IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE
CASE NO: AR395/2015
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In the matter between:

JIGGER PROPERTIES CC	APPELLANT
and	
SCOTT RICHARD MAYNARD N.O.	1ST RESPONDENT
RICHARD ALISTAIR MAYNARD N.O.	2ND RESPONDENT
PAMELA JOAN MAYNARD N.O.	3RD RESPONDENT
ADD RESINS & CHEMICAL (PTY) LTD	4TH RESPONDENT

Coram : Jappie JP, Van Zÿl J et SeegobinJ
Heard : 06 February 2017
Delivered : 13 March 2017

ORDER

On appeal from the KwaZulu-Natal Division of the High Court, Durban (Norman AJ, sitting as a court of first instance):

(a) The appeal is upheld and the orders of the court *a quo* are set aside and replaced with the following:

(b) (i) the application under case number 5209/2013 is dismissed with costs and the rule *nisi* granted on 16 May 2013 is discharged;

(ii) the appellant's application and the respondents' counter-application under 8638/2013 is dismissed with each party to pay its own costs.

(c) The first to fourth respondents are ordered, jointly and severally, to pay the appellant's costs of appeal.

JUDGMENT

SEEGOBIN J (Jappie JP et Van Zyl J concurring):

INTRODUCTION

[1] This is an appeal against the judgment and orders of the KwaZulu-Natal High Court, Durban, (Norman AJ), with its leave, granting a *mandament van spolie* in favour of the respondents under case number 5209/2013 and dismissing the appellant's application for certain declaratory relief under case number 8635/2013. The effect of the spoliation order is that the appellant, Jigger Properties CC, was required to restore access and allow the fourth respondent's suppliers access to certain underground storage tanks situated in an exclusive use area referred to as 'Y8' which was allocated to unit 16 in Pineside Park, a sectional scheme, situated at 6 Shepstone Road, New Germany ('the premises'), which unit is owned by the appellant. The declaratory relief sought by the appellant in its application was to the effect that no servitude or right of access to the exclusive use area (Y8) exists in favour of the respondents. The appellant also sought an order prohibiting the respondents from exercising any access to Y8 (the exclusive use area) without its permission. To this application the respondents filed a counter-application in which they sought a declarator to the effect that they have

rights of access to the exclusive use area by virtue of an unregistered servitude.

[2] At the appeal hearing on 6 February 2017, the appellant was represented by Mr *Camp* and the respondent by Mr *Shepstone*. We are indebted to both counsel for their heads of argument and helpful submissions.

RELEVANT BACKGROUND AND COMMON CAUSE FACTS

[3] The first, second and third respondents are the trustees for the time being of the Mycrochem Family Trust (the Trust). The Trust owns units 14, 15 and 23 in the sectional scheme referred to above. On 5 June 2001 the developers of the sectional scheme granted permission to the Trust to install underground tanks in the exclusive area allocated to unit 16. These tanks are used for the purpose of storing solvents for the business of the Trust. The Trust has access to the exclusive use area in order to service and maintain the tanks.

[4] On 12 July 2001 the Body Corporate of the property noted the approval of the installation of the tanks subject to the condition that the tanks were to be removed and the property reinstated in the event of a sale occurring. On 31 August 2003 the Department of Agriculture and Environmental Affairs for KwaZulu-Natal authorized the installation of the tanks. On 28 June 2004 the purchaser of unit 16 viz. Marbla CC confirmed an agreement with the Trust in terms of which 'minimum' access was granted to the Trust for 'occasional' maintenance of the tanks. For this permission the Trust paid a once-off consideration of R10 000,00 to Marbla CC.

[5] During 2010, the fourth respondent, ADD Resin (Pty) Ltd concluded a lease agreement with the Trust in respect of units 14, 15 and 20 and took over the business of the Trust. The fourth respondent stores the solvents it purchases in the underground tanks in Y8 in terms of its lease agreement

with the Trust. These solvents are then drawn off through pipes from the tanks to units 14 and 15 for repacking. The fourth respondent by virtue of its lease with the Trust continues to use the tanks for the purpose of storing liquid solvents.

