

SOUTH AFRICA / JUDGMENT

Viljoen and Another v Bekker (9189/2015) [2015] ZAGPPHC 161 (19 February 2015)

[2015] ZAGPPHC 161**COURT**

North Gauteng High Court, Pretoria

BEFORE

Molefe

CASE / FILE NUMBER

9189/2015

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Source record**IN****THE GAUTENG DIVISION HIGH COURT, PRETORIA****(REPUBLIC****OF SOUTH AFRICA)****Case Number:**

9189/2015

Date

Coram: Molefe J

Heard: 19

February 2015

Delivered: 27

February 2015

FREDERICK

RUDOLFUS

VILJOEN.....1st

APPLICANT

HELENA MARIA

VILJOEN.....2nd

APPLICANT

And

ALETTA ELIZABETH

DORATHEA

BEKKER.....RESPONDENT

JUDGMENT

MOLEFE J

[1] The applicants approached this court by way of urgency for a mandament van spolie. The purpose of this application is to restore to the applicants, access to and possession of the registered servitude, registered in their favour over the respondent's property known as Portion 256 (a portion of Portion 18) of the farm Naauwpoort 335, Registration Division JS, Mpumalanga Province, held by virtue of Deed of Transport T11201/2008 ante omnia. The applicants further apply for an order that a status quo in respect of the servitude road be restored to enable them to utilize it.

The respondent opposes the application and puts in issue whether mandament van spolie was an appropriate remedy.

[2] The facts of the matter are briefly that:

2.1 The applicants are the registered owners of Portion 254 (a portion of Portion 18) of the farm Naauwpoort 335, Registration Division JS, Mpumalanga Province, registered in the Deeds Office on 18 July 2008 and held by virtue of Deed of Transport T11200/2008. Clause 5 of the Title Deed No T11200/2008 provides the following:

“Die eiendom hiermee getranspoteer is onderhewig aan ‘n Reg van Wet ten gunste van die Algemene Publiek Serwituut 8 meter wyd soos aangetoon deur die lyn ef op kaart 12432/1998 wat die Suidwesteike grens daarvan voorstel”.

2.2 The respondent is the owner of Portion 256 (a portion of Portion 18) of the farm Naauwpoort 335, Registration Division JS, Mpumalanga Province, registered in the Deeds Office on 18 July 2008 and held by virtue of Title Deed T11201/2008. Clause 5 of the Title Deed No T11201/2008 provides the following:

“Die eiendom hiermee getranpoteer is onderhewig aan ‘n Reg van Weg ten gunste van die Algemene Publiek Serwituut 8 meter wyd soos aangetoon deur die lyn ef kaart 12432/1998, wat die Suidwestelike grens daarvan voorstel”.

[3] The relevant facts which are common cause and the respondent's allegations which must be accepted may be summarized as follows:

3.1 The applicants' property is “land locked” and the only manner in which the applicants can access their property is through the respondent's property. The respondent had previously afforded the applicants an opportunity to use an alternative road to the servitude road to access their property.

3.2 The respondent intentionally and deliberately decided to close the alternative road (depicted in the photo marked Annexure “FV6”) by constructing a gravel barrier or obstacle on the road, together with rocks and two notices displaying the word “privaat”.

3.3 As a result of the respondent's closure of the alternative road, the applicants made use of the servitude road to access their property. Shortly after the use of the servitude road, the respondent spoliated the applicants by ordering her employees to construct a barricade in the form of a deep ditch or trench as depicted in the photo marked Annexure "FV10".

[4] The applicant's case is made in the respondent's answering affidavit by the following passage:¹

"Annexure "FV10" is a photograph of a drainage ditch that was excavated on my instructions on or about 21 January 2015. That part of the drainage ditch that is depicted in the photograph is situated roughly at point M on annexure "AEDB1" on my properties. I had the drainage ditch excavated to channel excessive rainwater on my properties. It is by pure chance that the drainage ditch traverses the servitude road. In any event, I repeat that nobody, including the applicants, make use of the servitude road. "

[5] Counsel for the applicants² submits that at all relevant times, the applicants were in the undisturbed and peaceful possession of the servitude road, which

servitude was registered against the respondent's property in their favour as is evident from the title deed referred to supra. The respondent unilaterally and deliberately prevented the applicants from using either the alternative road or the servitude road, thereby spoliating them by making it impossible for them to access their property via the registered servitude.

[6] I agree with the case as argued to me on behalf of the respondent in that an applicant who seeks spoliation order, seeks final relief and generally such relief may be granted only if the allegations of fact made by the applicant which are admitted by the respondent, together with the allegations of fact made by the respondent, justify the grant of such relief (See *Kinnear and Others v Traviso (Pty) Ltd* (A567/2007) [2008] ZA GPHC 389 (4 December 2008)).

