**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE HIGH COURT, CAPE TOWN**

**CASE NO: 3719/2010**

In the matter between:

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| **Pavilion Conference Centre (Pty) Ltd** | **Applicant** |
| **and** | |
| **BMW (SA) (PTY) LIMITED** | **Respondent** |

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**JUDGMENT: THURSDAY 18 MARCH 2010**

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**Riley, AJ:**

[1] The applicant applies as a matter of urgency for the following relief:

> *"(a) directing respondents to restore to applicant possession of assets to and use of the premises at the BMW Pavilion comprising the theatre (previously used as the Imax Theatre) foyer and entrance staircase thereto, projection room and storage facility ("the theatre"), heretofore enjoyed by applicant, ante omnia."*

[2] Applicant conducts business as a conference centre provider from various premises in the BMW Pavilion which are leased from the respondents. It is applicant's case that there are separate leases covering two separate areas of the BMW Pavilion namely:

(1) the theatre premises which is let by the applicant from the respondent in terms of verbal lease allegedly concluded between the parties on 5th February 2009, ("the theatre lease")

(2) certain office and conference premises in the BMW Pavilion which are let by respondent to applicant in terms of a written lease executed in December 2003. ("the office lease").

[3] Applicant previously had a written lease of the premises with respondent but this lease terminated in 2008. The parties have however been engaged in a dispute about whether or not applicant had exercised a valid right of renewal of this lease. Respondent disputed this.

[4] Respondent then entered into a lease agreement of the theatre with a third party, Experience Theatre ("ET") ("the ET lease") which lease commenced on 1 September 2009.

[5] On 17 February 2010, respondent gave the instructions for the lock on the theatre door to be changed and thus prevented applicant from gaining access thereto.

[6] The applicant contended *inter alia* in its founding affidavit that:

(a) Respondent's unlawful action in dispossessing it of possession and access to and use of the theatre by changing the locks thereto severely disrupted the hosting by applicant of an event by Growpoint in aid of Growsmart; a literacy

initiative for disadvantaged and rural schools;

(b) That applicant was forced to make emergency arrangements to host the event in the foyer outside the actual venue which had been booked and paid for by the client;

(c) That as a result of respondent's actions applicant has suffered financial loss and harm to its reputation as a reliable and professional operation;

(d) Applicant was put to significant expense in securing the alternative venue and ensuring its suitability for the function;

(e) Applicant has had consistent and regular access to and use of the theatre since March 2003 including the period since the termination of the lease between respondent and ET.

(f) Applicant had been using the theatre for actual conference purposes on average some 60 (sixty) days per year.

(g) Applicant also accessed the theatre for the purposes of marketing, cleaning and preparation for conferences;

(h) Neither respondent, nor any other party other than applicant has once made actual use of the theatre since June 2006.

(i) That up until the locks had been changed applicant continued to possess and exercise rights of access and use to the premises.

See applicant's founding affidavit record pages 11-12.

[7] The main basis upon which relief is sought by the applicant is upon the basis of the mandament van spolie.

[8] In order to succeed the applicant must prove that:

(1) Applicant was in possession or *quasi* possession;

(2) The respondent illegally deprived the applicant of such possession or *quasi* possession.

See in this regard Silverberg and Schoeman: The Law of Property (4th Edition) Butterworths p. 269

[9] In Shoprite Checkers Ltd v Pangbourne Properties Ltd 1994 (1) SA 616 (W) the court in dealing with the requirement of what constitutes possession for the purposes of the mandament van spolie held at page 619 F to 621 A that:

*"It is trite that the purpose of the mandament van spolie is to protect possession without having first to embark upon an enquiry, for example, into the question of the ownership of the person dispossessed. Possession is an important juristic fact because it has legal consequences, one of which is that the party dispossessed is afforded the remedy of the mandament van spolie. In addition, other remedies, such as an interdict or a possessory*

*action, also afford protection (see, for example, Joubert (ed) Law of South Africa vol 27 para 54 at 51.2). As pointed out by Van Blerk JA in Yeko v Qana 1973 (4) SA 735 (A) at 739D-H, the very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established:*

> *'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 ... All that the spoliatus has to prove is possession of the kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'*

