

SOUTH AFRICA / JUDGMENT

BVDM Trading 4 CC v Kings Terrace Body Corporate (561/2019) [2019] ZAECPEHC 35 (30 May 2019) [2019] ZAECPEHC 35

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

NQUMSE

CASE / FILE NUMBER

561/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, PORT ELIZABETH

Case

No.: 561/2019

In

the matter between:

BVDM
TRADING 4
CC Applicant
and
KINGS
TERRACE BODY
CORPORATE Respondent

JUDGMENT

NQUMSE AJ

Introduction

- [1] On 12 March 2019 the applicant launched an urgent application for an interdict and certain other relief. On the date, the matter appeared before Rugunanan AJ and it was postponed to 19 March 2019 with the following order:

1.1 “... .

1.2 The applicant is hereby given leave to amend its Notice of Motion.

1.3 The amended Notice of Motion shall be electronically served on the respondent’s attorneys.

1.4 The respondent is given leave to supplement its opposing papers, such papers to be delivered on the applicant’s attorneys by not later than 12h00 noon on 15 March 2019.

1.5 The applicant shall, if necessary, supplement its papers and file same by 12h00 on Monday 18 March 2019.

1.6 The applicant shall ensure that the court file is indexed, and paginated by close of business on Monday 18 March 2019.

1.7 That the costs are reserved.”

[2] The amended Notice of Motion sought for an order with variations from the original one in the following terms:

2.1 “Ordering that the non-compliance with the Rules of this Honourable Court in respect of forms, time periods and service is condoned and that leave be granted to the applicant to move this application forthwith as a matter of urgency.

2.2 That the respondent forthwith restores the applicant’s access to, possession of, use of and/or control over the internet network, related equipment and related structures, which had been utilised by the applicant at Kings Terrace, Port Elizabeth immediately prior to 1 March 2019, pending the final outcome of the dispute referred to the Community Schemes Ombud;

2.3 That the respondent is restrained from interfering with and/or causing any interference with the applicant’s access to, possession of, use of and/or control over the network, related equipment and related structures pending the final outcome of the dispute referred to the Community Schemes Ombud;

2.4 That the respondent pays the costs of this application;

2.5 Granting the applicant such further and/or alternative relief as this Honourable Court may deem meet.”

The

facts

[3] The following facts are either common cause or not seriously disputed.

3.1 During or about 2005, the applicant received consent from the trustees of the respondent to install a transmitter on the roof of a structure in Kings Terrace. The applicant was also permitted to supply free internet service to residents of King Terrace.

3.2 As a result of the consent he received, the applicant offered to supply the Kings Terrace management office with free internet service, which offer was accepted.

3.3 During 2014 the respondent elected to install a new [Closed-circuit television] (CCTV) equipment which ran on the applicant's network which was already installed in the property. The same arrangement obtained when the respondent upgraded its CCTV system with the installation of additional cameras and switches that ran on the applicant's existing network. The applicant took advantage of the newly acquired equipment and utilised it with the knowledge of the respondent for its site benefit. The applicant makes no qualms with the switches and admits that they are the property of the respondent. The applicant further contends that should the respondent claim them back, it will not be a hassle to remove them and re-install the old switches that were utilised by the applicant before the installation of the CCTV switches.

3.4 Notwithstanding the claim by applicant that he purchased the network cabling equipment on which he ran the internet service, no proof of payment of such network cabling and/or related equipment was furnished as proof of this claim. As a result, the respondent places reliance on annexure "DM8" in the schedule reflecting the respondent's electronic security expenses for the period 1 May 2015 to 17 July 2017 which reflects a sum of R292 582, 48 as a proof that he is the lawful owner of the entire equipment which is claimed by the applicant.

3.5 During 2018 the respondent's trustees terminated their relationship with the applicant and no longer wished to utilise the applicant's services. As a result, on 28 June 2018 the applicant was requested by the respondent to handover the tag system in respect of the access control. This demand was made through correspondence annexed to the respondent's papers as annexure "DM10". This was followed by a resolution reflected in annexure "DM11" of the respondent's papers wherein the respondent took a decision to outsource the surveillance system and concomitantly take legal steps against the applicant.

