

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2692/2006

In the matter between:

J S VAN DER WATT INVESTMENTS CC

1st Applicant

HAJAREE SUPERMARKET CC T/A
JABULA WHOLESALERS

2nd Applicant

and

VUSANI PROPERTY INVESTMENTS (PTY) LTD

Respondent

HEARD ON: 3 AUGUST 2006

JUDGMENT BY: VAN DER MERWE J

DELIVERED ON: 31 AUGUST 2006

[1] This is an application for a spoliation order. The application was launched on an urgent basis on 22 June 2006, on which date it was postponed to 3 August 2006 and an interim arrangement agreed upon between the legal representatives of the parties was made an order of court.

- [2] Erf 140 and Erf 3406 are adjoining properties situated in the business area of Odendaalsrus. The first applicant is the registered owner of Erf 140. The second applicant is the tenant of a portion of the building on Erf 140, from which it trades as Jabulani Wholesalers. The respondent is the registered owner of Erf 3406. Erf 3406 is improved by a shopping centre.
- [3] The portion of the building on Erf 140 that houses the business of the second applicant ("the premises"), faces in the direction of the boundary between Erven 140 and 3406. There is an open space on Erf 140 between the premises and the boundary between Erven 140 and 3406. Between this boundary and the building on Erf 3406, on Erf 3406, there is also an open space. Before the erection of the palisade referred to below, the said open spaces on Erven 140 and 3406 were connected so that access could be obtained from both Waterkant Street and Josias Street over Erf 3406 to the open space on Erf 140 in front of the second applicant's business. When reference is made herein to

access to Erf 140, it must be understood to mean access to this open space and therefor to the premises. Both parties adduced further evidence in respect of the layout and features of these erven and the surrounding area. I find it unnecessary to refer to this evidence. This evidence, for the most part, was adduced by the applicants in order to show why it happened or is necessary to gain access to Erf 140 over Erf 3406 and by the respondent to show that alternative access routes are available. I consider both aspects to be irrelevant to the issues to be decided in this case.

- [4] The application pertains specifically to the aforesaid open space on Erf 3406. It is common cause that the respondent erected a palisade on Erf 3406 along the whole of the boundary between Erven 140 and 3406. It is also clear that this palisade prevents access to Erf 140 from Waterkant Street and Josias Street over Erf 3406. A gate was also installed at the entrance to Erf 3406 from Waterkant Street. This gate can of course be opened if need be.

- [5] The applicants rely on the *mandament van spolie*. It is trite that the main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands or to exercise self-help. The *mandament van spolie* is available to a person whose possession of a thing was interfered with or disturbed without due process. The essence of the remedy is that the possession deprived or disturbed must first be restored before the merits of the case will be considered. The remedy is also available in cases of disturbance of quasi-possession of an incorporeal such as a servitude. In case of a servitude, the actual use of an alleged servitude is equated to possession of a corporeal thing. See **BON QUELLE (EDMS) BPK v MUNISIPALITEIT VAN OTAVI** 1989 (1) SA 508 (AD) at 514 H and further. Further, as was lucidly pointed out by Thirion J in **ZULU v MINISTER OF WORKS, KWAZULU, AND OTHERS** 1992 (1) SA 181 (D), the *mandament van spolie* is not concerned with the protection or restoration of rights at all but its aim is to restore factual possession which has been unlawfully deprived. Therefore,

protection given by the *mandement van spolie* cannot be extended to the exercise of rights in the widest sense. See also **TELKOM SA LTD v XSINET (PTY) LTD** 2003 (5) SA 309 (SCA) at 313 – 314. The question for decision therefore is whether the applicants have established the actual or factual exercise of an alleged servitotal right in respect of Erf 3406.

- [6] The first applicant is the registered owner of Erf 140 since 1971. The first applicant says that at least since 1971 and therefore for an uninterrupted period of more than 30 years, a business was operated from the premises. The further evidence of the first applicant is that at all times during this period the members and/or employees of these successive occupiers and/or tenants of the premises, as well as their customers and suppliers, factually made use of Erf 3406 to gain access to Erf 140 from both Waterkant Street and Josias Street. Suppliers drove trucks over Erf 3406 to the open space on Erf 140 in front of the business in order to make deliveries. Customers on foot and per vehicle similarly

moved over Erf 3406 to the open space on Erf 140. It is also stated that customers of the business over these years not only parked their vehicles on the open space in front of the business on Erf 140, but also parked their vehicles on the open space on Erf 3406. All of this, according to the evidence adduced on behalf of the applicants, took place for an uninterrupted period of more than 30 years up to the construction of the palisade by the respondent.

