REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/21837

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

5/3/2020
DATE

SIGNATURE

In the matter between:

MICHAEL MOTSOENENG BILL Applicant

and

WATERFALL ESTATE HOME OWNERS ASSOCIATION NPC First Respondent

TRAFALGAR PROPERTY MANAGEMENT (PTY) LIMITED Second Respondent

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JUDGMENT

SOUTHWOOD, AJ:

A. INTRODUCTION

1. This is an application for an order *inter alia* directing the respondents to restore possession and unrestricted access to Erf 3004, Jukskei View, Ext 38 Township, Registration Division IR Province of Gauteng located at stand 1223 Waterfall Country Estate, North ('**the property**'); and to restore unrestricted access to the property to the applicant's contractors.

B. THE PARTIES

2. The applicant is Michael Motsoeneng Bill, an adult male residing at 3726, Tugela Drive, Waterfall Country Village, Waterfall City ('**the residence**'). The applicant is the registered lessee of the property in terms of a 99-year lease. The lessor is Waterfall Country Estate WUQF Proprietary Limited. The applicant is a member of the first respondent by virtue of his lease.

3. The first respondent is the Waterfall Estate Homeowners Association, incorporated as a non-profit company.

4. The objects of the first respondent are to manage and control the Estate which consists of the residential property developments known as Waterfall Country Village and Waterfall Country Estate ('**the Estate**'); and to render services for the mutual benefit of members of the first respondent in the Estate.

5. The second respondent is the property manager of the first respondent.

C. BACKGROUND

6. The Estate is situated on Waterval farm. In 1934, the farm was bought by Moosa Ismail Mia, who built a religious training facility and a school for Indian and Black orphans on parts of the farm. Later the government expropriated portions of the farm for development. Eskom's Megawatt Park and the Buccleuch interchange are built on what was once the farm. When the Mia family decided to develop the remaining portions of the farm, this had to be done within a framework of a religious requirement not to sell the land but rather to lease the land by means of 99-year leases.

7. The Waterfall development, which includes the Estate, has emerged as the largest property development in South African history. It envisages the development of between twelve and nineteen thousand residential units, which will eventually house an estimated forty-eight to seventy-six thousand people. It also incorporates commercial and office space that will ultimately accommodate a further seventy-five thousand people.

8. The Estate is located on the embankments of the Jukskei River. It is a highly secure luxury lifestyle residential estate focused on green living. The Estate includes 17km of walking/jogging trails and mountain-bike trails, which feature bird-hides, park-benches and drinking-fountains. The Estate also includes a five-hectare lake and a riverside lapa which hosts non-motorised

water sports events and provides other entertainment amenities. There are numerous outdoor sporting facilities and a clubhouse which includes a comprehensive fitness centre; tennis, volleyball and squash courts; a swimming pool; aerobics and pilates studios, as well as a gym.

9. Further facilities include private international pre-primary, primary and high schools and shopping centres. There are additional facilities which include secure gatehouses. Security is managed by trained manpower of, what is described as, a state of the art security system. This system is described, further, as non-intrusive but highly visible to the outside world. The perimeters of the Estate are secured by a 4m high, reinforced-concrete wall, supporting an electric fence. The wall is well lit, monitored by mounted CCTV cameras and patrolled by on-site security personnel.

10. The first respondent's memorandum of incorporation ('**MOI**') provides that the members of the first respondent consist mainly of the Home Owners in the Estate, as defined in the MOI. A Home Owner is a Lessee in terms of an End-User Lease which is defined as a lease between Waterfall Country Estate WUQF Proprietary Limited and a Lessee in respect of a Stand. Upon becoming a Home Owner, a person automatically becomes a member of the first respondent, which membership ceases when a person ceases to be a Home Owner.

11. On 7 April 2016, a notarial deed of cession and assignment was registered in the applicant's favour with the Registrar of Deeds, in terms of which the

applicant took over the lease of the property from Mafafo Building Construction CC.

12. Upon registration of the deed of cession and assignment, and in terms thereof, the applicant became a member of the first respondent. The applicant also became bound by the Estate's MOI and the conduct rules of the Estate ('**the Rules**').

13. As a consequence of registration, the applicant took possession of the property and has been in peaceful and undisturbed possession thereof until the impugned conduct of the respondents occurred.

14. The property is a resale property, as contemplated in Rule 16.3. When the applicant became a member of the first respondent, the first respondent had already imposed commencement and completion penalties in respect of the property as a consequence of the failure of the previous lessee, Mafafo Building Construction CC, to comply with the provisions of Rules 16.1 and 16.2, namely to commence construction within twenty-four months of registration of the lease and to complete construction within forty-eight months of registration of the lease.

15. In terms of Rule 16.3.1, the applicant was required to commence construction within twelve months from 7 April 2016 and complete construction within twenty-four months of 7 April 2016, failing which certain penalties would be imposed.

16. During the period June 2016 and June 2018, the applicant attempted to get his building plans drawn up and approved by the first respondent and building lines relaxed and approved by the Johannesburg City Council. This process was only completed on 8 June 2018. The applicant only commenced construction on the property on or around 23 July 2018.

