IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 3268 / 2021

In the application between:

VITAL SALES CAPE TOWN (PTY) LTD	Applicant
and	
VITAL ENGINEERING (PTY) LTD	First Respondent
GLEN ANDREW PRINGLE	Second Respondent
YVONNE GADNEY	Third Respondent

Coram: Wille, J

Heard: 12th April 2021

Order: 16th of April 2021

Reasons: 19th of April 2021

REASONS

WILLE, J:

INTRODUCTION

[1] In these urgent opposed motion proceedings, the applicant sought an order that the respondents restore to it, 'possession' of its information housed on a communal server[1]. This, together with access to its emails and records on an accounting system.[2] In short, the applicant's intellectual property was allegedly possessed through its access to these servers and systems. The applicant required access to the server and the system, so it says, so as to conduct its business. Alternatively, the applicant sought an interim interdict to restore its access to the systems and servers, pending the institution of further proceedings against the respondents.

[2] The alleged dispossession occurred on the 16th of February 2021, when the applicant's access to the servers and systems was barred by the respondents. It became common cause that the first respondent obstructed the applicant's access to the servers and systems on the 16th of February 2021. The respondents' case was that they were entitled to touch this obstruction. This, because the applicant had breached an

[1] The 'servers'
[2] The 'Syspro' systems

'arrangement' by accessing the first respondent's proprietary and confidential information on the servers and systems. The first respondent averred that it was entitled to take all reasonable and necessary steps to protect its proprietary and confidential information on the subject servers and systems. This because of the alleged breach by the applicant.

[3] To counter this, the applicant avers that its alleged breach of the arrangement is irrelevant as the spoliation remedy is aimed at redressing unlawful self-help and restoring the parties to their status *ante omnia*. Further, the applicant contends for the position that it never had access, nor could it obtain access, to the first respondent's proprietary and confidential information on the servers or systems. This may very well be a factual dispute, but more about this later. The trigger to the termination of applicant's possession was allegedly the suspension of the applicant's branch manager on the 15th of February 2021. The said branch manager was believed to have been in league with the respondents. This then, was the nub of the dispute before me on application.

[4] On the 16th of April 2021[3], I issued out an order in the following terms:

1. That condonation is granted to the applicant in that the forms of service and the time periods provided for in the rules of court are dispensed with and the matter is ordered to be determined as an 'urgent' application as provided for in the rule 6 (12) (a);

[3] Due to the urgent nature of the relief contended for by the applicant

2. *That the respondents' applications to strike-out are dismissed and each party shall be responsible for their own respective costs in connection with the applications to strike-out;*

3. *That the second and third respondents application for 'mis-joinder' is granted and the applicant shall be liable for the costs of and incidental to the application for 'mis-joinder' on the scale as between party and party as taxed or agreed (including the costs of two counsel, where so employed);*

4. *That the applicant's main application as set out in paragraphs 1.2, 1.3, and 1.4 of the notice of motion dated the 22nd of February 2021, is dismissed;*

5. *That pendente lite (pending the outcome of the action referred to below), the first respondent is interdicted and restrained from preventing the applicant to 'undisturbed access' the communal server, emails and Syspro systems administered by the first respondent. This access shall be further limited to only access to the applicant's proprietary information emails and accounting information housed on the communal server and Syspro system.*

6. *That applicant is prohibited from access to any of the first respondent's proprietary and confidential information located on the Syspro system or housed on the communal server;*

7. *That the applicant is ordered to issue out action proceedings within (21) court days of date of this order against the first respondent in order to determine and ventilate the contractual disputes between the applicant and the first respondent as broadly formulated in the application proceedings;*

8. *That all other issues of costs shall stand over for determination by the trial court;*

9. *That in the event that the applicant fails to comply with the provisions of paragraph (7) of the order above, then in that event, the interim order pendente lite shall automatically lapse for want of prosecution of the action proceedings and the first respondent will be afforded an opportunity to set down all remaining issues of costs for determination by the court (before Wille J), on reasonable notice to the applicant and the court.*

PRELIMINARY ISSUES

[5] The respondents contended for the following: that applicant's application was materially defective for misjoinder: that this court did not have the required jurisdiction to adjudicate and determine the relief sought by the applicant and that the spoliation relief sought was incompetent. This, because the applicant exercised a mere personal right which was based upon an 'arrangement' that the applicant had concluded with the first respondent.

[6] Further, it was advanced that the applicant was not entitled to any alternative temporary interdictory relief. In addition, the respondents advanced two applications to strike out certain averments in the applicant's founding affidavit and replying affidavits, while the applicant, in turn, applied to admit certain evidence of a 'hearsay' nature.

