IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/26064

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

DATE: _____ _____
SIGNATURE

In the matter between -

OUTDOOR NETWORK LIMITED	1st APPLICANT
AUTUMN STORM INVESTMENTS 362 (PTY) LIMITED	2ND APPLICANT
And	
THE PASSENGER RAIL AGENCY OF SOUTH AFRICA	1ST RESPONDENT
INTERSITE ASSET INVESTMENT (PTY) LTD	2ND RESPONDENT

JUDGMENT

BORUCHOWITZ, J:

[1] This case highlights the fundamental differences between the *mandament van spolie*, the possessory remedy available for the restoration of lost possession, and an interdict to restrain a threatened spoliation.

[2] The applicants conduct the business of leasing and selling outdoor advertising. They own and maintain advertising structures which include large billboards that are visible over great distances in the outdoors. The structures are situated on approximately 126 sites of land in Gauteng, KwaZulu-Natal and the Western Cape, which the applicants have leased from the first respondent (PRASA). Many of the sites have been leased for in excess of ten years, some as a result of direct leases with PRASA and others by way of cessions from other entities.

[3] In February 2011, PRASA awarded a tender to an entity called "Umjanji Media Consortium" entitling it to conduct advertising operations on its land. The lawfulness of the tender process is the subject-matter of review proceedings that are pending before this Court.

[4] Following the award of the tender, PRASA purported to terminate the applicants' leases. In November 2011, the first applicant received a letter from the second respondent (Intersite), representing PRASA, wherein the latter purported to cancel the master lease agreement entered into between the parties in about 2004. It was also demanded that the advertising structures be removed and the sites handed over within forty-five days; Intersite threatened that if the demand was not complied with, it would attend to the removal of the structures. An offer was made to purchase the structures, presumably for use by the consortium or a subcontractor.

[5] From February 2012 to August 2012 there was a further exchange of correspondence in which PRASA continued to assert the validity of its termination of the master lease and the leases flowing therefrom.

[6] A further demand was made by PRASA's attorneys on or about 28 June 2013 in which the applicants were again said to be in unlawful occupation of the sites and given notice of cancellation of all rights of occupation. In terms of this demand the applicants were required to give vacant possession of the sites to PRASA on or about 31 July 2013, failing which they would be deemed to have abandoned the sites and PRASA would remove the property belonging to the applicant.

[7] On 12 July 2013, applicants' attorney addressed a letter to PRASA's attorney in which they asserted that the applicants had been in peaceful and undisturbed possession of the sites for many years and that PRASA's intention to remove their advertising structures would constitute an unlawful spoliation. A written undertaking was sought that PRASA would not proceed with the threatened conduct or interfere with the applicants' possession. On 16 July 2013, PRASA's attorneys indicated that PRASA maintained the stance that applicants' possession was unlawful and that it was not prepared to give the undertaking sought. This precipitated the launch of the present application.

[8] The relief sought in the present proceedings is a final interdict to restrain the respondents from unlawfully evicting them from occupation or possession of any of the sites, and from unlawfully removing or causing to be removed any of the advertising structures maintained, operated or used by the applicants at the sites.

[9] The applicants' case is a simple one. They allege that they are in peaceful and undisturbed possession of the sites. Their possession of the sites is said to arise from the fact that they have been afforded access rights thereto and have displayed and maintained the advertising structures.

[10] They further allege that if the threatened acts of spoliation are implemented this would cause them irreparable loss in that once evicted from occupation of the sites and their structures removed, new structures and new operators will be in place. It is contended that if a spoliation order were to be obtained at a later stage, the applicants would suffer a loss of revenue and goodwill in relation to advertisers contracted to the applicants, the applicants' property would probably be damaged or destroyed. To wait until the acts of spoliation take place, would be impractical as this could result in a multiplicity of actions involving the joinder of many parties. Accordingly, the applicants state that their only effective remedy is to obtain an interdict.

[11] The respondents deny that the applicants are in lawful occupation of the sites, and that they physically possess the sites and the structures. They contend that the structures were erected pursuant to agreements of lease which have been lawfully terminated or have lapsed by the effluxion of time. They emphasize that the applicants do not need to be and have never been in physical possession of either the respondents' land, the billboard structures or the advertisements. In terms of the lease agreements access to the sites was strictly regulated as special permission was required to access PRASA's property in terms of the Railway Safety Act, 16 of 2002. What the leases afforded the applicants were contractually defined access rights and nothing else; their business was to sell advertising space and the applicants utilised their contractual rights to achieve their purpose without being in physical possession. Accordingly, the respondents state that the structures have at all times remained in the possession and under the control of PRASA, and that, at best, the applicants are the owners of the structures and their only claim is to have ownership thereof restored to them.

[12] The remedy to prevent a threatened spoliation is a prohibitory interdict. Where, as in the present case, a final interdict is sought, the applicants are required to satisfy the requirements for the obtaining of an interdict. In *Setlogelo v Setlogelo*[1] the court confirmed the three requirements laid down

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

by Van der Linden for the obtaining of a final interdict,[2] namely the establishment of a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.

[13] The dispute between the parties centres around the question whether the applicants have established possession or what is termed quasi possession,[3] of the sites and the advertising structures,[4] and whether such possession is sufficient to establish the clear right required in order to obtain final interdictory relief.

[14] The applicants argue that proof of factual possession, as required by the *mandament van spolie*, is sufficient to prove a clear right for the purposes of obtaining a final interdict. The contrary argument advanced by the respondents is that proof of the applicants' factual possession is not in itself sufficient to establish the requisite clear right and that what is required in order

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2 Van der Linden's "*Judiceele Practijck*" 2.19.1.

3 As to the concept of quasi possession, see *Bon Quelle (Edms) Beperk v Munisipaliteit van Otavi* 1989 (1) SA 508 at 514H-J; *Zulu v Minister of Works, KwaZulu & Others* 1992 (1) SA 81 (DC&LD) at 187H-188D.

4 During argument, the applicants referred to a number of conflicting judgments relating to the possession of advertising structures in the context of spoliation proceedings, viz: *African Billboard Advertising (Pty) Limited v North & South Central Local Councils, Durban* 2004 (3) SA 223 (N); *Easy Green Advertising (Pty) Limited v Eagle Canyon Golf Estate & 2 Ors* (Gauteng High Court Case No 2009/19114 - Unreported); *Khulu Media Gateway (Pty) Ltd v Bryanston Parallel Medium School & Ano* (Gauteng High Court Case No 2012/03136 – Unreported) and *Prime Media & Others v Passenger Rail Agency* (Gauteng High Court Case No 2012/6168 – Unreported).

to obtain a final interdict is proof of a legal right to possession (*ius possidendi*) flowing from either a real right such as ownership or a personal right arising from contract.

[15] The applicants, relying on the case of *Aussenkehr Farms (Pty) Ltd v Walvis Bay Municipality,*[5] submitted that proof of a legal right to possession was not necessary in order to satisfy the clear right requirement.

[16] What occurred in *Aussenkehr* was the following. The applicants, without the apparent approval of an official of the respondent municipality, erected a tent on an open site. When the municipality threatened to remove the tent the applicant sought a final interdict to restrain it from evicting it, from demolishing the tent and from interfering in any way with the applicant's trading activities. The question for decision was whether a clear right had been established. The Court (per Horn AJ, as he then was), relying on a dictum of Innes JA in *Setlogelo* (at 227), held that it was unnecessary for the applicant to prove a right to possession (*ius possidendi*) and that proof of *de facto* possession was sufficient to establish a clear right. The fact that the applicant could prove that it had a right not to be unlawfully deprived of its *de facto* possession of the site without an order of court or other lawful authority was, in the opinion of Horn AJ, sufficient proof of a clear right on its part.

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5 *Aussenkehr Farms (Pty) Ltd v Walvis Bay Municipality* 1996 (1) SA 180 (C).

[17] In *Aussenkehr* the Court referred, with approval, to a discussion of *Setlogelo* in Silberberg & Schoeman's "*The Law of Property*" (3 ed) at 146, where the following was stated in footnote 75:

> "Insofar as an application may be made for an interdict to prohibit an unlawful interference or threatened interference with possession, it would appear from the decision of Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 at 227 that the requirement of a 'clear right' is complied with upon proof of the legal fact 'possession':
>
> > 'Now the right of the applicant is perfectly clear. He is a possessor; he is in actual occupation of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession.'
>
> It would therefore seem as if it is unnecessary for a possessor to prove any *ius possidendi*. See also *Sonnekus Sakereg (Vonnisbundel)* at 50-1. *Contra*, however, Kleyn, *Die Mandament van Spolie in die Suid-Afrikaansereg* at 327-9; Van der Merwe, *Sakereg* at 149."

