IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 2021/30408

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

19 July 2021.

DATE SIGNATURE

In the matter between

ATLAS TOWER (PTY)LTD **APPLICANT**

And

SHAIK PROPERTY LTD **RESPONDENT**

JUDGMENT

Siwendu J

[1] The applicant, Atlas Tower (Pty) Ltd (the applicant) provides telecommunications base stations, masts, antennas and other subservient telecommunications infrastructure to telecommunications companies. It launched this urgent application on 6 July 2021. The application was heard on the 9 July 2021.

[2] The applicant sought an order against the Respondent that: pending the outcome of the disputes between the parties pertaining to the cancellation of the lease

agreement, which is to be referred to AFS for arbitration within 15 (fifteen) days from the date of the court order, the court should order the Respondent:

(a) To grant the applicant (its agents, nominees, contractors, and subtenants (Telkom and Cell C) full and unrestricted access to the leased premises situated at Portion 1 of Erf 243, Corner of Griesel and Very Street, Beyerspark, Boksburg, Johannesburg

(b) To forthwith restore the Applicant's temporary power/ electricity connection, pending finalisation of the applicant's application for its own power supply connection.

[3] The Respondent, Shaik Property Holding (Pty) Ltd, is a private company which operates from Unit 14 Pomona Business Park, 57 Maple Street, Kempton Park, Gauteng. It is the owner of the property situated at the Corner of Griesel and Very Street, Beyerspark in Boksburg, being the premises, which are the subject of this urgent application.

[4] The Respondent opposed the relief sought on the grounds of a lack of urgency and on the legal basis that the relief the Applicant sought was not competent in law. I deal with this aspect later in the judgment.

[5] In addition, the Respondent challenged Mr Pretorius' authority to depose to and bring the application on behalf of the Applicant.

[6] The challenge to the authority of Mr Pretorius need not detain the court. It has been consistently held that a party seeking to challenge the authority to act must so do in terms of Rule 7 (1). In particular, the court in *Eskom v Soweto City Council*[1] held that it is a factual question whether a particular person holds a specific authority, and that risk is adequately managed by the Rule.

[7] The background to the application is that Applicant has amongst its clients, mobile network operators, Telkom and Cell C. The applicant leased a portion of the premises on the property to construct, affix and install telecommunications related infrastructure for us by its clients. Telkom and Cell C have installed their transmitters on the infrastructure offered by Applicant to enhance better network coverage for their respective customers in the area. The use of the premise by these mobile network

[1] *Eskom v Soweto City Council* 1992 (2) SA 703 (W)

operating companies is premised on sublease agreements concluded with the Applicant.

[8] The Applicant first acquired the right to use a portion of the property by way of a cession and an assignment it concluded with Sky Coverage (Pty) Ltd on or about 2016. On 25 February 2019, it entered into and concluded a direct leased agreement with the Respondent. The lease agreement endures for the duration of Eighty- 2019 Five (85) months with a provision for a further renewal period of one hundred and nineteen months (119).

[9] Clause 7 of the Lease Agreement grants to the Applicant the right to undisturbed use and enjoyment of the property "*according to the terms of the lease agreement"*. [emphasis added]

[10] In particular, Clause 10.1 of the Lease Agreement grants the Applicant access over the Respondent's property on a 24- hour basis any day of the week. The Clause reads as follows:

> "In the even that access by means of the road in terms of clause 10.2 is unavailable or in case of emergency and the Lessor shall not refuse, withhold and/ or prevent such access for any reason of whatsoever nature. The Lessor and Lessee hereby agree that the Lessee's right of access over the Property to the Premises is a material term of this Agreement, subject to prior notification (telephonic or written), which shall not be unreasonably withheld"

[11] It is common cause from the papers that within months of singing the lease agreement, late in January 2020, the Respondent notified the Applicant of a damage to roof of the property, contending that the Applicant had breached the terms of the lease agreement. In opposing the application, the Respondent complains that despite the notification late in January and before the declaration of the National State of Disaster and the National Lock Down, the Applicant failed to satisfactorily and meaningfully remedy the damage to the property even after an undertaking to do so.

[12] The details of the communication exchange between the parties is not essential for the scope of this Judgment, save to observe that the exchange concerning the damage to the property persisted through to July 2020 when the Respondent conveyed further details of the extent of the damage which purportedly occurred during

the Applicant's maintenance procedures. The Respondent claims that the Applicant accepted the responsibility for the damage in a letter dated 6 of July 2020 and undertook to engage contractors to remedy it.

[13] The Respondent agreed in its opposing papers that the Applicant attempted to remedy the damage but did so unsatisfactorily. On the other hand, the Applicant claims it remedied the breach and there had been no further breach notices.

[14] It is not disputed that despite the belief that it had remedied the breach, when the Applicant sought to install additional equipment for a new client RAIN, in October 2020, the Respondent denied it immediate access. However, the Applicant sought information from the Respondent's engineers about the proposed installation. The Applicant asserts that it considered the refusal a breach of the lease agreement and dispatched a notice to the respondent on 19 October 2020. Even though it claims there was a request for negotiations, it lost the business from RAIN.

[15] Other than to state that the matter was resolved *inter partes*, it is not disclosed in the papers how it was resolved. According to the Respondent, it continually called for the satisfactory repair of the damage to its property. For this it relies on WhatsApp communication exchanges in February 2021.

[16] On the other hand, the Applicant complains that on or about 10 and 11 May, and thereafter, on 15 June 2021 the respondent unilaterally revoked and refused to grant access. It claims on or about 10 June, the respondent unlawfully disconnected electricity supply to the premises rendering the telecommunications infrastructure inoperative, thus preventing Telkom and Cell- C from providing coverage. The consequence is that it is unable to fulfil its obligations to its subtenants, Telkom and Cell C, and now risks a cancellation of the sublease agreements.

