

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4122/2016

In the matter between:

HENDRINA WILHELMINA MEINTJIES N.O. First Applicant

GERDINE STOLTZ N.O. Second Applicant

SCHALK WILLEM MEINTJES N.O. Third Applicant

ANDRE MEINTJES Fourth Applicant

HENDRINA WILHELMINA MEINTJES Fifth Applicant

and

LLOYD NEL BK First

Respondent

JOHANNES PETRUS NEL Second Respondent

BLANCHE NEL Third Respondent

CORAM: PHALATSI, AJ

HEARD ON: 09 SEPTEMBER 2016

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 09 FEBRUARY 2017

[1] The applicants approached the court for an order in the following terms:

2.1 The Applicants' possession of the immovable property better known as **"Die omheinde werf insluitend twee woonhuise en buitegeboue gelee op die eiendom bekend as Gedeelte 1 van die plaas M. [...], distrik Reitz, Provinsie Vrystaat"** be restored;

2.2 The Respondents are ordered and directed to restore the Applicants' usage and enjoyment of the immovable property;

2.3 The Respondents are ordered and directed to remove all piles of gravel on the road leading to the abovementioned immovable property;

2.4 The Respondents are ordered and directed to remove all of their equipment, tools and belongings from the store room situated on the abovementioned immovable property;

2.5 The Respondents are ordered and directed to remove all of their furniture, tools, equipment, personal belongings and decorations from the immovable property.

[2] The facts of the case are briefly as follows:

The applicants allege that a lease agreement was entered into in terms of which the Wilandre Trust leased the immovable property described as "Die omheinde werf insluitende twee woonhuise en buitegeboue gelee op die eiendom bekend as Gedeelte 1 van die plaas M. [...], distrik Reitz, Provinsie Vrystaat", from the first respondent. It is apposite to deal with this aspect at this early stage of the judgment, in respect of the respective arguments advanced by both parties. The respondents aver that the purported lease agreement is a nullity because it does not provide for the payment of rent. The applicants argue, correctly in my view, that the validity of this agreement is

irrelevant for the purpose of the present application. What is clear is that when the fourth and fifth applicants sold the farm to the respondents, they reserved to themselves the right of occupation of the residential part of the farm, analogous to the right of *Habitatio*. The respondents do not appear to dispute this fact. It is further common cause that the property which is the subject matter of the case, consists of two houses and the outside building, which is referred to as "the storeroom". It is further common cause that gravel and soil was dumped on the gravel road leading to the immovable property where the fourth and fifth applicants resided. It is this dumping of the gravel on the road that the applicants aver deprived them of possession, usage and enjoyment of the immovable property in that they could no longer tow their caravan into their residence.

[3] The applicants further allege that the respondents removed a big Banktia Rose Plant from the small house and started renovating same. The respondents also removed the applicants' equipment, tools and other belongings from the outside building (storeroom). The respondents further constructed a "hang moth" under one of the trees in the garden, which area the applicants used for activities such as skinning sheep, relaxing and spending time with their grandchild. The applicants were in peaceful and undisturbed possession of the entire immovable property and they were deprived of their possession, usage and enjoyment in an unlawful manner, so the argument goes.

[4] The respondents, on the other hand, aver that a contractor by the name of Mr. Sibanyoni was contracted by the Nketoane Local Municipality to do excavations and to lay water piping in the excavated ground, which excavation covered a distance of 9 Kilometres over their farms. They then agreed with the said Sibanyoni that the excess gravel should be used to improve the particular access road, instead of having to transport it away. This would improve

the condition of the road and make it more accessible and user friendly, in times of rain. The applicants did not dispute this averment that the road would be improved. Sibanyoni then dumped the gravel on the said access road in heaps and said that he would only level the gravel with a grader, once the construction in the area is finished. The respondents aver that this was discussed with the fourth applicant and he agreed thereto, which averment is denied by the fourth applicant. It is, however, common cause that there was a two track farm road, next to the original road, which was utilised by the vehicles to access the farm. The main argument of the applicants is that they cannot access the property with their caravan. In respect of the small house, the respondents aver that they were handed the keys to the said house by the applicants.