*All of this is of course based upon the fundamental principle that no man is allowed to take the law into his own hands and no one is permitted to dispossess another forcibly or wrongfully and against his consent 'of the possession of property, whether movable or immovable' and that 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' (see, for example, Nino Bonino v De Lange 1906 TS 120 at 122.). In Nienaber v Stuckey 1946 AD 1049 at 1056 it was held that "the possession of incorporeal rights is protected against spoliation." The mandament van spolie is concerned with the protection or restoration of rights at all. Its aim is to restore the factual possession of what the spoliatus has been deprived."*

***and further***

*It is also apparent from the various authorities to which I was referred by counsel for the*

*parties that exclusive possession is not a requirement of the mandament. Possession is sufficient, provided that the possessor derives a benefit from such possession. Restoration is also granted in terms of the mandament where possession is incidental to the use of the property."*

*The elements of possession are well summarised in Law of South Africa (supra para 56 at 53-4) as follows:*

> *'56. It is trite law that possession consists of both an objective and a subjective element, namely the objective of physical element (corpus, dententio) and the subjective or mental element (animus).*
>
> *'Literally, a possessor must control the article with both the body and the mind. The physical element consists in the factual control exercised over the article. The mental element concerns the state of mind of the possessor. Whereas a minimum of factual control is required for all classes of possession, the content of the state of mind required for possession differs, according to the functions served by the possession in the particular case.'*

*As further pointed out in para 57 of Law of South Africa, the objective element of possession consists in effective –*

> *'Physical control or custody of the thing in a person's possession. The measure of control required is a question of degree and differs according to the circumstances of each case.'*

[10] The main thrust of the respondent's defence is that applicant was not in possession of the property or that it had a right of access thereto. The respondent emphatically denied that applicant was at any time in possession or occupation of the theatre premises. See: page 84 and 103 of the record.

[11] In my view the essential question which arises for consideration in this matter is whether upon the facts and based on the well known principles set out in the authorities above, it can be said that the applicant was in possession (or *quasi* possession) of the premises.

[12] Mr. Kantor contended that all that was required from the applicant was that it should show that it was in *de facto* possession. He argued that applicant did not have to show that it was entitled to be in possession. Accordingly he argued that the cause or lawfulness of the possession is irrelevant.

[13] Mr. Swart for the respondent contended that applicant's rights to possession arose from the written lease which terminated on 28 February 2009. He averred that there is no allegation in the founding affidavit that the applicant after the termination of the lease agreement on 28 February 2009 had the intention to remain in possession of the theatre premises on a continuous basis. In any event, he argued that applicant lacked the element of factual possession after 28 February 2009.

[14] According to him the applicant's alleged right to possession is clearly contractual in terms of an alleged contract which does not give applicant a right to continuous possession,

but rather a right to take possession of the theatre premises on specific dates from 05h00 to approximately 18h00 but only if an agreement for the use and occupation of the theatre premises on that day has first been concluded.

[15] In considering the law in relation to the requirement of possession in this case, I am guided by the approach of the courts in the following cases:
Nienaber v Stuckey (*supra*); Willowvale Estates CC and Another v Bryanmore Estates Ltd 1990 (3) SA 954; Bennet Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) ECD 230.

[16] In Nienaber v Stuckey *supra* Greenberg JA held at 1056 that –

> *"...I can see no reason why relief should not be available merely because the person who has been despoiled does not hold exclusive possession ..."*

[17] In Willowvale Estates CC and Another v Bryanmore Estates Ltd (supra), the court was confronted with the following facts as is summarised in the headnote of the judgment:

> *"the first applicant, which had owned land adjacent to the respondent's property since 1981, and whose members, tenants (the second applicant), servants and invitees had, since then, used the gravel road across the respondent's land to gain access to the applicant's land, brought an urgent application for a mandament van spolie because the respondent had erected and locked gates across the road, thus barring access to the property. The*

*respondent admitted having erected and locked the gates, undertook to leave the gates unlocked only until the application had been finalised, and counterclaimed for a declaration that the applicants had no right of way across its land."*

[18] The court held that exclusive possession of a route or road was not a necessary pre-requisite to the right to claim a spoliation order. The court held further that according to the authorities the right or title to the use of the route or road in question was not relevant.

