Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE No: 3172/2008

In the matter between:

CHOPPER WORX (PTY) LTD	**First Applicant**
PENINSULA EXECUTIVE HELICOPTERS (PTY) LTD	**Second Applicant**

and

WRC CONSULTATION SERVICES (PTY) LTD	**Respondent**

JUDGMENT DELIVERED : 17 MARCH 2008

MOOSA, J:

Introduction

[1] This is the return day for the confirmation of the rule nisi and interim interdict granted by **Waglay J** on 21 February 200 in an *ex parte* application for *mandament van spolie*. Applicants alleged in their

founding papers that they were in the peaceful and undisturbed possession of a Robinson R44 helicopter with registration number ZS-HAG. They further alleged that, on 16 February 2008, respondent's representative, one Enzo Kuun (Kuun), removed the helicopter from their possession, wrongfully and unlawfully and thus committed *mandamant van spolie*.

The Defences

[2] The respondent resisted the application on a number of grounds. They comprised both technical and substantive grounds. The technical grounds were firstly, that the applicants had no *locus standi* to bring the application and secondly, that the form in which the application was initiated, is irregular in that the application was brought *ex parte* and without notice to the respondent. During the course of argument, counsel for respondent indicated that he is not persisting with the first technical ground. With regard to the second technical ground, the respondent did not dispute the urgency of the application or the grounds advanced by applicants for such urgency. It, however, contended that the applicants had failed to advance reasons why the application was of such extreme urgency that justified them dispensing with the giving of notice. I will deal firstly with that proposition.

The *Ex Parte* Application

[3] It is customary to bring a spoliation application *ex parte,* but applicants do so at their peril. *Ex parte* applications are usually accompanied by a rule nisi to give the respondent an opportunity to show cause why the rule nisi should not be confirmed. The rules of court do not expressly provide for the granting of a rule nisi, but such practice is firmly embedded in our procedural law, particularly where notice has been dispensed with due to certain circumstances. In this regard the *dictum* of *Corbett JA*, (as he then was) in **Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission** 1982 (3) SA 654 (A) at 674 is apposite and reads:

> "The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, ***prima facie****, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons."*

[4] *In casu*, applicants not only made out a case for urgency as conceded by respondent, but also sought an interim interdict to protect their immediate interests. In addition thereto, they showed, *prima facie*, that their rights have been infringed and that they would suffer loss and prejudice if they are not granted immediate relief. My brother, **Waglay J**, who granted the *ex parte* order, exercised a discretion in that respect and I have no reason to interfere with the exercise of such discretion.

[5] Counsel for respondent secondly submitted that applicants had failed to take the court into its confidence by not placing before it, in its *ex parte* applications, material facts which could have influenced the court in its decision whether or not to grant the application. In this regard he submitted that applicants were aware of the substantive defences of respondent and should have disclosed such information in its papers. It is a trite principle of our law that good faith is a *sine qua non* in an *ex parte* application.

[6] In its papers the respondent raised two defences to defeat the claim for *mandament van spolie*. The first, was that the applicants consented to the removal of the helicopter and the second was that restoration is impossible because possession of the helicopter was *bona fide* transferred to a third party. In my view, applicants placed all the material

facts, which were at their disposal, before the court when it sought the *ex parte* spoliation order. It annexed to their papers, all the correspondence that passed between applicants and respondent immediately after respondent took possession of the helicopter. In such correspondence respondent did not state firstly, that it had the necessary consent to remove the helicopter permanently from the possession of applicants or secondly, that it was impossible for it to restore possession of the helicopter to applicants as it had transferred possession of the helicopter to Base Four Aviation (Edms) Bpk (Base Four). I am satisfied that, when applicants approached the court for an *ex parte* order, they were not aware that respondent would raise these defences. They were raised for the first time in its opposing papers. The respondent's contention, that applicants had failed to place the substantive defences of respondent before **Waglay, J**, is accordingly without substance.

The Undertaking

[7] The third allegation that applicants' attorney undertook to give notice to respondent's attorney should the court be approached, is also without foundation. In support of such contention, respondent annexed to his affidavit, its attorney's contemporaneous notes relating to a telephonic conversation between him and applicants' attorney, and which was confirmed by Mr Truter, the respondent's attorney. The relevant portion

of the cryptic note reads: *"Ek vra kennis as wel aansoek bring. Hy meld op pad na Counsel".* This is consistent with the version of applicants' attorney, Mr Van der Hoven*: "Ek het nie onderneem om enigsins kennis te gee van die aansoek nie an slegs gesê dat ek op pad is na die advokaat en sal instruksies neem…".* The version of respondent with regard to such undertaking is, in my view, inherently improbable and is accordingly rejected.

Findings on Points *in limine*

[8] Respondent's contention firstly, that the manner in which the application was brought amounted to an abuse of the court's process as no facts were placed before it to justify an *ex parte* order and secondly, that the possible defences of respondent were not placed before it, is not tenable. I accordingly conclude that the points raised *in limine*, for reasons given, are without merit.