17. On 5 April 2017, the applicant received an email from Lely Mabaso, described by the respondents as a '*representative*' of the second respondent, warning the applicant that a penalty would be imposed if he failed to commence construction of a unit on the property as provided for in Rule 16.3.

18. In terms of Rule 16.3.3, a penalty of R5000 per month is payable for failure to commence construction timeously. The monthly penalty is applied retrospectively from the date of registration of the lease and continues until the date of commencement of construction.

19. On the same date, the applicant addressed an email to one Mr de Carvalho, the Building Control Manager of the second respondent, disputing his liability to pay the penalties.

20. On 6 April 2017, the applicant was, again, warned in writing that the penalty would be imposed from June 2017 if he failed to commence construction

before the end of May 2017. He was also furnished with a contractors' registration pack.

21. It appears from a levy statement for the property attached to the respondents' answering papers that a late building penalty was imposed on a monthly basis from June 2017 to August 2018.

22. On 13 December 2017, the applicant, again, addressed an email to Mr de Carvalho disputing that he was liable for any penalties. He indicated that his failure to commence construction was a consequence of the Municipality's failure to approve his plans. He indicated, further, that his contractor had approached the second respondent for permission to start construction. Such permission was refused because the Municipality had not yet approved his plans. He indicated, however, that his contractors had done a site establishment on the property.

23. On or about 23 July 2018, after the Municipality had approved the applicant's plans, Mr Singh, the Aesthetics and Building Control Manager of the second respondent, granted the applicant's contractor permission to commence with construction on the property and construction on the property commenced.

24. The applicant failed to pay the penalties imposed and the directors of the first respondent instructed the second respondent to deactivate the

applicant's biometric access to the Estate and to refuse his contractors' access to the Estate ('**the lock-out**').

D. THE SPOLIATION APPLICATION

25. On 4 October 2018, Ms Jonker of the second respondent, addressed an email to the applicant informing him that the lock-out was in effect as a consequence of his failure to pay the levy i.e. the penalty, which lock-out would be suspended when all arrears relating to the property had been paid in full. The lock-out was then put into effect. The applicant has, however, retained his biometric access to the Estate which is linked to the residence.

26. The applicant replied on the same day denying that he was in breach of the lease; that construction had commenced and that the lock-out would delay construction; that he would sue for damages caused by the delay; and that all his levies were up to date.

27. On 12 October 2018, an attorney, Mr Els, employed by the second respondent, sent an email to the applicant where he indicated the extremely clear provisions on construction timelines; the penalties imposed; and the applicant's intentional refusal to pay the penalties. The applicant was informed that he must pay the arrears in full or in part before construction would be allowed to proceed or avoid having the lease terminated. He was warned that should the matter not be resolved (presumably by paying a part

or the whole of the arrears), the account would be handed over to attorneys for collection of the arrears and cancellation of the lease.

28. The respondents do not allege that this threat has been carried out. The applicant, in his replying affidavit, expressly records that no steps have been taken to cancel the lease.

29. On 15 October 2018, the applicant responded to this email. He acknowledged that he had subscribed to the Rules but indicated that he had complied with every obligation in relation to both the property and the residence. He acknowledged the necessity of the imposition of penalties for failing to comply with construction deadlines but reiterated that his failure to comply arose from a delay in obtaining the Municipality's approval for his plans.

30. Between 25 October 2018 and 8 February 2019, the applicant corresponded with various employees of the second respondent in his attempts to resolve the issue. Eventually, this application was issued on or around 20 June 2019.

E. THE SPOLIATION

31. The *mandament van spolie* is available where:

31.1 a person has been deprived unlawfully of the whole or a part of his or her possession of a movable or immovable;

31.2 a joint possessor has been deprived unlawfully of his or her co-possession by his or her partner taking over exclusive control of the thing held in joint possession;

31.3 a person has been deprived unlawfully of his or her *quasi-possessio* of a servitude right; or

31.4 a person has been deprived unlawfully of his or her *quasi-possessio* of another incorporeal right.[1]

32. In order to succeed, the applicant must establish *inter alia* peaceful and undisturbed possession of the property or right. [2]

33. Possession, in the case of a corporeal thing, constitutes physical control of the thing and an intention to derive some benefit from the possession.[3]

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1 ***Dennegeur Estate Homeowners Association and Another v Telkom SA SOC Limited*** **2019 (4) SA 451 (SCA) at [9]**

2 ***Nienaber v Stuckey*** **1946 AD 1049 (AD) at 1055**

3 ***Dennegeur Estate Homeowners Association and Another v Telkom SA SOC Limited*** **2019 (4) SA 451 (SCA) at [10]**

34. Possession or *quasi*-possession of a right results from the exercise of the right. [4]

35. The applicant must also show an ostensible unlawful deprivation of possession of the property i.e. dispossession without the possessor's consent or due legal process. [5] However, where the respondent contends that the dispossession was lawful, it bears the onus of establishing same.[6]

F. POSSESSION AND DISPOSSESSION OF THE PROPERTY

36. In his founding papers, the applicant alleges that until he was spoliated, he was in peaceful and undisturbed possession of the property and that the first and/or second respondent '*locked the property thereby depriving me of my right and/or ability to develop, use and profit from my property and have since refused me and/or my contractors access to the property in order to proceed with construction*'. However, the applicant's complaint is directed at the deactivation of his biometric access to the Estate which is linked to the property and the cancellation of his contractor's access to the Estate.

