THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between

Appeal Case No: A595/2011

Trial Case No: 1334/2011

BRIAN LESLIE JAMIESON	**FIRST APPELLANT**
BARBARA-ANN JAMIESON	**SECOND RESPONDENT**

And

LODERF (PTY) LTD	**FIRST RESPONDENT**
BENJAMIN GUY BLUMENTHAL	**SECOND RESPONDENT**
TALIAH SALOMON	**THIRD RESPONDENT**
NELIO MANUEL MENDES	**FOURTH RESPONDENT**
ARMAND VAN DER MERWE	**FIFTH RESPONDENT**
SISANDA PUMEZA SIPAMLA	**SIXTH RESPONDENT**

Coram: BOZALEK, ROGERS AND DOLAMO JJ

Heard: **22 NOVEMBER 2013 & 6 FEBRUARY 2015**

Delivered: **20 FEBRUARY 2015**

JUDGMENT

ROGERS J (BOZALEK & DOLAMO JJ concurring):

Introduction

[1] This is an appeal, with the leave of the court a quo (Dlodlo J), against the dismissal of a spoliation application. I shall refer to the appellants as the Jamiesons and the first respondent as Loderf. The second to sixth respondents were joined during the course of the appeal proceedings in circumstances I shall presently explain.

[2] The main issues are the following: (i) whether there was a genuine dispute of fact regarding the alleged spoliation (Loderf alleged in its answering papers that the Jamiesons voluntarily surrendered possession); (ii) whether, if there was a genuine dispute of fact, the court a quo erred in not referring the dispute to oral evidence; (iii) whether, assuming that one or other of the preceding points were decided in favour of the Jamiesons, a spoliation order is competent in the light of the sale and transfer to the second to sixth respondents, while the appeal was pending, of the three flats which were the subject of the alleged spoliation.

[3] Mr Elliott appeared for the Jamiesons at the initial hearing on 22 November 2013 and Mr Studti at the subsequent hearing on 6 February 2015. Mr Bremridge appeared on both occasions for Loderf. The other respondents did not participate in the hearing.

The facts appearing from the initial record

[4] During March 2010 the Jamiesons bought flats A3, A4 and B4 in Avondale Flats, Three Anchor Bay, from Loderf. The estate agent who dealt with them was Errol Areington ('Areington') of Cape 24 Property Group. Their intention was to renovate and on-sell the flats. The keys of the flats were delivered to them and they

took possession. They placed furniture in flat A4, leaving the other two flats empty. They began the interior renovations.

[5] At the time the Jamiesons bought the flats Loderf was busy refurbishing the exterior of the block. The exterior refurbishment was important to the Jamiesons' plans for on-selling their flats. The exterior refurbishment ground to a halt during June 2010.

[6] On 11 October 2010 the first appellant ('Jamieson') met with Areington and Ronald Shell ('Shell'), a director of Loderf. Jamieson said they would not take transfer of the three flats until two months after completion of the external refurbishment. He told Areington and Shell that he and his wife had spent R369 352 on the interior renovations. Loderf, for its part, said that the Jamiesons should pay a deposit of R100 000 on each flat and take transfer by 31 March 2011. Matters remained unresolved at the end of the meeting.

[7] The Jamiesons completed the interior renovations in early November 2010 and placed the three flats on the market. At this stage their furniture was in flat A4. The other two flats were empty.

[8] During the second week of January 2011 Jamieson consulted his attorney, Craig Guthrie ('Guthrie'), of Guthrie & Rushton ('GAR'). Guthrie advised Jamieson that their agreements for the purchase of the flats had lapsed due to the non-fulfilment of a suspensive condition relating to the obtaining of mortgage finance. The Jamiesons had not hitherto realised this. Guthrie also advised the Jamiesons to secure their 'builder's lien' over the three flats.

[9] Guthrie prepared a letter dated 14 January 2011 on his firm's letterhead addressed to Loderf. The letter explained that the purchase agreements had lapsed but that the Jamiesons, acting in good faith, had made interior improvements at a cost of R369 352 and that the improvements had enhanced the value of the flats by considerably more than this. The letter continued:

'Our clients are reluctantly left with no option but to tender return of the units back to you against payment of the sum of R123 117,44 per unit. Pending such payment or being

furnished with a satisfactory bankers guarantee, our clients have been advised to exercise liens over the properties to secure their interest in this matter. Please find enclosed our clients' Notices of Liens which have been affixed to the outer doors of the flats.'

