WITH COMPLIMENTS

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Landlord vs Tenant: When Can You Cut Electricity or Change the Locks?

"Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their

– You Can Use Telkom Ducting After All

How Courts Sort Fact from Fiction - A Tale of Jags, Deception and Damages

Your Websites of the Month: Tips to Manage Debt and Master Your Money

own hands ... The cause for possession is irrelevant - that is why a thief is protected ... The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute" (extracts from a 2012 Supreme Court of Appeal decision)

As a landlord in dispute with your tenant you may well be tempted to avoid the delay and cost of litigation by taking your own eviction or enforcement action.

Bad idea. No matter how good your overall case may be (or how good you may think it is), taking the law into your own hands automatically puts you in the wrong.

Let's look at how that works, firstly the theory of it and then with reference to a practical example recently decided by the High Court.

The tenant's right to immediate return of possession

Our law requires that you approach a court for assistance; self-help is not an option. So if you remove the tenant's access to the leased premises without a court order, you face having to immediately restore possession to the tenant via a "spoliation order".

The important thing is that at this stage the court has no interest in how strong or weak your actual case against the tenant is. That you can fight about in a full court action down the line. All that counts now is **how** you dispossessed the tenant, **not** whether you are the owner nor whether you have any legal right to possession.

So to succeed in obtaining a spoliation order, all the tenant has to prove is –

1. That he/she was in "peaceful and undisturbed possession", and

2. That he/she was "unlawfully deprived of that possession." The critical question here is whether or not the tenant consented – freely and genuinely - to the dispossession. If so, the dispossession was lawful. If not, it was unlawful. Thus spoliation "may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft" – or just without consent.

Let's move on to the practical example of the shopping centre tenant …

The internet café and the self-help landlord

- An internet café business owner was locked in dispute with her landlord over its method of electricity billing.

- The landlord's response was firstly to cut electricity to the premises, then to change the locks.

- After trying without success to resolve the dispute, the tenant applied for a spoliation order.

- The landlord did not dispute that the applicant was in possession of the premises, nor that he had dispossessed her with neither consent nor court order.

- What the landlord did argue was that the tenant's application was not urgent, that it should have been brought in the magistrate's court and not in the High Court, and that it was really not about spoliation but about the tenant trying to enforce her rights in terms of the lease.

- Rejecting all these contentions, the Court held that the landlord had committed two separate acts of spoliation –

    - The first when it disconnected the electricity supply thus denying the tenant use of the premises – "a limitation of her rights as a possessor" and

    - The second when it changed the locks to the premises, thus

dispossessing her entirely.

- The end result – the landlord must pay all costs, immediately restore possession of the leased premises to the tenant, and immediately re-connect the electricity.

Landlords – the self-help option automatically puts you in the wrong. Rather go the legal route!

Dementia and Incapacity: What is a Power of Attorney and is it Forever?

"The number of cases of dementia is estimated to almost triple by 2050" (World Health Organisation)

Although the actual prevalence per capita of dementia is reportedly on the decline, aging populations ensure that it is becoming more and more of a problem in society - for older people, their families and caregivers.

If someone close to you (normally an aging parent or relative) needs - or may in the future need - assistance with their financial affairs, your first thought will probably be a power of attorney by which the "principal" appoints an "agent" to act for him/her, either for a particular purpose (a 'special power of attorney') or generally (a 'general power of attorney'). You may well have the same thought if you yourself are approaching old age and starting to plan for your future needs.

A power of attorney is certainly a quick, cheap and easy solution but be careful – it's only a temporary one. It is not "forever"!

The downside - automatic termination (just when help is most needed)

Of course a principal can cancel his/her own power of attorney at any time, but what is not so well known is that it terminates **automatically** if and when the principal –

1. Dies (an executor is then appointed); or
2. Becomes insolvent and his/her estate is sequestrated (a trustee is then appointed); or
3. Becomes mentally incapacitated in the sense of being no longer able to make his/her own decisions for whatever reason – perhaps a stroke, coma following an accident, mental illness, dementia, Alzheimer's, general age-related diminishing capacity etc.

It's this last scenario that catches most people unawares, because it seems so illogical for the power of attorney to lapse just when it's needed most.