3.6 On 8 February 2019 the respondent's attorney's delivered correspondence annexed to the founding papers as 'FA1' to applicant's erstwhile attorneys, terminating the applicant's access to the respondent's Body Corporate infrastructure. In reaction to 'FA1', on 19 February 2019, the applicant's attorneys addressed a letter annexed as 'FA2' to respondent's attorneys in which they advised that they contemplate bringing an urgent interdict against the respondent if he does not desist from its threat to disconnect the applicant's network.

3.7 On 13 February 2019 the respondent, advised the residents of Kings Terrace through a newsletter annexed to the founding papers as annexure 'FA3' that the applicant was providing its services unlawfully through the use of the respondent's infrastructure, and that the Virtucomp is a new service provider that will be providing the internet services at the termination of applicant's services on 1 March 2019.

3.8 On 27 February 2019 the applicant referred the dispute to the Community Scheme Ombud who is yet to make a decision on the dispute. In the meantime, on 1 March 2019 the respondents disconnected the applicant's internet service to the applicant's clients who are residents of Kings Terrace.

[4] Applicant further contends that the action of the respondent to terminate his supply of internet services to his clients who reside at Kings Terrace and to deny him access to the network cables and equipment which he is owner thereof is unlawful. He further submits that out of the 21 clients to which he supplies internet services he derives a full monthly income of R12 000, 00. As a result of the disconnection of internet services his clients immediately lodged a complaint with the applicant demanding instant and consistent internet access. As each day passes so the applicant says, brings about a risk in the applicant losing its clientele to a competitor. This is made worse by the introduction of Virtucomp who is a competitor in their industry. Applicant avers that a restoration of the connection pending the outcome of the Ombud will bear no prejudice to the respondent.

[5] The respondent contends that the application should not have been brought as an urgent application, this is more so since the applicant has shown on his own version that he has an alternative remedy for

damages. He avers that the applicant was given notice on 8 February 2019 that his access to the respondent's Body Corporate infrastructure will be terminated with effect from 1 March 2019 and that between 8 February and 1 March 2019 his access will be supervised. He further avers that no explanation was given for the delay in launching the application given the intervening period between 8 February and 1 March 2019.

[6] The respondent stated that during the intervening period his attorneys communicated with the applicant's attorneys regarding login passwords to enable Virtucomp to take over the respondent's

security and control of the network. When this demand was resisted by the applicant, the respondent threatened to terminate the access of the applicant prematurely and shut him out if he refused with the password. This prompted the applicant's

attorneys to write communication as reflected in annexure "DM 1" in the papers in which they exhorted the respondent to allow the status quo obtaining in the intervening period of 8 February to 1 March 2019 to remain. On 18 February 2019 the applicant ultimately furnished Virtucomp with the necessary passwords.

[7] As a demonstration of the withdrawal of the consent of the use of the Body Corporate infrastructure by the applicant, the respondent refers to an email dated 4 February 2019 annexed to the papers as "DM4" in which the following was reflected:

"Dear Dave

According to the respondent the above correspondence demonstrates the real reason for their decisions to terminate applicant's access to the respondent's electronic equipment and network system. Respondent further submits that annexures DM5 and DM6 which are annexed on the papers as proof that the cameras and switches are the property of respondent".

[8] In another example which confirms that the applicant was fully aware of the termination of the consent is reflected in the letter annexed as "DM 7" in which the applicant requested a further

month to make alternative arrangements to service his clients. The respondent submits that given the process and communication

between them that has been ongoing for months, the launch of this application on an urgent basis was an abuse of the court process.

[9] The respondent further contends that the averment of applicant that he has 21 clients from which he derives R12 000.00 monthly, he has quantified his damages and therefore has an alternative remedy for a claim for damages. The respondent further stated that the applicant has no contractual right to continue to utilise the respondent's property for its own benefit and rely on the complaint which is referred to the Ombud, whereas its right to utilise such property was from the onset dependent on the consent of the respondent. The respondent further contends that the Ombud is not in terms of section 39 of the Community Schemes Ombud Service Act[1] competent to adjudicate the dispute that has been referred to it by the applicant. In essence the Ombud has no authority to grant an Order requiring the respondent to provide proof of installation, as well as ownership and payment of his equipment.

