

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

APPEAL CASE NO: A5073/2021

COURT A QUO CASE NO: 2020/21400

1. REPORTABLE: Yes/ No
2. OF INTEREST TO OTHER JUDGES: No Yes
3. REVISED: Yes /No
13/09/2022
Date
signature

In the matter between: -

TSHEPO GUGU CC

Appellant

and

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

**SOWETO STEEL STRUCTURAL
ENGINEERING PTY LTD**

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform.
The date for hand-down is deemed to be 13 September 2022.

Summary: Appeal against refusal to grant a spoliation order to the appellant. The

appellant erecting a billboard on municipal land. The municipality removing the billboard on the ground that appellant failed to comply sections 52 (5) and 64 (3) of the Billboards and Display of Advertisement By-law. The municipality dismantling the billboard erected by the appellant on its land.

The court below held that the appellant's peaceful possession was spoliated by the municipality.

The court below held that the remedy of *mandament van spolie* did not find application in the circumstances of the case because the property that was the subject of the dispute was dismantled or destroyed.

Mootness of the dispossession: the principles governing mootness restated. Held that the issue of dispossession was, not resolved, and thus could not be said to be moot.

The defence of impossibility: the principles governing the defence of impossibility to restore possession in spoliation matters restated.

The spoliation remedy and the determination of constitutional rights relief under sections 26 (3) and 38 of the Constitution, analysed.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an appeal with leave from the court below concerning the refusal to grant the appellant a spoliation order against the first and second respondents (the respondents). The spoliation application concerned the alleged unlawful dispossession of the appellant's right to possess an advertising billboard.

[2] The appellant¹, Tshepo Gugu, is a close corporation duly registered in terms of the laws of the Republic of South Africa.

¹ The applicant in the Court below;

[3] The first respondent², Ekurhuleni Metropolitan Municipality (the municipality), is the owner of the immovable property where the issue in dispute arose. The property is described as Portion 988, Elandsfontein 90-IR, Gillooly's Farm.

[4] The second respondent³, Soweto Steel Structural Engineering (Proprietary) Limited, is a private company duly registered in terms of the laws of the Republic of South Africa.

[5] The dispute between the parties arose following the construction of a billboard by the appellant on the above land. The appellant contended in the court below that it was unlawfully dispossessed of its billboard by the municipality.

[6] The issue raised before the court below was that the billboard was illegally constructed in that there was noncompliance with the by-laws of the municipality. The relevant by-law in this respect is the *Billboards and Display of Advertisements By-laws* of 30 March 2017 (the BDA). Section 52 (5) of the BDA provides:

"52 (5) Every application must be accompanied by the prescribed application fee and, where applicable, a deposit as determined by the Municipality from time to time."

[7] Section 64 (3) of the BDA provides as follows:

"64 (3) Every person who applies to the Municipality for permission of an advertising sign or advertisement to be displayed, must on making the application, pay to

² The first respondent in the Court below;

³ The second respondent in the Court below.

the Municipality the tariff determined, therefor, and no application will be considered until such tariff has been paid."

[8] In its *mandament van spolie* application before the court below, the appellant contended that it had in constructing the billboard that is the subject of this appeal complied with the above requirements of the BDA.

[9] The municipality opposed the appeal and contended that the decision of the court below was correct because the billboard was lawfully removed. In other words, it did not unlawfully dispossess the appellant of its billboard. This, as will appear later, is not the basis upon which the court below refused to grant the spoliation order.

Background facts

[10] It is apparent that initially, the municipality approved the erection of the billboard in June 2015. However, after its construction in 2016, the municipality complained about the failure to comply with the by-law of the appellant.

[11] Following the dispute about compliance or otherwise with the by-law, the municipality instituted a self-review application under case number 27136/2016 on 8 August 2018, seeking to review and set aside the approval of the billboard's construction. The application did not proceed further in court as the parties settled the dispute by agreement and made that an order of the court. The order was made by Victor J (Victor J's order) on 11 September 2018. The relevant parts of the order read as follows:

