REPUBLIC OF SOUTH AFRICA

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

CASE NO: **44644/2017**

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

18-4-18

Date: **WHG VAN DER LINDE**

In the matter between:

Huawei Technologies South Africa (Pty) Limited **Applicant**

and

Redefine Properties Limited **Respondent**

Judgment: leave to appeal

Van der Linde, J:

Introduction

1. This is an application for leave to appeal against a judgment I gave on 7 December 2017. I will refer to the parties as they were before me, or by their abbreviated name, as appropriate. In the judgment I granted the applicant's (now respondent, or "Redefine") relief which was based on spoliation. The spoliation consisted in the respondent (now applicant, or "Huawei") closing six out of eight vehicular traffic lanes that lead into an office complex in which the applicant has its office block, among many other office blocks. The other office blocks belong to the respondent.

2. Four of the traffic lanes afforded access through the main entrance and four through the Kelvin Drive entrance. In October 2017 the respondent closed off the main entrance completely to the applicant, and closed off two of the lanes at the Kelvin Drive exit with palisade fencing.

3. It was common cause before me when I heard the application in the urgent court, and now too in the application for leave to appeal, that before the closure the applicant had enjoyed undisturbed access through the two entrances along those eight lanes *"for many years"*; and further that the closing of six out of eight lanes was sufficient to constitute deprivation of possession for purposes of spoliation. It was not necessary that all eight lanes needed to be closed off.

4. It was submitted by the respondent that another court may hold that I erred in the conclusion to which I came. The respondent accepted that the threshold is now, under s.17 of the Superior Courts Act 10 of 2013, no longer that there is a reasonable prospect that another court might come to a different conclusion; the test is now, at least under

s.17(1)(a)(i), that the applicant for leave must actually show that there is a measure of certainty that another court will come to a different conclusion.[1]

5. Specifically, it was submitted that I was too generous in characterizing the applicant's right which gave rise to its asserted quasi-possession. Reliance was placed on the judgment of Malan AJA (then) in Firstrand Ltd t/a Rand Merchant bank and Another v Scholtz NO and Others[2] for the proposition that quasi-possessio consists in the actual exercise of an alleged right; and thus that the applicant had not sufficiently characterized that alleged right.

6. There is also a substantive application by the applicant under the same case number for declaratory orders that my order is not final and not appealable; that if it were appealable under s.18(2), there was no prospect of success; that in any event the respondent has not shown that the existence of exceptional circumstances justify the suspension of my order; that if it were appealable under s.18(1), exceptional circumstances exist that propel the execution of my order pending an appeal; and that if I were to refuse leave to appeal, I should in any event declare the existence of exceptional circumstances so as to prevent the suspension of my order pending any subsequent application by the respondent to the Supreme Court of Appeal for leave.

7. Two further observations are relevant by way of background. The first is that I was told from the Bar that the respondent's application for declarations that it was, as a matter of law, entitled to close off the traffic lanes (spoliation apart), was ripe and has been enrolled for hearing on 15 May 2018 in this court. The second is that the respondent tendered from the Bar, unqualifiedly and with prejudice, that it would keep open the two lanes currently still open pending the determination by this court of the merits application of 15 May 2018.

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[1]The Mont Chevaux Trust v Tina Goosen, LCC case no LCC14R/2014 (3 November 2014), per Bertelsmann J, adopted by the full court in The Acting National Director of Public Prosecution v Democratic Alliance, unreported, GP case no 19577/09 (24 June 2016) at [25]. See further Erasmus, Superior Court Practice, 2nd ed, Van Loggerenberg, vol 1, pA2-55.

[2] 2008 (2) SA 503 (SCA) at [13].

8. I deal first with the application for leave to appeal and thereafter the application for declaratory relief.

Should leave to appeal be granted?

9. S.17(1) of the Superior Courts Act provides in relevant part:

> "***17. Leave to appeal***
>
> *(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*
>
> *(a)(i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

10. The reference to s.16(2)(a) is relevant. It provides:

> *"(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*
>
> *(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."*

11. Given the respondent's reliance on the judgment of Malan AJA[3] it is appropriate that I should quote from it:

> *"[13] 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.[10] In cases such as where a*

[3] And specifically [13].

purported servitude is concerned the mandement is obviously the appropriate remedy,[11] but not where contractual rights are in dispute[12] or specific performance of contractual obligations is claimed:[13] 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 mandement.[14] Kleyn[15] seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a name plate to a wall[16] regardless of whether the alleged right is real or personal.[17] That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandement.[18] The right held in quasi possessio must be a 'gebruiksreg' or an incident of the possession or control of the property."

