

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
③ REVISED. ✓	
27/3/2015	
<u>DATE</u>	<u>SIGNATURE</u>

10/3/15

Case Number: A859/2014

In the matter between:

POTCH BOUDIENSTE BK

1st Appellant

Registration Number: 1997/003362/23

(1st Applicant *a quo*)

and

VAN DER HOFF PARK EXTENSION 39 HOME

2nd Appellant

OWNERS ASSOCIATION NPC

(2nd Applicant *a quo*)

Registration Number: 2012/087892/02

and

STRENDI CAST PROPERTIES CC h/a HABIPLAN

1st Respondent

ESTATES

(1st Defendant *a quo*)

Registration Number: 2010/042334/23

and

ALTIVEX 174 NPC

2nd Respondent

Registration Number: 2005/037682/08

(2nd Defendant *a quo*)

JUDGMENT

POTTERILL J

[1] The appellants are appealing against the order of the court *a quo* which reads as follows:

- “1. *Die aansoek teen die Eerste Respondent word van die hand gewys.*
2. *Die Eerste Applikant en Tweede Applikant, gesamentlik en afsonderlik die een betaal die ander om vrygestel te word, word gelas om die Eerste Respondent se koste van die aansoek te betaal op die prokureur en kliënt skaal, watter koste insluit die koste van ‘n advokaat op die verhoogde skaal volgens die Pretoria Vereniging van Advokate se fooie parameters, in die diskresie van die takseermeester.*

3. *Die tussentydse bevel-nisi word bekragtig.*
- 4.1 *Die Tweede Respondent, of enige ander persone in hulle diens, tender om nie die sekuriteitshek aangebring tussen Van Der Hoff Park Uitbereiding 16 en Van Der Hoff Park Uitbereiding 39 toe te sluit nie tensy en behalwe in die geval waar:-*
- 4.2 *sleutel van die slot daarvan aan alle permanente inwoners van Van Der Hoff Park Uitbereiding 39 verskaf is wat daardie permanente inwoners van Van Der Hoff Park Uitbereiding 39 in staat stel om die hek self onmiddellik oop te sluit en die hek dus deur die permanente inwoners van Van Der Hoff Park Uitbereiding 39 self oopgemaak kan word sodra enige permanente inwoner van Van Der Hoff Park Uitbereiding 39 daardeur wil loop of ry.*
- 4.3 *die klokke reeds geïnstalleer by die sekuriteitshek wat aangebring is tussen Van Der Hoff Park Uitbereiding 16 en Van Der Hoff Park Uitbereiding 39, waarmee die sekuriteitsbeamptes in diens van die Tweede Respondent en aan diens te Van Der Hoff Park Uitbereiding 16, geroep kan word om die sekuriteitshek aangebring tussen Van Der Hoff Park Uitbereiding 16 en Van Der Hoff Park Uitbereiding 39 te kom oopmaak, in 'n werkende toestand gehou word.*
5. *Elke ander party is verantwoordelik vir hul eie kostes."*

[2] The chronology of events set out the background to this appeal:

- 2.1 "Tuscany Ridge" (Extension 6) and "Lifestyle" (Extension 39) are two distinct security complexes, although sharing one gate to gain entry and a single security boundary wall. The two estates are separated by a water canal, but joined by a road, over the canal, which is a servitude road over Tuscany Ridge in favour of Lifestyle to gain entry and exit from the main gate.
- 2.2 The first appellant is the developer of the property and the second appellant is the home owners association of Lifestyle.
- 2.3 The first respondent is the management agent of Tuscany Ridge and the second respondent is the home owners association of Tuscany Ridge.
- 2.4 On the 6th of March 2014 the appellants obtained an *ex parte* order which reads as follows:

"1. Dat die Applikante se nie-nakoming van die Reëls met betrekking tot vorm, tyd en betekening gekondoneer word;

2. Dat die Respondente opgeroep word om op 31 Maart 2014 om 09:00 of so spoedig moontlik daarna as wat die aansoek aangehoor kan word, redes aan te voer, indien enige, waarom die volgende bevel nie finaal gemaak moet word nie:

2.1 Dat die Respondente en enige persone wat in hulle opdrag en/of namens hulle optree, verbied word om engisins verder

inbreuk te maak op die Applikante en hulle lede se vrye en ongestoorde besit van die pad omskryf in bede 2.2, deur die oprig van 'n hek of enige versperring van die pad;