[10] In reply the applicant contended that the reason the application was launched after 1 March 2019 is because the applicant had earlier warned the respondent to desist from its threats. The disconnection of his equipment only happened on 1 March 2019. Consequently, there has been no delay in launching the application. He further stated that he released the passwords in order to minimise conflict, subject to an agreement that Virtucomp and/or the respondent will not interfere with the applicant's supply of services to its clients. He also contends that the letter annexed as "DM1" from his attorneys to the respondent should not be construed as an agreement that the network connection could be disconnected on 1 March 2019, but was a request that no unlawful actions be taken prior to that date. The applicant further stated that the respondent has no lawful entitlement to prevent the applicant from accessing its equipment, to disconnect the applicant's network and to prevent the applicant from accessing its network and the rendering of services to its clients. In the alternative, the applicant contends that if the respondent is correct that it could revoke the consent it contends to have granted the applicant, the manner in which such consent was revoked and the inadequacy of the notice renders the revocation of the consent unlawful. Applicant further states that the arrangement for the respondent to run its security system on the applicant's network was just a favour free from any contractual

obligation. If the respondent no longer wishes to take advantage thereof, the applicant is amenable to the removal of respondent's security system from its network system.

- [11] Since the security system of the respondent is operated under its own access codes, such codes can be changed in order for applicant not to have access thereto and that can be done without the need to hijack the entire network system of the applicant. As an interim measure the applicant has already given full control of the security system over to Virtucomp.
- [12] The applicant further denies that the claim for damages will be a reasonable, satisfactory, and an alternative remedy; since the loss of its clients would result in an irreparable harm to its business. Applicant denies that it has compromised the respondent's security system, instead he reiterates its position regarding ownership of the network and the equipment thereon which has always been under the control of the applicant.
- [13] Sequel to the amended Notice of Motion the applicant sought to base its application on spoliation. The respondent reacted with a supplementary answering affidavit and stated that the respondent has been in possession of the common property through which the bulk and electronic equipment were provided. He denies that the applicant had an undisturbed possession of the equipment and the network as claimed. He contends that such rights were in terms of the contract between them. The applicant had given up his possession before launching this application. He further reiterated his averments in the opposing affidavit that it is denied that the applicant paid for the network or is owner thereof. Instead the respondent contends that it has spent more than R81 892, 55 and R101 657, 22 for the period 1 May 2015 to July 2017.

The respondent further states that the applicant was running a business from the respondent's property, acting as an Internet

Service Provider and funding security service not only to the residents of the respondent, but as a host of neighbouring properties. The applicant was also transmitting bandwidth by way of an antenna from the roof of respondent's property. According to the respondent there is no doubt that the applicant utilised the equipment for its own benefit to the exclusion of the respondent. He further avers that the applicant can also not proffer an explanation for some of the missing assets that the respondent had paid for.

- [14] The respondent further stated that in terms of the agreement they had concluded, the applicant would install the network at the respondent's cost and in return, the applicant was to manage the security of the respondent and provide free internet to the respondent's management office. Respondent further contends that due to numerous problems experienced with the applicant, the Trustees of the respondent decided unanimously on 24 May 2018 to outsource the CCTV surveillance, networking and internet requirements to Virtucomp. A copy of the resolution was annexed to the supplementary opposing affidavit as "DM 14". Thereafter Virtucomp was contracted with effect from October 2018 to take over the entire security of the respondent which included all of the cameras which are connected

via the network together with the tagging system for the gates.

- [15] On 18 October 2018 the applicant handed over to Virtucomp all the login details, passwords and the intellectual property to the network. This enabled Virtucomp to change all the login details, passwords which excluded the applicant from accessing the network and the security system. According to the respondent this was effectively a consensual termination of the contractual agreement between the applicant and the respondent. Owing to an undertaking by the respondent to preserve the status quo until 1 March 2019, the 21 clients of the applicant were permitted to continue utilising the respondent's network for their internet services.
- [16] After the applicant handed over possession of the network and its control to Virtucomp, the respondent changed all the locks to the meter rooms and the applicant was prohibited from entering the meter rooms, unless with prior notice given to the respondent and with supervision by the respondent's property manager. The respondent contends that the applicant was never in undisturbed possession of the network, alternatively whatever control he exercised over the network was consequent to a contractual arrangement which ended when the applicant handed over voluntarily the control and possession of the login details and password.
- [17] In the replying affidavit to the supplementary answering affidavit, the applicant denied giving up possession and ownership of the equipment voluntary prior to instituting these proceedings. He reiterated that the reason he handed over the login and password details was to minimise conflict between the parties and was not surrendering full control of the network to the respondent. He however, concedes that his access to the equipment was restricted, although he still retained access to the internet network.
- [18] Counsel for the applicant submitted in its heads of argument as well as before me that, by virtue of the fact that the relief sought is that of mandament van spolie it is urgent in nature and requires urgent determination. He further argued that the applicant will not obtain substantial redress if the matter is not heard on an urgent basis. This is more so that the applicant stands to lose its entire client base if the matter were to be heard in the ordinary course. In this regard so the argument went, the applicant is not required to show irreparable harm.
- [19] Counsel for the respondent pointed out that initially the relief sought was an interim interdict wherefore papers were prepared by both parties on that basis. However as a result of the amended Notice of Motion the relief sought changed to a mandament van spolie which by its nature is a final relief albeit the framing of the relief sought is still in the form of an interim interdict, pending the outcome of a dispute which has been referred to the Community Scheme Ombud.

