

SOUTH AFRICA / JUDGMENT

Abrahams N.O and Others v Geldenhuys N.O and Others (Reasons) (2025/001463) [2025] ZAWCHC 78; [2025] 2 All SA 388 (WCC) (5 March 2025)

[2025] ZAWCHC 78

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

2025/001463

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 2025-001463

In the matter between:

MARK ABRAHAMS N.O. (in his capacity as Chairman of the Squash Section of the Villager Football Club) First applicant ANDRE NAUDE N.O. (in his capacity as a member of the Squash Section of the Villager Football Club) Second applicant CHRISTOPHER MITCHELL N.O. (in his capacity as a member of the Squash Section of the Villager Football Club) Third applicant PATRICIA SWART N.O. (in his capacity as a member of the Squash Section of the Villager Football Club) Fourth applicant WARREN FOX N.O. (in his capacity as a member of the Squash Section of the Villager Football Club) Fifth applicant MELISSA ROSSOUW N.O. (in his capacity as a member of the Squash Section of the Villager Football Club) Sixth applicant ANITA ROSSOUW N.O. (in his capacity as a member of the Squash Section of the Villager Football Club) Seventh applicant GEORGE KALLIGIANIS N.O. (in his capacity as a member of the Squash Section of the Villager Football Club) Eighth applicant and PIET GELDENHUYS N.O. (in his capacity as trustee for the time being of Villager Football Club) First respondent ANTON COOSNER N.O. (in his capacity as trustee for the time being of Villager Football Club) Second respondent DYLAN KEETING N.O. (in his capacity as a member of the Club Committee for the time being) Third respondent GERARD PEDERSEN N.O. (in his capacity as a member of the Club Committee for the time being) Fourth respondent KIRK GAINSFORD N.O. (in his capacity as a member of the Club Committee for the time being) Fifth respondent PATRICK MAILE N.O. (in his capacity as a member of the Club Committee for the time being) Sixth respondent AURELIA FORBES N.O. (in his capacity as a

member of the Club Committee for the time being) Seventh respondent CRAIG SEALE N.O. (in his capacity as a member of the Club Committee for the time being) Eighth respondent ALAN PAYNE N.O. (in his capacity as a member of the Club Committee for the time being) Ninth respondent

REASONS DELIVERED ON 5 MARCH 2025

VAN ZYL AJ:

Introduction

1. On 31 January 2025 I granted an order in the following terms in an urgent application “to restore the applicants’ possession of the squash facilities” at the Villager Football Club in Claremont:

1.1 The applicants’ non-compliance with the provisions of the Uniform Rules of Court relating to time periods, forms and service is condoned, and this application is heard as one of urgency in terms of Rule 6(12).

1.2 The application is dismissed on the basis that the applicants have failed to establish the type of possession entitling them to invoke the mandament van spolie.

1.3 The applicants in their personal capacities, joint and severally, the one paying, the other to be absolved, shall pay the respondents’ costs on the scale as between party and party, including counsel’s

fees taxed on Scale B.

2. The respondents disputed the issue of urgency, but I was of the view that, given the intervening December holiday period, the matter was sufficiently urgent to warrant a decision on the merits. It was also clearly in the interest of the Club and its members that some clarity be given as to the applicants’ position in the particular circumstances of the matter.[1]

3. As is apparent from the order itself, I was of the view that the mandament van spolie was not available to the applicants, given the nature of the possession that they were seeking to protect.[2] These are the reasons for my conclusion in this respect.

The underlying principles

4. 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 in addition to remedies such as interdict or a possessory action.[3]

5. The requirements for obtaining of a mandament van spolie are well-known:[4]

“The mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for a mandament van spolie has to show.”

6. The mandament’s focus is thus on possession, not ownership or the right to possess. It seeks to preserve the status quo ante and prevent resort to self-help. It is a remedy to preserve orderly judicial process and does not secure substantive rights. To succeed, the applicant must prove two requirements:[5]

6.1 First, peaceful and undisturbed possession at the time of dispossession: Possession is established by physical control and the intention to possess.