[6] During September 2010, Marbla CC sold unit 16 to the appellant. In terms of the sale agreement the appellant acknowledged "the agreement between the seller and Mycrochem CC which owns sections in the development in terms of which Mycrochem CC is entitled to access Yard Y8 for the purpose of servicing underground tanks".

[7] By 2012 the appellant's stance changed. In an email dated 8 February 2012 from a member of the appellant to the Trust it was suggested that the Trust and/or the fourth respondent should pay the appellant "a market related rent for the use of and access to the tanks of the exclusive area" and that the sum of R3 000,00 per month was considered to be reasonable. Thereafter various correspondence passed between the attorneys representing the Trust and the appellant. For purposes of this appeal I set out hereunder only those pieces of correspondence which have some bearing on the issues that require determination:

7.1 The letter from the appellant's attorney to the respondents' attorney on 23 April 2013 was to the following effect:

> "Your e-mail of 19 December 2012 refers. Unless your client agrees to pay for the privilege of access to the tanks over our client's exclusive use area and unless suitable arrangements are made to pay for all repairs caused by your client in so accessing the tanks, we are instructed that our client will deny your client access to the tanks. We look forward to hearing from you by the month end and failing which our clients rights to deny your clients access as aforesaid with effect from 6 May 2013 are expressly reserved.
>
> We have also suggested to our client that this issue should be placed on the agenda for discussion at the next Body Corporate AGM."

7.2 On 26 April 2013 the respondents' attorney responded as follows:

> "Your letter of 25 April 2013 refers.
>
> I have been instructed by my clients that unless your client withdraws his threat as set out in your letter, that they will approach the High Court for the necessary relief.
>
> At this point, I draw to your attention to your letter of 3 September 2010 to me and my response.
>
> Your client was at all times aware of the agreement entered into between Marbla CC and Mycrochem."

7.3 Not having had a reply to his letter of 26 April 2013, the respondents' attorney wrote a further letter dated 30 April 2013 to the appellant's attorney as follows:

> "My letter of the 26th April 2013 refers.
>
> Unless your client confirms by no later than noon on Thursday 2nd May 2013 that it will not interfere with my clients right to access the tanks on the property, my client will approach the High Court for the appropriate relief."

7.4 On 7 May 2013 the appellant's attorney replied as follows:

> "I refer to our recent telephone conversation. My understanding is that your client's access is not capable of being registered as a servitude over my client's exclusive use area. Refer to Section 27(6) of the Section Title's Act and RCR44/2003."

[8] Following upon the above correspondence the respondents brought an urgent application under case number 5209/2013 for spoliatory relief. At the initial hearing on 16 May 2013 the respondents were granted interim relief, by consent, in terms of paragraph 1 and 2 of their Notice of Motion. This was followed by an application by the appellant and a counter-application by the respondents under case number 8638/2013. In the latter application the parties respectively sought declaratory orders aimed at

resolving the issue of the Trust's alleged servitude or other right of access to the exclusive use area constituting Y8.

[9] While the court *a quo* granted the respondents a spoliation order under case number 5209/2013, it did not adjudicate upon the declaratory orders sought by the parties under case number 8638/2013. That application was simply dismissed with costs.

ISSUES ON APPEAL

[10] The main issue in this appeal is whether the respondents' access to the exclusive use area, Y8, amounted to a *quasi-possessio* which was deserving of protection by means of a *mandament van spolie*.