Nature of the application

[20] As correctly pointed out by counsel for the respondent and not seriously contested by the applicant, the application as I see it is a hybrid that straddles between an interim interdict and a remedy under the mandament van spolie. In one hand the applicant seeks an order pending the final outcome of the Ombud and on the other hand a final redress under mandament van spolie. In light of the amended Notice of Motion, I shall proceed and determine the issue as though the intended relief sought is that of

the mandament van spolie. In light of that determination, I tend to agree with the contention that mandament van spolie is urgent in nature where a party has shown that the matter is urgent and could not be afforded substantial redress at a hearing in due course. Owing to the reaction of the applicant's clients upon being disconnected from the network service of the applicant, this rendered the matter urgent and therefore I do not find that the applicant abused the court's process when it brought the matter on a matter of urgency.

Issues

to be determined

[21] The issues to be determined in this matter as I understand them are the following:

(i) Whether the applicant was in possession of the network and the equipment that was connected to the premises of the respondent.

(ii) Whether the applicant was dispossessed unlawfully of his network as well as the accompanying equipment for such a service.

(iii) Whether the respondent has succeeded in the available defences under the remedy of the mandament van spolie.

The law

[22] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession of the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else)[2]. In order to obtain a spoliation order the onus is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession[3]. In *Nino Bonino* the general principle of the mandament van spolie was stated by Innes CJ as follows:

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute".

[4]

- [23] The onus the applicant faces is whether he has established possession and control over the property in question viz, possession of, use of and control over the network and related equipment. The applicant's contention is ostensibly that he has been denied access to its network and prevented from rendering internet services to its clients.
- [24] The established facts point to an incontrovertible fact that applicant gained access to the premises of respondent through a consensual agreement. It should therefore follow that at all material times the applicant was using the network facility that was hosted on the premises of respondent subject to the existence of the consent or permission granted to the applicant by the respondent. Consequently, the ability to operate the network by the applicant was dependent on the existence of that consent.
- [25] There is no suggestion or evidence to the effect that the arrangement for access that was granted to applicant was perpetual.

Instead the respondent alleges that the agreement was subject to termination on notice by either party. There are also no

specific terms of time frames for a notice of termination or the procedure to be followed whenever there may be a request of an

extension of the agreement as well as how a requesting party should go about making such a request for extension.

- [26] According to the evidence it is apparent that the agreement was not a perpetual one. This therefore allowed either of the parties to terminate the agreement as per the wishes of that party. The applicant denies that the parties agreed to a termination as alleged by the respondent, as a result denies that the termination was lawful. However, what the applicant failed to allege and prove is the existence of a framework or procedure that the parties had agreed on, that shows how and when they can terminate their relationship. Neither did the applicant point the Court to any timeframes that ought to have been adhered to by the respondent when he contemplated to terminate their agreement. In the absence of the framework that regulates these aspects I refer to, I am unable to criticize the manner in which the consent was terminated. However, the matter does not end there.
- [27] I shall now deal with the aspect of possession. As is required under mandament van spolie, an applicant who wants relief under this remedy must have been in possession of the item he has been dispossessed of[5]. The question that begs an answer in this matter is whether at the time the respondent denied the applicant access to its control rooms and effectively preventing the applicant to its network and equipment constituted spoliation. I am of the view that at the time the access was denied, whether the agreement was in existence or not the applicant was in possession and in control of its network and related equipment that was on the premises of the respondent. As stated earlier, in order for the applicant to succeed he needs to prove that he was in possession of the thing spoiled[6].