2.2 Dat die Respondente die Applikant en hul lede se besit van die teerpad geleë tussen die grens van erf 873 op uitbreiding 16 en erf 944 op uitbreiding 39 van Van der Hoffpark, Potchefstroom en wat die enigste toegan tot uitbreiding 39 is en soos blyk uit die foto, aanhangsel "A" hiertoe aangedui en op die kaart, aanhangsel "B" hiertoe aangedui (die pad) herstel;

2.3 Dat die Respondente alle obstruksies verwyder en welke insluit die hek, ten einde die pad begaanbaar vir motorvoertuie te maak;

2.4 Dat die Respondente sodanige besit herstel deur op eie koste enige hek en/of obstruksies op die pad af te breek en te verwyder;

2.5 Enige uitgrawings op die pad op te vul en te kompakteer;

2.6 Die pad te herstel in die toestand waarin dit was voor Respondente se besitsontneming;

2.7 *Dat die Respondente die koste van die aansoek betaal op 'n prokureur en kliënt skaal, die een betaal die ander vrygestel te word;*

2.8 *Dat die Respondente of enige persone in hulle diens verbied word om die hek soos omskryf in bede 2.2 toe te maak of toe te sluit tensy die hek onmiddelik oopgemaak kan word sodra enige reghebbende daardeur wil loop of ry. Onmiddelik is oombliklik en nie bv. iemand wat eers van 'n ander plek af soontoe moet kom nie. In die sin moet die hek of oopstaan of beman wees.*

2.9 *Verder en/of alternatiewe regshulp.*

3. *Dat bedes 2.8 tussentydse onmiddellike werking en regsrag sal hê, hangende die keerdatum;*

4. *Dat die Respondente die keerdatum met 24 uur kennis kan vervroeg;*

5. *Dat hierdie aansoek en bevel op die Respondente beteken word."*

2.5 The matter was argued on 14 and 15 March 2014.

2.6 On 16 April 2014 the court *a quo* was to deliver judgment. Just prior to delivery thereof the respondents applied to hand up further affidavits. The matter was postponed *sine die*.

2.7 Further affidavits were exchanged between the parties.

2.8 On 26 June 2014 the respondents argued that the rule *nisi* had lapsed. The matter was again postponed to 1 July 2014.

2.9 On 1 July 2014 the respondents argued that the rule *nisi* should be relaxed. The matter is postponed to 23 July 2014.

2.10 On 23 July 2014 the matter is postponed to 31 July 2014 due to the applicants' attorney being a victim of robbery.

2.11 On 31 July 2014 the court delivered judgment. The court did not rely on any of the new affidavits that were exchanged in coming to his judgment.

[3] The first point of appeal is against the finding of the magistrate that the first appellant was misjoined because it could not be spoliated. On the facts it was common cause that:

3.1 The first appellant at its cost was responsible for the construction of the road as well the registration of the servitude;

3.2 It was also not denied that the first appellant at the very least utilised the road on the 20th of February 2014 and on the 5th and 6th of March 2014.

3.3 The first appellant also owns property in extension 39; Lifestyle.

[4] The court *a quo* found that a developer could in principle be spoliated. A person or entity can also be spoliated although not permanently on the premises. The court however found that there was no indication what the necessity was for the first appellant to specifically be on the premises. There was also no indication that the first appellant was spoliated. In the reasons for his judgment the magistrate expressed that the court did not find that the first appellant had no *locus standi* but that she was not spoliated; *"My gevolglike bevinding was dat Me De Klerk as lid van die eerste applikant en verteenwoordiger van Potch Boudienste CC nie gespolieer was nie. Ek meen egter nie dat sy geen locus standi gehad het nie. Die eerste applikant het bloot nie in sy aansoek geslaag nie."* I am thus satisfied that the point *in limine* needs no further address because the court did in fact not uphold the point *in limine*, but on the merits found that the first appellant was not spoliated. The first appellant did indeed have *locus standi* because the first appellant is a servitude holder and thus had possession. Whether the first appellant was spoliated will be addressed later on in the merits.

- [5] A further point *in limine* was raised that the first respondent was misjoined; this is so because the first respondent was just the managing agent of the second respondent and as an agent did not commit spoliation.
- [6] The court *a quo* upheld this point *in limine* because the first respondent did not take the decision to erect a gate on the road. The first respondent thus could not be held responsible for the conduct of the second respondent to erect a gate and the method in which the gate was locked. The appellants also did not prove that the first respondent had exceeded his mandate as representative of the second respondent.
- [7] The appellants submitted that the court *a quo* erred because the first respondent as the agent executed the instructions of the second respondent and therefore the second respondent was not misjoined. The first respondent thus in fact partook in the spoliation. In fact the first respondent launched an application in its own name to amend the rule *nisi*.
- [8] On behalf of the respondents it was submitted that the first respondent is only a provider of administrative services as agent to the second respondent and did not make any independent decisions. The appellants had only speculated and had no

facts to sustain their theory that the first respondent was actively involved in the construction and closure of the gate.

