



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 739/07

ATM SOLUTIONS (PTY) LTD

Appellant

and

**OLKRU HANDELAARS CC
ABSA BANK LIMITED**

**1st Respondent
2nd Respondent**

Neutral citation: ATM Solutions (Pty) Ltd v Olkru Handelaars
CC(739/2007) [2008] ZASCA 153 (27 November
2008)

Coram: STREICHER, CLOETE, LEWIS, JAFTA and
PONNAN JJA

Heard: 14 November 2008
Delivered: 27 November 2008

Summary: Mandement van spolie not granted for the protection
or enforcement of a mere contractual right: appeal
against order of high court dismissed.

ORDER

On appeal from the High Court Cape Town (Griesel J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

LEWIS JA (Streicher, Cloete, Ponnann and Maya JJA concurring)

[1] This is an appeal against a judgment of the Cape High Court (Griesel J),¹ with its leave, refusing the grant of a mandament van spolie against the two respondents. The appellant, ATM Solutions (Pty) Ltd (ATM Solutions), supplies and instals automated teller machines (ATMs) at the premises of retailers. The first respondent, Olkru Handelaars CC (Olkru), runs a convenience store in Worcester known as Kwikspar Breedevallei (Kwikspar), in which ATM Solutions had installed an ATM in 2007. The second respondent, Absa Bank Ltd (Absa), also instals ATMs within stores and elsewhere. ATM Solutions brought an urgent application for a spoliation order against both respondents when Olkru had the ATM in the Kwikspar premises disconnected, and removed and placed in a storeroom. The claim against ABSA was brought on the basis that it was a co-spoliator, having facilitated immediate replacement of ATM Solutions' ATM in Kwikspar with its own.

¹ Now reported as *ATM Solutions (Pty) Ltd v Olkru Handelaars CC & another* 2008 (2) SA 345 (C).

[2] The high court refused the application for a spoliation order on the basis that ATM Solutions had nothing more than a contractual right to have its machine in place in Kwikspar and that the mandament is not the appropriate remedy for the enforcement of contractual rights. In reaching this decision the court considered itself bound by recent decisions of this court, in particular *Telkom SA Ltd v Xsinet (Pty) Ltd*² (*Xsinet*) and *First Rand Ltd t/a Rand Merchant Bank v Scholtz NO*³ 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.

[3] It is thus necessary to determine the nature of the right on which ATM Solutions relied in claiming spoliatory relief. ATM Solutions and Olkru had entered into a contract, a 'Site Location Agreement', in February 2007, in terms of which Olkru would provide floor space within the premises occupied by Kwikspar for an ATM supplied by ATM Solutions. The ATM was intended for use by Kwikspar's customers, and was installed in the store with wooden panelling around it, and was fixed to the floor with bolts.

[4] The agreement provided that ATM Solutions would 'use and occupy' the premises for the 'sole purpose of placing and operating' an ATM. The

² 2003 (5) SA 309 (SCA).

³ [2007] 1 All SA 436 (SCA); 2008 (2) SA 503.

ATM was placed at a 'mutually agreed location' and ATM Solutions undertook responsibility for the 'installation, operation and maintenance' of the ATM during the currency of the contract. Olkru was obliged to provide the electricity for the ATM, while ATM Solutions ensured connectivity to banks. Olkru, as the 'user', was not entitled to 'permit the removal' of the ATM from the premises, and granted ATM Solutions, and 'third party servicing agents' 'reasonable access to the ATM' during Olkru's 'normal hours of operation or, for purposes of servicing, during pre-opening and post-closing hours as are mutually agreed'. In the event of the ATM failing to operate, Olkru undertook to notify ATM Solutions within 24 hours; and ATM Solutions would 'have the right at any reasonable time during User's business hours to enter' the premises to inspect and repair the ATM .

[5] On 17 September 2007 Olkru, without the consent of ATM Solutions, disconnected the electricity supply to the ATM and moved the machine to a storeroom on the Kwikspar premises. Immediately afterwards an ATM belonging to Absa, and bearing its brand, was installed in the same space – hence the claim that the respondents were both guilty of spoliation. Although ATM Solutions initially claimed specific performance of the contract against ATM Solutions, in the alternative, it did not pursue this relief.

[6] The basis of the argument that ATM Solutions was entitled to a spoliation order was initially that the ATM occupied a specific mutually agreed part of the premises, that it would remain available for use by Kwikspar customers during normal business hours, and that ATM Solutions was entitled

to maintain and service the ATM. These allegations were meant, presumably, to establish that ATM Solutions actually had possession of the machine. Olkru's reply, however, showed that ATM Solutions had never had actual possession of the ATM within Kwikspar.

