IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2025-054421

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

[redacted]

23 May 2025

Date **K. La M Manamela**

In the matter between:

AFFIRM MANUFACTURING SERVICES (PTY) LTD Applicant

T/A ROTOTANK

and

DASEL PROPERTIES (PTY) LTD First respondent

MARTHA MARIA SPEED Second respondent

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 23 May 2025.

JUDGMENT

Khashane Manamela, AJ

Introduction

[1] Affirm Manufacturing Services (Pty) Ltd trading as Rototank ('Rototank'), the applicant, sought urgent relief by way of a *mandament van spolie* against Dasel Properties (Pty) Ltd ('Dasel'), the first respondent. Rototank seeks that Dasel be directed to urgently restore to Rototank possession of the advertising space, structures, advertisement signs and props ('advertising space') at Plot 148, R512, Pelindaba Road, Broederstroom ('Plot 148'). Rototank claims that it was unlawfully deprived of peaceful and undisturbed possession of the advertising space by Dasel. Rototank is a manufacturer of polyethylene tanks, such as water and septic tanks, and storage silos. Dasel is the registered owner of Plot 148.

[2] The application is opposed by Dasel, including on the ground that restoration of possession is impossible given the specific circumstances of this matter. Mrs Martha Maria Speed ('Mrs Speed'), the second respondent, is not taking part in these proceedings. Besides, no relief is sought against her. But her pre-litigation role in the dispute is relevant to some of the issues raised in this matter.

[3] This matter came before me in the urgent court on 29 April 2025. Mr CA Boonzaaier appeared for Rototank, whilst Mr FW Botes SC appeared for Dasel. I reserved this judgment after listening to oral submissions by counsel. Counsel had generally assured me that, in the few weeks of awaiting the delivery of the judgment their respective clients do not expect material or prejudicial change in circumstances. The peculiar nature and extent of the issues in the matter deserved a further reflection - after the hearing - before their determination.

Preliminary issues

General

[4] Although the only issue dealt with on a preliminary basis at the hearing of this matter is the urgency of the application, Rototank had raised on the papers two other issues for

preliminary determination by the Court, namely, (a) the late delivery of Dasel's answering affidavit, and (b) the alleged reliance on hearsay evidence on the part of Dasel in its answer. I will deal with urgency below, once enough light is shed by way of background facts to this matter. I first direct my attention to Rototank's other preliminary issues.

The late delivery of Dasel's answering affidavit

[5] This application was issued on 16 April 2025. According to the service affidavit filed by Rototank's attorney, the application was served by e-mail on Dasel's attorneys the same day and by the sheriff on Dasel, later on 22 April 2025.[1] Any respondent intending to oppose the matter was to notify the applicant of such intention by 17 April 2025 and to deliver an answer by 12h00 on 23 April 2025. The date of hearing was stated as 29 April 2025. Rototank complains that, despite these clear timeframes, Dasel only delivered its answering affidavit, a day late, in the afternoon of 24 April 2025, without proffering any explanation for the delay or seeking condonation therefor. The size of the founding affidavit and the length of time rationed to Dasel for its answer did not justify the delay. Consequently, Dasel's answer is not properly before this Court. I did not detect prejudice (nor was I made aware of any) on the part of Rototank and, thus, admitted the answering affidavit due to the brief nature of the material delay and in the interests of justice.[2]

Dasel's reliance on hearsay evidence

[6] Rototank is further unhappy with what it considers to be hearsay evidence in Dasel's answering affidavit. This, in the main, concerns what Mrs Speed allegedly told Mr Dennon Michael Speed ('Mr Speed'), the director of Dasel and the deponent to its answering affidavit, as well as what Mr Speed says he heard from a certain 'Adriaan', allegedly a representative of La Joya. La Joya is the current user of the disputed advertising space. Rototank objects against

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1 Applicant's service affidavit pars 3-4, CaseLines ('CL') 004-9.

2 DE van Loggerenberg, *Erasmus: Superior Court Practice* (Service 23, Jutastat e-publications December 2024) ('*Erasmus: Superior Court Practice*') RS 24, 2024, D1 Rule 6-26 and the authorities cited there.

this evidence as inadmissible hearsay in the absence of confirmatory affidavits from Mrs Speed and Adriaan. I do not think that a blanket ruling is warranted, given the nature or form of the objection and, thus, would pronounce on the admissibility of the relevant part of the evidence whenever it features, below.

Background

[7] A brief narration of the facts in the background to this matter is warranted to provide context. I will do so on the basis of the facts that are common cause between the parties or else the point of divergence would be highlighted.

[8] Rototank says it was in possession of the advertising space from October or November 2024 in terms of a lease agreement concluded with Mrs Speed, acting on behalf of Dasel. Dasel initially appeared to be denying that Mrs Speed had authority to lease out the advertising space, but that mellowed into specific constraints being attributed to her mandate, as to the terms relating to duration and cancellation of the lease. I will return to this below.

[9] Rototank, in terms of the lease, installed a concrete slab, refurbished the steel structures, and installed its signage and two large Rototank water tanks as display props in November 2024. It paid a deposit and rental amounts (including rent in advance) at R4 000 per month for the use of the advertising space.

[10] In February 2025, Mrs Speed advised Rototank that Plot 148 has been sold by the owners and in terms of sale agreement the advertising space was to be 'handed over to the new owners effective 01 April 2025'.[3] She also informed Rototank that the advertising space was no longer available for its use from that date and that all 'temporary structures, including tanks'

[3] Founding Affidavit ('FA') par 31, CL 003-19.

were to have been removed from Plot 148 by 31 March 2025, 'unless alternative arrangements are made with the new owners'.[4]

[11] Faced with this turn of events, Rototank, on 26 February 2025, sent a letter to Mrs Speed disputing the termination and, also, attached the letter at the advertising space at Plot 148, together with a notice asserting Rototank's right to possession on 08 April 2025.