[18] *Setlogelo* is not authority for the proposition that factual possession, howsoever obtained, is sufficient to establish the requisite clear right. In *Setlogelo*, the clear right was held to have been established because on the undisputed facts the applicant was a *bona fide* occupier and possessor of the land. This is borne out in the following passage from the judgment of Lord De Villiers CJ (at 225):

"I am opinion that upon the uncontradicted facts before the Court the petitioner has a clear right to an interdict. He does not by his petition claim that he is the registered owner or lessee of the land, but he states that he is in *bona fide* occupation and possession of the land. As such occupier he is entitled to retain undisturbed occupation until ousted by someone who can establish a better title than his to own or occupy the land. This is an elementary principle of law which Mr Botha, on behalf of the respondents, has not attempted to deny but he has contended that there is no proof of such irreparable injury as would justify the granting of an interdict. *Prima facie*, the disturbance of a man's *bona fide* possession is such an injury to him as to justify the granting of an interdict. If such a disturbance takes place in circumstances which show that the trespasser honestly believes that he has a better right to possession than the occupier, or at all events, has an equal right, the Court will be justified in withholding the interdict until the relative rights of the parties have been decided by action. But where, as in the present case, the fact of the disturbance of a *bona fide* possession is not denied, and no single fact is adduced to show that the trespasser had or honestly believed that he had, an equal right as, or a better right than, the occupier, the disturbance should be treated as an act of spoliation, and the party should be replaced in the position in which they were before the act was committed. The interdict ought, in my opinion, to have been granted in order to place the parties in that position **…**"

[19] It is evident from the above-quoted extract that the result in *Setlogelo* may well have been different if it were shown that the applicant was a *mala fide* occupier or that the respondents had a superior right to occupation than the applicant.

[20] Both *Setlogelo* and *Aussenkehr* have been trenchantly criticised by academic writers.[6] The views expressed by these writers can be summarised as follows.

[21] There are fundamental differences between the *mandament van spolie*, which is aimed at the recovery of lost possession, and a final interdict to prohibit a threatened spoliation or dispossession.

[22] The *mandament van spolie* is founded on the principle that no one is allowed to take the law into his own hands by dispossessing another forcibly or wrongfully. In *Nino Bonino v De Lange* 1906 TS 120 the principle was formulated as follows:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so the Court will summarily restore the *status quo ante* and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."

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6 D Kleyn, "*Mandament van Spolie a*nd *The Interdict: The confusion continues*" 1996 *De Jure* 162; "*Mandament van Spolie 'n interdik?"* AJ Van der Walt, *De Rebus*, October 1984 at 477; JC Sonnekus, "*Sakereg Vonnisbundel*" (2 ed) at 166; Silberberg & Schoeman's "*The Law of Property*" (5 ed) Footnote 235 at 309; Van der Merwe, "*Sakereg*" (2 ed) at 149 Note 439).

[23] Where the *mandament van spolie* is relied on, the possession which must be proved is not possession in the juridical sense; it is enough if the holding by the applicant is with the intention of securing some benefit for himself.[7] The lawfulness or injustice of the possession is irrelevant. Thus, even a thief or robber is entitled to avail himself of the *mandament*.[8] Also, a lessee who is deprived of the use and enjoyment of premises is entitled to invoke the *mandament* to have the use and enjoyment restored to him even though he is not a possessor in the juristic sense.[9]

[24] If mere factual possession, irrespective of how it was obtained, was sufficient to establish a clear right, even a thief or *mala fide* possessor would be entitled to obtain a final interdict. There can be no justification for the protection by means of an interdict of illicitly or illegally obtained possession.

[25] The *mandament van spolie* cannot be invoked to prohibit a threatened spoliation; it is only available to a *de facto* possessor who has been despoiled. Possessory remedies to prevent a threatened spoliation were available in Roman law, namely the *mandament van complainte* and

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7 An applicant relying on the *mandament van spolie* need merely prove factual possession. See *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-G and *Ness & Another v Greef* 1985 (4) SA 641 (C) at 647D-G.

8 *Yeko v Qana supra* at 739G.

9 *Bennet Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 232H).

mandament van maintenue, but these were not imported into South African law.[10]

[26] The *mandament van spolie* is a robust remedy which generally operates on an interim or temporary basis pending the final determination of the parties' respective legal rights. In contradistinction, a final interdict is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs.[11] It stands to reason, therefore, that the applicant for a final interdict must establish that it is the holder of a right which is recognised as a matter of substantive law.

[27] The clear right required to be shown in interdict proceedings has been variously described. Van der Linden refers to it as "*een liquide recht*" ("*Judicieele Pracktijck*" 2.19.1). Modern authorities refer to it as a definite right, that is a right clearly established.[12]

[28] Whether a right is established is a matter of substantive law. The word "clear" relates to the degree of proof required to establish the right.[13] Should

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10 Price, *"The Possessory Remedies in Roman-Dutch Law*" Chapter VI pp 46-54; Kleyn, *supra* at 168; Silberberg & Schoeman *supra* at 287.