6.2 Second, unlawful deprivation of possession by the respondents: Spoliation occurs when dispossession happens without the consent of the possessor, regardless of how it is effected (for example, by force, deceit, or stealth).[6]

7. Although the mandament van spolie originally protected only the physical possession of movable or immovable property, the remedy has been extended to provide a remedy to protect so-called "quasi-possession" of certain incorporeal rights, such as those of servitude. [7] It is, however, well settled that not all incorporeal rights can be the subject of spoliation.
8. The Supreme Court of Appeal has confirmed[8] that the mandament van spolie does not have a catch-all function to protect the quasi-possessio of all kinds of rights, irrespective of their nature. The mandament is not the appropriate remedy where contractual rights are in dispute, or where specific performance of contractual obligations is claimed. Its purpose is the protection of quasi-possessio of certain rights.
9. Consequently, the nature of the professed right, even if it need not be proved, must be determined (or the right must be characterised) to establish whether its quasi-possessio is deserving of protection by the mandament. Possession of mere personal rights (or the exercise of personal rights) is not protected by the mandament.
10. The Supreme Court of Appeal has thus held that where an order is sought essentially to compel specific performance of a contractual right to resolve a contractual dispute, the mandament is not available,[9] and there is no authority for an extension of the remedy to such cases.[10] The rights that flow from a contractual nexus between the parties are insufficient for the purposes of the mandament, as they are purely personal, and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for

possession.[11]

11. Moreover, the mandament protects only possession, and not access.[12]
12. A spoliation order is a final order, and the degree of proof and the onus on the applicant remain unchanged:[13]

“Where a final order is sought in an application and there are disputes of fact on the papers, then the matter can be resolved on the facts stated by respondent together with the admitted facts in the applicant's affidavits... In the first paragraph of the headnote in the case of Nienaber v Stuckey 1946 AD 1049, the test is set out as follows:

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

13. For the purposes of the present matter, it is further well settled that the constitution of a voluntary association is a contract entered into by its members. The relationship between a voluntary association and its members is thus contractual in nature. [14]

The applicants seek to protect personal rights

14. There are many accusations and recriminations on the papers but the

background

to this matter is essentially common cause. It is not in dispute that since 15 January 2025, the Club's squash facilities have been open and accessible to all members of the Club in good standing.

15. The applicants used to be members of the Club's committee (established under the Club's constitution as it stood at the time) that managed the operations of the Club's squash section, until they were suspended as Club members in November 2024, and subsequently lost their respective memberships at the Club. The

applicants say that the act of spoliation occurred when the respondents locked the squash facilities on 19 December 2024, and refused to let the applicants have access thereto.

16. The loss of membership came about as follows. On 4 November 2024 a Special General Meeting of the members of the Club was held, at which a new constitution was duly adopted. The applicants deny that the new constitution was validly adopted. On the same date, the Club's executive committee took a decision to suspend the applicants' respective memberships of the Club. On 19 December 2024 the executive committee took a further decision not to renew the memberships of the first to fourth applicants. A further decision was taken by the executive committee on 6 January 2025 not to renew the memberships of the remaining applicants. The validity of these decisions is in dispute.[15]

17. It is common cause that the Club is a voluntary association and, in terms of the Club's constitution, only members of the Club are entitled to the use of and access to the Club's facilities, including the squash facilities. Non-members do not enjoy such rights. Consequently, when the applicants' respective memberships were not renewed, they lost any entitlement to the use of and access to the Club's squash facilities.
18. It does not assist the applicants to say that because they contest the validity of the new constitution and of the decisions to suspend them and not to renew their memberships of the Club, they "regard themselves" as members of the Club. They are, as a fact, no longer members of the Club.
19. The nub of the matter is whether the applicants have established, on the basis of undisputed facts, that they were in possession of the Club's squash courts at the relevant time, that is, prior to being deprived thereof because of the loss of their respective memberships of the Club.[16]
20. The applicants argue that they do not have to prove that they have a right to possession or that their possession was or will be lawful. In the current matter this would mean that the disputes relating to whether the applicants remain members of the Club are irrelevant for the determination of the application.
21. As a basic statement of the law in relation to spoliation applications generally this is undoubtedly correct,[17] but what the applicants seek to ignore is the nature of the "possession" that they wish to protect in the particular

circumstances of this matter. They are asking the Court to disregard the fact that the right of access to the Club's facilities

is an incident of membership and arises solely because of the contract that exists between the Club and its members (that is, the constitution).

22.

Consequently, the rights associated with membership (including access to the Club's facilities) are purely contractual in nature.

The rights are personal in nature. What the applicants are seeking is thus not the restoration of possession, but specific

performance of what they contend are their contractual rights. It is clear from the authorities referred to above that such relief falls outside of the ambit of a spoliation order.

23. The applicants argue that they have specifically pleaded a loss of their physical possession of the squash facilities. For this reason, they say that the fact that an order restoring such possession would effectively restore their membership rights is incidental and of no consequence.
24. This is, however, not the state of the law. The applicants are seeking to disregard the contractual position of the parties, and are asking the Court to assume that they might have no contractual rights at all to access the Club's squash courts, but are nevertheless entitled to claim the benefits of membership. The mere fact that the applicants might or might not have had a right, derived from a contract with the Club, to make use of and even manage the Club's squash facilities as part of a subcommittee under the old constitution, does not amount to possession for the purposes of establishing an entitlement to the mandament van spolie because the mere right to use property does not amount to possession:[18]

“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. ...