[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'⁴) or an incident of the possession or control of the property. The law in this regard

⁴ The classic cases on granting a spoliation order for the protection of the exercise or purported exercise of a servitude are *Nienaber v Stuckey* 1946 AD 1049 and *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A).

was recently succinctly stated in *First Rand Ltd v Scholtz*⁵ 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*.’⁶ 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.⁷

[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 re-installed and reconnected. That

⁵ Above, para 13.

⁶ Footnotes omitted.

⁷ See also *Xsinet* above para 14; cf *Impala Water Users Association v Lourens NO 2008 (2) SA 495 (SCA)*, reported first in [2004] 2 All SA 476, where the court considered that the rights to water in issue were not purely contractual in origin and that they were protected by the mandament.

seems to me no different from claiming specific performance of a contract, as was the case in *Xsinet* and *First Rand*.

[11] Counsel also relied on cases where the mandament has been granted to restore incidents of occupation of premises such as the supply of electricity or water by a lessor.⁸ Particular reliance was placed on *Shapiro v South African Savings and Credit Bank*⁹ where the court ordered the replacement of a nameplate on the wall of the entrance to the building in which Dr Shapiro hired premises. Shapiro had no control over the entrance, and the nameplate was not affixed to his premises but to another part of the building. Roper J held, however, that he was given the right, 'as part of his conditions of tenancy' to occupy the space covered by his nameplate.¹⁰ When the building was sold and the new owner removed the nameplate, Shapiro applied successfully for a spoliation order that the nameplate be restored. However, Roper J went on to say,¹¹ 'it seems to me that the applicant had a contractual right as against the respondent to have his nameplate upon that defined portion of the respondent's premises. I can see no reason why this right should not be capable of protection by a spoliatory order'.

[12] Counsel for ATM Solutions argue that the 'conditions of tenancy' referred to by Roper J were the source of the contractual right and that the right to have his nameplate at the entrance was not an incident of Shapiro's tenancy of another part of the building. I do not agree. The placing of a

⁸ See *Naidoo v Moodley* 1982 (4) SA 82 (T) and *Froman v Herbmere Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W).

⁹ 1949 (4) SA 985 (W), approved in several cases since, notably *Bon Quelle* above at 515C-E.

¹⁰ At 991.

¹¹ *Ibid.*

nameplate at the entrance to a building is part of the right of occupation of premises just as is the supply of electricity, water or other services provided by a lessor. The nameplate both indicates the presence of the lessee in the building and directs people to his premises. That Shapiro had no control over the entrance does not make it any less part of his 'conditions of tenancy'.

[13] In this case, too, the origin of the right to have the ATM in the Kwikspar premises is contractual. Counsel for ATM Solutions contend that we must distinguish between the origin of the right it seeks to protect – the contract – and the fact that the ATM was installed in the Kwikspar premises and connected to the Kwikspar electricity supply. I do not see the distinction. ATM Solutions did not occupy the premises, did not control the ATM and did not have access without the co-operation of Olkru. It did not control any part of the premises through the presence and connection of the ATM.

[14] Indeed, counsel for Olkru contended that ATM Solutions had 'relinquished control' of the ATM. That, argue counsel for ATM Solutions, is not the point. They may have relinquished control of the machine, but they did not relinquish their right to have the machine present and connected in the Kwikspar premises. But that right is in my view purely contractual. The presence of the machine in Kwikspar and its connection to Kwikspar's electricity supply were nothing more than consequences of the contract, and not incidents of actual possession or occupation. See in this regard *First*

Rand,¹² and *Wille's Principles of South African Law* 9 ed (2007) (general editor Francois du Bois) where C G van der Merwe and Anne Pope state:¹³

'Protection for non-servituted rights appears to be confined to those rights that flow from or are incidental to possession of corporeal property. . . . Where the non-servituted right of use is separate from applicant's possession of corporeal property it is almost inevitably a contractual right which is not protected by the mandament van spolie.'

[15] Thus in my view the relief ATM Solutions sought in the high court – reinstallation and reconnection of its ATM in the Kwikspar premises – amounted to no more than an order for specific performance of the contract. In the circumstances the high court correctly dismissed the application for a spoliation order. The application against Absa accordingly also had to fail.

[16] The appeal is dismissed with costs.

C H Lewis
Judge of Appeal

¹² Para 14.

¹³ Pages 458-459.

Appearances:

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