

SOUTH AFRICA / JUDGMENT

De Beer v Zimbali Estate Management Association (Pty) Ltd and Another (6711/05) [2006] ZAKZHC 21; 2007 (3) SA 254 (N) (11 May 2006)

[2006] ZAKZHC 21

COURT

High Courts - Kwazulu Natal

BEFORE

Nicholson

CASE / FILE NUMBER

6711/05

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IN

THE HIGH COURT OF SOUTH AFRICA Reportable

NATAL

PROVINCIAL DIVISION CASE

NO 6711/05In the matter
between:

PAULA
DE BEER APPLICANTand
THE
ZIMBALI ESTATE MANAGEMENT
ASSOCIATION
(PTY) LTD FIRST
RESPONDENTZIMBALI DEVELOPMENT
COMPANY
(PTY) LTD SECOND
RESPONDENT
1.

JUDGMENT**NICHOLSON J**

The applicant is an estate agent employed by Casandav Property CC ('Casandav') who carries on business on the North Coast of KwaZulu-Natal. The first respondent is a section 21 company. The second respondent is a limited liability company responsible for the development of the Zimbali Estate ('Zimbali') cited because it has an interest in the application but no relief is sought against it.

Zimbali is a property development south of Ballito and is an upmarket, gated residential and resort development. When the development of Zimbali was approved the Administrator made it a condition of registration that it be managed by a homeowners' association and the first respondent was set up for this very purpose. Access to Zimbali is restricted and controlled by first respondent.

At the time of the commencement of this application first respondent controlled access to Zimbali by boom gates and in March 2003 the applicant was issued by first respondent with a disc that enabled her to gain unrestricted access to all areas of Zimbali. This disc appears to have been automatically disabled after a given period of time as applicant had it reprogrammed from time to time.

On 23 October 2005 the applicant's disc was reprogrammed but on the following day it was disabled so applicant could not gain access to any part of the Zimbali estate. Applicant had exercised peaceful and undisturbed access for some two and a half years by that time. Through her attorneys applicant has demanded that her access be restored to no avail.

Applicant contends that the underlying reason for the disablement of the disc is not relevant for the application and further alleges that the matter is urgent as she stands to lose a sale of property in Zimbali of a property worth R 15 million.

The relief claimed by applicant is that commonly referred to as a spoliation order and is in the following terms:

- a. That the first respondent is ordered forthwith to restore to applicant unrestricted access to the Zimbali resort and residential development, Zimbali, KwaZulu-Natal, by reactivating applicant's access/security disc

renewed by the first respondent on 24 October and cancelled on 25 October 2005,

- b. That the first respondent, or which ever of the two respondents oppose the application be ordered to pay the costs.

The first respondent has opposed the application and filed an affidavit by Valdemar Purves a director of the first respondent. He indicates that the standard sale agreement between the second respondent as seller and purchasers of property in Zimbali contained a clause to the effect that if owners wanted to dispose of their properties they had to use estate agents appointed by second respondent or its nominee.

Purves alleges that applicant was not accredited to sell properties by the second respondent which had a sole discretion as to who was entitled to sell. He states that all owners of properties in Zimbali are members of first respondent and as such bound by its rules which are in place to preserve the natural environment, regulate the use of the land and prevent any nuisances taking place. Any estate agent has to be acquainted with the complex rules in order to conduct business. Purves explains further that Zimbali has three access points from outside the estate and that originally the Beach estate was developed by another developer. Casandav through its principal Peter Harris was accorded sole rights to sell properties there.

9. It was explained to Casandav and Harris that their discs gave them access to the Beach estate only and that they had no rights to the other two parts of Zimbali.

With time Casandav acquired the Pam Golding Franchise and traded as Pam Golding Properties, Ballito ('PGP'). The second respondent entered into agreements with estate agents whose knowledge of Zimbali, its particular facets and rules, was deemed sufficient.

During January 2003 Casandav, trading as PGP, applied for such accreditation for the remainder of the Zimbali estate and an agreement was concluded, including paragraph 6, which provided that once accredited, agents would only be entitled to access in the sole discretion of the first respondent. Various agents employed by Casandav sat for accreditation assessment and Harris and two others were appointed but applicant failed. On first respondent's version she was never accredited with the right to sell properties on the remainder of the Zimbali estate.

The second respondent accepts that applicant's disc enabled her to gain access to all three sectors of Zimbali, but denies that she was entitled to access to any part save the Beach estate. In the other areas she was a trespasser.

