

SOUTH AFRICA / JUDGMENT

**Cedar Park Properties 39 (Pty) Ltd v
Strawberry Worx Pop (Pty) Ltd (21068/2016,
21594/2016, 23878/2016, 18810/2016) [2016]
ZAGPJHC 207 (1 August 2016)
[2016] ZAGPJHC 207**

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

21068/2016, 21594/2016, 23878/2016, 18810/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

OF

INTEREST TO OTHER JUDGES: YES

REPORTABLE:

NO

REVISED.

1 August 2016

CASE

NOS: 21068/2016

21594/2016

23878/2016

(18810/2016)

In

the matter between: CEDAR
PARK PROPERTIES 39 (PTY) LTD
Applicant
and
STRAWBERRY WORX POP
(PTY) LTD
Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. Cedar Park Properties 39 (Pty) Ltd ('Cedar Park') is the owner of the property comprising the block at the corner of Rivonia Road and West Street Johannesburg, generally known as the Sandton Gautrain Station.
2. Strawberry Worx Pop (Pty) Ltd ('SW') is an outdoor advertising company which markets and sells advertising space. In the judgment of van Oosten J to which reference will be made, the learned judge referred to SW as "a turnkey outdoor advertising solution agent in respect of advertising on billboards, building wraps and hoarding"

While Cedar Park contends that SW simply markets Cedar Park's site as its agent, SW contends that it concludes agreements with property owners for the right to install advertising structures and then sell advertising space on these structures to prospective advertisers and that this was the basis upon which it contracted with Cedar Park.

In spoliation proceedings brought by SW against Cedar Park and Fusion Gen Communications (Pty) Ltd ("Fusion Gen")[1] in June 2016 under case number 18810/2016 van Oosten J held that the relationship was not one of agency as contended for by Cedar Park but one "analogous to those of a sub-lessee"[2] .

3. The learned judge pertinently refrained from deciding on the duration of the agreement since it was unnecessary for the purposes of a spoliation application[3]. I will return to this.
4. This case is about an applicant owner seeking to regain use and possession of its property after a court found that it had unlawfully spoliated the respondent. It attempted to do so by way of an interim interdict after the respondent had allegedly regained possession and use of the property pursuant to the spoliation order and by applying for leave to appeal the spoliation order.

In addition Cedar Park seeks an urgent eviction order against SW and in yet another (and earlier) application, based on a vindicatory right, the return of an advertising canvas taken from the property by SW.

5. Aside from opposing the relief sought by Cedar Park, SW has brought a section 18 application for leave to execute its spoliation order. It also contends that there was a further spoliation which together with, or independently of, the first spoliation precludes Cedar Park from proceeding with its eviction application and seeks appropriate relief.

An overarching challenge by SW is that none of the Cedar Park's applications is urgent.

6. Subsequent to the grant of the spoliation order on 17 June 2016 a number of orders have already been granted, all based on urgency. They are:
 - a. An ex parte application under case no 21068/2016 brought on 22 June 2016 by Cedar Park to vindicate a Nike sign admittedly removed by SW from the advertising site which was the subject of the spoliation order;
 - b. An application under case no 21594/2016 brought on 24 June 2016 by Cedar Park for an interdict preventing SW from entering the advertising site which was the subject of the spoliation order;
 - c. A counter-application brought under the last mentioned case number on 30 June 2016 by SW which was based on an alleged further spoliation, on 24 June 2016, of their possession of the advertising site and the advertising H&M and Alexander Forbes signs.

In addition SW sought, in the counter-application an order under section 18 of the Superior Courts Act, 10 of 2013 to enforce the spoliation orders obtained pending the outcome of an application for leave to appeal;

- d. An application for eviction under case no 23878/2016 brought on 11 July 2016 by Cedar Park against SW.

THE SPOLIATION APPLICATION (CASE NO 18810/2016)

7. On 12 May 2016 Cedar Park through its attorneys addressed a letter to SW claiming that it would bring an urgent application to remove certain identified advertising signs that had been placed on the rooftop of the Gautrain Station if SW did not do so by no later than 16 May. These were the advertisement signage of Alexander Forbes on one area and of H&M on another area of the rooftop.
8. Cedar Park did not bring a court application but on 29 May removed the signage which resulted in the urgent spoliation application brought by SW on 2 June. It is unnecessary to decide whether this was because it envisaged a dispute of fact arising from the way transactions had been conducted between them or because it took the view that the relationship was one of agency and that SW had no possessory rights.
9. On 17 June 2016 my brother van Oosten J granted an urgent spoliation order in favour of SW (the then applicant) against Cedar Park (then the first respondent).

In its terms Cedar Park was ordered to “forthwith restore the applicant into possession of the advertising space and advertising signs of Alexander Forbes and H&M” (emphasis added)

10. The court identified two distinct agreements. The one was the written agreement which terminated on 15 November 2015. In the

judgment[4] the court referred to the subsidiary disputes concerning whether the written agreement between the parties, which in its terms related exclusively to an Alexander Forbes advertisement sign was de facto renewed by the conduct of the parties. The conduct relied on was the delivery in November 2015 to Cedar Park, without demur, of a new advertising agreement concluded by SW with Omnicom Media Group SA (Pty) Ltd which extended the existing Alexander Forbes advertisement campaign through to December 2016. The effect of the agreement between Omnicom and SW was that the Alexander Forbes signage would remain in place after November 2015. The signage was removed by Cedar Park some six months later on about the 29th May 2016, which is one of the acts which precipitated the spoliation application.