"THE REGULARISATION APPLICATION

- 3.1. The respondent [appellant] will submit an application to the applicant [municipality] for approval of the billboard at its current size and/or an application for the approval of an electrical billboard, at the same location as the current billboard (the regularisation application).
- 3.2. The respondent will submit the regularisation application within 30 calendar days of this agreement.
- 3.3. The regularisation application must be submitted by the respondent and will be decided by the respondent in accordance with the respondent's Billboards, and the Display of Advertisements By-laws dated 30 March 2017 and the Municipal Systems Act 32 of 2000.
- 3.4. The regularisation application must be decided within 30 days of its receipt by the applicant (the respondent).
- 3.5. Nothing in this agreement fetters the discretion of the applicant and/or its delegated officials and/or committees in respect of the determination of the regularisation application.
- 3.6. In the event that the regularisation application is unsuccessful, the applicant will:
 - 3.6.1 Either remove the billboard within 60 calendar day or such further period as agreed to between the parties, the costs of which removal are to be paid for by the respondent;
 - 3.6.2 Or reduce the billboard's size to 61m'ithin 60 calendar days or such further period as agreed to between the parties, in which event the billboard may remain erected until the fifth anniversary of the decision pursuant to which it is erect;
- 3.7. In the event that the applicant fails to remove the billboard or reduce its size to 81m within 60 calendar days or such further period as agreed to between the parties, the applicant (the municipality) will be entitled to remove the billboard or cause the billboard to be removed by a contractor, the reasonable costs of which will be carried paid by the respondent,

3.8. The respondent will have the right to seek to review and/or appeal any decision made in respect of the regularisation application."

[12] The essence of the above order was to provide the applicant with an opportunity to regularise its compliance with the by-laws governing the construction of billboards on the municipality's land. In terms of the order, the appellant had until 11 September 2020 to regularise its application for the construction of the billboard.

[13] It is common cause that the appellant submitted the regularisation application on 9 October 2018. The municipality contended that the application did not comply with the court order. After an exchange of correspondence between the parties during October 2018, the municipality's attorneys of record confirmed receipt of the regularisation application on 9 November 2018. They, however, raised the issue of the financial documentation which ought to have accompanied the application.

[14] On 26 November 2019, the municipality launched an application to compel the appellant to disclose the financial information regarding the revenue earned from the billboard (the debatement application) under case number 41691/2019. The appellant opposed the application and launched the counter application. The debatement application, which is still pending before the court, does not seem to have any bearing on this application.

[15] On 23 January 2020, the municipality addressed a letter to the appellant demanding payment for the regularisation application by the end of February 2020

and further indicated its intention to remove the billboard if there was noncompliance with the by-laws.

[16] It is common cause that the respondents commenced with the dismantling of the billboard on 20 August 2020. The appellant responded to this action by issuing a *mandament van spolie* on the same day. The matter was served before Wepener J, who issued the following order:

"2. Pending the final hearing of the matter, the First and Second Respondents and anyone under the First Respondent's mandate are interdicted, ordered and directed to forthwith:

2.1 cease and desist from taking any further steps or continuing to take steps to dismantle and remove the billboard ("the Property") situated at Portion 988 of Elandsfontein 90-IR described as Gillooly's Farm ("the Site"), or take any other steps to damage the property or render same non-functional."

The decision of the court *a quo*

[17] It is clear from the reading of the judgment that the court below agreed with the appellant that its possession of the billboard was spoliated by the municipality. In this respect, the court below held in paragraph [19] that: -

"It cannot be denied that the applicant was in peaceful possession of the billboard. "

[18] It is further clear that the court *a quo* refused to grant the relief sought by the appellant for the following reasons:

- (a) The municipality had dismantled the billboard and reduced it to a pile of steel structures.
- (b) It was not possible to order the *status quo* as the billboard had been dismantled.
- (c) The remedy of spoliation had become moot because the order made during September 2020, had expired.

[19] In brief, the court below dismissed the appellant's application because the respondents had dismantled the billboard and reduced it to a pile of steel structure; thus, restitution could not be ordered. It further found that it could not order restitution because the order made by Victor J had lapsed.

The grounds of appeal

[20] The applicant contends that the court below erred or misdirected itself in finding that:

- "2.1. the first respondent opposed the relief on the basis that the property sought to be restored ceased to exist. This defence according to the applicant was never raised by the respondent in its answering affidavit.
- 2.2 it is further contended that the respondent never placed before the court below facts to support the proposition that the billboard was destroyed to the extent that it cannot be restored to its previous position.
- 2.3 the finding that the restoration was impossible because the billboards were reduced to a "pile of steel structures" was also criticised on the same ground that the issue was raised in the founding papers of the parties."