The second respondent alleges that the applicant was using her disc to secure access to all parts to gain access to clients in order to effect sales and thereby recover commission. In a replying affidavit the applicant submits that agents of Casandav have been stopped from entering the estate because Casandav no longer trades as a Pam Golding franchise. Applicant disputes that she was never an accredited agent entitled to access to the whole estate.

Applicant puts up an affidavit by Hugh Thornycroft to the effect that she passed the accreditation test. Thornycroft alleges that he is mystified as to why he later learned from John Cook that she had not been accredited. The respondents suggest that Thornycroft has an axe to grind, as he left the respondents under a cloud, the circumstances of which they will only divulge if the court so desires.

The applicant sets out the long history of animosity between Casandav and the respondents including an action in which a large sum is claimed in damages by Casandav against the second respondent. The respondents have filed further affidavits wherein they put up the tests undergone by applicant in order to prove that she failed to gain accreditation.

A recurring theme of the applicant is that the merits of the dispute or causa are irrelevant and that what she is relying on is the fact that she had been despoiled of possession of the remainder of the estate. In any event on the principles regularly applied by the courts the matter must be determined on the respondents' allegations.

Mr Marnewick SC who appeared with Mr Rail SC and Mr Potgieter for the applicant submitted that there were three bases to approach this application. The first basis was to decide the legal issue of whether a spoliation order should be granted on the basis of the decision in *Plascon-Evans Paints v Van Riebeeck Paints* [1984] ZASCA 51; 1984

(3) SA 623 at 634 E- 635C. In that case Corbett JA (as he then was) said

'Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order... In certain instances the denial by respondent of a fact alleged by applicant may not be such as to raise a real, genuine or bona fide dispute of fact... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g)... and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief he seeks... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...'

The last two bases required that the matter be sent for oral evidence on whether applicant was an accredited agent and, also, even if she was not an accredited agent, that she had a precarious right to access, which could be only terminated on reasonable notice. Throughout her papers the applicant has stressed that she seeks a spoliation order and no case has been made out for the other two forms of relief. Examples of this include the relief sought in the notice of motion and there are numerous other allegations on the papers stressing that what applicant seeks is a spoliation order and that the merits as such are not relevant.

It follows that the only question is whether the applicant has made out a case for a spoliation order. The requirements for obtaining the mandament van spolie are when:

- (a) a person has been deprived unlawfully of the whole or part of his possession of movables or immovables and also

- (b) a person has been deprived unlawfully of his quasi-possession of a movable or immovable incorporeal.

See *Nino Bonino v De Lange* 1906 TS 120; *Shahmahomed v Hendriks* 1920 AD 151; *Mans v Loxton Municipality* 1948 1 SA 966 (C). I have found the treatment of the mandament in volume 27 of *Lawsa* under the title of Things by CG Van Der Merwe extremely helpful.

19. Innes CJ set out the basis in *Nino Bonino v De Lange* supra at 122 as follows:

"Spoliation is any illicit deprivation 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."

20. This definition was adopted from *Leyser Meditationes* and was approved inter alia in *Sillo v Naude* 1929 AD 21; *Nienaber v Stuckey* 1946 AD 1049; *Van Eck & Van Rensburg v Etna Stores* 1947 2 SA 984 (A) 1000.
21. The question of the application of the mandament for incorporeal rights has been the subject of wide-ranging discussion in the case law and in academic circles. In *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003
- (5) SA 309 (SCA) *Jones AJA* deals with the origins and development of the mandament as follows at 312 G - 313 B:

'[9] Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has 'quasi-possession' of it, when he has exercised

such right. Many theoretical and methodological objections can be raised against this construct, inter alia, that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of 'quasi-possession' has passed into our law. This is all firmly established.'

After what appears to be a sceptical shrug of the judicial shoulders *Jones AJA* goes on to accept the passage of time and the cases which have extended the law. The facts of the case were that the appellant supplied the respondent (an internet service provider) with a telephone system and a bandwidth system in order for the latter to conduct its business as an internet service provider. The appellant alleged that the respondent was indebted to it in a sum of money in respect of one of the services provided, which the respondent disputed. The appellant thereupon disconnected the respondent's telephone and bandwidth systems. The respondent successfully brought an urgent spoliation application in a Provincial Division. In an appeal it was held, that there was no suggestion that the appellant had interfered with respondent's physical possession of its equipment. (Paragraph

[13] at 314E.)

