unlawfully deprived of that possession. I was satisfied that these requirements had been met for the following reasons.

### **The dispute**

- 3 At the centre of this case is Mark Farber. He is the deponent to the founding affidavit. He is also the sole member of HCI, and the sole shareholder and director of the first respondent, 266 Bree Street. The first respondent is a company named after the Metro Centre property, which appears to be its only major asset. In these capacities, Mr. Farber arranged things so that HCI was the property agent appointed to manage the affairs of the Metro Centre property. Sosengwase is in turn employed by HCI to secure Metro Centre.
- 4 Mr. Farber is the subject of a complex set of manoeuvres aimed at wresting control of Metro Centre from him. The prime mover behind these efforts appears to be the Trust for Urban Housing Finance (“TUHF”), which is one of 266 Bree Street’s creditors. There is an action pending between TUHF and 266 Bree Street, in which TUHF seeks a money judgment against 266 Bree Street and against Mr. Farber. It appears that 266 Bree Street took a loan from TUHF and that Mr. Farber stood surety for its repayment obligations. Evidence in that action has been led. I understand from the papers that my brother

Senyatsi J is currently hearing argument and will deliver judgment in due course.

5 In the meantime, Mr. Farber has placed 266 Bree Street in business rescue. The second respondent, Mr. Kgaboesele, is the practitioner currently overseeing the business rescue process. He is implementing a business rescue plan that was adopted at a creditors' meeting held on 2 February 2023. Mr. Farber opposed the plan in the form that it was finally adopted, but the plan was approved, it seems, substantially because TUHF supported it at the meeting.

6 The parts of the plan that are material to this case are those that provide for the sale of Metro Centre, and HCI's replacement as its managing agent. Acting on these aspects of the adopted plan, on 13 and 14 February 2023, Mr. Kgaboesele wrote to Mr. Farber to inform him that HCI's management agreement with 266 Bree Street would be terminated and that a new managing agent would be appointed with effect from 15 February 2023. The new managing agent Mr. Kgaboesele selected turned out to be the third respondent, Mafadi Property Management. Mr. Farber, through his attorneys, immediately objected to the termination of HCI's management agreement with 266 Bree Street. Mr. Farber took the view that Mr. Kgaboesele lacked the power to terminate the management agreement, which, Mr. Farber contended, could only be terminated pursuant to a court order. Mr. Kgaboesele, through his own attorneys, predictably took the contrary view, and demanded that the "handover" of Metro Centre "be effected forthwith".

## **Peaceful and undisturbed possession**

7       What matters about this correspondence is that it plainly evinces an acceptance that HCI was in possession of Metro Centre, but that there was a dispute about whether it should be. Indeed, Mr. Farber sets out in his founding affidavit a detailed account of HCI's work as managing agent at Metro Centre, including the collection of rent, the supervision of tenants, the management of leases and a range of other property management work. HCI has done this work since 10 August 2020, when Mr. Farber appointed it to manage the property. In his answering affidavit, Mr. Kgaboesele issues a blanket denial of the paragraph in which this account is given in Mr. Farber's founding affidavit, but, save for asserting that HCI's building manager does not live on site, the substance of Mr. Farber's account of HCI's work in and possession of the building is not seriously engaged with. It must accordingly be accepted that HCI's management of Metro Centre entailed HCI being in physical possession of the property, through its employees and agents.

8       It is irrelevant to these proceedings whether Mr. Farber is correct in his assertions about the nature and limits of Mr. Kgaboesele's powers. It was not argued before me that Mr. Kgaboesele had the power to evict HCI from Metro Centre. The issue of whether Mr. Kgaboesele had the right to terminate HCI's management agreement is obviously beyond the scope of spoliation proceedings.

9       It can accordingly be accepted that on 15 February 2023, HCI was in possession of Metro Centre, and that it had been in possession of Metro Centre for the better part of three years. It is not clear from the papers when

Sosengwase was appointed to secure the building, but it seems clear that HCI's possession of Metro Centre was exercised, at least in part, through Sosengwase's own presence in and possession of the property.

- 10 On 16 February 2023, representatives of Mafadi Property Management went to Metro Centre intent on taking over the management of the property. They were later joined by employees of a security company described on the papers as "GSG" security. Simon Mhlongo, a manager of Sosengwase whose responsibility it was to oversee security at the property, made clear that GSG's personnel were not welcome, and that they had to leave. GSG and Mafadi withdrew.

