**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 49129/2017**

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

29/05/18
DATE

SIGNATURE

In the matter between:

**HUAWEI TECHNOLOGIES SOUTH AFRICA (PTY) LTD** **APPLICANT**

**AND**

**REDEFINE PROPERTIES LTD** **1ST RESPONDENT**

**ACCENTURE SOUTH AFRICA (PTY) LTD** **2ND RESPONDENT**

---

**JUDGMENT**

---

**CELE AJ**

Heard: 15 May 2018
Delivered: 29 May 2018

**Introduction**

[1] In this application the Applicant seeks a declaratory order saying that neither of the Respondents nor their successors in title have any lawful right to traverse or take access over the Applicant's Properties and an interdict restraining the Respondents from continuing to do so. Effectively the Applicant seeks to exercise its rights as the owner of the property in question by means of a *rei vindicatio* remedy. The First Respondent acted on behalf of both Respondents to oppose this application and brought a counter application seeking a stay of the present application pending the outcome of the Applicant's intended appeal against the Spoliation Order and, in the alternative, a stay for 30 days pending the outcome of an application they intend to make to the City of Johannesburg Metropolitan Municipality ("the Municipality") and/or the Johannesburg Road Agency (Pty) Ltd ("the JRA") for consent to take an alternative access directly from Kelvin Drive. They also seek a further stay of 30 days to allow for the construction of the new access.

[2] This application is a sequel to an earlier application by the Respondents who obtained a spoliation order against the Applicant in terms whereof the continued use of the Applicant's Properties for the purpose of access to the Redefine Property was restored to them. The Applicant had denied access to the Respondents through one gate and threatened to close the second. Both entrances were in the property owned by the Applicant. In terms of the spoliation order Respondents' access through the two gates of the Applicant was restored to them as the Applicant had not followed due legal process in closing the two entrances.

**Factual Background**

[3] Most of the facts in this matter stood as common cause between the parties. The Applicant is the registered owner of the following immovable properties situated within the Huawei Office Park (previously known as the Harrowdene Office Park) ("the Office Park"):

1. Erf 827 Woodmead Extension 12 Township ("Erf 827");
2. Erf 828 Woodmead Extension 25 Township ("Erf 828");

3. Erf 832 Woodmead Extension 20 Township ("Erf 832");
4. Portion 2 of Erf 8 Woodlands Extension 4 Township ("Portion 2");
5. Portion 3 of Erf 8 Woodlands Extension 4 Township ("Portion 3");
6. Portion 4 of Erf 8 Woodlands Extension 4 Township ("Portion 4");

("the Applicant's Properties") which the Applicant holds by virtue of Deed of Transfer No. T22631/2017.

[4] The First Respondent (Redefine) is the registered owner of Portion 1 of Erf 5 Woodlands Extension 4 Township (the Redefine Property). The relevant position of the Applicant's Properties and the Redefine Property were well indicated on the aerial photograph annexed to the replying affidavit. The Second Respondent (Accenture) is a tenant of Redefine and presently occupies the Redefine Property and conducts the business of management consultants therein. Redefine took access through the Office Park via two controlled access points, one on the Western Service Road and the other on Kelvin Drive.

[5] Soon after the Applicant took transfer of its property, in May 2017, it enquired from Redefine as to the basis on which Redefine access its property through the two gates of the Applicant. Correspondence was exchanged in an attempt to establish how the arrangement came about. No amicable solution was found and the Applicant gave Redefine two dates from which access would be denied for them through the two gates. The first date was 20 October 2017, when Huawei closed the main gate and partially closed the Kelvin Drive gate.

[6] Because Redefine and Accenture believed they had free and unfettered access to the two gates and the road between them in order to access the Redefine property and that since they had partially closed Kelvin Gate entrance, they approached this Court on urgent basis successfully obtaining a spoliation order against the Applicant. The Applicant lodged an application for leave to appeal but this application was dismissed, after the Applicant had initiated this application.

