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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Not Reportable
Case No: 155/2025

In the matter between:

NORTHERN CAPE HIGH SCHOOL

APPLICANT

and

HANSEN ELITE WELLNESS (PTY) LTD

FIRST RESPONDENT

HELGARD HANSEN

SECOND RESPONDENT

Neutral citation: *Northern Cape High School v Hansen Elite Wellness (Pty) Ltd and Another (155/2025) (28 November 2025).*

Heard: 15 August 2025.

Delivered: 28 November 2025.

Summary: **Law of Property** – *Mandament van spolie* – *quasi possession* - alleged unlawful dispossession of the gymnasium – spoliation order issued for the immediate restoration of possession.

ORDER

1. The first and second respondents are to forthwith restore to the applicant its undisturbed possession and use of the gymnasium facility situated on Erf 1[...], a portion of Erf 1[...], Kimberley, between 15h00 and 17h00 during the weekdays.
2. The first and second respondents are to pay costs of this application on party and party scale; such costs are to include the fees of counsel on scale B in terms of Rule 67A read with Rule 69 of the Uniform Rules of this Court.

JUDGMENT

Phatshoane DJP

Introduction

[1] This is a spoliation application which was launched on an urgent basis on 23 January 2025. For reasons not apparent from the record, it was struck off the roll for lack of urgency. The applicant, the Northern Cape High School (the school), a public school established in terms of the South African Schools Act 84 of 1996, seeks an order that the first respondent, Hansen Elite Wellness (Pty) Ltd (Hansen Elite) previously styled Elite Nutrition (Pty) Ltd, alternatively, the second respondent, Mr Helgard Hansen (Mr Hansen), alternatively, Hansen Elite and Mr Hansen (collectively referred to as the respondents) jointly restore to it its undisturbed possession of the gymnasium facility situated at Erf 1[...], a portion of Erf 1[...], Kimberley, Northern Cape Province (the property). Further ancillary relief with regard to costs is also sought.

The application to strike out

[2] I first dispose of the application to strike out some specified paragraphs in the founding affidavit. The respondents did not bring a formal application on this score. Instead, they averred in their answering affidavit, without more, that 29 paragraphs in the founding affidavit were irrelevant, scandalous and vexatious and that at least seven paragraphs of that affidavit contained inadmissible hearsay evidence. These paragraphs, it was submitted, ought to be struck out. The respondents barely proffered oral and written arguments in support of the point taken. It is nonetheless important to determine whether the specified paragraphs are offensive and ought to be expunged.

[3] Two requirements must be satisfied before an application to strike out can succeed in terms of rule 6(15) of the Uniform Rules of Court. First, the matter sought to be struck out must be scandalous, vexatious or irrelevant; and secondly, the court must be satisfied that if such a matter is not struck out, the party seeking such relief would be prejudiced.¹ The relevance of the impugned allegations in striking out applications has to be tested with reference to the merits of the case. A consideration of the probative force of the statements does not arise.²

[4] The impugned paragraphs: 13, 19-20, 22, 27-29, 31, 35-37, 42 and 67 set out the historical context, the current ownership and use of the property (sports ground) which houses the gymnasium, and how this latter facility was established. They also outline some historical disputes over the ownership of the sports ground and how these were resolved. I am of the view that the specified paragraphs cannot be categorised as irrelevant. A trust, established by the school, the Adnitor Trust (the trust), largely features on some of the events and or transactions in relation to the ownership of the property. To the extent that paragraphs 23, 25-26, and 68-69 detail how the trust was established, its purpose and who its beneficiaries are, they also cannot be classified as irrelevant.

¹ *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733A-B; see also *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) para 27.

² *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 25.