THE STRIKING OUT APPLICATIONS

[7] In the first instance, the respondents sought an order to strike out certain paragraphs of the applicant's founding affidavit on the basis that they contained hearsay evidence.[4] Secondly, the respondents sought to strike out certain hearsay evidence relating to the Syspro system's operation.[5] It was also contended that the latter emerged as 'new' matter for the first time by way of reply.

[8] Turning for a moment to the context of the material sought to be struck out in connection with the first application, the following: this related to evidence of a hearsay nature concerning certain enquiries made by the employees of the applicant to establish if the servers and systems were also inaccessible by other companies in the group: the source of this information was only identified by the applicant in reply: the truth or otherwise of this hearsay material did not seem to be in dispute. In my view, nothing turned on the introduction or otherwise of this material. This, because the introduction thereof was not to the prejudice of the respondents.

[9] As far as the replying affidavit was concerned, the respondents sought to strike out most of the averments in the applicant's replying affidavit. It was the applicant's case that the disputed passages in the replying affidavit served primarily to refute certain of the contentions made by the respondents. The main proposition was that, in any event, the applicant sought an order to restore its peaceful and undisturbed possession of its intellectual property, which was, in itself, nothing new.

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[4] The 'first' application to strike out
[5] The 'second' application to strike out

[10] Further, precisely because of the challenge that the applicant failed to allege that the second and third respondents had a direct and substantial interest in the merits of the application, the applicant proceeded to set out further facts relating to the second and third respondents' functions to refute these suggestions, in reply. It is the respondents' case that applicant's access was by agreement to the effect that the applicant was prohibited from accessing the first respondent's proprietary and confidential information located on the server and systems.

[11] Further, it is alleged that contrary to that agreement, the applicant attempted to unlawfully breach and obtain the first respondent's proprietary and confidential information. In reply, the applicant contends for the position that it was impossible for the applicant to access any of the first respondent's information on the system and that this status was confirmed by Syspro, itself.

[12] A court may in its discretion allow new matter in a replying affidavit having regard to: whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court: whether the determination of the new matter would prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs: whether the new matter was known to the applicant when the application was launched and whether the disallowance of the new matter would result in unnecessary wasted costs.

[13] In terms of the provisions of Section 3(1)(c) of the Law of Evidence Amendment Act[6], the court has a discretion to admit hearsay evidence if the evidence itself is not contentious and the information is in the public domain. I formed the view that the evidence was neither contentious, was in the public domain, and nor could there be any prejudice to its admission. Besides, the respondents tendered no alternative facts relating to the system's access requirements.

MISJOINDER

[14] The respondents alleged misjoinder. They contended that neither the second nor third respondent should have been joined, because the applicant failed to disclose a cause of action against any of them for the relief it sought. The second respondent is the first respondent's managing director. The third respondent is the administrator of the servers and systems. The first respondent's employees report to her. The argument by the applicant is: that it was necessary for the applicant in the spoliation proceedings to seek relief against any co-spoliators[7]: that an order against the second and third respondents was required to give effect to the order and that they clearly had a direct and substantial interest in the proceedings. The latter averments were only made out in reply.

[15] In the applicant's founding affidavit were absent allegations which established a cause of action against either the second or the third respondent. These latter respondents were joined ostensibly because they are employed by the first respondent. There was no material before me to suggest that the second and third respondent were, at all material

[6] Act 45 of 1988
[7] *Monteiro and Another v Diedricks* (case no 1199/19) ZASCA (2 March 2021) at paragraphs [53] to [59]

times, acting outside the course and scope of their employment with the first respondent. Besides, any proposed order against the first respondent would ordinarily be subject to execution, without the involvement of either the second or third respondent.

JURISDICTION

[16] Upon an analysis of the common cause facts, it seemed to me to be accepted: that the applicant obtained access to the Syspro accounting system at its business premises in Cape Town: that it exercised its access to all its proprietary information on the servers and systems at its business premises in Cape Town: that its 'possession' was disturbed by the respondents at its business premises in Cape Town and that its employees were denied access to the server and the system, in Cape Town.

[17] Section 21(1) of the Superior Courts Act[8], provides, inter alia, that a division:

'*…has jurisdiction over all persons residing or being in, and in relation to all causes and all offences triable within, its area of jurisdiction and in all other matters of which may according to the law take cognisance…'*

[18] The respondents argue that the alleged cause of action did not arise within the geographical area of the jurisdiction of this court. The argument is that there existed insufficient jurisdictional connecting factors having been firmly established in favour of the applicant. This enquiry depends, *inter alia*, on the following: on the nature of the relief claimed: on the nature of the proceedings, or in some cases, on both these

[8] Act 10 of 2013

enquiries. In my view, taking into account these peculiar circumstances, it would be entirely permissible for this court to have the requisite jurisdiction to grant the interim relief sought and for an appropriate order to be executed at the first respondent's offices, in Gauteng. I say this also because, in the event of a failure by the first respondent to comply with the interim order, the order would be rendered sufficiently effective, so as to confer jurisdiction on this court.

