**IN THE HIGH COURT OF SOUTH AFRICA**
**CAPE OF GOOD HOPE PROVINCIAL DIVISION**

**Case no A 894/05**

In the matter between

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| **CAREL EDWARD GREAVES** | First appellant |
| **DIRK CYRIL KNAPP** | Second appellant |
| **CARL GREAVES BROKERS (PTY) LTD** | Third appellant |
| **ELIZABETH ANNE GREAVES** | Fourth appellant |
| **MUSTAPHA MURUDKER** | Fifth appellant |

and

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| **JUAN BARNARD** | Respondent |

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**JUDGMENT DELIVERED ON 3 AUGUST 2006**

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**BLIGNAULT J:**

[1] Respondent, Mr Juan Barnard, was the successful applicant in spoliation proceedings in the court below. Appellants were ordered to

restore possession to him of certain office premises situated at 29 Douglas Carr Drive, Bellville, Western Cape. They now appeal against that order.

[2] At the time of the events giving rise to the application respondent was the marketing director of third appellant, a company named Carl Greaves Brokers (Proprietary) Limited, which has its principal place of business at 29 Douglas Carr Drive, Bellville. First appellant, Mr Carel Edward Greaves, is the managing director of third appellant. Second appellant, Mr Dirk Cyril Knapp, is third appellant's human resources director. Fourth appellant, Ms Elzabeth Anne Greaves, and fifth appellant, Mr Mustapha Murudker, are also directors of third appellant.

[3] Respondent said that he and first and second appellants were the shareholders in and executive directors of third appellant in terms of a shareholders' agreement signed on 12 March 1998. The shareholders' agreement provided that respondent would hold 25 of the 97 issued shares in third appellant, first appellant would hold 49 shares and second appellant 23 shares. The agreement provided that

the three of them would be the executive directors of third appellant. In terms of clause 10 of the agreement all benefits accruing to the company would be divided equally between the three shareholders. Clause 18 of the shareholders' agreement reads as follows:

> *"Shareholders shall owe to each other a duty of good faith at all times. Their relationship shall be construed as that of quasi partners."*

[4] Third appellant carries on the business of insurance and property brokers, financial and estate planners, medical aid consultants, bookkeepers and drafters of wills. The immovable property where its offices are situated, is owned by a subsidiary, Insurance Broking Shop (Proprietary) Limited. It consists of a double story building which was previously used as a residential home and an office. It has a reception area, consultation room, eight offices, a bar and entertainment area and a courtyard with a swimming pool and a safe.

[5] In para 36 of his founding affidavit respondent described his possession of his office as follows:

> *"My possession entailed the use of my office, access to all the other offices, entertainment and other areas, as well as interaction with the staff to assist me in the peformance of my duties. I further had access to all the files with client and company information. I had access to the office safe through the office manager."*

[6] The spoliation, respondent said, took place on 8 April 2005. It was preceded by negotiations between him and first and second appellants to sell his shares to them. On 4 April 2005 first appellant addressed a letter to him in which he was asked to respond to certain allegations that he was acting in breach of his duty of good faith to the company and his fellow directors. He responded to that letter but on 6 April 2005 he was informed in writing by third appellant's attorneys that procedures to remove him as director were about to be instituted and that pending the resolution of that issue he was suspended as a director. He was informed that in terms of the suspension he was not allowed to enter the company's premises without first appellant's express written permission, nor to contact any of the company's staff, suppliers, business contacts or clients. The

letter was hand delivered to him at 19:35 on 6 April 2005. He responded to that letter on 8 April 2005.

[7] Respondent said that the interference with his peaceful use and possession of his office began after lunch on 8 April 2005. He received a telephone call from third appellant's attorney informing him that he would be removed from the building by the police or security guards. Two security guards and two policemen entered his office and told him that they had instructions to remove him from the premises. When he asked them to provide him with a court order authorising their conduct, they left. He tried to telephone one of the company's employees to discuss certain matters with him. Four security guards again entered his office unannounced and told him to leave the premises immediately. He again asked whether they had a court order and they left. Another person, ostensibly from third appellant's attorneys, also entered his office and told him to leave his office. This person appeared very intimidating. With all the activity in his office he found it impossible to continue with his normal work. When he left the building that afternoon he noticed that the lock to the

front gate had been replaced. When he visited the premises the next day he found that he could not open the front gate as the lock had been replaced.