[19] In Bennet Pringle (Pty) Ltd v Adelaide Municipality Addleson J held at page 233

*"In terms of all the authorities cited, the "possession" in order to be protected by a spoliatory remedy, must still consist of the animus – the "intention of securing some benefit to" the possessor and of detention namely the "holding" itself. From the consideration of the cases referred to above, it seems to me to be clear that both these elements, and especially the detention, will be held to exist despite the fact that the claimant may not possess the whole property or may not possess it continuously. If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is –*

*'(a) making physical use of property to the extent that he derives a benefit from such use;*

*(b) intends by such use to secure that benefit to himself; and*

*(c) is deprived of such use and benefit by a third person.'*

*Such a definition may obviously be incomplete but it seems to me to comprise the essentials*

*derived from the authorities referred to, which are necessary to inclusion in this case and which were relied on by M. Howie, for the applicant and at p. 236 H .*

*"Even accepting that the applicant may have exercised very little physical control of the premises and was only intermittently physically on the premises, the fact remains that such control as existed was handed over to the applicant and later resumed by the respondent. The applicant was leased the use and enjoyment of the premises"*

***and at p. 237 B***

*"It seems to me that the question of "possession" is one of degree. Where what is encompassed by possession (in this case the right to run the abattoir) requires little in the way of positive physical activity by the possessor, the person who gave him such right and who now invades it cannot justify his conduct on the ground that there was very little positive physical activity by the possessor. The enquiry must be whether the conduct of the possessor – minimal as it might be – shows that he did exercise rights or carry out activities consistent with the transfer to him of control of the premises; and whether he did so with the intention of securing some benefit to himself"*

[20] Mr. Swart referred me to various cases in support of his forceful argument that applicant was not in possession of the premises when the spoliation occurred.

[21] The first case he referred to, to illustrate his point was Shoprite Checkers Ltd v Pangbourne Properties Ltd (*supra*). In this matter the applicant was a lessor of a supermarket in a shopping centre owned by the respondent. The lease agreement also

provided for access to the parking area for clients and staff of the supermarket. The respondent embarked on building operations which detrimentally affect the visibility of the supermarket and the applicant alleged that the building operations deprived it of the free and undisturbed possession of the parking area. The Court was required to establish whether the applicant was in fact in peaceful and undisturbed possession of the parking area as such, and found that the applicant was not in possession of a specific part of the parking area since it was used by many but controlled by none.

[22] At 622B the Court held that -

> *"The mere fact that the applicant might or might not have had a right, derived from a contract which it entered into with the respondent, to make use of the parking area in question, including the parking bays to be found in the designated area, did not, in my view amount to a "possession", as envisaged in the authorities, of such designated area for the purposes of establishing an entitlement to the mandament van spolie ... is, in my view, much closer to that which pertained in the Zulu case supra which was decided after the Bon Quelle case. In Zulu's case, Thirion J, after referring, inter alia, to Bon Quelle distinguished it from the case before him (at 186F) and pointed out that the mandament van spolie was not concerned with the protection or restoration of rights. Its aim was to restore factual possession of which the spoliatus had been unlawfully deprived."*

[23] And further at page 623D that -

> *"It seems to me that, superficially attractive as Mr. Kuschke SC's forceful argument may be in regard to the question of spoliation, it amounts to no more than an attempt by the*

*applicant, under the guise of an alleged spoliation, to enforce rights which it claims to have in terms of its contract with the applicant in relation to the designated area. It does not assist to seek to disregard the contractual position of the parties and to assume, for the purposes of the spoliation argument, that the applicant might have no contractual rights at all to occupy the designated area, but yet be entitled to claim the benefits of a spoliation order. This to my mind serves to confuse the true issue. The true issue in regard to the spoliation aspect of the matter is to enquire into the simple factual question as to whether the applicant has established, on the basis of the common cause or undisputed facts, that it was in possession of the designated area at the relevant time. In my view the mere right to use property does not amount to possession of property. On this basis I repeat that I am of the view that the applicant has not established the requisite of possession entitling it to the relief of the mandament van spolie."*

[24] The second case he referred to in support of his aforesaid contention is Zulu v Minister of Works Kwazulu and Others 1992 (1) SA 181 (D) where at 187 E-G the court held that -