[12] On 10 April 2025, Dasel – through its director and attorney, Mr HP Pennells - informed Rototank, that: (a) Dasel was the owner of the property (and, by extension, the advertising space); (b) Mrs Speed did not have any authority to act on Dasel's behalf; (c) Dasel did not 'give permission' to enter into a 3-year lease agreement, and (d) the lease agreement had been terminated. The following day, on 11 April 2025, Dasel's attorney informed Rototank that Dasel had removed Rototank's 'tanks and structures' and placed them in secure storage.[5]

[13] Rototank considered Dasel's conduct to constitute spoliation and Rototank (still on 11 April 2025) dispatched a letter to Dasel (again through the attorneys) demanding that possession of the advertising space be restored by 14 April 2025. Dasel, punctually, responded and asserted, among others, that: (a) Mrs Speed had no authority to conclude a lease agreement without a month's termination clause; (b) there was proper termination of the lease; (c) Rototank's material has been removed, and (d) that the advertising material on the board has been destroyed and cannot be replaced. Two days later, on 16 April 2025, this application ensued.

Rototank's case and submissions

[14] Rototank says it has been a manufacturer of polyethylene tanks and storage silos for over 30 years with 16 branches countrywide. It further says that it heavily relies on its

4 *Ibid.*
5 FA par 40, CL 003-22.

reputation in the market to generate sales and market its products through advertising campaigns, including advertising boards.[6] It has been in peaceful possession of the advertising space since October or November 2024. Its use or possession of the advertising space was previously admitted by Dasel, but Dasel has now made an about turn and denied Rototank's possession in papers before this Court, Rototank complains. This 'new version' by Dasel, it is submitted for Rototank, is 'far-fetched, untenable' and 'contrary to all reasonable probabilities', and is to be rejected by the Court.

[15] It is Rototank's case that it has been in possession of the advertising space from October or November 2024 in terms of a 3-year lease agreement concluded with Mrs Speed, the second respondent, representing Dasel. I have already referred in the background, above, to the correspondences exchanged between Rototank's attorneys and, at first, Mrs Speed and, subsequently, Dasel's attorneys regarding the disputed termination of the lease.[7] Rototank disputes Dasel's or Mrs Speed's right of termination or cancellation of the lease and considers this, as well as the removal of its material from the advertising space an unlawful spoliation. Rototank, further, asserts that it had no alternative under the circumstances but to urgently approach this Court to protect its possessory rights under the remedy *mandament van spolie*. According to Rototank's counsel, all that his client is required to establish - to regain restoration of possession - is the fact that there was prior peaceful possession, and that his client was deprived of that possession unlawfully against its will or without its consent or recourse to the law. There is no need to determine the rights of the parties to the thing possessed or the basis of the possession, counsel's submission concludes. I deal with the requirements for the remedy in more detail below.[8]

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6 FA par 23, CL 003-15.
7 Pars [10]-[13] above.
8 Pars [23]-[28] below.

[16] Mr Boonzaaier appearing for Rototank, also, submitted that the judgment of this Division in *Strawberry Worx Pop (Pty) Ltd v Cedar Park Properties* ('*Strawberry Worx*')[9] is on the proverbial 'all fours' with this matter. In *Strawberry Worx* the learned Van Oosten J, similarly to this matter, dealt with an urgent application for *mandament van spolie*. There the applicant complained about unlawful dispossession of advertising space on the rooftop of a building located in Rivonia, Johannesburg. The applicant was an advertising agency and the respondent the owner of the building. The applicant had concluded agreements with the respondent to erect advertising signs on the latter's buildings on behalf of third parties. The respondent replaced the signs with those of another party - without recourse to the court – after a dispute had arisen between the parties regarding the applicant's continued right to erect the signs. The court compared the agreement to a sub-lessee in terms of which the applicant was expressly and exclusively authorised to use the advertising space. It also held that the factors in the matter collectively amounted to possession of the advertising space entitling the applicant to peaceful possession thereof. Further, that the removal of the signs and erection of new signs without a court order constituted self-help on the part of the respondent and unlawful deprivation of possession. The court, consequently, ordered the respondent to restore possession of the advertising space and advertisement signs to the applicant.[10]

[17] Rototank avers that it is undisputed that it was entitled to use the advertising space to display advertising material, whilst maintaining or keeping the advertising board in good condition and effecting repairs to it when necessary. Further, Rototank says it was entitled to erect a concrete slab, cut down trees, and upon expiry of the lease to remove all advertising material and props and return the premises in good condition. All these, it is further submitted,

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9 *Strawberry Worx Pop Pty Ltd v Cedar Park Properties 39 (Pty) Ltd and Another* (18810/2016) [2016] ZAGPPHC 547 (17 June 2016); 2016 JDR 1310 (GJ) ('*Strawberry Worx*').

10 *Strawberry Worx* [10]. Subsequently, Cedar Park tried unsuccessfully to reverse the outcome or effect thereof in *Cedar Park Properties 39 (Pty) Ltd v Strawberry Worx Pop (Pty) Ltd* (21068/2016, 21594/2016, 23878/2016, 18810/2016) [2016] ZAGPJHC 207 (1 August 2016).

are the hallmarks of peaceful possession of the advertising space. These facts were confirmed by the email sent by Mrs Speed to Rototank on 18 February 2025 in which she specifically stated that 'the signboard currently in your [i.e. Rototank's] use must be handed over to the new owners'.[11] Therefore, it was never in dispute that Rototank had the use of the advertisement board, and use cannot exist without possession, the submission concludes.

[18] Rototank's case includes that it was deprived of peaceful possession by Dasel in an unlawful manner, contrary to Rototank's protests. Rototank considers the letter by Dasel's attorney on 11 April 2025 (confirming Dasel's instruction on the removal of Rototank's 'tanks and structures' and safekeeping same in storage) to have unequivocally admitted the unlawful deprivation of possession.[12] The deprivation was also confirmed in subsequent correspondences between the attorneys, it is further submitted.