[10] Although in the event Jamieson only delivered this letter on Monday 17 January 2011, there is no reason to doubt that it was prepared and signed on Friday 14 January 2011 and that Guthrie wrote it pursuant to the advice he had given Jamieson.

[11] The 'notice of lien' referred to in Guthrie's letter reads thus:

'Take notice that Barbara-Anne and Brian Jamieson are exercising a legal lien over this flat in the scheme known as Avondale Flats until payment for improvements to the property is received in full.

Take notice further that any attempt to unlawfully dispossess Barbara-Anne and Brian Jamieson is unlawful and will be met by an urgent Application to Court.'

[12] On the morning of Friday 14 January 2011 Jamieson purchased three keyhole locks and barrier tape (he annexed the tax invoice to his replying affidavit). A keyhole lock is a device which fits into the aperture of the lock installed on the door. The keyhole lock has its own special key. The installed lock cannot be opened with the ordinary key until the keyhole lock has been removed using the special key.

[13] There is a factual dispute as to precisely what happened on Saturday 15 January 2011, the date of the alleged spoliation. The Jamiesons version is the following. During the morning Jamieson and his sons removed the furniture from flat A4. He inserted keyhole locks in the front doors of the three flats, placed barrier tape across the doors and attached the notice of lien to the doors. Later in the day he received an abusive call from Areington. He terminated the call because Areington did not give him a chance to discuss the matter. On Monday 17 January 2011 Jamieson delivered GAR's letter to Loderf care of the latter's conveyancers in Bellville, David Kessler & Co ('DKC'). Later that day he received another abusive call from Areington. On Wednesday 19 January 2011 Jamieson's stepson, Brandon Botha ('Botha'), went to Avondale and saw that the keyhole locks, barrier tape and lien notices had been removed. The Jamiesons launched the urgent spoliation

application on Tuesday 25 January 2011. (The main founding affidavit was made by Jamieson with confirmatory affidavits from his wife and Botha.)

[14] Loderf's version is the following. Areington, who was at Avondale at lunchtime, noticed that Jamieson and his sons were removing furniture from A4. No keyhole locks had been inserted at that stage nor had any barrier tape or notices been put up. Areington left. At about 13h30 Jamieson handed the keys for all three flats to the Avondale caretaker, Nasief Abrahams ('Abrahams'). These were the ordinary keys for the new locks which the Jamiesons had installed on the front doors during the course of their renovations (ie not the original keys given to the Jamiesons when they initially took possession). Abrahams left Avondale at about 13h45 to perform an errand. At this stage Jamieson and his sons were still busy removing furniture from flat A4. Abrahams returned to Avondale at about 15h00 and noticed the barrier tape and lien notices. He reported this to Areington who returned to Avondale at about 16h00. Areington then saw for himself the barrier tape and the notices. He also saw a keyhole lock in A4. There were no keyhole locks in the front doors of the other two flats. He removed the barrier tape, notices and the keyhole lock on A4 (he does not say how). Areington denies having made abusive calls to Jamieson. (The main answering affidavit was made by Areington with confirmatory affidavits by Shell and Abrahams.)

[15] In his replying affidavit Jamieson denied having handed keys to Abrahams. He annexed the invoice for the purchase of the three keyhole locks and barrier tape. He contended that Loderf's version was so absurd and far-fetched as to create no genuine dispute of fact.

[16] The spoliation application, which was initially set down as a matter of urgency on 27 January 2011, was postponed by agreement to 24 February 2011 and then to 24 March 2011 when it was argued before Dlodlo J. The agreed postponement orders included an undertaking by Loderf that it would not, until the date of the next hearing, let, sell, transfer, alienate or dispose of the three flats or place them on show for purposes of sale or letting. At the hearing on 24 March 2011 Loderf's counsel agreed that this undertaking would stand until Dlodlo J delivered judgment.

[17] At the hearing in the court a quo the Jamiesons' counsel submitted that there was no genuine dispute of fact but requested, if the court found otherwise, that the matter be referred to oral evidence on the question whether the Jamiesons had voluntarily relinquished possession.

[18] The court a quo delivered judgment on 31 March 2011, dismissing the application with costs. Dlodlo J found that there was a genuine dispute of fact. He declined to refer the matter to oral evidence, on the basis that there were no exceptional circumstances to justify a departure from the usual position in terms whereof an applicant for final relief must elect, by not later than the commencement of the hearing, whether to argue on the papers or seek a referral to oral evidence.

[19] In the latter part of April 2011 Jamieson's delivered an application for leave to appeal. Leave was granted on 1 August 2011.