*"The mandament van spolie is a possessory remedy by which a person who has been illicitly deprived of his possession is restored to his possession before the merits of the dispute regarding the lawfulness of his possession are enquired into. An applicant for a spoliation order has to prove that he had possession.*

*In the present case the applicant asks for an order ordering the respondent to supply water to him. The applicant has never had possession of the water. He cannot therefore found his claim on loss of physical possession. However it has been held that also 'the possession*

*of incorporeal rights is protected against spoliation'. (Nienaber v Stuckey 1946 AD 1049 at 1056.) In truth the mandament van spolie is not concerned with the protection or restoration of rights at all. Its aim is to restore the factual possession of which the spoliatus has been unlawfully deprived. The question of the lawfulness of the spoliatus' possession is not enquired into at all."*

[25] Mr. Swart specifically referred to the article by Van der Walt in 1986 TSAR referred to by the court in Zulu at p. 189 and the article by Kleyn in the 1989 De Jure at p. 162-3.

*"...Daar kan glad nie sprake wees van die toepassiing van die mandament in gevalle waar daar geen sprake van die beheer oor 'n saak is nie, en as hierdie spesifieke kwalifikasie nie altyd uitdruklik vermeld word nie, is dit omdat dit, in die lig van die vereistes vir die mandament, vanselfsprekend is. Ook in gevalle soos die hofsake wat hierbo vermeld is, en in gevalle soos die onderhawige saak, moet daar aan die fisiese beheersvereiste voldoen word voordat die mandament van spolie gebruik kan word. ... Wanneer ek sonder 'n magtigende serwituut oor my buurman se grond ry, en hy sluit daarna die hek, kan ek die mandament van spolie alleen aanvra op grond van die bewering (wat uiteraard eers bewys moet word) dat ek daadwerklike beheer oor daardie pad gehad het deurdat ek dit daadwerklik gebruik het. Dit kan egter nie om my aanspraak om die pad te mag gebruik handel nie, net so min as wat dit in die Naidoo- of die Froman-saak om my aanspraak op die lewering van elektrisiteit (dit wil sê my vorderingsreg) kan handel. Dit kan egter wel om my aanspraak op daadwerklike gebruik (en by implikasie beheer) van die saak (die perseel) gaan..."*

[26] The Court at 189G and further referred with approval to an article by Kleyn in 1989 (1) De Jure, in which the author stated that -

*"...Uit eersgenoemde beslissing is dit duidelik dat die blote aanspraak op besit of eiendomsreg nie deur die mandament beskerm word nie. Indien 'n verhuurder byvoorbeeld weier om die huursaak aan die huurder te lewer, is die mandament nie die aangewese remedie om die aanspraak (ius possidendi) wat die huurder ex contractu op besit verkry, te beskerm nie, maar eerder die aksie uit die kontrak."*

[27] He then proceeded to place reliance on the following authorities which he contended was in point and should persuade me that based on the principles therein set out that I should not grant the applicant the relief which it seeks:

ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another 2008 (2) SA 345 (CPD);

Telkom SA Ltd v Xsinet (Pty) Ltd 2003 (5) SA 309 (SCA) and First Rand Limited t/a Rand Merchant Bank and Another v Scholtz N.O. (2007) 1 All SA 436 (SCA).

[28] In the matter of ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another (*supra)* the facts were that the applicant was in terms of a written agreement with the first respondent permitted to install one of its automated teller machines in the first respondent's premises *"at a mutually agreed location."* The agreement provided that the applicant would use and occupy such premises for the sole purposes of placing and operating the ATM. The first respondent also provided an electricity supply to the applicant's ATM machine. On 19 September 2007 the first respondent, without the consent

of the applicant, disconnected the electricity supply and removed the applicant's ATM to a storeroom on the premises, where it was inaccessible to customers. At the same time an ATM belonging to the second respondent was installed in the place and position previously occupied by the applicant's ATM. The applicant thereupon applied for a spoliation order directing "*the respondents forthwith to restore the installation of the ATM to the position and in the manner it formerly occupied on the premises of the first respondent*". The respondents opposed the application on the basis that the applicant had failed to establish that it had been in possession.

