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

JUDGMENT

Not Reportable

Case no: A48/2025

In the matter between:

CITRUSDAL BELEGGINGS (PTY) LTD

Appellant

and

THE MINISTER OF WATER AND SANITATION

Respondent

Coram: Saldanha J et Holderness J et Cooke AJ

Heard: 23 July 2025

Delivered: 24 October 2025

ORDER

[1] The appellant's appeal is upheld.

[2] The respondent shall pay the costs of the appeal, including the costs of the applications for leave to appeal, and also including the costs of two counsel on scale C.

[3] The order of the court a quo is set aside and replaced with the following order:

‘1. The respondent is ordered to immediately restore the applicant's possession of and access to the immovable property which is officially described as the Remainder of the Farm Andriesgrond No. 204, situated in the Cederberg Municipality, Division Clanwilliam, Province of the Western Cape (also known as Bokwater farm, Clanwilliam), including the Spoliated Areas as referred to and/or

depicted in the founding affidavit dated 19 October 2022 and/or the annexures thereto [with the exception of the offices used by the respondent's Department since 2014].

2. In the event of the respondent failing to comply with paragraph 1 above and/or in the event of the Department and their agents remaining in possession of the said Spoliated Areas or any other part of the said immovable property, the Sheriff of the Honourable Court is hereby authorised and ordered, with the support of the South African Police Services or another company if necessary (who are likewise authorised and ordered), to assist the applicant to regain possession of the said Spoliated Areas or any other part of the immovable property [excluding the said offices], including by means of towing away any machinery and vehicles not belonging to the applicant or its agents.

3. The respondent shall pay the costs of the application, including the costs of two counsel on scale C.'

JUDGMENT

THE COURT

[1] This is an appeal against the dismissal of a spoliation application by Wille, J sitting as the court of first instance. The appellant claimed that it had been in peaceful and undisturbed possession of farmland when without its consent or without an order of court, the respondent entered onto the land, uprooted citrus trees with the use of heavy machinery such as a digger loader and excavator. The respondent for its part sought to justify its conduct by claiming that it had lawfully expropriated the appellant's property (which included both the farmland and a homestead) several years ago and that the appellant having been financially compensated for the property, steadfastly refused to vacate the property despite repeated requests to do so. The respondent claimed that it was therefore entitled in law to have counter-spoliated the appellant by taking possession of the expropriated farmland. The central issue in the appeal was whether the two requirements of the *mandament van spolie* were met; (i) whether the appellant enjoyed peaceful and undisturbed *de facto* possession of the farmland and whether; (ii) the respondent unlawfully dispossessed the appellant of its farmland without its consent or due process of the law. Needless to state, there can be no lawful counter spoliation without a spoliation.

Context

[2] For the purpose of the appeal, no more than a brief background is necessary. The property that was the subject of the application lies downstream from the picturesque Clanwilliam Dam, which is situated just outside the town of Clanwilliam in the Western Cape. The dam was

constructed as far back as 1935 and is fed by amongst others, the Olifants River. It is common knowledge that South Africa remains a water scarce country and faces continued challenges in the delivery of water and sanitation services caused by several factors, including insufficient water infrastructure, maintenance and investment, recurrent droughts driven inter alia, by climate change, inequalities in access to water and sanitation, deteriorating water quality and in regard to the Clanwilliam Dam, the need to increase its yield and secure the safety of the aging dam wall in the event of flooding. To carry out its mandate through the Department of Water and Sanitation, the respondent as provided for, in the National Water Act of 1998 and the Water Services Act of 1997 has to ensure that the country's limited water resources are protected, managed, used, developed, conserved and controlled by regulating and supporting the delivery of effective water supply and sanitation. That is done in accordance with the requirements of water-related policies and legislation that are critical to delivering on people's rights of access to sufficient food, water and to the growing of the economy and eradicating poverty. In carrying out its mandate, the respondent embarked on a process to raise the existing wall on the Clanwilliam Dam and to secure its safety. In May 2020, cabinet approved, amongst others, the National Department of Water and Sanitation Water Resource Program, which amongst others, aimed to rebuild the economy of which the Clanwilliam Dam was made part of the Olifants-Doorn River Water Resources Project. It is apparently one of the biggest and long-standing infrastructure projects in the country. A feasibility study was conducted in respect of the dam, which as already indicated was constructed in 1935 and in 1962 was raised by 6.1