[5] The respondents then made an application to strike out certain paragraphs in the applicants' replying affidavit, on the basis that they constitute argumentative matter. The other paragraphs should be struck out on the basis that they constitute new evidence which should have been included in the founding affidavit. I then made a ruling that the paragraphs which are said to be argumentative should remain as the respondents did not show that they would suffer any prejudice, and the paragraphs which constituted new evidence, should be struck out. These paragraphs related solely to the dimensions and size of the applicants' caravan and photographs showing that it was impossible to access the residence of the applicants whilst towing a caravan.

[6] The applicants allege a number of different occasions of spoliation and I will, therefore, deal with specific aspects of those instances, although it might not be in the order in which the parties have dealt with them. It is trite that in an application of *mandament van spolie*, the applicant must allege and prove, on a balance of probabilities, that he/she was in peaceful and undisturbed possession of the thing and that he/she was unlawfully dispossessed of the

said thing.

SPOLIATION OF THE SMALL HOUSE, STOREROOM AND YARD

[7] It is common cause that the applicants handed over the keys of the small house to the respondents. The applicants allege that the agreement that led to the keys being given to the respondents was conditional upon the finalization of the question of the usage of electricity. As I have already alluded to, in a spoliation application, the court is not required to determine the merits of the underlying agreement, as the only aspect to be dealt with is possession and unlawful dispossession of a thing. In the present case, the applicants voluntarily relinquished possession of the keys and it can, therefore, never be said that they were unlawfully dispossessed of the small house. It is equally true that they have not shown that they have been dispossessed of the storeroom or outside building, in that they no more had access to the said room. They have also not shown that they can no longer use the storeroom for the purpose that they were using it, because of the actions of the respondents. This also holds true for the yard. The applicants have failed to show that the conduct of the respondents has prevented them from slaughtering their sheep under the tree, nor prevented their grandchildren from playing there. The mere placing of the ornaments and signs on the ground yard by the respondents, does not in any way disturb or dispossess the applicants of their use or enjoyment of the yard or garden. I find it difficult to imagine that a person can be given possession of the house, without having access or use of the yard, garden or storeroom. These are common places that are used by the people who are having different houses in the same yard. It cannot be expected of the respondents to have possession of the small house and have nothing to do with the garden, yard or storeroom. The sharing of these facilities does not amount to dispossession thereof.

THE ACCESS ROAD

[8] Mr Snellenburg, on behalf of the applicants, relies on the cases of Nienaber v Stuckey 1946 AD 1056 and **Willowvale Estates and Another v Bryanmore Estates (Ltd) 1990 (3) SA 954 (W)** and argues that the existence of other points of access or routes is not a defence to an act of spoliation. The cases that he relies upon are cases where the respondent had locked a specific gate giving access to a road, which had always been used by the applicant. The applicants state as follows in their founding affidavit:

"It is indeed so that the gate in question is on the First Respondent's property and I agree that the Applicants will not use this gate under normal conditions ..."

In the present case, therefore, there is no allegation that the applicants have been deprived of the right of access through the specific gate or route. The applicants have always had access to the house through the specific route and used the specific gate. It is not the route that had been changed but the surface of the road which was used. Indeed, it was conceded by Mr Snellenburg that there was no single instance where the applicants were not able to access their residence because of heaps of gravel on the road. The only emphasis of the applicants was that they could not access their residence whilst towing a caravan. This begs the question whether the inability to access their residence whilst towing a caravan amounts to spoliation and unlawful deprivation of the use of the road. I do not think so. The right of access is that of the applicants by car, and not the caravan.

The further point to be dealt with, is whether the placing of gravel on the road with a view to improve the said road amounts to unlawful dispossession of the use of same. It is not sufficient for the applicants to only prove that they have been dispossessed of the use of the road; they must also prove that the said dispossession was unlawful. As I have already pointed out, it is not disputed that the sole purpose of placing of the gravel on the road was to improve the said road. I fail to understand how can it be said that

improvement of the road can be held to be unlawful. The road is improved to the advantage of all the parties involved, including the applicants.

I therefore can come to no other conclusion but to find that the applicants have failed to prove that they have been unlawfully deprived of the right of access to their residence by the respondents.

[9] I therefore make the following order.

The application is dismissed with costs.

N.W. PHALATSI , AJ

On behalf of applicant: Adv. N Snellenburg SC

Instructed by:

Phatshoane Henney Inc.

Bloemfontein

On behalf of respondents: Adv. L Pohl SC

Instructed by:

Symington & De Kok

Bloemfontein