[11] An ancillary issue that arises is whether a threat of spoliation amounts to an act of spoliation entitling a party to relief by way of a *mandament van spolie.*

THE LAW

[12] A key characteristic of a *mandament van spolie* is that it is a possessory remedy (*remedium possessoruim*). The essential characteristic of a possessory remedy is that the legal process whereby the possession of a party is protected (*iudicium possessorium*), is kept strictly separate from the process whereby a party's right to ownership or other right to the property in dispute, is determined (*iudicum petitoruim*). The object of the order sought by way of a *mandament van spolie* is:

> "merely to restore the *status quo ante* the illegal action. It decides no rights of ownership; it secures only that if such decision is required, it shall be given by a court of law, and not affected by violence. If before the spoliation either party needed a legal decision to establish his rights, he requires it just as much after, as before, the order. He is in no better, and not worse, a position than he was before the spoliation. There is consequently nothing

> inherent in a *mandament van spolie* which demands that it should be conditional as being granted *pendent lite*." [1]

[13] The reason behind the practice of granting spoliation orders is that no man is allowed to take the law into his own hands and to dispossess another illicitly of possession of property. If he does so, a 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. The rule is *spoliatus ante omnia restituendus est.*[2]

[14] An essential requirement that must be satisfied for spoliatory relief is that there must have been a spoliation. Put differently, there must have been a 'wrongful deprivation of another's right of possession'.[3]

[15] In *De Beer v Zimbali Estate Management Association (Pty) Ltd and another*,[4] the court stated that the requirements for obtaining a *mandament van spolie* were met when (a) a person has been deprived unlawfully of the whole or part of his possession of movables or immovables; and also (b) a person has been deprived unlawfully of his *quasi-possessio* of a movable or immovable incorporeal.

[16] In *Firstrand Ltd t/a Rand Merchant Bank v Scholtz NO,*[5] the legal principles that apply where *quasi-possession* is protected by a spoliation order were re-affirmed by Malan AJA as follows:

> "The mandement van spolie is a remedy to restore to another *ante omnia* property dispossessed 'forcibly or wrongfully and against his consent'. It protects the possession of movable and immovable property as well as some forms of incorporeal property. The mandement van spolie is available for the

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[1] *Man v Marie* 1932 CPD 352 at 356. See also Erasmus, Superior Court Practice, Service EG-1 and the authorities collected in footnote 4.
[2] Voet 41 1 16, 43 17 7. See also *Nino Bonino v De Lange* 1906 TS 120 at 122 which was approved in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) 514 J-516E. Also Erasmus, supra, service E 9-1 and the authorities in footnote 5.
[3] *Le Riche v PSP Properties CC & others* 2005 (3) SA 189 (C) para 8. *Shelving Man (Pty) Ltd v Dawood & others* [2015] 3 All SA 243 (KZD) paras 4 and 5; *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) para 19 and *Malan & another v Green Valley Farm Portion 7 Holt Hill 434 CC & others* 2007 (5) SA 114 (E) para 35.
[4] 2007 (3) SA 254 (N) at 258B-C.
[5] 2008 (2) SA 503 (SCA) para 12.

> restoration of *quasi-possessio* of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the status quo *ante* and not the determination of the existence of the right. The *quasi-possessio* consists in the actual exercise of an alleged right or as formulated in *Zulu v Minister of Works, Kwazulu, and Others* in 'die daadwerklike uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word'."
> [footnotes omitted]

[17] In paragraph 13 of the judgment Malan AJA points out that the *mandament van spolie*:

> ". . . does not have a 'catch-all function' to protect the *quasi-possessio* of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandement is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of *quasi-possessio* of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its *quasi-possessio* is deserving of protection by the mandement. Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandement. The right held in *quasi-possessio* must be a 'gebruiksreg' or an incident of the possession or control of the property."