11. The court found that the agreement for the H&M sign arose from a distinct oral agreement concluded during September 2015 for an intermittent campaign that was to end on 31 May 2016. The court relied on a concession by Cedar Park that it had removed the H&M sign at least a day prior to the agreement’s expiry date[5].
12. Adv Fisher for Cedar Park contended that van Oosten J had decided that there was no umbrella agreement, only a written agreement that had been extended from 15 November 2015.
13. I am prepared to accept Adv Fisher’s submission that this court would be bound to respect the ratio of van Oosten J on the basis of issue estoppel. It is however necessary to determine whether the judgment included a finding that

there was only this written agreement governing the rights between the parties or that SW had only relied on this agreement as embodying the entire relationship between the parties.

14. I should add that at the commencement of the argument the contention advanced by Cedar Park was that the written agreement was the only one governing the relationship in respect of all sites and that, by reason of its non-variation and sole memorial clauses, SW cannot contend for any verbal variations or extensions. The position changed when Adv Peter for SW demonstrated that the written agreement of 15 November 2014 could only apply to the Alexander Forbes signage erected in one area (an L shape on the South Eastern corner of the rooftop facing part of Rivonia Road and part of West Streets) and not any other area, whereas the H&M sign dwarfed it in size and ran effectively along the entire western side of the rooftop. I should add that it was never suggested by either party that, in its terms, the November 2014 written agreement could be extended beyond the physical area where the Alexander Forbes’ signage was installed; which was only a part of the rooftop and certainly not any of the site where the H&M signage was located in terms of the admitted oral agreement between Cedar Park and H&M.

15. In my view there is a conflation of a specific agreement SW contends for with a particular advertiser and to which Cedar Park was required to agree and the broader oral master (or umbrella) agreement contended for by SW between it and Cedar Park which also governed the period of time (express, tacit or implied) for which, and the area at the Sandton Gautrain Station in respect of which, SW could procure advertisement signage.
16. The argument then proceeded on the basis that van Oosten J had dealt with the two agreements both of which had now expired and therefore found that there was no umbrella oral agreement.

If that were so then it would mean that the learned judge had overlooked the contents of the founding affidavit and its annexures in which SW alleged that its Mr Moodley had concluded an oral agreement with Mr Pillay of Cedar Park in November 2014 and in terms of which the former “was given the exclusive rights to market and sell advertising space which implied the use and occupation on the property ...”.

17. Moreover in its relying affidavit SW persisted with its allegation that there was an umbrella oral agreement in respect of the advertising space for the entire building and that the written agreement concerning Alexander Forbes only related to one of at least the sites on the rooftop of the building.
18. In my view it is evident from the judgment as a whole that the court’s consideration of the terms of the written agreement relating to the Alexander Forbes’ signage was limited to only those clauses relevant for determining the true nature of the relationship between the parties.
19. The court also clearly understood that the written agreement related only to the Alexander Forbes signage. The relevance of that part of the judgment dealing with SW setting up what the court termed a renewal of the agreement was limited to its finding, contra the position adopted by Cedar Park, that SW “was in possession of both signs at the time the respondent’s act of spoliation was committed”.
20. The court made it clear earlier in the judgment that the H&M sign was erected pursuant to an oral agreement concluded between SW and Cedar Park in September 2015 and terminating on 31 May 2016. It however only went as far as it was necessary to resolve the dispute regarding whether SW possessed the signs. Unlike the tacit extension of the Alexander Forbes agreement which was not conceded by Cedar Park, it had been driven to concede (albeit earlier in correspondence) that it had reached agreement with SW in respect of the H&M advertisement signage up to the end of May 2016.

To this end the court found that the general terms contained in the Alexander Forbes written agreement would have also applied in

relation to determining the rights SW enjoyed in respect of the advertising space and the advertisement signs.

21. In my view the court did not, because (as it said) it was unnecessary to do so, to delve into whether there was an oral umbrella agreement concluded in November 2014 dealing with the advertising area, the duration of the agreement and if indefinite what type of notice was contemplated. The only relevance of the written agreement was that both parties accepted that its terms were determinative of the issues of access, use, possession, and the characterisation of the relationship between the parties. The court had regard to the terms for that limited purpose. In my respectful view, nothing more can be read into the

judgment.

22. In order to find a spoliation the court was however required to three findings. They were:
- a. Whether the relationship between the parties was one of agency or something akin to a sub-lease;
 - b. Whether SW could contend in law that it had possession of both the advertisement signage and the advertising space in issue; being that advertising space where the Alexander Forbes and H&M signs had been installed;
 - c. Whether as a fact Cedar Park had deprived SW of possession.
23. I have already mentioned that, in regard to the first issue, the court found that the relationship was akin to a sub-lease.
24. On whether SW could claim the legal rights of a possessor in respect of the advertising space and signs, the court relied on various clauses in the written agreement and, applying *Nienaber v Stuckey* 1946 AD 1049, held that SW was
- “expressly entitled to use the advertising space and to have access at all reasonable times for all purposes related to carrying out its mandate.... The applicant was entitled to access the site which, only for practical reasons, had to be pre-arranged, it was moreover in control of and responsible for the maintenance of the signs and, if requested to do so, to remove the signs and clear the site”*[6].
25. The court was at pains to belabour the aspect of use and control of the advertising space and the signs. At para 7 of the judgment, and applying *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977
- (1) SA 230 (EC) at 236H-237H van Oosten J said that “the question of possession is one of degree”. The judge concluded that, minimal as it might be, the conduct of SW demonstrated (again adopting the words of Addleson J in *Bennett Pringle*) that it “did exercise rights or carry out activities consistent with the transfer to him of control of the premises and that he did so with the intention of securing some benefit to himself.”

