



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 2627/15

In the matter between:

LÖTTER C.J. & 1 OTHER

Applicant

And

UYS C

Respondent

JUDGMENT

CORAM: LEVER AJ

1. In this matter the applicants were granted an urgent interdict in the form of a *rule nisi* to restore a right of way to their farm. The said right of way passed over the respondent's land. The applicants claimed that the respondent unlawfully deprived them of the use of this right of way by building a motorised gate which blocked the relevant road. The said gate could only be opened by way of a remote control and respondent refused to provide the applicants with a remote control to open such gate. The applicants obtained an interim order in their favour on the 21 December 2015 and on the extended return day the matter was argued as an opposed motion.

2. The applicants claimed the right of way over the respondent's land on the basis that the relevant road is a proclaimed 'divisional road'. Applicants claim that they had been using the said road for 15 years and that their predecessors in title had also used such road. On this basis, the applicants claimed that they were in free and undisturbed possession of the right to use the relevant road prior to the respondent's spoliation.
3. Applicants claimed that the act of building the new gate and more specifically refusing to provide applicants with a remote control to open such gate constituted a spoliation.
4. The respondent admits the contention that the applicants have used the relevant road for some 15 years. However, respondent attacks applicants' right to invoke the mundament van spolie on several grounds. Firstly, respondent contends that applicants have not shown that the proclaimed divisional road, in terms of which they claim the right of way, traverses the respondent's land. Secondly, respondent asserts that the applicants have not made out a case for acquiring the said right of way by means of acquisitive prescription. Thirdly, respondent also asserts that the applicants have not made out a case that they had acquired the right of way by way of necessity. Fourthly, there is a general assertion that applicants' have not made out a case for the relief claimed based on a right of way. Finally, respondent contends that there is an alternative route on a proclaimed divisional

road which is, a shorter route to the applicants' home in Kimberley and that this should be the main route to the applicants' farm.

5. The applicants annex to their papers a proclamation by the Divisional Council of Kimberley, which had been approved by the relevant Administrator. This proclamation was published in the Provincial Gazette on the 28 November 1958 as P.N. 759/1958. The respondent does not challenge this proclamation on any basis and in the circumstances, must be taken to have admitted it.
6. The said proclamation proclaims several minor roads in the jurisdiction of the Divisional Council of Kimberley. The road in issue is the 9th one on the said list. The format of the said proclamation is that on the extreme left of the page the minor roads are numbered in a list format under the heading "No." (Nommer). The next heading is "Aanvangspunt" (point of origin). The next heading is "Roete" (Route). Which is followed by the heading "Eindpunt" (point of termination). Finally, on the extreme right of the page the heading "Mylafstand" (distance in the old measure of miles).
7. The point of origin for the relevant road is described as "Afdelingspad no. 57 op Bothaspoort." (Divisional road number 57 at Bothaspoort). The route is described as "Suid oor Panfontein, Skietpanskop, Rooikraalfontein, Groenvlei en Rietpan-Oos". The point of termination of the said proclaimed divisional road is described as "Grens van

Oranje-Vrystaat” (now simply known as the Free State). Finally, the length of the said divisional road is said to be 9 miles.

8. Mr Van Niekerk SC who appeared on behalf of the respondent argued that the applicants had not established that the road upon which they traversed the respondent's land was the proclaimed divisional road that appeared on the said proclamation as item 9. To illustrate this argument as well as the argument relating to the alternative route Mr Van Niekerk referred the court to a map that respondent had annexed to his papers, which had been marked annexure “CU1”.
9. Mr Van Niekerk pointed out that the proclamation stated that the relevant road started at Bothaspoort, it then went South over Panfontein and that, with reference to the map (annexure “CU1”), it was not possible to find Panfontein South of Bothaspoort. Mr Van Niekerk then referred to the proclamation and submitted that as the respondent's farm was not named in the relevant proclamation, the applicants had not established that such proclaimed road did traverse respondent's farm. Accordingly, Mr Van Niekerk argued the applicants cannot rely on the said proclaimed divisional road as the basis for their right of way over the respondent's land.
10. Mr Van Niekerk then submitted that if the applicants' right of way cannot be founded on the proclaimed divisional road then applicants' right of way was nothing more than a concession (“n vergunning”). This submission was linked to the argument that if possession was not

direct possession of a corporeal object it must be possession of the right to use the property (“gebruiksregte”) that is incidental to possession and control of the property. Otherwise, it was submitted that the applicants would not qualify for the protection of a spoliation order. Mr Van Niekerk based this argument on the authority of the Supreme Court of Appeal (SCA) decision in the matter of **First Rand Bank t/a Rand Merchant & Another v Scholtz N.O. & Others**¹.

11. Mr Van Niekerk further submitted that on the authority of the judgment of the SCA in the matter of **ATM Solutions (Pty) Ltd v Okru Handelaars CC and Another**², ordinary contractual rights as opposed a right to use the property or a right which is incidental to possession and control of the property, do not qualify for the protection of a spoliation order.

12. Mr Van Niekerk then submitted that the concession (“vergunning”) which the respondent and his predecessors in title afforded the applicants was nothing more than a contract and as such did not qualify for the protection afforded by a spoliation order.

13. Mr Van Niekerk conceded that if I found the applicants’ right of way to be based on the proclamation of the divisional road then the argument relating to the applicability of a spoliation order to a contract would fall away.