[19] Rototank is also unhappy with what appears in Dasel's answering affidavit to be attempts by Dasel to alter or withdraw statements and admissions previously made by Dasel on 11 and 14 April 2025 in communications between the attorneys. The impugned material relates to: (a) La Joya being in the peaceful and undisturbed possession of the advertisement signs; (b) Dasel having surrendered possession of the Plot and the advertising space to Dasel's majority shareholder, only referred to as 'the Third Party', on 1 April 2025, and (c) La Joya's placement of its own advertisement on the billboard and removal of Rototank's material.[13] Rototank says that the material is clearly prejudicial. It has launched this application on the basis that Dasel had expressly admitted deprivation of Rototank's possession of the advertising space and, thus, the only issues anticipated to be in dispute were whether Rototank was in peaceful possession of the advertising space and whether restoration of possession was possible

11 FA par 31, CL 003-19.
12 FA par 40, CL 003-22.
13 Answering affidavit ('AA') pars 8, 18.14 and 18.16, CL 007-5, 007-12 and 007-13, respectively.

given the alleged destruction of Rototank's signage. The 'new facts' that an unnamed 'Third Party' or 'La Joya' is responsible for depriving Rototank of possession of the advertising space constitute impermissible hearsay and contradiction of Dasel's earlier factual statements and concessions. Other than lacking support from the evidence before the Court, the averments attributed to third parties are not backed by confirmatory affidavits from the third parties. Also, no explanation has been proffered by Dasel or its attorneys for the purported withdrawal of the factual statements and admissions made, it is further argued. Therefore, the Court ought to reject the 'new version' similarly to the hearsay evidence in Dasel's answer, referred to above. Overall, Rototank seeks the relief sought in the notice of motion, albeit with some adjustments, as will be further discussed, below.

Dasel's case and submissions

[20] Dasel's opposition to the application begins with a denial that this application or the relief sought is urgent. Dasel also complained that the urgency was manifested by the truncation of the time periods for exchange of papers in Rototank's notice of motion which substantially curtailed Dasel's timetable for consultations, gathering of information and filing of papers. I will return to the issue of urgency below. Dasel's further grounds of opposition of the relief sought by Rototank include that: (a) Rototank does not meet the requirements of a *mandament van spolie*; (b) the lease agreement was lawfully and legally terminated, and (c) restoration of the advertisement signs or space is factually impossible.

[21] Dasel, in recognition of the requirements for the remedy of *mandament van spolie*, avers that for Rototank to be granted the remedy it ought to meet the two requirements for the remedy, namely, that Rototank was in possession of the advertising space and was wrongfully deprived of such possession by Dasel. Dasel disputes that Rototank was in possession of the advertising space from 1 April 2025. According to Dasel, the following part the Rototank's own version demonstrates that Rototank was not forcibly or wrongfully dispossessed or lost

possession against its consent: (a) Mrs Speed obtained permission from Dasel to place a marketing or advertising board on Plot 148 in order to generate income; (b) permission was granted subject to conclusion of a written agreement and rental of the advertising space on a month-to-month basis or with cancelation allowed on a month's notice; (c) the lease agreement concluded by Rototank with Mrs Speed, as Dasel was advised by Mrs Speed, was for a period of one-year, subject to cancelation on a month's notice; (d) Rototank unilaterally changed the term or duration of the agreement from one year to three years; (e) the agreement was mutually terminated between Mrs Speed and Rototank on 6 February 2025; (f) Mrs Speed confirmed the termination in writing on 18 February 2025; (g) Dasel surrendered possession of Plot 148 and the advertising space to the 'third party', who purchased Dasel's majority shareholding ('the Third Party'), on 1 April 2025; (h) the Third Party was at liberty and entitled to utilise the advertising space as from 1 April 2025; (i) on 11 April 2025, La Joya's advertisement replaced Rototank's at the advertising space and the latter's material was subsequently destroyed and, thus, no longer exists; (j) Dasel had no involvement in the removal and replacement of the advertisement signs, and (k), therefore, Rototank was not deprived of possession against its will, without resort to legal process, or by trickery.[14] Further, the aforesaid is exacerbated by the fact that Dasel was not the cause of the alleged deprivation of possession, even if this Court were to find that Rototank was deprived of possession, the submissions conclude in this regard.

[22] Regarding Dasel's contention that the prevailing circumstances have rendered restoration of possession impossible, the following is notable: (a) it is impossible to undo the present signwriting and artwork, and to replace same with Rototank's signwriting; (b) Rototank's signwriting was removed and completely destroyed by virtue of the currently displayed signwriting and artwork of La Joya; (c) Dasel does not possess the template for

[14] Kleyn DG *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (LLD-thesis University of Pretoria 1986) at 385.

Rototank's artwork previously displayed at the advertising space; (d) Dasel would, if the relief is granted, find it impossible to comply with the orders to reverse the alleged spoliation, and (e) Dasel surrendered possession of Plot 148 and the advertising space to the majority shareholder Third Party effective 1 April 2025. Therefore, there is impossibility of the restoration, which is a question of fact, as observed in the legal authorities, the submission concludes.

Applicable legal principles

[23] It is common cause between the parties that this application is primarily for the granting of relief in the form of a spoliation order or *mandament van spolie*.[15] Also, it is trite that for an applicant, such as Rototank, to succeed in obtaining the remedy it ought to establish that: (a) it was wholly or partly deprived of its possession of a movable or immovable property, unlawfully, without agreement or recourse to law, or (b) it was so deprived of its *quasi*-possession of other incorporeal rights.[16] 'Spoliation' constitutes an 'illicit deprivation of another of the right of possession which [such person] has, whether in regard to movable or immovable property or even in regard to a legal right'.[17]

[24] Fairly recently, the Supreme Court of Appeal ('the SCA') had an opportunity to pronounce on the nature and extent of the spoliation remedy in *Eskom Holdings SOC Ltd v Masinda*[18] when it made the following observations:

> The mandament van spolie (spoliation) is a remedy of ancient origin, based upon 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.

