PETER NDUMO MUTSINYA
versus
DANDE HOLDINGS (PVT) LTD
and
DAMISO MHLANGA
and
GEORGE CHIKUPO
and
TAPERA MAVURA

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 21 and 22 August 2008.

Urgent Chamber Application

Adv L Mazonde, for applicant
Adv O Takaindisa, for respondents.

MAKARAU JP: The facts of this matter are very simple and yet they present a novel issue before this court. In their simplicity, the facts bring to the fore the challenges posed by advancement in information technology and the response of the law to such advancement.

The applicant was employed by the first respondent as its Managing Director. The second to fourth respondent were colleagues and fellow employees of the first respondent, being the chief Executive Officer, Production Director and Human Resources Director respectively.

On 23 July, 2008, certain allegations of a criminal nature were made against the applicant by his colleagues. The applicant was taken by the police and whilst in custody, the respondents gained access to his computer and transferred therefrom a number of files and information onto their computers. This they did after "cracking" the applicant's password and rendering it dysfunctional in the process.

The information that was transferred from the applicant's computers was personal and confidential to the applicant and included an examination paper he had set for students at the University of Zimbabwe where he also lectures.

Upon discovering the intrusion and transfer, the applicant reported the matter to the police. The papers filed of record do not disclose the response of the police to the report by the applicant.

In addition to reporting the matter to the police, the applicant filed this application on a certificate of urgency, seeking an order compelling the respondents to delete from their computers all the information that they transferred from his computer in the interim and as final relief, that the respondents be restrained from using the information that they transferred from the applicant's computers.

The application was opposed.

In moving the application on behalf of the applicant, *Advocate Mazonde* was clear that what the applicant was seeking was relief under the *mandament van spolie*. In this regard, he argued that the applicant was in peaceful and undisturbed possession of the information and that he was unlawfully dispossessed of such by the respondents when they unlawfully broke the password to his computer and thereby gained access to the information thereon, which they then transferred to their own computers.

Whilst in the opposing affidavits the respondents had sought to argue that the applicant had another remedy in the nature of the criminal proceedings he had initiated by making the report to the police, in argument, *Advocate Takaindisa* submitted that the applicant had approached the court for the incorrect relief as the *mandament van spolie* could not be used to restore information stored on computers and allied devices.

It is trite that the *mandament van spolie* is a remedy for the restoration of possession. The remedy is usually used to restore physical possession of movable or immovable property. (See *Nino Bonino v De Lange* 1906 TS 120 at 122.) It is a remedy of a very specific nature and whose sole purpose is to restore the parties to the status quo ante after one of them has been despoiled against his will or without his consent of possession of something by the other party's violence, fraud, stealth or other illicit conduct. This is why in an application for a *mandament van spolie*, the rights of the parties to the property in question do not enter the fray and no attempt is made or is indeed permissible to determine the merits of the underlying dispute between the parties.

In my view, we can now take it as settled law that the remedy now applies to incorporeal rights. (See *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA)).

In my view, it cannot be disputed that the applicant was in possession of all the information on this computer prior to the cracking of his password. He had exclusive control over access to that information.

It is further not in dispute that the conduct of the respondents in gaining access to his files without his consent and in is absence was illicit.

In my view, the first real issue that I have to deal with in this application is whether by gaining access to his information and mirroring such information onto their own computers, the respondents deprived the applicant of "possession" of the information in such a manner that such possession can be restored by an order *mandament van spolie*.

I think not.

The applicant remained in possession of the information that was originally on his computer. Due to the versatility of the storage and transfer functions of information stored on computers, the respondents did not take away the information they had accessed. What they did was to simply obtain copies thereof, albeit illicitly.

I did not hear the applicant to aver that in tempering with his password, the respondents have barred him from accessing his files. If that was the case, one could very well argue that he had thus been despoiled of control and access as one could equate the password to a key to a building for instance and hold that by breaking the key, the respondents had barred the applicant from accessing his information. By making copies of the information on his computers, the respondents did not interfere with the applicant's physical possession and /or access to the information.

It is trite that the *mandament van spolie* is employed as a remedy to prevent respondents from taking the law into their own hands and taking into their possessions property that they believe they are entitled. Its aim is to restore the factual possession of which the spoliatus has been unlawfully deprived. It requires that the property despoiled be restored without going into the merits of the dispute between the parties.

It has been generally accepted that a claim of right is not a defence to a *mandament van spolie*. In my view, equally, the remedy cannot be used to assert and vindicate any other right in the property that is not possession. In other words, the applicant cannot use the remedy to interdict the respondents from accessing information that they are not entitled to but which they now have, or to eradicate from their own computers information that they illicitly obtained from his. It would appear to me that his remedy lies in some other branch of the law and not in the possessory remedy that he has invoked in these proceedings. What the applicant has lost through the actions of the respondents is the right to have exclusive access, knowledge and use of the information that was on his computer. Such a right, albeit incorporeal, is in my

view incapable of restoration once access has been had to the information. It is a right that is incapable of being possessed physically and in my view, it cannot be protected by the *mandament van spolie*. In my further view, the situation can be likened to a spoliatus who is in possession of a bucket full of water which the respondent illicitly takes and uses the water for his own needs. In such circumstances, while possession by the applicant and an illicit dispossession by the respondent can both be proved, a *mandament van spolie* cannot be used to fill the bucket with water and restore possession with the applicant.

It is on the basis of the above that I dismissed the application on the turn.

I made no order as to costs to show the court's disapproval of what the respondents did to access the applicant's information.

Tondlanga & Associates, applicant's legal practitioners.