IN THE CAPE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 4573/2006

In the matter between:

DENMAR TRADING BP	1st Applicant
DENNISE LORRAINE MARTIN	2nd Applicant
ANGHONY PETER MARTIN	3rd Applicant

en

CORPORATION RETAIL S E (PTY) LTD	Respondent

JUDGMENT DELIVERED ON: 27 JUNE 2006

Meer, J:

Introduction

[1] Applicants seek the urgent restoration of possession to them of their business, a “Friendly Seven Eleven” store, situated at 195 Voortrekker Road, Maitland, of which they were dispossessed by the Respondent. Applicants were in peaceful and undisturbed possession of the store when Respondent, so they allege, unlawfully deprived them of possession thereof on 01 May 2006. Applicants seek also an order forbidding Respondent from interfering with the business and intimidating the employees.

[2] Respondent opposes the application on the basis that Applicants voluntarily gave up possession of the premises to it, and were accordingly not unlawfully deprived of possession thereof.

The parties and the contractual relationships that existed between them.

[3] The first Applicant is a close corporation with its principal place of business at 195 Voortrekker Road, Maitland, Western Cape. The second and third Respondents each own a 50% share in first Applicant.

[4] Respondent is a close corporation with its principle place of business in Epping, Western Cape. Respondent is a franchisee of the Metcash Group of Companies. It owns and is licensed by Metcash to conduct the business of a number of convenience stores under the name and style of "Friendly Seven Eleven". The shop which is the subject matter of this application is one such convenience store. Metcash permits the Respondent to sub franchise its convenience stores. Respondent does so by way of sub franchise arrangements entered into with sub franchisees who run individual stores. Such sub franchise arrangements are governed by three standard form contracts, namely, an agreement of lease, an agreement of sublease and a sub franchise agreement.

[5] In October 2004 Respondent entered into a sub franchise arrangement with second Applicant and the three standard form contracts were concluded between them. Each contract afforded the second Applicant the right to nominate a third party as the contracting party in her stead. Pursuant to that right she nominated the first Applicant as the sub franchisee.

[6] In terms of the lease agreement the first Applicant hired from the Respondent the business of the shop as a going concern, for an initial period of 2 years, effective from 22 October 2004. Consideration was payable as follows:

- a monthly rental of R8000.00 for October – December 2004 and thereafter R10 000.00 per month until the end of the initial period.
- payment of R150 000.00 for stock in the shop (actual payment for

stock amounted to R144 361.14).

[7] The sub franchise agreement licensed the first Applicant in conducting the business of the shop, to use the requisite insignias, intellectual property, know-how system, trade marks and trade names for a period of 2 years with effect from 22 October 2004. The sub franchise agreement recorded the value of the business as R800 000.00.

Facts.

[8] On 26 April 2006 Respondent sent a letter to first Applicant cancelling the sub franchise agreement. The reasons for the cancellation as stated in the letter, was that first Applicant had "failed, refused and/or neglected to maintain the standards, quality, cleanliness stock levels and timeous payments per the agreement". The cancellation was effected in terms of clause 31.2 of the sub franchise agreement. The letter notified the first Applicant that Respondent would implement the take back procedures of the store on 01 May 2006 at 09h00. The letter stated moreover that the lease of business and lease of premises agreements, would automatically be terminated upon the termination of the sub franchise agreement.

[9] According to Applicants, the complaints recorded in the letter were unfounded. There had moreover not previously been complaints about the business. Upon receipt of the letter of cancellation the second Applicant sought legal advice from her attorney, Mr Theron, who advised her that the Respondent did not have the right to take the law into its own hands, and that Applicants therefore should not allow Respondent to enforce its threat to take over the shop. Mr Theron said the Respondent was however entitled to conduct a stock taking and advised Applicants not to get into direct conflict with Respondent's representatives, but to ask them to contact him after the weekend.

[10] Also upon receipt of Respondent's letter, second Applicant attempted to have an urgent meeting with Mr Elia Hadjidakis, a director of Respondent and she phoned him on 28 April 2006 to arrange this. According to second Applicant Mr Hadjidakis told her that he would only be available on Tuesday 02 May 2006.