- [28] The applicant has indeniably installed a transmitter on the roof of a structure in King Terrace with the necessary cabling and equipment in order to run its network. He has over time maintained and upgraded its network in order to service its clients. From this service, the respondent has also benefited freely. It is patently clear therefore that at all material times of the 14 years' period the applicant was allowed to run its network, he was in possession and in control of its network and related equipment.
- [29] It is trite that a court hearing a spoliation application does not concern itself with the rights of the parties before the spoliation took place, it merely enquires whether or not there has been a spoliation, and if there has been, it restores the status quo ante[7].
- [30] Once the applicant has discharged the onus resting upon him and no recognised defence has been raised with success, the Court has no discretion to refuse the grant of a spoliation order on the grounds of considerations relating to the merits of the dispute between the parties.[8]
- [31] The defence raised by the respondent is ostensibly that the consent for the applicant to run its network was terminated

consensually. Further, the respondent contest the ownership of the equipment on which the applicant was running its network

services. In addition the respondent argued that the failure of the applicant to join Virtucomp who presently controls the network has compromised and watered down the possession the applicant is claiming.

- [32] The allegation that the termination was consensual is not supported by the evidence. It is clear that the applicant had at no stage surrendered its possession of its network and equipment to render internet services to its clients. The claim that termination was consensual lacks merit and has to be rejected. The claim that the equipment is owned by the respondent is irrelevant for the relief under mandament van spolie.
- [33] I find what was said in Bon Quelle[9] very instructive where the court said that the mandament van spolie is a possessory remedy, the limited and exclusive function of which is to restore the status quo ante and it therefore matters not that the spoliation might have a stronger claim to possession than the person spoliator or that the

latter has indeed no right to possession. The principle is simple, possession must first be restored to the person spoliated

irrespective of the parties' actual rights to possession.[10] In amplification of the principle in Bon Quelle the Supreme Court of Appeal said the question of illegality or wrongfulness of the spoliator's possession are irrelevant.

[34] In my view the applicant has discharged the onus on it to meet the requirements of a remedy under mandament van spolie. I find therefore that the applicant was in possession of the network and the related equipment to render internet services, that he was deprived of its possession unlawfully and I am satisfied that the applicant's possession must first be restored before the merits of the competing claims is considered.

[35] In the result the following order will issue:

1. The respondent is hereby directed to restore the applicant's access to, possession of, use of and/or control over the internet network, related equipment and related structures, which had been utilised by the applicant at Kings Terrace, Port Elizabeth immediately prior to 1 March 2019.
2. The respondent is hereby directed to pay the costs of this application.

V. NQUMSE

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Mr. A C Moorhouse

Instructed by

Van Wuk & Associates

137 Water Road, section B, Warmer

PORT ELIZABETH.

For the Respondent: Mr. G Friedman

Instructed by

Friedman Scheckter

75 Second Avenue

PORT ELIZABETH.

Date heard: 19

March 2019

Judgment

delivered: 30 May 2019.

- [1] Section 39 of the Community Schemes Ombud Service Act 9 of 2011 provides for 7 different types of prayers for relief.
- [2] Ngqukumba v Minister of Safety and Security and Others [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) at para 10.
- [3] Yeko v Qana 1973 (4) SA 735 (AD) at 739 E.
- [4] Nino Bonino v De Lange 1906 TS 120 at 122 (Nino Bonino).
- [5] Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi [1988] ZASCA 123; 1989 (1) SA 508 (A); [1989] 1 All SA 416 (A) (Bon Quelle).
- [6] Pieter v Muller 1973 (4) SA 126 -127 E; Malan and Another v Green Valley Farm Portion 7 Holt Hill 434 CC and Others 2007 (5) SA 114 (ECD) (Malan).
- [7] Malan above n 6 at 123 E.
- [8] Id at 123 I-J to 124 A.
- [9] Above n 5 at 521 A-B.
- [10] Ivanov v North West Gambling Board and Others
- [2012] ZASCA 92; 2012 (6) SA 67 (SCA); 2012 (2) SACR 408 (SCA);
- [2012] 4 All SA 1 (SCA) at para 24.

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