[5] Paragraph 20 is to the effect that The Kimberley Pirates Club Ltd (the Pirates Club), a non-profit company, was the registered owner of the property. This is to be read in conjunction with paragraphs 13 and 14. Paragraph 13 addresses the historical ownership of the property which I have already found to be admissible. Paragraph 14 on the other hand, makes reference to a WinDeed property search drawn by Ms C Roules and is attached to the founding affidavit as proof of ownership of the property. This cannot be hearsay evidence. Ms Roules deposed to a confirmatory affidavit confirming the role attributed to her in paragraph 14 of the founding affidavit. The averments contained in paragraphs 21-22, 26-27 and 46-47, which also pertain to the historical use and disputes over the ownership of the property, were confirmed by the school's headmaster, Mr O Du Plooy, as true. It bears emphasis that the principal held that position at the time of such ownership, possession and use. He is best placed to verify the historical context from the school's records. Surely, insofar as the averments are separately supported by him, these too cannot constitute hearsay evidence.

[6] The alleged offending paragraphs 38-41 and 43-49 concern mainly some loan advanced by an entity styled Seasons Find to the trust to purchase a school bus; certain alleged simulated transactions concluded between the school and the trust following the advance; and other matters incidental thereto. In my view, the allegations contained in these paragraphs have no bearing on the issues that are to be considered in this case. However, the respondents did not mount an argument that they stood to suffer prejudice should the specified paragraphs not be struck out. Neither could I find any prejudice. It is well known that Judges disabuse their minds of any vexatious, scandalous or irrelevant matters contained in the affidavits.³ The upshot of this is that the application to strike out must fail and it is so ordered.

The school's version

[7] Prior to 2008 the Pirates Club was the registered owner of the property which included a lawned sports field approximately the size of two rugby pitches, a squash

³ *Beinash v Wixley Supra* fn 1 at 733J-734B.

court, a small function hall, a pavilion and a clubhouse, all of which served as amenities for the community and for sporting activities.

[8] Mr Jaco Nel, a member of the School Governing Body (SGB), deposed to the founding affidavit. He stated that since 2000 the school had, for almost a decade, an arrangement with the Pirates Club in terms of which it was allowed to utilise, *inter alia*, the lawned sports field, the pavilion and other facilities situated on the property from time to time. In due course the school commenced negotiations with the Pirates Club regarding the possible purchase of the property. To this end, the school established the trust, with Mr Andries Johannes Snyman, its former principal, as a founder, and some former members of the SGB and educators as the trustees. The school, including its learners, students or its trainees are the beneficiaries of the trust. The trust's main objectives are, *inter alia*:

'To create a special fund in the Republic of South Africa to receive donations to be utilised exclusively for educational and training purposes, including, but not limited to, acquiring, maintenance, improvement and development of educational facilities including buildings, land and vehicles, and the appointment and provision of lecturers or other persons for the benefit of the beneficiaries.

The collection and receiving of monies, funds, contributions and donations by any legal means with the help and assistance of and under the control of the trustees.

...'

According to Mr Nel, in general, the purpose of the trust was to safeguard the school's interest in the property and to be used when properties are purchased in future for the school. Accordingly, the trust was established essentially with the primary objective of serving as the commercial arm of the school.

[9] During 2008 a dispute arose between the Pirates Club and Sol Plaatje Municipality (the municipality) in respect of the ownership of the property. This prompted the municipality to lodge an application in this Court in which it sought an order that the ownership of the property be bestowed upon it. The school, the SGB and the trust were,

amongst others, cited as the respondents due to the school's continued use and enjoyment of the facilities. That dispute was amicably resolved, resulting in a deed of settlement which was noted and attached to this Court's order of 31 October 2008. Because of that deed, presently, the municipality is the registered owner of the property. The deed further stipulated, subject to certain conditions being met, that the property would be subdivided and certain portions thereof would be transferred to the Pirates Club and to the trust, respectively. In particular, paragraph 10.1 thereof provided that the trust would be entitled to remain in undisturbed possession of a certain portion of the property from the date on which the deed of settlement was signed. Mr Nel stated that in terms of this deed the trust had exclusive use of the portion of the property on which the sports field and pavilion are located.