The Law

[9] Before I turn to discuss the substantive defences raised by respondent to applicants' application for *mandament van spolie*, it is appropriate, at this stage, to set out the law. The law is succinctly summarised in a passage of the case **Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd (In Vol Liq)** 1948 (1) SA 91 (W) at 98-99 as follows:

"Two factors are requisite to found a claim for an order for restitution of possession on an allegation of spoliation. The first is that applicant was in possession and the second, that he has been wrongfully deprived of that possession and against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before an order should be granted. (See ***Rieseberg v Rieseberg*** *(1926, WLD 59, at 65).) It must be shown that the applicant had had free and undisturbed possession (**Hall v Pitsoane** (1911, TPD 853).) When it is shown that there was such possession, which is possession in physical fact and not in the juridical sense, and there has been such deprivation, the applicant has a right to be restored in possession **ante omnia**. On a claim for such restoration it is not a valid defence to set up a claim on the merits."*

[10] The *dictum* of *Innes CJ* in the case of **Nino Bonino v De Lange** 1906 TS 120, sets out the principles at 122 as follows:

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or

immovable. If he does so, the Court will summarily restore the status ***quo ante****, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute."*

The question of onus has been set out in **Yeko v Qana** 1973 (4) SA 735 (A) at 739E as follows:

"In order to obtain a spoliation order the onus is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession."

[11] *Erasmus* on **Superior Court Practice** at E9-10 says:

"When an applicant seeks a spoliation order, it is not sufficient for him to make out merely a ***prima facie*** *case for the order, he must 'prove the facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in his possession , and that they were removed from his possession forcibly or wrongfully or against his consent'."*

[12] Where a final order is sought in an application and there are disputes of fact on the papers, then the matter can be resolved on the facts stated by respondent together with the admitted facts in the applicants' affidavits.

(**Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd** 1982 (1) SA 398 (A) at 430-431; **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634.) In the first paragraph of the Headnote in the case of **Nienaber v Stuckey**, 1946 AD 1049, the test is set out as follows:

> "Where the applicant asks for a spoliation order he must make out not only a ***prima facie*** *case, but must satisfy the Court on the admitted or undisputed facts, by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in the application."*

The Facts

[13] I now turn to the facts of this case. It is common cause that applicants, at the time of the alleged spoliation, were in possession of the helicopter in terms of a Lease Agreement between respondent and applicants dated 12 December 2007 (the Lease). It is also common cause that the helicopter was removed from their possession by the respondent. The respondent alleges that it had the consent of the applicants to remove the helicopter, but should the court find that no such consent existed, then it is impossible for respondent to restore possession of the helicopter to applicants as it had transferred possession thereof, *bona fide,* to a third party before it became aware of this application.

[14] I will first deal with the question of consent. It is common cause that on 16 February 2008, Kuun, the director and shareholder of respondent, approached Victor Rottcher (Rottcher), a pilot and an employee of applicants, and informed him that he wanted to take the helicopter for a test flight and would return the helicopter thereafter. Kuun flew the

helicopter to the premises of Base Four at the Cape Town International airport. Kuun later 'phoned Rottcher and informed him that he would return the helicopter the following morning, that is, 17 February 2008, as the wind was too strong to fly the helicopter back the same day. The following day respondent, instead of returning the helicopter, delivered a letter to applicants in terms of which it cancelled the Lease, demanded the immediate return of the helicopter and said it will take control of the helicopter. It is common cause that the helicopter was never returned to applicants.

Evaluation

[15] Applicants contended that respondent obtained possession of the helicopter under the false pretences that it wanted to take the helicopter for a test flight. Respondent conceded that the consent to remove the helicopter from applicants' possession was not expressly asked for and not expressly given. However, respondent submitted that such consent was tacitly given. I will accept in respondent's favour, without making a formal finding that applicants acquiesced or consented in giving the helicopter to respondent for the purpose of taking it on a test flight. The next question the court has to answer, was such acquiescence or consent obtained by false pretences in order to deprive applicants permanently of possession of the helicopter? Counsel for respondent

conceded that should the court find that such acquiescence or consent was obtained under false pretences, then the dispossession would be wrongful. I will now examine that proposition.

[16] In **Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director,Department of Education and Culture Services and Others** 1996 (4) SA 231 (C) at 240B-C the court said:

> "The element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force or by threat of force or by stealth, deceit or theft…"

[17] It is common cause that the Lease provides that the applicants *"shall at all reasonable times, allow the Lessor* (respondent) *his (sic) representative reasonable facilities for inspecting the Helicopter whilst being operated by the Lessee".* The Lease does not provide for the respondent to take the helicopter for a test flight. Applicants contend that

neither respondent nor Kuun are qualified Aircraft Maintenance Operators (AMO's) to carry out inspections. Clause 14 of the Lease provides that the respondent shall have preferential use of the helicopter during the duration of the lease under certain circumstances, but it is subject to respondent giving the applicants 24 hours notice of its intention to use the helicopter. No such notice was given and it is clear that respondents did not exercise its rights in terms of clause 14 of the Lease.

[18] Kuun undertook to return the helicopter the same day after the alleged test flight, but it is common cause that it was not returned. The reason given was that the wind was too strong that particular day and the helicopter would be returned the next morning. This undertaking was given by Kuun despite the fact that he had knowledge that there was a play with the main mast. It is clear that at that stage he did not regard the problem as serious enough either, not to return the helicopter the next morning to applicants, or to send it for repairs.