[11] Respondent's version about exchanges between Applicants and Hadjidakis differs. According to Hadjidakis on 27 April 2006 the third Applicant telephoned him to discuss the complaints about the manner in which the business of the shop was being conducted and the Respondent's cancellation of the sub franchise agreement as a result. The third Applicant asked for time within which the shop could be cleaned up. The second Applicant requested time to consider the first Applicant's position and asked Hadjidakis not to proceed with the implementation of the take back procedures which had been scheduled for 01 May 2006. Hadjidakis says he adopted an accommodating attitude, offering that

Respondent would be prepared to defer the implementation of the take back procedures for a period of 30 days to allow the Applicants an opportunity to remedy the breaches of the sub franchise agreement.

11.1 Hadjidakis says thereafter, on 28 April 2006 the third Applicant again telephoned him and reported that Applicants did not have the resources to operate the business in accordance with the terms of the applicable contract. The third Applicant, according to Hadjidakis, asked the Respondent to proceed with the take back procedures and said that 01 May 2006, being a public holiday, would be convenient for the take over. Respondent's version is therefore that prior to the actual take over of the shop on 01 May 2006, Applicants had consented thereto. Applicants vehemently deny this.

[12] On Monday 01 May 2006 the representatives of Respondent, supervised by one of its regional managers, Mr Van As, arrived at the store. According to Hadjidakis, on arrival they took possession of the store with Applicants' consent and then went about implementing Respondent's standard take back procedure. This, Hadjidakis explained, entails firstly a stock taking as at the moment that the sub franchisee seizes to trade. To fix this moment, Respondent's representatives, in accordance with the procedure, recorded the sales proceeds up until the time they arrived, being the time when the sub franchisee seized to trade. They did so by generating what is referred to as a "Z-report" from the cash registers in the store. This amount was wholly due to the Applicants.

[13] According to Respondent, Van As explained to second Applicant

that he was going to generate a Z-report to commence the stock taking and that the sales proceeds between that report and a second report to be generated later, would be shared equally between the first Applicant and the Respondent. The second Applicant, said Hadjidakis, was completely familiar with the procedure as it had also been adopted when the Applicants took over the shop from the Respondent in 2004.

[14] According to second Applicant the particular stock take that morning was no different in procedure to any other stock take, and Applicants “certainly did not consider the stock taking that morning to be an act of taking over”.

[15] After Mr Van As generated the ”Z report”, the stock taking commenced. The second Applicant arranged for each of Van As’s assistants to be accompanied by a store employee to verify the correctness of the count. The stock taking continued with the co-operation of second Applicant.

[16] The third Applicant arrived at the shop at about 11:00am while the stock taking was in progress. He proceeded to the office within the shop, where second Applicant from time to time went to speak to him. Shortly before the stock taking was due to be completed, Mr Van As telephoned Mr Hadjidakis who prepared to proceed to the shop with his brother, also a director of Respondent, to inspect the premises.

[17] Around the same time, when the stock taking was about to be completed, the third Applicant telephoned Applicants’ attorney, Mr

Theron, to whom he had faxed the sub franchise agreement earlier that morning. Theron reiterated that Respondent could not take possession of the business and asked third Applicant to inform Respondent's representatives, accordingly. The third Applicant asked Theron to speak directly to Mr Van As which he did. Theron informed Mr Van As that Respondent may not take possession of the business and that if Van As and his team did not leave, they would be trespassing.

[18] Applicants' version is that thereafter Van As and his team left, leaving the stock sheets with Applicants. The Applicants were relieved although they anticipated that Hadjidakis would probably come to the shop. Approximately half an hour later according to Applicants, Van As and his team returned followed soon thereafter by the two Hadjidakis brothers.

[19] Respondent's version in contrast, is that Van As and his team never left the shop after Van As's conversation with Applicants' attorney, Theron. Instead Van As telephoned Mr Elia Hadjidakis who was at that stage en route to the shop. Both Van As and Elia Hadjidakis were flabbergasted by Applicants' change of mind about the takeover, it being altogether inconsistent with their stance on 28 April 2006, when they had, according to Hadjidakis consented to the take over.

[20] Hadjidakis said he himself spoke to the third Applicant on the phone and enquired why he had changed his mind, to which third Applicant replied that he had not previously been able to contact his attorney.

[21] When the Hadjidakis brothers arrived at the shop, heated words were exchanged. Elia Hadjidakis told the Applicants that as far as he was concerned they had already returned the shop to Respondent and he was not prepared to reverse the process by handing it back to them. Applicants deny this was said.

