

SOUTH AFRICA / JUDGMENT

Burger v Oppimex (Edms) Bpk and Others (1766/2006) [2011] ZANWHC 11 (10 March 2011)

[2011] ZANWHC 11

COURT

North West High Court, Mafikeng

BEFORE

D I Matlapeng

CASE / FILE NUMBER

1766/2006

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NORTH

WEST HIGH COURT

MAFIKENG

CASE NO.:

1766/2006

In the matter

between:

ROBERT BYRON

BURGER

.....APPLICANT

and

OPPIMEX (EDMS)

BPK

.....1ST

RESPONDENT

JIMMY McDONALD

.....2ND

RESPONDENT

PETER McDONALD

.....3RD

RESPONDENT

DATE OF HEARING

: 17 FEBRUARY 2011

DATE OF

JUDGMENT : 10 MARCH 2011

FOR THE

APPLICANT : ADV D B DU PREEZ SC

FOR THE

RESPONDENTS : ADV G V MAREE

JUDGMENT

MATLAPENG AJ:

- [1] This is an application for a mandament van spolie brought by the applicant against the respondents in respect of a right of way.
- [2] The applicant has a farm which is adjacent to the first respondent's farm. The farm is situated in such a manner that for the applicant to gain access to his farm, he had to pass through the first respondent's farm. The first respondent is a company and the second and third respondents are directors of the first respondent. There was a road which was used by the applicant in order to access his farm. This was a long standing road which was used even before by the applicant's predecessors' in title to the farm. There is a right of way servitude registered over the respondent's property in favour of the applicant.
- [3] In September 2006 the first respondent, through the second and third respondents and their employees prevented the applicant of his use of the road by:
- 3.1 erecting a steel gate across the said road, locking the gate by means of a chain and padlock and failing to give the applicant the keys to the padlock.
- 3.2 ploughing parts of the road to such an extent as to make it impassable.
- [4] The respondents admit that a gate has been erected on the road and that it is locked. They also admit that they have ploughed over part of the road. However, they submit that the applicant should not succeed in this claim because:
- 4.1 The road in question was not laid where it was supposed to be in terms of the right of way servitude.
- 4.3 The restoration of the road is impossible.
- 4.3 The applicant took long to have the matter finalized.
- [5] Subsequent to the documents of this application being served upon the respondents on 23 January 2007, the parties entered into settlement negotiations which in the main related to where the road was supposed to be in terms of the servitude. To this end a land surveyor was appointed to properly survey points where the road should be situated. Settlement negotiations did not reach finality and the applicant, on the same papers issued in 2006, is now approaching the Court for relief.
- [6] A spoliation remedy is available to any person who exercises physical control over a thing with the intention of deriving benefit from it. For the applicant to succeed in an application for spoliation, he has to prove the following:

- (a) that at the time he was allegedly despoiled, he was in peaceful and undisturbed possession of the property in question; and that
- (b) he was unlawfully deprived of such possession see *Nienaber v Stuckey* 1946 AD 1049.
- [7] The defenses available to the despoiler are a denial that spoliation has taken place *Engling and Another v Bosielo and Others* 1994 (2) SA 388 (BGD) that restoration of the thing is impossible *Tswelopele Non-profit Organization v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) and that the applicant delayed to bring the application to court as he failed to act within a reasonable time *Jivan v National Housing Commission* 1977 (3) SA 890 (W).
- [8] Coming to the facts of this matter. It is settled in our law that the right to use a road or route is included in the concept of possession and thus it is capable of being spoliated. *Willowvale Estates CC and Another v Bryanmor Estates Ltd* 1990 (3) SA 954 (W). The applicant has shown that he has been unlawfully dispossessed of the road that he previously used. This has been done by way of erecting and locking a gate over the road and failing to provide the applicant with the keys thereof and also by ploughing part of the road.
- [9] The respondents do not dispute the above statement by the applicant. They state in defence that the road that the applicant was using and which they closed, was not positioned as granted in terms of the servitude. This is not an answer to the case made out by applicant. *Mandament van spolie* is underlined by the maxim *spoliation ante omnia restituendus est*. This presupposes that before the issue of entitlement or non-entitlement of the parties can be entertained, the parties must be placed in the position they were in before the act complain of was perpetrated.
- [10] It is regrettable that the respondents, instead of approaching the Courts for relief, resorted to self help. The *raison d'être* of *mandament van spolie* is to discourage the citizenry from resorting to self help. I am of the view that the fact that the road was not positioned in terms of the right of way servitude did not give the respondents the right to act the way they did. They cannot use it as a shield against the applicant in his quest for justice. That contention should be reserved for another legal skirmish that the respondents may contemplate.
- [11] The respondents further submit that it is impossible to restore possession of the road. This is premised on the fact that part of the road has been ploughed over. Whilst it is recognised that restoration in some instances may be impossible, in my judgment such impossibility has to be viewed objectively. In *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (W) it was stated at 533C that:

"It is also well-established that a spoliator is required to restore the property in the state it was at the time of the spoliation, which may require him to do something to place it in its former condition". . ." (My own emphasis).

- [12] Except for those part of the road that has been ploughed over, I have not been informed that the whole road have been destroyed. The road at issue is an ordinary farm gravel road that was constructed out of scraping the land at issue. It is not a macadam road. Viewed objectively, it is not impossible for the respondents to restore the road to its former condition. It is not expected of the respondents to construct a gravel road with the density of 98 mothsanto. What is required of them to restore it to its former condition is to scrape over the ploughed part.
- [13] The respondents submit lastly that the applicant excessively delayed in finalizing the matter. Whilst it is indeed correct that a period of four years elapsed between the institution of these proceedings until the finalization thereof, one should not read much into such delay. The applicant, immediately upon finding that his route had been barred, commenced these proceedings. It is common cause, between the parties, that settlement negotiations were entered into whilst the very complaint giving rise to the proceedings remained unresolved.
- [14] The negotiations related to where the actual position of the road in terms of the right of way servitude was and not to restore possession of the spoliated road to the applicant. The negotiations broke down. As a result of the negotiations, the matter was prolonged.
- [15] The respondents rely on the authorities that are to the effect that an application for spoliation has to be brought within a reasonable time. Erasmus, Superior Court Practice E9-14. See too *Jivan v National Housing Commission* referred to above, *Le Riche v PSP Property CC and Another* 2005 (3) SA 189 (C). They submit that the inordinate delay in bringing this matter to conclusion, disentitle the applicant to the relief sought.
- [16] I am of the view that the respondents' reliance on the authorities referred to above is misplaced. The authorities deal with a delay in instituting the proceedings. My understanding of the said authorities is that an applicant has to bring the application to court within a year failing which there has to be special circumstances before he may be allowed to proceed. The Court still has a discretion to refuse the application where as a result of the inordinate delay, no relief of any practical value can be granted at the hearing of the application.
- [17] The applicant did not delay in bringing this application. He acted promptly within the proverbial one year of the unlawful act coming into being. What delayed is the finalization of the matter. The respondents are not blameless in this respect. They, together with the applicant delayed the finalization by engaging in the negotiations which were not fruitful. As a result of the conclusion that I have reached it is not necessary for me to determine whether the delay in finalizing the application as against bringing it is fatal to the applicant's cause. In the circumstances I come to the conclusion that there is no merit in the contentions raised by the respondents.
- [18] Therefore the following order is made:

1. The applicant is granted relief in terms of prayers 1 and 2 of the Notice of Motion issued on 12 December 2006.

D I MATLAPENG

ACTING JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPLICANT : CHRIS MARITZ

FOR THE RESPONDENT : SMIT & STANTON INC.

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