But that, unfortunately, is the law. An agent can only do what the principal can do, so if a principal loses legal capacity, the power of attorney immediately fails. Or as a Department of Justice document neatly puts it: "In South Africa the power of attorney remains valid only for as long as the principal is still capable of appreciating the concept and consequences of granting another person his or her power of attorney".

In practice there are probably many cases of powers of attorney continuing to be used to everyone's benefit long after the principal has lost formal capacity, but an agent in

that situation acts without authority and risks personal liability for doing so if the validity of anything done under the failed power of attorney is challenged.

So what are the alternatives?

- The High Court can appoint a "*curator*" when a person becomes unable to manage his/her own affairs. A *curator bonis* handles all the person's financial affairs, a *curator ad personam* his/her personal affairs (such as giving consent for medical treatment, where to live etc). Unfortunately curatorships are costly, prone to bureaucratic red tape and delay, paternalistic and, being public, demeaning to the principal.

- A simpler and cheaper alternative is the appointment by a Master of the High Court of an "administrator" in terms of the Mental Health Care Act. An administrator only has power to deal with the person's property (not personal affairs), and this alternative is only available in cases of actual "mental illness" or severe/profound intellectual disability, and only for smaller estates (assets up to R 200,000 and annual income up to R 24,000).

- A trust to address the purely financial aspects might also be worth considering whilst the person in question still has legal capacity. Take advice however on the costs, tax and other implications.

What about an "enduring" or "conditional" power of attorney?

In 2004 the South African Law Reform Commission recommended changes to our law to allow for alternatives like –

1. An "enduring power of attorney" (or "EPA") which would remain valid despite the subsequent incapacity of the principal; and

2. A "conditional power of attorney" which would come into operation only on the incapacity of the principal.

Unfortunately nothing concrete has as yet come of that, and although some legal commentators suggest that our courts might perhaps uphold a properly-worded EPA, the general consensus appears to be that they will not be recognised.

It boils down to this - **take full legal advice on your particular circumstances.**

Security Complexes and Fibre – You Can Use Telkom Ducting After All

"Reliable electronic communications go beyond just benefiting the commercial interest of licensees to the detriment of ownership of property. The statute [Electronic Communications Act] is designed to avoid this no-winner conflict. What it seeks is to bring our country to the edge of social and economic development for rural and urban residents in a world in which technology is so obviously linked to progress." (Extract from Constitutional Court decision quoted in the judgment below)

If you haven't already done so, you are no doubt thinking of upgrading soon to the

"superfast broadband" provided by fibre optic cabling. In any event ADSL is about to disappear with Telkom's plans to shut down its copper network and migrate ADSL customers to either fibre (where available) or LTE.

In a community scheme, your challenge is that your chosen fibre service provider must either use your existing underground ducting or start digging new trenches and putting in new ducting, sleeves and manholes. The expense and disruption of the latter option naturally make it very much second prize.

So Telkom no doubt celebrated its 2017 High Court victory over Vodacom and a Home Owners Association (HOA) restoring to Telkom exclusive and undisturbed possession of its underground ducting in a residential estate.

The fight, however, had only just begun. The HOA and Vodacom took this decision on appeal to the SCA (Supreme Court of Appeal), and this time they succeeded.

The complex and the copper cables

- In what is no doubt a pretty standard historical scenario for residential complexes, the developers of a private security lifestyle residential estate had some 20 years ago asked Telkom to provide telecommunication services to the estate, and had built and installed the infrastructure at the developer's cost but in compliance with plans provided by Telkom and under Telkom's oversight.

- Correspondence at the time indicated that "Telkom envisaged that the infrastructure would be for its exclusive use", and since then it had always had access to the network and maintained it.

- When the HOA rejected an offer by Telkom to install fibre and instead awarded a contract to do so to Vodacom, Vodacom installed its fibre in the Telkom ducting. Long story short, Telkom successfully asked the High Court for a "spoliation order" restoring "undisturbed possession" of the infrastructure to it.

- On appeal however, the SCA ruled that in fact "Telkom's actual use of the ducts, cables and its service to its customers remains undisturbed. It has not lost possession of anything. It remains entitled to enter into [the estate] for the purposes set out in s 22 [of the Electronic Communications Act] and its network remains fully functional as it was prior to Vodacom's conduct. There was accordingly no spoliation." The spoliation order was accordingly set aside.

