



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG PROVINCIAL DIVISION)**

Case number: 19069/2009

Date: 5/05/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES NO.	
(2) OF INTEREST TO OTHER JUDGES: YES NO.	
(3) REVISED. ✓	
5/509	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

MANTELLA TRADING 341 CC	First Applicant
MARTHUINUS PETRUS CHRISTIAAN BAMBERGER	Second Applicant
ANANJA LOUISA BAMBERGER	Third Applicant
ABEL DISANE MOLOANTOA	Fourth Applicant
JOEL NGOBENI	Fifth Applicant
LESIBA WILLY MOROATSE	Sixth Applicant
MADUMETJA JHON MOLOATSE	Seventh Applicant

and

MARK BYRON THOMPSON N.O.	First Respondent
MICHELLE CECILE THOMPSON N.O.	Second Respondent

JUDGMENT

PRETORIUS J.

This application is an urgent application in which the relief requested is that the first to seventh applicants be restored in their peaceful and undisturbed possession of the existing (old) road over the property of Mbala Lodge Trust as indicated on the annexures to the founding affidavit.

In the alternative that the first and second respondents be interdicted from interfering with first to seventh respondents' use of the road over the Mbala Lodge Trust property, pending the finalization of the action instituted by the applicants.

The third prayer is that the Mbala Lodge Trust and the respondents be ordered to remove the fence that was erected across the existing road and to re-establish the status quo by re-installing the previous gate on the said road.

This matter was brought on a semi- urgent basis, as the application was launched on 1 April 2009. The respondents had to file their opposing affidavits on or before 7 April 2009. The applicants had to file their replying affidavits on 16 April 2009 to ensure that the matter would be heard on 21 April 2009.

The respondents only filed their opposing papers on 17 April 2009 at 19h55, making it impossible for the applicants to file the reply within the time limits.

The replying affidavit was filed on 21 April 2009.

This application is in essence a "mandament van spolie", according to the applicants.

This court decided to hear the question of urgency at the same time as the merits of the matter.

Mr. Strydom, for the applicant, argued that should the matter be heard in the normal course of the roll, it would take at least 6 months for the matter to be heard. In the *interim* the applicants would not be able to use the road.

It is common cause that the applicants had peaceful and undisturbed use of the road in question since, at least 1911. The road was used by the applicants who had keys to the gates installed on the road. These keys were supplied to all users of the road after the western bypass had been completed.

At the beginning of March 2009 the respondents unilaterally decided to close the road by erecting a fence in the place where the gate was at the entrance to their property, thus causing the closure of the road.

In **Le Riche v PSP Properties CC and Others 2005(3) SA 189 CPD** at 193

Yekiso J found that the *mandament van spolie*:

"... is an extraordinary, robust and speedy remedy."

The applicants only have to allege and prove (i) peaceful and undisturbed possession and (ii) unlawful deprivation of such possession.

The only question this court has to decide in regards to the *mandament van spolie* is whether there has been spoliation. To be able to decide this the court has to find that the applicants were in *de facto* possession. This also includes incorporeal rights – the cases of *quasi* possession.

In **Bon Quelle (Edms) Bpk v Munisipaliteit Otavi 1989(1) 508 AD Hefer JA** found at p514:

"'n Onliggaamlike saak soos 'n serwituut is natuurlik nie vatbaar vir fisiese 'besit' in dieselfde sin as wat daardie uitdrukking gebruik word met betrekking tot liggaamlike sake nie, maar wel vir quasi-possessio wat bestaan uit die daadwerklike gebruik van die serwituut....In die samehang van die mandament van spolie neem, soos later sal blyk, die daadwerklike gebruik van 'n beweerde serwituut die plek van die besit van 'n liggaamlike saak."

Hefer JA further found at p516:

"Dit is nogtans hoe die mandament van spolie ontwikkel het en die logiese beswaar vervaag wanneer in gedagte gehou word dat die mandament gemik is bloot op die herstel van die feitelike toestand wat vantevore bestaan het en wat deur appellant se eiegeregtige optrede versteur is."