The municipality's defence

[21] As indicated above, the municipality opposed the appellant's application and summarised its defence as follows:

- (a) The respondents never took the law into its own hands and acted in terms of a Court Order;
- (b) There was never unlawfulness on the side of the respondents, nor did the appellant have undisturbed possession;
- (c) The respondents' actions did not constitute spoliation;
- (d) The appellant failed to establish the requirements of spoliation.

[22] In opposing the application, the municipality contended in the heads of argument that the spoliation relief was unavailable because the property which was the subject matter, had been destroyed or dismantled. According to the municipality, the property could not be restored to the original structure.

[23] The first respondent contended in the heads of argument that it was authorised by the order made by Victor J to remove the billboard.

[24] The first respondent also referred to the contempt of court application raised by it under case number 4169/2020. This matter is still pending before the court and is not part of this appeal.

[25] The municipality further contends that the relief sought has become moot because the period for which the applicant was permitted to regularise its application lapsed on 11 September 2020. The other point raised by the municipality is that the

appellant did not disclose the facts upon which the first respondent is required to rebuild or reconstruct the billboard.

[26] The municipality further argued that the appeal stands to fail on the following three grounds:

"Firstly, the provision of clause 4 of the settlement agreement, which permits the existence of the appellant's billboard until such time the regularisation application has been determined. [30 day period from 11 September 2018].

Secondly, the appellant's failure to obtain approval of its regularisation application entitled the municipality to remove/dismantle, the billboard in terms of clause 3.7 of the settlement agreement.

The settlement agreement only permitted the billboard to be on site for a further period of 2 years, only in the event that the appellant's regularisation application was approved, which was not. In any event, two years lapsed on 11 September 2020."

Evaluation and analysis

[27] As alluded to earlier, the municipality has raised as a point *in limine*, the mootness of the appellant's case. The basic principle governing this issue is that a court should not decide on academic issues or make an order that would have no practical effect. The approach to dealing with the issue of mootness as envisaged in section 16(2)(a)(i) of the Superior Courts Act,⁴ was set out by the Constitutional Court

⁴ Act number 10 of 2003. Section 2 (a) (i) of the Superior Courts Act reads as follows: "(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone."

in *President of the Republic of South Africa v Democratic Alliance & others*,⁵ the Constitutional Court per Mogoeng CJ as follows:

"[17] This would ordinarily put an end to this application. But, this court has the discretionary power to entertain even admittedly moot issues. In *Langeberg* we said that we have — "a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require." [*Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC)] [18] And in *Shuttleworth* we said — "to the extent that it may be argued that this dispute is moot . . . this court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear the matter."

[28] I do not agree with the municipality that the issue of possession in the present matter has become moot. The municipality seems to conflate the issue of the right of possession with the other underlying rights in the property, such as ownership and control over the property. The underlying legal principle in this regard is expressed in the maxim, "*spoliatus ante Omnia restituendus est*," meaning:

"... before the court will allow any enquiry into the ultimate rights of parties, the property which is the subject to the act of spoliation must be restored to the person from whom it was taken, irrespective of the question as to who is in law entitled to such property," or

'the despoiled person must be restored to possession before all else.'

[29] In *Midvaal Local Municipality v Meyerton Golf Club*,⁶ the court held that:

⁵ 2020 (1) SA 428 (CC),

⁶ A3038/14) [2014] ZAGPJHC 235 (15 October 2014) at paragraph [7].

"[7] The nature of a *mandament van spolie* is such that a possessor, even if he be a fraud, robber or thief, is entitled to possession prior to issues arising from such possession being determined by a court. By analogy, it would also be so in the case of someone breaking the law, such as the respondent, who acted in contravention of a by-law, as the issue of the possessor's fault is irrelevant."

[30] In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*,⁷ the Supreme Court of Appeal said:

"Under [the *mandament van spolie*], anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante Omnia restituendus est*). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the *mandament's* protection. The principle is that illicit deprivation must be remedied before the courts will decide competing for claims to the object or property."

[31] In my view, the proposition by the municipality that the issue of dispossession in the present matter was resolved by clause 4 of the agreement, which permitted the existence of the appellant's billboard until the regularisation application was determined, is an incorrect approach to the issue. As stated elsewhere in this judgement, whilst the regularisation application was submitted to the municipality, there is no evidence that it was ever determined. Thus the condition in the agreement that the municipality would be entitled to remove the billboard once the regularisation application was rejected never materialised.