It was held, further, that there was no evidence that the respondent was ever in possession of any of the mechanisms by which its equipment was connected to the internet. (Paragraph [13] at 314E/F.) It was held further, that the appellant had not entered the respondent's premises and removed an item of respondent's equipment in order to effect the disconnection. (Paragraph [13] at 314F.) The court was of the view that it was both artificial and illogical to conclude on the facts that the respondent's use of the telephones, lines, modems or electrical pulses gave it 'possession' of the connection of its corporeal property to the appellant's systems. (Paragraph [13] at 314F - G.)

Furthermore Jones AJA held that the quasi-possession of the right to receive the appellant's telecommunication services consisted of the actual use of those services and that was a mere personal right. (Paragraph

[14] at 314G - G/H.) Jones AJA held, further, that the order sought was essentially to compel specific performance of a contractual right in order to resolve a contractual dispute. This had never been allowed under the mandament van spolie and there was no authority for such an extension of the remedy. (Paragraph [14] at 314H.)

In *Zulu v Minister of Works, Kwazulu, and others* 1992 1 SA 181 D Thirion J grappled with the question of incorporeal rights and accepted that 'the possession of incorporeal rights is protected against spoliation'. (*Nienaber v Stuckey* 1946 AD 1049 at 1056.) Thirion J then held at 187 et seq that

'In truth the mandament van spolie is not concerned with the protection or restoration of rights at all. Its aim is to restore the factual possession of which the spoliatus has been unlawfully deprived. The question of the lawfulness of the spoliatus' possession is not enquired into at all. What then does a spoliatus have to prove to establish the possession of 'an incorporeal right' and what such 'rights' qualify for protection by the mandament van spolie?...

Accepting then that what is protected by the remedy is the actual performance of acts which if lawfully performed would constitute the exercise of a right, the question which arises is what such acts are protected by the remedy...'

26. Thirion J in discussing this question looked at *Nienaber v Stuckey* (supra at 1055-6) where Greenberg JA observed with reference to Voet 43.16.7; Wassenaar *Practyk Judicieel* ch 14 art 1 and Lee's *Introduction to Roman Dutch Law* 3rd ed at 167:

'The fact that these authorities state generally and without any limitation or exception that the possession of incorporeal rights is protected against spoliation means that the holders of such servitudinal rights as rights of way ... are entitled to the relief against dispossession by spoliation.'

27. Thirion J maintains that

'Too much should not be read into this statement. Greenberg JA was here simply pointing out that possession need not be exclusive in order to qualify for protection by the mandament. The question of what kinds of rights the possession of which is protected by the mandament did not

arise because the spoliatus there had clearly been in physical possession of the land. It is true that Wassenaar states in the passage referred to that the mandament van spolie may be obtained in any case of a spoliation of 'enige goederen of gerechtigheden' but I would not conclude from this bald statement that the dispossession of just any right can be made the subject of spoliation proceedings.

If the protection given by the mandament van spolie were to be held to extend to the exercise of rights in the widest sense then supposedly rights such as the right to performance of a contractual obligation would have to be included - which would be to extend the remedy beyond its legitimate field of application and usefulness.'

The possession in Nienaber's case was fairly extensive and encompassed a whole year from June 1945 during which period the appellant ploughed the lands. From 1943 the appellant had leased the land in question. The Court found that he had not abandoned the possession in question and that when the respondent locked the gate he effectively despoiled the appellant's possession. See page 1057-8.

In his judgment Thirion J deals with the work of a number of academics and considers what they say in this regard. Of significance, in the consideration of the

facts of this case, are the following comments, in an article on the application of the mandament to immovables, in 1986 TSAR 232 by Van der Walt who states