Procedural developments in the appeal

[20] What is set out above represents, in summary, what appeared from the record until shortly before the appeal first served before us on 22 November 2013. However, on 30 October 2013, and simultaneously with the delivery of Loderf's heads of argument, Loderf delivered an application in which it sought the dismissal of the appeal because it had allegedly become moot as a result of the intervening sale of the flats to the second to sixth respondents. The Jamiesons filed an affidavit opposing the mootness application.

[21] As a result of these developments, and following preliminary debate with counsel in open court on 22 November 2013, we granted an order, in essence by agreement, in terms whereof (i) the appeal was postponed sine die; (ii) the Jamiesons were given leave, by a specified date, to amend the relief sought in their notice of motion so as to include relief against the new owners; (iii) the Jamiesons were given leave, by a specified date, to bring an application to join the new owners in the appeal; (iv) a time-limit was specified for the filing of further papers by Loderf, the new owners (if they opposed) and the Jamiesons and for the filing of supplementary heads of argument; (v) costs stood over for later determination.

[22] The Jamiesons duly served an amended notice of motion and brought an application for the joinder of the new owners. The new owners filed affidavits during December 2013 but did not give notice of opposition and have not participated further in the proceedings. On 9 February 2014 Henney J granted an order for the joinder of the new owners, with the costs in the joinder application to be costs in the appeal.

[23] Loderf filed a supplementary answering affidavit by Shell during January 2014. The Jamiesons filed a supplementary replying affidavit on 10 February 2014 to which Shell responded by way of a further supplementary affidavit on 26 February 2014.

[24] Counsel filed supplementary heads and the matter came before us again on 6 February 2015.

The facts appearing from the further affidavits

[25] The appeal record having been supplemented by the mootness application and the further affidavits mentioned above, I now summarise the facts appearing from this new material.

[26] On 26 July 2011, ie about four months after the court quo's judgment and about three months after the Jamiesons filed the application for leave to appeal, GAR wrote on their behalf to Loderf's attorneys, DKC, stating that it had come to the Jamiesons' attention that two of the three flats were occupied. GAR stated that if the Jamiesons' application for leave to appeal succeeded (presumably they meant the appeal itself) their lien would be reinstated and they would be entitled to evict the occupiers. GAR informed DKC that they held instructions to address letters to the occupiers advising them of this.

[27] Having had no response, GAR wrote a further letter to DKC on 17 August 2011, stating that despite the Jamiesons' having been granted leave to appeal Loderf was persisting in allowing two of the three flats to be occupied. GAR stated that Loderf did so at its peril and that if the appeal succeeded the Jamiesons would

take immediate steps to evict the occupiers. GAR added that they held instructions to notify the occupants of the Jamiesons' rights.

[28] There is no evidence that the Jamiesons or GAR thereafter notified the occupants of the Jamiesons' rights.

[29] During late September and early October 2012 Loderf sold the three flats by way of separate deeds of sale to the second and third respondents (A3), the fourth and fifth respondents (A4) and the sixth respondent (B4). Transfer was passed to them on 27 May 2013.

[30] It is common cause that the new owners had no knowledge, either at the time of purchase or transfer, of the dispute between the Jamiesons and Loderf or of the pending appeal.

[31] What Loderf had done to bring these matters to the purchasers' attention is more contentious. Shell says that during September 2012 he engaged The Billion Trust, in the person of a Mr Herman Varkel ('Varkel'), to market all the flats and garages which Loderf owned in the block (26 in all). He alleges that he informed Varkel of the spoliation application, its dismissal and the pending appeal. They agreed that Loderf would take responsibility for trying to resolve the dispute, since there were at that time settlement negotiations between the Jamiesons and Loderf. Shell says that he had no direct contact with any purchasers. He added that Varkel may in turn have engaged other estate agents to assist in the marketing of the flats.

[32] The new owners in their affidavits identified the estate agents with whom they dealt when buying the flats. Jamiesons' attorney spoke with these agents. The latter were not prepared to make affidavits though told Jamiesons' attorney that they had not been aware of a pending dispute. On this basis, and because Loderf did not file any confirmatory affidavit by Varkel, the Jamiesons disputed Shell's allegations as to his dealings with and disclosure to Varkel.

[33] During September 2013 the Jamiesons issued summons against Loderf in which they claimed payment of R369 354 in respect of the improvements they had effected to the flats. That action is still pending.

