IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 89098/2014
DATE: 09 March 2016
In the matter between

MARCO GERAZOUNIS	**First Applicant**
GEKO STUDIOS (PTY) LIMITED	**Second Applicant**
MLG GROUP LIMITED	**Third Applicant**

And

IRENE KOKOSIOULI	**First Respondent**
PANAJOTIS APOSTOLIS KOKOSIOULI	**Second Respondent**
IRENE KOKOSIOULI N.O.	**Third Respondent**

J U D G M E N T

MALI AJ:

[1] This is an application for a *mandament van spo/ie* and an interim interdict in terms of which the applicants seek:

1.1 an order to have the second applicant restored to its former position prior to it being stripped of the tools of its trade so that it can again conduct business;

1.2 payment of a sum of R90 527.87 by the first respondent to the second applicant;

1.3 Interdictory relief to conduct the business of the second applicant without interruption pending the institution of further proceedings by the second applicant.

[2] The first applicant is a director of the second applicant ("the company" which was incorporated in terms of the Companies Act 2008. The third applicant is a company incorporated in the British Virgin Island and is a 50% Shareholder of the second applicant.

[3] The first respondent is an adult female businesswoman, residing at 8 C….. S…..., C….. L……, M…….

[4] The second respondent is an adult male residing at 8 C…… S……., C…….. L….., M…….. He is the husband of the first respondent.

[5] The third respondent is trini Valentina Kokosiouli, cited in her capacity as the trustee of the PI Industries Trust ("PI Industries"), registered with the Master of the High Court under trust number IT 1…… ('the trust").

[6] During June 2014, the third applicant, MLG Group Ltd, the third respondent and PI Industries entered into a shareholders' agreement in terms of which they were to become equal shareholders in the second applicant, previously known as Olicavista (Pty) Ltd.

[7] Each of the shareholders had to make a contribution to the second applicant. The

relevant terms of the agreement are as follows:

"2.*11 Within 30 (thirty) days after signature of this agreement:*

2.11.1 …

2.11.2 The First shareholder [PI Industries] shall subscribe by way of ceding, assigning and transferring to and in favour of the Company [Geko Studios] all rights, titles and interest in all patents, rights to inventions, copyright (including, but not limited to copyright in the programs known as 'Salon Management Studio' and all its additions, components, modules, sub components and sub modules) and related rights, trademarks, trade names and domain names, rights in designs, rights in computer software, database rights, rights in confidential information (including know-how) and any other intellectual property rights, in each case whether registered or unregistered and including all applications (or rights to apply), for and renewals or extensions of, such rights and all similar equivalent rights or forms of protections which subsist or will subsist now or in the future in any part of the world and Goodwill attaching to, associated with, or belonging to and its client list, contracts (known as pink slips), debtors book, investments and revenue comprising of monthly income of approximately R150 000 belonging to PI Industries Trust for 50% (Fifty Percent) shares in the capital of the Company

2.11.2.1 [PI Industries] agrees to do all such to do all such things and to take all such steps as may be required to give effect to the transfer of all rights, titles and interest in all intellectual Property including all patents, copyrights, Trademarks (whether register, in the process of being registered or not registered as the case may be) and the all Goodwill to the Company [the second applicant], and expressly agrees to:

2.11.2.1.1 cause to be delivered or made available to the Company all such additional documents as the Company may reasonably require to complete the transfer of the Intellectual Property and Goodwill into the name of the Company; and

2.11.2.1.2 do all such other things as may be reasonably necessary to give full effect to this Agreement.

2.11.3 The Second Shareholder [MLG] shall subscribe in cash for 50% (Fifty [0]Percent) shares in the capital of the Company at R2 500 000.00 (Two Million Five Hundred Thousand Rand) in the aggregate of which 50% of the above amount shall be apportioned to the cost of this subscription and 50% as a cash injection by [MLG].[n]

[8] The contemplated subscription of shares did not materialise. Instead, MLG and PI Industries bought shares in the shelf company. It is common cause between the parties that the second respondent had been conducting the business of rendering software services to spa and salon owners in the beauty industry through an entity called Salon Management Studios (Pty) Ltd ("Salon Management"). It is common cause that the software programme which Salon Management used to conduct

business was owned by PI Industries.