[17] Lastly, the Applicant claims the Respondent had allowed it access until 10 June, when its request for access to conduct maintenance work was denied resulting in this application. It had not received prior notice about the cancellation until the email of June 2021 referring to the cancellation.

[18] The Respondent counters that its refusal to grant access is consistent with and is a continuation of its previous stance pertaining to the proposed installation on behalf of RAIN. It repeated the allegations about the breach of the lease agreement. Unlike

on the previous occasions involving RAIN, it elected to cancel the lease on 14 June 2020 based on the Applicant's failure to repair and remedy the breach satisfactorily.

[19] The thrust of the legal complaint by the Applicant is that the Respondent cancelled the lease unlawfully. In response to the cancellation, on 18 June 2021 it sought an undertaking from the Respondent that it must restore the undisturbed use and the electricity supply to the property immediately by the 22 June 2021. For this, it relies on Clause 14.4, contending that the Respondent is obliged to adhere to the terms of the lease agreement. It does not accept what it considers to be a repudiation of the lease agreement, and as already said, rejects that it was cancelled lawfully. It claims that the repudiation by the Respondent is inconsistent with the party's conduct. The respondent accepted the rental payments which negates the unlawful cancellation of the agreement.

[20] To buttress the order to restore the use of the property, the Applicant claims the respondent has taken the law into its own hands. Absent an arbitration award or a court order, the Respondent's conduct is unlawful. Therefore, the aim of the urgent application is to restore the *status quo ante* pending the outcome or resolution of the disputes about the validity of the cancellation of the lease and its rights to performance**.**

[21] I pause to mention that the foundation of the Applicant's *prima facie* rights as well as the balance of convenience is premised on the terms of the lease agreement. The applicant claims that Telkom and Cell C require that it rectifies any breach of its obligations in terms of the subleases within 30 days of the notice to do so. The period stated is not sufficient to resolve the dispute by arbitration. The irreparable harm it will suffer is that it faces substantial damages as well as reputational damage should Telkom and Cell C cancel the sublease agreements.

[22] Mr Marques argued that all the Applicant sought was to hold the Respondent to the contract pending arbitration proceedings challenging the cancellation. He argued that consistent with the founding affidavit, the Applicant does not accept the repudiation and, therefore, he seeks the performance of the terms of the contract. I understand this to be a specific performance of the contract.

[23] It is trite that a *mandament van spolie* is a remedy available in South African law to protect possession of property. The remedy results in the restoration of possession to persons who have been unlawfully dispossessed of their property. To

qualify for relief, the Applicant must prove that it was in peaceful and undisturbed possession of the property. Secondly, there must be an unlawful dispossession (or deprivation) by the spoliator, *in casu* the Respondent. Thirdly, a court should generally disregard the merits of the dispute when deciding whether the remedy should be granted.

[24] However, Ms Chowan (for the respondent), argued that the Applicant impermissibly seeks a *mandament van spolie* in order to restore the position and to enforce the lease agreement. She relied on the decision in *ATM Solutions (Pty) Ltd v Okru Handelaars CC and Another*[2]*.*

[25] At the hearing of the application, I had been of the view that Mr Marques (for the Applicant) established spoliation which entitled the Applicant to some relief. This preliminary view was exacerbated by the fact that Ms Chowan had not filed Heads of Argument to assist the court.

[26] On consideration, of the decision in the *ATM Solution (Pty) Ltd vs Okru Handelaar cc and Another,* which is binding on this Court, enjoins the court to consider the origin and the nature of the right the Applicant seeks to enforce. The court makes it clear that an Applicant is not entitled to a *mandament van spolie* where all it seeks is to enforce a contractual right.

[27] Confronted with the court's decision in *ATM Solution,* Mr Marques made an about turn. He disavowed the reliance on a *mandament van spolie* and sought to refashion the cause of action first relied in the founding affidavit on the basis that is not clear to the court. The change is inconsistent with his heads of argument. He had contended the Respondent effectively *"spoliated*" the Applicant and its case is *"akin to spoliation and should be treated as such.*" The change in the cause of action and departure does not assist the Applicant. On the strength of the authority above, the Applicant would not be entitled to relief.

[28] The second issue is that the genesis of the dispute between the parties about the repair to the property as well as the Respondent's complaints germinated in 2020. It seems they resurrected when it was denied access in October 2021 leading to it

[2] *ATM Solution (Pty) Ltd vs. Olkru Handerlaar cc and another* 2009 2 ALL SA 1 (SCA). Paragraph 13 and 14.

losing a potential client, RAIN. The applicant does not disclose how that disagreement was resolved. Furthermore, despite the assertion by the applicant that it disputes what it considers an unlawful cancellation of the lease agreement which occurred on 14 June, it allowed more than three weeks to lapse. It did not require a court order in order to refer the matter to arbitration. Yet by the time of the hearing, it had not taken the cudgels to do so.

[29] The Applicant is not entitled to relief both on account of a lack of urgency and on account that based on the argument, it denounced its earlier cause of action leaving the basis of its prima facie right and the application unclear to the court.

Accordingly, I make the following order:

1. The application is dismissed
2. The Applicant is ordered to pay the costs of the application.

T SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	9 July 2021
Date of judgment:	19 July 2021

Appearances:

Counsel for the Applicant:	Adv AAR Marques
Attorneys for the Applicant	VFV Attorneys
Counsel for the Respondents:	Adv Chowan
Attorneys for the Respondent	Ruarc Dhabi Pillay Attorneys