[7] In this application the applicant said that it acquired its properties with the intention of utilising them solely for its own use and seeks to limit access to the

Office Park to its own employees and patrons. To achieve that, the Applicant needs to prevent access to the Redefine Property through the Office Park. As already alluded to, for the relief it seeks, the Applicant relies solely on its rights as owner of the Applicant's Properties and seeks to prevent the traversal thereof by Redefine and Accenture. Stated differently, the Applicant invokes the *rei vindicatio* to gain sole possession and control of its immovable properties.

**Applicable Legal Principles.**

[8] The *rei vindicatio* is the common law real action for the protection of ownership.[1] It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner. The owner, in instituting a rei vindicatio, need do no more than allege and prove that he is the owner and that the defendant is holding or in possession of the res. The onus is on the Defendant to allege and establish a right to continue to hold against the owner.[2] A court does not have an equitable discretion to refuse an order for ejectment on the grounds of equity and fairness.[3] In the case of eviction based on an owner's *rei vindicatio*, the owner has only to prove his ownership which can be done by producing his title deed indicating that the property is registered in his name.[4]

[9] In addition, the owner will have to provide proof that the Defendant is in occupation of the property. The onus is then on the occupier to prove that he has a valid right of occupation against the owner.[5] In this matter the Applicant annexed proof of its ownership to the property, including the two gates and the road in between and the Respondents did not contest the ownership issue any further. It remained common cause that the Respondents were and wanted to continue to use the two gates and road in between to access their property. That use equates to

---

[1] C P Smith, Eviction and Rental Claims: A Practical Guide at p 1-2; Graham v Ridley 1931 TPD 476; Chetty v Naidoo 1974 (3) SA 13 (A).
[2] Chetty v Naidoo (supra) at 20 A – E.
[3] Belmont House v Gore NNO 2011 (6) SA 173 (WCC) at para [15].
[4] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at 82 A – C.
[5] Chetty v Naidoo (*supra*) at 20 A – I

them holding or being in possession of the res. It was on this basis that they sought and were granted the spoliation order, which is a remedy for a possessor.

[10] The two requirements for a *rei vindicatio* are accordingly found to have been proved by the Applicant in this matter. All that remains then is for Redefine and/or Accenture to demonstrate a legal right to continue to utilise the Applicant's Properties for access to the Redefine Property which is good against the Applicant. The final probe will turn on whether the Applicant has demonstrated entitlement to the relief it seeks which is also in the form of an interdict.

**Respondents' grounds for opposition**

[11] Various grounds have been outlined by the Respondents in opposition to this application. These will be dealt with together with grounds for the counter-application.

**Res Judicata**

[12] The Respondents relied on the Court order dated 2 January 2018 issued in the spoliation application by **Van Der Linder J**, involving Redefine and the Applicant for their submissions. The requirement of *res judicata* are met when the judgment relied upon was delivered in litigation to which the present parties were parties.[6] The second requirement is that the cause of action must be the same.[7] Finally, it must be a final judgment.[8] The Respondents have correctly submitted that the parties in both applications were effectively the same, notwithstanding that the Second Respondent has been added in the current application. It is further correct that the spoliation order was final in nature and could be, as was, appealed against. The last probe on this aspect turns on whether the cause of action was the same.

[13] The Court formulated its order on the basis of paragraphs 1 (b) to 1 (d) of the Notice of motion which read:

---

[6] See Le Roux en 'n Ander v Le Roux 1967 (1) SA 446 (AD) at 462G – 463G.
[7] See Liley and Another v Johannesburg Turf Club and Another 1983 (4) SA 548 (W).
[8] See African Wanderers F.C. v Wanderers F.C. 1977 (2) SA 38 (AD) at page 45 H – 47 H.

"1.(b) Ordering the Respondent to restore the Plaintiff's exercise of its rights to:

(aa) enter the Western Service Road main gate at the Harrowdene Office Park;

(bb) enter the Kelvin Drive gate at Harrowdene Office Park;

(cc) traverse the road between the Western Service Road main gate and Kelvin Drive gate at the Harrowdene Office Park.

(c) Ordering the Respondent to reopen the Western Service Road main gate and entrance and to restore the gate and entrance to the same state it was in immediately before its closure on or about 20 October 2017.

(d) Ordering the Respondent to reopen the exit lanes, pedestrian gates and guardhouse at the Kelvin Drive gate and to restore the gate and entrance to the same state it was in immediately before the partial closure and obstruction thereof by the Respondent on or about 20 October 2017."