[9] One of the terms of the agreement was that PI Industries was going to cede the software to the second applicant. It was also agreed that the customers which had been serviced by Salon Management would all be transferred to the second applicant and that Salon Management would be wound up. The third applicant's role was to contribute R2.5 million to the second applicant. The third applicant paid a sum of R1 million as part payment into the second applicant.

[10] The second applicant commenced business using the intellectual property of PI Industries. However, shortly thereafter, a dispute arose between the first applicant and the first and second respondents. The first and second respondents resigned from the second applicant. The applicants could not use the intellectual property of PI Industries.

[11] The issue for determination is whether the applicants were despoiled and are entitled to an interim interdict restoring the *status quo* and enabling the first applicant to continue conducting business pending the trial which will determine the factual disputes between the parties.

SPOLIATION

[12] The requisites for a spoliation order are trite and may be summarised as follows:

12.1 that the applicant was in peaceful and undisturbed possession; and

12.2 that the respondent deprived him of the possession forcibly or wrongfully without his consent.

The above is supported by case law. See: Yeko v Qana 1973 (4) SA 735 at 739.

[13] The cause for the applicant's possession is irrelevant. The question whether that possession is wrongful or illegal is also irrelevant and goes to the merits of the

dispute. An applicant has to show not that he was entitled to be in possession but that he was in *de facto* possession at the time of being despoiled.

"It seems to me that the remedy provided by spoliation permits very limited defences. The only possible defences should be in the form of a response to the grounds stated above, namely the applicant was not in peaceful and undisturbed possession alternatively that the deprivation was lawful." **See Knox and Another v Second Lifestyle Properties (Pty) Ltd and another (CA 28/2011) [2012] ZAGPHC at 223.**

[14] In Solar Mounting Solutions (Pty) Ltd v Engala Africa (Pty) Ltd and Others (3717/2014), the following was stated:

75*I The mandament van spolie is a possessory remedy. The essential characteristic of a possessory remedy is that the legal process whereby the possession of a party is protected is kept strictly separated from the process whereby a party's right to the property, is determined. Spoliation orders are granted so as not to allow any man to take the law into his own hands. If he does so, the court will summarily restore the status quo ante as a preliminary step to any investigation into the merits of the dispute.*

See: Nino Bonino v De Lanae 1906 TS 120 at 122;

***Ivanov v North West Gambling Board** 2012 (6) SA 67 (SCA) at 75 B-E.*

[6] As such, the mandament van spolie is an extraordinary and robust remedy."

[15] In Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) SA 508 (A), It was stated:

*"An incorporeal right cannot be possessed in the ordinary sense of the word. The possession is represented by the actual exercise of the right Consequently refusal to allow a person to exercise the right will amount to a dispossession of the right In spoliation proceedings the applicant need not to prove that he has the right; what is relevant is whether or not he has exercised the right***"**

[16] The act of spoliation complained of *in casu* occurred during December 2014. According to the applicants, they, through the first applicant, had electronic access to the Company's database and other information mentioned below:

16.1 the administrative online log-in requirements, including user names and passwords where applicable, for all accounts used by the second applicant in the conduct of its business, with the following service providers: Infobip Africa (Pty) Limited, Hetzner (Pty) Limited, Hostgator.com LLC, Ozone Information Technology Solutions CC and cPanel Inc;

16.2 all online log-in details, including user names and passwords where

applicable, for every user-profile created by the respondents for the accounts referred to in paragraph 18.1 where

such user-profile was used for the conduct of the second applicants business;

16.3 All log-in details, including user names and passwords where applicable, for all SQL databases, Microsoft servers and licensing servers utilised by the second applicant in the conduct of the business;