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4 ***Dennegeur Estate Home Owners Association and Another v Telkom SA SOC Limited*** **2019 (4) SA 451 (SCA) at [15]**

5 ***Sillo v Naude*** **1929 AD 21 at 27**

6 ***George Municipality v Vena and Another*** **1989 (2) SA 263 (A) at 273D; *Singh and Another v Mount Edgecombe County Club Estate Management Association (RF) NBC and Others* 2016 (5) SA 134 (KZD) at [129]; *Impala Water Users Association v Lourens and others* 2008 (2) SA 495 (SCA) at [22]-[27]**

37. It is not disputed that the applicant was in possession of the property. In fact, the respondents contend that the applicant remains in possession of the property.

38. The respondents deny that the applicant has been locked out of the property but confirm the deactivation of the applicant's biometric access to the Estate which is linked to the property and the cancellation of the applicant's contractors' access to the Estate. As indicated above, the applicant retains his biometric access to the Estate which is linked to the residence.

39. In his replying papers, the applicant contends that the restriction of his access curtails his possession and use of the property and the refusal to allow his contractors access to the Estate '*effectively*' denies him access and possession of the property since he is denied full use and enjoyment of the property.

40. In their heads of argument, *Mr Kutumela* and *Ms Ntuli* for the applicant, reiterated this contention – the applicant was unlawfully deprived of the possession of the property when his biometric access to the Estate which is linked to the property was deactivated, and his contractors refused entry into the Estate.

41. No authority was referred to for this proposition, raised in *Nienaber*[7] but not dealt with therein.

42. Given that no dispossession of the property has been established, no order will be made in this regard.

G. ***QUASI-POSSESSIO* OF THE RIGHT OF ACCESS**

43. Applicant's counsel also contend that access to the Estate and development of the property are essential and necessary features of possession of the property. They rely heavily on the judgment in *Mount Edgecombe*[8] which, as is the case here, dealt with the cancellation of biometric access to a residential estate (as opposed to the residential property in the estate) as the subject matter of the spoliation application. The applicant also relies on the matter of *Impala*[9] which dealt with an interference with water rights as opposed to the dispossession of a corporeal moveable or immoveable.

44. As such, the applicant also claims dispossession of a right of access.

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7 ***Nienaber v Stuckey*** **1946 AD 1049 (AD)**

8 ***Singh and Another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and Others*** **2016 (5) SA 134 (KZD)**

9 ***Impala Water Users Association v Lourens NO*** **2008 (2) SA 495 (SCA)**

45. The respondents dealt with the application on this basis. In his heads of argument, *Mr du Bruyn* for the first respondent, indicates that the subject matter of this application is a right of access, that the right is derived from contract and that the respondents were contractually entitled to cancel the applicant's access as a result of his failure to comply with the Rules.

46. It is not in dispute that the applicant exercised a right of access to the Estate through the biometric system linked to the property and that his contractors exercised a right of access to the Estate.

47. The applicant contends that the rights of access are possessory rights which may be protected by a spoliation application. The respondents contend that the rights of access are merely contractual rights which are not protected by the *mandament*. They contend, furthermore, that there has been no dispossession of the right as the applicant has alternative access in the form of his biometric access linked to the residence. This contention does not apply to the contractors' access. Lastly, the respondents contend that the MOI authorises the conduct of the respondents and is, thus, lawful.

48. As such, the following issues arise:

48.1 whether the right of access is a possessory right or a merely contractual right;

48.2 whether the applicant has been dispossessed of his right of access; and

48.3 whether the dispossession was unlawful

H. THE NATURE OF THE RIGHTS OF ACCESS

49. In *Scholtz,*[10] the Supreme Court of Appeal held that '*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. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, 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 possessory right, even if it need not be proven, must be determined or the right characterised to establish whether its quasi-possessio is deserving of protection by the mandament. 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 a fix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of mere personal rights (or their exercise) is not protected by the mandament. The right held*

10 ***FirstRand Limited t/a Rand Merchant Bank and Another v Scholtz NO and Another*** **2008 (2) SA 503 (SCA)**

in quasi-possessio must be gebruiksregte or an incident of the possession or control of the property."[11] (own emphasis)

50. As is clear from the examples quoted in this *dictum*, a right of access to a property is an incident of the possession or control of that property. This is confirmed by the authorities relied on by the applicant such as *Mount Edgecombe,*[12] *Nienaber,*[13] *Pinzon Traders*[14] and *Lessing.*[15]

51. It has also been held that the *mandament* protects a right of access which is intended to retain possession or use of property.[16]

52. *Prima facie*, a right of access into the Estate is an incident of possession of the property.

53. *Mr du Bruyn* contends, however, that the applicant's membership of the first respondent and his occupation of the property is founded in the lease agreement and the MOI with the consequence that the relationship between the applicant and the first respondent is contractual in nature.