[34] As noted, Loderf delivered its mootness application on 30 October 2013 which was when the Jamiesons learnt of the sale and transfer of the flats.

The alleged spoliation

[35] Loderf's version is that the Jamiesons voluntarily surrendered possession of the flats at about lunchtime on Saturday 15 January 2011 by handing the keys to Abrahams. The Jamiesons deny that they handed the keys to Abrahams. In appropriate circumstances, the handing over of keys may be a symbolic act whereby possession is surrendered to another. The crucial question in the present case, however, is whether there was a handing over of keys at all.

[36] The trial judge considered that there was a genuine dispute of fact on this issue. The general test is not in issue. Where there is a genuine dispute of fact in a claim for final relief, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that the court is justified in rejecting it on the papers (*Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C; *Wrightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) para 12). This exception to the usual position is allowed because motion proceedings are quicker and cheaper and it is in the interests of justice that unvirtuous respondents should not be permitted to shelter behind patently implausible versions on affidavit or bald denials; indeed, practice in this regard has rightly become more robust (*Fakie NO v CCII Systems (Pty) Ltd v* 2006 (4) SA 326 (SCA) paras 55-56). However, the test is not simply whether the respondent's version is improbable; in order to reject the respondent's version on the papers, the test is the more stringent one, namely whether the respondent's version is so far-fetched or so clearly untenable that the court may safely reject it on the papers (*National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA) paras 21-22 and cases there cited).

[37] Spoliation relief is final nature. On the other hand, an application for such relief is generally urgent by nature. The robust practice mentioned in *Fakie* is thus not out of place in such matters.

[38] In my respectful view, the court quo erred in its conclusion that the factual dispute raised by Loderf was genuine. Certain facts, which Loderf could not deny, make it patently implausible that the Jamiesons would have surrendered possession:

(i) The Jamiesons had spent a large sum in renovating the three flats. If they could not recoup their expenditure by on-selling the flats, it would be important for them, if they could, to recover the money by other means available to them.

(ii) They took legal advice a few days before Saturday 15 January 2011. Guthrie's advice was that although the purchase agreements had lapsed, they were entitled to assert a lien. Guthrie advised them to do so.

(iii) Guthrie drafted a letter dated Friday 14 January 2011 in which he said that the Jamiesons had been advised to exercise a lien. A tender to return the flats was made but only against payment of the sum of R123 117 per flat. It was stated that until then the lien would be asserted.

(iv) The attached lien notice, also self-evidently prepared by Guthrie, stated that the Jamiesons were exercising a lien and that any attempt to dispossess them would be unlawful. The Jamiesons must have come into possession of the notice of lien by not later than Friday 14 January 2011.

(v) At 10h55 on the morning of Friday 14 January 2011 Jamieson bought three keyhole locks and barrier tape from a hardware store. This must have followed Guthrie's advice. The keyhole locks could only have been for the purpose of preventing anyone else from gaining access to the flats.

(vi) Jamieson and his sons were at the flats on Saturday 15 January 2011. It is common cause that at some point during the day the lien notices were attached to the front doors, that barrier tape was placed across the front doors and that a keyhole lock was inserted in at least one of the flats. There is no suggestion that Jamieson spoke with his attorney on the Saturday before taking these steps. They

are entirely consistent with implementing the advice given by his attorney a few days previously.

(vii) The barrier tape was clearly intended as an additional measure signalling the Jamiesons' intention to retain possession to the exclusion of all others, an intention which must have existed by the time Jamieson bought the barrier tape on Friday 14 January 2011.

(viii) There would have been no point in placing a keyhole lock on any of the front doors unless the door in question was first locked with the ordinary key (since otherwise the door, even if there was keyhole lock in the aperture of the ordinary lock, could be opened without any key at all). So one must infer that Jamieson at least locked the front door of A4 with the ordinary key before inserting the keyhole lock which was admittedly found on that door at 16h00. Loderf's version is that Jamieson handed the ordinary keys to Abrahams while he was still removing furniture from A4 and at a time when A4's front door was still unlocked. But if this were true, how could Jamieson thereafter have locked A4? The ineluctable conclusion is that, contrary to Loderf's version, Jamieson did not surrender the key to A4. And if Loderf's version is false in regard to the surrendering of the key to A4, it is unlikely to be true in respect of the other two keys (since Abrahams drew no distinction).