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15 CG Van der Merwe Things in The Law of South Africa ('LAWSA') (Volume 27, Second Edition LexisNexis 2014) ("Van der Merwe, Things in *LAWSA* (Vol 27)") 94.

16 Van der Merwe, Things in *LAWSA* (Vol 27) 94. See also *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) at [6] and [7].

17 *Nino Bonino v De Lange* 1906 TS 120 at 122 where the observation is as follows: "… spoliation is any illicit depravation 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" [accessed through the link: https://lawblogsa.files.wordpress.com/2013/01/nino-bonino-v-de-lange.doc]. See also *Van Eck & Van Rensburg v Etna Stores* 1947 2 SA 984 (A)1000, 1947 3 All SA 143 (A) 152. See further Van der Merwe, Things in *LAWSA* (Vol 27) 94.

18 *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA).

> 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. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief.[19] [footnotes omitted]

[25] The meaning or principle of the remedy of *mandament van spolie* is that 'the person who has been deprived of his or her possession must first be restored to his or her former position before the merits of the case can be considered'.[20] The remedy seeks to preserve public order by restraining the taking of the law into individual's hands by inducing them to rather consider submitting to the rule of law and jurisdiction of the courts.[21] It offers temporary relief as the disaffected respondent may, afterwards, seek restoration of possession through lawful means, such as a *rei vindicatio*.[22] Resorting to self-help in order to regain lost possession of a thing one is entitled to is discouraged in order to maintain peace and legal order in the community.[23]

[26] The remedy protects the physical manifestation of a right and not the right, itself.[24] When the court grants a spoliation order it seeks to redress breach of peace signified by the unlawful interference with the factual control or the physical manifestation of a right.[25] This means that the correct approach when determining a claim based on the remedy is to steer away from enquiring about the impugned right of use or access affected by the

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19 *Eskom v Masinda* 2019 (5) SA 386 (SCA) [8].

20 Based on the meaning in Van der Merwe, Things in *LAWSA* (Vol 27) 93, 111 attributed to the Latin maxim: '*spoliatus ante omnia restituendus est*'.

21 Van der Merwe, Things in *LAWSA* (Vol 27) 93.

22 Van der Merwe, Things in *LAWSA* (Vol 27) 111. *Rei vindicatio* refers to a remedy which entitles an owner "to reclaim possession of her or his property". See LTC Harms, *Amler's Precedents of Pleadings* (10th ed LexisNexis 2024) 383.

23 Van der Merwe, Things in *LAWSA* (Vol 27) 93. See also *Ngqukumba v Minister of Safety and Security and others* 2014 (5) SA 112 (CC) [10]-[12].

24 Van der Merwe, Things in *LAWSA* (Vol 27) 103.

25 Van der Merwe, Things in *LAWSA* (Vol 27) 103.

alleged breach which amounts to an investigation of the merits of the matter, itself an antithesis of the spoliation law.[26]

[27] What appears above shows that when seeking a *mandament van spolie* an applicant ought to establish that:[27] (a) the applicant had peaceful and undisturbed possession of the material thing,[28] and the applicant was unlawfully deprived of such possession.[29] Both parties in this matter appear to share a common view on this. Counsel also referred the Court to the decision in *Blendrite (Pty) Ltd and Another v Moonisami and Another*[30] where the SCA emphasised the characteristics of *mandament van spolie* as a robust, speedy possessory remedy,[31] when dealing with spoliation to do with access to server and use of email address.

[28] Possible valid defences against spoliation claim include the following, that: (a) an applicant was not in peaceful and undisturbed possession of the impugned thing when dispossessed; (b) dispossession was not unlawful, hence no spoliation; (c) a respondent regained possession within the confines of counter-spoliation; (d) dispossession was with the applicant's consent, and (e) it is impossible to restore possession.[32] Dasel's main ground of defence is pivoted on the latter: restoration of possession is impossible. The permissible defences against a claim of spoliation are constrained due to the absolute nature of the rule *spoliatus ante omnia restituendus est*.[33]

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26 Van der Merwe, Things in *LAWSA* (Vol 27) 103. See also *Eskom v Masinda* 2019 (5) SA 386 (SCA) [8], quoted in par [24] above.

27 Van der Merwe, Things in *LAWSA* (Vol 27) 108. See also *Chopper Worx (Pty) Ltd v WRC Consultation Services (Pty) Ltd* 2008 (6) SA 497 (C) [16]-[21].

28 When establishing that he or she was in peaceful and undisturbed possession of the thing, the applicant ought to show that she or he had factual control of the thing, which control was accompanied by an intention to derive some benefit from the material thing. See Van der Merwe, Things in *LAWSA* (Vol 27) 108

29 An act of spoliation ought to be established on the part of the respondents, being an illicit deprivation of the applicant's possession of the impugned thing or disturbance of such possession without the consent and against the will of the possessed applicant. See Van der Merwe, Things in *LAWSA* (Vol 27) 108; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) [27].

30 *Blendrite v Moonisami* 2021 (5) SA 61 (SCA).

31 *Blendrite v Moonisami* 2021 (5) SA 61 (SCA) [6].

32 Van der Merwe, Things in *LAWSA* (Vol 27) 109.

33 Van der Merwe, Things in *LAWSA* (Vol 27) 111. See footnote 20 above on the meaning of the Latin maxim.

Issues for determination

[29] As this is a spoliation application the requirements for the remedy *mandament van spolie* are the primary issues to be determined in this matter. The application, as stated above, is opposed mainly on the ground that restoration of possession is impossible. These main or primary issues are potentially dispositive of this matter, but they are not the only issues requiring determination. The following appear to be other issues ancillary to the main or primary issues above: (a) urgency; (b) duration and termination of the lease agreement; (c) alteration or withdrawal of previous statements and admissions; (d) Dasel's surrender of possession of Plot 148 and the advertising space to the majority shareholding Third Party; (e) utilisation of the advertising space by La Joya, and (f) Dasel's (non)involvement in the removal and replacement of Rototank's advertisement signs.

