



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 2215/2023

In the matter between:

CHRISTIAAN CORNELIS VENTER

First Applicant

CHRISTIAAN CORNELIS VENTER N.O.

*(in his capacity as duly appointed trustee of the
Chris Venter Family Trust, IT 1076/08)*

Second Applicant

HANLIE VENTER N.O.

*(in her capacity as duly appointed trustee of the
Chris Venter Family Trust, IT 1076/08)*

Third Applicant

IZAK DANIËL BOSMAN N.O.

*(in his capacity as duly appointed trustee of the
Chris Venter Family Trust, IT 1076/08)*

Fourth Applicant

and

EMANUEL ("MANI") GUSTAV FICHARDT

First Respondent

IRENE FICHARDT

Second Respondent

GUSTAV ("NIEL") EMANUEL FICHARDT

Third Respondent

JULIUS FICHARDT

Fourth Respondent

JUDGMENT BY: C REINDERS, J

HEARD ON: 12 MAY 2023

DELIVERED ON: 19 MAY 2023

[1] The applicants move for urgent relief under the mandament van spolie. For sake of brevity the full description of the parties will not be cited, save where necessary to do so. The relief sought by applicants appears from the notice of motion (although in some respects incoherent) and is quoted verbatim:

1. "That this application be heard as an urgent application in accordance with the provisions of Uniform Rule of Court 6(12) and that the requirements pertaining to service and time periods be dispensed with
2. The First Respondent (*and the Second-, Third- and Fourth Respondent, in as far as the Second-, Third- and Fourth Respondent may be acting / spoliating the Applicants on their own accord and not on the instructions and direction of the First Respondent*) be ordered to remove all and any fences, poles and/or obstacles constructed, including but not limited to chains, wire, poles or locks, if any, giving:
 - 2.1 the First Applicant and/or the Second to Fourth Applicants, including their employees, contractors and/or agents, undisturbed and unfettered access to the gravel road connecting and leading from the Farm Simonsium 594, district Reitz (*adjacent to and/or across the Farm Simonsium 594, district Reitz and/or the farm Gegund 420, district Reitz and/or the farm Rietfontein 380 and/or the farm Silo 946*

and/or the farm Waldo 593) to the tar road connecting the town of Reitz in the Free State Province with the town of Warden in the Free State Province; and

2.2 The First Applicant and/or Second to Fourth Applicants, including their employees, contractors and/or agents, undisturbed and unfettered access to the Klein Bietjie Dam, also known as the Bass Feather Dam, situated outside the town of Reitz in the Free State Province on or near the Farm Waldo 593, Reitz District from the farm Leland 575, District Reitz;

3. that the First Applicant and/or the Second to Fourth Applicants, including their employees, contractors and/or agents, unfettered use of and/or possession of and/or access to:

3.1 the gravel road connecting and leading from the Farm Simonsium 594, district Reitz (*adjacent to and/or across the Farm Simonsium 594, district Reitz and/or the farm Gegund 420, district Reitz and/or the farm Rietfontein 380 and/or the farm Silo 946 and/or the farm Waldo 593*) to the tar road connecting the town of Reitz in the Free State Province with the town of Warden in the Free State Province; *and*

3.2 the portion of the land situated on the farm Leland 575, district Reitz and/or the farm Waldo 593, district Reitz adjacent to the Klein Bietjie Dam, also known as the Bass Feather Dam, situated outside the town of Reitz in the Free State Province, forthwith, be restored *ante omnia*.

4. That in the event that the First Respondent (*and/or Second and/or Third- and/or and Forth Respondent, if applicable*) fail to comply with the order in 2 and 3 above within the **twenty four [24] hours** from the time and date of service of the order in 2 and 3 above upon the First Respondent (*or other Respondents opposing this application*),

the sheriff for the district of Reitz, Free State, be and are hereby authorised to do all necessary to give effect to the order granted in 2 and 3 above and will such costs incurred by the sheriff for the district, Reitz, constitute costs taxable and recoverable by the Applicants from the First Respondent (*and/or any further Respondent opposing this application*);

5. The First Respondent and any other Respondents who may unsuccessfully oppose this application, be ordered and directed to jointly and severally, the one to pay, the others to be absolved, to pay the Applicants' costs on a scale as between attorney and own client.
6. Further and/or alternative relief."

