THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 227/2020

In the matter between:

BLENDRITE (PTY) LTD	**FIRST APPELLANT**
MANIVASAN PALANI	**SECOND APPELLANT**

and

DHRAMALINGUM MOONISAMI	**FIRST RESPONDENT**
GLOBAL NEWORK SYSTEMS (PTY)LTD	**SECOND RESPONDENT**

Neutral citation: *Blendrite (Pty) Ltd and Another v Moonisami and Another* (Case no 227/2020) [2021] ZASCA 77 (10 June 2021)

Coram: NAVSA, MOCUMIE and DLODLO JJA and LEDWABA and GORVEN AJJA

Heard: 25 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 10 June 2021.

Summary: Property Law – spoliation – access to server and use of email address of director terminated – neither servitutal use nor use as an incident of possession of corporeal property – not *quasi*-possession for which *mandament van spolie* available.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Chetty J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the High Court is set aside and substituted with an order dismissing the application with costs, including the costs of two counsel, where so employed.

JUDGMENT

Gorven AJA (Navsa, Mocumie and Dlodlo JJA and Ledwaba AJA concurring):

[1] The first appellant (Blendrite) has two listed directors, the first respondent (Mr Moonisami) and the second appellant (Dr Palani). Disputes have arisen between them. These prompted Mr Moonisami to launch an application (the liquidation application) to liquidate the appellant (Blendrite). The basis of the liquidation application is that, due to the deadlock between the two listed directors, it is just and equitable that Blendrite be wound up by the court. The liquidation application is opposed and not yet finalised. The second respondent (Global) is a web hosting entity which hosts the server and email addresses of Blendrite.

[2] It is common ground that Mr Moonisami and Dr Palani jointly funded the formation of Blendrite in 2008. The former functioned as the managing director and the latter as the financial director until the disputes arose. Dr Palani claims that Mr Moonisami has resigned as a director of Blendrite. This, too, is contested and remains unresolved. At a factual level, Dr Palani is in control of Blendrite. By letter dated 11 July 2019, an attorney purporting to represent Blendrite wrote to one Greg Lock, the managing director of Global. The letter stated that Mr Moonisami had resigned as a director of Blendrite and instructed Global to terminate the 'email and company network/server access' of Mr Moonisami with immediate effect. Global did so on 17 July 2019.

[3] As a result, Mr Moonisami approached the KwaZulu-Natal Division of the High Court, Durban by way of an urgent application. The relief sought by Mr Moonisami was spoliatory in nature, seeking a *rule nisi* with interim relief as follows:

'That [Global] be and is hereby directed to *ante omnia* restore [Mr Moonisami's] access to the email and company network/server in respect of Blendrite [. . .] forthwith.'

The case made out by Mr Moonisami was that he was in peaceful and undisturbed possession of his access to Blendrite's internet server and his email address kc@blendrite.co.za and that he had been denied this access by Global.

[4] Only Blendrite and Dr Palani opposed the application. After various adjournments it was heard as an opposed motion for final relief by Chetty J. He granted the relief mentioned above as well as a punitive costs order against those opposing. An application by Blendrite and Dr Palani for leave to appeal

was dismissed with costs. The present appeal is with the leave of this court. As with the application in the high court, Global takes no part in the appeal.

[5] The *mandament van spolie* remedy relates to possession. Possession is:

'[M]ost commonly defined as the combination of a factual situation and of a mental state consisting in the factual control or detention of a thing (*corpus*) coupled with the will to possess the thing (*animus possidendi*).'[1]

In *Nino Bonino v De Lange*,[2] Innes CJ explained the nature of spoliation:

'[S]poliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right.'

The remedy is a possessory suit based on the maxim *spoliatus ante omnia restituendus est*. In simple terms, this means that possession must be restored to the dispossessed person before enquiring into anything else.

[6] The *mandament van spolie* is designed to be a robust, speedy remedy which serves to prevent recourse to self-help.[3] The sole requirements are that the dispossessed person had 'possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted'.[4] All that must be proved is the fact of prior possession and that the possessor was deprived of that possession unlawfully. Unlawfully here means without agreement or recourse to law.

[7] The *mandament* provides for the immediate restoration of possession regardless of, and before determining, the rights of the parties to the thing

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[1] 27 *Lawsa* 2 ed para 70.
[2] *Nino Bonino v De Lange* 1906 TS 120 at 122.
[3] *Painter v Strauss* 1951 (3) SA 307 (O) at 31-H4A – B.
[4] *Yeko v Qana* 1973 (4) SA 735 (A) at 739G.

possessed. As indicated, it is the fact of possession which is material not the basis of possession. As Innes CJ held:

'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.'[5]

The prior lawfulness or otherwise of the possession is of no moment. This was trenchantly stated by Van Blerk JA in *Yeko v Qana*:[6]

'[T]he injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands'.

