

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 23061/2023

In the matter between

WILD X (PTY) LTD

APPLICANT

And

BLOEMENDAL WINE ESTATE

RESPONDENT

SPIRITO TRADING 82 (PTY) LTD

SECOND RESPONDENT

JUDGEMENT

Van den Berg AJ

RELIEF APPLIED FOR

1. This is an application for spoliation. The applicant seeks an order directing the respondent to restore possession of certain areas of the Bloemendal Wine Estate, together with a storage unit (referred to in the evidence as the “*old church*”) and its contents.

THE ISSUE OF THE JOINDER AND THE AMENDMENT OF THE NOTICE OF MOTION

2. The Bloemendal Wine Estate was the sole respondent cited by the applicant. In the answering affidavit the point was taken that Bloemendal Wine Estate is “a

piece of land that is not possessed of juristic personality or is not capable of suing or being sued.”

3. In the answering affidavit, Mr. Anton Louw identified himself as a director of Spirito Trading 82 (Pty) Ltd, the registered owner of the immovable property described as Portion 1 of Farm Bloemendal 1471 and Remainder of Farm Bloemendal 1471 held by Deed of Transfer T1527/2009, informally referred to as Bloemendal Wine Estate.

4. Spirito Trading 82 (Pty) Ltd (“**Spirito**”) filed a Notice of Motion founded upon Mr Anton Louw's answering affidavit seeking an order that Spirito be joined as the second respondent in the spoliation application.

5. The applicant did not oppose Spirito's joinder, and the argument proceeded accordingly. However, Mr Newton, who appeared on behalf of the “respondent”, argued at the conclusion of his address that the applicant does not seek any relief against Spirito, despite its joinder.

6. The Notice of Motion is formulated on the basis that the relief applied for is against “...*the Respondent*”. No reference is made to Spirito as a first, or second respondent.

7. Mr Welgemoed, who represents the applicant, applied for the amendment of the Notice of Motion during his argument in reply. The Court was not furnished with a copy of the proposed amended Notice of Motion. However, it was submitted that all references to the “*respondent*” should be construed to refer to Bloemendal Wine Estate and Spirito.

8. Paragraph 2 of the Notice of Motion for the joinder of Spirito reads as follows:

“That the headings and citations of all items of process hitherto filed of record be amended to reflect the second respondent's joinder as the second respondent in these proceedings.”

9. Does this imply that the relief sought against the respondent, Bloemendal Wine Estate, hitherto is applied for against the second respondent, Spirito?

10. It is uncontested that the second respondent is the registered owner of the property on which the Bloemendal Wine Estate is situated, and that Spirito controls the Bloemendal Wine Estate. It is further common cause that there exists no such a corporation or juristic person as the Bloemendal Wine Estate.

11. Mr Newton further argued that Spirito is prejudiced by the proposed amendment of the Notice of Motion since it could have conducted its opposition differently if it had known that the applicant had applied for relief against it. Spirito joined the proceedings, according to his argument, as the landowner merely to safeguard its interests.

12. I have difficulty accepting that Spirito would suffer real prejudice if the amendment is allowed. Spirito dealt with the merits of the applicant's case in its answering affidavit and Mr Newton argued the matter accordingly.

13. However, this is not the end of the matter. Prejudice is only one of the factors the Court considers in deciding whether an amendment should be granted. The applicant's failure to cite the correct respondent in its founding affidavit was not the only obstacle in the way of granting the amendment. The point is further raised in the answering affidavit that the applicant does not explain how it could have allegedly concluded an agreement pursuant to which it obtained possession of the old church and the use of the areas, but it does not know the identity of its contracting party.

14. Consequently, the amendment is inextricably intertwined with the merits of the application. I will address the amendment at the conclusion of this judgment.

FACTUAL SYNOPSIS AND CHRONOLOGY

15. In light of the finding that the second respondent should be joined I will hereinafter refer to Bloemendal Wine Estate and Spirito Trading 82 (Pty) Ltd

collectively as “the respondent” unless the contrary appears expressly from the context.

16. The applicant provides a range of tourist adventure activities conducted at various locations throughout the Western Cape, such as quad bike rides, teambuilding activities, archery, and paintball games. During or about January 2023, the applicant’s Mr Johnnie Borrett approached the respondents with a request to conduct recreational quadbike activities on the Bloemendal Wine Estate. The respondent was not averse to the idea in principle, provided that the parties conclude an agreement.