[10] According to Mr Nel in 2012 the trust acquired a double-decker bus for school-related activities and to be leased to third parties to generate revenue when not in use by the school. An open-sided metal-framed and roofed shed was constructed with funds donated by parents of two pupils and used as a parking for the bus. This bus storage was situated on the property which the school had exclusive use. The school's commercial ambition to generate income through the use of the bus did not materialise due to a combination of practical and regulatory hurdles. The bus was eventually sold in November 2017. There is presently a dispute, pending in this Court under a different case number, between the school and the trust related to this transaction. In the nutshell, that application concerns the eviction of the school from the property by the trust. Mr Nel says that the transaction has increasingly strained relations between the school and the trustees of the trust.

[11] Mr Nel intimated that the building in which the gymnasium is housed, did not form part of the original Pirates Club building complex. It was only constructed later by the school itself with funds acquired *inter alia* from the National Lotteries Commission (NLC), by converting the bus storage referred to in the preceding paragraph or parking into a gymnasium which came to be called the "NCH Muscle Jungle" and branded to that effect. NCH is the acronym for Northern Cape High School.

[12] Mr Hansen is the only shareholder and director of Hansen Elite. He is an experienced personal trainer who previously worked at Virgin Active Gymnasium, Kimberley, and provided personal training services to its various clients. The school says that Mr Hansen is acquainted with Mr Zandr  Swartz (Mr Swartz), an educator and rugby coordinator at the school. Mr Swartz requested Mr Hansen to assist the school and its pupils with training as and when required during 2020. However, prior to 2020, pupils utilised the gymnasium with or without engaging the training services of Mr Hansen. The school further explained that the written arrangement entailed that Mr Hansen, either personally or through Hansen Elite, would provide personal training services at the gymnasium between 15h30 and 17h00 on weekdays to specific school's sports teams at a fee which would be agreed upon between the teams' coaches and Mr Hansen. The relevant team and not the school would then be required to remunerate Mr Hansen for his services. The school maintained that there was no contractual relationship between itself and the respondents.

[13] The school further averred that the respondents unilaterally sought to impose fees for the school's use of the gymnasium facility, which were never payable by the school nor its pupils. It says that on 1 October 2024 Mr Hansen informed Mr Swartz that the respondents had concluded a lease agreement with the trust in terms of which the respondents would be entitled to utilise the gymnasium facilities situated on the property and to provide personal training services to his private clients. During October 2024 Mr Hansen directed, what he referred to as a "pricing document", on behalf of Exclusive Nutrition, his company, to the school in which he set out the prices which he would charge for providing personal training services to pupils at the gymnasium. On 13 January 2025 Mr Swartz addressed a document entitled "Gym program vir HNK Rugby 2025" to Mr Hansen which recorded the times during which the various age groups of pupils, who participate in rugby, would utilise the gymnasium and contained a request that the previous year's times be amended to 15h00 - 17h00.

[14] On 15 January 2025, Mr Hansen informed Mr Swartz through a WhatsApp message that the school's rugby teams and coaches no longer had "his permission" to utilise the gymnasium, which he referred to as "his facility", and that he would contact the police in the event the school's rugby pupils attended the gymnasium. In so doing, the school submitted that it was despoiled of possession and use of the gymnasium.

[15] The school argued that by virtue of the 2008 deed of settlement, the trust had exclusive use of the portion of the property on which the sports field and pavilion are located. It contended that the respondents jointly and separately deprived it of its undisturbed possession of the gymnasium situated on the property. The right of the school to occupy the sports ground, inclusive of the gymnasium, does not derive from the purported lease agreements with the trust. It derives from the trust having acquired the use of the sports ground from the municipality, specifically for the use by the school in consonance with the very purpose and objective for which the trust was established. Whether expressly, tacitly or impliedly, this arrangement was to endure for as long as the trust retained permission from the municipality to use the sports ground. The trust's primary purpose is to benefit the school, and central to the purpose has always been the provision of the sports ground for the school's use.