[19] In my view, this is precisely so because the ambit of jurisdiction conferred falls to be determined by the jurisdictional connecting factors recognised by the common law.[9] The cause of action requirements in common law, need not arise wholly within the area of jurisdiction of the relevant court in order for that court to have jurisdiction based on the *ratio rei gestae*. The place of performance of part of the contract, constitutes a jurisdictional connecting factor, even if the contract was concluded outside the court's area of jurisdiction.[10] The respondents' arguments in connection with this court's lack of jurisdiction may very well have been of a weightier consideration, in the event that I was with the applicant in the main relief that it sought in its notice of motion. Further, the arguments for lack of jurisdiction, were somewhat diluted in view of my findings in connection with the misjoinder of the second and the third respondent.

[20] In the light of the above, the court may assume jurisdiction to grant an interdict, no matter if the act in question is to be performed or restrained outside the court's area of jurisdiction. We live in times of rapidly developing 'information technologies' and we

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[9] *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 392 (SCA) at 333 C
[10] *Travelex Limited v Maloney* (823/15) ZASCA 128 (27 September 2016) at para [22]

need to adapt our practices and guard against practices that render court orders ineffective for mere technical arguments in connection with issues of jurisdiction.

THE MANDAMENT VAN SPOLIE

[21] The spoilation remedy is available to any despoiled person who exercises physical control over the property with the intention of deriving some benefit therefrom. Possession is the most important element. Possession suffices if the holding was with the intention of securing some benefit for the applicant. It is actual physical possession that is protected and not '*the right'* to possession. The applicant bears the onus of demonstrating effective physical control over the property.[11]

[22] In *Shaw v Hendry*[12], the applicant was a builder and alleged that he was in possession of a house as a result of a builder's lien. He was unable to complete certain plumbing work and gave over a key to enable another plumber to have access. The plumber and the respondent's father thereafter had access and under these circumstances, it was held that no possession was established.

[23] More recently in *De Beer v Zimbali Estate Management Association (Pty) Ltd*[13], it was held as follows:

'*A summary of the above cases would seem to me to indicate that the mandament is there to protect possession, not access. Such possession must be exclusive in the sense of being to the exclusion of others. The possession of keys by a multiplicity of parties waters down their*

[11] *Yeko v Qana* 1973 (4) SA 735 (A) at 739H - 740A.
[12] 1927 CPD 357
[13] De Beer v Zimbali Estate Management Association (Pty) Ltd and Another 2007 (3) SA 254 at para [54]

possession, and in the present case it becomes so dilute that it ceases to be the sort of possession that is required to achieve the protection of the mandament. It must be recalled that the real purpose of the mandament was to prevent breaches of the peace. If someone is in exclusive possession and exercises such possession, then deprivation thereof can, and often does, lead to a breach of the peace. No such breach would in the ordinary course of events take place where a large number of persons have access, rather than possession, of the property in question'

[24] On the facts of this matter, it could not have been seriously contended by the applicant that it was ever in physical possession or quasi-possession of the servers and the Syspro system. Further, factually the applicant only laid claim to being entitled to undisturbed access. This was premised on a reciprocal payment by the applicant for the use of these services. In my view, this matter had less to do with the facts and legal reasoning as set out in *Moonisami*.[14] I was rather persuaded by the findings in *Xsinet*[15] and *Microsure*[16]. I say this because, in *Xsinet,* the nub of the argument in the SCA eventually was this:

'*…Xsinet was in possession of the system, including the lines, telephones and modems installed at its premises as well as electronic impluses, and that it made use of them in the conduct of its business. Disconnetion denied Xsinet access to the beneficial use of its equipment, which, so the argument goes, was an act of spoliation. There is no suggestion that Telkom interfered in any way with Xsinet's physical possession of its equipment'*[17]

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[14] *Dharamlingum Moonisami v Global Network Systems (Pty) Ltd and others* (Kwazulu-Natal Local Division, Case Number D5815/19 - 4 October 2019)
[15] *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA)
[16] *Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (N)
[17] *Xsinet* at 314 C - J

[25] This reasoning was further eloquently formulated by Koen J, in *Microsure* as follows:

'*Our Courts have cautioned against widening the category of incorporeals properly capable of protection by the mandament, understandably so, given the robust nature of the relief where no enquiry into the merits of the particular dispute will be entertained'*[18]

[26] Spoliation is by its very nature in the form of final relief. This being so, I was obliged, in these circumstances, to accept the version of the respondents. This, inter alia, because the use of these services by the applicant was contractually regulated. On this score, I accepted that there existed a contractual dispute between the applicant and the first respondent. This is yet another reason, why I found that the applicant had not made out a case for spoliation relief.