17. The applicant alleges that it was at all material times in peaceful and undisturbed possession of the old church and other areas in terms of an agreement. A copy of this agreement is affixed to the founding affidavit marked as Annexure “WX1” and “WX2”. There is a dispute of fact regarding the conclusion of the agreement.

18. The applicant alleges regarding its use of the Bloemendal Wine Estate as follows:

“...THE APPLICANT has operated and utilised premises on the bloemendal wine estate, since the early part of march 2023, these premises are approximately 120m2 in area and included the front and adjacent outdoor areas and fields.”¹

And

“...these areas were specifically allocated to wildx adventures (known as the “old church building”) by the bloemendal management team in late February 2023.”²

¹ Founding Affidavit, para 8
² Founding Affidavit, para 9

19. The applicant's alleged right of use (*according to the founding affidavit*) was for the old church building, its front and adjacent outdoor areas and fields.

20. The respondent contends that they requested the applicant to provide a proposed draft agreement and indemnity but that it was never provided. The respondent denies that any agreement was concluded. Annexures "WX1" and "WX2" were not signed by either of the alleged contracting parties.

21. According to the respondent, the parties exchanged electronic communications via "*WhatsApp*" during February 2023. The applicant provided proposals for the possible terms of an agreement to be concluded in these messages. Copies of the "*WhatsApp*" electronic messages are annexed to the answering affidavit. The respondents allege that Annexures "WX1" and "WX2" to the founding affidavit are, in fact, reproductions of the "*WhatsApp*" messages with the exception of the ex post facto addition of the heading "*Memorandum of Agreement*" which had been added thereto in an effort to create the false impression that some form of agreement was reached between the parties.

22. The applicant did not pay any form of rental, commission, or other consideration for the use and enjoyment of any area or building on the farm. The applicant does not dispute this, contending that the payment of any rental is extraneous to the issue of spoliation.

23. It is undeniable that the respondent permitted the applicant to engage in a variety of activities on the Bloemendal Wine Estate in 2023. The respondent also admit that they allowed the applicant to store quadbikes in the "old church," a corrugated iron structure located on the farm.

24. The respondent terminated the interim arrangement, which allowed the applicant to use the old church. The applicant agreed to the termination of the interim arrangement and undertook to remove the quadbikes from the farm by the end of September 2023 and to vacate the old church by 18 October 2023. The applicant returned the key, or at least a copy of the key of the old church, on 7 November 2023. However, the reason for returning the key of is a matter of dispute.

25. The respondents allege that the applicant abandoned equipment, such as old umbrellas and tools in the old church, but not the items enumerated on Annexure “WX3” to the applicant’s founding affidavit. The respondent allowed the labourers on the farm to take these items for themselves rather than disposing of it at the local landfill.

26. The applicant discovered that the items were removed from the old church on 8 December 2023 and subsequently instituted the urgent spoliation application on 18 December 2023. No explanation is offered as to how it happened that the applicant could have returned the key or copy of the key to the old church on 7 November 2023 but only discovered that the equipment had been removed on 8 December 2023 if it retained the original key and enjoyed the undisturbed use as alleged.

27. The urgent application could not be heard during December 2023, the date allocated for hearing of the matter because the applicant filed its voluminous replying affidavit late. Mziweni, J postponed the application and ordered the applicant to pay the costs.

28. The applicant secured alternative premises for its various activities at the Ostrich Farm, which is situated opposite the Vissershok landfill site on the N7 and commenced operating immediately after the institution of the spoliation application.

29. The applicant alleges that the equipment stored in the old church was worth approximately R1,600,000.00 and is the subject matter of an action that will be instituted.

30. The applicant’s case revolves around the claim that he was in undisturbed possession of particular demarcated areas and had unrestricted access and exclusive use of such areas.

APPLICANT’S SUBMISSIONS

31. The applicant argued regarding the citation of Bloemendal Wine Estate that “*people deal with people*”. What mattered was not who the legal entity was behind Bloemendal Wine Estate but that the parties’ representatives dealt with each other on a personal basis.

a) The applicant’s replying and supplementary affidavits

32. During his argument, Mr Welgemoed requested leave to submit a Supplementary Affidavit. The purpose of the Supplementary Affidavit was to place pages of the replying affidavit before the Court that were not properly commissioned. Upon perusing the document, it became immediately clear that it contained photographs and documents that were not part of the replying affidavit in the Court file.