[16] The school submitted that the type of possession implicated in this application is *quasi possession*. It further contended that the respondents never had exclusive use of the gymnasium. What the respondents cannot gainsay, the school submitted, is the fact that the school and its pupils had access to the gymnasium facility and were entitled to the undisturbed possession thereof until 15 January 2025. It seeks only restoration of its undisturbed possession of the gymnasium between 15h00 and 17h00 on weekdays and does not seek to deprive the respondents of the historically use which they claim to have had of the facility.

The respondents' version

[17] Mr Hansen stated that at the end of 2020 he consulted and agreed with Messrs Gerrit Myburgh and Deon Carney, the employees of the school involved in sports

coaching, who represented the Northerns Rugby Academy (NPO), a non-profit company registered by the said employees, to transform the old bus storage facility into a gymnasium. He therefore denied that he had an arrangement with Mr Swartz in 2020. He says that Mr Swartz was recently appointed the school's rugby organizer after Mr Carney's resignation during 2024.

[18] According to Mr Hansen, Messrs Myburgh and Carney, with his inputs, approached several donors to assist with the construction of the gymnasium. After its completion, the gymnasium was equipped with his fitness equipment, and that which the trust and the NPO purchased with funds received from the NLC. He says that he agreed with the NPO, which was represented by Messrs Myburgh and Carney, that he would utilise the facilities for his own benefit on condition that he would "pay rent" to the NPO for the use of the gymnasium equipment. Furthermore, Mr Hansen intimated, in exchange for such use, he would supply services in the form of strength and conditioning sessions to the NPO for which he would be reimbursed. The rent payable by Mr Hansen would be set off against his professional service account, and the NPO would pay the remaining balance to him monthly.

[19] Mr Hansen stated that on 2 October 2024 he had a discussion with Mr Swartz and Mr Du Plooy, the school's headmaster, regarding his services and fees. He agreed to assist Mr Swartz with the school's under 19 rugby team free of charge but only for the month of October 2024. Further arrangements regarding his services and fees beyond October 2024 were to be made by Mr Swartz prior to 1 November 2024. As time went by, he extended the "free of charge" courtesy to Mr Swartz until December 2024 when the school would be in recess.

[20] He further intimated that the 2020 agreement between himself and the school, regarding his services and fees, was later confirmed by means of a letter dated 4 March 2021 (FA12), and later in the meeting of 2 October 2024, referred to in the preceding paragraph, between himself, Mr Swartz and Mr Du Plooy. The agreement was also reaffirmed through his letter to the school and Mr Swartz during October 2024, that each

sports coach would make separate arrangements with the respondents for the use of Mr Hansen's services and or the gymnasium on agreed payment terms.

[21] Mr Hansen intimated that since the opening of the gymnasium he had been in possession and exclusive control thereof. He disputed that the school was ever in undisturbed possession of the gymnasium. According to him, no person has had access to the gymnasium without his consent and or assistance. On the evenings he would lock up the gymnasium and would open it the next morning. Mr Hansen further says that at no stage did individual learners turn up to utilise the gymnasium. All learners who attended the gymnasium's sessions did so with their sport teams and after proper arrangements had been made with the respondents regarding the payment of fees. He further denied that the respondents refused the school access. He says that he indicated to the school that '[his] permission is needed to enter' the facility.

[22] Mr Frankel Engelbrecht and Mr Hendrik Johannes Brand, both the trustees of the trust, attested to the supporting affidavits for the respondents. They confirmed that the trust received money from the NLC which was used to purchase, *inter alia*, the gym equipment currently utilised by the respondents at the gymnasium. They denied that the municipality ever indicated that the sports ground, purportedly sold to the trust, was for the sole purpose of being used by the school. Mr Myburgh also attested to a supporting affidavit for the respondents. He says that since the building of the gymnasium, Mr Hansen has been in total control and possession of the gymnasium. He indicated that at no stage during his tenure at the school, did the school control and or possess the gymnasium.