Likewise, and importantly, the respective legal rights of the parties to possess the property in question do not enter into consideration.[7]

[8] As mentioned, what is protected must be 'possession of a kind which warrants the protection accorded by the remedy'. It is on this issue that the present appeal turns.

[9] In general, the factual possession of movable and immovable property does not give rise to conceptual difficulties. There the physical thing (*corpus*)

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[5] *Nino Bonino* at 122.
[6] *Yeko v Qana* at 739F-G.
[7] *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) at 763A. See also *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC). Section 68(6)(*b*) of the National Road Traffic Act prohibited lawful possession of motor vehicles whose engine or chassis number had been falsified, destroyed, or tampered with. The Constitutional Court held at para 21 that the *mandament van spolie* entailed restoration of possession of the vehicle in question before all else and directed that possession be restored. The question of whether the erstwhile possessor had lawful cause to possess was a matter to be dealt with after restoration of possession under the *mandament* had taken place.

is possessed. But the law also recognises that the remedy lies where incorporeal property is spoliated:

'However, the law also recognises so-called *quasi*-possession or juridical possession (*possessio iuris*) which consists in the exercise of control over an incorporeal coupled with *animus* to exercise such control.'[8]

[10] The *mandament* was recognised early in Roman-Dutch law to apply to the exercise of actions usually flowing from servitudes.[9] This, and other incorporeals relating to possession of property, are protected even if exclusive use or occupation is not alleged. In the case of servitudes, for example, the owner of the servient tenement has use of the property subject to the servitude. The approach to the factual purported use of a servitude has been taken up into our law. Some debate ensued in South African law as to what needs to be proved in such a case. Is it necessary to prove the servitude or only that use normally arising from a servitude has been exercised?

[11] In *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*,[10] this court dealt with the termination by the appellant of a flow of water to the respondent. The respondent municipality had for decades pumped water from a particular farm. It had done so claiming to hold a servitude entitling it to such use. The appellant acquired the farm on which the fountain was located and, after some time, prevented the municipality from using the water. The municipality was granted a spoliation order requiring the *status quo ante* to be restored. On appeal, the appellant, which had disputed the servitude, argued that the

[8] 27 *Lawsa* 2 ed para 70.
[9] J Voet *Commentarius ad Pandectas* 43 16 7.
[10] *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* [1988] ZASCA 123; 1989 (1) SA 508 (A); [1989] 1 All SA 416 (A).

municipality was obliged to prove that it held a servitude in order to be entitled to spoliatory relief.

[12] Obviously, the specific water which the municipality was prevented from obtaining had never been possessed by it. The purported exercise of a servitude to obtain the water was thus incorporeal property. Hefer JA disagreed that possession of only corporeal property is protected by the *mandament*.[11] He went on to hold that, in that matter, it was unnecessary to prove the servitude, concluding:

'Prior to the interference, the respondent, under the impression that he was doing so on the basis of a servitude, exercised the powers of a servitude holder. That is the status quo which must be restored until it is determined if the servitude indeed exists.'[12]

This accords with the principle that no rights need be proved. This was elegantly summarised by Du Plessis:

'[T]he actual use or the exercise of powers which would normally flow from the named rights are exercised by the spoliated person. In those circumstances, it is then not considered whether the spoliated person obtained those rights, only whether they actually used or exercised the powers associated with that right.'[13]

[13] Although Innes CJ, and many following cases, spoke of the 'right of possession' and 'a legal right', what is in issue is the deprivation of actions associated with a servitude rather than the underlying basis or right of that person to the servitude. This kind of possession of an incorporeal is known as

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[11] J C Sonnekus and J L Neels *Sakereg Vonnisbundel* 2 ed (2008) at 54. See also *Bon Quelle* at 514I-515B.

[12] *Bon Quelle* at 516G-H. My translation. The original reads:
'Voor die versteuring het die respondent, onder die indruk dat hy dit uit hoofde van 'n serwituut doen, die bevoegdhede van 'n serwituuthouer uitgeoefen. Dit is die *status quo* wat herstel moet word totdat dit vasgestel word of die serwituut inderdaad bestaan.'