- [2] As is evident from the quoted notice of motion, the relief prayed for by the applicants entails two averred incidents of spoliation, to wit, that in relation to the Bietjie Water Dam, also known as the Bass Feather Dam ("the dam"), and in respect of the Simonsium road ("the road"). It is common cause (or not seriously disputed) that fences were erected or constructed both on the road and adjacent to the dam (as is fully described in the notice of motion). First applicant, Mr CC Venter, deposed to the application in his private capacity as well as his official capacity as a duly appointed trustee of the Chris Venter Family Trust ("the trust").
- [3] The respondents opposed the relief claimed in respect of both urgency and, to the extent that will be set out herein later, the merit of the application. Having heard submissions by counsel representing the parties, I was satisfied that the applicants had made out a case for the relief in prayer 1, granted such an order and took the matter on the roll.
- [4] In the answering affidavit the deponent, Mr EG Fichardt (the first respondent), states that he deposes to the affidavit on behalf of the second, third and fourth respondents. Paragraph 8 of the answering affidavit reads: "*Insofar as the applicants seek the restoration of their use, possession and/or access to the gravel road... (as per prayers 2.1 and 3.1 of the notice of motion), I formally tender such access*

to the applicants..." At the commencement of the hearing of the application, the tender was repeated orally, and I was informed that the respondents were already busy removing the fence at the time. The tender was made "...pending the outcome of an action to be launched by me, within 30 days of the date of the granting of an order herein. In these action proceedings I shall seek a declaratory order to the effect that the road has been constructed on my land and that I am entitled to fence off my property as I have done." Accordingly, it is only necessary to deal with the issue of the dam herein.

- [5] Mr Venter avers that the trust, its employees, himself and his friends have had peaceful and undisturbed possession and use of the dam in order to access, fish, boat and/or pump (withdraw) water from the dam since at least 2019. The applicants aver that the respondents had spoliated them by the erection of the complained of fence. He avers that the issue in respect of the dam is no different than the conceded issue in respect of the road.

- [6] The respondents in answering to the applicants' founding affidavit summarize its opposition to the relief sought by applicants (apart from disputing urgency), as follows:

"... 14.2 the Chris Venter family Trust ("the trust") has not authorised the launching of this application;

14.3 the applicants have access to the dam via the applicant's farm Simonsium 594 and, therefore, are not deprived of access to the dam; and

14.4 the applicants have not made out a case for the granting of an order in terms of the mandament van spolie."

- [7] The attack by respondents regarding the authority of Mr Venter to launch the application on behalf of the trust, is without merit in my view. The sad passing of the third applicant still left the fourth applicant to constitute, together with Mr Venter, the required two trustees to take decisions on behalf of the trust

including the institution of these proceedings, as is evident from the trust deed annexed to founding affidavit. Moreover, the respondents failed to file a notice in terms of Uniform Rule 7.

- [8] It is trite that the mandament van spolie is a possessory remedy, the rationale being that no person is allowed to take the law into their own hands.¹ It seeks only to restore the *status quo ante*. It does so by mandatory order irrespective of the merits of any underlying dispute regarding the rights of the parties.² The despoiled persons need only prove that they were in possession of the object and were wrongfully deprived of such possession without consent.³
- [9] In my view the crisp issue in this application relates to the question on what constitutes possession for purposes of the mandament van spolie.
- [10] Relying on the work of Silbert and Schoeman: *The Law of Property*, Mr Van Niekerk (appearing for respondents) contended that, on the facts of the matter, the applicants were not in possession of the dam. As I understood his argument, he contended that some sort of a physical presence at all times next to the dam was required in order to constitute possession and successfully apply for relief under the mandament van spolie. It was also contended that the applicants had alternative access to the dam, and the small opening provided for access to the pump house close to the dam, should suffice for purposes of accessing the pump.
- [11] I was referred by counsel for applicant to case law dealing with possession. Mr Snyman (acting on behalf of applicants) submitted that the use of the road or route is included in the concept of possession, with reference to Knox and

¹ Administrator, Cape, & Another v. Ntshwaqela & Others 1990(1) SA 705 at 717 – 721.

² Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd 2013 (5) SA 54 (WCC).

³ Ngqukumba v Minister of Safety and Security 2014 (5) SA 112 CC at para 13.

Another v Second Lifestyle Properties (Pty) Ltd and Another⁴ where it was held on appeal:

"[19] ... **The use of a road which has been despoiled, gives rise to protection under the mandament van spolie regardless of whether the road is subjected to multiple use by other person other than the applicant.** The appellants in casu were confronted with a situation where the road they have been using was closed. **They can no longer use that road. Their peaceful and undisturbed possession of that road is therefore despoiled through the closure thereof.** In my view, they are entitled to relief under spoliation. (own emphasis)

[20] One of the findings by the Court a quo in dismissing the application for spoliation is **that the appellants had an alternative route that they could have used.** Apart from the fact that the appellants in their affidavits give an explanation as to the inherent difficulties in the use of the alternative route, it is my view that this was a collateral issue which cannot be raised as a defence against spoliation. It is trite that in an application for spoliation, the applicants need to show only two grounds namely:

20.1 That they were in peaceful and undisturbed possession of the thing or in this case, the road; and

20.2 That they have been unlawfully deprived of that possession.

See in this regard Yeko v Qana 1973 SA 735A.