⁷ [2007] ZASCA 70; 2007 (6) SA 511 (SCA) at para 21.

[32] The court below also found on a different basis that the matter had become moot. It did so on the basis that the order of Victor J had lapsed. It is correct that Victor J's order lapsed before all its terms could be complied with. However, in my view, the court below misinterpreted the order for the following reason. The essential aspect which that order dealt with was the regularisation of the applicant's application for erecting the billboard. The power or authority of the municipality to remove the billboard based on Victor J's order depended on the following conditions:

- (a) application by the applicant to regularise its application to erect the billboard, and
- (b) the rejection of the regularisation application by the municipality.

[33] Although there was some toing and froing between the parties about the issue of the regularisation of the application for the erection of the billboard, there is no dispute that the applicant did submit the application in accordance with Victor J's order. There is also no dispute that at the time of the expiry of the order, the municipality had not made any decision as to the outcome of the application. Put another way, the order expired before the municipality could consider and determine the regularisation of the application. It, therefore, means that the issue of dispossession remained in dispute even after the expiry of Victor J's order. In terms of the agreement, the issue of dispossession would probably have been addressed and become moot had the regularisation application been considered and rejected by the municipality.

[34] As indicated above, the court ruled that the appellant was in peaceful possession of the billboard when the municipality disturbed that peaceful possession.

It, however, found that the spoliation remedy was not available because the billboard had been destroyed.

[35] It is important to note in light of the above finding of the court below that the municipality did not file a counter appeal, and thus the finding that the appellant's possession had been spoliated stands. Accordingly, the contention that the municipality acted legally in removing the billboard is unsustainable.

[36] Given the finding that the municipality illegally interfered with the applicant's peaceful possession, the issue, as alluded to earlier, is whether the court below was correct in refusing to award the applicant the remedy of *mandament van spolie*.

The principles governing spoliation remedy.

[37] The principles governing the remedy of spoliation are well established in our law. The two basic requirements to succeed in an application for spoliation are namely:

- (a) the applicant was in possession of the property.
- (b) that the respondent wrongfully dispossesses the applicant of his or her peaceful possession.⁸

[38] The underlying purpose of the remedy of *mandament van spolie* is to restore possession to the party complaining that his or her dispossession was unlawful. The

⁸ See *Mdlulwa and another v Gwija and others* 1992 [3] SA776. (TK.).

fundamental purpose of this remedy which has been restated many times by the courts, is to promote the rule of law and discourage self-help. As alluded to earlier, it applies irrespective of the nature of the possession.

The issues

[39] Given the finding that the municipality unlawfully interfered with the applicant's lawful possession, the two issues for determination in this appeal, are the following:

- a. was the impossibility of restoring the billboard raised in the founding papers that served before the court below to warrant making a determination in that regard.
- b. do the facts of this case supports the conclusion by the court below that there is an impossibility of restoring the possession of the billboard?

[40] In general, two defences may be raised in relation to the impossibility of restoring possession in a claim of *mandament van spolie*, namely: –

- (a) the property in issue has moved to a third party.
- (b) the property in issue is damaged to the extent that it is irreparable or no longer exists.

[41] In support of its defence of impossibility of restoration of the dispossession, the municipality relied on the Supreme Court of Appeal decision in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*,⁹ where the extent of the nature of the *mandament van spolie* remedy was

⁹ 2007 (6) SA 511 (SCA).

considered. I will revert to the details of that decision later. The other case that the municipality relied on is *Moosa v Ramsugit*,¹⁰ where the court refused to grant a spoliation relief to the applicant where the respondent had removed and destroyed the property in question.

[42] The issue of impossibility to restore possession before the present constitutional dispensation received attention in *Fredericks and Another v Stellenbosch Divisional Council*.¹¹ In that case, the applicants had erected shacks on the municipal land. In evicting them, the municipality demolished their homes and belongings, including discarding their building materials. In their application, they sought restoration of their possessions, including the building materials, made up mainly of sheets of corrugated iron. They also sought to have the municipality reconstruct their homes.

[43] The court rejected the defence of impossibility of restoration by the municipality, and granted *mandament van spolie*. The municipality was ordered to re-erect the homes, even though the initial material through which the homes were constructed had been destroyed. The court further ordered that in the event that the original building sheets could not be found, the municipality should use sheets of similar size and quality as that of the original.

[44] In essence, the decision in *Fredericks* extended the common law possessory remedy of *mandament van spolie* to a general remedy against unlawfulness.

