

3 AUGUST 2021

DISPUTE RESOLUTION ALERT

IN THIS ISSUE >

When an unstoppable force hits an immovable object: The right to immovable property is not absolute

The right to immovable property is not absolute. The Supreme Court of Appeal (SCA) confirmed as much in the recent judgment of *Grobler v Phillips and Others*, where it dismissed an appeal against the High Court's refusal to grant an eviction order in favour of a land owner, despite finding that the tenant was an unlawful occupier of the land.

But it's my emails and stuff!

Does the *mandament van spolie* remedy apply to email addresses and network servers? This question was recently answered by the Supreme Court of Appeal (SCA) in the case of *Blendrite (Pty) Ltd and Another v Moonisami and Another* (Case no 227/2020) [2021] ZASCA 77.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

CLICK HERE 



INCORPORATING
KIETI LAW LLP, KENYA

When an unstoppable force hits an immovable object: The right to immovable property is not absolute

The ESTA was enacted in order to deal with the eviction of lawful occupiers, or occupiers of rural or suburban land whose occupation was previously lawful.

The right to immovable property is not absolute. The Supreme Court of Appeal (SCA) confirmed as much in the recent judgment of *Grobler v Phillips and Others*, where it dismissed an appeal against the High Court's refusal to grant an eviction order in favour of a land owner, despite finding that the tenant was an unlawful occupier of the land.

The background to this matter is a familiar one, as is often the case with farm land that has been subdivided and urbanised. The respondent, Ms Phillips, is an 84-year-old widow who has been living in a house on the property in question since she was 11 years old. Her disabled son lives with her. The appellant, Mr Grobler, is the owner of the land on which the property that Ms Phillips resides in, is situated. Sometime before 1991, this land was redesignated from a lot (farm land) to an erf (urban land). The part of the land on which Ms Phillips resides was further subdivided into several erven for development purposes. Mr Grobler had bought the erf in a public auction in 2008. He was informed that a previous owner had given Ms Phillips a life-long right of occupation, but she was unable to produce a copy of such agreement. As such, Mr Grobler gave her notice to vacate and subsequently applied to the Magistrate's Court for an eviction order.

Judgment

The application to the Magistrate's Court was based on the provisions of the Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 (PIE), in terms of which Mr Grobler alleged that Ms Phillips was an unlawful occupier as defined in the act. The Magistrate's Court granted the order.

On appeal before the High Court, Ms Phillips raised an alternative ground of appeal, namely that the provisions of the Extension of Security of Tenure Act 62 of 1997 (ESTA) applied. The ESTA was enacted in order to deal with the eviction of lawful occupiers, or occupiers of rural or suburban land whose occupation was previously lawful. It specifically applies to persons residing on land which belongs to another person, and who have on 4 February 1997 or thereafter had consent or another right in law to do so. The High Court found in favour of Ms Phillips on the basis that (i) she was not an unlawful occupier as defined in the PIE; (ii) the provisions of the ESTA applied to her; and (iii) even if the ESTA did not apply and she was an unlawful occupier, it would not be just and equitable to grant the eviction order.

CDH IS THE EXCLUSIVE MEMBER FIRM IN AFRICA FOR THE:

Insuralex Global Insurance Lawyers Group
(the world's leading insurance and reinsurance law firm network).

[CLICK HERE TO READ MORE](#)



When an unstoppable force hits an immovable object: The right to immovable property is not absolute

...continued

Despite the letter of the law favouring Mr Grobler, Ms Phillips had the spirit of the law on her side.

It was now Mr Grobler's turn to appeal the judgment and the SCA was tasked with determining three main issues raised in the appeal: the interrelation between the PIE and the ESTA, the validity of an oral right of *habitatio*, and whether an order of eviction would be just and equitable.

In determining the first issue, the SCA started by dealing with Mr Grobler's contention that Ms Phillips should not be allowed to advance a new case on appeal in her reliance on the ESTA. The SCA considered the wording of section 1 of the PIE, which defines an unlawful occupier as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997..." It also considered section 2 of the ESTA, which excludes from its application land within a township established prior to 1997.

Section 1 of PIE clearly requires that, in order for a person to be defined as an unlawful occupier, it must be established that the ESTA does not apply. As such, the SCA found that the reliance on the ESTA was not a "new issue", but rather a point of law which could be raised on appeal.

The next step for the SCA, was to determine whether the ESTA did indeed apply and here the SCA stepped away from the decision of the High Court. The undisputed facts showed that the property had been incorporated into a township by no later than 1991 and, as such, the ESTA did not apply.

The SCA also disagreed with the High Court's finding that Ms Phillips was not an unlawful occupier of the property. This was because, as soon as Mr Grobler withdrew his consent for Ms Phillips' continued occupation of the premises, her occupation was rendered unlawful. Whilst Mr Grobler accepted that Ms Phillips had been granted an oral life-long right of occupation, he denied that it was enforceable against successive owners as it was not reduced to writing. The SCA agreed.