26. The court therefore concluded that SW was in possession of both the signs and that part of the premises for the limited purpose of using the advertising space on the rooftop advertising platform erected on Cedar Park's building and where the Alexander Forbes and H&M signs were located. This is clear from the order that was granted which was not limited to restoring possession of the signs but extended to restoring possession of the advertising space. Therefore there can be no ambiguity on that score[7].
27. The third finding was based on Cedar Park's admission that it had taken down all the signs and was precluding SW from putting them up again. The court said that this amounted to depriving SW of possession of both the space and the signs.
28. In my view all the various interim applications before me readily unravel once the order of van Oosten J is considered with reference

to whether SW took repossession of the advertising site and its signs[8]; and if not, whether Cedar Park complied with the terms of the order or frustrated it, prior to bringing its application for leave to appeal. I deal with this next.

WHETHER SPOILIATION ORDER IMPLEMENTED

29. Van Oosten ordered Cedar Park to 'forthwith restore ... possession of the advertising space and the advertisement signs of Alexander Forbes and H&M'. I have attempted to demonstrate that the order is clear and unambiguous.
30. Until an application for leave to appeal is actually served the order had to be respected. The consequences of a spoliation are clear from *Nino Bonino v De Lange* 1906 TS 120 at 122 where Innes CJ stated:

'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.'

Prior to citing this passage in *Ntshwaqela Nicholas AJA* in an obiter at 717E-G mentioned that:

'The accepted principle is that the mandament van spolie envisages not only the restitution of possession but also the performance of acts, such as repairs and rebuilding, which are necessary for the restoration of the status quo ante. If, for example, a spoliator, in order to deprive a spoliatus of the possession of immovable property, physically removes him therefrom and transports him to a remote part of the country in order to prevent him from resuming possession, there would seem to be no reason in principle why the Court should not, if requested by the applicant to do so, make a transportation order as part of a mandament van spolie. But that is by the way.'

31. In its answering affidavit to the vindication application SW alleged that on the afternoon of Tuesday 21 June 2016 it re-assumed possession of the advertising site through its crew of contractors and removed the Nike advertising material which it then transported to a storeroom. However the failure of Cedar Park to immediately return the Alexander Forbes and H&M advertisement signs precluded it from putting them up. Cedar Park in replying to this paragraph did not dispute that SW had re-assumed possession through its crew. It simply averred that the conduct in doing so and then of taking the Nike sign down was unlawful.
32. It is evident therefore that while the signs were not returned the first part of the spoliation order, namely that SW be restored to possession of the site, de facto occurred prior to the delivery of the application for leave to appeal.

The practical consequence of obtaining possession and control of the advertising site on the afternoon of 21 June was twofold.

33. Firstly it meant, if regard is had to van Oosten J's decision, that SW was entitled to take the Nike sign down if it had not already been done and to have restored to it the Alexander Forbes and H&M signs so that they could be put up immediately. This appears to be self-evident if regard is had to the failure of Cedar Park to raise any impediment in its answering affidavit in the spoliation application to taking the Nike sign down and Fusion Gen not opposing SW's claim to repossession of the site and restoration of the Alexander Forbes and H&M advertisement signs.
34. The failure of Cedar Park to comply with the court order to 'forthwith' return the signs and thereby prevent the signs physically replacing the Nike ones cannot inure to its benefit. On the contrary it appears to be a deliberate attempt to try and forestall restoration until an application for leave to appeal had been delivered. If regard is had to the admission made by Cedar Park then it appears to amount to a wilful contempt of the spoliation order. However no positive finding need be made. Suffice it that the failure of Cedar Park to enable one part the spoliation order to be effected by not restoring possession of the advertising signs "forthwith" does not militate against SW having regained possession of the space. Otherwise it would frustrate the very purpose of spoliation

orders.

35. In my view SW had repossessed the advertising space and the representatives of Nike had not defended the case, thereby accepting that, as an inevitable consequence of a successful spoliation order, the Nike sign would immediately be removed.
36. Accordingly SW remained in possession of the site, albeit not of the signs, up to the time of the application for leave to appeal. This conclusion also follows from the ratio of van Oosten J's judgment which held that in the circumstances of the present case possession need not be continuous.

37. Secondly, since SW had the necessary animus and re-exercised its detentio, in the legally accepted sense having regard to how it is exercised over the area in question in the circumstances of the case as determined by van Oosten J with reference to Nienaber, any attempt to remove SW from control of the advertising space would amount to a fresh spoliation[9] thereby frustrating any attempt by Cedar Park to evict it based on the above cited extracts from Nino Bonino and Nienaber.
38. A second attempt to remove SW from control of the advertising space succeeded when Cedar Park removed the new Alexander Forbes and H&M signage that SW had re-installed on the evening of 22 June. It is no answer to say that SW ignored security guards who had deprived them of access. They gained access with the assistance of the SAPS.
39. In my view SW was entitled to access the site over which, an application of the Nienaber case to the factual relationship between the parties, it had regained detentio on 21 June prior to Cedar Park serving its application for leave to appeal. That being so, SW did not otherwise need permission since the ratio of van Oosten J's judgment included the passage that SW was entitled to access the site and that it was only for practical reasons that such was to be pre-arranged- it was not a legal pre-condition.
40. This also answers the second issue; namely, service of the leave to appeal application occurred after SW took re-possession of the site. The removal of the replacement Alexander Forbes and H&M signs procured by SW which it had put up on 22 June therefore constitutes a second spoliation which forms the subject matter of one of SW's counter-applications.