[8] First, second and third appellants opposed the application. They did not seriously dispute that the conduct complained of amounted to interference with respondent's occupation of his office. Their defence to the application was that respondent's former occupation of his office was derived from his position as employee of third appellant and that in such capacity he was not entitled to the remedy of spoliation.

[9] The court below (Motala J) rejected appellants' defence and granted the relief sought by respondent. Appellants (according to the notice of appeal, all five the original respondents) now appeal, with leave of the court below, to this court (a Full Bench of this Division), against the whole of the judgment including the order as to costs. They contend that the court below should have upheld the defence to the application.

[10] The learned judge in the court below referred to a number of cases in which it was decided that a person who was in possession of property as an employee or as an agent, is not entitled to obtain a spoliation order, namely *Mpunga v Malaba* 1959 (1) SA 853 (W)*, Mbuku v Mdinwa* 1982 (1) SA 219 (TkS) and *Dlamini and Another v Mavi and Others* 1982 (2) SA 490 (W). He pointed out, however, that the general rule only applied to an agent or employee who had no interest in the property over and above the right which he held as agent or employee. Thus in *Mpunga's* case, *supra,* Steyn AJ said, at 861F:

> *"It seems to me that the authorities have established that a servant or a person who holds no rights on his own behalf, except insofar as such rights derive from an authority given to him by the master, is not entitled to bring proceedings for a spoliation order, but that only the employer can do so. In other words it seems to me that before a person can bring spoliation proceedings, he must show that the right of which he has been spoliated is something in which he has an interest over and above that interest which he has as a servant or as a person who is in the position of a servant or a quasi-servant."*

In *Mbuku v Mdinwa, supra,* Hefer CJ said, at 222F-H:

> *"In any event, I am of the view that an agent who has no interest in the property which he holds for his principal, or who derives no benefit from holding it, is not entitled to claim the relief of a mandament van spolie. One should not forget that it is a remedy which is available to a possessor; it has never, to my knowledge, been extended, except perhaps inadvertently, to a mere detentor. But the animus possidendi which is required to transform detentio into possession is not the intention required of old for so-called civil possession; it is no more than the intention to hold the thing in question for one's own benefit and not for another. And a detentor who does not have that intention is indeed merely a detentor. I am in full agreement with the view expressed in Wille Principles of SA Law 7th ed at 196 - 7 that*
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> > *'... if the person who has detentio of a thing has the intention of holding it not for himself but for another person, he does not have possession, he is a custodian merely and the possessor is the person on whose behalf he is holding.'"*

And in *Dlamini and Another v Mavi and Others, supra,* at 492E-F, reference was made to *Yeko v Qana* 1973 (4) SA 735 (A) where van Blerk JA (at 739D – H) said the following:

> *"The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself."*

[11] In the present case, the learned judge held, respondent was in occupation of his office as a director of third appellant. As such his position could not be equated with that of a servant or agent of the company. Directors are creatures of statute and occupy a fiduciary position peculiar to themselves. Respondent was moreover a shareholder in third appellant and the shareholders' agreement provided that the relationship between shareholders is to be regarded as that of quasi-partners. It is well established, he said, that partners are joint possessors of partnership property and a partner can obtain a spoliation order in respect of partnership property. By virtue of his shareholding in and directorship of third appellant, he said, respondent had an interest over and above that of a mere employee. He derived a benefit from being on the premises and he was under a

duty to be there.

[12] Mr A C Oosthuizen SC appeared on behalf of appellants. He submitted first that the present case falls within the general rule that an employee is not entitled to bring spoliation proceedings. The case made out by respondent in para 36 of his founding affidavit, he submitted, was that he required access to his office and his files and his staff. This was access in his capacity as employee of third appellant. In his replying affidavit, Mr Oosthuizen submitted, respondent sought to make out a different case, namely that he was an occupant of the premises by virtue of his position as shareholder and director of third appellant and as a quasi-partner of first and second appellants.

[13] Mr Oosthuizen submitted in any event that respondent's rights as shareholder did not confer upon him any rights of occupation of the property. The rights of a shareholder in a company, he argued, are to attend shareholders' meetings and receive dividends. He does not require possession of the company's property for those purposes.

