



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: 20 MARCH 2025
SIGNATURE:.....

CASE NUMBER: A129/2024

In the matter between:

**RIGHTPLAY BUSINESS REHABILITATION
(PTY) LTD**

Appellant

And

TRANSNET SOC LTD

Respondent

Coram: Mazibuko AJ *et* Davis & Van Der Westhuizen JJ concurring

Heard on: 19 February 2025

Delivered: 20 March 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 20 March 2025.

Summary: Mandament van spolie- not available for a party with contractual obligations who had breached material terms of the contract. Lien- the creditor has a right to retain the property of the debtor even if it has no rental interdict or court order – it can refuse removal of the debtor's goods. The debtor who sub-leased the property with the third parties without permission may not institute proceedings and claim mandament van spolie order without joining those third parties. Such a party has no locus standi. Costs are in the discretion of the court determining the matter. The court of appeal is loath to interfere with such discretion. Appeal is dismissed with costs.

JUDGMENT

MAZIBUKO AJ (DAVIS et VAN DER WESTHUIZEN JJ concurring)

INTRODUCTION

- [1] During November 2017, the parties concluded a 10-year commercial lease agreement (the agreement) in terms of which the appellant occupied premises on the 52nd floor including the rooftop part of the Carlton Centre building that belongs to the respondent (Transnet). In terms of the agreement, the exclusive use of the leased premises was to install, operate and maintain antennae. Portions of the rooftop were sub-leased to the appellant's clients, including LBP Communications, Liquid Telecoms, Megasurf, Konecta, Broadlink, Seacom, Comsol and the Sierra Group for the installation of radio, other antennae and related products, including batteries (the goods).

- [2] The appellant breached the terms of the agreement by falling behind with the rental. During December 2023, the appellant gave 30 days' notice of its intention to terminate the agreement, which it terminated on 31 January 2024.
- [3] In January 2024, the appellant, on an urgent basis, sought *mandament van spolie* order that Transnet be directed to grant it and its clients unlimited access to the rooftop part of the building to remove the goods. Transnet opposed the application. The court a quo dismissed the appellant's application.
- [4] Aggrieved by the court a quo's decision, the appellant approached this court with the leave of the court a quo to overturn its decision of not granting *mandament van spolie* order against Transnet. The appeal is opposed by Transnet.

THE DECISION OF THE COURT A QUO

- [5] The appellant's application pertained to Transnet's refusal to allow any removal of the goods the appellant caused to be installed on the rooftop. What was before the court a quo for determination was whether the appellant had made out a case for a spoliation order. Further, whether the appellant had locus standi to bring the spoliation application and whether it was required to join its clients, the third parties to the application.
- [6] The argument on behalf of the appellant was that it was factually in peaceful and undisturbed possession of the property and exercising control over the rooftop, where the goods were, and had been denied access by reason of the goods lift not being operational, making it impossible for it to comply with its agreement with its clients. Transnet had refused to grant it and its clients access to the rooftop unless the arrear rental was paid or the appellant signed an acknowledgement of debt. Further, the agreement made no provision for a right of retention. Therefore, Transnet could not assert any *lien*.

- [7] Upholding the views expressed on behalf of Transnet, the court *a quo* held that mandament van spolie was not an appropriate remedy under the circumstances. The appellant had no locus standi to launch the application as the goods belonged to the third parties. The third parties had a direct and substantial interest in the matter as the relief sought could, in one way or the other, affect them. In addition, the third parties had been in contact with Transnet to try and find an amicable solution in order to retain their equipment on the rooftop.

GROUND OF APPEAL

- [8] According to the appellant, the appeal is based on the grounds that the court *a quo* erred in finding that the appellant placed its reliance on a bad remedy of spoliation and misdirected itself in finding that :
- [8.1] the appellant was not in peaceful enjoyment and use of the properties belonging to the third parties.
 - [8.2] the appellant did not have locus standi in prosecuting the application.
 - [8.3] the non-joinder of the third parties was fatal to the appellant's case.
 - [8.4] the appellant should pay the costs.

ISSUE FOR DETERMINATION

- [9] The question before this court is whether the court *a quo* was correct in finding that (a) Transnet's conduct of unilaterally revoking the appellant's right to remove goods from the rooftop constituted spoliation, (b) the appellant lacked locus standi and (c) the appellant was required to join its clients, the third parties to the application.

APPELLANT'S SUBMISSIONS

- [10] An argument advanced on behalf of the appellant follows. The appellant was in peaceful and undisturbed possession of the property, having leased the property and exercising control over the rooftop and all the third parties' goods thereon. When permitting the third parties to remove their goods from the rooftop, it was relinquishing its possession thereof in favour of them as they

could only recover their possession through it. It would apply to Transnet for permission by completing a removal permit slip to remove or allow to remove the goods from the premises. Transnet committed spoliation by refusing to issue a permit so that it could remove the goods from the rooftop or facilitate the removal thereof by third parties.