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11 **At [13]**

12 **at [124]**

13 **at 1060**

14 ***Pinzon Traders 8 (Pty) Limited v Clublink (Pty) Limited and Another*** **2010 (1) SA 506 (ECG) at [7]**

15 ***Lessing v Serengeti Golf and Wildlife Estate*** **(28609/2016) [2017] ZAGPJHC 261 (13 September 2017) at [4]**

16 ***Fisher v Body Corporate Misty Bay*** **2012 (4) SA 215 (GP) at [24]**

54. *Mr du Bruyn* contends, further, that the applicant has admitted that the rights in question, namely the right of the applicant to use the biometric finger recognition access system and the right of the applicant to have his contractors access the Estate, are contractual in nature, referring to the following allegations in the applicant's affidavits, namely:

54.1 '*9. In terms of the notarial deed of cession and assignment, I became a member of the Waterfall Home Owners Association, which is the First Respondent.*

54.2 *10. On or about 07 April 2016 and after registration of the lease agreement with the Registrar of deeds, I was given possession of the property…*

54.3 *11. My possession was also fortified by the lease agreement which states at paragraph 11.1, that: "Possession and occupation of the property shall be given to and taken by the Lessee on the Effective Date…*';

54.4 *'10.2.2.1 The lease agreement, which conferred on me my rights of possession, did not only confer on me a right to enter the property and/or to enter it using a biometric system but it conferred on me the right to develop the property and enjoy and benefit from it.*'

55. Furthermore, contends *Mr du Bruyn*, the contractual nature of the rights in question is confirmed by both the MOI and the lease.

56. Referring to Rule 6.1.1, *Mr du Bruyn* contends that the applicant's right to use the biometric system is created and regulated by the Rules which provide that all Home Owners living on the Estate must register their fingerprints with security for access into and out of the Estate and, referring to Rule 2.4, that any infringement of the Rules may result in a sanction being imposed, as deemed appropriate by the directors.

57. The applicant's right to have his contractors access the Estate is created and regulated, contends *Mr du Bruyn*, by *inter alia* the following Rules which provide that:

57.1 the applicant may build on the property once his plans have been approved by the Aesthetics Committee, referring to Rule 15.1;

57.2 construction of a unit must commence within a certain period after resale, referring to Rule 16.3.1;

57.3 construction of a unit shall be completed within a certain period of the resale, referring to Rule 16.3.2; and

57.4 any infringement of the Rules may result in a sanction, as deemed appropriate by the directors, being imposed on the applicant, referring to Rule 2.4.

58. *Mr du Bruyn* then concludes that it is evident from these Rules that the applicant's rights in question are contractual in nature and that by virtue thereof they are not deserving of protection in terms of the *mandament van spolie*.

59. As such, contends *Mr du* Bruyn, once it has been determined that the applicant's contractual rights are not deserving of protection under the *mandament van spolie*, this court should not inquire into the merits of the parties' opposing contentions relating to the parties' contractual rights.

60. *Mr du Bruyn* conceded in argument that the same would apply if it was found that the rights sought to be restored are protected by the *mandament van spolie*. However, given the tenor of his argument regarding the lawfulness of the dispossession, I have not relied on this concession.

61. The mere fact that the rights may be contractual in nature does not necessarily exclude these rights from being possessory.

62. *Mr du Bruyn* referred to a number of authorities in order to contend that the rights sought to be restored were mere personal rights.

63. In *Xsinet*,[17] a spoliation application was brought to restore a bandwidth sytem and a telephone system. The court held that the use of these services could not be described as an incident of possession in the same way as the use of a water or electricity installation may, in certain circumstances, be an incident of possession of residential premises.[18]

64. The judgment does not further explain why the right to receive these services was found to be a mere personal right and not an incident of possession of the premises.

65. Accordingly, this authority is of no assistance in determining whether the rights of access are an incident of possession of the property; nor as the basis for distinguishing the authorities which have found that biometric or other access to a residential estate or body corporate is an incident of possession of the property within that residential estate or body corporate, or to contend that these authorities are wrong.

66. In *Impala*, it was held that water rights are an incident of possession because they were linked to and registered in respect of the relevant properties.[19]

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17 ***Telkom SA Limited v Xsinet (Pty) Limited*** **2003 (5) SA 309 (SCA)**

18 **At [12]**

19 **at [19]**

67. However, this finding does not, in my view, mean that only registered rights are possessory rights which may be protected by the *mandament*. Such an interpretation of *Impala* would be contrary to the *dictum* in *Scholtz*, where it was held that the right in issue does not need to be established.[20] Instead, the nature of the right must be identified. Accordingly, *Impala* does not assist the respondents and does not detract from the appellate authority in *Nienaber* and *Scholtz* which indicates that access is an incident of possession of immoveable property.

68. In *Masinda,*[21] the court had to decide whether the respondent was entitled to a spoliation order when the appellant disconnected an illegal supply of electricity to immovable property owned and possessed by the appellant. The court held that in order to justify a spoliation order, the right must be of such a nature that it vests in a person in possession of the property as an incident of such possession. Rights bestowed by servitude, registration or statute are examples of this.[22]

69. *Mr du Bruyn* contends that *Masinda* is authority for the proposition that when rights flow from a contractual *nexus* between the parties, these rights are not protected by the *mandament*. The contractual source of the right excludes the possibility that the rights sought to be restored are an incident of possession of the property.