[7] Counsel for the respondent³ argued that the subject matter of the present application is a public servitude of right of way and that the applicants have not

established on the papers that they have actually used the servitude road. Counsel contends that the applicants cannot therefore claim to have had possession of the servitude for purposes of a spoliation application as proof of the existence of the servitude does not by itself prove possession of the servitude. In this regard, counsel relied on *Van Rhyn NO and Others v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521 (WCC) at par [9]:

"Thus where a right is concerned, dispossession is established by the applicant demonstrating that it has been deprived of a previously

exercised utility and identifying the right in terms which it contends it is entitled to exercise the utility. It is the relationship between the two that prima facie establishes the possessory element that is an essential part of the case of an applicant for relief under the mandament, for it identifies the subject matter of the alleged despoilment. "

[8] The respondent, in her answering affidavit submits that the applicants have access to their property via an alternative access road, and are thus not suffering undue hardship and discomfort on a daily basis, because they are unable to access their property via the servitude road. According to the respondent, the applicants have never used the servitude road which has fallen into disuse. It is further argued by the respondent's counsel that the existence of the servitude merely identifies the nature of the right relied upon and not the use thereof.

[9] It is a fundamental principle that no man is allowed to take the law into his own hands; no-one is permitted to dispossess another

forcibly or wrongfully and against his consent for the possession of property whether movable or immovable. If he does so, the court will summarily restore the status quo ante and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. (See *Nino Bonino v De Lange* 1906 TS 120 at 122).

[10] It is trite that in a spoliation application, an applicant must comply with two requirements, namely, firstly, peaceful and

undisturbed possession, and secondly, wrongful or unlawful deprivation of such possession. (LAWSA, volume 11, para 342 at p.304). Wrongful or unlawful deprivation refers to dispossession without the applicant's consent or without due legal process. (Harms, *Amler's Precedents of Pleadings*, seventh edition, p358).

[11] It is equally trite that the merits of an applicant's possession and the respondent's rights to dispossess are,

subject to at least one exception, not justiciable in a mandament van spolie application. The exception is that of a statutory right to dispossess. (Harms, *supra* 358).

[12] It is the respondent's submission that this application for spoliation be dismissed as the applicants had an alternative route that they could use or were using and that the applicants never used the servitude road. In my view, this is a collateral issue which cannot be raised as a defence against spoliation. It has been recognised that the use of a servitude can be protected by the mandament without proof of the existence or otherwise of the servitude⁴.

[13] As mentioned above, the applicants need only show two grounds, peaceful and undisturbed possession of the thing or in this case, the road and that they have been unlawfully deprived of that possession. The respondent is generally not allowed to contest the spoliated applicant's title to the property because good title is irrelevant. The claim to relief under the mandament arises solely from deprivation of possession without following legal procedure.

[14] The question is whether the applicants have discharged the onus of proving on a balance of probability that they were in possession of the servitude road and that they had been wrongfully deprived of possession. Because these proceedings are on notice of motion, I am bound to use the fact-finding process set out in *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A).

The uncontested evidence in the present matter is that the applicants have a servitude registered in their favour over the respondent's

property and had the undisturbed and peaceful possession thereof. The respondent conceded that she unlawfully deprived the applicants of that possession by digging a drainage ditch which "by pure chance" traverses the servitude road and that the applicants are unable to access their property via the servitude road. It is evident in casu that the applicants are entitled to the relief in terms of mandament van spolie. The use of an alternative route has, in my opinion, no relevance to the exercise of peaceful and undisturbed possession of the servitude

road. Furthermore, it is not a defence to the unlawful deprivation of the thing possessed.

[15] I am satisfied that the applicants have succeeded on a balance of probabilities to prove their application for spoliation and are thus entitled to the relief sought in the application.

[16] There remains the aspect of costs. No one contended that costs should not follow the result, but the applicants submitted that a special attorney and client costs should be made against the respondent. I am not persuaded that such an order should be granted.

[17] In the premises, the following order is made:

- 1) That the Respondent be ordered to restore the Applicants' access to and possession of the registered servitude (right of way) registered in their favour over the Respondent's property known as Portion 256 (a Portion of Portion 18) of the farm Naauwpoort 335, Registration Division JS, Mpumalanga Province, held by virtue of Deed of Transport T11201/2008, ante omnia;
- 2) That the Respondent be ordered to restore the status quo of the road (right of way) in respect of which the servitude, referred to and contained in paragraph 2 supra, and to repair or to rehabilitate the road (to enable the Applicants to utilize it) and to enable the Applicants to access their property known as Portion 254 (a Portion of Portion 18) of the farm Naauwpoort 335, Registration Division JS, Mpumalanga Province, held by virtue of Deed of Transport T11200/2008;
- 3) That the respondent be ordered to pay the costs of this application on the scale as between party and party, including costs consequent upon the employment of senior counsel.

D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant : Adv. FW Botes SC

Instructed by: Friedland Hart Solomon & Nicolson Attorneys

Counsel on behalf of Respondent: Adv. CP Wesley

Instructed by: Jacobs Attorneys

1Page 64 of the bundle, paragraph 32

2Advocate FW Botes SC

3Advocate C Wesley

4Bon Quelle (Edms) Bpk v Munisipaliteit van Octavi 1989 (1) SA 508 (A) at 514 D-H

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