- [11] Transnet was not entitled to refuse the removal of the goods without a rental interdict or a court order. Transnet could not rely on the contractual relationship based on the agreement, though there was a rental dispute between Transnet and itself. Further, it was not required to join the third parties.

TRANSNET'S SUBMISSIONS

- [12] Counsel for Transnet contended that the appellant lacked the necessary locus standi as the goods did not belong to it. It was required of the appellant to join its clients, the third parties to the application. Further, mandament van spolie was not an appropriate remedy for the appellant as the dispute between them arose from contractual obligations.

DISCUSSION

- [13] It is trite that an appeal court may interfere with a court a quo's decision only when it was based on misdirection of facts and/or law or exercised its discretion improperly.

Mandament van spolie

- [14] It is incumbent on an applicant to prove that they were in possession of the thing and that they were unlawfully dispossessed or despoiled.¹
- [15] It is stated in the Law of South Africa (LAWSA),² that 'the spoliation order or *mandament van spolie* is available where:

¹ Nino Bonino v De Lange 1906 TS 120, Yeko v Qana 1973 4 SA 735 (A) 739).

² The Law of South Africa (LAWSA) Vol 27 para 94.

"(a) a person has been deprived unlawfully of the whole or part of his or her possession of movables or immovable;

(b) a joint possessor has been deprived unlawfully of his or her co possession by his or her partner taking over exclusive control of the thing held in joint possession;

(c) a person has been deprived unlawfully of his or her quasi-possession of a servitute right;

(d) a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.'

[16] It is established law that mandament is not about the underlying rights to claim possession of the property in question; it seeks only to restore the status quo prior to dispossession until the entitlement to possession of the property is determined. The principle underlying the remedy is that the entitlement to possession must be resolved by the courts and not by a resort to self-help.

[17] In the matter of *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another*,³ it was held: '*... Mandament is there to protect possession, not access. Such possession must be exclusive in the sense of being to the exclusion of others. The possession of keys by a multiplicity of parties waters down the possession to the extent that it ceases to be the sort of possession that is required to achieve the protection of the mandament.*'⁴

[18] In *Firststrand v Scholtz*,⁵ the Supreme Court of Appeal held:-
'[13] *The mandement van spolie does not have a 'catch-all function' to protect the quasi possessio of all kinds of rights irrespective of their nature.*⁶ *In cases such as where a purported servitude is concerned, the mandement is obviously the appropriate remedy,*⁷ *but not where contractual rights are in*

³ (6711/05)[2006] ZAKZHC 21;2007(3)SA 254(N) (11 May 2006), para 41

⁴ *De Beer*, supra, para 54.

⁵ [2006] ZASCA 99; [2006] SCA 98 (RSA); 2008 (2) SA 503 (SCA) ; [2007] 1 All SA 436 (SCA)

⁶ Duard Kleyn 'Possession' in Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 819 at p 830; JC Sonnekus 'Mandement van spolie en ongeregistreerde servitute vir water' 2006 TSAR 392 p 400; MJ de Waal 'Naidoo v Moodley 1982 4 SA 82 (T)' 1984 (47) THRHR 115 p 118.

⁷ *Bon Quelle* 514D-E and see *Zulu v Minister of Works Kwazulu* 188D.

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dispute⁸ or specific performance of contractual obligations is claimed:⁹ 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.'

- [19] There was no evidence that the appellant ever had possession, use and or enjoyment of any of the goods on the rooftop. The evidence is that the goods the appellant required access to belonged to the appellant's clients, the third parties. Its clients would sometimes get permission from Transnet to access the rooftop to work by installing or maintaining same. The appellant sought access to the rooftop to remove the goods and hand them over to its clients, not to possess them. It was not the case of the appellant that it would acquire possession of the goods for its own benefit in obtaining spoliatory relief.
- [20] The appellant did not establish any right to the goods on the rooftop. Its right to obtain unlimited access to the rooftop to remove the third parties' goods and to exercise control was not a property right for spoliation. It failed to allege and prove factual possession of its clients' goods. Instead, it relied on a right to possess by virtue of being a sub-lessor. It was vital for the applicant to show actual possession, albeit quasi-possession, to succeed in spoliatory relief.
- [21] There is no evidence that Transnet interfered in any way with the appellant's possession of the property it occupied or the third parties' goods. Transnet never objected to the appellant having access to the rooftop. The non-functioning of the goods lift limited the appellant and its clients' access to the rooftop. The evidence showed that the appellant had been granted access on condition that it paid the arrear rental, alternatively, signed the acknowledgement of debt owed to Transnet by reason of the agreement.