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20 **See the quote from *Scholtz* above**

21 ***Eskom Holdings SOC Limited v Masinda* 2019 (5) SA 386 (SCA)**

22 **At [22]**

70. However, this contention is inconsistent with the findings in both *Nienaber* and *Impala.* Furthermore, as *Mr Kutumela* pointed out, this is contrary to what is stated in paragraphs 14 and 15 of *Masinda*. In particular, in *Masinda*, the court held that depending upon the circumstances, the supply of electricity or water[23] may be recognised as being an incorporeal right, the possession of which is capable of protection under the *mandament*. And, referring to *Impala*, the court said, '*the respondents' rights to receive water were not mere personal rights but were linked to and registered in respect of certain portions of each of the respondents' farms that were dependent on the supply of the water*'.[24]

71. Accordingly, *Masinda* does not, in my view, find that rights which derive from a contract exclude the possibility of the right being an incident of possession of property.

72. In the premises, *Masinda* does not assist in determining whether the right of access is an incident of possession of the property.

73. Relying on *Scholtz*, *Mr du Bruyn* contends that what the applicant has been dispossessed of is not a right of access to the Estate but a contractual right to access the Estate using a particular method of access, namely, biometric access. Such a right is not an incident of possession but a contractual right.

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23 **Which is generally supplied in terms of a contract**

24 **At [15]**

74. *Mr du Bruyn* referred to Rule 6.1.1 as the source of this contractual right to biometric access.

75. Rule 6.1.1 provides that all registered Home Owners and Residents living on the Estate are required to have their fingerprints registered with security for access control into or out of the Estate. Owners or Residents whose fingerprints are of a poor quality will be issued with an access card and a 4-digit pin code. Owners and Residents may not request the security guard on duty to open for them without following correct access control procedures.

76. In my view, this imposes an obligation on the applicant as a Home Owner. Unlike in *Scholtz* where the holders of water rights entered into agreements specifically for the conveyance of water, in terms of these rights, for a fee, the applicant did not take assignment of the lease and did not agree to pay levies in relation to the property in order to be able to access the Estate via biometric access or to have his contractors' access the estate. The applicant, as a lessee of a property within the Estate, would be entitled to enter and exit the Estate freely subject to any limitations imposed by the MOI and/or the Rules for security reasons. Biometric access and access cards give effect to such unrestricted access subject to retaining control for security purposes. Such access is clearly linked to possession of the property.

77. The applicant obtained *quasi-possessio* of these rights of access by exercising such access.

78. Accordingly, the access exercised by the applicant and his contractors is not the exercise of a contractual right (or merely of a contractual right).

79. *Mr du Bruyn* contended that *Fisher* was wrongly decided because it is at odds with the principles in *Xsinet, Impala, Scholtz* and *Masinda.* I do not agree. In *Fisher*, the court applied the *mandament* to protect the applicant's access because it was intended to retain possession and use of the property in the estate[25] i.e. because access is an incident of the applicant's possession of the property in the estate. This is in accordance with the principles in these cases.

80. *Mr du Bruyn* also sought to distinguish *Mount Edgecombe* on the basis that the applicant, in that matter, had merely sought reactivation of his family's access cards and biometric access, whereas the applicant in this matter seeks unrestricted access to the Estate.

81. However, what the applicant seeks is relief in terms of the *mandament*. The fact that the applicant seeks relief different from that sought in *Mount Edgecombe* is not a distinguishing feature.

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25 **At [20]-[24]**

82. *Mr du Bruyn* contended, further, that *Mount Edgecombe* was wrongly decided if one considers the findings made in *Scholtz.* The court should have found that the use of biometric access, being a particular method of access, is not an incident of possession but arises out of contract.

83. This is a factual finding. *Mr du Bruyn* failed to identify the factual basis for his contention that *Mount Edgecombe* had been wrongly decided. The submission is made that biometric access is a contractual right, which submission is consistent with the finding in *Singh,*[26] namely:

> '*When the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property with the estate.*' [27]

84. The factual findings made in *Scholtz* cannot serve as precedent for the factual findings which needed to be made in *Mount Edgecombe*. The judgment in *Mount Edgecombe* referred to *Scholtz* and the need to determine whether the right in issue is a possessory or a merely contractual

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26 ***Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and others*** **2019 (4) SA 471 (SCA), the SCA judgment originating in *Mount Edgecombe.* However, the SCA judgment dealt *inter alia* with the setting aside of the Rules but not with the spoliation application dealt with in *Mount Edgecombe***

27 **At [19]**

right. [28] As such, *Singh* does not establish that *Mount Edgecombe* was wrongly decided.

85. *Mr du Bruyn* referred to *Lenz*[29] in support of the submission that the *mandament* is not the appropriate remedy because the matter relates to disputed contractual rights. However, in *Lenz* the application was dismissed on the basis that the applicant had not been wrongfully deprived of possession[30]. Accordingly, *Lenz* is not support for this submission.

86. *Mr du Bruyn* also referred to *Alegria*[31] in support of the contention that the applicant's rights of access were contractual in nature. The finding in *Alegria* that the right to possess an access tag is not an incident of possession is based, it appears, on the finding that "t]*he applicant does not allege that it was in peaceful and undisturbed possession of any particular subject matter relating to the activation of the access tags'.* [32] That is not the case here.