The discussion

[23] Essentially, the question that arises for consideration is whether the school had been despoiled. The *mandament van spolie* restores unlawfully deprived possession at once (*ante onia*). It is a speedy remedy which is not aimed at the restoration of rights. Its purpose is to protect possession without first having to embark upon an enquiry, for

example, into the question of the ownership of the person dispossessed.⁴ Put otherwise, it provides a temporary solution and sets the scene for the subsequent determination of rights in relation to property.⁵ It is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands.⁶ In order to obtain a spoliation order, two allegations must be made and proved: (a) that the applicant was in possession of the property; and (b) that the respondent deprived it of possession forcibly or wrongfully against its consent.⁷ The *onus* is on the applicant to prove the required possession and that it was unlawfully deprived of such possession.⁸

[24] To buttress their argument that the school's possession is unsustainable, the respondents rely on *Blendrite (Pty) Ltd and Another v Moonisami and Another (Blendrite)*⁹ where the Supreme Court of Appeal (SCA), held that:

'In the present matter, the prior use of the email address and server was not an incident of possession of movable or immovable property on the part of the first respondent. This was not even alleged. The first respondent did not possess any movable or immovable property in relation to his erstwhile use of the server or email address. Any entitlement to use the server and email address is wrapped up in the contested issue of whether the first respondent remains a director of Blendrite, and might relate to the terms of his contract of employment. It is a personal right enforceable, if at all, against Blendrite. . . '

[25] The facts in *Blendrite* are distinguishable from the present. There, a dispute arose between the two directors of the appellant as to whether the respondent had resigned as a director of the appellant. The appellant, on the instructions of its controlling director, then effected the termination of the respondent's access to the appellant's email address and server. It was on these bases that the SCA concluded as set out in the preceding paragraph.

⁴ *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W) at 619E-F.

⁵ See *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) para 29.

⁶ *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) para 5.

⁷ *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) para 19.

⁸ *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-F.

⁹ 2021 (5) SA 61 (SCA) para 20.

[26] It was contended for the respondents that irrespective of the type of possession the school alleges it had, such possession and/or use was exercised along with the broader public and not exclusive because the respondents' clients had access to and use of the equipment in the gymnasium. As support for their argument the respondents referred to the following dictum in *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another (De Beer)*¹⁰:

'A summary of the above cases would seem to me to indicate that the *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, and in the present case it becomes so dilute that it ceases to be the sort of possession that is required to achieve the protection of the *mandament*. It must be recalled that the real purpose of the *mandament* was to prevent breaches of the peace. If someone is in exclusive possession and exercises such possession, then deprivation thereof can, and often does, lead to a breach of the peace. No such breach would in the ordinary course of events take place where a large number of persons have access, rather than possession, of the property in question.'¹¹

[27] The facts in *De Beer* were briefly this. After having exercised peaceful and undisturbed access to a certain residential and resort property development for more than two years, the disc with which the applicant had been issued, in order to gain access to the development, was disabled. She sought a spoliation order to restore her access to the development. It appeared, *inter alia*, that the individual owners of units in the development and visitors to the development were all issued with discs as the applicant. The Court held that the disc issued to the applicant was analogous to a key by which access was gained to the development.¹² Further, that the *mandament van spolie* protected possession, not access.¹³ The possession sought to be protected had to be exclusive in the sense of being to the exclusion of others. This is an entirely different situation to that which confronts this Court in this case.

¹⁰ 2007 (3) SA 254 (N).

¹¹ *Ibid* para 54.

¹² *Supra* fn 10 para 33.

¹³ *Ibid* para 54.