[13] P Du Plessis 'Bulletin van die Fakulteit Regte PU vir CHO' (1976) 27 30-31. Referenced in A J Van der Walt (1984) 47 *THRHR* 429 at 430. My translation. The original reads:
'[D]ie daadwerklike gebruik of die uitoefening van bevoegdhede wat normaalweg uit die genoemde regte voortspruit, deur die gespolieerde uitgeoefen is. Daar word dan in sodanige gevalle nie gekyk of die betrokke reg aan die gespolieerde toegekom het nie, maar of die gespolieerde wel daadwerklik die bevoegdhede wat uit sodanige reg sou voortspruit, gebruik of uitgeoefen het.'

quasi-possession. Since there is no physical thing possessed, there is little wonder that our courts have struggled to articulate the basis on which *quasi*-possession is protected. In order to avoid the confusion that any right need be proved, I prefer to avoid the use of language concerning rights where possible.

[14] So, in this line of cases, the purported use of a servitude constitutes *quasi*-possession of an incorporeal, irrespective of whether the user, or *quasi*-possessor, proves a legal right to the servitude.[14] Prior users who have been deprived of the use of a servitude have been spoliated and the *mandament van spolie* lies.

[15] Our courts have also recognised the use of certain supplies of services to property which are incidental to the possession of immovable property as being incorporeal property capable of *quasi*-possession and worthy of protection. However, a distinction is drawn between these and personal rights which do not arise as an incident of possession of corporeal property. In *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another*,[15] Lewis JA explained:

'The cases where quasi-possession has been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes or the purported exercise of servitudes – 'gebruiksregte') or an incident of the possession or control of the property. The law in this regard was recently succinctly stated in *FirstRand Ltd v Scholtz* where Malan AJA pointed out that a spoliation order –

"does not have a catch-all function to protect the *quasi-possessio* of all kinds of rights irrespective of their nature. In cases . . . where a purported servitude is concerned the

[14] *Nienaber v Stuckey* 1946 AD 1049 at 1056; *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A).

[15] *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* [2008] ZASCA 153; 2009 (4) SA 337 (SCA); [2009] 2 All SA 1 (SCA) para 9.

mandament is obviously the appropriate remedy but not where contractual rights are in dispute or specific performance of contractual obligations is claimed . . . It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its *quasi possessio* is deserving of protection by the *mandament*."

[. . .] Thus only rights to use property, or incidents of occupation, will warrant a spoliation order.'[16]

[16] Cases involving the supply of water and electricity have occasioned some uneven judgments. These sometimes refer to the deprivation of a 'right' to receive a supply of water or electricity. More accurately, however, it is the deprivation of a prior supply of water or electricity. The crucial issue is that this is protected in limited circumstances, where it has been received as an incident of occupation of the property. The limitation was made clear in *Eskom Holdings Soc Ltd v Masinda*,[17] where Leach JA considered what can be protected by the *mandament*, saying:

'However, the cases that I have dealt with above graphically illustrate how, in the context of a disconnection of the supply of such a service, spoliation should be refused where the right to receive it is purely personal in nature. The mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient 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. Consequently, insofar as

[16] The reference, omitted from the quote, is to *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA); [2007] 1 All SA 436.

[17] *Eskom Holdings Soc Ltd v Masinda* [2019] ZASCA 98; 2019 (5) SA 386 (SCA) para 22.

previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided.'

This sets out the approach to be taken. The incorporeal of a prior supply of the service which qualifies is one which is an incident of the possession or control of corporeal property.

[17] Since the present matter does not relate to interruption in the supply of water or electricity, or to something which is alleged to be an incident of possession of movable or immovable property, it is not necessary to deal with that line of cases in any further detail.

[18] In *ATM Solutions*, the appellant had installed an automated teller machine (ATM) at a convenience store run by the first respondent. The first respondent had the ATM disconnected, removed, and placed in a storeroom. It was then replaced with another entity's ATM. The appellant applied for a spoliation order but both the court of first instance and this Court refused it on the basis that this amounted to seeking specific performance of a contract. The placing of the ATM of the appellant was not an incident of possession or control of property. The appellant did not occupy the property. Any right to have the ATM present and connected at the premises was a personal right arising from contract.

[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*.[18] 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 respondent. This was not even alleged. The 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 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 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. The appeal must succeed and the order of the court of first instance, based on spoliatory relief, set aside.

[18] *Telkom SA v Xsinet (Pty) Ltd* [2003] ZASCA 35; 2003 (5) SA 309 (SCA).

[21] In the result:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the High Court is set aside and substituted with an order dismissing the application with costs, including the costs of two counsel, where so employed.

GORVEN AJA

ACTING JUDGE OF APPEAL

Appearances

For appellants:	N Singh SC (with him M Manikam)
Instructed by:	Jay Reddy Attorney, Durban
	Phatshoane Henney, Bloemfontein
For respondent:	PD Quinlan
Instructed by:	Maharaj Attorneys, Durban
	Clause Reid Attorneys, Bloemfontein.