⁸ *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 250 (NC) 255B-C; *Rooibokoord Sitrus (Edms) Bpk v Louw's Creek Sitrus Koöperatiewe Maatskappy Bpk* 1964 (3) SA 601 (T) 607A-B. Cf *Slabbert v Theodoulou and another* 1952 (2) SA 667 (T).

⁹ *Kotze v Pretorius* 1971 (4) SA 346 (NCD) 350D-E.

- [22] The court a quo was correct in finding that mandament van spolie was not an appropriate remedy where contractual obligations are in dispute. It correctly held that the appellant had not established the sort of possession, use and or enjoyment required for mandament for the unlimited access to the rooftop to remove the goods belonging to the third parties.
- [23] Regarding Transnet's right of retention. The appellant and Transnet had concluded the agreement, which was breached by the appellant by falling behind in its rental payment. It is trite that the person relying on the lien must be a creditor of the owner and be in control of the owner's thing.
- [24] In terms of the agreement, there was no provision for sub-letting of the premises, including the rooftop. Transnet argued that it learnt of the subletting by the applicant to its clients late into the agreement. Transnet was entitled to the arrear rental owed by the appellant as per the agreement and had a right in common law to hold on to the goods until the debt was paid or arrangements to pay were made, which would be the signing of the acknowledgement of debt by the appellant.
- [25] Transnet's refusal of access to the appellant and its clients to remove the goods is not unlawful dispossession to qualify for mandament due to the fact that Transnet has not taken possession of the goods but is exercising its right of retention as a result of the agreement it had with the appellant.
- [26] Transnet did not infringe on the applicant's real right. The appellant had a contractual right, based on the agreement, which cannot be construed as an incident of possession of the property. The mandament does not protect such a contractual right.¹⁰ The appellant was not unlawfully dispossessed of the property or goods as its entitlement to the property, including the rooftop, was through its lease agreement with Transnet, which it had breached by falling behind with its rental payment. As a result, the court a quo was correct in finding that mandament van spolie was not an available remedy considering the facts.

¹⁰ Eskom Holdings SOC Limited v Masinda 19 (5) SA 386 (SCA), para 25.

- [27] The appellant requires the removal of the goods to ensure it is not sued by Liquid Telecoms and other clients, the third parties. The evidence reveals that the appellant's clients were able to access their equipment, the goods on the rooftop by virtue of the sub-lease between themselves and the appellant. When they became aware of the termination of the agreement between Transnet and the appellant, some of them approached Transnet directly about their interest in retaining the rooftop site in respect of the equipment, the goods thereon.
- [28] Transnet asserted that Seacom wrote to them expressing their interest in retaining the rooftop location as it was vital to them. Comsol also wrote to Transnet regarding the cession of their sub-lease agreement with the appellant to Transnet.
- [29] It is against this backdrop that I agree with the court a quo that the appellant's clients would thus have substantial interest in the relief sought. The appellant does not have the necessary locus standi to bring an application for mandament. If the appellant's clients, the owners of the goods are not joined, their position of ownership would be prejudicially affected in that they can not access to install, remove or maintain same.

COSTS

- [30] It was contended by the appellant that the court a quo ought not to have awarded costs against it. It is trite that the issue of costs is the discretion of the court. The general rule is that the costs follow the result, and the court of appeal is loath to interfere with the court a quo's discretion in this regard.¹¹
- [31] Unless the appeal court finds that the court a quo exercised its discretion incorrectly in law or fact, there is no ground for the appeal court to interfere. No cogent facts and evidence are placed before this court, demonstrating that the court a quo misdirected itself in granting the costs order when it did. No

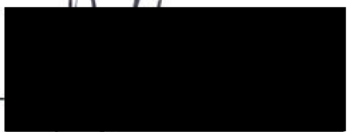
¹¹ Hotz and Others v University of Cape Town 2018 (1) SA 369 (CC) Para 25 and 28 2018 (1) SA 369 (CC) Para 25 and 28.

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circumstances justified the court a quo to deviate from the general rule. I find no misdirection by the court a quo in granting the costs order the way it did.

[32] The costs in this appeal matter will follow the result. The matter is clearly one of great importance to the parties, and both chose to engage the services of counsel. Accordingly, such costs will include the costs consequent upon the engagement of counsel.

[33] In the circumstances, I propose the following order:
Order:

[33.1] The appeal is dismissed with costs, which costs are to include that of counsel.



NGM MAZIBUKO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE, AND IT IS SO ORDERED,



N DAVIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE,



C VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA