NORTH WEST HIGH COURT, MAFIKENG

CASE: 2110/10

In the matter between:

RUST PRAC INVESTMENT (PTY) LTD **Applicant**

and

A DU PLESSIS **1ST Respondent**

TRANSFORUM CENTRE (PTY) LTD **2nd Respondent**

MMABATHO

KGOELE J

DATE OF HEARING	:	9 June 2011
DATE OF JUDGMENT	:	30 September 2011
COUNSEL FOR THE	:	Adv. P.J. Van der Walt
COUNSEL FOR THE	:	Adv. W.B. Van Heerden

JUDGMENT

KGOELE J.

A. INTRODUCTION

[1] The applicant is **Rust Prac Investment (Pty) Ltd**, a duly registered company in terms of the law of the Republic of South Africa. The first respondent is **A Du Plessis** a male dentist, practicing as such at Shop 34, Express City, Rustenburg. The second respondent is **Transforum Center (Pty) Ltd**, a company duly registered in terms of the South African Law.

[2] The application before me is a *Mandament Van Spolie* in terms of which applicant seek beneficial occupation to be restored to him of the under mentioned fixed property by the first respondent or any other person in beneficial occupation of the premises known as Shop 34, situated in a building on the Portion Remaining of Portion 1 of the Farm, Town and Townlands of Rustenburg 272 JQ **(The Property),** as well as a *Mandament Van Spolie* in favour of the applicant in terms of which beneficial occupation be restored to the applicant of the goods mentioned in Annexure "C" attached to the pleadings by the respondents or any other person in beneficial occupation of the movable goods.

[3] The applicant and the second respondent entered into a written agreement of lease on 30 June 1995 in terms of which the applicant leased from the second respondent premises

described as Shop 34, situated on the portion remaining of portion 1 of the farm, town and town lands of the Rustenburg 272, JQ for an initial period of 3 (three) years. A copy of the lease agreement is annexed to the pleadings as Annexure "D". This agreement was extended for three years until 30 June 2001 by means of a document which has since been lost by the applicant. It should be pointed out at this juncture that the name of the building in which the premises is situated was changed by the second respondent during this period from Rustenburg Transform Building to Express City.

[4] On 29 May 2001 a document titled TAKE-UP OF OPTION TO RENEW, was duly signed between the applicant and the second respondent in terms of which the agreement of lease, referred to above was extended from 1 July 2001 to 30 June 2004 on terms and conditions as contained in the original lease agreement, Annexure "D" to the pleadings.

[5] On 22 June 2004 a further renewal document was signed between the applicant and the second respondent in terms of which it was agreed to extend the rental period until 30 June 2007. A copy of this renewal document is annexed to the pleadings as Annexure "E".

[6] On 9 July 2007 a further renewal document was signed between the applicant and the second respondent in terms of which it was agreed to extend the rental period until 30

June 2010. A copy of this renewal document is annexed to the pleadings as Annexure "F".

[7] The applicant has various dental practices over the country, for which purpose the applicant leases suitable premises. In each of these instances the applicant, at it's own cost installed (and continue to install in each new premises) suitable furniture, fittings and equipment in order to make such premises suitable to conduct a dental practice therein. In each of such practices the applicant further installs a properly qualified dentist to conduct such practices in terms of a specific contractual relationship.

[8] In the case of the Rustenburg practice, the applicant leased the mentioned premises from the second respondent as aforesaid and installed all the fittings, furniture and equipment **(The Goods)** to conduct a proper dental practice and dental laboratory from such premises. The applicant also installed the first respondent during 1998/99 for the latter to act as the local dentist to conduct such practice from the mentioned premises.

B. <u>APPLICATION TO STRIKE OUT</u>

[9] There were a number of objections to the pleadings by or against each party which culminated to an order couched as follows being issued by this court on the 28th April 2011:-

"***THAT:*** ***The 1st Respondent files a further affidavit on or before 13th day of May 2011, if any;***

THAT: ***The parties file amended Heads of Argument occasioned by the Replying Affidavit and further affidavit by the 1st Respondent, if any, on or before 27th day of May 2011;***

THAT: ***The Applicant has no objection to the late filing of the 1st Respondent's Head of Argument as filed on 30th day of November 2010;***

THAT: ***The parties agree that no further disputes exist relating to the late filing of document / pleading to date hereof.***

THAT: ***The matter be and is hereby postponed to 9th day of June 2011."***

[10] As a result thereof, there were further two interlocutory applications filed by the applicant and the respondent respectively to strike out numerous paragraphs or portions thereof from their further pleadings filed at the commencement of the hearing in this matter. The parties agreed that the striking out applications should be argued first. For convenience sake I will start with the second application and the parties will be referred to as they are in

the main application.

[11] The second application to strike out by the applicant was worded as follows:-

"1. To strike out the following paragraphs or portions thereof from the First Respondent's Supplementary Answer to the Applicant's Replying affidavit on the basis that same is argumentative, contain no evidence and is irrelevant:

1.1 in paragraph 4 thereof on page 4 thereof from the word "Should" to and including the word March 2011

1.2 paragraph 5 thereof on page 5 thereof

1.3 in paragraph 6 thereof on page 5 thereof from the word "Interestingly" to and including the words "paragraph 9.2 thereof;

1.4 in paragraph 6 thereof on page 5 thereof from the words "I submit" to and including the words "but recently"

1.5 in paragraph 6 thereof on page 5 thereof from the word "confirming" to and including the words "still exist" on page 6 thereof

1.6 in paragraph 9 thereof on page 7 thereof from the words "I therefore" to the end of the paragraph

1.7 paragraph 10 thereof on page 7 thereof

1.8 paragraph 11 thereof on page 7 thereof

1.9 in paragraph 12 thereof on page 8 thereof from the beginning of the paragraph to and including the words "11 March 2008"

1.10 in paragraph 15 thereof on page 9 thereof from the words "and honestly" to the end of the paragraph

1.11 in paragraph 16 thereof on page 9 thereof from the words "I find" to the end of the paragraph

1.12 paragraph 17.1 thereof on page 9 and 10 thereof.

2. Costs to be granted to the applicant"

[12] The first respondent did not object thereto and it was consequently granted as prayed for. The issue of costs remained. After counsel made submissions thereto, the order granted by this court was to the effect that costs will be cause in the main cause.

[13] The first application to strike out by the first respondent was worded as follows:-

"1. Striking out of the following paragraph from the Applicant's founding affidavit:

1.1 paragraph 15 thereof

2. Striking out of the following paragraphs from the Applicant's replying affidavit:

2.1 Paragraph 4.2
2.2 Paragraph 6
2.3 Paragraph 9

3. Costs of the application;"

[14] The applicant opposed only the portion that deals with paragraph 4.2, 6 and 9 of this application, therefore the first respondent's request in respect of paragraph 15 was duly granted.

[15] Arguments were heard by this court from both counsel in respect of the remaining paragraphs and or portion thereof, and the following order was granted by this court:- **"The striking out application by the first respondent is dismissed / refused.** The reasons therefore follows hereunder.

C. AD PARAGRAPH 4.2 (REPLYING AFFIDAVIT)

[16] The first respondent submits that the applicant should have made all the necessary allegations in his founding affidavit in respect of his ***locus standi*** and therefore paragraph 4.2 constitutes new evidence.

[17] The second paragraph, 4.2 referred to, read thus:-

> "4.2 In the circumstances of what the First Respondent states in this paragraph, the applicant infers that he is in fact challenging my authority to have made the founding affidavit, although such challenge is not stated blandly in this paragraph, but in paragraph 9 of the opposing affidavit. Therefore the Honourable Court is being referred to with respect to an Extract of the Minutes of the Applicant, annexed hereto as Annexure "A", to the effect that the deponent to the founding affidavit was in fact properly authorized to depose to it".

[18] The applicant opposed this application to have the evidence be striked out by contending that the order that this Court granted on the 28th of April 2011, in terms of which the late filing of the applicant's replying affidavit was condoned, and in terms of which an opportunity was afforded to the first respondent to file a further supplementary affidavit, negates the first respondent's argument.

D. AD PARAGRAPH 6 AND 9 (REPLYING AFFIDAVIT)

[19] The first respondents submits that the reference to Annexure A and its contents should be striked out as it constitute inadmissible evidence which should have been incorporated in the founding affidavit. Further that although applicant contends that the Annexure as such had to be searched for before it was found, the basic and general terms and conditions of the agreement that existed were known to the applicant, references and evidence relating thereto should have been incorporated in the founding affidavit.

[20] Paragraph 6 of the applicant's replying affidavit reads thus:-

> "The Applicant respectfully refers the Honourable Court to the contents of Annexure "A" hereto.

[21] Paragraph 9 read thus:-

''Ad paragraphs 17 and 18 thereof;

9.1 Although the First Respondent confirms in paragraph 18 of the Opposing Affidavit that there was a relationship between the Applicant and the First Respondent during the late 1990's, the nature of which is not stated by him, he refers to a partnership in paragraph 17 thereof;

9.2 In view of the contents of the Replying Affidavit in this regard, my co-director of the Applicant, Dr Dirk Jacobus Le Roux went to great lengths in order to trace the original documentation, which reflects the true relationship that existed between the Applicant and the First Respondent, with which efforts he in fact succeeded;

9.3 I annex hereto a copy of an Agreement, entitled Management Agreement, to which the Honourable Court is referred with respect, marked Annexure "C", which document Dr Le Roux discovered in a security safe containing an archive of old and defunct documents;

9.4 The truth of the matter is that the First Respondent was in fact not employed by the Applicant to conduct the relevant practice as local dentist in the leased premises, but occupied the premises leased by the Applicant in terms of Annexure "C" hereto. I confess that my recollection of the true nature of the initial relationship between the Applicant and the 1st Respondent, as set out in the Founding Affidavit, was in fact incorrect;

9.5 As a result of the fact that Dr Le Roux has to delve into the history of this matter, which include to obtaining of certain bank statements, annexed hereto as Annexures "E" , "F", "G" and "H", to which the Honourable Court is respectfully referred, took longer than the period anticipated by the legal representatives of the Applicant within which to file this Replying Affidavit and as a result the Applicant will at the hearing of this matter ask for the Honourable Court's condonation for the late filing of this Replying Affidavit;

9.6 From the contents of Annexure "C" hereto, it is clear that all the income of the practice conducted by the First Respondent in the leased premises had to be paid into the separate bank account for the practice, referred to in Annexure

"C", from which all the overheads pertaining to the practice had to be paid;

9.7 The further truth of the matter is that the First Respondent repeatedly withdrew all the credit amounts from the mentioned separate bank account and repeatedly supplied the Applicant with many reasons for his having done so;

9.8 The Applicant, as a result of such unsatisfactory behavior on the part of the First Respondent, came to an agreement during or about October 2006 with the First Respondent to amend Annexure "C" hereto between the parties to the effect that the First Respondent, out of the proceeds of the practice, on behalf of the Applicant, would pay all the overheads of the said practice and only pay to the Applicant an amount of R21 000-00 (Twenty One Thousand Rand) per month.

9.9 Save for the amendment of Annexure "C" hereto as stated above, Annexure "C" to this day, sets out the true friendship between the parties thereto, with specific reference to the right of the Applicant to have undisturbed possession of the premises as the lessee thereof;

9.10 The further truth of the matter is that the First Respondent also fell into arrears regarding such payments and is presently owing the Applicant an amount of R802 500-00 (Eight Hundred and Two Thousand and Five Hundred Rand), made up as set out in Annexure "D" hereto, to which the Honourable Court is referred with respect;

9.11 The truth of the matter is that the First Respondent has as recently as 11 March 2008 still paid into the Applicant's bank account an amount of R10 000-00 (Ten Thousand Rand) in lieu of the funds owing to the latter by the First Respondent;

9.12 The Honourable Court is referred with respect to archive copies of the Applicant's bank account, marked Annexures "E", "F", "G" and "H" covering inter alia the dates of 22 March 2007; 10 April 2007; 12 April 2007; 25 February 2008 and 11 March 2008, showing these payments to have been made by the First Respondent;

9.13 Unfortunately, the time afforded to the Applicant to obtain proof of all the payments reflected on the Annexure "D" hereto is not sufficient, but such proof will be available at the hearing of an action in terms of which the Applicant will summons the Second Respondent for payment in the amount referred to in paragraph 9.9 hereof, plus interest a *tempora mora*;

9.14 The truth of the matter is that the First Respondent also did some *locum* work as a dentist in the practice of Dr Le Roux, one of the directors of the Applicant Close Corporation during July 2009, at a remuneration of R40 949,83 (Forty Thousand Nine Hundred and Forty Nine Rand Eighty Three Cents) and arranged with the Applicant to credit his (First Respondent's) account with the Applicant with this amount as appears from Annexure "D" hereto;

9.15 In view of the fact that Dr Dirk Jacobus Le Roux, one of the directors of the Applicant usually dealt with the financial side of the matters between the Applicant and the First Respondent, I humbly refer the Honourable Court to his affidavit annexed hereto, marked Annexure "J";

9.16 The Applicant has been advised by its legal representatives that it is incumbent on the First Respondent to explain the contents of the Annexures referred to in this paragraph in view of his statements contained in the paragraphs in question;

9.17 It is being acknowledged by the Applicant that the reference by the Applicant to Annexure "C" and the attachment thereof to this Replying Affidavit, may compel the First Respondent to file a Duplicating Affidavit. The Applicant has no objection to such document being filed on behalf of the First Respondents within a reasonable period of ten days after the receipt of the first respondent attorneys of the Replying Affidavit. The Applicant will then have sufficient opportunity to lodge a further Replying Affidavit, if necessary, in order for the matter still to be able to be heard on 2 December 2010.

E. ANALYSIS

[22] The issue that is to be addressed by this court is whether the applicant introduced new evidence in relation to the issue relating to the ***locus standi*** of the applicant (Authority) and evidence relating to a contractual relationship that existed between the applicant and the first respondent.

[23] The test in dealing with amendments introducing new evidence is usually whether the amendment cause such prejudice to the opposing party as cannot be remedied by an appropriate order as to costs, postponement or otherwise. Where, however, the amendment does not introduce a fresh cause of action but only clarifies a pleading which is insufficiently or imperfectly set out in the original cause of action, the amendment will apply. See **Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 273 (A) at 279 A-E.** Also applied in **Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit 2000 (2) SA 789 (SCA).**

[24] I fully agree with the applicant that infact the order this Court granted on the 28th of April, in terms of which the late filing of the applicant's replying affidavit was condoned, and in terms of which opportunity was afforded to the first respondent to file a further supplementary affidavit, negates the first respondent's argument. This conclusion therefore summarily disposes of the submission of the first respondent in regard to paragraph 4.2.

[25] On page 11 par. 12 of the founding affidavit, the applicant amongst others states the following:-

> "In each of such practices the applicant installs a property qualified dentist to conduct such practices in terms of a **specific contractual relationship**" (My own emphasis)

[26] Paragraph 13 of the applicant's founding affidavit read thus:-

> "In the case of the Rustenburg practice, the Applicant leased the mentioned premises from the Second Respondent as aforesaid and installed all the fittings, furniture and equipment (The Goods) to conduct a proper dental practice and dental laboratory from such premises. The Applicant also installed the First Respondent during 1998/99 for the latter to act as the local dentist to conduct such practice from the mentioned premises. This was done upon **certain terms and conditions**, (My own emphasis) which were repeatedly broken by the first respondent".

[27] It is clear from the wording of the two paragraphs referred to above, that the paragraphs complained of in the replying affidavit of the applicant does not at all introduce new evidence and/or fresh cause of action. Annexure A and C attached to the replying affidavit and referred to in paragraph 6 and 9 respectively are documents detailing the contractual relationship and or terms and conditions that the applicant referred to in his founding affidavit. I am of the view that the said paragraphs the first respondent want to

strike out, only clarifies a pleading (founding affidavit of the applicant) which was insufficiently or imperfectly set out. I do not agree with the first respondent's submission that the applicant by insertion of paragraph 6 and 9 in his replying affidavit changed his initial ground for his application by introducing a contractual relationship that existed between the two parties.

[28] I am also of the view that the first respondent failed to show any prejudice that cannot be remedied one way or the other. Fortunately this court had already granted them leave to file further affidavits.

[29] I come to the conclusion that the first respondent's request to have the contents of paragraph 4.2, 6 and 9 of the applicant's replying affidavits to be striked out is of no merit and should not be upheld.

F. MAIN APPLICATION

[30] There was initially, when the application was made, an order sought for the matter to be treated as semi-urgent. I will not deal with this issue as it also fell away before the matter was argued before me.

[31] According to the applicant, he only became aware on the 16th August 2010 that there was no Take-Up option to renew

when an e-mail was received from the second respondent for the further renewal of the lease agreement. He also for the first time became aware that a dentist by the name of Phaphathi who claimed to be holding the fort on behalf of the first respondent was at the Rustenburg practice.

[32] He visited the practice again on the 22 August 2010 but found no one there. Seeing that neither the first respondent nor the said Phaphathi was at the practice, he installed a lock at the entrance to the practice as well as a guard in order to ensure the safety of the applicant's equipment that is worth more than one million rand.

[33] As a result the first respondent according to the applicant, applied to the Magistrate Court for a *Mandament Van Spolie* against the second respondent after the mentioned lock has been affixed to the entrance.

[34] The applicant maintains that the basis for this application is that despite this, the first respondent had already committed an act of *Spoliation* against the applicant during **May** and **June 2010**, as he was at the time of this application still in possession of the premises as well as the goods of the applicant.

[35] The applicant's argument is that the contents of paragraph 9.9 of the Replying Affidavit is of major importance in this

matter insofar as it is clear from such contents that not only is the said Annexure "C" the basis of the relationship between the applicant and the first respondent, but that the said document is presently still in full force and effect;

[36] Due to the fact that the first respondent did not contest either the existence and contents of Annexure "C" to the Replying Affidavit, neither the averments made by the applicant in connection thereto, the applicant submit that such evidence was in fact accepted by the first respondent as correct and exist before this Court as uncontested evidence that has been properly proven.

[37] Applicant further submit that the first respondent in terms of clause 6.22 of the said Annexure "C", should not have gotten involved directly or indirectly into any business employment (including his own), without the prior written consent of the applicant (the existence of which is not being alleged by the first respondent) and that the first respondent has contravened the terms of this clause by continuing in the premises rented by the applicant for his own account.

[38] Further that the first respondent is and was duty bound in terms of clause 6.23 of the said Annexure "C" to inform the applicant of any information which came to his attention which may have affected the relationship between the applicant and the first respondent, the practice, the

premises or the practice staff.

[39] The applicant finally submit that the *Spoliation* committed by the first respondent lies precisely in his actions by first, omitting to advise the applicant regarding the renewal of the lease agreement with the second respondent, and secondly to enter into an agreement of lease with the second respondent in his own name.

[40] Lastly, that it is clear from the affidavits before the Court that the first respondent is in unlawful possession of the fittings, furniture and equipment to conduct a proper dental practice and dental laboratory, which belongs to the applicant as set in Annexure "C" to the Founding Affidavit and has also committed *Spoliation* regarding such goods.

[41] The first respondent's reply to this submissions is that he had indicated in his answering affidavit that the second respondent contacted him and indicated that the applicant failed to exercise his option to renew and requested the first respondent to enter into a lease agreement with him. This agreement was duly entered into which is not in dispute.

[42] Therefore, the first respondent had a valid lease agreement which was duly entered into and in terms whereof the first respondent duly acted upon.

[43] The first respondent's submission is that this action was not unlawful and that he did not dispossess the applicant unlawfully.

[44] Further that for the applicant to be successful in a spoliation application he must allege and prove unlawful deprivation of possession by the first respondent. In this context "unlawful" refers to dispossession without due legal process. First respondent based his submission on the following authorities:-

Sillo v Naude 1929 AD21 Ntai & Others v Vereeniging Town Council & Another [1953 (4) SA 579 (A)]

George Municipality v Vena & Another 1989 (2) SA 263 (A)

[45] Further that the applicant relied upon the fact that the first respondent disposed him of the property. First respondent submit that possession when is referred to is actual physical possession and not the right to possession. The right to possession is not protected. He quoted the following authorities in support of this submission:

Yeko v Qana 1973 (4) SA 735 (A)

Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services & Others 1996 (4) SA 231 (C)

[46] The first respondent's main contention is that the applicant did not have actual physical possession of the property of

the leased premises when he took possession thereof. Instead he had possession long before the agreement was entered into between the first and second respondent.

[47] The other leg which the first respondent relies upon is that the *mandament* does not protect contractual rights and cannot be used to enforce specific performance of a contract. The following cases were quoted in support of this submissions:-

Kotze v Pretorius 1971 (4) SA 346 (NC)
Telkom SA Ltd v Xsinet (Pty) Ltd 2003 (5) SA 309 (SCA)
First Rand Limited t/a Rand Merchant Bank & Another v Scholtz No & Others 2008 (2) SA 503 (SCA).
ATM Solutions (Pty) Ltd v Olkru Handelaars CC [2009] 2 ALL SA (1) (SCA)

[48] In as far as the issue concerning contractual relationship is concerned, the first respondent's reply is to the effect that he does not intend to deal any further with the alleged contractual relationship between the first respondent and the applicant, except for denying the existence of such a relationship.

[49] The first respondent's final submission is that the applicant's application should be dismissed for the mere fact that the applicant failed to allege and proof the following allegations relevant to a *mandament van spolie*:

- Unlawfulness
- Dispossession

G. THE LAW

[50] In **Erasmus, Superior Court Practice, page E9-2** the following is found:-

"A court hearing spoliation application does not concern itself with the right of the parties (whatever they may have been) before the spoliation took place, it merely inquires whether or not there has been a spoliation, and if there has been, it restores the status quo ante."

[51] Further on page **E9-4**

"The fact that a spoliation order is a final order has three important results:-

a) It is not sufficient for the Applicant to merely make out a prima facie case. He must proof his case on a balance of probabilities as in any other civil case
b) It is an order having the effect of a final judgment"

[52] And on page **E9-5**

"In order to obtain a spoliation order, two allegations must be made and proof:

i) That the Applicant was in possession of the property; and
ii) That the Respondent deprived him of the possession forcibly or wrongfully against his consent"

[53] And lastly on page **E9-6**

"An incorporeal right cannot be possession in the ordinary sense of the word. The possession is represented by the actual exercise of their right. In spoliation proceedings the Applicant need not proof that he has the right, what is relevant in such proceedings is whether or not the Applicant has exercised

rather that "owned" the right. In First Rank Limited t/a Rand Merchant Bank v Scholtz N.O. it was held that the remedy does not have a "catch – all function" to protect the quasi possession of all kinds of right irrespective of their nature".

H. ANALYSIS

[54] The two contentious clauses in Annexure "C" to the replying affidavit which comprise the Management Agreement between the parties are couched as follows:-

> "6.22 Without the prior written consent of the company first being obtained get involve direct by or indirectly into any business employment or activity in whatsoever capacities, which may in the absolute discretion of the company are to the detriment of the company, the practice, the patients thereof or which may result in a conflict in interest.
>
> 6.23Inform the company of any information which comes to his attention which may affect the relationship between the parties, the practice, the premises or the practice staff".

I. POSSESSION

[55] There are two versions in regard to the relationship between the applicant and the first respondent in the founding and opposing affidavits.

[56] Applicants maintains that Annexure "C" is presently and still in full force and effect and was so, even at the time when the disposition took place. On the other hand the first respondent contends that such a relationship does not exist anymore based on the following:-

"- On the Applicant's own version, the first Respondent was the party that had physical possession of the property
- And that they only had a contractual right to such possession which they had lost when they did not renew the lease agreement by exercising their option to renew promptly"

[57] It is clear that the version put forward by the applicant in his Replying Affidavit created a factual dispute. It is common cause that when a Court is requested to grant a final interdict / order in motion proceedings, and a dispute exist as to the facts, the court should not grant such an application. There are exceptions to this general rule, one of which is that where the allegations and denials of the respondent are so far fetched or clearly untenable that the Court is justified in rejecting them merely on the papers, it should do so.

[58] The following are important considerations which this court has noted in making a finding based on a pre-ponderence of probabilities in favour of the applicant in this matter:-

- There is no explanation by the first respondent before this Court as to why the first respondent did not file a duplicating affidavit after having been invited and

afforded ample opportunity to do so.

- There is no explanation by the first respondent before this Court as to why the first respondent continued to make payments (although not regularly) to the applicant as it appear from Annexure "D", "E", "F", "G" and "H" to the Replying Affidavit as recently as March 2007, April 2007, February 2008, March 2008 and July 2009 respectively if the version placed before this Court by the first respondent is to be accepted that the contractual relationship has ended long time ago.

- The first respondent and the second respondent signed their contract on the **25 May 2010**, which is obviously a period before the contract of the applicant and second respondent expired. See Annexure "F" and "G" respectively.

- There is no specific date mentioned by the second respondent as to when this relationship ended. Furthermore the management agreement is silent on this.

[59] Under the circumstances I come to the conclusion that the version by the first respondent that the contractual relationship between him and applicant did not exist for a substantial period of time anymore when the new contract was obtained and further that the applicant had also lost a contractual right to such possession when they did not renew

the lease agreement by exercising their option to renew is farfetched and clearly untenable that this court is justified in rejecting it merely on the papers before it.

J. ACTS OF SPOLIATION

[60] According to the first respondent there is no evidence before this court that shows that the applicant has been spoliated. First respondent submit that his action was not unlawful because of the fact that he had a valid lease agreement which was duly entered into and in terms whereof he duly acted upon.

[61] The acts of spoliation the applicant is relying upon according to his founding affidavit were committed by the first respondent during **May** and **June 2010**. I need not deal with this issue further and or in more detail except to reiterate what I had already said in the preceding paragraphs, that according to the Annexure "G" which is contract signed between the first and second respondent, it was signed on the 25 May 2010, before the contract between the applicant and second respondent expired,

[62] The signing thereof whilst the first contract between the applicant and second respondent was still in force especially in view of the fact that respondent knew of his obligations in terms of clauses 6.22 and 6.23 of Annexure "C", renders the

action of the first respondent unlawful.

[63] By firstly, omitting to advice the applicant regarding the renewal of the lease agreement between him and the second respondent, and secondly, to enter into an agreement with the second respondent in his own name, all of these are clearly acts of *spoliation* arising from a contract and not contractual rights to enforce specific performance as argued by the second respondent.

[64] I am of the view that the balance of probabilities favours the applicant. This court has ample grounds to make a finding to the effect that first respondents did in fact commit acts of *spoliation* regarding the premises in question as well as the goods, which belongs to the applicant.

K. ORDER

[65] The following order is thus made:-

65.1 That a *Mandament Van Spolie* is granted to the applicant in terms of which beneficial occupation be restored to the applicant of the under mentioned fixed property by the respondents or any other person in occupation of a premises known as Shop 34, Situated in a building on the portion 1 of the farm, town and townlands of Rustenburg 272 JQ;

65.2 That a *Mandament Van Spolie* be granted to the applicant in terms of which beneficial occupation be restored to the applicant of the under mentioned goods by respondents or any other person in beneficial occupation of the movable goods specified in Annexure "C" to the Founding Affidavit attached thereto.

64.4 That the first respondent is to pay the costs of this application.

_____

A.M. KGOELE
JUDGE OF THE HIGH COURT

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