¹⁰ 2020 JDR 0111).

¹¹ 1977 (3) SA 113 (C).

[45] In the current constitutional dispensation, the issue of whether the remedy of *mandament van spolie* was available where the dispossessed property had been destroyed received attention in various decisions of the courts. In *Tswelopele*, the Supreme Court of Appeal adopted an approach different to that in *Fredericks*. The applicants in that case (*Tswelopele*) approached the High Court after they had been evicted from their shacks and the materials used to construct their dwellings destroyed. The High Court, following the decision in *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others*,¹² held that *mandament van spolie* remedy was not available because the property in question had been destroyed. In this regard, the court per Nugent J held that:

"In my view, the weight of authority supports the proposition that a spoliation order cannot be granted if the property in issue has ceased to exist. It is a remedy for the restoration of possession, not for the making of reparation."

[46] The Supreme Court of Appeal confirmed as correct the approach which was adopted in *Rikhotso* and stated per Cameron JA as follows:

"24 The doctrinal analysis in *Rikhotso* is, in my view, undoubtedly correct. While the *mandament* clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent. To insist that the *mandament* be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function)."

¹² 1997 (1) SA 526 (W) at 535 A – B.

[47] The Constitutional Court confirmed the above approach in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality*,¹³ where it was held that:

"[24] A spoliation order, then, does not determine the lawfulness of competing claims to the object or property. For this reason, there are, under the common law, only a limited number of defences available to a spoliation claim, impossibility being one of them. In *Rikhotso*, it was held that a spoliation order may not be granted if the property in issue has ceased to exist and that it is a remedy for the restoration of possession, not for the making of reparation. This was confirmed as correct by the Supreme Court of Appeal in *Tswelopele*."

[48] It is important to note that the Constitutional Court in *Schubart Park Residents' Association* pointed out that a distinction needs to be maintained between "possessory focus" of the spoliation remedy and the determination of constitutional rights relief under section 38 of the Constitution,¹⁴ in particular relating to rights envisaged under section 26 (3) of the Constitution.¹⁵

[49] I turn now to the question of whether the defence of impossibility was established in the present matter. The first question to answer in this regard is whether the defence of impossibility of restoration of possession was raised by the municipality

¹³ 2013 (1) SA 323 (CC).

¹⁴ The relevant parts of section 38 read as follows: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

¹⁵ Section 26 (3) of the Constitution reads as follows: "(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." As is apparent from the reading of this section the issue of dispossession generally arises from an alleged illegal eviction.

in the answering affidavit. The second question is, if found that the defence was pleaded in the answering affidavit, whether the facts support such finding by the court below.

[50] The question of whether the defence of impossibility was raised in this matter arises from the nature of these proceedings, namely motion proceedings. It follows from the fact that these are motion proceedings that the notice of motion and the affidavits of both parties constitute the pleadings and evidence. Thus for the applicant, its case had to be set out in the founding affidavit and similarly, for the municipality as the respondent, its case has to be set out in the answering affidavit.¹⁶ It is, as a matter of principle, impermissible for an applicant to make out his or her case in the replying affidavit, nor is it permissible for any party, for that matter, to make out a case in the heads of argument.¹⁷

[51] In the present matter, the appeal record reveals that the municipality pleaded in paragraph 71 of the answering affidavit that the applicant's application is incompetent. This averment is not substantiated in the answering affidavit; neither is the defence of impossibility pleaded.

[52] The issue of the defence of impossibility of restoring possession was raised for the first time in paragraph 32 of the municipality's heads of argument. It is contended in the middle of that paragraph that:

¹⁶ See *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200 D.

¹⁷ See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H – 636D.

"It is common cause that the applicant's Billboard is made out of steel, and at the time the applicant approached this Court, the Municipality and its Agent had already partially destroyed or dismantled the Billboard, and on this basis, spoliation is not a competent remedy as the granting of such an order will effectively need the Municipality to rebuilt the applicant's steel Billboard."

[53] It is apparent from the reading of the judgment that the court below accepted the defence of impossibility of restoring possession on the basis of what the municipality raised in its heads of argument. In this respect, paragraph [28] of the judgment reads as follows:

"[28] As already stated, the enquiry into the existence of the property forming the subject matter of the spoliatory relief is factual. In the instant case, the respondents dismantled the billboard, made of steel structure.