[22] The situation became sufficiently heated for Applicants to summon the police on the grounds that Respondent's personnel were trespassing in the store. Inspector Fourie, arrived on the scene and, it would appear, decided that the parties were engaged in a civil dispute, in which he ought not to intervene. He left the shop. Thereafter the stock taking process was completed. According to Hadjidakis and the other representatives of Respondent conducted themselves in such an intimidating fashion, that Applicants felt powerless. The staff were informed that their services were being taken over by Respondent and they felt pressurized. Applicants informed Hadjidakis that they intended taking legal steps against Respondent. Respondent thereafter, it would appear, obtained the keys to the store. The Applicants still have a key to the store, but it is Respondent who is now in control.

Argument.

[23] Mr Maree for Applicants submitted that in order to determine whether a spoliation had taken place, it was crucial to establish the precise moment of spoliation and assess whether Applicants had consented to Respondent's taking possession of the business at that point.

He urged that I should accept on a balance of probabilities Applicants' version that Van As and his team left the shop when ordered so to do by third Applicant and returned half an hour later with Hadjidakis and his brother. It was the arrival of Hadjidakis and the events which ensued thereafter, he submitted, which constituted the "taking over" of the shop without Applicants' consent. Applicants did not consider the earlier visit by Van As and his team to stock take, to be intimidating in any manner. This did not disturb their peaceful possession and control of the shop which continued right until the arrival of the Hadjidakis brothers. On Applicants' version, he submitted, Respondent's argument that possession of the shop had already taken place in the morning at the commencement of the stock taking, must fall away, given that when Van As and his team left, possession was restored to Applicants and continued undisturbed until the arrival of the Hadjidakis brothers.

[24] Mr Maree submitted also, that on a balance of probabilities it should be found that Applicants did not consent to the take over telephonically on 28 April 2006, given that it was a profitable business and Applicants were trying to arrange a meeting in order to prevent the take over. In any case, so his argument went, it was irrelevant even if Applicants did agree prior to 01 May 2006 to the take over, because the precise moment at which the existence of consent must be assessed, is the moment that possession passed. At the time of the take over of the shop by Hadjidakis, even assuming that there had been prior consent, Applicants had changed their mind which they were entitled to do, and consent to the take over was absent.

[25] He pointed also with reference to the case *Nino Bonino v de Lange* 1906 TS 120 at 123 that an agreement between parties to the effect that one of them could take possession without consent, is invalid.

[26] Finally, Mr Maree argued that the take over procedure which commenced with the stock taking did not contain the elements for the passing of possession as defined at common law. Applicants were still in control of the premises, had the keys, were in control of the employees, occupied the office and trading still continued. The Applicants did not regard the stock taking as a take over but merely as a first step to what might later occur. The Respondent did not possess the shop to the exclusion of Applicants at that stage, nor does it allege so.

[27] Mr Tyler, who appeared for the Respondent submitted that Respondent took possession of the shop with the arrival of Van As and his team that morning to implement the take back procedure. The Applicants he submitted appreciated that the Respondent was engaged in taking back the shop at that time as no other possible reason could have existed for Van As to state that Respondent would share equally in the sales proceeds generated between the first Z-report and the second Z-report. Applicants were moreover familiar with the take over procedure. The fact that the Applicants offered no opposition whatsoever to Van As during the period from the commencement of the stock taking to about 11h:45, he argued, is compatible with one inference only, namely that Applicants had indeed consented to the take back of the shop, but had afterwards changed their minds.

[28] In order to obtain a *mandament van spolie,* an Applicant must show that he was in peaceful and undisturbed possession of the thing and he was unlawfully deprived of such possession.

[29] The Respondent can justify taking possession of the shop and business from the Applicants by showing that the Applicants genuinely and freely consented to give up their possession thereof see *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education & Culture Services* 1996 (4) SA 231 (C) at 240B - D; *LAWSA* vol. 27 paragraph 269.

[30] The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts. As has been stated "peace in a community could not be maintained if every person who asserted that he had a claim to a particular thing was entitled to resort to self help to gain possession of a thing", see *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 250 (NC) at 255C-D; *George Municipality v Vena & Another* 1989 (2) SA 263 (A) at 271I; *LAWSA* vol. 27 paragraph 265.