87. In the premises, none of the authorities relied on by the respondents nor the contentions made disturb my *prima facie* view, based on *Nienaber* and

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28 **At [120]-[121]**

29 ***Lenz v Blair Atholl Home Owners Association NPC* (2016/36336) unreported judgment of Nickolls J (as she then was) dated 11 April 2016 in the Gauteng Local Division**

30 **At [28]-[29]**

31 ***Alegria Body Corporate v The Splice Riviera Body Corporate* (11999/2016) [2017] ZAGPJHC 64 (6 March 2018)**

32 **At [19] read with [17]**

Scholtz, that the biometric access exercised by the applicant is an incident of the applicant's possession of the property and, thus, constitutes a possessory right which may be protected by the *mandament*.

88. Insofar as the contractors are concerned, the Rules do not create a right of access for contractors. Instead, contractors must meet certain requirements and follow certain procedures to access the Estate.

89. It is not disputed that the contractors were permitted and were exercising a right of access. Such access must have been a consequence of the applicant's possession of the property.

90. As such, the access by the applicant's contractors to the Estate in order to develop the property is also an incident of the applicant's possession of the property.

91. Both the applicant's biometric access and the contractor's access may, therefore, be protected by means of a spoliation application.

I. HAS THE APPLICANT BEEN DISPOSSESSED?

92. The next issue to be determined is whether the fact that the applicant is able to access the Estate using biometric access which is linked to the residence has the consequence that the applicant has not been dispossessed of his right of access.

93. In *Nienaber*, the court, dealing with the contention that the appellant had not been deprived of possession of the land or access to the land because he had an alternative means of access, found that the appellant had been in possession of a particular right of access i.e. access through a particular gate, of which he had been deprived and that the *mandament* was applicable.[33]

94. The applicant's right to biometric access to the Estate which is linked to the property is an incident of possession of the property not the Estate. His use of the biometric access to the Estate which is linked to the residence is an incident of his possession of the residence and not the Estate. The contention that the exercise of the latter right enables the applicant to retain possession of the property entails an abuse of the biometric access linked to the residence i.e. that it is being used for a purpose other than for what the right is intended.

95. Accordingly, given that it is the particular method of access, in other words biometric access linked to the property, which has been deactivated, the applicant has been dispossessed of this right. In these circumstances, it matters not, where this right is the subject matter of the application, that he has an alternative method of accessing the Estate.

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33 **At 1060**

96. *Mr du Bruyn* contended that *Fisher* is distinguishable from the current matter because there was no alternative motor vehicle access, as *in casu*. Given the finding in *Nienaber*, this contention is irrelevant, and *Fisher* is not distinguishable on this basis.

97. Insofar as the rights of access of the applicant's contractors is concerned, there is no alternative manner of access for the contractors and the refusal to allow the contractors to enter the Estate is a dispossession of such right.

J. IS THE DISPOSSESSION UNLAWFUL?

98. The last issue to be determined is whether the respondents' conduct constitutes a lawful dispossession, in particular whether the Rules and/or the MOI constitute the applicant's contractual consent for the respondents' conduct.

K. CONSENT AND ENFORCEABILITY

99. The applicant contends that even if the Rules and the MOI contain provisions which entitle the respondents to act in the manner in which they did, the relevant provisions would permit self-help and be unenforceable.

100. Applicant's counsel referred to number of judgments in this regard.

101. The respondents did not deal with these authorities at all.

102. In *Chief Lesapo*[34], the court held that the approach to be adopted for determining questions of constitutionality is objective. Accordingly, whether there is a dispute between the parties (such as whether the applicant is liable to pay the late construction penalties) is irrelevant to the enquiry. The subjective position in which the parties find themselves cannot affect the constitutional status of the law under attack.[35]

103. The court held further that in a modern constitutional state like ours, there is no room for legislation which is inimical to a fundamental principle such as that against self-help. This is particularly so when the tendency for aggrieved persons to take the law into their own hands is a constant threat. This rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary. It is a guarantee against partiality and the consequent injustice that may arise.[36]

104. Dispossessing a person against their will or without an order of court amounts to self-help. [37]

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34 ***Chief Lesapo v North West Agriculture Bank and Another*** **2000 (1) SA 409 (CC)**

35 **At [7]**

36 **At [17] - [18]**

37 ***Sillo v Naude*** **1929 AD 21 at 27**

105. Applying the reasoning in *Chief Lesapo,* enforcing the terms of the agreement, as understood by the respondents, authorises the first respondent, an adversary of the applicant, to decide the outcome of a dispute. The first respondent thus become a judge in its own cause. The first respondent decides whether there is a claim against the applicant. The first respondent decides the outcome of that claim and the subsequent relief and the first respondent enforces its own decision. In all three cases it does so by usurping the powers and functions of the court.

106. The applicant, relying on *Mount Edgecombe,* contends that it is a long-established principle that self-help is unlawful and that any provision in a contract providing for such will not be enforced by our courts.