16.4 the online administrative user name and password used for logging into the account at the Wordpress.com website where the second applicant's webpage was hosted;

16.5 all documents, files and paper removed by the respondents from the first applicant's office at the second applicant's premises;

16.6 all electronic files which were hosted on the electronic Dropbox folder utilised by the applicants' business as they stood on 28 November 2014;

& 16.7 all keys and access tags to the second applicant's office which may be in the possession or under the control of the respondents;

16.8 all license keys for any software or hardware utilised in the conduct of the second applicant's business, and

16.9 all and any property of whatsoever nature and kind belonging to the second applicant which is in the respondents' possession or under the respondent's control.

[17] The applicants further state that, when the relationship broke down between the parties, the respondents purported to reclaim the abovementioned materials and software which PI Industries was supposed to have ceded to the second applicant. The respondents, by purporting to reclaim the software, spoliated them as they were in peaceful and undisturbed possession of same. They further raise the issue of

mala tides on the part of the respondents because they failed to inform the applicants that there was no cession.

[18] The first respondent states that the applicants had access only to the folders hosted by Hetzner (Pty) Ltd and could be accessed through this particular server. The said server was accessed through the use of a user name and a password via KonsoleH. The second respondent was the only one who had possession of KonsoleH. The user name and

- password for accessing the software were never at any point furnished to the applicants.

[19] It was further submitted on behalf of the respondents that, during January 2015, Hetzner (Pty) Ltd blocked the second respondent from access to their servers and console. The said blocking of access resulted in the respondents being unable to log into any of the servers to access information stored, including the user names and passwords being sought in this application.

[20] The second respondent was the only person who could activate the programme in order to make it work and allow the customer the use thereof. This is because the second respondent was the only person who ever had possession of the intellectual property to generate the registration and serial numbers, which were necessary to activate the

0 programme, so that the customer could make use of them. The programme could not be activated without the said registration and serial numbers, which intellectual property remained with the second respondent exclusively.

[21] The first respondent further stated that, in good faith and in anticipation of the third applicant complying with its obligations in terms of the shareholder's agreement, the third respondent allowed the second applicant the use of its intellectual property.

However, it was only the second respondent who would have control of the programme and be able to conduct the second applicant's business.

[22] According to the second respondent, the source code, which constitutes the heart of the programme, was stored on a private folder and encrypted in such a way that access thereto could only be gained by the second respondent. At page 238 paragraph 40 of the respondents' answering affidavit, the respondents admit to the second applicant's submission but state the following:

"this property was never formally ceded as both th$ Second Respondent and I became increasingly suspicious of the on-going failure to invest the remaining R1 500 000.00.[m]

[23] The above statement by the respondents is irrelevant. The issue is whether the applicants were ever in possession of the login details, passwords and any other material allegedly despoiled.

[24] To the submissions made by the respondents, the applicants do not provide any clear explanation or evidence as to whether they indeed have access to the passwords, user names and login details. The applicants maintain that they had use of the intellectual property. According to them, how they accessed it is irrelevant. I do not think so; in the notice of motion the applicants are seeking passwords, login details etc. They do not dispute that they were not provided same; however, they want restoration of something they never possessed, contrary to the law of spoliation.

[25] The first applicant states in his affidavit that the second applicant made software available to customers for a fee. However, he does not address the respondents' submission that the exercise of control of the software was only through the second respondent. The possession is represented by the actual exercise of the right. See Zulu v Minister of Works KwaZulu Natali992 (1) SA 181 (N). The use of something is not an incident of possession. See Telkom SA Ltd v Xsnet(Pty) Ltd 2003 (5) SA 309 (SCA).

[26] By the applicants' own admission, once one is told the user name and password, it is known. It is a piece of information which can be used at will to obtain access. From the above, it is apparent they were never in possession of passwords and access to the programmes complained of. The applicants would not have been seeking any redress if they had been given passwords. They would have proceeded with the use of the said login details. The respondents admit to removing the electronic folder access which, according to them, is insignificant to the running of the business. The applicants could not gainsay the respondents' submissions. In my view, to order relief of no practical value is of no use.