Note that the judgment itself contains much that will be of interest to lawyers on the questions of "servitutal rights", "quasi-possession of rights", and the ins and outs of the Electronic Communications Act – **but the important practical outcome for HOAs and complex homeowners is that it is now easier to choose your own fibre installer because, provided your installer does nothing to disturb Telkom's use of the ducts (and its service to its clients), the free space in the existing underground infrastructure is available for use.**

How Courts Sort Fact from Fiction - A Tale of Jags, Deception and Damages

"Truth will out" (Shakespeare)

You are wondering whether you can win in court against an opponent where your two versions of what happened are totally at odds with each other.

How will a judge decide where the truth lies? It's an important question because even though you know you are telling the truth, the court must base its decision on the evidence put before it. In other words, whether or not Shakespeare's "Truth will out" will apply to your court case is going to depend on what evidence you have, and on how you present it.

A recent damages claim for fraudulent misrepresentation illustrates…

Selling R320k worth of Jaguar XF as a R1m XFR

- A dealership (owned by a close corporation) sold a "Jaguar XFR" to a buyer, who financed the purchase through a bank at a price of R985,139-29. Legally the sale was from the dealership to an intermediary, which then sold the vehicle on to the bank, which then sold it to the buyer on instalment sale.

- When the buyer failed to make payments due under the instalment sale agreement, the bank seized the vehicle from him. In the process it became aware that it was in fact a Jaguar XF, not the XFR reflected in all the documentation.

- That made a big difference to the bank because a Jaguar XFR5.0 V8 S/C is, the Court was told, a very different beast from its cousin the XF5.0 V8. What was most relevant to this case was that "the Jaguar XF is a considerably cheaper kind of Jaguar vehicle than the Jaguar XFR".

- The bank cancelled its agreement with the intermediary on the grounds of misrepresentation and the intermediary had to repay the R985k to the bank.

- The intermediary then in turn tried to recover its losses from the dealership, which however refused to pay back a cent and refused to accept return of the vehicle. To reduce its losses, the intermediary sold the XF on for R275k, after which it sued the dealership for its net loss of R710k.

- The two versions of events given by the dealership and the intermediary were irreconcilable and the factual evidence heard by the Court was an interesting and complex mix of allegedly forged signatures, unsigned documents, the mysterious addition of an "R" badge to the vehicle, and a disclosure that the dealership had bought the vehicle for R320k just days before on-selling it for R985k.

How did the Court decide?

- The Court followed "the technique generally employed by courts in resolving such factual disputes" which it summarised as (format supplied):

  "To come to a conclusion on the disputed issues a court must make findings on -

  - The credibility of the various factual witnesses;
  - Their reliability; and
  - The probabilities."

- Those three factors are of course closely inter-linked, and the Court's assessment of them will lead it to decide whether whichever party bears the onus of proving a fact or facts has succeeded in doing so. There's a clear blueprint there for any litigant wondering whether their version of events is likely to be accepted as fact, or rejected as fiction.

- In this case, the "We did nothing wrong" evidence given for the dealership by the close corporation's member and ex-member was rejected by the Court,

which referred to both the general probabilities and to several important changes of story both on the papers and on the witness stand with comments like "…had to change his version drastically during cross-examination as to how the transaction came about…".

- The end result - the Court found that the member had made a misrepresentation, knowing that it was false, that the vehicle was a Jaguar XFR and not a Jaguar XF. The ex-member was found co-responsible for the fraudulent misrepresentation and all three (member, ex-member and dealership) held jointly and severally liable for damages of R710,139-29 plus interest and costs.

Your Websites of the Month: Tips to Manage Debt and Master Your Money

Times are hard, and although hopefully we are now seeing the first green shoots in our economy, there has never been a better time to improve your relationship with money and the state of your finances.

Have a look at these website articles for ideas on how to make a start –

- "No more fighting over bills! Here are 3 tips to master your money" on The Catalyst **website**
- Time's "Struggling to Repay Your Debt? The Snowball Method Could Help" **here**.

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