- [9] A person is a necessary party and should be joined if such party has a direct and substantial interest in any order the court can make, or if such order cannot be sustained or carried into effect without prejudicing that party. The agent may not have made the decisions, but most certainly has the mandate to execute the decisions. If the second respondent took the decision and then instructed its agent to execute the decision, the agent partook in the spoliation. In its opposition to the application the first respondent in paragraph 4 sets out its duty as follows: *"... first respondent is simply a service provider/managing agent contracted by the Second Respondent to provide some administrative services relating to the financial administration of levies raised by the Second Respondent."* Issuing the letter (M) is a far cry from rendering financial administration of levies. The first respondent on behalf of the directors of the second respondent informed the first applicant as follows:

"SEKURITEITSHEK BY KANAAL

Die sekuriteitshek by die kanaal word môre in werking gestel. Daar is bordjies aangebring wat aandui dat die klokkie gedruk moet word sodat die sekuriteitsmaatskappy van Tuscany Ridge die hek kan gaan oopmaak.

Laat weet asseblief of ons ook moet reël dat die afleweringshek aan die Oostekant oop- en toegesluit moet word soos in my vorige skrywe.” [M]

It is quite ludicrous that this letter is written to the first applicant, while the respondents argued that the first applicant had no *locus standi* and no business being on the premises; that aside, this letter clearly has nothing to do with administrative functions of levies. If this was the first respondent's duty it would have exceeded its powers in sending “M” to the first appellant. The fact of the matter is that the first respondent was executing the plan of the second respondent and therefore was not misjoined; it partook in the spoliation. The magistrate thus erred in upholding this point *in limine*.

- [10] The applicants had to prove possession of the road. The appellants had possession of the road and in fact undisturbed possession of the road i.e. they never had a gate across the road where the gate was now erected. The fact that they always had to enter a security gate at the entrance of the estate is of no consequence; controlled access to a security estate is par for the cause. The argument on behalf of the respondents that the initial controlled access is a factor to consider is clearly untenable and has no bearing on the fact that the servitude road now has a gate which was not previously there. This is an uncreditworthy denial by the respondents

and the court is justified in rejecting such a version. The applicants had proven that the road is a servitude road registered in their favour. In *Firststrand Limited t/a Rand Merchant Bank v Scholtz NO and Another* 2008 (2) SA 503 (SCA) at paragraph 13 the court found the following:

"[13] The mandament van spolie does not have a 'catch-all function' to protect the quasi-possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, ..."

The appellants thus have a "gebruiksreg" over the road and clearly had possession of the road.

[11] The next question is whether the appellants were despoiled. The answer thereto is simple; yes. The appellants had undisturbed access and now there was a gate erected without their permission and without resort to legal process. The court *a quo* erred in looking to the reasonableness of the method of spoliation, i.e. whether a bell was reasonable or whether a remote was reasonable to gain access to the erected gate. There is no test of reasonableness in deciding spoliation, there is

either spoliation or not. The Magistrate thus confused the act of spoliation with the determination of the rights of a servitude holder.

[12] Counsel for the respondents relied heavily on the *dictum* of ***Malan v Green Valley Farm Portion 7 Holt Hill 434 CC 2007 (5) SA 114 (ECD)***. It was argued that the facts are totally akin to the matter *in casu* and that there the court found that erecting a fence and supplying a remote and a keyboard did not amount to spoliation.

[13] Firstly this is a judgment of a single Judge in another division and I am not bound by it. Secondly, the set of facts differ materially in a very important aspect. In paragraph [7] Dlodlo J sets out the following:

“[7] It is important to mention that there is presently no servitude/right of way in favour of the two applicants.”

This is a material difference as a servitude holder immediately had quasi-possession of the road. In paragraph [34] Dlodlo J found as follows:

*“[34] In my view the owner of a right of way also has a duty to display reasonableness whenever he exercises such right. When an owner of such right proceeds to enforce the right in question, I would also expect nothing short of absolute good faith on his part. I am aware that in the instant case the applicants are not armed with the usual servitude providing them with a right of way. They do have a right to gain access to their property. **The question of servitude is not part of this litigation and does not fall to be pronounced upon.** But despite that, it may illustrate the reasonableness I have alluded to *supra* to refer to the words of Innes CJ in *Texas CO (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 474-475 ...” [My emphasis]*

The court in the *Malan* matter *supra* clearly knew that it was not to confuse the question of the reasonableness of the actions of a servitude holder with a *mandament* but proceeded to do so anyhow. The court *a quo* also defined the question of spoliation as follows:

“[30] ... Can it be said that the applicants have been spoliated? I say so because it seems that they have rather chosen not to have access to the road in question.”