[19] The helicopter was then parked overnight at the premises of Base Four who usually rendered maintenance and repair services to the helicopters of respondent. According to Kuun, he thought about the matter overnight and the following morning decided to ground the helicopter because of the play in the main mast and hand over the helicopter to Base Four for purpose of repairs. This was in direct contrast to the undertaking he gave to return the helicopter the following morning. If we accept that the helicopter required repairs, as Kuun alleges, and there was no ulterior motives, one would have expected him to inform applicants accordingly.

In other words, he should have informed them that he had taken the helicopter on a test flight, found certain problems and before the helicopter can take to the air, it requires certain repairs that he had asked Base Four to do. Because of the contractual relationship between the parties, this would have been a *bona fide* and reasonable approach. It is common cause that this did not transpire, but what followed were the alleged cancellation of the Lease and the repossession of the helicopter.

[20] There is some ambivalence on the part of the respondent as to the exact reason for the cancellation of the Lease. Clause 21 of the Lease provides that the respondent is entitled to terminate the lease with immediate effect if (a) any payment is not effected timeously; (b) if the insurance of the helicopter is cancelled and (c) if the applicants commit any act whereby respondent's rights are in jeopardy. On respondent's own version there appears firstly, to be a dispute with regard to the payment of the rental; secondly, the insurance was not cancelled, but an endorsement was effected removing the name of second applicant from the policy at the instance of respondent *post ex facto* and thirdly, respondent failed to establish that applicants committed any act which would jeopardise the rights of respondent. For the purpose of this case, it is not necessary to go into the merits of the case, but I am of the view that the reasons given for the cancellation is not only tenuous, but

appears to have been contrived to *post ex facto* justify and reinforce the illicit conduct of respondent in unlawfully depriving applicants of possession of the helicopter.

[21] I am satisfied that, on the admitted facts, respondent obtained possession of the helicopter from the applicants under false pretences. By its conduct, respondent wrongly and without consent deprived applicants of the possession of the helicopter that was lawfully in their possession at the time the spoliation was committed. The subsequent conduct of respondent, in cancelling the Lease and taking control of the helicopter, was aimed to cover up its illegitimate conduct. I accordingly find that respondent committed *mandamant of spolie* against applicants.

Restoration of Possession Impossible

[22] I now turn to the second defence raised by the respondent. Respondent alleges that the possession of the helicopter has been transferred to Base Four for repairs. As it has a right of retention for such repairs, restoration of possession to applicants has become impossible. In **Administrator, Cape and Another v Ntshwaqela & Others** 1990 (1) SA 705 (A) at 720G-H, the court said:

> "In the context of the ***Mandamant van spolie****, impossibility*

is a question of fact, and when it is contended that an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts."

[23] On the facts of this case, the defence is legally untenable. The right of retention only endures while such right is exercised by Base Four and the repair costs remain unpaid. There is a legal duty on respondent to pay for the costs of such repairs as it contracted with Base Four to affect the necessary repairs. Nothing, however, prevents applicants from paying such amount and obtaining the termination of the *lien* over the helicopter. Applicants may then have right of recourse against respondent, depending on which party is responsible for such repairs in terms of the Lease.

[24] In terms of the provisional order, possession of the helicopter has been restored to applicants subject, however, to the right of retention in favour of Base Four. The helicopter has not been alienated by respondent to Base Four. In that event the defence of respondent in this regard may have been good. Counsel for respondent submitted that where a third party has acquired possession of the thing spoliated in a *bona fide* manner, a *mandament van spolie* cannot be granted. In support of this

submission, he relied on the case of **Bank van die Oranje Vrystaat v Rossouw** 1984 (2) 644 (C). That case is distinguishable from this case on the facts and in fact lends support for the case of applicants in that they could obtain possession of the helicopter by paying Base Four. In that case the Bank had obtained possession of a vehicle after paying and obtaining the release of the vehicle from the panel beater who had the right of retention. The vehicle was subsequently sold by the Bank in good faith to the third party. In the present case the helicopter has not been alienated in good faith to a third party. This is a fundamental difference between the facts in that case and the facts under consideration. The same applies to the facts of **Jivan v National Housing Commission** 1977 (3) SA 890 (W) at 894G-H, which is likewise distinguishable from the facts in this case.

Final Relief

[25] In this matter legal possession of the helicopter was restored by the Sheriff to the applicants on 22 February 2008 in terms of the interim order. Once the *lien* in favour of Base Four has been discharged, factual possession of the helicopter will be vested in applicants. In the circumstance it is not necessary for me to decide the question of whether respondent was allowed to come into possession of the helicopter in bad faith. I am satisfied that applicants have made out a case for final relief

on the papers. In the circumstances the rule nisi is confirmed save and except for Clause 2.5 of the rule nisi and the final order is granted with costs. To give effect to the interim and final order of this court, Base Four is required to give possession of the helicopter to applicants as soon as its *lien,* if any, in respect thereof expires.

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