[39] In the light of these facts, it simply does not make sense, and cannot be true, that Jamieson handed the keys of the flats to Abrahams, thereby surrendering possession. The trial court considered that the Jamiesons probably misunderstood Guthrie's advice about how to secure possession and were not told that they should not hand over the keys. The trial court considered, further, that – not having been warned of the implications of handing over the keys – the Jamiesons did so as a symbolic signal that the agreements had lapsed and so as to avoid liability for occupational rent.

[40] In my respectful view, these hypotheses are unduly charitable to Loderf. There was no evidence that the Jamiesons misunderstood the advice. Loderf did not suggest this in the answering papers. It does not strike me as remotely plausible that Guthrie as an attorney would not have known that retention of possession was

of the essence to the lien. The notice and letter he drafted make this plain. It is most unlikely that his advice to the Jamiesons would not have covered the need for them to retain possession. Jamieson's action in purchasing the keyhole locks and barrier tape show that he correctly understood the advice.

[41] The idea of avoiding occupational interest was not a suggestion which the Jamiesons were called upon to deal with in their replying papers. In any event, the notion that this concern would have trumped their assertion of the lien is not compatible with the advice they received or with the actions they and their attorney took on the strength of such advice.

[42] I would also reject as wholly untenable the assertion that Jamieson fitted only one of the three keyhole locks he had bought the previous day. Even if the ordinary keys had been surrendered before any keyhole locks were fitted, why would Jamieson thereafter insert only one of the keyhole locks? Indeed, and as I have observed, what would have been the point unless he still had the ordinary key with which first to lock the front door? The trial court speculated that Jamieson's intention may have been to secure the furniture in that particular flat (A4). Again, the Jamiesons were not called upon to comment on this hypothesis in their replying papers. There is no evidence that when Areington returned to Avondale and found the keyhole lock in flat A4 there was any furniture still there. Areington did not say that after removing the keyhole lock and barrier tape he found furniture in A4. Jamieson's evidence, supported by Botha, is that the furniture was removed from the flat during the course of the morning.

[43] I appreciate that a rejection of Loderf's version entails a finding that Areington and Abrahams swore affidavits which they knew were untrue. I regret to say that the circumstances impel me to that conclusion. Abrahams, I observe, was not an independent witness. Areington said that Abrahams had left Avondale at about 13h45 (after receiving the keys) in order to attend to a broken lavatory at a house rented out by Areington in Fresnaye. Abrahams thus seems to have been Areington's general factotum. Furthermore, Abrahams' version (given by Areington and briefly confirmed by Abrahams) provided no context to the alleged handing over of the keys. If there was a surrender of the keys, it seems most unlikely that

Jamieson would not have explained why he was doing so, yet Loderf's version contains nothing beyond the bald assertion that the keys were given to Abrahams.

[44] In view of this conclusion, it is unnecessary to decide whether the trial court erred in not referring the matter to oral evidence on the limited question whether the keys were handed over as alleged. If I had concluded that there was a genuine dispute of fact, I think this would have been an appropriate case to accede to the alternative request for oral evidence. Although it is a salutary rule to require an applicant to make his election by not later than the commencement of the hearing, the court may in exceptional circumstances permit the double-barrelled approach (see *Pahud Shipping CC v Commissioner, South African Revenue Service* [2010] 2 All SA 246 (SCA) para 20). If there was a genuine dispute of fact, it was on the borderline, with the probabilities very strongly in the Jamiesons' favour. The application was by its nature urgent. Argument on the papers would not have taken very long. (The transcript of the oral argument shows that the hearing lasted 1¼ hours.) If the judge concluded, as he did, that there was a genuine dispute of fact, the oral evidence itself should not have caused much delay. The evidence would have been on a very narrow issue. It is unlikely that there would have been scope for discovery of further documents. A date for the evidence could have been arranged within a week or two. What was at stake was the law's strong disapproval of self-help and a remedy with an obvious rule of law dimension (see *Tswelopele Non-Profit Organisation & Others v City of Tshwane Metropolitan Municipality & Others* 2007 (6) SA 511 (SCA) para 22).

[45] In their notice of motion the Jamiesons sought a spoliation order not only in respect of the three flats but also in respect of three garages which were linked to them by way of exclusive use arrangements. The Jamiesons did not establish that they were ever in factual possession of the garages, so any relief to which they might be entitled would not apply to the garages. This was conceded by their counsel in the court a quo.

The subsequent sales and transfers

[46] I turn now to the question whether, given the sales and transfers which occurred after the dismissal of the spoliation application in the court quo, this court can substitute for such dismissal an order that Loderf (or the new owners) restore the flats to the Jamiesons' possession.