[28] The respondents also relied on *Abrahams NO and Others v Geldenhuys NO and Others*¹⁴. In that case, the applicants had been members of the club's committee that managed the operations of the club's squash section. They were suspended as club members and therefore lost their memberships. They submitted that spoliation occurred when the respondents locked the squash facilities and refused them access thereto. It was there held that the rights associated with membership (including access to the club's facilities) are personal rights, purely contractual in nature. That the applicants were not seeking the restoration of possession, but specific performance which relief fell outside the ambit of a spoliatory order.¹⁵ The present case is wholly different. The possession and use the school asserts is not founded in a contract.

[29] A deprivation of possession may find a spoliation order with regard to movables, immovables and *quasi*-possession of an incorporeal right.¹⁶ It is not available to the exercise of the rights in a wide sense such as the right of performance of a contractual obligation. Leach J explained it as follows in *Eskom Holdings SOC Ltd v Masinda*:¹⁷

'It is necessary to undertake a more detailed examination of the principles applicable to the mandament. Although it originally protected only the physical possession of movable or immovable property, this court pointed out in *Telkom v Xsinet* [2003 (5) SA 309 (SCA) para 9] that in the course of scientific development it was extended to provide a remedy to protect so-called "quasi-possession" of certain incorporeal rights, such as those of servitude. But not all incorporeal rights may be the subject of spoliation. As was explained in *FirstRand v Scholtz* [2008 (2) SA 503 (SCA) para 13]:

'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 mandament 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

¹⁴ [2025] 2 All SA 388 (WCC).

¹⁵ *Ibid* para 22.

¹⁶ *Nino Bonino v De Lange* 1906 TS 120 at 122.

¹⁷ 2019 (5) SA 386 (SCA) para 14.

its *quasi-possessio* is deserving of protection by the mandament. 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 mandament. The right held in *quasi-possessio* must be a [right of use] or an incident of the possession or control of the property.'

[30] The respondents argued that the school's belated claim, to have been only in possession of the use of the gymnasium, should be rejected, as this was not a case that they were called to answer. They argued that nowhere in the founding affidavit do the words "*quasi possession*" or "*use*" appear. This entirely different form of possession, it was argued, was impermissibly raised for the first time in the replying affidavit. This argument is devoid of any merit. The founding affidavit is replete with statements to the effect that the school enjoyed uninterrupted and free *use* of the sports ground through the "deliberate conduit of the trust". The school further stated that its occupation of the property arises by virtue of its longstanding *use* which originated before the trust was established; and as a beneficiary of the trust which acquired rights in respect of the property under the 2008 settlement agreement.

[31] I am unpersuaded that there exist genuine material disputes of fact on the affidavits as the respondents sought to argue. In my view, this case concerns an incorporeal right of a non-servitutorial character. The aerial photograph attached to the founding papers show that the sports ground is situated adjacent to the school. The origins of the school's possession of the property were not cogently challenged by the respondents. Additionally, they did not dispute that the sports ground serves not as "mere track of land but as the heartbeat of the schools' sporting life". The sports ground has been transformed into a vital space of recreation, competition and community engagement, and has become inseparable from the life and identity of the school. It was also not gainsaid that from 2008 to 2012 the school enjoyed uninterrupted and free use of the sports ground through the trust, which was an extension of the school's operational framework.

[32] Apparent from a document dated 4 March 2021, which is admitted by the respondents, titled “WITH REFERENCE TO: THE USE OF THE GYM AT PIRATES” (FA12), signed by the acting principal and head of sports and marketing, the school was entitled, to utilise the gymnasium with or without engaging the services of the respondents. The document states in its concluding paragraph: “These terms, as well as the other general “rules” for the use of the gym, will be put together in a document which will have to be signed by the head of each sporting code.’