[18] It is now well-established that mere personal rights are not protected by the *mandament* and that only rights to use or occupy property or incidents of occupation will warrant protection by a spoliation order.[6]

RESPONDENTS' CASE

[19] Counsel for the respondent, Mr *Shepstone*, with reference to the decision in *Bon Quelle (Edms) Bpk v Munisipaliteit Van Otavi,*[7] contended that the respondents' rights of access to the underground tanks amounted

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[6] *ATM Solutions (Pty) Ltd v Olkvu Handelaars CC* 2009 (4) SA 337 SCA. See also *Microsure v Net 1 Applied Technologies SA* 2010 (2) SA 59 (N); and *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA).
[7] 1989 (1) SA 508 (A) at 514 D-I.

to a *quasi-possessio* in the form of a right of servitude which was demonstrated by the actual use of that servitude. It was argued that the appellant's threat to deny the respondents access to the tanks amounted to a dispossession of that right and for which the *mandament van spolie* was the appropriate relief. For the reasons that follow, I find no merit in this argument.

FINDINGS

[20] On the facts of this matter, it is clear that the Trust's rights of access to the underground tanks arose initially from a prior agreement which the Trust had with the developers of the sectional scheme *firstly* for the installation of such tanks in the exclusive use area allocated to unit 16, and *secondly* for the Trust to access this area in order to service and maintain the tanks. When Marbla CC purchased unit 16 in 2004, it acknowledged the agreement with the Trust which allowed the Trust 'minimum' access for 'occasional' maintenance of the tanks. The fourth respondent's rights of access to the tanks are governed by a lease agreement which it holds with the Trust. When Marbla CC sold unit 16 to the appellant in 2010 the appellant in turn acknowledged the agreement between Marbla CC and the Trust which allowed the Trust access to the exclusive use area "for the purpose of servicing underground tanks". [8]

[21] On these facts it is clear that the respondent's right to access the tanks flows from a contractual arrangement which the parties had with each other over the years. This was the right which the Trust and the fourth respondent were exercising and which the appellant threatened to stop. On the strength of the authorities referred to above, the respondents' claim in the court *a quo* amounted to nothing more than a claim for specific performance of their contractual rights. This, according to the authorities, is not permissible by way of a *mandament van spolie*. In my view, all that

[8] This contractual arrangement is expressly provided for in paragraph 6.6 of the Agreement of Purchase and Sale of unit 16 from Marbla CC to the appellant; Record, page 57.

the Trust and the fourth respondent enjoyed was a right of access – they neither occupied the premises nor did they exercise any physical control over it. The respondents access to the premises was for a specific purpose, namely to service and maintain their tanks from time to time. None of this could be achieved without the co-operation of the appellant which owns unit 16 and the exclusive area attached to it.

[22] As pointed out in the *ATM Solutions* matter, *supra*,

> "[t]he cases where quasi-possession has been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes or the purported exercise of servitudes – 'gebruiksregte') or an incident of the possession or control of the property".

In the present matter a claim to a servitudinal right would only apply in a sectional scheme such as this, in terms of either the rules[9] or their registration in the Deeds Office.[10] None of these considerations apply herein for the simple reason that no such rights of access to the tanks on the common property under Y8 were conferred upon any of the respondents in terms of the rules and neither were such rights registered in the Deeds Office. It seems that at some point the Trust did take steps to register a right of access to the tanks in the Deeds Office but failed to complete the process, to its peril. The absence of a clearly recognized and registered servitudinal right in favour of the Trust, fortifies the view that its claim to a right of access flowed from an agreement that was concluded between the Trust and Marbla CC. At no stage did Marbla CC grant nor was it ever requested to grant a servitude in favour of the Trust over Y8.[11]

[23] I accordingly conclude that the respondents were not entitled to the relief they sought in the court *a quo* – their right of access to Y8 was for a limited purpose and occurred as a consequence of their prior agreement

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[9] Section 27 of the Sectional Titles Act, 95 of 1986.
[10] Sectional 29 of the Sectional Titles Act, 95 of 1986.
[11] Vol. 1, pages 148-149, para 20.1; Vol 2. Page 53, para 19.

with Marbla CC – it was not an incident of actual possession and occupation.[12]