[30] I have identified the primary and ancillary issues above to simply facilitate the discussion. The issues are interlinked and, therefore, not warranting a straitjacket approach. Therefore, in some instances, the issues will be discussed jointly due to interlinkages. And the discussion will not take the order or sequence of the issues adopted above.

Urgency

[31] I extemporaneously at the hearing ruled that the matter is urgent. The oral and written submissions by counsel preceding this ruling included what appears next.

[32] Mr Boonzaaier for Rototank submitted that his client acted promptly as from 11 April 2025 when it became aware of the alleged dispossession. It demanded restoration of possession by 14 April 2025, to no avail, and this urgent application was launched on 16 April 2025. Counsel referred to the principles relating to urgency succinctly stated in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* ('*East Rock Trading*')[34] in

[34] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) [6], [7], [9].

which this Division *per* Notshe AJ was emphatic about the need to establish that the applicant would not obtain substantial redress in the normal course. Further, counsel emphasised the design of the remedy to attain speedy relief,[35] whilst steering away from the notion of 'inherent urgency' as admonished – with respect - by Wilson J of this Division in *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* ('*Volvo Financial*').[36] Counsel submitted that Rototank will not be afforded substantial redress at a hearing in due course, as the removal of the advertising board would result in loss of sales in millions over the next six to nine months whilst waiting for a hearing in the ordinary course. This would be a reversal of Rototank's substantially increased sales in Gauteng over the five months from November 2024 to April 2025 linked to the advertising board at Plot 148. A damages claim would fall short in restoring loss of custom and goodwill caused by the unlawful dispossession, it was further argued. Also, there is a possibility of the sale or transfer of Plot 148 which may render restoration of possession impossible. Therefore, the Court ought to restore the status *quo ante* without delay in order to offer effective or substantial redress.[37]

[33] Mr Botes SC for Dasel submitted that Rototank has not explicitly stated why it will not obtain substantial redress in due course as observed in *East Rock Trading*.[38] This is in addition to the necessity to have abridged time periods for delivery of court papers.[39] Besides, if there is urgency in this matter it would only have been self-created by Rototank's own conduct. Counsel, further, cited the durable principles on urgency from *Luna Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers)*.[40] Regarding

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35 *Blendrite v Moonisami* 2021 (5) SA 61 (SCA) [6].

36 *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* (2023/067290) [2023] ZAGPJHC 846 (1 August 2023) [6].

37 *Nino Bonino v De Lange* 1906 TS 120 at 122; *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) at 117.

38 Par [32] above. See also Rule 6(12)(b) of the Uniform Rules of the High Court.

39 Rule 6(12)(a) of the Uniform Rules.

40 *Luna Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) 137-138.

Rototank's argument that it would suffer financial harm or reduction in sales due to the absence of the advertising space, counsel referred to the *dicta* in *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* ('*Aroma Inn*').[41] In *Aroma Inn*, Fagan J dismissed apprehension by litigants of commercial or financial consequences which may ensue from a delay in the hearing of a matter and rather preferred personal safety or liberty concerns or the likelihood of physical or psychological harm to warrant preferential treatment for urgent hearing of matters.[42] Rototank has not demonstrated on the facts of this matter that immediate assistance is warranted from the Court. Further, Mr Botes SC criticised what he considered Rototank's apparent reliance on the so-called 'inherent urgency' of spoliation proceedings in the face of the observation in *Volvo Financial Services Southern Africa*, referred to above.[43]

[34] I searched in vain for anything to contradict the fact that Rototank would suffer financial or commercial harm due to the alleged dispossession of the advertising space if the matter is not given urgent attention. Protection of commercial interests through urgent relief - depending on the circumstances of matter - is recognised by the courts,[44] despite the previous sentiments by Fagan J expressed in *Aroma Inn*, referred to above.[45] I was satisfied that based on the facts set out above, this matter is urgent, hence the order to that effect made at the hearing.

Alteration or withdrawal of previous statements and admissions

[35] Rototank, as indicated above, seeks that this Court finds some statements made in Dasel's answering affidavit to constitute impermissible withdrawal of previous statements and

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41 *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd And Another; Aroma Inn (Pty) Ltd v Hypermarkerts (Pty) Ltd and Another* 1981 (4) SA 108 (C).

42 *Aroma Inn* at 113-114.

43 *Volvo Financial* [6], referred to in par [32] above.

44 *Ziegler South Africa (Pty) Ltd v South African Express Soc Ltd and Others* 2020 (4) SA 626 (GJ) [17], relying on *Aroma Inn*; *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586F-G.

45 Par [33] above.

admissions made.[46] This argument is somewhat linked to the one urging the Court to extricate inadmissible hearsay evidence alleged to be contained in the answering affidavit.[47] I don't think this argument was developed by counsel for Rototank to be capable of determination. I agree that Mr Pennells or his client did not explain what I can only describe as the change of tack in Dasel's defence of this matter. Although, the Court expects of litigants not to take their opponents by surprise, on the facts of this matter I don't think that much could be made about the so-called factual admissions previously made by Dasel. Perhaps, the issue may be relevant to the issue of costs.

Lease agreement and its duration

[36] Part of Dasel's grounds for opposing the spoliation claim is that there was no unlawful dispossession as the lease was lawfully cancelled or terminated on its terms. Normally, this should be a straightforward issue, but in this matter it is not. The parties are at cross purposes as to the agreement for the lease of the impugned advertising space.

