

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 23065/2020 (Court a quo)

Case No. A134/2021 (High Court)

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
24/01/2022	
DATE	SIGNATURE

In the matter between:

CATHARINA MARIE PETRONELLA STEENKAMP

APPELLANT

And

CYNTHIA AUDREY JAMMINE

RESPONDENT

JUDGMENT ON APPEAL

MAKWEYA AJ

INTRODUCTION:

- [1] The Appellant, Mrs Catharina Steenkamp, appeals against an order granted by Magistrate Erasmus on the 09 October 2020 relating to a mandament van spolie that was brought on urgent basis by her in the Pretoria Magistrates Court.
- [2] On 19 August 2020 Appellant was granted the following order:
- (i) *That the Respondent is to remove the palisade gate obstruction situated on the right of way of the respective properties known as Wishbone North 480 Band C Lynwood, Pretoria, also known as Erf 619 Portions 1 and 2, Lynwood, Pretoria.*
 - (ii) *In the event of the Respondent refusing to adhere to prayer 1 supra the sheriff is authorised to remove the obstructions as referred to in prayer 1 supra, in order for the Applicant to enjoy right of way;*
 - (iii) *To order the Respondent to restore the Applicant's free, undisturbed and uninterrupted possession of right of way;*
 - (iv) *To order the Respondent to pay the costs of this application on a scale as between attorney and own client as well costs of sheriff.*
- [3] The application for a *rule nisi* was unopposed as it was on ex-parte and it was granted as prayed for.
- [4] On 02 September 2020, the Respondent filed opposing papers where after the matter was heard on the 09 October 2020. On 09 October 2020 the parties argued the matter before Magistrate Erasmus and, after hearing their arguments, the Magistrate discharged the *rule nisi* with costs against the Appellant, including costs for Counsel.

- [5] The Appellant filed a request for reasons for the orders on the 21 October 2020 and same were given to her on the 4th November 2020 and thereafter she noted an appeal on the 2 December 2020.

GROUNDS OF APPEAL

The grounds of appeal were that:

- The learned Magistrate erred in failing to find that the Appellant was in peaceful and undisturbed possession of her property;
- The learned Magistrate erred in failing to find that the Respondent disposed the Appellant's peaceful and undisturbed possession, when the palisade and gate were erected;
- The learned Magistrate erred in failing to find that the dispossession, namely the erecting of the palisade and gate was unlawful.

REASONS FOR JUDGMENT

- [6] The Applicant failed to prove on balance of probabilities that she was in possession of the Respondent's drive way gate and that the Respondent deprived her of the possession forcibly or wrongfully against her consent.

ISSUES FOR DETERMINATION

- Whether the court a quo was incorrect in finding that the Appellant was not in peaceful and undisturbed possession of the Respondent's driveway and thus discharging the rule nisi with costs order against the Appellant.
- Whether the court a quo was incorrect in ordering the Appellants to pay the costs of the application including the costs of Counsel.

SUBMISSIONS BY THE PARTIES

Appellant's version

- [7] The Appellant alleges that her property and the Respondent property is adjacent to each other and that, as a result, she used to reverse to the Respondent's driveway in order to make her way to the shared driveway of their complex. She has been utilising the Respondent's driveway for the past eight years until the Respondent constructed a palisade and gate.
- [8] She uses the Respondent's driveway because she finds it difficult to drive from her garage to the shared driveway without any assistance. Her husband is the one who normally assist her with driving out of the complex.
- [9] The driveway of the Respondent's property does not have any servitude registered on it. The servitude available is the shared driveway which is the access point from their respective properties to the main road. The servitude is detailed by figure LKEFGH on the diagram LG 10450/1999 referred to and noted in the Title Deeds of both properties.
- [10] It is common cause that the Respondent constructed the palisade and the gate on the 25 July 2020. The Appellant alleges that the Respondent erected same without informing her about it and also that she did not get a court order to erect the said palisade and gate on her property.
- [11] She was in peaceful and undisturbed possession of the Respondent driveway before the gate was constructed.
- [12] She therefore approached the High Court to set aside the judgment of the court a quo which was handed down on the 09 October 2020, discharging the rule nisi which was granted in her favour.

Respondent's version

- [13] The Respondent confirms that their properties are adjacent to each other. She also stated that due to several break-ins at her house she decided to erect a security gate at her driveway. She did not need permission from the Appellant nor a court order to erect same on her property and does not fall within the servitude area. She avers that there is no right of way on her property for anyone.
- [14] The fact that the Appellant from time to time used the driveway of the Respondent does not amount to undisturbed possession thereof as alleged by the Appellant. The Appellant was never in possession of the front entrance of the Respondent's property. There was no legal right or arrangement that the Appellant will use the driveway.
- [15] The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. The law is not concerned about the lawfulness of the Appellant's possession but the Appellant must show that she was in fact in possession at the time of being despoiled.