[14] The Respondents contend that the Court in the Spoliation Order found that the Respondents had a right to continue to utilise the Applicant's Properties for access to the Redefine Property and, on that basis, they argue that the cause of action is the same. The submission is further that the order was not limited in its duration nor was it ordered that same was to be of application pending the outcome of any further action or application. It was contended that this order was not capable of being reversed or rendered inoperative by way of an application and/or the relief that the Applicant seeks in this application. As the judgment and the order were still of force and effect, it was submitted that, there was a danger that the Court hearing this application might make findings and grant an order which is contrary to the judgment and order in the spoliation application, resulting in there being two conflicting and inconsistent findings and orders. Court was thus asked to dismiss this application.

[15] In paragraph 1 (b) the spoliation order commences thus: "*Ordering the Respondent to restore the Plaintiff's exercise of its rights to...*" (my emphasis). This is what Redefine came to Court to ask for, namely the restoration of the position

which was in existence before the intervention of the Applicant, nothing more and nothing less. The rest of the part of the order explains how the restoration to the *status quo ante* was to be achieved. The right referred to in the order is similar in nature to the right of spoliation granted to a thief to possess the merx until any further legal steps may be resorted to by the owner of the merx. Therefore the right accorded to the Respondents in the judgment were limited to rights of a possessor. They are distinct from the rights of the owner to the merx, which rank superior to that of a possessor, provided due process is followed in the exercise thereof.

[16] In the spoliation application, the Court had only to satisfy itself that prior to being denied access through the main gate on the Western Service Road and the reduction in width of the access available to the Respondents at the Kelvin Drive gate, the Respondents had been in possession thereof in the sense that they enjoyed the unencumbered use thereof and that the Applicant had spoliated their possession by summarily denying them access without due process. Once those two requirements were satisfied, the Respondents were entitled to the Spoliation Order. The present application takes the enquiry to a different level, where the issue of ownership, which was then irrelevant, came into direct focus.

[17] The submissions of the Respondents on this issue are accordingly found to be bad in law and should therefore not be sustained.

**Non joinder**

[18] The City of Johannesburg Metropolitan Municipality (the City) has registered right of way servitude over and in respect of the road between main and Kelvin Drive gates. According to the Applicant this servitude is not for a public road. The Respondents contended that the City has a direct and substantial interest in not only the relief sought by the Applicant but more importantly, to the Applicant's closing of the gate at both ends of the servitude road, that is, at the main entrance and the Kelvin Drive entrance. By not joining the City with its agent, the Johannesburg Road Agency (JRA), the submission is that there is a non-joinder as a result of which this application should not have been heard. The submission was that this application ought therefore to be dismissed.

[19] The question brought to bear on this issue is whether the Municipality and the JRA have any direct and substantial interest sufficient to necessitate their joinder, in the question whether the Respondents are entitled to use the Applicant's Properties to obtain access to the Redefine Property. In this respect it has been held in *United Watch & Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another*[9] that :

> 'It is settled law that the right of a defendant to demand joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and duty appear to be co extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might mak. In Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O), Horwitz AJP (with whom Van Blerk J concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 169)
>
> "...an interest in the right which is the subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation."
>
> This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, ..., and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see Henry Viljoen's case, supra at p 167).'

[20] It follows from the decision in United Watch & Diamond Co, supra, that what constitutes a direct and substantial interest is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court. It was never demonstrated in this matter that there was a legal interest of the City and JRA in the subject-matter of this application which could be prejudicially affected by the judgment of this Court. Furthermore, the JRA, as the municipal entity responsible for the construction, control and administration of roads within the jurisdiction of the Municipality, has confirmed in writing that it has no objection to access to the Redefine Property being taken directly from Kelvin Drive via a newly-constructed entrance. Yet another consideration is that, the Applicant gave written advice to the

---

[9] 1972 (4) SA 409 (C) at 415 E - H, Corbett J (as he then was).

City and the JRA of the present application. A copy of the papers served herein was made available to them and they were invited to participate as parties in these proceedings if they so wished. They declined and indicated that they would abide the decision of the Court.