[24] As for the ancillary issue as to whether a threat of spoliation amounts to an act of spoliation entitling a party to relief by way of a *mandament van spolie*, I make the following points. There are fundamental differences between the *mandament van spolie* which is aimed at the recovery of lost possession, and a final interdict to prohibit a threatened spoliation or dispossession. In the unreported judgment of Boruchowitz J (30 May 2014) in *Outdoor Network Limited v Passenger Rail Agency of South Africa*[13] it was pointed out that the *mandament van spolie* cannot be invoked to prohibit a threatened spoliation – it is only available to a *de facto* possessor who has been despoiled. While possessory remedies to prevent a threatened spoliation were available in Roman Law, namely the *mandament van complainte* and *mandament van maintenue*, these were not imported into South African law.

[25] In light of the above, I consider that even if the respondents reasonably and *bona fide* believed that their right of access to Y8 stemmed from a servitude or the purported exercise of a servitude ('gebruiksregte') or was an incident of possession or control of the premises, none of this justified the granting of a *mandament van spolie* on a mere threat of termination of that right. In my view, without an actual and wrongful deprivation of their purported right of possession did not justify the kind of relief they sought from the outset. It follows that a mere threat of dispossession can find no ground for relief through a *mandament van spolie.*

[12] See in this regard *First Rand*, and *Wille's Principles of South African Law* 9ed (2007) (general editor Francois du Bois) where CG van der Merwe and Anne Pope state: "Protection for non-servitutal rights appears to be confined to those rights that flow from or are incidental to possession of corporeal property . . . . Where the non-servitutal right of use is separate from applicant's possession of corporeal property it is almost inevitably a contractual right which is not protected by the *mandament van spolie*."
[13] 2014 JDR 2283 (GJ) para 25.

APPELLANT'S APPLICATION AND RESPONDENTS' COUNTER-APPLICATION

[26] As I pointed out at the commencement of this judgment, the appellant's application for declaratory relief was simply dismissed by the court *a quo*. The nature of the declaratory relief was to the effect that no servitude or other right of access existed in favour of the respondents in respect of the exclusive use area (Y8) attached to unit 16. The additional relief was for an order prohibiting the respondents from exercising any access to Y8 without the permission of the appellant. In a counter-application filed by the respondents, they in turn sought a declaratory order to the effect that they have rights of access to Y8 in terms of an unregistered servitude.

[27] On the papers as they stand there are real and material disputes between the parties regarding the nature of the right in respect of which declaratory relief is sought. Neither party addressed the issue fully either in heads of argument or in oral submissions before us. Nor was the issue properly raised by the appellant in its notice and grounds of appeal.[14] The granting of declaratory relief by a court is a discretionary matter the exercise of which requires a careful consideration of all relevant information which must be placed before it. In the present matter I am not satisfied that the evidence goes far enough to make a determinative finding on the issues raised more so because of the material disputes raised. In these circumstances I would be reluctant to grant any declaratory relief under case number 8638/2013 and would simply dismiss that application as well as the respondents' counter-application with each party to carry its own costs.

[14] In the appellant's notice of appeal at page 193 of the record, Vol. 2 (AR396/15), the issue is raised rather obliquely in para (i).

ORDER

[28] In the result the order I make is the following:

(a) The appeal is upheld and the orders of the court *a quo* are set aside and replaced with the following:

(b) (i) the application under case number 5209/2013 is dismissed with costs and the rule *nisi* granted on 16 May 2013 is discharged;

(ii) the appellant's application and the respondents' counter-application under 8638/2013 is dismissed with each party to pay its own costs.

(c) The first to fourth respondents are ordered, jointly and severally, to pay the appellant's costs of appeal.

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JAPPIE JP

I agree

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Van Zÿl J

Date of Hearing	:	06 February 2017
Date of Judgment	:	13 March 2017
Counsel for Appellant	:	A Camp
Instructed by	:	Colyn Townsend
		c/o Dawsons Incorporated
Counsel for Respondents	:	SM Shepstone
Instructed by	:	Thornhill & Company
		c/o Jon White Attorneys