33. Mr Newton did not initially object to the Supplemental Affidavit being introduced. His stance changed upon realising that the Supplemental Affidavit introduced new evidence, and he objected to its use.

34. The Supplementary Affidavit contains evidence that was not part of the founding or replying affidavits, and its contents are not admissible as evidence for purposes of the judgment.

35. The entire record comprised 317 pages. The applicant’s replying affidavit numbered 198 pages. The majority of the pages in the answering affidavit appear to be copies of a computerised diary booking system, as well as several images. The copies of the electronic diary bookings and photographs were not attached to the replying affidavit as annexures, as is the practice. These documents were merely incorporated into the replying affidavit as part of the *ad seriatim* reply.

36. The applicant’s Mr Gerrit van der Merwe for example states in paragraph 12 of the replying affidavit as follows:

“... I refer to the following proof of bookings of events which has been held on the farm.”

37. He then incorporates the “proof of bookings” into the replying affidavit from pages 121 to 203. The deponent provides no explanation in the replying affidavit as to what the bookings reflect or how the papers should be read.

38. Similarly, in paragraph 80 of the replying affidavit, the deponent merely refers to what is termed “*further Evidence of our Business Activities as advertised are herein below.*” What follows are numerous colour photographs on pages 243 to 267.

39. The applicant has also attached aerial and colour photographs as annexures from pages 269 to 334 to their replying affidavit.

40. It is trite that an applicant must make out their case in the founding affidavit. Apart from this, the founding and replying affidavit makes no direct reference, description or explanation of what is depicted or conveyed by colour and aerial photographs. Mr Welgemoed argued that the photographs speak for itself and serve as “*empiric evidence*” that the applicant utilised the wine estate for its business operations during 2023.

41. This argument ignores the fact that the applicant claims possession and use of specific demarcated areas of the Bloemendal Wine Estate. The applicant needed to provide at least particulars of the areas that it alleges to have used.

42. Upon questioning Mr Welgemoed about how the Sheriff would execute the Court order in granting access and possession to the applicant, Mr Welgemoed referred me to aerial photographs attached to the replying affidavit, which, according to the argument, identified the relevant areas to which the applicant lay claim. It is unclear how these photographs correlate to the allegations in the founding affidavit quoted above and the relief claimed in the notice of motion.

43. I understand that the applicant’s papers were prepared in haste before the hearing of the urgent application, but the manner in which the replying affidavit was prepared is unacceptable. A party cannot expect an opponent or the Court to trawl through documents and photographs reduced to a mass of print without properly

identifying the relevant parts thereof. It is incumbent to identify specific portions thereof upon which reliance is placed as an indication of the case which is sought to be made out on the strength of the document concerned.³

b) The applicant's right of use and possession

44. During argument, it became common cause that the applicant had permission to operate so-called quadbike tours, but Bloemendal decided to terminate them owing to safety concerns. The applicant accepted this decision on or about 22 September 2023.⁴

45. The applicant alleges, however, that despite removing the quadbikes, it continued to use the wine estate to conduct team-building activities. The applicant relies on the "*Proof of Bookings*" to substantiate its claim that it would have organised a teambuilding event at Bloemendal Wine Estate on 8 and 9 December 2023.

46. Regarding the return of the key to the old church, the applicant alleges that it gave a copy of the key to one "*Line*" who operates the mounting bike shop on the wine estate to decide if she wanted to share the old church. The copy of the key was apparently never returned, and the applicant retains possession of what it alleges to be the original key to the old church.

47. In essence, the applicant alleges that the respondent, Mr Louw violated the law and spoliated the applicant. The applicant intends to pursue criminal charges and a claim for damage resulting from the loss of the items that were allegedly stored in the old church.

RESPONDENT'S VERSION

³ Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 324F-G

⁴ See the WhatsApp messages at pp 113 and 115 on which the following is recorded *inter alia*:
 "Wanneer maak julle die kerkie leeg? Ons het nodig om dit te gebruik"
 "Baie dankie ek sal probeer leeg hê by volgende naweek. Is dit reg?"