THE INTERIM INTERDICT

[27] In the alternative, the applicant sought an interim interdict. The requirements for a right *prima facie* established, though open to some doubt, involves two stages. Once the *prima facie* right has been assessed that part of the requirement which refers to the *doubt* involves a further enquiry in terms whereof the court looks at the facts set up by the respondent, in contradiction of the applicant's case and, if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt, then the applicant cannot succeed.

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[18] *Microsure* para [19]

[28] The applicant has (20) employees and conducts its business as part of a group of companies.[19] They conduct the business of the manufacturing and supply of mainly steel products throughout South Africa. The applicant's case was that it relied on the information it possessed and its access to the communal servers and systems[20]. These were administered by the first respondent.

[29] The servers and systems contained the applicant's intellectual property which, included its employees' emails relating to the business of the applicant, and a host of information on the Syspro system. This, all comprises the property of the applicant and the applicant required access to it, to conduct its business. In addition, the applicant paid for access to (6) 'seats' on the Syspro system. These (6) employees could access the Syspro system by way of unique passwords. The other companies (which form part of the group of companies), also used the servers and systems to conduct their businesses. Each company in the group only had access to its own documents on the communal server, and to its own emails. The only party that enjoyed unlimited access, was the first respondent.[21]

[30] The applicant enjoyed peaceful and undisturbed access to its intellectual property via the means of the server and systems until the morning of the 16th of February 2021. This access was then summarily interrupted. The applicant's case is that this followed 'hot on the heels' of the suspension of the applicant's branch manager on the 15th of February 2021. On the following morning, the applicant's employees experienced

[19] The Vital Group
[20] Which are hosted by third parties
[21] This may be a further signal as to who was in 'possession' of the server and the system

problems with their access to the server. Another branch office was then contacted, and it was confirmed that 'Vital Durban' was operating without any issues of access to the server and the systems. On the day following, it became apparent that the first respondent had terminated the applicant's access to the server and systems. A flurry of legal correspondence followed. Initially, the first respondent's attorneys responded in the following fashion:

'Our client denies that it has "locked your client out" from the Syspro system'

[31] By this denial, the first respondent later became somewhat hoisted by its own petard. I say this because, the first respondent thereafter was driven to concede that it had terminated the applicant's access to the servers and systems. This was for 'security reasons' and allegedly shortly thereafter[22], the first respondent transferred an amount of R886,000.00 from the applicant's bank account to the first respondent's bank account. This, without the consent of the applicant.

[32] Besides, the respondents admitted that they terminated the applicant's access to the servers and systems because, so they contended, the applicant had breached an 'arrangement' with the first respondent in terms of which the applicant enjoyed its access to the server and systems. The breach contended for was that the applicant may not access the first respondent's proprietary and confidential information. According to the respondents, the applicant acted unlawfully in attempting to access the first respondent's proprietary and confidential information. This was and is clearly a factual dispute. It was

[22] On the 22nd of February 2021

against the canvass of these disputed facts that I considered the alternative relief contended for by the applicant.

[33] Nevertheless, I was persuaded that the applicant made out a compelling case that it, was as a fact, unable to access the first respondent's proprietary and confidential information stored on the server and systems or any other information belonging to any of the other companies of the group. Simply put, access to the applicant and its employees was limited to the applicant's own information on the systems and servers.

[34] Indeed, it is so that the applicant's intellectual property is housed on the servers and systems administered by the first respondent. Undoubtedly, the applicant required this intellectual property to continue to effectively run its business activities. The balance of convenience accordingly favoured the granting of the interim relief contended for in the alternative. This because, the applicant's intellectual property on the first respondent's servers and systems, was deserving of protection. In contrast, no harm would be suffered by the first respondent, if the interim relief fell to be granted. Also, the manner in which I had formulated the order in connection with the interim relief, was so designed as to allay any fears expressed by the first respondent regarding the alleged violation of its rights in connection with their intellectual property and confidential information, which also deserved protection.

[35] On the facts, irreparable harm was being suffered by the applicant and its business may very well have faced imminent closure if it was not afforded urgent interim relief. This was fortified by the fact that the first respondent conceded that it had terminated the

applicant's access to the server and systems. What was also of some significance, was that this concession was belatedly made at a very late stage in the proceedings when the proverbial 'shoe pinched'.

[36] I stood accordingly persuaded that a case was made out for an interim order interdicting and restraining the first respondent from denying the applicant access to the servers and systems.

[37] These are then my reasons for the order granted on the 16th of April 2021.

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E D WILLE

(Judge of the High Court)