¹ [2006] JOL 18273 (SCA).

² [2009] 2 All SA 1 (SCA).

14. Mr Jankowitz, who appeared on behalf of the applicants, argued that not all farms which the relevant road traversed were named in the proclamation. There is some merit in this argument.
15. It appears from the proclamation, the relevant extract of which is already quoted in full above, read with the map supplied by the respondent, being annexure “CU1” to respondent’s answering affidavit, that the Kimberley Divisional Council used a mixture of farm, village, hamlet or settlement names, when describing the route that the relevant road followed.
16. The point of origin of the relevant proclaimed road is from the village or hamlet of Bothaspoort. The said road runs south over Panfontein. As Previously stated Panfontein cannot be located South of Bothaspoort. I am unable to say if the Panfontein mentioned in the proclamation referred to a village, hamlet, settlement or farm. It is possible that Panfontein referred to a settlement, hamlet or village that ceased to exist before the map was drawn.
17. It is also possible that Panfontein referred to a farm that might have had its name changed because of subdivisions or consolidation or merely a change of name before the map was drawn. Clearly, on the evidence before me I cannot reach a conclusion on this question. However, on the facts of this particular case, I do not believe that it is necessary for me to resolve this issue.

18. Respondent on his own version states that he lives on the farm “Leeuwpoort” but that the farm is also known as Dagbreek. The farm “Leeuw Poort” appears on the map supplied by the respondent but there is no reference to the farm also being known as Dagbreek on the said map. This, and the Panfontein issue, illustrates that we are dealing with a proclamation that is many decades old while trying to reconcile it with a map whose date of publication is unknown.
19. The reference to Skietpanskop in the proclamation is interesting. In the title deed to applicants’ farm, annexure “CJL1” to the founding affidavit, their farm is described as “Die plaas SCHIETPANSKOP 23”. This is the same description that appears on the map supplied by respondent. However, the map also shows a settlement or hamlet on the said farm whose name is spelt “Skietpanskop”. The road in question runs directly to that settlement or hamlet. As set out above, the proclamation refers to “Skietpanskop” an indication that the proclamation referred to the settlement or hamlet rather than the farm.
20. In relation to Rooikraalfontein the proclamation probably refers to the farm because, that reflects the most direct route to “Groenvlei” and “Rietpan East”, as described on the map (Rietpan-Oos as described in the proclamation). Both Groenvlei and Rietpan East appear to be settlements or hamlets on the map.

21. It is also important to bear in mind that the map indicates that there is only one road originating in the hamlet of Bothaspoort that heads South from Bothaspoort. This is the road that travels over the respondent's farm as well as the applicants' farm. Save for Panfontein, this first road traverses all of the farms, hamlets, settlements or villages that indicate the route in the relevant proclamation.
22. The other road that the map indicates does not originate at Bothaspoort, but passes through Bothaspoort and this road is oriented in a west to east direction and maintains this orientation for some distance after Bothaspoort before it turns in a South-Easterly direction. Furthermore, this road that passes through Bothaspoort from West to East does not traverse any of the farms, villages, hamlets or settlements indicated as waypoints or the route of the relevant road described in the proclamation.
23. Taking the above factors into account, the only reasonable conclusion that this court can reach is that the applicants have established that the right of way which they claim, is a right of way over the road described in the relevant proclamation. By no stretch of the imagination can it be said that the respondent has established a real dispute of fact on this question. The mere fact that respondent's farm is not mentioned in the proclamation does not mean that the relevant proclaimed road does not traverse respondent's farm. The other reference points in the relevant part of the proclamation show

that such road must traverse the respondent's farm. The map supplied by the respondent substantiates and supports this conclusion.

24. That being the case, it is not necessary for me to consider the other arguments and defences raised by and on behalf of the respondent. The respondent has admitted that applicants have used this right of way for some 15 years before he deprived them of its use by building the remote-controlled gate referred to and refusing to supply applicants with a remote-control making it impossible for applicants to continue to have the benefit of such right of way.

25. Clearly, on the facts before the court, the applicants were in free and undisturbed possession of this right of way prior to the spoliation referred to above. In these circumstances, the applicants are entitled to confirmation of the *rule nisi* issued on the 21 December 2015.

26. The last remaining issue is the issue of costs. Applicants have sought a special order that costs be awarded on a scale as between an attorney and his own client.

27. Mr Van Niekerk submitted on the authority of the Appellate Division decision in the matter of **NEL v WATERBERG LANDBOUWERS KO-OPERATIEVE VEREENIGING**³ that the facts of this case did not warrant a costs order of the type sought by the applicants. In my view Mr Van Niekerk is correct. However, the applicants are the successful

³ 1946 AD 597.

party and in the circumstances, they are entitled to their costs. Accordingly, they will be awarded costs on the ordinary party-and-party scale.

In the circumstances, it is ordered that:

- 1) The *rule nisi* issued out of this court on the 21 December 2015 is confirmed.
- 2) The respondent is ordered to pay the applicants party-and-party costs.

Lawrence Lever
Acting Judge
Northern Cape High Court

On behalf of Applicant:	Adv D Jankowitz	Haarhoffs In
On behalf of Respondents:	Adv J Van Niekerk SC	Duncan & Rothman
Date of hearing:	05 August 2016	
Date of Judgment:	11 November 2016	