107. The court in *Mount Edgecombe* based its *dictum* on the judgment in *Chief Lesapo* and *Barkhuizen.*[38]

108. In *Barkhuizen*, the court held that section 34 of the Constitution guarantees everyone the right to seek the assistance of a court to resolve any dispute.[39] Any contractual clause which denies this constitutional right is contrary to public policy and is unenforceable. [40]

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38 ***Barkhuizen v Napier* 2007 (5) SA 323 (CC)**

39 **At [31]**

40 **At [32]-[35];**

109. The court considered whether the relevant provision was contrary to public policy i.e. *contra bonos mores.* [41]

110. The court held that the test for determining whether the relevant provision is contrary to public policy is whether it affords a party an adequate and fair opportunity to seek judicial redress.[42]

111. This involves determining two questions, firstly, whether the relevant contractual clause is unreasonable, and, if the clause is found to be reasonable, whether it should be enforced in light of the circumstances which prevent compliance with the clause.[43]

112. The first question involves the balancing of two considerations. On the one hand, public policy requires that parties should comply with contractual obligations freely and voluntarily undertaken, giving effect to the constitutional values of freedom and dignity. On the other hand, all persons have a right to seek judicial redress.[44]

113. The second question involves an inquiry into the circumstances that prevented compliance with the clause. [45]

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41 **At [36]; [44]**

42 **At [50] - [52]**

43 **At [56]**

44 **At [57]**

45 **At [58]**

114. The first enquiry must be directed at the objective terms of the contract. [46]

115. *Mr du Bruyn*, in his heads of argument, contends that the first respondent is entitled to deactivate the applicant's biometric access and to refuse access to the applicant's contractors in terms of articles 2.5 and 16.1 of the MOI.

116. Article 2.5 of the MOI provides as follows: '*The Directors*[47] *may take or cause to be taken such steps as they may consider necessary to remedy the breach of any Rules of which the Member*[48] *may be guilty and debit the costs of so doing to the Member concerned which amount shall be deemed to be a debt owing by the Member to the Company. In addition, the Directors may impose a system of fines or other penalties. The amounts of such fines and/or penalties shall be determined by the Directors from time to time'.*

117. Article 16.1 of the MOI provides as follows: '*Should any Member or guest or invitee of a Member fail to perform any obligation incumbent upon him, if applicable, within the period of any notice given for compliance, the Company shall be entitled, but not obliged, to do such things and incur such*

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46 **At [59]**

47 **defined in article 1.1(n) of the MOI as a member of the Board of the Company, as contemplated in section 66, or an alternate director of the Company and includes any person occupying the position of a director or alternate director, by whatever name designated; Company is defined in article 1.1(g) as the Waterfall Country Estate Home Owners Association NPC registration number 2009/012918/08 i.e. the first respondent**

48 **A Home Owner (article 2.12(2)(a) of the MOI) or Lessee (article 1.1(p)), such as the applicant**

expenditure as is, in the opinion of the Company, necessary and/or requisite to procure compliance. The costs thereby incurred by the Company shall be recoverable from the Member, which amounts shall be deemed to be part of the levy due by the Member concerned.'

118. The respondents contend that when a Member, such as the applicant, fails to comply with the Rules, both of these articles of the MOI empower the first respondent to take whatever steps it may deem to enforce the Rules, whether as leverage or otherwise. This would include interfering with the applicant's access in order to enforce payment of outstanding levies.

119. At first blush, this would appear to be correct.

120. However, statutes are interpreted to interfere as little as possible with the fundamental principle that a person may not take the law into his own hands.[49] Contractual provisions should be interpreted in the same way.

121. Both articles indicate that the costs of the steps taken to enforce the rules may be recovered from the member concerned. This implies that the steps taken would result in the first respondent incurring costs and suggests that the steps taken must be directed at the first respondent itself remedying the contravention rather than leveraging compliance of the Rules e.g. engaging a contractor to maintain a stand which is not being maintained per Rule 7.1

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49 ***George Municipality v Vena and another*** **1989 (2) SA 263 (A) at 271D-E**

and not interfering or creating an inconvenience for that member in order to leverage compliance with the Rules. In relation to the non-payment of levies (Rules 5.1 and 5.2), the appropriate remedy would be to instruct an attorney to collect the levies and to recover the attorney's fees from the member.

122. Holding otherwise means that the first respondent could refuse access to contractors to build on the property where a member has failed to commence and/or complete construction within certain deadlines required by the Rules. This would be absurd.

123. In my view, these articles do not empower the respondents to deactivate the applicant's biometric access which is linked to the property nor to refuse access to the applicant's contractors in these circumstances. The lock-out is not directed at the respondents themselves remedying the member's alleged contravention of the Rules but as a means of leverage to ensure compliance with the Rules.

124. In any event, as the court held in *Mount Edgecombe* in similar circumstances, the respondents' interpretation of these articles, namely that the applicant's biometric access and his contractors' access may be suspended merely upon the first respondent forming the opinion that he or

she has breached the Rules, without first having recourse to a court of law in order to seek sanction to do so, amounts to self-help. [50]

125. Applying the first part of the test enunciated in *Barkhuizen*, it is clear that these articles, if interpreted in this way, prevent a party from an adequate and fair opportunity to have the dispute determined by a court and falls within the contemplation of what *Chief Lesapo* found objectionable, namely that the first respondent is prosecutor, judge and executioner in its own cause.