[33] Mr Hansen requires the school to make payment to the respondents in order for it to gain access to the gymnasium. He intimates that ‘for periods that the gymnasium will be occupied by the [school’s] rugby players [he] will also not be able to earn income from other clients.’ In my view, this was not reason enough to deny the school access to the gymnasium which it had over the years. A document dated 4 March 2021 (FA12), which Mr Hansen claimed it confirmed an agreement between himself and the school, makes it plain that the appointment of Mr Hansen as conditioning coach for the school’s sports teams was not accepted by the SGB; sporting codes were given a leeway to make arrangements with Mr Hansen with regard to payment for training. The document categorically states that ‘the school will not be held liable for any non-compliance with regard to financial arrangements made with Mr Hansen or any other “outsourced” trainers’. It also provides for the learners to utilise the gymnasium without soliciting the services of the respondents. It is not necessary at this stage to determine whether the respondents were entitled to the payment of fees.

[34] It is significant that Mr Myburgh, in his supporting affidavit, states that the NPO was registered to obtain funding to support rugby at the school. The NPO applied for and received funds from the NLC which were used to purchase the gymnasium equipment. If all these were done by the NPO to support the school’s rugby, then it is problematic for the respondents to lay claim to exclusive use of the gymnasium and its equipment. How the NPO or the trust was able to agree with the respondents on the latter’s possession and use of the property was not clarified by the respondents. They have also failed to produce the lease between themselves and the trust. However,

nothing turns on this aspect because the determination of rights or good title to property does not arise at this stage of the enquiry. I am of the view that the respondents did not make out a case that they were ever in exclusive possession of the gymnasium. It is not the school's case that the gymnasium was solely in its possession. It acknowledged that the respondents were also in *quasi*-possession of the facility and do not move for relief that would deprive them of their possession. Shared control (joint possession) is quite possible.¹⁸

[35] It is so that the nature of the thing possessed, the gymnasium, was not in continuous use by the school and its learners. Continuous physical contact, occupation or use is not necessary for the retention of possession once it has been acquired, the degree of continuity required depends, amongst others, upon the nature of the thing possessed and the type of use to which it is put.¹⁹

[36] As already alluded to, the gymnasium is situated on the sports ground which the school, through the trust, for years had permission or right to occupy. Therefore, access and use of the gymnasium formed an incident of possession of corporeal property. It bears repeating that the incorporeal non-servituted right of use of the gymnasium or access to the facility, which the school asserts, is not connected to any contractual relationship between the school and the respondents. In my view, there is no reason why an incorporeal right of this nature should not form the subject of spoliation proceedings capable of protection by the *mandament van spolie*.

[37] The respondents failed to produce credible evidence to demonstrate that the school was never in possession of the gymnasium. The evidence demonstrates that the school utilised the gymnasium from 2020 on an unhindered basis until 15 January 2025, when Mr Hansen directed a WhatsApp message to Mr Swartz in which he unlawfully prohibited the school from gaining access to and use of the facility. By so doing, the respondents effectively resorted to self-help. On a conspectus of all the evidence that

¹⁸ Badenhorst and others *Silberberg and Schoeman's The Law of property* 6 ed (2019) LexisNexis at 316 and 334.

¹⁹ *Ibid* at 314.

bear upon the issue, the restoration of the peaceful and undisturbed *quasi*-possession must be ordered. In the result, I make the following order.

Order

1. The first and second respondents are to forthwith restore to the applicant its undisturbed possession and use of the gymnasium facility situated on Erf 1[...], a portion of Erf 1[...], Kimberley, between 15h00 and 17h00 during the weekdays.
2. The first and second respondents are to pay costs of this application on party and party scale; such costs are to include the fees of counsel on scale B in terms of Rule 67A read with Rule 69 of the Uniform Rules of this Court.

M V PHATSHOANE
DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

Appearances

For the applicant: R Van Der Merwe
Instructed by: Kramer Weihmann Inc, Bloemfontein
Duncan & Rothman Inc, Kimberley

For the respondents: A Botha
Instructed by: Haarhoffs Attorneys, Kimberley.