### **The unlawful dispossession**

- 11 Mafadi then appointed a new security company to take control of the property. This was the fourth respondent, G3. G3 arrived at the property on 18 February 2023. Its personnel were armed and they arrived in greater numbers than GSG had mustered on 16 February. Its personnel occupied the property and refused to leave. Although it appears that neither Mr. Mhlongo nor Sosengwase's other personnel were physically removed from the property, the presence of a large number of armed security guards obviously interfered with Sosengwase and with HCI's possession of the property. It also placed their personnel in reasonable fear of what would happen if they remained on the property for too much longer. Outnumbered and out-gunned, they left the property.
- 12 Mr. Solomon, who appeared together with Mr. Hollander for the applicants, said that this was a spoliation. I was inclined to agree, which is why I made

the 1 March 2023 order. However, Mr. Mahon, who appeared together with Ms. Mitchell for Mr. Kgaboesele, resisted the application on two fronts. First, he argued that the application was not urgent, and ought to have been struck from the roll. He secondly contended that, on the facts, both Sosengwase and HCI gave up possession of the property voluntarily when their personnel withdrew.

### **Urgency**

- 13 On the question of urgency, Mr. Mahon drew my attention to a number of instances of non-compliance with this court's practice directives on the preparation of urgent applications for hearing. I was not convinced that these instances of very technical non-compliance disqualified the matter from urgent consideration. The over-arching question in urgent applications is whether, assuming everything the applicant says is true, the applicant will be deprived of substantial redress if they are forced to enrol the matter in the ordinary course. It seems to me that HCI and Sosengwase would clearly not be able to obtain such redress if they were forced to wait several months for a hearing on the ordinary opposed roll. By that time Mafadi and G3 would have been entrenched at the property, and the damage to HCI's interests as the appointed property management agent would have been done.
- 14 In addition, while I do not think, as was argued on behalf of HCI, that all spoliation applications are inherently urgent, a spoliation which the despoiled person seeks promptly to reverse will nearly always be urgent. This is because the public interest in quickly reversing the breach of the peace embodied in

the act of spoliation will almost always outweigh any other consideration that might militate against granting the despoiled person an urgent hearing.

## **Consent**

15 On the question of consent, even though it is true that HCI and Sosengwase vacated the property under their own steam, I found it impossible to accept that they did so voluntarily. Unlawful dispossession need not be violent. Coercion is sufficient. Faced with a large number (24 by Mr. Farber's reckoning) of armed security guards, whose intentions, though implicit, could not have been obscure, HCI and Sosengwase quit the property. But they plainly did not do so freely and voluntarily. That this is the test for consent at common law, even in the context of spoliation proceedings, has long been established, as has the rule that the onus of proving consent rests on the person alleging it (see *Metropolitan Evangelical Services v Goge* 2018 (6) SA 564 (GJ) at paragraph 19 and *Laws v Rutherford* 1924 AD 261 at 263). The test was plainly not met on the facts of this case.

16 It was finally suggested that HCI and Sosengwase relinquished control of the property in obedience to a lawful instruction issued by officers of the fifth respondent, the JMPD, and that this rendered the dispossession lawful. I do not think that the facts support that contention. It appears that, early on 18 February 2023 there was some commotion at the property, which passing JMPD officers investigated. They took the view that G3 was lawfully entitled to take over the property, and they told Mr. Mhlongo so. They then left. It is apparent from the founding affidavit (and not seriously disputed in the answering affidavit) that Mr. Mhlongo remained at the property for an hour and

forty-five minutes after the JMPD left the scene. There is no suggestion that the JMPD officers had any role in coercing him to leave when he did. Even assuming that what the JMPD officers said amounted to an instruction that Mr. Mhlongo must leave the property, and that they were entitled to issue such an instruction, I do not think that, in these circumstances, the JMPD officers can realistically have been said to have caused HCI's or Sosengwase's loss of possession of the property.

17 It was for these reasons that I made the 1 March 2023 order.



**S D J WILSON**  
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 3 April 2023.

HEARD ON: 1 March 2023

DECIDED ON: 1 March 2023

REASONS: 3 April 2023

For the Applicants: R Solomon SC  
L Hollander  
Instructed by SWVG Inc Attorneys

For the First and Second Respondents: D Mahon  
L Mitchell  
Instructed by Thomson Wilks Inc