[47] There is no case directly in point. The authorities that might be thought to bear on the point are not entirely harmonious. The position here is that the sales and transfers occurred after the institution of the spoliation application. There are cases dealing with the situation where the spoliator parted with possession before institution of the spoliation application. There is a line of authority holding that in such circumstances the remedy of spoliation is not available where possession has passed in good faith to an innocent third party: *Burnham v Neumeyer* 1917 TPD 630 at 633; *Louw v Hermann* 1922 CPD 252 at 253; *Van Biljon v Kriel* 1939 (2) PH M82 143 at 144; *Chitiz v Loudon & Another* 1946 WLD 375 at 378-380; *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 894A-896G; *Bank van die Oranje Vrystaat v Rossouw* 1984 (2) SA 644 (C) at 648H-649B; *Builders Depot CC v Testa* 2011 (4) SA 486 (GSJ) paras 13-17; and cf *Harris v Unihold (Pty) Ltd & Others* 1981 (3) SA 144 (W) at 148D-149B. I shall refer to this as the *Jivan* line

[48] A somewhat different approach was adopted in two cases decided in the former Orange Free State division. In *Painter v Strauss* 1951(3) SA 307 (O) the respondent, who had despoiled the applicant in his possession of a dwelling and thereafter given possession to one Rautenbach, relied on *Burnham* for the proposition that a spoliation order was not competent. Brink J rejected this contention on two grounds, namely (i) that there was nothing to show that Rautenbach was an innocent third party; (ii) that even if he was, the respondent did not allege that he would be unable to make arrangements with Rautenbach to restore possession to the applicant (at 318B-D).

[49] In *Malan v Dippenaar* 1969 (2) SA 59 (O) a spoliation order was likewise granted against a respondent who had parted with possession by way of a lease with an innocent third party. De Villiers J, after quoting from certain old authorities,

said that one could perhaps deduce that the mandament as developed and received into our law had expanded so as to be available even against a person who obtained possession bona fide from the spoliator (at 64H-65G). The learned judge did not, however, base his decision on this view. Instead he proceeded along similar lines to Brink J in *Painter*, holding (at 65H-66C) that it was for the spoliator to allege and prove that he had parted with possession in good faith and was unable to restore the property. On the facts of the case the respondent (the spoliator) could scarcely contend that his conduct was bona fide. Moreover, he had not established that he was unable to restore the property. He had not placed the lease before the court. Conceivably the lease entitled the respondent to regain possession on short notice.

[50] Academic opinion is also divided. The learned authors of *Silberberg & Schoeman's The Law of Property* 5th Ed favour the Orange Free State approach (at 305). Prof CG van der Merwe rejects both approaches, arguing that once the spoliator has parted with possession a spoliation order cannot be granted, even if the third party took possession in bad faith, unless perhaps his conduct is such as to have made him a co-spoliator (*Sakereg* 2de Uitg at 136-137). Marius de Waal favours the view that where possession has passed to a third party relief should be granted only if the spoliator and the third party acted in collusion to defeat the despoiled party's remedy, in which event the remedy lies directly against the mala fide third party (*Die Moontlikheid van Besitsherstel as Wesenselement van die Aanwending van die Mandament van Spolie* Unpublished LLM dissertation University of Stellenbosch 1982) at 60-96, where the learned author critically reviews all the cases up to *Jivan*). For other academic discussion of the topic, see Price *The Possessory Remedies in Roman-Dutch Law* (1947) at 59-60 and at 94-98 (discussing *Burnham* and *Louw*); AJ van der Walt's discussion of *Rossouw* in *THRHR* 47 (1984) 220 at 230-231; JR Harker *The Mandament van Spolie In Private and Public Law SALJ* 105 (1988) 186 at 192-193.

[51] It is unnecessary to determine which of the varying approaches is correct. Although some cases in the *Jivan* line make reference to the *bona fides* of the spoliator, the emphasis on my reading falls on the third party's knowledge. If the third party had notice of the spoliation when taking possession, there is much to be

said for the view that spoliation relief should be granted, not because the third party is a spoliator but because he had notice of the spoliation when taking possession. This outcome could well be justified on the basis of the doctrine of notice,[1] an equitable doctrine which in a living system of law can in appropriate circumstances be extended to situations not already clearly covered by it, having regard to considerations of fairness and legal policy (see *Cussons & Andere v Kroon* 2001 (4) SA 833 (SCA) para 9; *Dale v Rheeder & Others* [2011] ZAKZPHC 13 paras 19-23 per Wallis J as he then was; FDJ Brand *Knowledge and Wrongfulness as Elements of the Doctrine of Notice*, published in *Essays in Honour of CG van der Merwe* Eds H Mostert and MJ de Waal (2013).

