REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **11999/2016**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

06 MARCH 2017
DATE

In the matter between:

ALEGRIA BODY CORPORATE Applicant

and

THE SPLICE RIVIERA BODY CORPORATE Respondent

JUDGMENT

MATOJANE J

[1] The applicant, in terms of its Notice of Motion, seeks a relief directing the respondent to forthwith re-activate the access tags held by the members, owners and/or residents of the applicant for purposes of entering and exiting the boom gates situated on the respondent's premises. The relief is that which is commonly referred to as a spoliation order.

[2] The respondent has opposed the application and contends that the applicant has not made of the case for the relief sought.

[3] The facts of the case are not in dispute.

[4] The applicant is the body corporate of a sectional title scheme known as Alegria and the respondent is a body corporate of sectional title scheme known as Splice. Both complexes are built on adjoining subdivisions of erf 28, Riviera. A servitude has been registered in favour of the applicant, which creates the passageway for access into the applicant's complex. The entrance to the applicant's complex can only be accessed through the use of the access gate on the respondent's complex, which has a security guard house that is manned on a 24-hour basis.

[5] Residents of the applicant gained access to the applicant's complex through the servitude area passing the respondent's complex by displaying an easily recognizable sticker to the security guard at the guardhouse at the entry point, without having to gain access by signing the security register.

[6] During September 2015 the respondent implemented security procedures for the monitoring and control of persons entering and exiting its access gate, as well as the servitude area, in order to secure its complex. The respondent invited the applicant to participate in an arrangement whereby the applicant's members and residents will be furnished with access tags to enter the respondent's entrance gate, without the need to sign the security register, for a monthly monetary contribution towards the security costs.

[7] The sticker access system was replaced with electronic access tags whereby a stand mechanism was set up at the respondent's entrance gate. In order

to be activated, the access tag is loaded with the relevant person's information and is recorded on the system. When the access tag is then presented at the stand mechanism in order to gain entry, the person's details are recorded on the system. In this manner, all persons entering and exiting the respondent's entrance gate are recorded on the system and can be monitored by the respondent.

[8] The access tags allowed the applicant's members/residents to gain access without having to sign the security register. Where a person does not have an access tag, the security guard at the entrance gate is required to record such person's details manually in the security register, before allowing entry for security purposes.

[9] Only the respondent could activate or deactivate the access tags, as only the respondent was in possession and control of all the software, source code and all intellectual property relating to the activation of the access tags. Neither the applicant's members nor its residents ever obtained or possessed any software or source codes or intellectual property relating to the activation or deactivation of the access tags.

[10] Subsequently a dispute arose between the parties in respect of payments associated with the new security system and the respondent caused the tags to be deactivated, with the result that the applicant's members no longer had access to and therefore use of the respondents security system. The applicant's members and residents were now required to sign the security register held by the security guards at the entrance gate to the respondent's complex to gain access to the applicant's complex.

[11] In its founding affidavit, the applicant states at paragraph 28:

"The applicant is advised, which advise it accepts to be true, that the conduct of the respondent by deactivating the access tags held by the residents of the applicant, as aforesaid amounts to an act of unlawful dispossession, otherwise known as a spoliation. This is so as there is no basis in law for the unilateral deactivation of the applicant's occupants' access to the property which the latter enjoyed until such deactivation."

[12] In paragraph 29 the applicant states:

"On the 4th day of March 2016, the legal representatives acting for and on behalf of the applicant duly sent a letter to the managing agent as well as to the chairman of the respondents' Body Corporate advising that the conduct as aforesaid amounts to an unlawful spoliation and called for the immediate reactivation of the access tags on an urgent basis."

[13] The applicant does not seek restoration of lost possession of any property (in the sense of the actual use of the servitude) or of a right of servitude, but access in the form of reactivation of access tags it has in its possession. 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.

[14] The requirement for obtaining the *mandament van spolie* order are when:

i) a person has been deprived unlawfully of the whole or part of his possession of movables or immovable; and

ii) a person has been deprived unlawfully of his quasi-possession of the movable or incorporeal immovable.[1]

[15] In *First Rand Ltd t/a Rand Merchant Bank and Another v Scholtz N O and Others*[2], Malan AJA pointed out that a spoliation order does not have a "catch-all

[1] See *Nino Bonino v De Lange* 1906 TS 120

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.*

[16] 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.

[17] The applicant does not allege that it was in peaceful and undisturbed possession of any particular subject matter relating to the activation of the access tags, of which it seeks restoration. It is common cause that the applicant, its members and residents have not been either denied or deprived possession of access to the applicant's complex. The applicant's complaint is that as a result of the deactivation of the access tags, its members and or residents as well as their family members will not be able to enter the complex as "residents" and will have to sign the security register held by the security guards at the entrance gate of the respondent's complex.

[18] The remedy is not concerned with the protection or restoration of rights at all. Its aim is to restore the factual possession of which the spoliatus has been unlawfully deprived[3]. The order sought by the applicant is essentially to compel specific performance of a disputed contractual right in order to solve a contractual dispute, which is not permissible under the possessory remedy.

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[2] 2008 (2) SA 503 (SCA)

[3] See *Zulu v Minister of Works Kwa-Zulu and Others* 1992 (1) SA 181 (D) at 187H - 188C

[19] In *Telkom SA Ltd v Xsinet Pty Ltd*[4], the use of bandwidth systems and telephone services at Xsinet's premises was not recognized as an incident of possession and control of premises and it was found that Xsinet was not entitled to a spoliation order. In my view, the right to possess an access tag in the present case, is similarly not an incident of possession and the applicant is not entitled to a spoliation order.

[20] The relief by way of the *mandament van spolie* is urgent by its nature. The applicant caused an inordinate delay in bringing this application and prosecuting same. On the applicant's version, the deactivation of the access tags occurred on 2 March 2016 and this application was launched as an ordinary application on 8 April 2016 a month after the alleged spoliation.

[21] 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.

The following order is made:

The application is dismissed with costs.

K E Matojane
Judge of the High Court
Gauteng Local Division, Johannesburg

APPEARANCES

PLAINTIFF: Adv. Saladino
Instructed by: Mobeen Moosa Attorneys

[4] (92/2002) [2003] ZASCA 35 (31 March 2003)

DEFENDANT:	Adv. De Oliveira
Instructed by:	Biccari Bollo Mariano Inc
HEARING DATE:	23 February 2017
JUDGMENT DATE:	06 March 2017