[21] It must accordingly, follow that the submissions of the Respondents on this aspect are lacking in their merits and should be rejected.

**Dispute of facts**

[22] The submission here is that, from what was stated in the affidavit filed of record in the urgent spoliation application and in particular with regard to Redefine's contention that it had a valid and binding agreement in regard to its, Accenture's, its employees' and visitors' right to enter and exit and use the road between the two gates versus the bold an unsubstantiated denial with regard thereto, it was apparent to the Applicant, prior to its launching the present application, that there was a measure dispute of facts with respect thereto. This dispute, the submission went, could not be resolved by way of affidavits. Two main issues from which the dispute is said to arise are:

- The issue of whether Redefine entered into an agreement, prior to the Applicant becoming the owner of its properties, to the effect that it was entitled to use the two entrance gates and the road between them in respect of which it paid a levy; and
- The issue raised by the parties' respective experts regarding, in particular, whether the servitude registered in favour of the City is also for the benefit of the public including Redefine and Accenture.

[23] The Applicant began these proceedings by seeking what agreement, if any was in existence between the Respondents and the Applicant's predecessor in title. No such agreement was ever produced or alluded to by the Respondents. As a precautionary measure, the Applicant informed the Respondents that, if there was any agreement, it was cancelling it. Again, at that stage no terms of such agreement were communicated to the Applicant so that it would be informed, for instance, how

to go about cancelling the agreement, as it wanted to. Upon Court enquiring on the issue, Mr Basslian, appearing for the Respondents said that the agreement between the parties was verbal in nature.

[24] If the Respondents want to rely on the existence of an agreement in terms of which they might be entitled to continue to traverse the Applicant's Properties, they bear the onus of proving the existence thereof and the terms thereof.[10] They have however, contented themselves with the allegation that a dispute exists between them and the Applicant as to whether or not an agreement exists and contend that, that dispute should preclude the adjudication of the present application on the papers. A real, genuine and *bona fide* dispute of facts can exist only where the Court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the fact said to be disputed.[11] The Respondents do not even allege the terms and conditions of any agreement and make it clear that they are unaware of any agreement.

[25] I accordingly, find here, that no real dispute of facts which ought to preclude the adjudication of this application on the papers has been shown to exist.

**The Constitutional consideration**

[26] The Respondents have placed their reliance on this ground on the provisions of section 25 (1) of the Constitution of the Republic of South Africa Act108 of 1996, the Constitution. The relevant provision reads:

> 'No-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[27] As to deprivation it was held in *Mkontwana v Nelson Mandela Metropolitan Municipality*.[12] that:

---

[10] See Chetty v Naidoo 1974 (3) SA 13 at 20 A – E
[11] See Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA).
[12] 2005 (1) SA 530 (CC) at paragraph 32.

> 'Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than at the very least, substantial interference or limitation that goes beyond the normal restrictions on property, use or enjoyment found in an open and democratic society would amount to deprivation.'

[28] Whether there has been a deprivation as defined therefore depends on the extent and nature of interference with the owner's use enjoyment or exploitation of the property in question which is "significant enough to have a legally relevant impact on the rights of the affected party". The submission is that by seeking the order articulated in the notice of motion, the Respondents will not have access to its property, which access it enjoyed without disturbance for many years and that would be tantamount to the Respondents being deprived of their property, or at least, the use and enjoyment thereof. Such deprivation was said to be impermissible in terms of section 25 (1) of the Constitution. It remained common cause between the parties that a total denial of access of the Respondents to the two gates and the road in between them would make it impossible for them to access their property. To this extent the Applicant initially gave notice of when it planned to close each gate, to enable the Respondents to create their own access.

[29] The submission is that it is clear from the wording of Section 25(1) of the Constitution that no owner of property, be it public or private property, should be deprived thereof by anyone including individuals, entities, organs of State, the State, etc. other than in terms of a law of general application which does not permit arbitrary deprivation and that the question of arbitrariness does not enter the equation in the present matter as same does not involve a law of general application.

[30] In this matter it cannot be said that the relief presently sought by the Applicant can be regarded as *arbitrary* as contemplated in section 25 (1). For a deprivation to

be arbitrary, it must be procedurally unfair or must take place without sufficient reason.[13] The Applicant seeks to prevent the further use of its properties in the present proceedings. That cannot be described as procedurally unfair as it is premised on its undisputed ownership thereof and that cannot be described as without sufficient reason.