[21] Once an applicant establishes these two grounds, he is entitled to relief in terms of mandament van spolie. **The use of an alternative route has no relevance to the exercise of peaceful and undisturbed possession the thing. Further, it is not a defence to the unlawful deprivation of the thing possessed.** (Own emphasis)

[22] It seems to me that the remedy provided by spoliation permits very

⁴ A28/2011 [2012] ZAGPPHC 223 (11 October 2012).

limited defences. The only possible defences should be in the form of a response to the grounds stated above, namely that the applicant was not in peaceful and undisturbed possession alternatively that the deprivation of such possession was lawful. I accordingly respectfully disagree with the Learned Judge in the Court a quo that the application for spoliation should fail **on the ground that because there was or there may be an alternative route which the applicant could have used.**" (Own emphasis)

I align myself with the reasoning and views expressed herein above by Motle, J (Mngquibisa-Thusi and Tuchen JJ concurring).

- [12] In Moss and Another v Paxton⁵ the contention by the respondents that some sort of physical and continuous presence was required to establish possession under spoliation, was rejected by Traverso DJP (as she then was) with whom Van Staden AJ agreed) in holding that:

"I need not repeat what I have stated above. **In my view the appellants demonstrated clearly that they have been dispossessed of their peaceful, private and undisturbed possession of their use of the garden** and that this was brought about by the demolition of the walls."⁶(Own emphasis)

- [13] Applying the above principles to the facts of this matter I have to conclude that the applicants have made out a case that they were in undisturbed possession of both the dam as well as the road. That undisturbed possession was disturbed by the respondents wrongfully and without consent of the applicants. In respect of the road, the respondents were probably advised that their conduct constitutes spoliation and hence the tender and communication that the respondents were busy removing the fence. The applicants are therefore

⁵ (A46/2011) [2011] ZAWCHC 361 (7 September 2011).

⁶ At para [11].

entitled to an order restoring their possession ante omnia. I agree with the submission by Mr Snyman that correspondence attached to the papers, more specifically the uncontested transcribed voice message wherein the second respondent states words to the effect that they (respondents) will erect fences on the borders of their farm as there is no more neighbourliness between them, confirms that respondents intended to spoliage the applicants and ultimately succeeded. The applicants are however not entitled to an order of “unfettered” use and/or an order granting them “access”. Such orders may appear to be final in form, granting the applicants rights which in my view should not be granted under the guise of a spoliation order.

- [14] The usual order of cost is that it follows the successful party. It was submitted by Mr Van Niekerk that in the event of the applicants being successful, cost in relation to the road should only be granted up until the date of the filing of respondents’ answering affidavit in view of the respondents’ tender. Mr Snyman urged me to grant costs on a scale as between attorney and own client against the respondents in view of the background to this application, including the alleged mala fides of respondents. I do not intend making any punitive cost orders.

- [15] Accordingly, I make the following order:

1. The respondents are ordered to immediately restore the applicants’ undisturbed possession ante omnia in respect of:

- 1.1 the gravel road connecting and leading from the Farm Simonsium 594, district Reitz (adjacent to and/or across the Farm Simonsium 594, district Reitz and/or the farm Gegund 420, district Reitz and/or the farm Rietfontein 380 and/or the farm Silo 946 and/or the farm Waldo 593) to the tar road connecting the town of Reitz in the Free State Province with the town of Warden in the Free State Province; and
 - 1.2 the portion of the land situated on the farm Leland 575, district Reitz and/or the farm Waldo 593, district Reitz adjacent to the Klein Bietjie Dam, also known as the Bass Feather Dam, situated outside the town of Reitz in the Free State Province.
2. The respondents are ordered to remove all and any fences, poles and/or obstacles constructed including chains, wires, poles and locks interfering with and/or preventing applicants' undisturbed possession.
3. In the event that respondents fail to comply with this order within 72 hours of service of this order, the Sherriff for the District of Reitz, Free State is authorized to give effect to this order and do all that is necessary to restore the applicants' undisturbed possession of the road and dam specified in paragraphs 1.1 and 1.2 of this order.
4. The respondents are ordered to pay the costs, jointly and severally, the one to pay, the others to be absolved.



C. REINDERS, J

On behalf of the Applicants:

Adv C Snyman

Instructed by:

FJ Senekal Inc

BLOEMFONTEIN

On behalf of the Respondents:

Adv Van Niekerk

Instructed by:

Corne Boshoff Attorneys

c/o Phatsoane Henney Attorneys

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