'In gevalle soos die wat hierbo vermeld is, herstel die Hof deur verlening van die gevraagde regshulp nie die versteuring van die reg op gebruik nie maar die versteuring van die daadwerklike beheer wat deur die daadwerklike gebruik van die betrokke saak ge'impliseer word. Dit is dan ook wat in die onderhawige tipe gevalle, waar die bewoning, okkupasie of gebruik van 'n perseel of pad ter sprake is, gebeur. Daar kan dus nie werklik hier van uitbreiding van die mandament van spolie sprake wees nie: dit is niks anders nie as 'n toepassing van die gebruikelike beginsels van die mandament op een spesifieke tipe geval wat van huis uit aan al die vereistes voldoen. Sonnekus se beswaar teen die uitbreiding van die mandament berus dus enersyds op die regte uitgangspunt, maar andersyds ook op 'n misvatting van wat werklik in hierdie gevalle gebeur. Daar kan glad nie sprake wees van die toepassing van die mandament in gevalle waar daar geen sprake van die beheer oor 'n saak is nie, en as hierdie spesifieke kwalifikasie nie altyd uitdruklik vermeld word nie, is dit omdat dit, in die lig van die vereistes vir die mandament, vanselfsprekend is. Ook in gevalle soos die hofsake wat hierbo vermeld is, en in gevalle soos die onderhawige saak, moet daar aan die fisiese beheersvereiste voldoen word voordat die mandament van spolie gebruik kan word. Daar kan egter nie in hierdie gevalle enige besware teen die toepassing van die mandament bestaan nie en daar is ook nie werklik van 'n uitbreiding sprake nie, juis omdat dit in die betrokke sake nie om die handhawing van die applikant se reg op gebruik van die saak (pad, perseel, en dies meer) handel nie, maar om sy daadwerklike gebruik en die meegaande beheer oor die saak. Wanneer ek sonder 'n magtigende servituut oor my buurman se grond ry, en hy sluit daarna die hek, kan ek die mandament van spolie alleen aanvra op grond van die bewering (wat uiteraard eers bewys moet word) dat ek daadwerklike beheer oor

daardie pad gehad het deurdat ek dit daadwerklik gebruik het. Dit kan egter nie om my aanspraak om die pad te mag gebruik handel nie, net so min as wat dit in die Naidoo of die Froman saak om my aanspraak op die lewering van elektrisiteit (dws my vorderingsreg) kan handel. Dit kan egter wel om my aanspraak op daadwerklike gebruik (en by implikasie beheer) van die saak (die perseel) gaan.' (Emphasis added by me.)

30. Thirion J also considers an article by Kleyn in 1989 (1) De Jure who expressed his opinion on the subject as follows at 162-3:

'Dit is sekerlik waar in die geval van sommige servitude, maar dit is te betwyfel of byvoorbeeld die eienaar van die heersende erf, wat bloot 'n

reg op waterleiding deur middel van 'n pyp oor die dienende erf het, in besit van die dienende erf of van die water is. Diefseifde geld vir die reghebbende op 'n reg van weg.'

31. Thirion J goes on to say

'It would seem to me that unless the concept of 'gebruiksregte' is further circumscribed and defined it would not serve the purpose of confining the application of the mandament when applied in respect of incorporeal rights within manageable limits. The occupier of an urban property usually has the benefit of a number of services rendered to him at the property on an ongoing basis: the supply of electricity and water, sewage disposal, refuse removal, television signals from the nearest beacon, postal deliveries, milk, coal and bread deliveries, a bus service.'

32. The cynical might observe that estate agents can be added to the list of personshawking their wares. Thirion J concludes this part of his judgment by saying

'Van der Walt (1989 (3) THRHR 444) expresses the view that the cases in which the mandament van spolie was applied, purportedly for the protection of the quasi possession of rights were, with a few exceptions (which he says were cases which were wrongly decided) cases where it was actually applied

to restore physical possession or control over corporeal things where the exercise of the possession or control is intermittent and not exclusive.

Van der Walt is also of the opinion that the holder of a servitude of right of way over a property does have physical possession of the road to the extent of his use of the road. The same applies to a servitude of aquae ductus. I think Van der Walt is correct.'

33. It is clear that the boom or gate was effectively locked as far as the applicant was concerned. The disc was in effect a key which would normally make access to the whole estate possible. The changing of the computer to prevent the disc facilitating access amounts to the same as changing the locks.

The only remaining question is whether the applicant had possession of the whole estate. At one level the simple answer is that she had a key or disc allowing access to the whole estate. By giving her the disc were the respondents in effect giving her possession of the whole estate? That they maintain that she was given access to the whole estate in error or due to some subterfuge on her part does not matter.

In *Painter v Strauss* 1951

(3) SA 307 (O) at page 314 Brink J held that

The mandament van spolie is employed to prevent people from taking the law into their own hands, and it requires the property despoiled to be restored as a preliminary to any enquiry or investigation on the merits of the dispute.'

36. Van der Merwe in the title *Things* at para 259 says the following about the control element where possession is concerned

'The control element of possession is more closely scrutinised in the case of acquisition of possession by occupation than by transfer; since transfer need not necessarily consist in the physical handing over of the thing, but can also take fictitious forms, like the handing over of keys (*clavium traditio*) or the pointing out of an object (*traditio longa manu*), less stringent physical requirements are on the whole exacted for acquisition of possession by transfer than by occupation.'

