REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case no. 19457/2023

In the matter between

BODIES UNDER CONSTRUCTION CC	First Applicant
SPECIALISED WEIGHT ENDURANCE AND AEROBIC TRAINING CC	Second Applicant
FLUIDITY WELLNESS CC	Third Applicant

and

PERMASOLVE INVESTMENTS (PTY) LTD	Respondent

Coram: Wille, J

Heard: 17 November 2023

Order: 17 November 2023

Application for Leave to Appeal: 18 November 2023

Reasons Requested: 27 November 2023

Reasons Delivered: 20 December 2023

REASONS

WILLE, J:

Introduction

[1] I found myself in the fast lane with this application for spoliation. After hearing extensive arguments in the morning, I issued an interim injunction in the late afternoon. Strangely, the following day (a Saturday morning), the respondent emailed my registrar a notice requesting leave to appeal. I can only interpret this as an adverse reaction to the injunction I had issued the previous afternoon. Or it was an attempt by the respondent not to abide by the injunction's terms.

[2] Belatedly, and more than a week later, the respondent arranged for a request for reasons to be sent to my registrar together with the court file, as required by our practice directions. This happened in the last week of term and is the reason for the delay in sending this statement of reasons.

[3] I issued an interim order with some of the following wording: (a) that the matter is categorised as a matter of urgency; (b) that the respondent was directed to immediately reconnect the premises occupied by the applicants[1], to an alternative power supply so that the applicants may continue occupation thereof; (c) if the respondent fails to comply with the order the court's sheriff was authorised to reconnect the premises occupied by the applicants to an alternative electricity supply installed at the property so that the applicants may resume occupation of the premises; (d) that the applicants would refer to arbitration the dispute between the parties as to whether the applicants are required to pay for the alternative power supply over and above the rental paid according to the addendum entered into between the parties ; (e) that if the applicants fail to submit the dispute to arbitration as described above within forty-five days of this order, the reconnection orders would

---

[1] Situated at the Point Mall Shopping Centre at 76 Regent Road, Sea Point.

lapse, and (f) the respondent would bear the costs of the proceedings on a party and party scale schedule, including the costs of two counsel (if retained).

[4] Undoubtedly, I granted interim relief pending the outcome of the arbitration between the applicants and the respondent. Accordingly, it is incomprehensible why the respondent immediately applied for leave to appeal and then, belatedly, applied for reasons. I must, therefore, conclude that the respondent has yet to take steps to advance the application for leave to appeal in terms of this court's practice directions.

Overview

[5] The applicants operate an exclusive high-end gym, which they lease from the respondent. This gym is located in a shopping centre. They have been tenants of the respondent for more than a decade. The respondent has installed a generator that their tenants can use during load shedding. The applicants have used this alternative energy source for many years when load shedding occurs. This generator switches on automatically when the power supply is interrupted, so the respondent’s tenants, including the applicants, are spared load shedding.

[6] This alternative power supply is necessary so that the applicants can offer certain specialised fitness classes to their members. Load shedding is financially and reputationally disastrous for the applicants' business. Over the last ten years, the applicants have never paid the respondent any additional levy or further financial contribution for using the alternative power supply.

[7] The lease agreement does not provide for any additional payments in this regard. About two years ago, an addendum to the lease was executed in which the applicants agreed to pay the respondent an all-inclusive monthly fee for all expenses related to the lease of the premises.

[8] Some eighteen months later, and after the addendum to the lease had been entered into, the respondent ‘out of the blue’ demanded that the applicants pay an additional amount towards the cost of the alternative power supply under threat of disconnection. The applicants did not agree to this. The parties agreed to take the dispute to private arbitration. The dispute centred on the correct interpretation of the second addendum regarding these additional costs for the alternative power supply.

[9] The applicants claimed that while the respondent negotiated in good faith by referring the matter to arbitration, they took the law into their own hands and disconnected the gym from the alternative power supply. The applicants say the respondent acted in bad faith and committed an act of 'spoliation' that triggered this emergency motion. The applicants sought to be reconnected to the alternative power supply, which the respondent summarily cancelled by taking the law into their own hands.

Context

[10] The lease states that the applicants leased the premises from the respondent for the express purpose of a 'gymnasium and related services'. In the past, the applicants paid for the cost of the 'normal' electricity they used on the premises, which was measured by a meter, as the provision of electricity was facilitated by the respondent as the landlord. Historically, the applicants were happy to use the alternative power supply, which protected them from load shedding. In the past, the applicants never paid anything additional for the use of this alternative power supply.

[11] Early last year, the parties entered into the second addendum to the lease, which, among other things, addressed all of the applicants' financial obligations by no longer requiring them to pay separately for electricity used at the premises. After that, the applicants became contractually obligated and agreed to pay a flat fee for renting the premises from the respondent, including all utilities they consumed. About a year and a half after entering into this new agreement, the respondent contacted the applicants and informed them 'out of the blue' that they would now be asked to pay for the 'diesel recovery' associated with the alternative power supply. Understandably, this met with some resistance from the applicants as they had entered into an addendum with the respondent for the payment of an all-inclusive rental.

[12] As a result, the respondent's attorneys wrote to the applicants to demand this additional specific payment concerning the cost of the alternative power supply. They threatened the applicants with arbitrary exclusion from the alternative power supply. The parties' respective attorneys then drew their swords and sharpened them, and a plethora of correspondence between these attorneys ensued.