[27] The other act of spoliation complained of is the allocation of R90 527.87 by the respondents. The said money, which was supposed to have been paid to the second applicant, was paid into the account of Salon Management on the first's respondent's instruction. By the applicants' own admission, the amount in question was never in the second applicant's possession. The applicants have failed to prove that they were in peaceful and undisturbed possession of the said monies.

[28] Having regard to the above, there is no evidence that the applicants were spoliated.

INTERIM INTERDICT

[29] The interim relief sought *in casu* is as follows:

29.1 an order interdicting the respondents from directly or indirectly taking any step or action to divert money owed by any person to the second applicant to any person or banking account other than the banking account of the second applicant;

29.2 an order interdicting the respondents from directly or indirectly soliciting the custom of any client serviced by the second applicant or previously serviced by Salon Management;

29.3 an order interdicting the respondents from directly or indirectly providing any

client serviced by the second applicant or previously serviced by Salon Management any of the services provided by the second applicant;

29.4 an order interdicting the respondents from directly or indirectly interfering with the operations of any software, or any component or database thereof, operated by the second applicant or provided by the second applicant to any customer or client;

29.5 an order interdicting the third respondent from taking any steps pursuant to the purported cancellation of the shareholders' agreement entered into between MLG and the PI Industries Trust; and

29.6 an order directing the third respondent to comply with its obligations in terms of the cession in favour of the third applicant

as contained in clause 2.11.2 of the shareholders' agreement entered into between the third applicant and the third respondent.

[30] The following requirements for an interim interdict are laid down:

*"the requirements for the granting of an interim interdict***;** *namely that the applicant must show*

(a) that the right which is the subject of the main action and which he or she seeks to protect by reason of the interim relief is only prima facie established though open to some doubt;

(b) that if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he or she ultimately succeeds in the establishing of his or her right;

(c) that the balance of convenience favours the granting of interim relief;

(d) that the applicant has no other satisfactory remedy "

See Erasmus *Superior Court Practice* at B1-330- B1-330A. The above is supported by the case law. See Ndauti v Kgami & Others 1948 (3) SA 27.

[31] The applicants' argument is that they have established a *prima facie* right and that there is apprehension of reasonable harm. This is because the applicants will not be in a position to pay any amount of damages as they depend on the amount of R60 000.00 per month drawn from the second applicant. There is also apprehension of the liquidation of the company as a result of the respondents' actions, which will lead to the

employees of the company losing jobs. The further basis for the applicants submission is that the shareholders' agreement between the parties gives rise to obligations of the first and second respondents. The said respondents no longer have any relationship with the second applicant. Thus, they cannot direct the manner of payment in respect of the second applicant. They are neither entitled to service the customers of the second applicant and have no right to interfere with the software.

[32] I am not persuaded by the above submissions. There are allegations by both parties about the fulfilment and or non-fulfilment of the shareholder's agreement. The said allegations cannot be decided on papers. The harm

apprehended by the applicants is reparable; there remains the right to damages. The right includes the right to institute a claim for payment of R90 527.87 by the respondents.

COUNTER APPLICATION

[33] The respondents seek a declaratory order that the shareholders' agreement is cancelled. From the submissions by both parties, I find that there are various disputes of facts which the respondents should have foreseen. As it stands the issue cannot be resolved on the papers.

ORDER

[34] In the result the following order shall issue:

34.1 The applicants' application is dismissed with costs;
34.2 The respondents' counter application is dismissed with costs.
NP MALI

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION

DATE HEARD ON: 15 **OCTOBER** 2015

DATE HANDED DOWN: 03 **MARCH** 2016 **APPEARANCES**

For the applicants: Adv M A Chohan SC

Instructed by: MacRobert Attorneys
For the respondents: Mr C Bollo (Attorney)
Instructed by: Biccari Bollo Mariano Inc