

TRUSTEES SUCCESSFULLY LIMITING LEVY DEFAULTER'S ACCESS TO CERTAIN OWNER PERKS

McGregor v Selborne Park Body Corporate and Others (AR224/2020) [2021] ZAKZPHC 87 (8 October 2021)

The golf estate where the complainant in this matter owned units, offered to its owners the option, with the consent of the trustees, to rent out their units to third parties. In addition, the owners would then have access to an electronic visitor management solutions application, where codes and passwords are issued to the visitors to gain entry to the golf estate. When it became apparent that some owners were receiving funds from rentals whilst refusing to ensure that their levies remain paid up, the trustees passed a resolution that permission to rent out would be withdrawn in such instances, and such owners will also not have access to the visitor system. A mandament van spolie, a remedy reinstating the position that existed before, was not available to the unhappy owner, the Court found here. The judgment explains why.

The Judgment can be viewed [here](#).

FACTS

McGregor is the owner of some residential units situated within the Selborne Park Golf Estate (the Estate), in a sectional title scheme. McGregor did not reside within the estate but leased his units to various tenants. He did this through the Estate's Glovent portal system ('the System'). The System was a visitor management solution application for homeowners, a facility through which those wishing to lease their units to prospective tenants, could do so. The Estate, as the administrator of the System, issued to homeowners authorisation to issue access codes or pin numbers to either guests or contractors wanting access to the Estate. All homeowners in the Estate, by virtue of their ownership, were registered as users of the System by the Estate.

In December 2018, at a stage when McGregor was in arrears with his levies and the trustees had issued summons to recover the amounts that were outstanding, a resolution was passed. It had the effect that unit owners who were in arrears with their levies would only be granted consent to let their units out from 1 March 2019 on condition that they had paid the outstanding arrear levies.

In the context, the following rules and wording of the new resolution is important. The relevant conduct rule (Rule 13) provided as follows

'(1) The owner of a residential section may, with the Trustees approval let to a person who is not a member of the Body corporate (a 'Third Party') or allow a Third Party to occupy the Owner's section

.....

(5) When granting the approval ... the Trustees may prescribe any reasonable condition to the grant of such approval and the Trustees may withdraw such approval in the event of any breach of any condition prescribed in terms of this Conduct Rule.'

In addition, the resolution passed on 21 December 2018 signed by all the trustees read:

'1. ... notice be given in writing to Lawrence McGregor withdrawing any consent to his letting units ... with effect from 1 March 2019 and that such withdrawal of consent shall remain until such time as all arrear levies owing ... to the Body Corporate have been paid.

2. All homeowners be subject to a withdrawal of the consent of the body Corporate to the letting of their units if the homeowner concerned is in default with the payment of levies.'

Five months later, McGregor launched an urgent application seeking orders that the Estate restore his access to the System, amongst other things. His claim was based on the *mandament van spolie* relief.

The Court *a quo* found in favour of the trustees. The present matter deals with McGregor's appeal thereto.

HELD

- The *mandament van spolie* remedy is available in instances of spoliation which, in turn, 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 based on the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute' as to which of the parties is entitled to possession.'
- The issue in the appeal was whether the remedy of *mandament van spolie* was available to McGregor for access to the system.
- However, in order to justify a spoliation order, the right in question must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights that flow from a contractual nexus between the parties are insufficient in this context, as they are purely personal. The reason for this distinction is the following: A spoliation order would otherwise 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.
- Clearly the rights in issue here were contractual in nature:
 - As the owner of units in the scheme, McGregor was contractually bound by both the rules of conduct and management rules of the Estate.
 - McGregor enjoyed the right to access the portal system by virtue of being an owner of some units in the Estate. In terms of rule 13, McGregor had to obtain approval from the trustees prior to letting out his units to prospective tenants. Neither McGregor nor the trustees possessed the System at any given time as same is controlled by a service provider. They therefore did not have any physical control over the portal system. It must follow therefore that McGregor, under the circumstances, could not have been despoiled of anything as the access to the portal system was not an incident of possession.
 - In line with the approval required to let out the units in terms of conduct rule 13, access to the portal system went hand in hand with the approval to let out units. In other words, whilst McGregor could have access to the portal system, he would still have required the trustees' approval to let out the units. Therefore, McGregor's application was one of seeking to compel the trustees to grant him approval to let out his units disguised as a *mandament van spolie* application.
 - As McGregor required approval from the trustees prior to him letting out his units, it shows that he was never in physical control of the portal system. His right to let the units has always been subject to him obtaining approval from the trustees. That was a contractual right between him and the trustees.

- The trustees' application of the rules did not amount to self-help (or taking the law into their own hands). As the rights in dispute were contractual in nature and as specific performance of contractual obligations were being claimed, the *mandament van spolie* was not applicable.
- Even if one were to accept that McGregor was despoiled of access to the portal system it cannot be said that it was wrongful. The trustees took a resolution in November 2018 and notified all the owners during December 2018 as to what was going to happen to those owners whose accounts fell into arrears. McGregor did nothing for almost five months to challenge the resolution and its effect. Under the circumstances, it cannot be said that the 'deprivation' was wrongful and unlawful as McGregor was given ample notice as to what would happen when levies were in arrears. The remedy of spoliation was for this reason too, not available to McGregor.

CONCLUSION

Accordingly, the appeal failed.