CEDAR PARK'S EX PARTE VINDICATION APPLICATION

41. On 22 June Carstensen AJ granted Cedar Park an order ex parte returnable on the following day which required SW to return the Nike advertisement signage that it had removed from the advertising space which was in issue in the spoliation application. The order also interdicted SW from damaging or disposing of the Nike signage.
42. In para 4 of the ex parte vindication application Cedar Park claimed that SW had conceded in the spoliation application that its sub-lease had expired. As demonstrated earlier this is incorrect.
43. Cedar Park also claimed to have contractual obligations inter alia to Nike in terms of which it had undertaken to safeguard Nike's advertisements and allow their display. It claimed to have derived income of R470 000 per month from the advertising site and that the cost of manufacturing the advertisement excluding the design work was approximately R134 000. It also alleged that it could lose income from the advertisement.
44. Accordingly Cedar Park relied in the ex parte application on an allegation that SW conceded that it has no right to occupy the site and is holding over. There was no basis set out to reasonably apprehend that if notice was given to SW the Nike sign would be damaged other than to aver that the advertisement was removed for nefarious purposes.

45. Since no judgment was delivered, it must be assumed that Carstensen AJ granted the ex parte order on the basis that SW had no right to occupy and that the Nike sign had been removed in order to damage it, not in order to put up the Alexander Forbes and H&M signs or to put up any other signs which, in terms of the spoliation papers had been agreed upon. In this regard SW claimed an entitlement to put up ShowMax's advertisement signage until March 2017. ShowMax is part of the DSTV stable.
46. Cedar Park also did not disclose that in an email of 20 October it advised that the ShowMax advertisement could go up for 3 months although they were not satisfied with the quote (of R220 000 pm) and that in April 2016 SW informed Cedar Park that it had secured ShowMax advertising at R230 000 pm until March 2017. It was SW's letter to Cedar Park of 12 May 2016 advising that it had concluded this agreement but was still awaiting Cedar Park's consent to arrange a meeting. It is this letter which prompted the response by Cedar Park's attorneys later on the same day that the agreement between SW and Cedar Park had expired by effluxion of time. It is also significant that no mention was made either in that letter or in the demand of 19 May, mentioned earlier, that Cedar Park had purportedly concluded an agreement during the previous month with Fusion Glen to take over from SW. This only surfaced later in the papers filed.

However for present purposes it suffices that Carstensen AJ was unaware that there may be issues relating to Cedar Park wrongfully withholding consent and was unaware that there would be loss of revenues to SW or claims against it and that, in terms of the agreement relied on by SW, 70% of the revenues generated would in any event go to Cedar Park.

47. Moreover in my view Cedar Park was obliged to disclose in its ex parte application the relationship that existed between it, Fusion Gen and Nike.
48. It is evident that Cedar Park failed to disclose that the Nike advertisement came to be placed on the advertising space by reason of an agreement it had concluded with Fusion Gen which conferred on the latter exclusive permission to advertise on the site and giving it exclusive use and possession of the site.

Cedar Park also failed to disclose that it had not removed the Nike sign as required by in terms of van Oosten J's judgment which expressly stated that "the status quo must be restored ante omnia"[10] .

Furthermore at the time of the spoliation order van Oosten J was aware that the new Nike advertisement sign which Cedar Park had put in the advertising space from which it had taken down the Alexander Forbes and H&M signs was erected through the agency of Fusion Gen (the second respondent in those proceedings) and that the latter had not entered the fray. Accordingly there would have been no reason to believe that the Nike sign would not be taken down or that an additional order would be required.

49. The Nike sign was returned and, on the papers before me, there was no ground to believe that the Nike sign would not be returned if requested. As a fact there was an immediate tender of return; if only once SW had informed Nike and Mindshare South Africa (Gauteng) (Pty) Ltd, which was Nike's media buying agency.
50. On 23 June, which was the return date, Carstensen AJ heard argument and on 24 June directed that pending the determination of ownership of the Nike signs they would be in the possession of Cedar Park and that both parties were interdicted from damaging or disposing of the signage.
51. This matter was allocated to me by the senior urgent court judge together with the other two related matters regarding the interdict and eviction applications. This was pursuant to a consent order made by my brother Tsoka on 1 June consolidating the three applications, effectively either extending the rules nisi granted by Carstensen AJ and postponing the eviction application to this week's urgent court roll.
52. In my view there was a material non-disclosure of facts in the founding affidavit which might have influenced the decision of Carstensen AJ to grant the ex parte order[11]. Moreover the application was persisted with when it should have been evident that the Nike advertising sign would have been replaced on the advertising site and the only issue would have been whether Cedar Park was entitled to advertising revenues through Fusion Gen or through SW.
53. Most disconcerting is that Cedar Park based its ex parte application on the key allegation that SW had concede that it had no rights to continue possession of the site. This was clearly incorrect, yet this allegation was the only basis Cedar Park relied on for contending that SW would damage the signs. It did not expressly allege that giving notice would result in such a consequence. As set out earlier the court was asked to draw such an inference from the incorrect facts placed before it. In the context of this case, Cedar Park could not have made these allegations. It suffices that having regard to the ex parte nature of the application little or no care was taken in distilling the actual allegations relied on by SW in the earlier papers and the gravamen of van Oosten J's decision while the facts mentioned earlier should have been disclosed.
54. There was no objectively justifiable basis for launching the vindictory order ex parte irrespective of the alleged unlawfulness of SW's actions . It also should not have been persisted with post the tender. There may have also been questions of non-joinder.

