Short notes on:

UNPACKING THE MANDAMENT OF SPOLIE

Introduction

The *mandament van spolie* (also known as the spoliation remedy, or the mandament) is an ancient remedy available to any person who is dispossessed unlawfully without a court order, or authorizing legislation for the dispossession, or consent. Very basically, there are (generally speaking) two requirements that a dispossessed person needs to prove in order to succeed in court:

- Showing that there was actual dispossession and
- That that dispossession was unlawful.

In *Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd 2013 (5) SA 521* (WCC) the court described the mandament of spolie as follows:

"The mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for a mandament van spolie has to show..."

Defenses and obtaining a final interdict

In Dyalo v Mnquma Local Municipality and Another (8490/2016) [2016] ZAECMHC 36 (9 September 2016) , the court held that:

[7] "The following defenses are recognised in spoliation proceedings:

- *the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;*
- *the dispossession was not unlawful and therefore did not constitute spoliation;*
- *the restoration of possession is impossible; and*
- *the respondent acted within the limits of counter-spoliation in regaining possession of the article.*

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[8] In order to obtain a final interdict as contemplated in addition to his mandament van spolie, the applicant must establish the following:

- *that there is a clear right on the part of the applicant;*
- *an injury actually committed or reasonably apprehended; and*
- *the absence of any other satisfactory remedy."*

In respect of the requirements for a final interdict, thes have consistently referred to the requirement to stablish a clear right as a requirement to establish, on the balance of probabilities, facts and evidence. This will depend on the facts and evidence at hand.

Impala Water Users Association v Lourens NO and Others (087/2003) [2004] ZASCA 15; 2008 (2) SA 495 (SCA) ; [2004] 2 All SA 476 (SCA) (26 March 2004):

'*The mandament van spolie does not have a 'catch-all function' to protect the* quasi-possessio *of all kinds of rights irrespective of their nature….* ***but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: Its purpose is the protection of* quasi-possessio *of certain rights****. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its*** quasi-possessio *is deserving of protection by the mandement. Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. ….'.*

Conclusion

A clear right must be established and this will largely depend on the facts / evidence concerned. Where performance of an agreement is concerned, the mandament may not be the most appropriate remedy. It is therefore important to consult with a professional, contact SchoemanLaw today.

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