meters. The study found that the sandstone foundation of the dam was fractured and that there was doubt about the effectiveness of prestressed cables that had been installed during the 1962 raising and there had also been concrete deterioration over time. The analysis of these aspects indicated that the stability of the dam structure was not adequate under extreme floods. It appeared also that almost two decades ago, dam safety investigations identified the need for remedial work to the existing dam. Such remedial work would involve major construction work. The feasibility study undertaken to consider the implications of raising the dam wall was completed in October 2007. The study found that raising the wall was both technically feasible and economically viable and recommended that the dam wall be raised by 13 meters. The project involved extending the dam wall on the downstream side and therefore raising it to a higher level. The objectives of the project were to improve the safety of the dam through remedial work, increase its yield by about 70 million cubic meters per annum, that would increase the water supplies to agriculture, domestic, industrial and mining sectors in the north-western part of the Western Cape Province. For these purposes, the department was required to acquire certain properties and/or land and/or portions of properties that were privately owned by members of the public. To that end, the department resolved to invoke the provisions of section 64 of the National Water Act.¹ The section empowered the respondent to

¹ Expropriation of Property –

- (1) The Minister, or a water management institution authorized by the Minister in writing, may expropriate any property for any purpose contemplated in this Act, if that purpose is a public purpose or is in the public interest.
- (2) Subject to this Act, the Expropriation Act, 1975 (Act No. 63 of 1975), applies to all expropriations in terms of this Act.

expropriate any properties for any purposes contemplated in the Act if that purpose was a public purpose or in the public interest. Amongst the properties expropriated was that described as a portion of the remainder of Andriesgrond No. 204 situated at Clanwilliam Division, Western Cape Province in Extent 1799.2484 ha, held under Deed of Transfer T[...] dated 18 September 1995, in part, the subject property of the appeal and then owned by the appellant. In fact, it was one of two properties earmarked for expropriation related to the appellant.

- [3] On 20 August 2013, the respondent issued a notice in compliance with the Promotion of Administrative Justice Act of 2000 (PAJA) in respect of the expropriation of the property. In the notice, the respondent stated that the acquisition of the land was urgently required to implement the raising of the Clanwilliam Dam and associated road realignment. The effect of the proposed expropriation on owners and occupants and other right holders would be that the owners would be divested of their ownership rights which would terminate upon expropriation. Lessees or other occupants would also be divested of their rights to occupy which would terminate upon occupation and that the expropriated land would be released from any mortgage bond(s). The respondent stated further that the contemplated date of expropriation was to be 12 September 2013 and the date of possession of the property as the same date. The notice also stated that the owner and all occupants would be allowed to remain on the property until the date of possession when the

(3) Where the Minister expropriates any property under this Act, any reference to “Minister” in the Expropriation Act, 1975, must be construed as being a reference to the Minister.

Where any water management institution expropriates property under this Act, any reference to “Minister” and “State” in the Expropriation Act, 1975, must be regarded as being a reference to that water management institution.

expropriated area had to be vacated. The appellant was also informed of its right to object, accept or reject the compensation that would be offered.

[4] On 19 June 2014, the respondent issued out a notice of expropriation in respect of the appellant's property in which it recorded that the date of expropriation was 1 October 2013 and that the respondent had taken possession of the expropriated property as from the same date. The appellant was offered an amount of R13 746 326, including solatium of R55 000 and interest of R632 409.

[5] In July 2014 and April / August 2017 the compensation was paid out to the appellant.

[6] On 18 July 2019, the respondent through its Chief Director, Infrastructure Development issued a notice to the appellant to vacate the acquired portion of the farm. It stated that the department required the use of the property as the raising of the existing dam wall was currently underway. The appellant was requested to vacate the property by 1 September 2019. A further letter of similar content was sent on 18 September 2019, with the department requiring the appellant to vacate the property by 1 November 2019 as it sought to make use of the property.

[7] On 25 November 2020, the respondent issued a further notice of expropriation (with an offer of compensation) in respect of the appellant's property similar to the previous notice except with an

increase in the size of the property to be acquired. The date of expropriation was set as 6 January 2021 and in which the respondent claimed that the state would take possession of the acquired portion of the property as from 13 January 2021.