126. *Mr du Bruyn* relied on *Lenz* in support of the submission that the articles in the MOI authorised the respondents' conduct. In *Lenz,* the court found that a provision in the Association's Articles of Association and Constitution established the applicant's consent for the deactivation of access cards. The relevant provision reads as follows: '*No member shall be entitled to the privileges of membership unless and until he shall have paid every levy and other sum, if any, which may be due and payable to the Association in respect of his membership. Access cards may be invalidated until all arrears have been paid, at the discretion of the Manager'.* [51]

127. In failing to consider the enforceability of this provision *per Chief Lesapo* and *Barkhuizen*, *Lenz is* distinguishable.

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50 **At [129]**

51 **At [18] read with [28]-[29]**

128. Accordingly, on the basis of the principles in *Barkhuizen* and *Chief Lesapo,* the articles in the MOI relied upon by the respondents are unenforceable insofar as they empower the first respondent to deactivate the applicant's biometric access and to instruct the second respondent to refuse access to the applicant's contractors without recourse to a court.

129. In the premises, the dispossession of the applicant's right of access is without an order of court or the consent of the applicant and is unlawful.

L. CONCLUSION

130. I have found that the applicant has established:

130.1 *quasi-posssessio* of a right of access;

130.2 that the right of access is an incident of possession of the property and may be protected by the *mandament*;

130.3 that the applicant has been dispossessed of that right;

130.4 that the dispossession was unlawful.

131. The relief sought in prayer 1 to a declarator that the locking of the applicant and his contractors '*out of the property*' is unlawful cannot be granted.

There has been no dispossession of access to the property but to the Estate.

132. The relief sought in prayers 2 and 3 which seek restoration of the applicant's possession and unrestricted access to the property is, similarly, problematic. The applicant has not been deprived of possession of the property or unrestricted access to the property.

133. However, the applicant's biometric access to the Estate which is linked to the property has been taken away as well as the applicant's contractors' access to the Estate. It is that access which must be restored.

M. COSTS

134. The applicant sought a punitive costs order against the deponent to the answering affidavit, Mr Poole, the Estate Manager employed by the second respondent, because of the arbitrariness with which the applicant was dealt with together with his misleading statements under oath.

135. Insofar as it is alleged that the applicant was dealt with in an arbitrary fashion, it is the respondents which act and not Mr Poole. He is merely a representative of the second respondent.

136. Insofar as he allegedly misled the court regarding whether the applicant had appealed the decision to impose the penalties, it is clear that the

allegation that no appeal had been brought constituted Mr Poole's interpretation of the events which had transpired. In any event, whether an appeal had been lodged is irrelevant to this application.

137. Although a number of authorities were referred to relating to costs *de bonis propiis*, none of these deal with costs orders against a witness who is not a party to the proceedings and where it is unclear whether notice of the proposed relief has been given to Mr Poole.

138. Accordingly, no costs order will be granted against Mr Poole.

139. In the alternative, the applicant sought a punitive costs order against the first respondent, presumably on the basis that it has acted in bad faith. The applicant refers to the fact that:

139.1 penalties were imposed despite the fact that the applicant's failure to construct timeously resulted from the Municipality's failure to approve his building plans timeously;

139.2 the applicant's contractors were refused access to the Estate preventing construction from continuing yet the first respondent was required to continue paying levies in relation to the property;

139.3 the respondents ignored the applicant's proposal that he would pay the disputed amount into a trust account; that access then

be restored; and that the respondents should resolve the dispute regarding the applicant's indebtedness by instituting proceedings against him.

140. None of these facts establishes bad faith.

141. As such, there is no basis for imposing punitive costs.

142. The applicant, relying on *Fisher*[52], also contended that punitive costs orders are generally granted in spoliation matters to indicate the court's displeasure with a party who has taken the law into its own hands.

143. Given the conflicting judgments in the High Court (both in this division and others) in relation to spoliation applications dealing with the interference with access into residential estates or complexes; and the differences in approach in various judgments of the Supreme Court of Appeal dealing with the (alleged) spoliation of rights, it was by no means clear that the respondents had taken the law into their own hands. In these circumstances, a punitive costs order is not warranted.

ORDER

Accordingly, I make the following order:

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52 **At [29]**

1. The respondents are directed to restore/reactivate the applicant's biometric access to the Estate (Waterfall Country Estate and Waterfall Country Village) as defined in the Memorandum of Incorporation of the first respondent ('**the Estate**') which is linked to Erf 3004 Jukskei View Extension 38 Township, Registration Division IR Province of Gauteng also known as stand 1223 Waterfall Country Estate, North, within seven days of this order;

2. The respondents are directed to restore access to the Estate to the applicant's contractors who had previously registered with estate management and security *alternatively* had previously been given access to the Estate;

3. The first respondent is directed to pay the applicant's costs of the application.

F SOUTHWOOD 5/03/20
ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Date of Hearing:	29 January 2020
Date of Judgment:	10/03/2020
For the Applicant:	L Kutumela with N Ntuli
Instructed by:	Motsoeneng Bill Attorneys Inc.
For the First Respondent:	L du Bruyn
Instructed by:	Werksmans Attorneys

No appearance for the Second Respondent