The applicants' case is that the right to the road was used at different times by different people. The road was used by the applicants, their family, the employees and contractors even after the western road had been completed. Contrary to Mr. Vorster's allegation that the applicants only averred in the replying affidavit that the keys to the gates on the road was still used after the new road had been completed, it was quite clearly set out in the applicants' founding affidavit:

"After the new western road was established, we obtained keys for the locks on the existing road giving us free access thereto until the deprivation during March 2009."

This is not denied by the respondents. They only state:

"I am doubtful that the old road may have been used by various persons up to the time when I closed it where it enters the property of the respondents."

The respondents further state:

"In any event, the old road could never have been a public right of way until now as locked gates were installed on all the properties including the property of the first applicant. Only property owners had keys to the relevant gates."

The respondents admit that Mr. Bamberger, the second applicant's father, used the road recently when there was a problem with the Telkom lines, as well as the fact that Mr. Bamberger had moved cattle from portions 1 and 2 of the farm to portions 7 and 8 of the farm utilizing the road. Furthermore the respondents merely deny the fact that the second and third applicants use the road continuously. The respondents admit that the road was historically used until it was closed by the respondents. The respondents do not reside on the farm.

It is quite clear from Mr. Makuru's statement annexed to the respondents' opposing papers, that even the respondents had occasion to use the old road, after the new road had been constructed. He also admits that:

"I have only very occasionally seen Mr. Bamberger on the old road."

Ms Annah Tswinyana states on behalf of the respondents:

"The old road was not used a lot. We did not see or hear trucks nor(sic) people using the old road too much."

These statements confirm that the old road was still used. This is further confirmed by the fourth to seventh applicants who state that when they returned from vacation on 9 March 2009 the existing road was closed by a fence. The only inference the court can draw from this, is that they would not have used this road if they had not been utilizing it.

Having regard to all the evidence I cannot but come to the conclusion that the applicants, or at least the first, second and third applicants were in *quasi* possession of the old road.

The respondents rely on an e-mail dated 6 December 2005, which according to them is an agreement.

The portion of the e-mail the respondents rely on reads as follows:

"As discussed with yourself on Tuesday, December 06, 2005 construction of the new servitude can begin immediately. It is envisaged that the servitude will be fully functional by February 2006; thereafter we will close the current road"

The second applicant says the first time he saw this e-mail was at the drawing of the replying affidavit. He denies, in any event, that it constitutes an agreement.

The next correspondence relating to the closure of the road is the e-mail sent by the first respondent on 23 February 2009. This e-mail was only received by the second applicant on 4 March 2009, on his return from overseas. This e-mail makes no reference to any agreement, but reads:

"Further to our correspondence and discussions in December 2005 and our subsequent construction of the new servitude road for our respective properties in 2006, we felt that the time was now appropriate to advise of our intention to remove our gate and close off our property at our front Grootfontein entrance."

The first respondent continues:

"After closely monitoring the old road through our properties since October 2008, we can advise that the traffic through our mutual properties has been almost zero"

I must agree with Mr Strydom, for the applicants, that such a survey would have been totally unnecessary if there was an agreement regarding the closure of the old road. Furthermore, the first respondent says that the traffic was almost zero – indicating that there was still traffic using the road. No further mention is made of the survey in any of the opposing affidavits.

Telkom and Escom also used the old road to maintain the telephone and electricity lines respectively.

I have come to the conclusion that the applicants have proved they were in possession of the road and had access to the road on a continuous basis, as the respondents had supplied them all with keys to the gates on the road, after the western bypass had been completed.

As to the second leg of spoliation, that the respondents deprived them wrongfully of possession without their consent, it is clear that there was no agreement. The applicants have also proved on a preponderance of probabilities that the respondents have deprived them wrongfully of their possession without their consent.

I am not making any finding regarding the alternative remedy, as I have found that the applicants are successful with their application for a *mandament van spolie*

I make the following order:

1. That the first to and including the seventh applicants be restored in their peaceful and undisturbed possession of the existing road over the property of Mbala Lodge Trust, which road is indicated in red on annexures "MB2" and "MB3" to the applicants' founding affidavit;
2. That the respondents must pay the costs of the application.



C Pretorius

Judge of the High Court

Case number	:	19069/2009
Heard on	:	23 April 2009
For the Applicant	:	T Strydom
Instructed by	:	Wagenar
For the Respondent	:	L J Vorster SC
Instructed by	:	Prinsloo Bekker Inc
Date of Judgment	:	