[31] In *Runsin Properties (Pty) Ltd v Ferreira* 1982 (1) SA 658 SE at 670 Addleson J stated:

> "The essence of the remedy by way of spoliation is that it is a robust one. Discretion and considerations of convenience do not enter into it. I do not think it is not necessary to cite authority for that proposition other than to refer to the convenient summary in

Wille's *Principles of South African Law* 7th Edition at p199 as follows:

> "Consequently, if a person without being authorized by a judicial decree disposesses another, the court, without enquiring into the merits of the dispute, will summarily grant an order for restoration of possession to the applicant as soon as he has proved two facts, namely that he was in possession and that he had been despoiled of possession by the respondent. The policy of the law is neatly summed up in the maxim *spoliatus ante omnia restituenda est*".

[32] It is trite that common law possession consists of both an objective and subjective element, namely the objective or physical element, *corpus*, *dententio* and the subjective or mental, *animus*. See *S v R* 1971 (3) SA 798 at 801A-B; *LAWSA* vol. 27 paragraph 246. Physical control over a building is exercised by the person who occupies it, (*R v Betelezie* 1941 TPD 191; *LAWSA* vol. 27 paragraph 248) or who holds the key to the building. See *Malan v Dippenaar* 1969 (2) SA 59 at 62H - 63A-B; *Liquidators of Royal Hotel Co v Rutherford* 1906 CTR 179 at 181; *LAWSA* vol. 27 paragraph 248.

[33] Possession moreover need not be exclusive possession. See *Engling and Another v Bosielo and Others* 1994 (2) SA 388 at 395B – E; *Mankowitz v Loewenthal* 1982 (3) 758 (AD) at 761E; *Nienaber v Stuckey* 1946 AD 1049 at 1055. A spoliation claim will lie at the suit of a person who holds jointly with others. See *Coetzee v Coetzee* 1982 (1) SA 933 (C); *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230

(ECD) at 233A. Where one of the joint possessors of the thing takes exclusive possession of it against the others will, the latter can avail himself of the mandament van spolie against the former. See *Du Randt en 'n Ander v Du Randt* 1995 (1) SA 401 at 404D – E; Erasmus *Superior Court Practice* E9-6.

[34] An aspect of the entity that is the subject matter of possession in this case, to which counsel drew my attention, is its corporeal as well as its incorporeal nature. The entity comprised two components as it were, a business, an incorporeal thing, and the physical premises, a corporeal, from which the business was conducted. The business and the premises were however so closely identified that it can be said possession of the one comprised equally possession of the other, or as Mr Maree submitted, possession of the business largely constituted possession of the premises and vice versa.

[35] Applying these principles to the case at hand I come to the view that Applicants continued to have control of the shop after the arrival of Van As at 9h:00am that morning and the implementation of the take over proceedings commencing with the stock taking. Applicants retained the keys to the premises which had not yet been handed over at that stage, they maintained control of the office, the employees, who had not been informed that their employment contracts with Applicants were terminated, and Applicants importantly were still in occupation of the premises. It was only after the arrival of Mr Hadjidakis and his brother that this situation came to an end and possession passed. Until that stage Applicants had the elements of possession specified at common law,

namely animus and corpus. This, I find to be so, regardless of whether Van As and his team left the premises before Hadjidakis arrived. On this aspect I note that Ms Jacobs, a former employee of Applicants, currently employed by Respondent, in her affidavit supports Applicants' version that Van As and his team left the premises before the arrival of Hadjidakis.

[36] I accordingly come to the view that Applicants were in peaceful and undisturbed possession of the premises at the time of the arrival of Hadjidakis and that they were deprived of such possession without their consent after his arrival. This being so, Applicants are entitled to avail themselves of the remedy provided for in the *mandament van spolie*.

Urgency.

[37] Mr Tyler submitted that this matter was never urgent, ought not to have been launched with the urgency in which it was brought and thus constituted an abuse of the process of court. He argued that the application stood to be dismissed solely on these grounds and urged that I do so.

[38] He emphasized that the application was launched on 09 May 2006 for hearing on 12 May 2006. On the latter date when it came before the 3rd division Judge, the Respondent had not been able to complete its answering affidavits and for that reason alone the application was postponed to 31 May 2006 for hearing on the semi-urgent role. The issue of urgency was not determined and is still open for determination.