... 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" ... 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 unlawfulness of the spoliatus' possession is not enquired into at all . . .

... If the protection given by the mandament van spolie were to be held to extend to the exercise of rights in the widest sense then

supposedly rights such as the right to performance of a contractual obligation would have to be included - which would be to extend the remedy beyond its legitimate field of application and usefulness. ...

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 respondent 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 only serves to confuse the true issue....”

25. The position is clearly illustrated, too, by the discussion in *Blendrite (Pty) Ltd and another v Moonisami and another*:^[19]

*“[19] The crisp issue in both the court of first instance and on appeal in the present matter is thus whether the prior access to an email address and company network and/or server amounted to quasi-possession of an incorporeal which qualified for protection by a spoliation order. The case most closely resembling the present one is this court's decision in *Telkom SA v Xsinet (Pty) Ltd*. In that matter, the appellant disconnected the respondent's telephone and bandwidth systems when a dispute arose as to whether the respondent owed money for a service. This court held that the receipt of the telecommunications service arose from a personal right in contract. The use of the bandwidth and telephone service was not an incident of possession of the premises from which the respondent operated. The appeal against the spoliation order succeeded and the order was set aside.*”

- [20] In the present matter, the prior use of the email address and server was not an incident of possession of movable or immovable property on the part of the first respondent. This was not even alleged. The first respondent did not possess any movable or immovable property in relation to his erstwhile use of the server or email address. Any entitlement to use the server and email address is wrapped up in the contested issue of whether the first respondent remains a director of Blendrite, and might relate to the terms of his contract of employment. It is a personal right enforceable, if at all, against Blendrite. I can see no basis for distinguishing the present matter from that of *Telkom*, by which we are bound unless we are of the view that it is clearly wrong and requires to be set right. For the reasons aforesaid that decision is consonant with prior jurisprudence and correct. The first respondent's prior use did not amount to quasi-possession of incorporeal property. It is therefore not protectable by way of the mandament. As such, the court of first instance erred in granting spoliatory relief.”
26. In the present matter, the applicants' use and possession (or control, as they put it) of the squash facilities are “wrapped up in the contested issue” of whether their memberships of the Club were validly terminated. These are personal rights, enforceable, if at all, against the Club.
27. As indicated, too, the mandament protects possession, not access.^[20] The applicants are, in truth, seeking to have their access to the squash facilities restored. The fact that they wish to have access because they – as they argue – need to perform various administrative and maintenance services in relation to the squash facilities at the Club – does not change the position. It therefore does not assist them to argue, as they do, that they require restoration of control of (“and not so much access to”) the squash facilities.

The applicants shared access to the facilities with all members of the Club

28. There is a further hurdle in the applicants' way.

29. To be protected by the mandament possession need not be exclusive,[21] but it has been held[22] that where multiple parties have access, the nature of the possession is watered down to such an extent that it ceases to be the kind of possession that is required for purposes of the mandament.
30. This is so because the real purpose of the mandament is to prevent breaches of the peace. [23] If someone is in exclusive possession and exercises such possession, then deprivation thereof may lead to a breach of the peace but 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.
31. The remarks in *De Beer v Zimbali Estate Management Association*[24] are apposite in the present matter in relation to the rights of access by members of the Club:
- “Although possession can be shared, the cases relating to the joint possession of keys, illustrate that the access to keys for two or more real possessors is intended to be to the exclusion of others. If the alleged possession by applicant to the whole of the Zimbali estate, was to be to the exclusion of the real owners I would have more sympathy for her.”*
32. It is common cause that all members of the Club, in particular members of the Club's squash section have access to the Club's squash facilities. The applicants do not allege that they ever had exclusive use of or access to the Club's squash facilities.
33. Viewed in its proper context, the applicants' situation in the present matter is manifestly not one in which the mandament can come to their rescue. The applicants have not established the requisite possession entitling them to relief by way of the mandament van spolie:[25]

Conclusion

34. In essence, this application relates to a dispute about the control of the squash section of the Club. It is not about regaining possession of the Club's squash facilities. What the applicants are seeking is the restoration of their membership rights and the incidents of membership, with the privileges and benefits that such a position would afford them. They seek to enforce rights which they claim to have in terms of a contract (whether the new or the old constitution) with the Club in relation to the Club's squash facilities.
35. These rights, in my view, form part of the category of “possession” that cannot be obtained through the mechanism of the mandament van spolie. On the authorities referred to above, the applicants are as a matter of law not entitled to a spoliation order to enforce what is in truth a dispute about whether the applicants are entitled to specific performance of their alleged contractual rights.

