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1]IN THE HIGH COURT OF SOUTH AFRICA

2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)

3] CASE NO /07

4]In the matters between:

5] *ATM SOLUTIONS (PTY) LIMITED*

6]and

7] *OLKRU HANDELAARS CC*

First Respondent

ABSA BANK LIMITED

Respondent

8] _____

9]JUDGMENT DELIVERED: 7 NOVEMBER 2007

10] _____

11]GRIESEL J:

Introduction

12]This is an urgent application for a spoliation order. The applicant conducts the business of installing and maintaining automated teller machines (ATM's) at the premises of various retailers, of which the first respondent's convenience store, trading as *Kwikspar Breedevallei* in Worcester, is one. In terms of a written agreement with the first respondent which took effect on 1 June 2007, the applicant was allowed to install one of its ATM's within the

first respondent's premises 'at a mutually agreed location'. In addition, the first respondent provided an electricity supply to the applicant's ATM device.

Clause 1.1 of the agreement provided:

13] 'ATM Solutions shall use and occupy such premises for the sole purpose of placing and operating therein, an Automated Teller Machine (ATM) on the terms and conditions recorded herein.'

14] In clause 2.1 of the agreement, after providing that the ATM shall be installed 'at a mutually agreed location', it was further agreed as follows:

15] '...The ATM shall remain installed at the Premises in the same location for the duration of this Site Location agreement' [i.e. 48 months as from 1 June 2007].

16] The installation took place by way of shop-fitting with wooden panels around the ATM device, which was affixed to the floor by bolts and connected to the electrical output facilities of the premises. Until 19 September 2007, the applicant's ATM remained situated in the agreed position at the entrance to the first respondent's shop, where it was easily accessible to potential customers. In addition, the first respondent provided the necessary electricity supply to the ATM.

17]On or about 19 September 2007 the first respondent – without the consent of the applicant – disconnected the electricity supply and removed the applicant's ATM to a storeroom on the premises, where it is inaccessible to customers. At the same time, an ATM device belonging to the second respondent, ABSA Bank Limited, was installed in the place and position previously occupied by the applicant's device.

18]This conduct gave rise to the present application. facts set out above are undisputed. The applicant claims that the first respondent's conduct amounts to spoliation. It accordingly claims an order 'that the respondents forthwith restore the installation of a 9960 ATM device—multi with serial number 8210797 to the position and in the manner it formerly occupied on the premises of the first respondent'. (At an earlier stage of the proceedings, the applicant sought contractual relief as an alternative to a spoliation order. At the hearing before me, however, the claim for contractual relief was expressly abandoned and the applicant's claim was restricted to spoliatory relief.)

19]Both respondents oppose the relief claimed and have advanced various explanations for the events giving rise to the present application. Due to the nature of these proceedings, however, those explanations are not presently relevant and were not canvassed during oral argument. The crux of the matter

is the respondents' defence that the applicant has failed to establish the essential prerequisite for a *mandament van spolie*, namely the element of possession.

Possession

20]In its founding affidavit, the applicant made the bald statement that at all material times prior to the events of 19 September, it was 'in peaceful and undisturbed possession' of the ATM device.

21]The first respondent took issue with this contention and showed convincingly that the applicant had not been in actual physical possession or control of the ATM. In this regard, the first respondent pointed out, *inter alia* –

- (a) that the ATM and the floor area on which it stood were at all relevant times in the first respondent's possession and control, to the exclusion of all others – including the applicant;
- (b) that the first respondent held the device inside its premises, to which it held all the keys, including the keys to the device itself;

- (c) that the first respondent controlled all access to the ATM by the applicant and its employees or agents;
- (d) that the first respondent stocked the ATM device daily with money, changed paper rolls and operated the controls of the ATM in order to download and print information concerning transactions done by customers by way of the ATM.

22]Recognising the force in these arguments, the applicant's stance was modified somewhat in reply: it alleged that 'the applicant at all times had peaceful and undisturbed possession, *through the installation and location of the ATM device*, of an agreed, designated part of the first respondent's premises'.¹ Elsewhere it claimed that, prior to the alleged spoliation, the applicant 'physically, through the ATM device, occupied an identifiable portion of the premises'.² In argument before me, the applicant further developed this stance by squarely relying on the concept of *quasi possessio*.

23]Although the respondents correctly pointed out that the applicant has not endeavoured to make out a case for *quasi possessio* in its founding papers, a party is, of course, entitled to make any legal contention open to it on the facts

¹ Record p 83 para 10 [emphasis added].

² Record p 91 para 28.2.

as they appear on the affidavits and the court may decide an application on a point of law that arises out of the alleged facts even if the applicant has not relied on it in its application.³ I accordingly proceed to consider the applicant's claim based on *quasi possessio*.