[14] The question of the *mandament* was thus confused with the determination of the rights of the servitude holder. Reliance can accordingly not be placed on this matter. The question before the court *a quo* was not whether the servitude holder was acting reasonably but whether the possessor of the servitude road was being despoiled. There was previously no gate and erection of the gate did spoliage the respondents in that they do not have undisturbed possession of the road anymore.

[15] The *mandament of spolie* is a final ruling on possession and does not bar a servitude holder from bringing an interdict, *mandamus* or action to establish the reasons as to why a gate would be necessary and what measures in erecting such gate would be reasonable to the holder of the servitude right. Reliance on ***Roeloffze NO and Another v Bothma NO and Others 2007 (2) SA 257 (C)*** is thus bad in law as this relates to the ambit of a servitude right of way and the reasonableness pertaining thereto. I am thus satisfied that the Magistrate erred in finding “some spoliation”, but then tempering the spoliation by ordering reasonable relief.

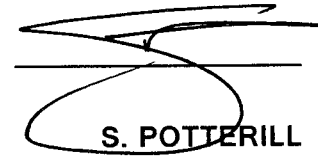
[16] The general rule is that a successful party is entitled to its costs. The appellants should thus in the court *a quo* have been successful with their costs and must also be successful with the appeal costs. The appellants requested that the costs be

granted on a punitive scale. It was argued that the respondents should pay the costs on an attorney and client scale because they proceeded to erect the gate despite the appellants' objections. The respondents were also forewarned that the applicants would proceed with an urgent application if the respondents proceeded with the action. The respondents then proceeded to file further affidavits minutes before judgment was to be handed down. The court *a quo* postponed the matter but did not take cognisance of the affidavits. These affidavits unnecessarily burdened the papers and lengthened the hearing. It was also argued that the respondents without just cause opposed the application.

- [17] A court has a discretion to grant a punitive costs order and must do so in order to mark its disapproval of the conduct of the losing party. The true explanation of awards of attorney and client costs are derived from special considerations from the circumstances which gave rise to the application or from the conduct of the losing party. The court would then considering it just to ensure more effectually that it can grant the successful party a costs order enabling the successful party not to be out of pocket in respect of the expenses caused to him by the litigation. I find that on the papers the respondents acted unreasonable in its conduct of the litigation, deserving of a punitive costs order for the reasons as set out above.

[18] I accordingly make the following order:

- 18.1 Dat die Applikante se nie-nakoming van die Reëls met betrekking tot vorm, tyd en betekening gekondoneer word;
- 18.2 Dat die Respondente die Applikante en hul lede se besit van die teerpad geleë tussen die grens van erf 873 op uitbreiding 16 en erf 944 op uitbreiding 39 van Van der Hoffpark, Potchefstroom en wat die enigste toegang tot uitbreiding 39 is en soos blyk uit die foto, aanhangsel "A" hiertoe aangedui en op die kaart, aanhangsel "B" hiertoe aangedui (die pad) herstel;
- 18.3 Dat die Respondente alle obstruksies verwyder en welke insluit die hek, ten einde die pad begaanbaar vir motorvoertuie maak;
- 18.4 Dat enige uitgraving gemaak ten einde die hek op te rig, opgevol en te gekompakteer word;
- 18.5 Dat die padoppervlak op die ligging van die hek herstel word na die toestand waarin dit was voor die besitsontneming; en
- 18.6 Dat eerste en tweede respondente gelas word om eerste en tweede appellante se koste van die aansoek te betaal op 'n prokureur en kliëntskaal, die een betaal die ander vrygestel te word.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



M.F. KGANYAGO

ACTING JUDGE OF THE HIGH COURT

CASE NO: A859/2014

HEARD ON: 10 March 2015

FOR THE APPELLANTS: ADV. J.J. PRETORIUS

INSTRUCTED BY: Jan Ellis Attorneys

FOR THE RESPONDENTS: ADV. J.C. KLOPPER

INSTRUCTED BY: E VAN DER WESTHUIZEN ATTORNEY

DATE OF JUDGMENT: 27 March 2015