- [8] On 11 October 2022 the respondent again by letter sought the vacating of the property by the appellant. However, that which precipitated the spoliation proceedings in the court a quo, was when the respondent on Friday, 14 October 2022 at 16h19 in an e-mail addressed to the appellant by an official in the department of the respondent Mr Rohrs Manfred, stated that the department intended to move on to the property depicted on an attached map (part of the area occupied by the appellant) on Monday, 17 October 2022. Manfred stated further, *'please can you remove anything before then that you were not paid out for already (sic)'*. On Saturday, 15 October 2022 at 14h02, the appellant responded by e-mail to the respondent in which it claimed that it had been in legitimate possession of the indicated areas with the consent of the department since the expropriation of the property. It also stated that it had an invested interest in the property because of production expenses on the property with a legitimate expectation that it would be able to harvest the citrus on the property in return for its investment. Apart from that, the appellant stated that the notice was only sent to it on Friday, 14 October 2022 expecting it to vacate over a weekend. It claimed that it was entitled to proper and reasonable notification taking into account the relevant circumstances. The appellant also informed the respondent that it had been advised by its legal representatives that the respondent could not take possession of the property without its

permission which it thereby 'formally refuse(d)' and that any attempt by the respondent to take possession without its permission would amount to self-help and an unlawful spoliation of the property. It threatened that an urgent application for spoliation would be brought against the respondent if it moved onto the property. The respondent replied on Sunday, 16 October 2022, to the claims made by the appellant. The appellant recorded that the response by the respondent dealt with the alleged merits of the department's claim to be in possession of the property and was not relevant to the spoliation proceedings. On Monday, 17 October 2022 at 08h22 the legal representatives of the appellant sent an e-mail to the respondent, copied to the office of the State Attorney, in which they recorded that the respondent had threatened to take possession of their client's property and that their client refused to give the respondent its consent to do so. It further pointed out that should the respondent proceed to do so without due process, it would be regarded as self-help and its actions would amount to an unlawful spoliation. In such an event their instructions were to bring an urgent spoliation application.

[9] In the founding affidavit of the appellant deposed to by Mr. Gerard Johannes Stone, the director of the appellant, he described that on Monday, 17 October 2022 at approximately 07h00 he personally observed heavy machinery, including a digger loader and excavator moving on to the property where citrus trees were uprooted and removed.

The urgent application and the relief sought by the appellant

[10] On 19 October 2022 the appellant issued out an urgent application against the respondent in the court a quo. It sought urgent relief and a rule nisi in the following terms:

‘2.1. That the Respondent be ordered to immediately restore the Applicant’s possession of and access to the immovable property which is officially described as the Remainder of the Farm Andriesgrond No. 20, situated in the Cederberg Municipality, Division Clanwilliam, Province of the Western Cape (also known as Bokwater farm, Clanwilliam), including the Spoliated Areas as referred to and/or depicted in the founding affidavit dated 19 October 2022 and/or the annexures thereto [with the exception of the offices used by the Respondent’s Department since 2014];

2.2. That in the event of the Respondent failing to comply with paragraph 2.1 hereof above and/or in the event of his Department and their agents remaining in possession of the said Spoliated Areas or any other part of the said immovable property, the Sheriff of the Honorable Court is hereby authorised and ordered to, with the support of the South African Police Services or another company if necessary (who are likewise so authorised and ordered), assist the Applicant to regain possession of the said Spoliated Areas or any other part of the immovable property [excluding the said offices], including by means of towing away any machinery and vehicles not belonging to the Applicant or its agents;

2.3. That the Respondent, including his Department and agents, is prohibited from interfering with the Applicant’s and/or its lawful agents’ farming activities or its/their possession of the aforesaid Spoliated Areas or any other part of the aforesaid immovable property and/or from removing therefrom any plants, irrigation system or movable assets of the Applicant or its lawful agents;

2.4. That the Respondent be ordered to pay the Applicant's costs of this application, including any costs associated with regaining possession of the aforesaid Spoliated Areas or any other part of the aforesaid immovable property (which latter costs shall include the actual costs of the Sheriff as well as any third party used by the Sheriff).'

The remainder of the relief related to the return date, together with a prayer for further and alternative relief and an order of costs against the respondent.