[13] The applicant's attorney (to his credit) warned the respondent's attorney of spoliation proceedings in the event of the respondent's self-help. Common sense prevailed temporarily, and the parties agreed to take their dispute over the additional costs of the alternative power supply to arbitration. Progress was made, a draft arbitration agreement was submitted, and the arbitrator's identity was agreed upon. The applicants sought a written undertaking that the premises would not be disconnected from the alternative power supply until the underlying dispute was resolved through the agreed arbitration process. In response, the respondent's attorneys recorded they had no instructions to give the assurances sought. I suppose it would have been straightforward for them to get an instruction from the respondent.

[14] In the meantime, a dreaded power cut occurred, and the applicants experienced load shedding at the premises, leaving them cut off from the alternative power source. The applicants became aware of the respondent's unlawful behaviour and warned the respondent that they would file a spoliation application. The application was served two days later when it found me in the fast lane.

Consideration

[15] The applicants used the alternative power supply before the respondent disconnected the applicants from it. The issue to be considered is 'quasi-possession' for a spoliation claim. Our constitution does not limit property to 'corporeal' things. Our jurisprudence also has a history of protecting quasi-possession by way of spoliation. It is a truism that a spoliation claim cannot enforce the specific fulfilment of quasi-possession. The use that triggers this remedy arises from the close connection between the 'use' and the 'possession' of a 'tangible' thing.[2]

[16] A close-connected quasi-possessory right is a legal concept that recognizes certain rights and protections for individuals concerning property. It is a term often used in legal discussions and cases where someone has been using a property for a significant period of time, and their relationship with the property has developed beyond a transient or temporary arrangement.

---

[2] *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W).

[17] Recognizing a closely connected quasi-possessory right aims to provide security and stability to individuals who have developed a substantial connection to a property. These rights can include the ability to continue using the property and protection against eviction. A closely connected quasi-possessory right acknowledges that persons who have established a long-term connection to a property should be afforded some legal recognition and protection. This recognition varies depending on the specific circumstances of each case.

[18] Two allegations must be made to succeed with a spoliation remedy: (a) that the claimant was in peaceful and undisturbed possession and (b) that the defendant unlawfully deprived the claimant of that possession. This remedy rightly extends to the realm of the 'incorporeal' because it is a remedy to protect from self-help. Thus, in this case, using the alternative power supply was undoubtedly incidental to the applicants' quasi-possession of the premises. It must be so that the quasi-possession lies in the actual use of the alleged right.

[19] In other words, since the exercise of the right is so closely connected with the thing, the loss of the right is tantamount to an interference with the possession of the thing itself, and thus, the possession of the alleged right lies in the use of the right. By way of illustration, reference may be made to recent case law, which is very helpful. This case concerned the use of a telephone. The parties were involved in divorce proceedings. The husband removed the telephone from the matrimonial home. The court ruled that access to the telephone was incidental to the use of the marital home and ordered the return of the telephone through a spoliation order.[3]

[20] An analogy for this situation could be a comparison with a dispute over using a communal kitchen in a block of flats. In this analogy, alternative electricity supply stands for the use of the kitchen. The question is whether the right to use the kitchen is connected with the possession of the flat or merely a personal right that the landlord can legally deny. Some would argue that the right to use the kitchen is a common right that falls within the protection of the dwelling's possession, similar to cases where the alleged right to a specific service is recognized as an easement.

---

[3] *Du Randt v Du Randt* 1995 (1) SA 501 (O).

[21] These cases are considered uncontroversial and enjoy the protection of the law through the spoliation remedy. In other cases, it is argued that the right to use the kitchen is purely personal and does not depend on an easement or similar right. These cases do not fall under the protection of the possession of the dwelling. Therefore, the landlord may lawfully deny these rights. Ultimately, I had to determine the nature of the right to use the alternative electricity supply and whether it was a personal right.

[22] This case was about the applicants' use (and historical use) of the respondent's alternative power supply. This right was historic in nature. It was critical to the use of the premises, and without this right, the applicant's possession would have been significantly disrupted. It was argued that these particular facts did not remove the applicants from the scope of the relevant final category of possession as eloquently articulated in the case law in *Makeshift*[4]. On this point, I agreed.

[23] I also say this because spoliation is a remedy to restore the status *quo ante*. It emphasises that it is a robust and extraordinary remedy where the court has limited discretion once the conditions are met. After all, the respondent proceeded with disconnection despite ongoing arbitration discussions, which were only about a levy, which has never been levied on the applicants historically. In this case, the distinguishing feature illustrates that the object of the right arises from the use of the premises by the applicants and was crucial to them. Without this right, the applicant's use of the premises would be significantly disrupted.

[24] The issue was whether the disconnection of the premises from the alternative power supply removed the applicants from the scope of the final category of quasi-possession as defined in *Makeshift.* The disconnection of the alternative electricity was undoubtedly a substantial interference with the possession of the premises by the applicants. The applicants' allegations in this connection were persuasive, as their fate was tied to the unpredictable and ever-changing load-shedding schedule experienced in this country. The impact of the respondent's unlawful conduct was significant and the respondent did not engage with this at all despite having the full opportunity to do so.

---

[4] *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 (5) SA 538 (WCC).

Costs

[25] The spoliation remedy is robust and exceptional if the conditions are met. Even though incorporeal rights cannot be 'possessed' in the ordinary sense of the word, they can give rise to rights equivalent to spoliation in cases of so-called quasi-possession. The deprivation of possession was undisputed in that the respondent deprived the applicants of using the alternative power supply. The costs followed the outcome because the respondent behaved unlawfully by disconnecting the premises from the alternative power supply. It did so despite actively and continuously engaging in discussions aimed at referring the underlying dispute to arbitration for swift resolution (after years of allowing the status *quo ante* to prevail).

[26] These are my reasons for the order granted with the attached costs.

D WILLE

_____

E D WILLE
(Cape Town)