The issue now is one of costs. In my view the cumulative effect of all these adverse features of the application launched without notice is that the court should reflect its displeasure at the way in which the vindication proceedings were conducted by making a punitive order for costs against Cedar Park.

APPLICATION FOR AN INTERIM INTERDICT

55. In response to SW erecting, during the evening of 24 June, the Alexander Forbes and H&M signs on the site Cedar Park launched an urgent application on 24 June to interdict SW from entering the property. This application was to be heard on extremely short notice and simultaneously with the return day of the first rule nisi issued in the vindication proceedings which was set down for 11h30.
56. Cedar Park filed the briefest of founding affidavits, relying on the allegations contained in the vindication application which were supplemented by the allegation of an unlawful entry by SW when it put up the signs.
57. Cedar Park's application for an interim interdict is based on the assumption that SW had no lawful right to regain possession of the advertising site. It also relied on the service of the application for leave to appeal at 16h30 on 22 June, which would precede the SW's entry onto the premises later that evening.
58. Firstly, and for reasons given earlier, SW had regained possession on 21 June before the application for leave to appeal was served and therefore was entitled to continue with its possession and control of the advertising site pursuant to the spoliation order of van Oosten J.
59. Accordingly there was no invasion of the property but rather the continued exercise of the lawful possessory rights conferred under the spoliation order, as found by van Oosten J, to "carry out activities consistent with the transfer to him of control of the premises with the intention of securing some benefit to himself" and entitled SW to "use the advertising space and to have access at all reasonable times for all purposes related to carrying out its mandate..."
- .
60. It is therefore difficult to follow how Cedar Park could show even a prima facie right. And if it could, there was no basis for contending that the balance of convenience favours it. The only allegation made in the founding papers was that SW had not sought any relief which allows it in the circumstances of the pending appeal to exercise any rights in the property or any part of it. This is clearly incorrect since, in the vindication proceedings, Cedar Park did not dispute that SW had returned to the advertising site on 21 June which was a day before the application for leave to appeal was delivered.
61. Furthermore SW has contracts for the advertising site with Alexander Forbes and ShowMax until at least the end of the year. At worst there would have been a recoupment of advertising revenue and any shortfall that otherwise may be occasioned to Cedar Park is claimable in a quantifiable action for damages. It was not suggested that SW could not meet such a claim financially. It was also established that Nike's position was not prejudiced.

62. In this case the threshold for this court to demonstrate its opprobrium in respect of the conduct of Cedar Park has not been reached. I accept that the application was launched to undo the effects of the spoliation order but nonetheless SW was afforded an opportunity to be heard.

THE ALLEGED SECOND SPOLIATION AND THE SECTION 18 APPLICATION

63. The alleged spoliation of 22 June together with a section 18 application under the Superior Courts Act to enforce van Oosten J's order pending the application for leave to appeal constitute the basis for SWs counter-application to the interdict application.
64. The prayers are couched in the form of both a spoliation order and an order under section 18 not to suspend execution of van Oosten J's order pending the outcome of Cedar Park's the application for leave to appeal. This may appear to be contradictory, however it is evident that the further spoliation is used to support the section18

application.

65. I have already found that there was a subsequent spoliation after SW regained possession of the site pursuant to the grant of the spoliation order of 17 June. Accordingly the spoliation order sought in the counter-application should be granted.
66. When delivering the judgment I overlooked repeating my earlier findings that van Oosten J's order comprised two parts; one concerning the spoliation of the signage space while the other was the spoliation of the Alexander Forbes and H&M signage.

As appears earlier I also found that SW had regained possession and control of the advertising site prior to service of the application

for leave to appeal which on my reading of van Oosten J's decision allowed them to take down the Nike signage.

I also found that Cedar Park did not return the Alexander Forbes and H&M signage which meant that the second part of the

spoliation order was not complied with . SW however obtained replacement signs which they reinstalled in the advertisement space

on the evening of 22 June 2016 with the assistance of the South African Police Service ('SAPS'). This entry onto the rooftop space was raised in the replying affidavit of Cedar Park to the interdict application.

This signage was in turn then removed by Cedar Park on 24 June and constitutes the basis for the spoliation relied on in the counter-application under case no 21594/2016 and also the section 18 application not to suspend execution of van Oosten J's order.