[11] On 21 October 2022 an order was taken by agreement between the parties that the matter was to be postponed to the urgent roll together with a time-table for the filing of further papers by both sides on the following basis:

'1. ...

2. That pending the hearing as referred to in paragraph 1 hereof above, the Respondent and his Department (including their employees) shall cease operations and removals on the areas where the Applicant alleges spoliation had taken place [i.e. the "Spoliated Areas" as referred to and/or depicted in the founding affidavit herein dated 19 October 2022 and/or the annexures thereto], or any other portion of the Remainder of the Farm Andriesgrond No. 204, situated in the Cederberg Municipality, Division Clanwilliam, Province of the Western Cape (also known as Bokwater farm, Clanwilliam), and further that the Respondent shall not commit any other act of spoliation not yet complained of by the Applicant.' ...

[12] In the founding affidavit, the appellant emphasized that it was seeking no more than spoliatory relief against the respondent and sought to confine its claims based on the requirements for such relief. It claimed

that part of the remaining relief sought was no more than ancillary to any spoliatory relief granted under paragraph 2.1 of the Notice of Motion. However, with reference to its emails to the respondent of the 15 October 2022 and the respondent's reply of the 16 October 2022 wherein various issues were raised by the parties about the appellant's occupation of the property and the respondent's responses, the appellant elected in the concluding paragraphs of the founding affidavit under the heading "Full Disclosure" to deal briefly with what it referred to as the various negotiations with the respondent's officials with regard to its continued occupation of the property, and the alleged ostensible agreements it had entered into with the respondent and SANRAL in respect of the property. The appellant nonetheless maintained that none of these issues were relevant for the purposes of the spoliatory relief it sought against the respondent.

[13] The respondent in its answering affidavit dealt extensively with the background to the need for the expropriation of the appellant's property, its legislative mandate, the expropriation of the property, the payment of compensation to the appellant and what it referred to as the various attempts by the appellant to secure agreements for its continued occupation of the property. The respondent also sought that the court develop the common law on the *mandament van spolie* in the interests of justice to allow the respondent and the court to deal with the merits of the respondent's ownership and possession of the expropriated property. The respondent claimed the circumstances of the matter were unique and given the exigencies of the responsibilities of the respondent to increase the height of the dam wall and secure its

stability and safety and so prevent the risk of harm to people living downstream of the dam and damage to property in the event of a flooding disaster. In that regard, it referred to a Fifth Dam Safety Evaluation commissioned by the Department in April 2020 and procured in terms of the various enabling legislation and government notices.² The respondent likewise referred to Emergency Plans compiled by it in November 2019. The respondent attached the elaborate Safety Evaluation and the Emergency Plans to its answering affidavit. The respondent also raised as a defense to what it regarded as the unlawful spoliation by the appellant of the expropriated property by refusing to vacate notwithstanding the various notices and letters sent by the respondent to do so, that it was entitled in law, to have counter-spoliated the appellant when moving on to the farmland to restore what it regarded as its possession of the property.

[14] The court a quo did not deal at all in its judgment with the development of the common law and it appears not to have been pursued by the respondent. Neither did it attempt to do so on appeal. The appellant, for its part, had in its replying papers vehemently resisted the invitation to the court to develop the common law. It nonetheless responded extensively to the merits of what was raised as both the ownership and alleged possession of the property by the respondent. It raised, amongst others, the lack of any necessity by the respondent to have expropriated the property when it could merely have obtained a servitude over the land, that it intended to challenge the compensation

² The Fifth Dam Safety Regulations promulgated in the Government Gazette and by Government Notice read together with the National Water Act.

paid to it, that it had an agreement with the respondent that it was entitled to remain on the property until the dam wall was inundated with water, but more importantly it steadfastly resisted that there was any basis both in fact and law, for the respondent to have counter-spoliated the appellant's occupation and possession of the property.

[15] We are mindful that an appeal does not lie against the reasoning of a court a quo save for the order made (see in this regard, *Cape Empowerment Trust Ltd v Fisher Hoffmann Sithole* 2013 (5) SA 183 (SCA) para 39). It would appear, however, that the court a quo was wholly persuaded by the defense raised by the respondent of having resorted to a counter-spoliation, which the court a quo regarded as what the matter was really all about and dealt with the merits of the respondent's ownership and possession of the expropriated property.