[39] For urgency, Mr Tyler submitted Applicants relied on two misplaced propositions, firstly that the first Applicant was the owner of the business and the Respondent's conduct was causing it ongoing, daily loss as an owner and secondly that Respondent was placing enormous pressure on the employees of the business and might be influencing them against the Applicants.

[40] The first of these grounds was shown not to be so as Applicants were the lessees and not the owner of the shop. The Respondent was the owner. The second of the aforementioned grounds, Mr Tyler contended, never rose above the level of mere suspicion, and as matters have now unfolded, cannot be accepted. It is inconceivable, that if the employees were under pressure, Ms Jacobs, an employee would have deposed to a confirmatory affidavit in favour of the Applicants, submitted Mr Tyler.

[41] Whilst it is so that the founding affidavit stated that Applicant was the owner of the premises, I accept as suggested by Mr Maree, that second Applicant made the submission in error and cleared this up in her replying affidavits.

[42] I am of the view that notwithstanding the fact that the Applicants were not the owners of the business, their prejudice as lessees who ran the business, who had obligations to the people employed in the business, and who had invested a considerable sum of money in the business was equivalent to that of an owner of the business. Their concerns likewise for their employees, whether or not they were subjected to pressure by

Respondent, was real. The consequences and prejudice of having the business one conducts and employees under one's control taken over at short notice without one's consent is, I believe a circumstance sufficiently serious to warrant urgent recourse to legal remedy, without having to wait for a hearing in due course.

[43] Mr Tyler referred me to *Mangala v Mangala* 1967 SA (2) 415 ECD where it was held that the mere fact that an application is one for a spoliation order, does not render it, urgent. It is not, I believe, the nature of this application *per se* that renders it urgent, but its circumstances as referred to above.

[44] I note in passing that the provisions of clause 31.2 of the sub-franchise agreement in terms of which Respondent terminated such agreement at short notice may well offend against the principle of *parate executie*, as discussed in the cases, *Bock and Others v Dubouroro Pty Ltd* 2004 (2) SA 242 SCA at 247E-F and *S A Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 SCA.

[45] The clause may also be in violation of the right of access to the courts prescribed at Section 34 of the Constitution Act 108 of 1996. See *Lesapo v North West Agricultural Bank* 2000 (1) SA 409 CC; see also *First National Bank of South Africa Ltd v Land and Agricultural Bank* 2000 (3) SA 626 CC. I am grateful to counsel for their submissions which I called for on this aspect. Mr Tyler in essence submitted that these cases are distinguishable from the case at hand, whilst the gist of Mr Maree's submissions were that the judgments support and strengthen the common

law principles underlying the remedy of *mandament van spolie*.

[46] The termination of the sub franchise agreement may well have been open to attack, in keeping with the aforementioned cases, on the basis of the contents of clause 31.3. It is well to be mindful of the principles highlighted in these cases. The accepted wisdom is however that for purposes such as the present, a spoliation application, it is not necessary to consider the clause in terms of which the sub franchise agreement was cancelled, and I accordingly delve no further into the potentially offending clause. See *Stocks Housing (Cape) (Pty) Ltd supra* at 240A - E. It would in any event not have been necessary for me to consider the clause given my finding that Applicants were dispossessed without their consent, and are for that reason entitled to restoration of possession.

Costs.

[47] It was submitted on behalf of Respondent that a departure from the normal rule pertaining to costs was warranted in this case on account of the urgent bringing of the application. I do not agree that such a departure is warranted, given my finding on the aspect of urgency.

[48] The following order is granted:

1. Respondent and all its representatives are ordered to immediately restore peaceful and undisturbed possession to Applicants of the premises situated at 195 Voortrekker Street, Maitland, from which First Applicant conducted a business known as Friendly Seven Eleven.

2. Respondent and its representatives are prohibited from interfering with First Applicant's business on the premises, except in accordance with the terms of the franchise agreement.
3. Respondent and its representatives are prohibited from intimidating any employees and are also prohibited from interfering with the work of employees, save as provided for in terms of the franchise agreement
4. The *status quo ante* pertaining to the running of the business on the premises is restored to what it was before 01 May 2006, such to include the receipt and depositing of moneys in respect of Lotto, electricity and general goods.
5. Respondent shall pay the costs of this application.

MEER, J