IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 2025-040657

In the matter between

PARCH PROPERTIES 72 (PTY) LTD	**FIRST APPLICANT**
THE TENANTS RESIDING IN SUMMERVALE GARDENS LISTED IN ANNEXURE 'FA2'	**SECOND APPLICANT**
and	
THE SUMMERVALE LIFESTYLE ESTATE OWNER'S ASSOCIATION	**RESPONDENT**

JUDGMENT
Leave to appeal

Date of hearing: 19 June 2025
Date of judgment: 20 June 2025

BHOOPCHAND AJ:

[1] The Applicants apply for leave to appeal the judgment of this Court delivered on 6 May 2025. The grounds of appeal are too numerous to mention. The Court

acknowledges the Applicant's recital of rules and the caselaw applicable to applications for leave to appeal. The Respondents oppose the application.

[2] The Applicants reminded the Court that paragraph 20 of the founding affidavit was the nub of the application. Paragraph 20 relates to the history of the alleged 'quasi-possession' of the Respondent's facilities and property for a prolonged period. The situation changed five months before the institution of the application when the First Applicant and the Respondent concluded a written facilities agreement. The Applicant submitted that the content of the paragraph was common cause.

[3] The Applicant then referred the Court to paragraphs 7 and 11 of the judgment and submitted that the content turned the law on its head. Paragraph 7 referred to the judgment of Adhikari AJ concerning the membership of the First Applicant in the Respondent. Had the First Applicant prevailed in that application, it would have been entitled to continue using the Respondent's facilities. The Applicants were obliged to agree with the Respondent to ensure further usage of the Respondent's property and facilities. continuity of usage. Adhikari AJ dismissed the application, which is on appeal to the SCA. The Court pointed out that the Applicant's use of the Respondent's facilities was contractual and personal, and the *mandament* did not apply.

[4] Paragraph 11 of the judgment is a factual account of the Applicant's position. They have not lost any right of access to their own landlocked properties. The Court does not understand how the content of these paragraphs changes the law. The *mandament* is not the appropriate remedy where contractual rights are in dispute, or where specific performance of contractual obligations is claimed, although certain quasi-possessory rights are protected. [1] The Court was obliged to follow the dictum in the Abrahams decision.

[5] The Applicant referred to an extract from LAWSA which acknowledged that Courts accept that the mandament should not be used to protect personal rights which can be enforced by contractual claims for specific performance. The Applicant relied

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1 *Abrahams N.O and Others v Geldenhuys N.O and Others* (Reasons) (2025/001463) [2025] ZAWCHC 78 (5 March 2025) at para 8 (Abrahams)

on the content, which stated that it is not the right, but the physical manifestation of the rights which is protected. The unlawful interference with such factual control establishes the breach of the peace, which is redressed by a spoliation order. Therefore, the better view is that one should not enquire into the right of use or a right of access that had been breached, for this smacks of an investigation of the merits of the case, which is not countenanced in spoliation law. The Applicant submitted that the contract is irrelevant. The merits issue is for another Court to decide.

[6] The Respondent submitted that the judgment is correct. The Applicants premised their application on the facilities they enjoyed under the contract. They were trying to enforce a contract that had expired. They had been denied their alleged membership in the Respondent. The *Abrahams* case confirms the principle that the law protects possession, not access.

[7] The Applicant wants to protect quasi-possession. In *Abrahams*, the Court referred to applicants who were seeking to disregard the contractual position of the parties, and were asking the Court to assume that they might have no contractual rights at all to access a club's squash courts, but are nevertheless entitled to claim the benefits of membership. The mere fact that the applicants might or might not have had a right derived from a contract does not amount to possession to establish an entitlement to the *mandament van spolie*. The mere right to use property does not amount to possession.

[8] The Applicants contend that the facilities use agreement was an interim measure to maintain the status quo, and the Court erred in characterising the Applicants' possessory rights as contractual. The submission is surprising considering that the Applicants averred in the founding affidavit that the parties failed to reach an agreement with the Respondent over a new facilities agreement. The new agreement differed radically from the old agreement, and the Respondent refused to agree to a renewal of the old agreement. The issue between the parties was over the terms of the contract, not over any possession or quasi-possession. (para 26 FA).

[9] The Court has carefully considered the Applicant's grounds for leave to appeal. Section 17 raises the threshold for obtaining leave to appeal a Court's judgment. The Court is nevertheless persuaded that another Court would come to a different conclusion and that the issues relating to contracts and quasi-possession in the peculiar circumstances of the facts of this case are compelling reasons why the appeal should be heard.

ORDER

In the premises, the Court makes the following order:

1. The Applicants are granted leave to appeal the whole of the judgment to the Full Bench of this division.

BHOOPCHAND AJ
Acting judge
High Court
Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 20 June 2025

Applicant's Counsel: A Ferreira
Instructed by Boy Louw Inc

Respondent's Counsel: P van Eeden SC
Instructed by Marais Muller Hendricks Inc