37. Van der Merwe goes on to discuss a number of cases relating to possession where a person has a key. A person who holds the key to only one room in a building does not have physical control of the building as a whole but only of that particular room and its contents. See *Van der Merwe op cit* para 248 and *Insolvent Estate of Israelson v Harris & Black* (1905) 22 SC 135 140.

Physical control over a building Van der Merwe points out is exercised by the person who occupies it (See *R v Betelezie* 1941 TPD 191). Van der Merwe is of the view that the decision in *R v Letsabo* 1912 TPD 667 that occupation of a building may also indicate possession of things buried in the vicinity of the building is open to doubt.

According to Van der Merwe physical control over a building is also carried out by a person who holds the key to the building. He quotes the following authorities; *Liquidators of Royal Hotel Co v Rutherford* 1906 CTR 179; *Scholtz v Faifer* 1910 TPD 243 247; *Malan v Dippenaar* 1969 2 SA 59 (O) 62H-63A.

The learned author also submits that the holding of the key is also sufficient for control over the contents of the building and he quotes as authority *Grotius Inleidinge* 2 5 12; *Voet Commentarius* 41 1 34; *Heydenrich v Saber* (1900) 17 SC 73 76-77.

What is of crucial importance in this matter is that for someone to exercise physical control the key must, however, be the only key to the building; the above does not apply if the owner or someone else holds a duplicate key. Van der Merwe quotes as authority for this proposition the case of *Shaw v Hendry* 1927 CPD 357. In that case the applicant was a builder and alleged that he was in possession of a house as a result of a builder's lien. The

facts revealed that he was unable to complete certain plumbing work and gave a key to a watchman to enable another plumber to have access. A plumber and the respondent's father thereafter had access and Gardiner JP held that no possession was established.

It is clear from the papers that a large number of persons have discs to enable them to have access to the whole estate and include homeowners in the estate, officials of first and second respondents and security personnel. Is the applicant in the same situation as a normal visitor? The situation of applicant and that of a casual visitor can be distinguished as the latter comes in with permission, on one occasion, and can then be prohibited next time. It seems clear that a visitor could not bring a spoliation order. By giving the applicant the disc were the respondents in effect saying that she could take possession of the whole estate at any time? In other words were they denying themselves the right to change their minds and stop her entry at some later date?

In *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (AD) (discussed by Van der Walt 1989 THRHR 444 and Sonnekus 1989 TSAR 429) the respondent had been in receipt of a flow of water from a fountain on the appellant's farm for a number of decades. The appellant stopped the flow and a spoliation order was granted.

The effect of the court judgment in that case was that the mandament van spolie is available for the restoration of the lost possession (in the sense of quasi-possessio which consists of the actual use of the servitude) of a right of servitude. Although it might appear to be illogical that the servitude does not have to be proved, it is the status quo which has to be restored by the mandament van spolie until it is determined whether the servitude indeed exists. See *Bon Quelle* at page 516 F-H. This decision is in contrast to the *Zulu* case

insofar as the facts are concerned but the quasi-possession was clearly of a long duration and enjoyed uninterruptedly.

There have been a number of cases where the courts have come to the rescue of litigants whose access to property has been blocked. For example where the owner of a servient tenement padlocked a gate and closed down a road used by the owner of the dominant tenement across his farm.

In *Van Wyk v Kleynhans* 1969 1 SA 221 (GW) the appellant had used a certain road over respondent's farm as a road leading out. The respondent had closed the road and the appellant had applied in a magistrate's court for an order in terms whereof the messenger of the court would be directed to open the road. The magistrate's court had dismissed the application. In an appeal, it appeared that the appellant had been in undisturbed possession of the right to use the road; that the respondent had arbitrarily closed the road and prevented appellant

using it, and that this conduct on the part of the respondent was against the wishes of the appellant.

The appellant had been exercising access to the road for seven years as a result of permission from the respondent which had been given while he was the manager of the previous owner. He subsequently bought the property and argued that as a manager he could not bestow a right of servitude on the appellant. It was held, that it was not necessary for the appellant to prove that he had a right of servitude over the respondent's farm. It was further held that the respondent had to be ordered to open the road.

in *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 1 SA 616 (W) the applicants leased premises in a shopping centre owned by the respondent for the purpose of operating a supermarket. In terms of the lease the applicant's employees and customers were allowed to use an area designated as common property for parking.

The applicant contended that building operations by the lessor substantially altered the parking area and detrimentally affected

the effectiveness of the supermarket depriving it of the free and undisturbed possession of the parking area. It therefore applied for a mandament van spolie for restoration of the use of the designated parking area.