[37] According to Rototank the advertising space was leased from October or November 2024 for a period of three years in terms of an agreement concluded with Mrs Speed. But the copy of the agreement attached to the papers is unsigned. Rototank says it tried in vain to get the agreement signed in its interactions with Mrs Speed.

[38] Dasel's case on the agreement is quite unclear. Dasel in its attorney's letter, first denied the authority of Mrs Speed to act on behalf of Dasel. But before this Court Dasel appears to admit that Mrs Speed was its appointed agent or someone it dealt with in respect of the leasing of the advertising space. It is Dasel's case that Mrs Speed was not given permission to enter into a three-year lease agreement, but a lease for only a year. Dasel attached in this regard an agreement it concluded with Mrs Speed purportedly as her authority or licence to rent out the

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46 AA pars 8, 18.14 and 18.16, CL 007-5, 007-12 and 007-13, respectively.
47 Par [6] above.

advertising space. Dasel accuses Rototank of having unilaterally changed the lease period from one to three years. Also, Dasel says that it was assured by Mrs Speed that the lease has been cancelled by giving one month's notice. This is the source of Dasel's argument that the lease agreement was lawfully terminated.

[39] I don't think that the term or duration of the lease makes any difference in this matter. For, whether the lease was meant to run for one or three years only means that the lease would be extant until at least around October/November 2025. Therefore, the only material issue is not the duration clause but the cancellation clause of the lease, if any. I deal with the issue of cancellation of the lease when discussing whether Rototank was lawfully deprived of possession of the advertising space, below.[48]

Spoliation application and the requirements

[40] I have referred to the basic principles or requirements for the remedy of *mandament van spolie* above, namely, unlawful deprivation of possession of property or the unlawful deprivation of *quasi*-possession of other incorporeal rights.[49] It is common cause that Rototank ought to establish, that (a) it had peaceful and undisturbed possession of the advertising space, and (b) it was unlawfully deprived of such possession.[50]

Was Rototank in peaceful and undisturbed possession of the advertising space?

[41] Rototank says it was in peaceful and undisturbed possession of the advertising space in terms of the lease agreement since October or November 2024. The existence of the lease agreement has been confirmed above, otherwise Rototank would have been an unlawful occupier of the advertising space, which is not part of Dasel's case. But Dasel denies that

48 Pars [43]-[46] below.
49 Pars [23]-[28] above.
50 Pars [23], [27] above.

Rototank was in peaceful and undisturbed possession. It seems Dasel's view is that La Joya is the one in peaceful and undisturbed possession.

[42] It is common cause that Rototank was entitled to occupy the advertising space and did occupy the advertising space through its signage and other material placed or erected at the advertising space between November 2024 and March 2025. Rototank was made aware on 11 April 2025 that its advertising material has been removed from Plot 148 or the advertising space to give way for new signage of or occupation by La Joya. Therefore, Rototank would have clearly been in peaceful and undisturbed possession of the advertising space until the removal of its material which it now complains of. I don't think this requires further discussions.

Was Rototank unlawfully deprived of possession?

[43] Having ruled that Rototank was in possession of the advertising space, my attention turns to whether Rototank was unlawfully deprived of possession. The point of departure is that Rototank occupied the advertising space in terms of a lease agreement. Therefore, the termination or cancellation of Rototank's occupation would ordinarily be on the basis of the terms of the lease agreement. The material terms would be those dealing with the duration and cancellation or termination of the agreement. This is common cause between the parties.

[44] But, the parties appear more fixated on the duration of the agreement. As stated above, there is a dispute regarding whether the lease agreement was for one or three years. Rototank says it was for three years. It attached an unsigned draft lease agreement (i.e. annexure 'FA10a' to the founding affidavit) and averred that the draft carries the agreement reached with Mrs Speed, only that she did not revert regarding the signing thereof. Dasel only concedes a lease agreement of one year.[51] So far, as I indicated above, there is no complication. Both parties

[51] AA par 18.7, CL 007-10.

agree that any lease between the parties would have not yet expired or lapsed due to effluxion of time.

[45] The other material term of the agreement will be its cancellation clause, if any. It is Dasel's case that Mrs Speed has been authorised to conclude a lease agreement with a one month's cancellation clause. But Dasel has not furnished a copy or draft of any lease agreement, but pivots its case on the allegation that Rototank unilaterally changed the duration clause of the lease agreement. This gives the impression that the only thing changed in the draft is the duration of the agreement and nothing else. Should this be the case then there will be a problem with cancellation or termination as the draft agreement does not appear to contain a cancellation or termination clause, let alone one for one month's notice.

[46] Dasel is the party alleging – as part of its defence - that the lease agreement is capable of cancellation and was indeed cancelled at a month's notice by Mrs Speed. Dasel, therefore, ought to establish this aspect of its defence, which is disputed by Rototank. Dasel relies on its private arrangement with Mrs Speed as to the extent or constraints of her authority. Mr Speed as the deponent to Dasel's answering affidavit refers to what was relayed to him by Mrs Speed. The latter did not depose to a confirmatory affidavit to confirm the averments and Dasel did not proffer any explanation in this regard. Whilst Mr Speed alleged some acrimony between Mrs Speed and Dasel, there appears to be none between him and Mrs Speed as they were able to communicate to the extent they did. A confirmatory affidavit by Mrs Speed, as the person with knowledge of the material facts ought to have been included as Mr Speed, the deponent to the answering affidavit, clearly has no first-hand knowledge of these facts.[52]

[52] Cilliers, AC, Loots, C and Nel, HC. *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th edition, Jutastat (November 2021) at at 5th Ed, 2009 ch14-pp444-445; *Erasmus: Superior Court Practice*' at RS 25, 2024, D1 Rule 6-16 to 6-18.