24]In this context, the applicant placed great reliance on the judgment in *Shapiro v SA Savings and Credit Bank*.⁴ In that case the applicant, a medical doctor, had agreed with the previous owner of immovable property where he held a tenancy that his nameplate advertising his presence could be installed on another part of the property by affixing it to a wall. A new owner of the building removed the nameplate without the applicant's consent. Roper J found that –

25]‘the applicant ... was given a right by the owner of the premises as part of the conditions of his tenancy to have his nameplate upon a defined portion of the wall. That is, he was given the right to occupy the space covered by this nameplate. When the respondent acquired the ownership of these premises he took them, of course, subject to existing leases, whether they were written or oral, or partly written and partly oral. Therefore it seems to me that the applicant had a contractual right as against the respondent to have his nameplate upon that defined

³ Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4ed (1997) 368 and authorities cited therein.

⁴ 1949 (4) SA 985 (W).

portion of the respondent's premises. I can see no reason why this should not be capable of protection by a spoliatory order'.⁵

26] *Shapiro's* case was referred to with approval by the Division in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*,⁶ where the court authoritatively reaffirmed the principle that the exercise of an incorporeal right can be the subject of spoliation via the concept of *quasi possessio*. The court held that in order to establish *quasi possessio*, an applicant must show actual use ('*daadwerklike gebruik*') of the right in question.⁷ The court regarded *Shapiro's* case, among others, as an example where our courts had afforded protection to the possession of rights.⁸

27] Counsel for the applicant also relied on *African Billboard Advertising (Pty) Limited v North and South Central Local Councils*,⁹ where a Full Bench afforded spoliatory relief to a party that had erected certain advertising signs on property owned by another in the Durban area, which signs had been unlawfully removed by the City Council. Although the issue in that case was whether the City Council's conduct was justified by the statutory provision

⁵ *Supra* at 991.

⁶ 1989 (1) SA 508 (A) at 515D. *Bon Quelle* was expressly approved and followed by the Supreme Court of Appeal in *Impala Water Users Association v Lourens NO & Others* 2004 (2) All SA 476 (SCA) para 20, where Farlam JA described it as 'carefully reasoned' and 'a scholarly judgment'.

⁷ At 514I.

⁸ At 515C–D.

⁹ 2004 (3) SA 223 (N).

under which it purported to act, the court had no difficulty in recognising that the erector of the signs on property owned by another was capable of being despoiled of possession, through the removal of the signs, without any physical presence on the property on which the signs were erected.

28]On the face of it, these decisions provide strong support for the applicant's stance herein. The respondents contended, however, that the *mandament van spolie* is not the appropriate remedy to be resorted to where specific performance of contractual obligations is claimed. In support of this proposition, they relied *inter alia* on two recent decisions of the Supreme Court of Appeal, namely *Telkom SA Ltd v Xsinet (Pty) Ltd*¹⁰ and *First Rand Limited t/a Rand Merchant Bank et al. v Scholtz NO*.¹¹

29]In *Xsinet* the SCA refused to accept a contention that the quasi-possession of a right to receive Telkom's telecommunication services consisting of the actual use of those services must be restored by the possessory remedy. In rejecting this argument, Jones AJA pointed out that this is 'a mere personal right and the order sought is essentially to compel specific performance of a contractual right in order to resolve a contractual dispute. This has never been allowed under the *mandament van spolie* and there is no authority for such an

¹⁰ 2003 (5) SA 309 (SCA).

¹¹ [2007] 1 All SA 436 (SCA).

extension of the remedy'.¹²

30]This principle was reiterated in the *First Rand* case, where it was stated that possession of 'mere' personal rights (or their exercise) is *not* protected by the *mandement*¹³ *van spolie* and where it was held that, in order to qualify for such protection, the right held in *quasi possessio* must be a 'gebruiksreg' or an *incident* of the possession or control of the property:

31]'The *mandement 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 *mandement* 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 its *quasi possessio* is deserving of protection by the *mandement*.'¹⁴ [emphasis added]

32]On the facts of the present case it is apparent that the applicant had a

¹² Para 14.

¹³ Note the difference in terminology between the traditional *mandament* and the court's preference for *mandement* in *First Rand*.

¹⁴ *Supra* para [14] (other case references and footnotes omitted). See also *Kotze v Pretorius* 1971 (4) SA 346 (NC) at 350D–E; *Plaatjie and Another v Olivier NO and Others* 1993 (2) SA 156 (O) at 159J; *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W) at 623C.

contractual right to keep its ATM device on the first respondent's premises in the position as agreed and that it had actually been exercising that right at the time that the first respondent removed its ATM. Its claim in these proceedings, in essence, amounts to a claim for specific performance of its contractual rights – something which, according to the authorities just referred to, is not permissible by means of the *mandament van spolie*. As a judge of first instance, I am, of course, bound by those decisions, unless I am satisfied that they are distinguishable from the present matter. Counsel for the applicant have been unable to persuade me that those decisions are in fact distinguishable, nor am I able to distinguish them.

33]I am accordingly driven to the conclusion – albeit not without some reluctance – that the applicant has failed to establish its entitlement to spoliatory relief on the facts of this case. Bearing in mind the underlying rationale for the existence of the mandament, viz to prevent people from taking the law into their own hands, this may be regarded as an unfortunate result, but then hard cases, notoriously, make bad law.

34]In these circumstances, it follows that the application must be dismissed with costs.

35]_____

36]**B M GRIESEL**
Judge of the High Court