

SPOILIATION AND COUNTER SPOILIATION

Introduction

Where resolution of issues between people takes long, we often see an increase in people taking matters into their own hands.

Spoilation (“*mandament van spolie*”) is a mechanism to avoid that.

In a spoliation application, a “true possessory remedy” is used to restore lost possession of property (movable, immovable, corporeal and incorporeal). Specifically where possession has been unlawfully deprived. The Court does not consider the right of the person launching the application to be in possession of the property

The applicant must meet the following requirements :

1. peaceful and undisturbed possession of the property; and
2. the spoliator unlawfully deprived them of possession.

Peaceful and undisturbed possession

In *Blendrite (Pty) Ltd and Another vs Moonisami and Another*¹ Mr Moonisami, one of the two listed directors of Blendrite, instituted an urgent spoliation application to restore his access to Blendrite's email and network/server.

The Supreme Court of Appeal (“SCA”) was required to determine that Mr Moonisami's prior access to an email address and company network/server amounted to quasi-possession of incorporeal property. Possession is a critical requirement for a spoliation application. The SCA held that:

“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

¹ Blendrite (Pty) Ltd and Another v Moonisami and Another (Case no 227/2020) [2021] ZASCA 77 (10 June 2021)

...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 Court found in Blendrite's favour.

Unlawful dispossession

The key issue in *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd*² was to determine whether the threat of dispossession qualified as unlawful deprivation concerning the spoliation remedy.

Welbeplan Boerdery (Pty) Ltd had breached lease agreements that it had concluded with the appellants. Following Welbeplan's breach, the appellants informed Welbeplan through two letters that they were cancelling the contracts. Welbeplan proceeded to bring a spoliation application and, based on the letters alone, was granted a spoliation order.

The SCA held that actual deprivation is the requirement to be met. However, the SCA also pointed out that if it does not end possession it must at the very least frustrate the control over the property.

Counter Spoliation as a defence

South African Human Rights Commission and others v The City of Cape Town and others (unreported Western Cape High Court case Case No: 8631/2020).

On 1 July 2020, the country was in the grip of a lockdown because of the Covid-19 pandemic. The third applicant, Mr Bulelani Qolani, naked and in the full glare of the public and social media, was forcefully dragged out of his informal structure in a settlement in Khayelitsha by officials of the City of Cape Town. They proceeded to demolish his structure with crowbars.

The central issue for determination was the legality of the City's demolition of erected structures and the meaning of the requirements for and application of the common law defence of counter-spoliation.

² Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd (Case No. 815/2016) [2021] ZASCA 81 (15 June 2021)

Spoliation is not a stand-alone remedy or defence and does not exist independently of the mandament van spolie. The Court found the City's conduct to be unconstitutional.

Conclusion

Spoliation is a powerful common law remedy. It is, therefore, best to seek advice when wanting to take re-possession of property (no matter the nature thereof) and not to take matters into your own hands. Contact an expert at SchoemanLaw for assistance today!