[47] There is clearly no evidence of an agreement between the parties that the lease agreement is capable of cancellation by giving a month's notice. Without evidence of such clause Dasel or Mrs Speed would not have been contractually or lawfully entitled to cancel the agreement, save through consensus with Rototank. It appears that Mrs Speed tried her earnest to agree to cancellation of the agreement with Mr André Maré, the regional sales manager of Rototank, but nothing came of her efforts. Against this outcome and absence of an authorising court order compelling Rototank to give up possession of the advertising space, the evidence shows that Dasel elected to resort to self-help.[53] Therefore, the available evidence confirms that Rototank was unlawfully deprived of possession of the advertising space.

Restoration of possession is impossible

[48] The corollary of a finding of unlawful deprivation of possession of a litigant is the restoration of undisturbed possession to such litigant. But in this matter Dasel's case includes that restoration of possession or occupation of the advertising space is impossible. This is one of the recognised defences against a spoliation claim.[54] It is not less significant that the defence is labelled from Dasel's point of view a torpedo which disposes of the application in its entirety. Dasel's case in advancement of its defence of impossibility of restoration is premised along the following lines:

> [48.1] After Dasel surrendered possession of Plot 148 and the advertising space to its new majority shareholding Third Party on 1 April 2025, the latter allowed La Joya to substitute its own advertisement for that of Rototank at the advertising space. Around the same time Rototank's material was destroyed and, therefore, it is no longer in

53 *Strawberry Worx* [8], partly relying on *Nino Bonino v De Lange* 1906 TS 120 at 122.

54 Par [28] above. See also *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 720G–H; *Chopper Worx (Pty) Ltd v WRC Consultation Services (Pty) Ltd* 2008 (6) SA 497 (C) at504H–505B; *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 (3) SA 218 (C) at 226–7; *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W) at 532J–535A; *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) at 521D–E.

existence. This includes Rototank's advertisement which was removed from the advertisement board and replaced, apparently without the involvement of Dasel.

[48.2] Restoration is also claimed to be impossible as any attempt to replace Rototank's signage will destroy the La Joya's new signage. Reliance was placed on some cases to support the contentions.

[48.3] First, reliance on the case of *Potgieter en 'n ander v Davel*[55] where some housing structures erected by the applicant to house his employees on land belonging to the respondent were destroyed, but the court ruled it as not an act of spoliation due to possession not having passed to the spoliator.[56] Counsel appears to submit that disposal of the matter was also possible on the basis that restoration of the property in question to the applicant was impossible. But this authority is unhelpful to Dasel's case and counsel appears to have been aware of this and the criticism levelled against it in *Administrator, Cape, and another v Ntshwaqela and others*.[57] Counsel also highlighted what he calls strong criticism against the order in *Fredericks and another v Stellenbosch Divisional Council*[58] that the respondent restores possession of the property through the use of other or new similar size and quality iron sheets after corrugated iron shelters of the applicants were demolished through a bulldozer.[59] It is submitted that the case was otherwise a good example of impossibility of restoration of possession of the property and the very essence of the *mandament van spolie*.

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55 *Potgieter en 'n ander v Davel* 1966 (3) SA 555 (O).
56 *Potgieter v Davel* 1966 (3) SA 555 (O). See also Kleyn Mandament 379–80.
57 *Administrator, Cape, and another v Ntshwaqela and others* 1990 (1) SA 705 (A) at 719.
58 *Fredericks and another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C)
59 *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C). See also *Vena v George Municipality* 1987 (4) SA 29 (C); *Ierse Trog CC v Sulra Trading CC* 1997 (4) SA 131 (C) 128 At 117.

[48.4] In *Rikhotso v Northcliff Ceramics (Pty) Ltd and others* ('*Rikhotso*')[60] it was held that a spoliation order cannot be granted if the property at issue has ceased to exist.[61] *Rikhotso* was cited with approval in varying degrees by the Constitutional Court in *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another*,[62] which concerned, among others, the order for reoccupation of homes by residents after their removal. *Rikhotso* also received positive mentions by the SCA in *Ngomane and others v Johannesburg (City) and another*,[63] which concerned the unlawful removal of homeless people's property from public space and destroying same, and *Monteiro and another v Diedricks*[64] dealing with restoration of possession of a motor vehicle.

[49] Rototank is dismissive of Dasel's contentions that Rototank's signage has been destroyed. It points out that its claim is not simply for restoration of possession of its signage on the billboard, but restoration of its possession of the advertising space (i.e. advertising space, structures, advertisement signs and props) as a whole. The alleged destruction of signage, therefore, is irrelevant as Rototank will replace the signage. Regarding Dasel's assertion that restoration is impossible because when replacing Rototank's signage the newly installed La Joya's signage would be destroyed, it is submitted on behalf of Rototank that a similar argument was unsuccessful in *Strawberry Worx*, referred to above. In the latter case possession of the advertising space was restored despite the respondent having given permission for a third party to erect new signage in the place of the applicant's.[65]

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60 *Rikhotso v Northcliff Ceramics (Pty) Ltd and others* 1997 (1) SA 526 (W).
61 *Rikhotso v Northcliff Ceramics* 1997 (1) SA 526 (W) at 535A–B; and see *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at 331B-333B.
62 *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC).
63 *Ngomane and others v Johannesburg (City) and another* 2020 (1) SA 52 (SCA) [18].
64 *Monteiro and another v Diedricks* 2021 (3) SA 482 (SCA).
65 *Strawberry Worx* [3], [8].

[50] I agree with submissions by counsel for Rototank that the facts of this matter are similar to those in *Strawberry Worx*. But a significant point of contrast is the fact that in the matter currently before the Court the advertising material or signage has apparently been destroyed. This does not appear to have been the case in *Strawberry Worx* where it seems that the sign had only been removed.[66] Even further, it is contended in this matter by Dasel that the very act of restoring Rototank's signage would destroy the new signage belonging to La Joya, a third party.