At this point Mr Grobler perhaps thought victory was in sight, but there was still one hurdle to overcome. The SCA, despite its findings that the ESTA did not apply and that Ms Phillips was in fact an unlawful occupier, still had to determine whether an order of eviction would be just and equitable. The factors it considered included (i) the fact that she did have an oral right of occupation and could not have been expected to know that it had to be reduced to writing; (ii) the length of her occupation; (iii) her advanced age; (iv) the fact that she lived with her disabled son; and (v) the purpose for which Mr Grobler acquired the property and what he intended to do with it. The SCA found no reason to interfere with the discretion exercised by the High Court in concluding that, despite the unlawful occupation, it was not just and equitable to grant the order. The appeal was dismissed and the eviction order refused.

Accordingly, despite the letter of the law favouring Mr Grobler, Ms Phillips had the spirit of the law on her side. In our new constitutional democracy where the spirit of the law encompasses the principles of justice, dignity and equity, this spirit must prevail.

Lucinde Rhoodie and Kara Meiring

The difficulty with the courts establishing a basis on which quasi-possession is protected arises from the fact that there is no possession of a corporeal thing.

But it's my emails and stuff!

Does the *mandament van spolie* remedy apply to email addresses and network servers? This question was recently answered by the Supreme Court of Appeal (SCA) in the case of *Blendrite (Pty) Ltd and Another v Moonisami and Another* (Case no 227/2020) [2021] ZASCA 77.

To succeed in obtaining a spoliation order, an applicant simply has to prove that there was peaceful and undisturbed possession of a movable or immovable object and that the dispossession thereof was unlawful. The spoliation remedy also applies to incorporeal property, recognising quasi-possession of an incorporeal thing, which consists of the exercise of control over an incorporeal coupled with the *animus* to exercise such control. An example of incorporeal property would be the exercise of a servitude to obtain water.

The difficulty with the courts establishing a basis on which quasi-possession is protected arises from the fact that there is no possession of a corporeal thing. In most cases where quasi-possession has been protected by a spoliation order, it pertains to rights to use property or an incident of possession or control of the property and is not applicable to disputed contractual rights.

In this present case, the applicant, Mr Moonisami, who was one of two directors of the second respondent, Blendrite, instituted an urgent spoliation application for an order directing the first respondent, a web hosting company Global Network Systems, to restore Mr Moonisami's access to Blendrite's network server and email address.

Mr Moonisami's access to Blendrite's network server and email address had been terminated after his relationship with the third respondent, Dr Palani, the other director of Blendrite, irretrievably broke down. The High Court was satisfied that peaceful and undisturbed quasi-possession had been established by Mr Moonisami and granted the spoliation order.

On appeal, the SCA considered whether the High Court erred in finding that Mr Moonisami's access to Blendrite's network server and email address amounted to quasi-possession of incorporeal property, which qualified for protection by a spoliation order.

The SCA found that Mr Moonisami prior use of Blendrite's network server and email address was not an incident of possession of movable or immovable property, nor did Mr Moonisami possess any movable or immovable property in relation to his use of the network server and email address. Mr Moonisami's prior use therefore did not amount to quasi-possession of incorporeal property.

The approach taken by the SCA was that any entitlement to use of Blendrite's network server and email address was a personal right arising from his disputed employment relationship with Blendrite and any spoliation order, in effect, would amount to an order of specific performance. In light thereof, Mr Moonisami's prior access to Blendrite's network server and email address was not protectable by a spoliation order and accordingly the SCA set aside the High Court's order.

Denise Durand, Muzammil Ahmed and Rethabile Mochela

2021 RESULTS

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2021.

Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.

Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.

Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.

Lucinde Rhodie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.

Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.

Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.

Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2021.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2021.

Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2021.

Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2021.

Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2021.



2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

CHAMBERS GLOBAL 2021 ranked our Construction sector in Band 3: Construction.

CHAMBERS GLOBAL 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

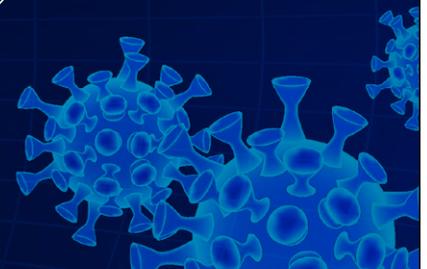
Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.



CDH'S COVID-19 RESOURCE HUB

[Click here for more information](#) 



OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Tim Fletcher
Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey
Director
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2021 10265/AUG



INCORPORATING
KIETI LAW LLP, KENYA



DISPUTE RESOLUTION | cliffedekkerhofmeyr.com