IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO. 92/2002
REPORTABLE

In the matter between:

TELKOM SA LIMITED **Appellant**

and

XSINET (PROPRIETARY) LIMITED **Respondent**

Before: **VIVIER ADP, OLIVIER, CONRADIE, JJA, JONES & SHONGWE AJA**
Heard: **6 MARCH 2003**
Delivered: **31 MARCH 2003**

Summary: **Spoliation - mandament – not available where supply of telecommunication systems in terms of contract disconnected.**

JUDGMENT

JONES AJA :

[1] This is an appeal, with leave from the court *a quo*, against a spoliation order granted by Hodes AJ in the Cape of Good Hope Provincial Division. Hodes AJ's judgment is reported as *Xsinet (Pty) Ltd v Telkom SA Ltd* 2002 (3) SA 629 (C), in which the facts are fully set out.

[2] The respondent, Xsinet (Pty) Ltd ("Xsinet"), carries on business as an internet service provider at premises at De Ville Centre, 1 Wellington Road, Durbanville. In order to conduct its business it required telecommunication services from the appellant, Telkom SA Limited ("Telkom"), which has an exclusive licence to provide these services in terms of the Telecommunications Act 103 of 1996.

[3] To enable Xsinet to operate, Telkom supplied, installed and maintained a telephone system and a bandwidth system at Xsinet's premises. The telephone system comprised a primary line which ran into a PABX system with 25 telephone extensions and 38 individual telephone lines. The telephone lines were connected to telephones at Xsinet's premises for use by Xsinet's employees and were used on a daily basis in Xsinet's business until Telkom disconnected them on 6 September 2001.

[4] The bandwidth system comprised two telephone lines which ran into Xsinet's premises and were connected to a modem on the premises. Its purpose was to connect Xsinet and its "hosted" clients to the Internet. Clients were called "hosted" clients because Xsinet managed their websites from its premises. By using the bandwidth system these clients were able to gain access to their websites and the Internet, and they were able to communicate via e-mail. Xsinet had about 400 "hosted" clients, ranging from small to large companies.

[5] Xsinet paid all charges levied by Telkom in terms of these agreements. It claimed a contractual right to use the systems. It alleged that it used them at its premises without interference from Telkom or anybody else, and that it was in peaceful and undisturbed possession thereof until the systems were

disconnected.

[6] The disconnection came about in the following way. Telkom also provided a third service to Xsinet, which is called a connectivity service. There is an unresolved dispute between Telkom and Xsinet about payment of charges in respect of the connectivity service. The dispute resulted in Xsinet instituting application proceedings against Telkom. Shortly before the hearing Xsinet withdrew its application and terminated the connectivity contract in circumstances which gave rise to yet another dispute. On 5 September 2002 Telkom advised Xsinet that unless its alleged indebtedness arising out of the connectivity service was paid the bandwidth system would be disconnected. That system was indeed disconnected later that day. On the following day the telephone lines were disconnected after a similar notification. Telkom purported to disconnect the systems in terms of the general conditions under which it provides services, which entitle it to cut off all services if payment is not made in respect of any one service. It would appear that Telkom provided the services by running the lines from its premises to Xsinet's premises, and that it connects and disconnects these services by operating switches on its own premises. It does not have to enter Xsinet's premises to do so.

[7] The disconnection of the telephone and bandwidth services had a crippling effect on Xsinet's business and was likely to cause considerable loss. Xsinet regarded the disconnection of the systems as an unlawful deprivation of its use and possession of the systems. It accordingly brought an urgent application for a spoliation order.

[8] On 11 September 2001 Hodes AJ made such an order. He ordered Telkom to reconnect and restore to Xsinet the use and possession of the telephone lines and the bandwidth lines at its premises, and to pay the costs of the application.

[9] Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has "quasi-possession" of it, when he has exercised such right. Many theoretical and methodological objections can be raised against this construct, inter alia

that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of "quasi-possession" has passed into our law. This is all firmly established. See *Nino Bonino v De Lange*[1], *Nienaber v Stuckey*[2], and *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*[3].

[10] Xsinet argues that it has a right to the continuous connection of the telephone and bandwidth systems, that it was in quasi-possession of the systems by making use of the services, and that it has discharged the onus of proving that the disconnection amounted to unlawful interference with its quasi-possession.