Costs

36. There was no reason why costs should not follow the result.

37. Each of the parties sought costs on the scale as between attorney and client (the applicants essentially because they had attempted, unsuccessfully, to negotiate with the respondents prior to the institution of this application, and the respondents because they regarded the case as being without merit from the outset), but I did not regard the matter as justifying punitive costs. In the exercise of my discretion under Rule 67A I was of the view that the applicants should pay the respondents' costs on a party and party scale, with counsel's fees taxed on Scale B.

Order

38. For these reasons, I granted the order referred to at the outset.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicants: Mr C. Bosch, instructed by De Klerk & Van Gend Inc. Attorneys

For the respondents: Ms M. Adhikari, instructed by Werksmans Attorneys

- [1] See the approach in *Tau Mining Contractors (Pty) Ltd v Aveng Moolmans (Pty) Ltd and another* [2024] ZANHC 103 (1 November 2024) at para [23].
- [2] In the answering papers the respondent disputed the applicants' locus standi, because they were no longer members of the Club. The issue of standing is interlinked with whether the applicants were entitled to invoke the mandament at all, and I therefore do not deal with it separately.
- [3] *Shoprite Checkers Ltd v Pangbourne Properties (Pty) Ltd* 1994 (1) SA 616 (W) at 619E-F.
- [4] *Van Rhyn and others NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521 (WCC) at para [7].
- [5] On a balance of probabilities. See *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-G.
- [6] *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and others* 1996 (4) SA 231 (C) at 240B-D.
- [7] *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 514D-516E.
- [8] See, for example, *First Rand Ltd t/a Rand Merchant Bank and another v Scholtz NO and others* 2008 (2) SA 503 (SCA) at para [13].
- [9] *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) at para [14]; and see *Eskom Holdings SOC Ltd v Masinda* 2019

- (5) SA 386 (SCA) at paras (14) and [22].
- [10] Telkom SA Ltd v Xsinet (Pty) Ltd supra at para [14].
- [11] Eskom Holdings supra at para [22].
- [12] De Beer v Zimbali Estate Management Association (Pty) Ltd and another 2007 (3) SA 254 (N) at para [54].
- [13] Chopper Worx (Pty) Ltd and another v WRC Consultation Services (Pty) Ltd 2008
- (6) SA 497 (C) at para [12].
- [14] Natal Rugby Union v Gould 1999 (1) SA 423 (SCA) at 440F-G: “The union is a voluntary association. On long standing authority the constitution of such a body is a contract entered into by its members. Whether Parkinson's having remained chairman vitiated his election must therefore be determined by reference to the terms of that contract.” See also Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and others 2019 (4) SA 471 (SCA) at para [19].
- [15] I express no view on the merits of the applicants’ loss of membership because it is not necessary and, in any event, is an issue for another forum, such as a court considering an application for judicial review, should the applicants decide to launch such an application in due course.
- [16] Pangbourne Properties supra at 621I-J and 623E-F.
- [17] The applicants rely upon Ivanov v North West Gambling Board and others 2012
- (6) SA 67 (SCA) at para {25} (involving the seizure of gambling machines and equipment); Yeko v Qana 1973
- (4) SA 735 (A) at 739E-F (involving the possession and occupation of business premises (with movables) from which the respondent had been
- trading); Mutale and another v Forte and others [2021] ZAGPJHC 573 (19 October 2021) at paras [12]-[13] (involving the occupation of residential property); and Lottering v Palm 2008
- (2) SA 553 (O) at 555J-556A (involving the respondent’s building of a wall on a portion of land in the applicant’s possession).
- [18] See the discussion in Pangbourne Properties supra at 622C-623G. Emphasis added.
- [19] 2021 (5) SA 61 (SCA) at paras [19]-[20]. Emphasis added.
- [20] De Beer supra at para [54].
- [21] Pangbourne supra at 620E-F.
- [22] See De Beer supra at para [54].

[23] See Ngqukumba v Minister of Safety and Security and others 2014

(5) SA 112 (CC) at para [12].

[24] De Beer supra at para [56].

[25] Pangbourne Properties supra at 623F-G.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2025/78.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/abrahams-no-and-others-v-geldenhuys-unknown-topic-awchc-2025>

Prepared on 10 October 2026 · Esheria