48. The respondents concede that the applicant conducted certain activities on the wine estate from time to time. This was a temporary arrangement on very specific routes intended to avoid interfering with existing mountain bike traffic and other farming activities. The purpose of this arrangement was to gauge whether the applicant's operations could be feasible on a more formal and permanent basis. To this end, Spirito also allowed the applicant to temporarily utilise the old church as a place to store its quadbikes.

49. Spirito remained in complete possession and control of the entire wine estate. It merely allowed the applicant temporary access to use certain areas for test purposes. At no stage was the applicant in peaceful or undisturbed possession of any of these areas but were merely granted access to use it. According to Spirito, the interim arrangement does not constitute an act of granting the applicant peaceful and undisturbed possession of areas of the farm.

50. In the absence of a binding agreement and in light of the consensual termination of the applicant's use of the old church to store its quadbikes, Spirito boldly admits that it discarded "*a few items in the old church*" that were allegedly abandoned by the applicant.

THE MANDAMENT OF SPOLIE

51. The mandament of spolie is generally granted where one party to a dispute concerning possession of property ceases possession pursuant to what he believes to be his own entitlement thereto. The Court will summarily order the return of the property regardless of either party's entitlement to possession, and will not hear argument relating to their respective rights until this has been done. The principle underlying the remedy is that the entitlement to possession must be resolved by the Courts and not by resorting to self-help.

52. The mandament operates as nothing more than a preliminary order to restore the status quo until the entitlement to ownership of the property is determined.⁵

53. The applicant must prove 2 (two) requirements to obtain the remedy.

54. Firstly, the applicant must show that it was at the time of the dispossession in possession of the property, and secondly, that the applicant was wrongfully deprived of possession without consent or a Court order.

55. It is well established that our Courts may under certain circumstances grant a mandament of spolie in specific instances where the property concerned has been destroyed. However, these circumstances are not relevant to the present matter and refer to instances where the dispossession also involves constitutionally protected rights such as the right to housing and shelter.

56. Given that the mandament by its nature involve mandatory elements such as the delivery of movable property, or prohibitory elements, as in the case where a party is restraint from preventing certain steps being taken to restore possession, it is important to consider if the order can be given effect. Where the order cannot be given effect, it cannot competently be granted. Whether the order can be carried into effect is a question of fact to be determined by the Court asked to grant an order.⁶

57. The mandament of spolie has been described as a speedy, robust remedy. If an applicant delays for more than a year before bringing his application there would have to be exceptional circumstances present to allow such an application to proceed.

58. On the other hand if an application for mandament of spoliation is brought within a year of the act of spoliation, special circumstances will have to be presented

⁵ Monteiro v Diedericks 2021 (3) SA 482 (SCA) at para 15 and 16

⁶ Monteiro and Another v Diedericks 2021 (3) SA 482 (SCA) at para 20 to 22

by the respondents for the relief sought to be refused merely on the grounds of excessive delay.⁷

DISPOSSESSION OF RIGHT OF ACCESS

59. Both parties relied upon the judgment of the Full Court in Jigger Properties CC v Maynard N.O. and others⁸. The Jigger judgment concerns the right of access to underground tanks governed by a lease agreement. The Full Court referred to the judgment of the Supreme Court of Appeal in FirstRand Limited t/a Rand Merchant Bank and others v Scholtz N.O. and others⁹ in which Malan AJA reaffirmed the legal position regarding *quasi possessio* as follows:

“The mandament van spolie is a remedy to restore to another ante omnia property dispossessed ‘forcibly or wrongfully and against his consent’. It protects the possession of movable and immovable property as well as some forms of incorporeal property. The mandament van spolie is available for the restoration of quasi possessio of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the status quo ante and not the determination of the existence of the right. The quasi possessio consists in the actual exercise of an alleged right or as formulated in Zulu v Minister of Works, Kwazulu, and others in ‘die daadwerklike uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word’

60. In paragraph 13 of the *FirstRand* judgment, the Supreme Court of Appeal further held that 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

⁷ Le Riche v PSP Properties CC and others 2005 (3) SA 189 (CPD) at para 8 and 25

⁸ 2017 (4) SA 569 (KZP)

⁹ 2008 (2) SA 503 (SCA) also reported as [2007] 1 All SA 436 at para 12

purported servitude is concerned the mandement is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its quasi possessio is deserving of protection by the mandement. Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a name plate to a wall regardless of whether the alleged right is real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandement. The right held in quasi possessio must be a 'gebruiksreg' or an incident of the possession or control of the property.

