

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/19114

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: ✓
18/03/2011	
DATE	SIGNATURE

In the matter between:

EASY GREEN ADVERTISING (PTY) LTD
t/a GREEN ADVERTISING

Applicant

and

EAGLE CANYON GOLF ESTATE

First Respondent

HOME OWNERS ASSOCIATION

Second Respondent

EAGLE INTERNATIONAL GOLF MANAGEMENT
(PTY) LTD

Third Respondent

J U D G M E N T

WEPENER, J:

[1] This is an application in which the applicant seeks to have certain sign boards restored to its possession or generally referred to as a spoliation application.

[2] The facts in the matter are common cause. The applicant entered into an agreement with the third respondent in terms of which it was permitted to erect and maintain advertising signs on the property over which the first respondent (a Home Owners Association) had control. The first respondent's rules prohibit the display of any advertisements on the property. Pursuant to the agreement the applicant erected two sign boards on the property and duly placed advertisements on them. The home owners objected thereto and removed the advertisements. This led to the applicant launching a spoliation application.

[3] Applicant's case is based on the fact that it a) had the written agreement which granted it the rights, b) it erected and maintained the sign boards and c) it derived revenue from the use of the sign boards from third parties who advertised on the boards.

[4] The issue to determine is whether the applicant had possession of the sign boards which possession would entitle it to spoliatory relief.

[5] Ms Millard, on behalf of the applicant, argued that the benefit i.e. the advertising revenue earned by the applicant in addition to the fact that it installed and maintained the sign board was sufficient to constitute its de facto possession of the sign boards. I do not agree. In *Yeko v Qana* 1973 (4) SA 735 (A) it was held that the very essence of the remedy against spoliation is that possession enjoyed by the parties who asks for the spoliation order must

be established. The possession which must be proved is not possession in the *juridical* sense, it may be enough if the holding by the appellant was within the intention of securing some benefit for himself.

[6] The requirement is clearly possession or "holding" as stated in the Yeko matter. The question remains what was the nature of the applicant's possession if any. Other than the erecting and maintaining of the sign boards and earning an income therefrom there are no facts to indicate that the applicant indeed had any possession of the sign boards.

[7] In the matter of Shoprite Checkers Limited v Pangbourne Properties Limited 1994 (1) SA 616 (W) Zulman J as he then was said at p 622 B – C "the mere fact that the applicant might or might not have a right derived from a contract which it entered into with the respondent, to make use of the parking area in question, including the parking bays to be found in a designated area, did not, in my view, amount to a "possession" as envisaged in the authorities, of such designated area for the purposes of establishing an entitlement to the mandament van spolie"

[8] In my view, for present purposes it is irrelevant that the contractual right that the applicant has is with the management and/or property owning company. Its right remains a contractual right and through the exercise of such contractual right it required neither physical nor any incident of such possession. In the matter of ATM Solutions v Olkru Handelaars cc 2009 (4) SA 337 (SCA) the facts were as follows: Olkru had concluded an agreement

with ATM Solutions in terms of which ATM Solutions was entitled to and did install and maintain two ATM machines on the property of Olkru. Olkru then removed the machines and allowed another party to install alternative machines. ATM Solutions' spoliation application failed since then the Supreme Court of Appeal held that after installation, ATM Solutions no longer exercise possession of the ATM machines and it merely had a contractual right to enforce specific performance of its agreement with Olkru which cannot be enforced under the guise of a spoliation application. At paragraph 2 of the judgment, Lewis JA held as follows:

"In reaching this decision the court considered itself bound by recent decisions of this court, in particular Telkom SA Ltd v Xsinet (Pty) Ltd (Xsinet); and FirstRand Ltd t/a Rand Merchant Bank v Scholtz NO and Others, which have held that in order for rights to qualify for protection through the grant of a spoliation order, they must be 'gebruiksregte' (rights to use property) or incidents of the possession or control of property. The purpose of spoliation orders, it is trite, is to stop people from taking the law into their own hands, and to preserve the peace, rather than to order specific performance of a contract."

At paragraph 7 – 10 it was held as follows:

"[7] It was not disputed that the ATM and the floor space where it stood were at all times in Olkru's possession and control, that only Olkru held the keys to the Kwikspar premises, and indeed the keys to the ATM itself; that Olkru controlled all access to the ATM; and that an employee of Olkru stocked the ATM with money, changed the paper rolls for receipts, and effectively operated the ATM. Access by ATM Solutions to the ATM was controlled by Olkru. The claim to actual possession of the ATM thus had to fail.

[8] However, ATM Solutions asserted in its replying affidavit that it 'physically, through the ATM device, occupied an identifiable portion of the premises', a proposition that was argued before the High Court and this court to mean that

ATM Solutions had 'quasi-possession' which would justify a spoliation order should it be precluded from exercising its right.

[9] The cases where quasi-possession has been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes or the purported exercise of servitudes - 'gebruiksregte') or an incident of the possession or control of the property. The law in this regard was recently succinctly stated in FirstRand Ltd v Scholtz where Malan AJA pointed out that a spoliation order -

'does not have a catch-all function to protect the quasi-possessio of all kinds of rights irrespective of their nature. In cases . . . where a purported servitude is concerned the mandament 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 characterized to establish whether its quasi possessio is deserving of protection by the mandament .

Mere personal rights, said Malan AJA, are not protected by the mandament. Thus only rights to use or occupy property, or incidents of occupation, will warrant a spoliation order.

[10] Counsel for ATM Solutions sought to persuade us that this matter is different from Xsinet and First Rand in both of which the ongoing performance of a contract (the first for the supply of telephone connectivity, and the second for water) was in issue. ATM Solutions, on the other hand, it was argued, had had not only a right to maintain their machine in place, but it had in fact already been installed and connected, and then removed. The physical state of presence and connectivity was changed through Olkru's conduct. Ongoing performance was not being claimed. I fail to see the distinction. ATM Solutions sought an order that its ATM be reinstalled and reconnected. That seems to me no different from claiming specific performance of a contract, as was the case in Xsinet and First Rand."

The SCA therefore recognised and reiterated that only instances of actual physical possession of property and the incidents arising from such physical

As appears from the above judgment incidents of possession are things that arise from your possession, such as water and electricity is an incident of possession of a dwelling. In the Xsinet case referred to in the above judgment, internet connectivity was not recognised as an incident of possession. In my view, the right to erect signboards and advertising rights, is similarly not an incident of possession

[9] In the circumstances the applicant has not shown actual physical possession exercised at the time when the alleged spoliation took place with the result that the application for spoliatory relief must fail with costs.



Judge W L Wepener
Judge of the High Court