Mr Oosthuizen referred in this regard to *Engling and Another v Bosielo and Others* 1994 (2) SA 388 (BG) in which a spoliation application by a director and shareholder of a company was refused.

[14] Mr Oosthuizen's third submission was that respondent's reliance on a quasi-partnership was flawed. A quasi-partnership is not the same as a partnership and respondent, he submitted, did not allege any facts in his affidavits to show that he was entitled to possession of the office in his capacity as a quasi-partner.

[15] Mr R Patrick appeared on behalf of respondent. He submitted first that respondent relied in his founding affidavit upon his possession of the premises in his capacity as an employee and director of, and a shareholder in, third appellant, with the rights and interests set forth in the shareholders' agreement. He pointed out that the shareholders' agreement was placed before the court as an annexure to the respondent's founding affidavit and its terms were not disputed by appellants.

[16] I agree with Mr Patrick's submission that by relying on the shareholders' agreement, respondent was not trying to make out a new case in reply. Reading para 36 of the founding affidavit in proper context it is clear that respondent was not confining himself to his occupation as an employee. Earlier in the same affidavit respondent said the following:

> *"9. This matter is urgent as I am being severely prejudiced on a daily basis by being prevented from:*
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> *a. Protecting the interests of clients effectively;*
>
> *b. Protecting the interests of the Third Respondent (of who I am a shareholder and director);*
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> *c. Protecting my interests as surety for the debts of the Third Respondent;*
>
> *d. Protecting my shareholding interests therein;*
>
> *e. Fulfilling my functions as director of the Third Respondent;*

*f. Peacefully occupying my place of employment;*

*g. Entering the office premises after hours."*

[17] On my reading of the founding affidavit as a whole, respondent's case is that in occupying his office he was carrying out his functions as employee and director and at the same time advancing his own interests as shareholder. As an allegation of fact appellants did not dispute this statement. It appears to me indeed to be unanswerable. By carrying out his functions as marketing director respondent would have increased the benefits accruing to the company. As one of the three shareholders he was entitled to one third thereof.

[18] As to respondent's rights and interests as shareholder it is in my view not helpful to refer to the theoretical position in other companies. One must have regard to respondent's position in this particular company, namely third appellant. I may add that the judgment in *Engling and Another v Bosielo and Others, supra,* does not assist appellants. Although the applicant in that matter was a

director and a two-thirds shareholder of the company that owned the property concerned, a bottle store, the application was refused on the ground that he did not have any physical possession *(detentio)* of the bottle store. It was accordingly not necessary for the court to decide whether, if he had had *detentio,* he was holding in order to secure some benefit for himself.

[19] More pertinent, in my view, is the earlier case of *Meyer v Glendinning* 1939 CPD 84 (referred to at 395G/H-396A in *Engling*). A racehorse trainer had been handed three horses by the owner for training and stabling, for which services a monthly fee was payable. The owner, without notice to and without the consent of the trainer, entered the latter's stables and removed the horses. A Full Court held that the trainer was entitled to a spoliation order against the owner. Davis J said, at 94:

> *"It is obvious that a trainer, such as the applicant, himself gains many advantages, both direct and indirect, from the presence of horses in his stables."*

[20] There may be some merit in Mr Oosthuizen's submission that the reference to a quasi-partnership in clause 18 of the shareholders' agreement does not mean that respondent must for all intents and purposes be regarded as a partner. In my view, however, nothing turns on this point. Even if the reference to a quasi-partnership in clause 18 is ignored it is quite clear that respondent's position can not be equated with that of a person whose only interest in the property is that of an agent or employee.

[21] I am accordingly of the view that the learned judge in the court below came to the correct conclusion. Respondent occupied the property in question in his capacity as an executive director of and shareholder in third appellant with the rights and interests described in the shareholders' agreement. The respondent's interests in his possession of the property materially transcended those of a mere agent or employee. He clearly performed his work and occupied his office *"with the intention of securing some benefit for himself."* Respondent was accordingly entitled to ask for a spoliation order.

[22] I would therefore dismiss the appeal with costs.

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**A P BLIGNAULT**

**DESAI J:** I agree. It is so ordered.

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**VELDHUIZEN J:** I agree.

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**A H VELDHUIZEN**