61. The earlier judgement by the Supreme Court of Appeal in ATM Solutions (Pty) Ltd v Olkru Handelaars CC and another¹⁰ held in a similar manner that to qualify for protection through a spoliation order, rights had to qualify as “gebruiksregte” (rights to use property) or incidents of the possession or control of the property. Mere personal rights are not protected by the mandement. Only rights to use or occupy property or incidents of occupation would warrant a spoliation order.

62. Spirito argues that possession must be exclusive in the sense of being to the exclusion of others¹¹. It submits that the applicant did not exercise physical control over the estate exclusively but rather, shared it with other operators such as “Line” who operated the mountain bike shop, and members of the public who were granted temporary access to utilise the wine estate’s trails, mountain bike routes, restaurants

¹⁰ 2009 (4) SA 337 (SCA)

¹¹ See the unreported judgment in Lead Engineering and Projects (Pty) Ltd V SWE Repco SA (Pty) Ltd and Others, Western Cape Division, Cape Town, 16567/2022 and De Beer v Zimbalie Estate Management Association (Pty) Ltd and Another 2007 (3) 254 (N) at para 54 to 55. In De Beer. Nicholson, J stated as follows:
 “[55] In a gated community such as that which obtains at Zimbali, it would seem to me that the individual owners are in possession of their houses or units as individuals and in possession of the communal areas as a group of unit owners. Persons who have access, albeit frequent or even habitual, are not in possession of the units or the communal areas. The milkman, the insurance salesman and the estate agent have access to, but not possession of, the units and communal property. Because communal areas are shared [this] should not confuse the issue.”

and other amenities on the wine estate. The applicant had no more rights than any other member of the public who accessed the Bloemendal Wine Estate daily.

CONCLUSION AND RELIEF

63. The applicant applies for final relief. Several factual disputes cannot be resolved on affidavit. These disputes include the contents that were stored in the old church, returning of the keys and the applicant's exclusive possession of the demarcated areas. I cannot reject the respondent's version as erroneous or far-fetched. The applicant concedes that it consensually removed the quadbikes that were stored in the old church. Therefore, no finding of spoliation can be made in respect thereof.

64. Spirito's admission that the applicant abandoned certain items in the old church and that it allowed its workers to take the items is the high point of the applicant's case.

65. However, the return of the abandoned goods is not the primary concern of the applicant's case. The alleged loss of the items stored in the old church is the subject of apparent criminal and civil proceedings. The main purpose of the application pertains to the applicant's asserted entitlement to continue utilising parts of the wine estate.

66. I fail to see how the relief claimed as formulated in the Notice of Motion can be executed. A spoliation order will have no practical effect since it is impossible to determine what areas of the wine estate should be restored to the applicant. The applicant relinquished the use of the old church, and, by implication, the adjacent front and adjacent outdoor areas and fields referred to in the founding affidavit. The applicant never enjoyed the exclusive use of the fields, mountain bike trails or other facilities on the farm.

67. This is apart from the fact that the applicant only half-heartedly applied at the eleventh hour to amend the Notice of Motion to seek relief against the Spirito.

68. The contractual rights between the parties are disputed, and the applicant is unable to prove a “*gebruikersreg*” deserving of protection by the mandament. The applicant’s proclaimed *quasi possessio* is not a right to use property such as a servitude, or the purported exercise of a servitude, or an incident of the possession, or control of the property. Bloemendal Wine Estate was and remained at all times in full control of the estate.

69. In light of the aforesaid, the following order is granted:

[1] The application for the amendment of the Notice of Motion is refused.

[2] The application is dismissed.

[3] The applicant is ordered to pay the costs, including the costs occasioned by the joinder application. Such costs include the costs of Counsel on Tariff A in terms of Rule 69(7).

VAN DEN BERG AJ
ACTING JUDGE OF THE HIGH COURT

HEARD ON 21 MAY 2024

JUDGMENT 27 MAY 2024

APPEARANCES:

FOR THE APPLICANT: ADV D WELGEMOED

INSTRUCTED BY KOEGLENBERG ATTORNEYS
J DE BOD

FOR THE RESPONDENT: ADV A NEWTON

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