67. When this application and the vindication application came before my brother Tsoka J on 1 July 2016 the parties reached what can best be described as a temporary truce whereby, pending the determination of all these applications, SW would have unhindered control and possession of the site, the signage referred to in the original spoliation order would be returned and could be put up on the advertising space while the Nike signage would be returned to Cedar Park. However these arrangements were without prejudice to the legal position that pertained immediately prior to the grant of the consent order.
68. In the reasons handed down on 25 July I sought to resolve the conundrum that arises where the person spoliated regains possession of the site but not of what was on it prior to service of an application for leave to appeal and where the spoliatus' repossession is short lived through a further act of spoliation by being deprived of coming on site again (the consent order of Tsoka J not amounting to a restoration for such purposes).
69. The effect was that I mistakenly directed that a section 18 application not to suspend execution could pre-empt any possible application for leave to appeal the second spoliation order. This is patently wrong since the provision is found in the statute and is limited to cases where an application for leave to appeal has been brought prior to execution being effected.
70. There was therefore a patent error in ordering that execution of the second spoliation order will not be suspended since there is only an application for leave to appeal in respect of the first spoliation order. I also ordered that to the extent that I was incorrect to find that SW had in law regained possession of the site on 21 June, and prior to service of the application for leave to appeal, that van Oosten J's order would not be suspended.
71. Before considering this aspect further it is necessary to return to the judgment originally handed down and pick up with regard to the findings on whether the requirements of section 18 are satisfied.
72. SW accepts that it must demonstrate exceptional circumstances and that on a balance of probabilities irreparable harm will be suffered to it and none to Cedar Park.
73. The exceptional circumstances are that Cedar Park does not come to court with clean hands. It spoliated SW and did not respect the court order fully. Unless an act of spoliation is treated as an exceptional circumstance an application for leave to appeal would undermine the very rationale for granting spoliation orders.
74. Adv Fisher is correct that every application for leave to appeal a spoliation order would satisfy the section 18(1) requirement of exceptional circumstances if possession is not restored to the person spoliated. I have no difficulty in finding that it is an exceptional circumstance, just as the right to bring a spoliation application even if one has no rights of possession is an extraordinary remedy; the fundamental legal rationale for insisting on immediate restoration where extra-judicial dispossession is resorted to does not alter simply because the spoliator has elected to exercise the right of appeal.

75. However that is only one leg of the enquiry. The other is whether Cedar Park will suffer irreparable harm. Sitting as an urgent court I am loathe to determine that as a matter of general principle irreparable harm cannot be occasioned where the spoliator has acted outside the law; more particularly where none of the parties could direct me to any authority and where there are not enough illustrations to consider the issue other than on a case by case basis at this stage.

Nonetheless it is difficult to comprehend irreparable harm to Cedar Park where it can institute eviction proceedings as soon as the impediment of the second spoliation is cured by SW being given possession of the site and where it does not suggest an inability recover its portion of the revenues generated by advertising which SW contends it has already procured.

76. It is however evident that SW will suffer irreparable harm. It has been spoliated in circumstances where it asserts a right to continue securing advertisers and that it claims to have done so until 2017 and where it contends that Cedar Park is deliberately frustrating its rights. The moment SW relinquishes the site Cedar Park can conclude agreements with bona fide third parties. This would effectively deprive SW of the ability to regain possession and its alleged contract will be lost even if a court was later to find that it has a valid on-going verbal agreement with Cedar Park. If the order is suspended then it may take a number of years before the appeal process is exhausted and if the appeal is finally dismissed then the order will be a brutum fulmen. On the other hand if an application for leave to appeal is successful then SW must approach the court again.
77. While Cedar Park may suffer a degree of harm, it will not be irreparable for reasons already given. In amplification: Aside from Cedar Park's ability to institute eviction proceedings once it restores possession of the site to SW (and the issue appears to be a straight forward one of whether or not there was an umbrella oral agreement concluded in November 2014 and if so for what duration) Cedar Park is entitled to 70% of the revenues generated by SW and it does not contend for a better deal with Fusion Gap. Fusion Gap did not oppose the application and the only disclosed advertiser obtained by Fusion Gap was Nike. Nike in turn was comfortable to be accommodated at the advertising site through SW. Accordingly there appears to be very little comeback to Cedar Park from third parties.
78. A final factor is that SW requests that the order not be suspended pending the outcome of the application for leave to appeal. Accordingly the implementation of the order is likely to be of relatively short duration.
79. It is evident therefore that the requirements of exceptional circumstances and irreparable harm under sections 18(1) and (3) are met in respect of each spoliation order granted in this case and therefore would be met if on a proper analysis there was a continued refusal to respect the first order even after possession of the site was regained on 21 June. Similarly the effect of the order would be identical.

80. The question then is whether properly characterised, a renewed deprivation of possession and control over the same corporeal or incorporeal right after a spoliation order has been granted and after an application for leave to appeal has been delivered should entitle the spoliatus to seek an order that execution of the first spoliation order not be suspended.
81. It seems to me that there is a practical way to deal with such a matter so as to avoid an infinite repetition of each subsequent spoliation order granted being met with an application for leave to appeal, and which in turn would be followed by an application for leave not to suspend execution and if successful would be responded to by the spoliator bringing an urgent appeal under the automatic right to do so in terms of section 18(4)(a)(ii).
82. The practical resolution is to treat the second spoliation, even if it occurs after the person spoliated had regained possession, as an act in breach of the first order. The basis is that ultimately the initial order has not been respected.
83. In the present case the second spoliation application was brought as a counter-application and appears to have been warranted in the circumstances, if only because one part of the spoliation order was not complied with (ie. the return of the signage).
84. Seen from this perspective the person spoliated for the second time is at a distinct disadvantage since the onus will be on it to satisfy the stringent requirements of section 18 even if it had regained possession immediately after the spoliation order was granted and before the service of an application for leave to appeal. There appear to be two responses.
85. The first is that the tenuous type of possessory right which van Oosten J found to be enjoyed by SW is exceptional because there is no on-going exclusive physical occupation nor can the site be locked to prevent entry by others.