[52] Be that as it may, it is common cause in the present case that the new owners did not know of the spoliation or of the pending proceedings when they purchased or when they took transfer. On the *Jivan* line, therefore, no spoliation order is now possible. This would be an *a fortiori* conclusion if there were a requirement of a conspiracy between the spoliator and the third party to defeat the despoiled party's remedy.

[53] If, on the other hand, the Orange Free State decisions were preferred, they do not go further than holding that an order for spoliation will be granted against the spoliator, even though he has parted with possession, if he fails to allege and prove that he is unable to restore possession. In the present case the new owners have purchased the flats outright and have taken transfer. They have been owners of the flats for more than a year and a half. The deeds of sale afford no scope to Loderf to recover possession. The new owners say that they purchased in good faith. Although they do not in terms state that they will not voluntarily relinquish possession, this is the only inference to be drawn from their affidavits

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[1] Similarly, in double sales (the paradigm case for the doctrine of notice) the second purchaser with notice must abide a transfer of the property to the first purchaser and a cancellation of his own registered title (*Tiger-Eye Investments (Pty) Ltd & Another v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C) at 358F-G). Indeed, and by virtue of the doctrine of notice and its equitable foundations, the court will even in appropriate circumstances dispense with the joinder of the double seller and permit the first purchaser to claim transfer directly from the second purchaser (see, in general, *Cussons & Andere v Kroon* 2001 (4) SA 833 (SCA) para 9; *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) paras 11-18; *Meridian Bay Restaurant (Pty) Ltd v Mitchell SC NO* 2011 (4) SA 1 (SCA) paras 12-31).

[54] Mr Studti submitted that the *Jivan* line was distinguishable because those cases dealt with transfers of possession which occurred prior to the institution of the spoliation proceedings, whereas in the present case the transfers of possession occurred while an appeal was pending. I do not think this makes a difference in principle. The reasoning in the cases was based on the essential nature of a spoliation order, namely the restoration of possession. The spoliator ordinarily cannot restore possession if he does not have it. This reasoning applies whether the transfer of possession occurred before or after the institution of the spoliation proceedings. The fact that the transfer of possession occurred after the institution of spoliation proceedings may be relevant in assessing whether or not the third party acquired possession innocently but is not decisive.

[55] Although Mr Studti did not refer to the law on *res litigiosae*, the distinction he asked us to draw between the position before and after the institution of the spoliation proceedings warrants brief reference to this topic. The authorities contrast actions *in rem* and *in personam* (see, in general, P van Warmelo *Res Litigiosa* in *Gedenkbundel HL Swanepoel* Ed JA Coetzee 1976 at 14-25; *Coronel v Gordon Estate & GM Co* 1902 TS 95, *Blue-Cliff Investments Pty Ltd & Another v Griesel & Others* 1971 (3) SA 93 (C) and *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* 1986 (2) SA 656 (C). An action *in rem* is one in which the ownership of property is in issue (though certain claims which are technically personal might be sufficiently akin to claims regarding disputed ownership as to make the property in question *res litigiosa*, an example being *Blue-Cliff* supra, where a co-owner issued a summons for partition of a farm). Once the property in question becomes *res litigiosa* (a point reached, according to the two Cape cases just cited, at the commencement of the proceedings rather than at *litis contestatio*), a purported sale of the property by the defendant cannot prejudice the plaintiff. He may proceed with his action against the defendant. If he wins he may execute to recover the property from the third party, even though the latter was not joined and did not have knowledge of the plaintiff's alleged ownership (see *McGregor v Jordaan & Another* 1921 CPD 301 at 308; *Opera House* supra at 661I-662A; Van Warmelo op cit at 24-25).

[56] Although personal claims (claims *in personam*) become *litigiosae* at *litis contestatio*, the law in regard to *actiones litigiosae* is concerned with questions such as whether the litigated claim may be ceded and if so with what results (see, in general, *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd & Another* 1978 (1) SA 671 (A); *LAWSA* 3rd Ed Vol 3 para 149). If property is claimed by a personal action (eg a claim for specific performance based on a sale agreement), the property itself does not become *res litigiosa* (see Zeffertt *The Sale of Res Litigiosa* 1971 SALJ 405 and authorities there mentioned; Van Warmelo op cit at 15-16).

