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DISPUTE RESOLUTION ALERT

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

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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.

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

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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.

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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.

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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

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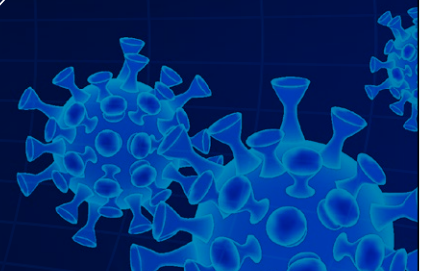
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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