The second is that the repeated act of spoliation must be a factor to be taken into account when considering exceptional circumstances. It is difficult to appreciate irreparable harm being suffered by a spoliator if the person spoliated had already regained possession

lawfully. The simple response for the owner is to institute eviction proceedings.

86. If SW needed the sheriff to formally serve the spoliation order in order to have possession restored, even though on its version it was not denied access to the site on 21 June, then my decision that SW regained possession prior to service of the application for leave to appeal would be wrong. However that does not alter the outcome of the section 18 application. The considerations set out in this part would yield the same result.
87. Since the effect of the actual order allowing execution does not change it appears unnecessary to have followed the provisions of Uniform Rule 42(3) by giving notice to the parties of the proposed variation of this part of the order. Moreover it follows the order sought in the draft submitted by Adv Peter on behalf of SW.

THE EVICTION APPLICATION

88. Cedar Park contends that it is the victim of a sophisticated hijacking of its property rights in order to obtain advertisers for the site and, while Cedar Park is entitled to a 70:30 split in its favour of the income generated by SW, it has not received amounts owing under the advertising agreements. Cedar Park avers that it is in the process of instituting action proceedings to recover the amounts.
89. It may well be that Cedar Park is the victim of a hijacked site. But Nicholas AJA also recognised that while one may have sympathy for the owner, taking the law into one's own hands even in the case of a land invasion, must be purged before an eviction application can be brought. Cedar Park spoliated SW for a second time which was after the spoliation order was granted. It has therefore not purged restored possession and is precluded from bringing an application for eviction.
90. Moreover, urgency is based on a number of grounds. One is the continued illegal conduct of SW which had unlawfully removed the Nike sign, the invasion of the site to erect the Alexander Forbes and H&M signage. Another ground is that SW is concluding contracts and putting up advertising signs for products which are not commensurate with the objectives and values Cedar Park without obtaining the requisite consent of Cedar Park. There is also the allegation that Fusion Gen has threatened to take legal action if it is not permitted to carry out its marketing functions. The conclusion was that the situation is volatile and unsustainable over any period of time.
91. I do not share such sentiments. Until May 2016 SW was in communication with Cedar Park requesting consent for the conclusion of advertising signage agreements. Only in one instance was this not done and, on request from Cedar Park, the signage was taken down. The type of advertisements that are brought in by SW have included reputable brands such as Alexander Forbes, H&M and ShowMax. To suggest that SW will not be able to seek out respectable brands for the prime site is incongruous.
92. Secondly SW has raised the allegation that Fusion Gen is a nominee company of Cedar Park which has realised that it can do the advertising itself and therefore does not have to pass on 30% of revenues to SW.
93. I have found that it was Cedar Park's failure to approach the court for an eviction order prior to taking the law into its own hands and its subsequent attempt to prevent the implementation of the spoliation order before it delivered the application for leave to appeal that led to the events of which it complains.
94. It should be recalled that the putting up of the signs on the evening of 22 June was effected in the presence of members of SAPS at the request of SW. It therefore can hardly be contended that this was an act of private thuggery. SW was relying on the spoliation order and that it had already retaken possession of the advertising site on 21 June.

95. Although Adv Fisher argued that the eviction related to the advertising sites where the Alexander Forbes and H&M signs were installed, it is evident from para 6 and para 18 of the founding affidavit that the agreement between the parties was intended to cover not only the rooftop but also all other advertising sites on Cedar Park's property.
96. SW counter-claims that there exists an oral agreement on certain terms and conditions that will endure for a minimum period of 10 years. It is evident that this relies on an expiry period not previously mentioned. Nonetheless it is evident from the list of documents contained in annexure AA2 that a lot of time, research and effort was put into the project and that the return was to be over a reasonable period longer than a year or on a month's notice. The building up of the revenues also was not an overnight windfall but based on marketing know-how and expertise which SW contends is now sought to be usurped by another company. The list of documents also reveals a distinction between the drafting of an agreement for advertising at the Sandton Gautrain station and the specific agreement for the Alexander Forbes advertisement signage.
97. Perhaps most telling is that Cedar Park had stated in May 2016 that it would bring a court application to stop further advertisements by SW yet took the law into its own hands by proceeding to spoliage. Cedar Park therefore cannot give a satisfactory explanation to overcome its unlawful act and which can justify now, some two months later, pursuing eviction proceedings as a matter of urgency.
98. This court sits as an urgent court and at present there appears to be a dispute as to the precise terms of the agreement. It should also be borne in mind that the conduct of Cedar Park appears to be inconsistent with the agreement it relies on both in relation to the area of the advertising site and as to the period. At face value the agreement set up by Cedar Park is confined to the Alexander Forbes advertisement signs and does not explain the much broader relationship in respect of the other advertising spaces that were admittedly utilised for the advertisements of other companies and products over other periods.