- [7] The respondent purchased Erf 3406 during July 2005 and became the registered owner thereof on 2 June 2006. The respondent vehemently denied, as it is wont to do, that the applicants at any stage had any possession of any portion of Erf 3406 and that the applicants established any right in respect of Erf 3406. Save in respect of the question of parking by customers on Erf 3406, to which I will revert, it is not the case of the applicants that they exercised possession of Erf 3406 *per se*, but that they made use of a right of way. As pointed out already, it is not required of the applicants to prove a right of way proper, but only that there was actual

exercise of an alleged right of way. In respect hereof, the Operations Manager of the shopping centre on Erf 3406 since 1994 who deposed to an affidavit on behalf of the respondent, in fact confirmed that the applicants' delivery trucks passed over Erf 3406. Apart from this, the evidence of the applicants that actual or factual use was made of an alleged right of way was met at most, with bare denials. In these circumstances, in my judgment, there is no *bona fide* dispute of fact in respect of the aforesaid averments of the applicants.

- [8] In my view the applicants did not establish any possession or quasi-possession in respect of Erf 3406 consisting of the parking of customers on Erf 3406. I am, however, convinced that the first applicant established such quasi-possession consisting of factual use of an alleged praedial servitude from both Waterkant Street and Josias Street over Erf 3406 in favour of Erf 140 at least through the occupiers or tenants of the premises which occupiers and/or tenants in turn made such use through their members and/or employees and

invitees, such as customers and suppliers. This use took place with vehicles as well as on foot. I accordingly find that the first applicant made a case for reliance on the *mandement van spolie*.

- [9] In respect of the second applicant, I find the following passage in **The Law of South Africa**, Vol. 27, First Reissue, p. 183, para 266 persuasive:

“In cases of indirect possession the question may arise in future whether the direct possessor and the person exercising indirect possession through another should not both be entitled to a mandament van spolie. Where physical control is exercised on behalf of a master or employer by a servant or an employee, the courts have decided that only the master or the employer can institute the mandament. What, however, about the case where the direct possessor such as an agent of a lessee who exercises control on behalf of a principal or a lessor does in fact have the intention of deriving some benefit from the thing? In this case it is submitted that both the direct and the indirect possessor should in principle be entitled to the mandament.”

See also **PAINTER v STRAUSS** 1951 (3) SA 307 (O) at 313 H – 314 A and **MBUKU v MDINWA** 1982 (1) SA 219 (TSC) at 222. On the evidence I am satisfied that the second applicant not only exercised the alleged right of way on behalf of the owner of Erf 140, but also with the intention of deriving at least some benefit for itself.

[10] Paragraph 2.3 of the Notice of Motion is couched in the form of a prohibitory interdict. Counsel for the applicants conceded, correctly in my view, that that prayer could or should not be granted. Prayers 2.1 and 2.2 of the Notice of Motion should be limited to restoration of possession of right of way in accordance with this judgment.

[11] For these reasons the following orders are made:

1. The respondent is ordered to forthwith restore to the first applicant and the second applicant peaceful and undisturbed possession of right of way over Erf 3406 in favour of Erf 140, Odendaalsrus.

2. The respondent is ordered to forthwith remove the palisade erected along the boundary between Erven 140 and 3406 in order to restore to the first and second applicants peaceful and undisturbed possession and use of right of way over Erf 3406 in favour of Erf 140, Odendaalsrus.
3. The respondent is ordered to pay the costs of the application, including the costs of 22 June 2006.

On behalf of the applicants:	C.H.G. VAN DER MERWE, J
Naudes	Adv. N. Snellenburg
	Instructed by:
	BLOEMFONTEIN
On behalf of the respondent:	Adv. S. Liebenberg
	Instructed by:
BLOEMFONTEIN	McIntyre & Van der Post

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