The court found that the mere fact that the applicant had a contractual right to use the parking area did not amount to possession for the purposes of establishing an entitlement to the mandament van spolie (at 622B-C).

The court found that the applicant attempted under the guise of an alleged spoliation to enforce rights, which it claims to have in terms of a contract with the respondent in relation to the designated area. The court found that the true issue is confused if the contractual position of the parties is disregarded and it is assumed for the purposes of the spoliation argument that the applicant might have had no contractual right at all to occupy the designated area, but yet be entitled to claim the benefits of the spoliation order.

The true issue in regard to the spoliation aspect was to enquire into the simple factual question as to whether the applicant had established, on the basis of undisputed facts, that it was in possession of the designated area at the relevant

time. The mere right to use the property does not amount to possession of the property. (At 263D-F.)

The court therefore concluded that since the mere right to use the property did not amount to possession of the property, the applicant had not established the requisite possession for the relief by means of the mandament van spolie. (Page 623F-G).

In that case it was not the right to use but the actual use of the parking areas that was regarded as the essential consideration. This means, in effect, that the Court held that the intermittent use of the parking bays in the parking area was not considered sufficient to establish control, even shared control, over the parking area.

A summary of the above cases would seem to me to indicate that the mandament is there to protect possession not access. Such possession must be exclusive in the sense of being to the exclusion of others. The possession of keys, by a multiplicity of parties, waters down the possession and, in the present case, it becomes so dilute that it ceases to be the sort of possession that is required to achieve the protection of the mandament. It must be recalled that the real purpose of the mandament was to prevent breaches of the peace. If someone is in exclusive possession and exercises such possession, then deprivation thereof can, and often does, lead to a breach of the peace. No such breach would, in the ordinary course of events, take place, where a large number of persons have access, rather than possession, of the property in question.

In a gated community such as that, which obtains at Zimbali, it would seem to me that the individual owners are in possession of their houses or units as individuals and in possession of the communal areas as a group of unit owners. Persons who have access, albeit frequent or even habitual, are not in possession of the units or the communal areas. The milkman, the insurance salesman and the estate agent have access to, but not possession of the units and communal property. Because communal areas are shared should not confuse the issue.

Although possession can be shared, the cases relating to the joint possession of keys, illustrate that the access to keys for two or more real possessors is intended to be to the exclusion of others. If the alleged possession by applicant to the whole of the Zimbali estate, was to be to the exclusion of the real owners I would have more sympathy for her.

A final illustration relating to the criminal law possession of land or buildings by a number of persons illustrates the point. Assuming that a patch of dagga was found in one of the communal areas of Zimbali and the police were rounding up suspects. I am sure that the applicant would be indignant if her alleged possession of the communal areas - assuming that she was aware of its presence - would be held sufficient to constitute possession.

As I understand the papers the respondents do not object to the applicant having access to the Beach estate. That portion can be accessed without the applicant being able to gain access to the other two parts. Applicant is entitled to access to the Beach estate but she wants access to the whole estate. Her notice of motion speaks of 'unrestricted access'.

59.1 do not believe that applicant has established the sort of possession required for a mandament for the remaining two parts and the application must be dismissed with costs.

Counsel for the Applicant: Mr Marnewick SC, Mr Rail SC and Mr Potgieter (instructed by Nel and Stevens)

Counsel for the Respondent: Mr Vahed SC and Mr Voormolen (instructed by Garlicke and Bousfield)

Date of hearing : 24th February 2006

Date of judgment: 11th May 2006

CASE NO: 6711/05

IN THE HIGH COURT OF SOUTH AFRICA NATAL PROVINCIAL DIVISION

AT PIETERMARITZBURG ON THE 11TH MAY 2006 BEFORE THE HONOURABLE MR JUSTICE NICHOLSON

In the matter of:

PAULA DE BEER APPLICANT

and

ASSOCIATION (PTY) LTD 1st RESPONDENT

ZIMBALI DEVELOPMENT COMPANY

(PTY) LTD 2nd RESPONDENT

HAVING on the 24th day of February 2006 heard Counsel for the Applicant and Counsel for the Respondent; and

HAVING read the Notice of Motion and the other documents filed of record; THE COURT RESERVED JUDGMENT; THEREAFTER ON THIS DAY;

IT IS ORDERED:

That the application be and is hereby dismissed with costs.

BY ORDER OF THE COURT,

MJK PRINSLOO SNR REGISTRAR

Verm Nemeth & Hart

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