ORDERS

99. On 25 June I granted orders in respect of each of the applications before this court. For reasons set out earlier the order in respect of the claim in reconvention for execution not to be suspended (under case number 21594/2016) has been varied since 25 June by reason of a patent error.
100. In the vindication application under case number 21068/2016 the order of 25 July 2016 reads:
 1. The application is dismissed.
 2. The applicant is to pay the respondent's costs, including the costs of two counsel where employed on an attorney and own client scale, including the costs of 23 June, 24 June, 1 July, 19 July and 20 July 2016.

101. In the interdict application under case no 21594/2016, which also contains the two counter-applications the order of 25 July as varied on 1 August 2016 reads:
1. The application in convention is dismissed.
 2. The respondent in reconvention, Cedar Parks Properties 39 (Pty) Ltd ('Cedar Parks'), is ordered forthwith to restore the applicant in reconvention, Strawberry Worx Pop (Pty) Ltd, ante omnia to possession of the advertising space and the advertisement signs situated at the respondent's property/premises at the Sandton Gautrain Station on the remaining extent of Erf [...], S. E. [...] Township, registration Division I.R Province of Gauteng.
 3. The operation and execution of the court order dated 17 June 2016 under case number 2016/18810 shall not be suspended pending the decision on the application for leave to appeal that order.
 4. The applicant in convention, Cedar Parks, is to pay the costs of the application in convention and the application in reconvention, including the costs of two counsel where employed and including the costs of 1 July, 19 July and 20 July 2016.
102. In the eviction order under case number 23878/2016 the order of 25 July 2016 reads:
1. The application is struck from the roll
 2. The applicant is to pay the respondent's costs, including the costs of two counsel where employed and including the costs of 19 July and 20 July 2016.

SPILG J

DATES OF HEARING:

19, 20, 21 and 22 July 2016

DATE OF JUDGMENT AND ORDERS:

25 July 2016

DATE OF REVISED JUDGMENT AND ORDER: 1 August 2016

LEGAL REPRESENTATIVES:

FOR THE APPLICANTS:

Adv D Fisher SC

Adv C van Castricum

Smit Sewgoolam Inc

FOR THE RESPONDENTS:

Adv J Peter SC

Adv W Krog

Adv Adv L Mfazi

Maraj Attorneys/Saint Attorneys

- [1] Fusion Gen is a competitor of SW in what is termed the advertising solution market
- [2] Spoliation judgment of 17 June 2016 at para 6. The court relied on *Nienaber v Stuckey* 1946 AD 1049
- [3] At para 4
- [4] At para 8
- [5] See at paras 1, 2 and 8
- [6] At paras 5 and 6. In *Nienaber v Stuckey* the Appellate Division was concerned with a case of spoliation where the appellant proved that he had been afforded a contractual right to plough and cultivate a piece of land over which the respondent was entitled to exercise all the other bundle of rights comprising ownership. The court found that the appellant had at all material times shown an intention of remaining in possession of the land. Despite the appellant having removed his implements and despite him and his employees having left the land once they had completed the previous season's harvesting the court found that he had been spoliated when the respondent had closed a gate which deprived the appellant of gaining access, with his planters, at the commencement of the new season in order to seed and fertilise the plot in question. In *Nienaber* at 1057-8 the court said: "The position, as proved by facts which are not in dispute, is that the appellant had clearly declared his contention, during June and July, 1945, that he was entitled to the land until the following year, and up to the end of July had unequivocally manifested his intention of acting accordingly, while the respondent had denied his right to remain on the land and had threatened to take proceedings for ejectment. In July the appellant ploughed the lands and it is clear that during this time he was in physical possession. From the fact that he was in physical possession at that time, with the clearly expressed intention, both by word and deed, of continuing in possession for the ensuing twelve months, and in the absence of any evidence to the contrary, it appears to me that there are good reasons for concluding that he continued in possession. In the absence of an allegation by them of any specific act on the part of the appellant that might be relevant as indicating an abandonment or vacation on his part, I conclude that their denial of his possession is not an independent allegation by them of a fact, but merely an inference drawn by them from the facts which they allege. In the circumstances there was nothing that required the presence of the appellant or his servants or any implements on the land between ploughing and planting, and the only thing that it can be said he has left undone is the omission of some symbolic or formal act such as walking on to the ground occasionally or leaving some of his property lying there --- at the

mercy of wind and weather and thieves. I know of no reason why the omission of a gesture of this kind should affect the matter.”

[6] At paras 5 and 6.

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[7] See *Administrator, Cape, and Another v Ntshwaqela and Others* 1990

(1) SA 705 (A) at 715F-716C.

[8] In *Nienaber* at 1056 the Appellate Division emphasised that there are two essential elements for possession which will protect against spoliation, namely “animus and detention”.

[9] See the earlier reference to Nienaber at 1056. The passage cited reads: “The learned Judge said that two elements are essential for the possession which is protected against spoliation, viz. animus and detentio. With this I agree.” See also the extracts from Nienaber at footnote 6 above as to what constitutes detention in these circumstances

[9] See the earlier reference to Nienaber at 1056. The passage cited reads:

“The learned Judge said that two elements are essential for the possession which is protected against spoliation, viz. animus and detentio. With this I agree.”

See also the extracts from Nienaber at footnote 6 above as to what constitutes detention in these circumstances

[10] See judgment at para 8

[11] See *Schlesinger v Schlesinger* 1979(4) SA 342 (W) per Le Roux J at 348E-350A, *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981(2) SA 412 (W) at 414D-E and *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at para 21

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