APPLICATION OF THE LAW

- [16] A court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.
- [17] The mandament van spolie is a possessory remedy. Spoliation is the wrongful deprivation of another's right of possession. Spoliation orders are aimed at ensuring that no man takes the law into his own hands.
- [18] In *Malan and Another vs Green Valley Farm Portion 7 Holt Hill 434 CC and Others* 2007 (5) SA 114 (ECO), the court found that the spoliation order as a final order will ordinarily

have three important results: firstly, it is not sufficient for the applicant merely to show a prima facie case; he must prove his case on a balance of probabilities as in any other civil case. Secondly, it is an order having an effect of a judgment; and thirdly, an order for costs should be made. The court went on to say that: "Spoliation is an extra-ordinary remedy in that once the applicant has discharged the onus resting upon him and no recognised defence has been raised successfully, the court has no discretion to refuse the ground of a spoliation order on the ground of considerations relating to the merits of the dispute between the parties".

- [19] In *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) at 75 B - E, the Supreme Court of appeal observed that an applicant upon proof of two requirements, he is entitled to a mandament van spolie restoring the status quo ante. The court noted that first is proof that the applicant was in possession of the spoliated thing. In this regard, the cause for possession is irrelevant hence that is why possession by a thief is protected. The second requirement is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute. The onus rests on the applicant to prove these two requirements. Furthermore, when the proceedings are on affidavit the applicant must satisfy the court on the admitted or undisputed facts, by the same balance of probabilities required in every civil suit, of the facts necessary for his success in the application.
- [20] The remedy which the Appellant claimed in its application for anti-spoliatory relief, a mandament van spolie, was consistent with what might have been expected, had it been asserting a defined right of servitude access.
- [21] It is common cause that the Appellant did not have a defined servitude right of access over the Respondent's property on her driveway. The Appellant relied in her application for spoliatory relief on the disturbance of what was contended as her right of access via an established route.

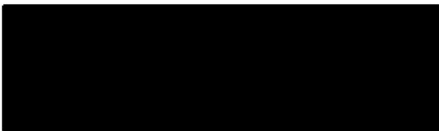
- [22] Although the Appellant's Counsel contended that the palisade and the gate of the Respondent erected, encroached on the line ED that indicate the eastern border of 1 meter-wide on the registered servitude of right of way. It is clear from the trial court documents that the Respondent's palisade and gate were not erected on the registered servitude but on her property. Further to that on the index bundle 2 on Caseline SO54, page 89 of 003-90, photo 'AA15' it also shows that the space from the Respondent's palisade gate to the other end of boundary wall is 5.5-metre-wide. The palisade gate of the Respondent is 11metre and the distance from the Appellant's gate to the main entrance gate of the complex is 45 metre which grants the Appellant enough space to turn around without entering the Respondent's drive way.
- [23] In *De Beer v Zimballi Estate Management Association (Pty) Ltd and Another* 2007 (3) SA 254 (N) (11 May 2006) at paras 41 and 54 the court considered *mandament van spolie* with regard to access to premises and found that it is there to protect possession not access. The court found that such possession must be exclusive in the sense of being to the exclusion of others. For someone to exercise physical control of premises, the key to such premises must however, be the only key to the building. The above does not apply if the owner or someone else holds a duplicate key.
- [24] In this matter the Appellant did not rely on a defined or registered right of way. The Appellant's alleged right of access over the Respondent's property is by reason of necessity to reverse into her driveway in order to avoid to reverse to the main gate. It was the Appellant's opinion to have been dispossessed of the right to enter the Respondent's driveway. It is however disputed by the Respondent that the Appellant was ever in possession of the front entrance of her driveway.
- [25] The Appellant's counsel submitted in her heads of argument that the palisade and the gate created a situation where the Appellant could no longer turn her vehicle around in the drive way and accordingly restricting the Appellant's possession of her property.

- [26] The Respondent's Counsel submitted that the Appellant rather used the driveway of the respondent in order to turn around in order to avoid reversing up to the shared driveway. It cannot be said the Appellant was ever in possession of the driveway of the respondent's front entrance of her property. The fact that the Appellant from time to time used the front entrance of the respondent's property does not amount to undisturbed possession. Inconvenience cannot be misconstrued to mean dispossession. The possession which must be proved is not possession in the Juridical sense. It may be enough if possession by the Appellant was with the intention of securing some benefit for herself, accompanied by the physical element of corpus or detention. The physical element implies physical control rather than physical apprehension.
- [27] The magistrate was correct in finding that the Appellant was not in peaceful and undisturbed possession of the Respondent's driveway when she utilised it to reverse into before the constructed gate and that it was not despoiled. This view finds support in the fact that the Respondent was exclusively in possession of the entrance to her yard which the appellants demanded from her.
- [28] I concur with the court a quo that the Appellant was never in possession of the Respondent's driveway and she was never dispossessed by the Respondent.
- [29] In light thereof, I am satisfied that the magistrate was correct in finding that the Appellant was not unlawfully deprived of her possession when the Respondent constructed the gate. As stated above, the question of lawfulness was irrelevant but however the important element is possession. Consequently, the Magistrate was absolutely correct in discharging the interim order.

[30] In the result, the following order is made:

30.1. That the appeal is dismissed;

30.2. That the appellants are ordered to pay the costs.



T.R. MAKWEYA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



M. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

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Date of hearing: 20 July 2021

**JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON THE 24th
JANUARY 2022**