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What if a tenant is locked out?

A COURT, tribunal or a forum will not grant an order or make a decision that is impossible to carry out. Let us take the case of a tenant who finds herself locked out and her personal belongings removed without a court order. The legal remedy is simple and uncomplicated.

The tenant can apply to be re-instated immediately through a (restitutory) interdict, and is most likely to be granted what is commonly referred to as a spoliation order (mandamenten van spolie). Our law does not allow an unlawful action to deprive a person of possession or the continued supply of services such as water and electricity.

An order would compel the party that resorted to the unlawful action to immediately restore peaceful and undisturbed possession of the premises to the tenant.

It would also order the Sheriff and/or his deputy to carry out the order.

SINCE a tenant deprived of possession seeks urgent relief, the matter is heard on an urgent basis. A tenant who wants a spoliation order can approach the magistrate's court, a high court or the provincial rental housing tribunals (RHTs). The RHTs can issue such an order for residential tenants in terms of section 13(12) (c)[1].

Judge Nugent[2] states that the principle underlying the remedy (of spoliation) is that the entitlement to possession must be resolved by the courts, and not by a resort to self-help.

Can an order or ruling be made to have a tenant restored possession, that is, to be placed back into the dwelling, if it is already occupied by someone?

In a unanimous judgment of the Constitutional court, judge Mogoeng[3] answers this question. "Ordinarily, an eviction," he said, "which is carried out pursuant to an invalid writ of execution amounts to spoliation. The evictee would therefore, be entitled to restitution.[4] However, when the premises are already occupied by a bona fide third party, they are as a matter of fact not available, and restitution is impossible. It is for this reason that an order reinstating a tenant to premises cannot be granted when the premises are no longer available for occupation."

Ms. P Jospher who occupied 1 Ixia Court Walton Place, Kenneth Gardens found herself locked out by her landlord, the eThekwini municipality. She claimed that she had left the flat in the care of her relative while working out of Durban, in Umzimkhulu.

However, upon her return she found her flat was given to another person by the municipality.

She lodged a complaint with the KwaZulu Natal Rental Housing Tribunal (the Tribunal) relating to eviction, notice to vacate and an illegal lockout. On 22 September 2008 the Tribunal in a unanimous ruling of M.T. Magigaba (chairperson of the hearing), Adv N.Z.Kuzwayo and Prof B. Dumisa, ordered the immediate reinstatement of Jospher. It made the following ruling: -

> **H**AVING regard to the above the Tribunal therefore rules as follows:-
>
> "1) The letter dated 30 January 2008 purporting to cancel lease is invalid since it is contrary to clause 1 of the lease agreement which provides that the lease would be terminated subject to one month calendar notice.

[1] "issue spoliation and attachment orders and grant interdicts."
[2] *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W)
[3] *Betlane v Shelly Court CC2011* (3) BCLR 264 (CC)
[4] This was the applicant's case in his application for a spoliation order in the High Court which was dismissed. See [12] above.

"Moreover, the letter makes reference to a lease agreement that the complainant has never seen and which lease agreement has not been brought before the Tribunal.

"2) The action of the Municipality to lock out the complainant is deemed to be unlawful and the Municipality is ordered to reinstate the complainant with immediate effect."

However, a cancellation for breach is in effect an immediate termination of the lease. As such, it would appear that the notice was therefore valid, contrary to the findings of the Tribunal.
What is perhaps more 'irregular' is an order to reinstate Jospher with immediate effect when on her own version, her flat was occupied.

Case law or the decisions of judges, which binds the RHTs and magistrates courts in particular, do not allow, for obvious and logical reasons, the reinstatement of a displaced tenant when the premises is already occupied after an illegal lock out.

This was one of the most significant issues acting judge Hughes-Madondo[5] considered in his judgment delivered on November 26, 2010; in the matter of Ethekwini Municipality against the KwaZulu Natal Rental Housing Tribunal and Two Others (the first respondent) and M.T Magigaba N.O. (the second respondent) and P. Jospher (the third respondent).

THE applicant, eThekwini Municipality, brought the review application in terms of section 6 of the Promotion of Administrative Justice Act (PAJA) in that, in terms of section 6 (c) there was procedural unfairness; section 6 (e) (iii) relevant considerations were not taken into account; section 6 (h) the decision taken by the first respondent was so unreasonable that no reasonable person could have taken same; and section 6(e) (vi) the decision was arbitrary or capricious.

According to judge Hughes-Madondo the Tribunal was informed by Jospher when she gave evidence that the premises was occupied but the Tribunal he said, "chose to disregard this evidence in *toto* and made a decision without taking this important information into account.

"The first respondent therefore failed to take into account a relevant consideration which was pertinent in reaching a decision. Further, the decision of the first respondent that *"...the Municipality [be] is ordered to reinstate the complainant with immediate effect."* cannot be seen as a reasonable one, as the premises were occupied.

"It therefore stands to reason that the actions of the first respondent fall to be arbitrary and as such the entire hearing is rendered procedurally unfair."

THE judge made the following order:

1. The decision of the first respondent is set aside and the first respondent is directed to conduct the hearing *de novo*,

2. Each party is ordered to pay their own costs in respect of this review application.

3. The first respondent is directed to give notice of the aforesaid hearing to the occupants of 1 Ixia Court Walton Place, Kenneth Gardens.

The matter is yet to be heard *de novo* (start afresh) by the KwaZulu Natal Rental Housing Tribunal. In terms of the Rental Housing Act 50 of 1999 as amended section 13(6) categorically states, among other requirements,

- that the Tribunal must have regard to the regulations in respect of unfair practices (which, unfortunately do not exist and was not raised by eThekwini Municipality);

- the need to resolve matters in a practicable and equitable manner; and

- in terms of s13 (7) requires a complaint to be resolved by the Tribunal within three months from the date it being lodged.

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[5] Ethekwini Municipality v KwaZulu Natal Rental Housing Tribunal 2010 JDR 1432 (KZD)