12. It seems to me that the learned judge was saying that where the possession sought to be protected by spoliation relief consisted of the use and enjoyment of a right, it is necessary to characterise that right (not prove it), because only certain rights may be protected by the mandament. Rights that may be protected in this way, are known as *"gebruiksregte"*, such as *"a right of access through a gate."*

13. If the use and enjoyment of the right cannot be characterised as such a right (which I will freely translate as "use rights"), then its enforcement is a matter for contractual performance, and not capable of being protected by the mandament. The learned judge, as I pointed out, characterised a right of access through a gate as such a use right.

14. In my judgment at p3 lines 21 and following, I quoted the paragraphs in the founding affidavit that founded the applicant's claim. There the applicant claimed that it was exercising a right to enter and exit two sets of gates; in other words, the applicant's case was characterized squarely as "a right of access through a gate." I reasoned, with reference to Willowvale Estates CC and Another v Bryanmore Estates Ltd, 1990 (3) SA 954 (WLD), a judgment binding on me unless I could hold that it was clearly wrong, that Redefine's use of the Main and Kelvin Drive access points to reach its own building within the office block, represented actual, physical possession of the entrance and the roads leading from the entrance to the building, and as such was an adjunct to the possession of its building.

15. In this regard I relied on the ratio decidendi in Willowdale for the proposition that access through a gate to a road that leads to the possessor's property was sufficient possession to warrant protection by the mandament van spolie. No further definition or characterization was required; that would be to over-complicate matters (judgment, page 9, lines 12 and following, especially at page 11 up to line 19).

16. Other than to submit that I should have found that Redefine had failed sufficiently to identify the underlying right in respect of which it enjoyed and thus sought protection, Hauwei did not offer reasons for suggesting that such characterization as is apparent from my judgment, as I have just identified, is not already sufficient. I have thus not been persuaded that there is the required measure of certainty that another court will come to a different conclusion.

17. In these circumstances the application for leave to appeal must be refused.

The declaratory relief

18. That leaves Redefine's application for a declaration that if Huawei were now to apply to the Supreme Court of Appeal for leave to appeal, there are exceptional circumstances that justify the implementation of my order, wherever the onus lies in this regard.

19. It is necessary to quote s.18(1) & (2):

"18. Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal."

20. I believe that Huawei is correct in submitting that my judgment and order had final effect between the parties. It defined, finally, their respective rights in regard to the application and reach of the possessory remedy of mandament van spolie. That being so, s.18(1) bound Redefine, not Huawei, if it wished to avoid the automatic suspension of my judgment and order, to show the presence of exceptional circumstances.

21. As to the presence of exceptional circumstances, I pointed out earlier that the parties' respective rights to the access points have been defined for final determination in an opposed application which is ripe for hearing, and has been set down in this court on the 15th of next month. I alluded too to the fact that it was common cause in the main application that Redefine had enjoyed the access and possession it seeks to protect for *"many years."*

22. If the merits court finds for Huawei, leaving questions of appeal aside for now as being too speculative, then Redefine ought no longer be entitled to enjoy the access that had been its grant thus far. If the merits court finds for Redefine, Redefine no longer needs the possessory entitlement afforded by my order.

23. In short, it would be unjust if any order I made now pending a potential application to the Supreme Court of Appeal for leave to appeal my order of last year, were to have the effect of operating in parallel to, or in competition with, any order of the merits court.

24. In the circumstances it seems to me that the imminent merits application and judgment is, from the perspective of both parties and in the circumstances of this case, a special circumstance for the purposes of s.18(1) of the Superior Courts Act 10 of 2013.

25. Once that court has given its judgment, however, the special circumstance will have ceased to exist, and there will be no justifiable reason further to avoid the suspension of my order of last year pending the application for leave to appeal to the Supreme Court of Appeal.

26. In these circumstances I make the following orders on the two applications:

(a) The application for leave to appeal is refused with costs.

(b) An order is granted in terms of prayers 3.1, 3.2.3 and 4, of Redefine's the notice of motion dated 26 January 2018, provided that the order in terms of prayer 3.2.3 will not endure beyond the judgment and order of this court in the application between these parties set down for 15 May 2018.

WHG van der Linde

Judge, High Court

Johannesburg

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Date argued: 10 April, 2018.
Date of judgment: 18 April, 2018.