[51] But, in my view, all these considerations or contentions appear – with respect - to miss the nature of possession at stake in this matter. What Rototank seeks is restoration of possession of the advertising space and advertising material. This is similar to the relief sought and granted in *Strawberry Worx*.[67] I do not view the fact that Rototank's signage may have been destroyed as affecting the granting of relief. The signage is ancillary to the occupation or possession. This much has since dawned on Rototank. Faced with the stark reality that the advertising material may have been destroyed, Mr Boonzaaier for Rototank urged the Court to grant restoration of the advertising space without the signage or the other material. This will be considered should his client succeed. On the other hand, I do not consider issues relating to what would happen to La Joya's new signage at the advertising space to be properly arising for determination in this application. Such determination involves an enquiry into other issues, not necessarily relevant to this matter, and rights including those of La Joya. La Joya is not taking part in these proceedings. The inquiry of that nature would be inimical to the very essence of the remedy, as discussed above.[68] Therefore, for all these reasons I consider that restoration of possession of the advertising space is not impossible.

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66 *Ibid*.
67 *Strawberry Worx* [4], [6], [7], [10].
68 Par [26] above.

Dasel's (non)involvement in the removal and replacement of Rototank's advertisement signs

[52] Counsel for Dasel submits that the fact that Dasel, as the alleged spoliator, has parted with possession of the property to a third party exacerbates the situation and is pertinent to restoration of possession. Further, that it renders restoration impossible and closes the door for the remedy of *mandament van spolie*. Also, that the good or bad faith of Dasel is irrelevant when possession has passed to a third party.[69]

[53] I think the so-called third party or parties in this matter need(s) to be closely examined. On Dasel's own version Plot 148 is still registered in the name of (and, therefore, owned by) Dasel.[70] There is reference to the undisclosed third party said to have purchased a majority shareholding in Dasel (i.e. the 'Third Party). In Dasel's view, this renders the Third Party to have some rights beyond and independent of those of Davel in respect of the assets and interests of Davel. Perhaps this may be so *inter partes* (i.e. between Dasel and the Third Party), but not beyond. For a contrary disposition would be inimical to the durable principle of our company law of the sanctity of the separate juristic personality of companies, as recognised over a century ago in *Dadoo Ltd and Others v Krugersdorp Municipal Council* ('*Dadoo*')[71] *per* Innes CJ that '[a] registered company is a legal *persona* distinct from the members who compose it'.[72] A long line of cases has recognised the cardinal principle applied in *Dadoo*, with obvious traces of the English law heritage, including in this Division in *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis and Others*[73] *per* Molopa-Sethosa J, confirmed on appeal

69 *Painter v Strauss* 1951 (3) SA 307 (O) at 318; *Malan v Dippenaar* 1969 (2) SA 59 (O) at 65-6; *Van Biljon v Kriel* 1939 (2) PH M82 (W).
70 AA par 15, CL 007-7.
71 *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530.
72 *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 at 550-551.
73 *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis and Others* 2019 (4) SA 569 (GP) [50].

to the SCA in *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others*[74] *per* Navsa and Schippers JJA.

[54] The Third Party, therefore, as a shareholder or even a majority shareholder is not the owner of any of the assets of the company. The Third Party's rights are limited to incidents of shareholding, ordinarily in the form of the right to attend, participate and vote at shareholders' meetings. The passing of any rights to or possession of the advertising space by Dasel to the Third Party in the latter's capacity as a shareholder is legally incompetent. The corollary of this is that any other person who received occupation of the advertising space from the Third Party, in substance received such occupation or possession from Dasel. Therefore, all these purported acts are legally incompetent and do not – without more - render restoration of the occupation or possession to Rototank impossible.

Conclusion and costs

[55] Rototank is successful and its application for a *mandament van spolie* will be granted. The order of restoration of possession will exclude Rototank's advertisement signs and props in terms of the tweaked relief moved by counsel during the hearing of the matter. I do not see any prejudice to Dasel in this regard. I will also change the period of compliance with the order on the part of Dasel from 24 hours to five days, which I deem reasonable under the circumstances.

[56] The above outcome will be followed by a costs order in favour of Rototank. But the latter has sought a punitive costs order, on the scale applicable between attorney and client, against Dasel. The Court is urged to show its displeasure at Dasel's conduct for impermissibly taking the law into its own hands - which conduct was severely prejudicial to Rototank - and

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74 *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) [17], [24] partly relying on *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA). See further Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, October 2024) 84 for a detailed discussion on the principle of separate legal personality of companies.

that Dasel's attempt to withdraw previous admissions of fact without any explanation is unreasonable.

[57] I agree that Dasel was not a model litigant in this matter, but its conduct does not call for more than a normal party and party scale costs order. The background facts to the matter do not trigger the highest sanction from the Court in this regard, even if Dasel's case has considerable blemishes. But I will also add that counsel's costs be at scale C. I consider this scale appropriate on the facts of this matter.

Order

[58] In the result, I make an order in the following terms:

a) condonation is granted to the applicant for non-compliance with the forms and service and time periods provided for in the Uniform Rules of Court, same is dispensed with, and this application is heard and finalised as an urgent application as contemplated in Uniform Rule 6(12)(a);

b) the first respondent is ordered to forthwith and within five (5) days of this Court's order restore the applicant's possession of the advertising space and the structures at Plot 148, R512, Pelindaba Road, Broederstroom;

c) The first respondent is ordered to pay the costs of this application on a party and party scale, including costs of counsel where employed on scale C.

[redacted]

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing	**:**	**29 April 2025**
Date of Judgment	**:**	**23 May 2025**

Appearances	:	
For the Applicant	:	Mr CA Boonzaaier
Instructed by	:	Du Plessis Mostert Inc, Malmesbury C/O Rina Rheeders Inc, Pretoria
For First Respondent	:	Mr FW Botes SC
Instructed by	:	Pennells Attorneys, Pretoria
For Second Respondent	:	No appearance