11 Jones & Buckle, "*The Civil Practice of the Magistrates' Courts in South Africa* (10 ed) Vol 1 p 172.

12 Nathan, "*The Law and Practice Relating to Interdicts Including Mandamus and Spoliation Orders*" (1931) 11; *Erasmus v Afrikander Proprietary Mines Limited* 1976 (1) SA (W) 950 at 956 and cases there cited.

13 CB Prest, *"Interlocutory Interdicts*" p 47 and *Welkom Bottling Co (Pty) Limited v Belfast Mineral Waters (OFS) (Pty) Limited* 1967 (3) SA 45 (O) at 56.

the alleged right be unfounded or doubtful, a final interdict will generally not be granted. This consideration does not apply to the *mandament van spolie* because the legal right of the applicant to possession is irrelevant.

[29] The Court has a discretion to withhold the grant of an interdict, but in the case of the *mandament van spolie* this consideration is irrelevant.

[30] In my view, *Aussenkehr* was wrongly decided. I agree with the criticism levelled by both Kleyn[14] and Van der Walt.[15] It was wrongly held in *Aussenkehr* that the right which an applicant had to establish in order to obtain an interdict probably spoliation was "*the right not to be unlawfully deprived of possession"*. Kleyn points out that –

> "**…** the right not to be unlawfully deprived of possession is not a 'right' in the sense of the word. As indicated above (par 1) it is a legal principle on which the mandament is based, a principle that is applied once the applicant for a mandament has proved that he was in possession and was spoliated by the respondent. It is therefore not a right in the sense of, for example, a subjective right which is required to satisfy the clear right requisite."

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14 Kleyn *supra* at 165-167.

15 Van der Walt *supra* at 477.

[31] The applicants have wrongly conflated the requirements of the *mandament van spolie* with that of a final interdict. An applicant for a final interdict to restrain a threatened spoliation must establish not only a right not to be unlawfully deprived of possession, but also a legal right to possession (a *ius possidendi*).

[32] As set out above, the applicants' alleged right to occupy the sites upon which the advertising structures are erected is said to arise from a number of direct leases with PRASA and other leases acquired by the applicants by way of cession, but PRASA contends that these leases have been lawfully cancelled or have lapsed by the effluxion of time.

[33] The applicants concede that they have made no attempt to establish a legal right to possession (*ius possidendi*. In their replying affidavit they candidly admit that the application is premised merely upon a threat to their alleged factual occupation of the sites and possession of the structures. In paragraph 10 the following is stated:

> "10. I accept as correct that I have not attempted to prove the existence or terms of the contracts nor did I intend to attempt to persuade this Honourable Court to find that the applicants' version of the invalidity of the purported cancellation is the correct version. I have given my evidence for the purpose of demonstrating the threat to the applicants' continued occupation of their sites and possession of their structures."

[34] For these reasons I find that the applicants have not established the requisite clear right which would entitle them to a final interdict. This conclusion renders it unnecessary to decide whether the applicants are in occupation of the sites and in possession of the advertising structures.

[35] There is yet a further reason why I cannot accede to the application. On a proper analysis of the papers it is evident that the real dispute between the parties is contractual in nature. Effectively, the order sought is to compel specific performance of the applicants' disputed contractual right to occupy the sites and the structures. The applicants seek under the guise of an alleged spoliation to enforce rights which they claim to have in terms of the disputed leases. The *mandament van spolie* is not the appropriate remedy where contractual rights are in dispute.[16]

[36] Accordingly, the application cannot succeed.

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[16] Compare: *Shoprite Checkers Limited v Pangbourne Properties Limited* 1994 (1) SA 616 (W) at 623D-G; *Telkom SA v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA); *First Rand Limited t/a Rand Merchant Bank v Scholtz NO* 2008 (2) SA 503 (SCA) para [13], and *ATM Solutions (Pty) Ltd v Olkru Handelaars CC & Another* 2009 (4) SA 337 (SCA) paras 9 and 14).

[37] The following order is granted:

The application is dismissed with costs.

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BORUCHOWITZ J
JUDGE OF THE HIGH COURT

DATE OF HEARING	:	21 OCTOBER 2013
DATE OF JUDGMENT	:	30 MAY 2014
ON BEHALF OF APPLICANTS	:	ADVOCATE J PETER SC with ADVOCATE S TAGER
INSTRUCTED BY	:	FLUXMANS INCORPORATED Applicants' Attorneys Ref: J Shafir/bd/08/120766
ON BEHALF OF RESPONDENTS	:	ADVOCATE PJ VENTER SC
INSTRUCTED BY	:	MARAJ ATTORNEYS Ref: Jan / MAR17/0007