As matters stand, the billboard has been reduced to a pile of steel structures. Ordering (that) the status *quo ante* would, in my view, be to vindicate and not be spoliatory. Consequently, possession will not be possible as the billboard has been dismantled."

[54] In concluding that the remedy of *mandament van spolie* did not find application in this matter, the court below did so on the basis of the facts which were not properly before it. The finding was made outside the case pleaded by the municipality. Put differently, the court below decided on a defence that was not defined by the municipality's answering affidavit. Thus the applicant had no opportunity of dealing with the issue, and accordingly, this was unfair. In essence, the approach that the court

below ought to have adopted was to have refused to entertain the defence of impossibility.¹⁸

[55] I proceed to deal with the issue of whether the evidence on the record supports the finding of the court below that the billboard no longer exists.

[56] As correctly pointed out by the court below, a factual inquiry has to be conducted to determine whether or not a property which is the subject of dispossession no longer exists or has been damaged to the extent it cannot be reinstated. In *Administrator, Cape and Another v Ntshwaqela and Others*,¹⁹ the court held that:

"In the context of the *mandament van spolie*, impossibility is a question of fact, and where it is contended that an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts."

[57] As alluded to elsewhere in this judgment, the court below, in dealing with the issue of the billboard, held that:

"In the instant case, the respondents dismantled the billboard, made of steel structure. As matters stand, the billboard has been reduced to a pile of steel structures. Ordering that the status *quo ante*, in my view, be to vindicate and not be spoliatory. Consequently, possession will not be possible as the billboard has been dismantled."

[58] The above finding is not supported by the facts appearing on the appeal record.

¹⁸ *Seal v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 10.

¹⁹ 1990 (1) SA 705 (A) at 720 G-H.

[59] It is clear from the above authorities that the defence of impossibility finds application where the property in question has ceased to exist or is destroyed.

[60] In the present matter, the finding of the court below is not that the property no longer exists but rather that "the respondents have dismantled the billboard."

[61] In my view, even if the word "dismantled" was to be interpreted to mean "destroy the integrity or functioning" of the billboard, that is not supported by the appeal record.²⁰

[62] There is no evidence that the billboard was not standing at the time the matter served before the court below. The pictures that appear at pages 046.7 – 35 and 37 of *CaseLines* depict a truck in front of the billboard with the crane indicating the process of dismantling or removing the structure from the steel pole. This process was incomplete at the time the matter served before the court below. The process was interrupted by the order made in favour of suspending the dismantling of the billboard by Wepener J. It is also important to note that one of the pictures was taken on the same day as that order. In fact, the proper interpretive analysis of the judgment is that the billboard was removed rather than destroyed. At worst, the application of the facts is that the billboard was dismantled and not destroyed. Thus the effect of the relief sought by the applicant would be to have the billboard returned to the applicant in its re-assembled form.

²⁰ Miriam.Webster.com/dictionary/dismantled.

[63] The court below, therefore, erroneously made factual findings that are not supported by the facts contained in the answering affidavit of the municipality and as stated earlier this has resulted in unfairness to the appellant.

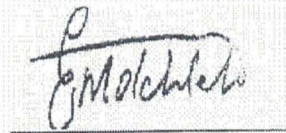
[64] In light of the above I find that the appellant has made out a case warranting interference with the decision of the court below.

Order

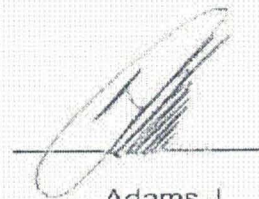
[65] In the circumstances the following order is made:

1. The appeal is upheld with costs.
2. The order made by the court below on 13 August 2021, dismissing the appellant's application is set aside and replaced with the following order:
 - 2.1 The first and second respondents are ordered to restore the status quo ante by returning to the applicant's possession the billboard situate at Portion 988 of Elandsfontein 90-IR described as Gillooly's Farm.

I agree

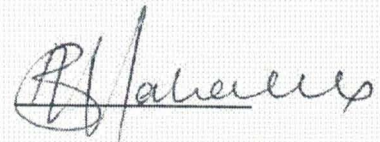


E Molahlehi J



Adams J

I agree



Mahalelo J

Representation

For the appellant: Adv W Krog

Instructed by: Peter Le Mottee Attorneys

For the respondent: Adv E Sithole

Instructed by: AF Van Wyk Attorneys

Date of the hearing: 18 May 2022.

Delivered: 13 September 2022.