[31] Yet again, the submission of the Respondents on this constitutional issue is found not to be meritorious.

**The Registered servitude.**

[32] It is true that the City has a registered servitude over the entrances and road leading between the two gates. The issue that arises in respect thereof is whether the servitude extends to members of the public and in particular the owners and tenants of property within the office park. In this regard reliance is placed by the Respondents on the supporting affidavit of Mr P J Dacomb, a qualified and registered Professional Town Planner who is a Director of a private company. He was briefed by the Respondents to investigate and report on the history and status of servitudes encumbering various erven in the township where the properties of the Respondents and the Applicant are situated. In paragraph 25 of his affidavit he had the following to say:

> 'I further consider that, on its part, the municipality, being the holder of the servitudes as described herein, remain at liberty to make such servitude area available to members of the general public and owners of adjacent land portions (erven in the aforesaid townships) to gain access to their land or to link into municipal services systems (potable water, electricity, sewerage systems, etc.). I further consider that this is indeed the de facto purpose for which the servitude system traversing the affected townships has always been used. I therefore conclude that, with regard to Portion 1 of Erf 5, Woodlands Extension 4, such Erf may indeed take access from the servitude which is now registered over Portion 2 of Erf 8 of Woodlands Extension 4, for the reasons described herein.'

[13] Minister of Education and Another v Syfrets Trust Ltd NO and Another 2006 (4) SA 205 (C).

[33] In simple terms he is of the opinion that the registered servitude gives the general public, including the Respondents, a right of access to the two gates and the interlinking road. The City is the benefactor of the servitude. When it was furnished with papers for this application, it chose not to be joined. It saw the order sought in the notice of motion. It then decided to abide the decision of this Court. The conduct of the City suggests the contrary position about the servitude. If the general public has a right of access, the City would have seen it fit to intervene and protect the interest of the general public. If the City knew that the interlinking road is a public road, it would know about it as such road would be so registered and the City would be responsible for its repair work. It was Ms Heydenrych, a registered professional Town Planner who wrote to say the Respondents may have direct access via Kelvin Drive. Mr Dacomb called this speculative exercise. Ms Heydenrych has committed the City in writing about the right of access of the Respondents from Kelvin Drive. On this issue, therefore the probabilities favour the version of the Applicant.

**Counter application**
**The Appeal results**

[34] During the presentation of this matter, Mr Porteous for the Applicant informed Court that the application for leave to appeal was dismissed. Any prayers that were based on this have become academic.

**The interdict**

[35] In prayer 2 of the notice of motion the order sought is in the form of an interdict against the Respondents. The Applicant demonstrated that it is the registered owner of the property in issue. An injury actually committed to it is the deprivation of its right to do with the merx as it so desires. No other remedy was shown to be appropriate and available to the Applicant. The Applicant is accordingly entitled to the relief it seeks.

[36] The Respondents have prayed that in the event the Applicant is successful, Court should consider the prejudice they stand to suffer in the running of their

business and that the effectiveness of the Court order should be stayed for a period of some six months while they create their access. While the *rei vindicatio* provides an owner with an immediate remedy, the justice of this matter would be better served if the Respondents are afforded some time to create their own access.

**Order:**

1. The order is granted as prayed for in paragraphs 1 and 2 of the Notice of Motion, subject to 2 herein below.
2. The effectiveness of the order in paragraph 2 of the Notice of Motion is suspended for six months subject to the Respondents paying the applicable levy to the Applicant, to enable the Respondents to take all reasonable steps so as to create their access via Kelvin Drive.
3. The First Respondent is ordered to pay the costs of this application, including half of the costs of the counter application.

**H Cele**
**Acting Judge Gauteng**
**Division of the High Court**

**Appearances**

| | |
|---|---|
| For the Plaintiff | Adv.G F Porteous |
| Instructed by | Tonkin Clacey Inc. Attorneys |
| | |
| For the Defendant | Adv.M Basslian SC |
| Instructed by | Jan Bezuidenhout Attorneys |