[57] A spoliation claim does not concern the ownership of the property. It is a personal claim against the spoliator to recover possession. I have found no authority that in spoliation proceedings the property itself becomes *res litigiosa* at any stage of the process. The principles briefly discussed above point to a conclusion that the property in spoliation proceedings is not *res litigiosa*. The law on this topic thus does not provide a basis for ordering restitution to the prejudice of the innocent new owners.

[58] Mr Studti, apart from his reliance on the distinction between a transfer of possession to a third party before and after the institution of spoliation proceedings, submitted that the present case concerned an improvement lien, a real right which could be exercised against all the world and which was a *pro tanto* diminution of the dominium of the new owners. The flaw in this argument, as he acknowledged in oral argument, is that it depends on the Jamiesons' alleged underlying right to possession. An analogous argument, where the applicant is an alleged owner, would be that a third party's possession is subject to the applicant's ownership, the latter being a real right which the applicant can assert against the whole world. But as is trite, spoliation proceedings are not concerned with the underlying rights of the parties. The court quo was not called upon to decide whether the Jamiesons had a *ius retentionis*. Their belief that they did merely served to explain, by way of background, why they were factually in possession on 15 January 2011 and why they would not voluntarily have surrendered possession.

Disposition of the appeal

[59] In view of the conclusions reached above, it is not possible for this court on appeal to substitute, for the order made by the court quo, an order directing Loderf or the new owners to restore possession of the flats to the Jamiesons. However, and as I have sought to demonstrate, the Jamiesons were entitled to such relief against Loderf at the time they launched their application and at the time judgment was delivered in the court a quo. Although we cannot now grant consequential relief, justice would be served by substituting, for the order made by the court a quo, a declaration that Loderf was guilty of unlawful spoliation together with an order for costs in that court. This will vindicate the rule of law, which regards self-help with particular disfavour. It would not be just to exercise our discretionary power to dismiss the appeal on the ground that the order on appeal would have no practical effect,[2] particularly since it was Loderf which by its conduct has made it impossible for the Jamiesons to obtain full relief. At Mr Bremridge's request I make it clear that the declaration does not imply that the Jamiesons would be entitled, in later proceedings, to recover possession by proving their underlying right to a lien, a question on which it is unnecessary to express an opinion.

[60] In regard to the costs of the appeal, it was only shortly before the initial set down of the appeal that Loderf revealed that the flats had been sold and transferred to the new owners. But for this development, the Jamiesons would have succeeded in the appeal outright. I thus consider that they should have their costs up to and including 22 November 2013. In regard to subsequent developments, the Jamiesons have failed in getting restoration but have succeeded in establishing the unlawful spoliation and in obtaining a declaration to that effect together with an order for costs in the court a quo. They failed on the restoration issue only because of Loderf's conduct subsequent to the hearing in the court a quo. In the circumstances I think the Jamiesons have achieved substantial success and are entitled to their costs in respect of the period after 22 November 2013 (cf *Stiff v Q Data Distribution (Pty) Ltd* 2003 (2) SA 336 (SCA) para 20).

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[2] Section 21A(1) of the Supreme Court Act 59 of 1959, now s 16(2) of the Superior Courts Act 10 of 2013.

[61] During argument on 6 February 2015 Mr Bremridge handed up a tender made by Loderf on 24 December 2013, the terms of which were that the Jamiesons would be permitted to withdraw their appeal on the basis that the parties bear their own costs to date, both in the court a quo and on appeal. He submitted that the Jamiesons should have accepted the tender on account of the appeal having become moot. He argued that we should give effect to the tender in respect of the period up to the date of the tender and order the Jamiesons to pay Loderf's costs thereafter. In view of what I have said in the preceding paragraph, it will be apparent that I do not regard the tender as having been acceptable and the Jamiesons were justified in rejecting it.

[62] The following order is made:

(a) The appeal succeeds with costs, including those arising from the postponement on 22 November 2013 and those relating to the joinder of the second to sixth respondents.

(b) The order of the court a quo is set aside and there is substituted an order in the following terms:

> '(i) It is declared that the first respondent on 15 January 2011 unlawfully despoiled the applicants of their possession of the following units in the sectional title scheme known as Avondale Flats situated at 13 Avondale Road, Three Anchor Bay, Cape Town: Flat A3 (section 14), Flat A4 (section 15) and Flat B4 (section 20).
>
> (ii) The first respondent is directed to pay the applicants' costs of suit.'

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BOZALEK J

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ROGERS J

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DOLAMO J

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