[11] The leading case on the quasi-possession of incorporeals is *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi supra*[4]. In that case the issues were somewhat confined. The was concerned with an alleged servitude which in the nature of things is incapable of possession in the way that movable or immovable property is possessed. The question which the was required to determine was whether or not an applicant is required to prove the servitude in order to get a spoliation order. Hefer JA held that he is not. The *ratio decidendi* of the judgment is that it is sufficient for an applicant to prove quasi-possession of an alleged servitude by showing an outward manifestation

1 1906 TS 120.
2 1946 AD 1049.
3 1989 (1) SA 508 (A).
4 See footnote 3.

of its use. An interference with such quasi-possession is an act of spoliation. The learned judge describes the nature of the quasi-possession of a servitude as follows.[5]

"n Onliggaamlike saak soos 'n serwituut is natuurlik nie vatbaar vir fisiese 'besit' in dieselfde sin as wat daardie uitdrukking gebruik word met betrekking tot liggaamlike sake nie, maar wel vir *quasi*-besit wat bestaan uit die daadwerklike gebruik van die serwituut. (Waar ek later in hierdie uitspraak die uitdrukking 'besit van 'n reg' gebruik, bedoel ek dit in hierdie sin.) In die samehang van die mandament van spolie neem, soos later sal blyk, die daadwerklike gebruik van 'n beweerde serwituut die plek van die besit van 'n liggamlike saak.'

[12] Hodes AJ held that Xsinet had indeed been spoliated. In doing so he attempted to bring the case within the principle of *Painter v Strauss*[6], *Naidoo v Moodley*[7] and *Froman v Herbmore Timber and Hardware (Pty) Ltd*[8] where interference with the supply of water and electricity to the premises in question was held to amount to interference with possession of the premises themselves. Hodes AJ's judgment concludes:[9]

'In the instant case the respondent as spoliator interrupted the bandwidth and telephone services supplied to the premises of which the applicant as *spoliatus* had occupation and control. The situation is analogous to the position which was obtained in *Painter v Strauss*, *Naidoo v Moodley* and *Froman v Herbmore Timber and Hardware (Pty)*

5 At 514 1
6 1951 (3) SA 307 (O).
7 1982 (4) SA 82 (T).
8 1984 (3) SA 609 (W).
9 At 639 G-H. The full reference is cited in paragraph 1.

Ltd (supra). The use of the bandwidth and telephone services constituted an incident of the applicant's possession and control of the premises occupied by it, and it was accordingly entitled to the spoliation order granted by me on 11 September 2001. What the respondent was ordered to do was to undo the effect of its interference with the bandwidth and telephone services.'

In my opinion the learned judge was not correct in concluding on the facts that the use of the bandwidth and telephone services constituted an incident of Xsinet's possession of its premises. Xsinet happened to use the services at its premises, but this cannot be described as an incident of possession in the same way as the use of water or electricity installations may in certain circumstances be an incident of occupation of residential premises.

[13] Counsel for Xsinet conceded that Hodes AJ erred in regarding the use of the equipment as an incident of the possession of the premises. He submitted, instead, that Xsinet was in possession of the system, including the lines, telephones and modems installed at its premises as well as electronic impulses, and that it made use of them in the conduct of its business. Disconnection denied Xsinet access to the beneficial use of its equipment, which, so the argument goes, was an act of spoliation. There is no suggestion that Telkom interfered in any way with Xsinet's physical possession of its equipment. There is no evidence that Xsinet was ever in possession of any of the mechanisms by which its equipment was connected to the Internet. It is not as if Telkom had entered the premises and removed an item of Xsinet's equipment in order to effect the disconnection. In these circumstances it is in my opinion both artificial and illogical to conclude on the facts before the that Xsinet's use of the telephones, lines, modems or electrical impulses gave it "possession" of the connection of its corporeal property to Telkom’s system.
[14] In the alternative counsel argued that the quasi-possession of the right to receive Telkom's telecommunication services consisting of the actual use ("daadwerklike gebruik") of those services must be restored by the possessory

remedy. This is, however, a mere personal right and the order sought is essentially to compel specific performance of a contractual right in order to resolve a contractual dispute. This has never been allowed under the *mandament van spolie* and there is no authority for such an extension of the remedy. See, for example, *Zulu v Minister of Works, KwaZulu-Natal and Others*[10]; Van der Walt, 1989 (3) *THRHR* 444 at 449; Kleyn, *Possession* in Zimmerman & Visser, Southern Cross: *Civil Law and Common Law in South Africa* (1996) at 830; Harms, *LAWSA* 11 (1st Reissue) 305 para 343 footnote 4; and Sonnekus, *Sakereg Vonnisbundel* (2nd ed) 168.

[15] In the result, the appeal is allowed with costs. The order of the court *a quo* dated 11 September 2001 is set aside and replaced with an order that the application is dismissed with costs.

RJW JONES

Acting Judge of Appeal.

CONCURRED:

VIVIER ADP

OLIVIER JA

CONRADIE JA

[10] 1992 (1) SA 181 (D) 190 B-E.

SHONGWE AJA