[29] In Telkom SA Ltd v Xsinet (Pty) Ltd (*supra*) the appellant supplied to the respondent (an internet service provider) a telephone system and a bandwidth system in order for the respondent to conduct its business as an internet service provider. The appellant alleged that the respondent was indebted to it in a sum of money in respect of one of the services provided, which the respondent disputed. The appellant thereupon disconnected the respondent's telephone and bandwidth systems. The respondent successfully brought an urgent spoliation application in the Provincial Division, which decision was overturned on appeal.

[30] In the matter of First Rand Limited t/a Rand Merchant Bank and Another v Scholtz N.O. and Others (*supra*) the respondents were members of a water users association which was responsible for the supply of water to the respondents. In terms of an agreement for the conveyance of water to users, the respondents agreed to pay a fee for the conveyance of water to them by the second appellant. The decision to terminate the water supply was due to the parties' inability to agree on the fee payable. The respondents had in a

provincial division successfully brought a spoliation application for the restoration of the water supply, which decision was overturned on appeal.

[31] I am satisfied that the cases referred to by Mr. Swart are distinguishable on the facts from the present matter.

[32] In my view the principal issue to decide in this matter is whether the applicant has established, on the basis of the common cause or undisputed facts, that it was in possession of the premises at the time.

[33] Accordingly I find that the cause or lawfulness of the possession is irrelevant to the enquiry in this case. I must therefore caution myself from not being side tracked by what was described by Mr. Kantor as red herrings raised by the respondent in an attempt to evade the real issue.

[34] Accordingly I now turn to deal with what has been described as *de facto* indications of applicant's possession of the premises, which, so it was argued by Mr. Kantor, remained unchanged from the outset of the written lease in 2006 until the date applicant was locked out of the premises on 17 February 2010.

[35] I agree that the facts referred to hereinafter (succinctly summarised in applicant's heads) are on the whole not in dispute and include the following:

(1) Applicant has been the sole user of the premises since 2006. The respondent admits that neither the respondent nor any other third party has used the premises;

(2) Applicant has accessed the premises on a regular basis for the purposes of showing the theatre to prospective clients for repairs and maintenance and for the preparation for the holding of conferences;

(3) Applicant has made regular use of the premises for the holding of conferences;

(4) Applicant has caused scaffolding and lighting to be erected and installed on the premises;

(5) Applicant has permanently stored its goods in the projector room of the premises and respondent has not objected to this.

(6) Applicant supervised the cleaning staff;

(7) According to the theatre key log sheet applicant was allowed access to the premises other than on the occasions when he holds conferences;

(8) Applicant made use of the theatre up until the date when respondent changed the locks.

[36] In addition to the facts set out in paragraph 35 above I find that based on the following facts and circumstances that the applicant did possess and or did have control over the premises at the time that the locks were changed:

(1) That even though respondent entered into a lease agreement with a third party ET) with effect from 1 September 2009, applicant, with the full

knowledge of respondent, had a valid sub-lease with ET in respect of the premises;

(2) It is a known fact that ET never made use of the premises, never occupied it and that its management was not in South Africa.

(3) Respondent itself did not make use of the premises;

(4) Notwithstanding the introduction of the new security system applicant accessed the premises as he pleased without reference to ET;

(5) The applicant continued to use the premises in January 2010 and February 2010 without any permission or consent from the respondent;

(6) Applicant has never been requested to remove the scaffolding and lighting erected and installed on the premise.

(7) Applicant continues to store its goods in the projector room of the premises.

[37] In the result I find that even if the respondent were to be in joint possession of the premises with the applicant, that applicant on the facts of this matter would still be entitled to a spoliation order.

See: Nienaber v Stuckey at page 1056.

[38] I agree with the submission of Mr. Kantor that the nature of applicants operation as the only *de facto* user of the premises and the various *indiciae* set out above establishes that the applicant was in factual possession of the premises.

[39] Accordingly I conclude that the applicant was in possession of the premises or at the

very least enjoyed *quasi possessio* thereof.

[40] In my view the applicant has established on a balance of probabilities that it has been deprived of possession and is accordingly entitled to a spoliation order.

[41] The respondent is ordered to restore the applicant forthwith the possession of, access to and use of the premises at the BMW Pavilion, comprising the theatre, foyer and entrance staircase thereto, projector room and storage facility.

[42] The respondent is to pay the costs of the application for spoliation.