The law

[16] It is trite, that an applicant in seeking to invoke the remedy of the possessory interdict of the *mandament van spolie*, is only required to demonstrate two things; (i) that he/she was in peaceful and undisturbed *de facto* possession of the relevant property at the time of spoliation, and (ii) that a respondent had without recourse to law or consent dispossessed her or him and in so doing took the law into its own hands. In essence the remedy seeks to protect the rule of law, a founding principle and value of our Constitution.³ The authority for the requirements for the *mandament* are legion. Van Blerk, JA in the oft

³ Supremacy of the constitution and the rule of law.

recited matter of *Yeko v Qana* 1973 (4) 735 at 739D-F succinctly stated that; ‘The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts, the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. In order to obtain a spoliation order, the *onus* is on the applicant to prove the required possession and that he was unlawfully deprived of such possession. ...whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. For, as Voet, 41.2.16, says the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the *spoliatus* has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that, he was unlawfully ousted’ (our emphasis). The nature of the relief that the court is required to restore the *status quo ante*, was set out as long ago in *Nino Bonino v De Lange* 1906 T. S. at page 122.

Application of the law to the facts

[17] It is indisputable that the appellant remained in physical and continued occupation of the property after the expropriation and continued its farming operations on part of the property. Moreover, the dwelling on the property was occupied by the director and his family. That, despite the various letters of demand and notices requiring the

appellant to vacate the property, it steadfastly refused to do so. Needless to state, that was simply indisputable otherwise there would have been no need for the respondent to have continuously demanded that the appellant vacate the property. Moreover, the respondent itself at various instances in its answering affidavit conceded that even after the expropriation of the property, the appellant remained in 'continued possession' of the property. That puts paid to the respondent's contention and the finding by the court a quo that the appellant was not in *de facto* possession of the property. Moreover, that undermines any other claims raised by the respondent that it was entitled to what it regarded as legitimately counter spoliating the appellant of the property. Simply stated, given that the very remedy of counter-spoliation is defensive in nature, there can be no lawful counter-spoliation without a spoliation. Moreover, the respondent contended that given the repeated refusals by the appellant, literally over several years in refusing to vacate the expropriated property amounted to a continued spoliation of the property and it was therefore entitled to counter-spoliate the appellant. That in our view was wholly without any merit. Van Blerk, J.A. in *Yeko v Qana* (above, at C-D) in dealing with the defense of counter spoliation stated 'Similarly there may be circumstances justifying self-help if it concerns *contra* spoliation which is *instanter* resorted to, thus forming part of the *res gestae* in regard to the despoiler's appropriation of possession, as would be the immediate dispossession of a thief of stolen goods when he was caught *flagrante delicto* (Cf. *Meyer v. Le Grange and Another*, 1952 (2) S.A. 55 (N)). The respondent's possession was, however, not of such a kind.' In respect of the requirement of *instanter* both the respondent and the court a quo

sought to rely on the decision of *South African Human Rights Commission and Others v City of Cape Town and Others* 2022 (6) SA 508 (WCC) (since upheld on appeal)⁴ where at para 44 the following is stated:

‘As stated above, counter spoliation is not a stand-alone remedy but is used as a defense to counter an act of spoliation and for this reason has to be used at the stage where it can be considered as being part of the act of spoliation. This stage is known as *instanter*. This would mean that it was a mere continuation of the existing breach, it sought to remedy, was not a new breach and consequently, is condoned by the law. If the first victim dispossessed proceeds to take the law into his/her own hands after the original breach is completed and possession is perfected by the despoiler, it would amount to a separate act of spoliation which would not be condoned by the law. What would amount to *instanter* is dependent upon the facts of each case and is inherently flexible but the act of counter spoliation must take place immediately in response to the act of spoliation.’ (our emphasis)

[18] The respondent sought to suggest that given the peculiar facts of this matter, that its conduct amounted to an *instanter* counter spoliation. The respondent and so did the court a quo, failed to appreciate the proviso that the counter-spoliation must take place ‘immediately in response to the act of spoliation’. On the facts of this matter, the conduct of the respondent could not have amounted to *instanter* and, with respect, it is inconceivable how such remedy could have been resorted to where after a period of not only months but years in which the appellant continued to occupy and *de facto* possess the expropriated property.

⁴ 2024 (5) SA 368 (SCA).

[19] Moreover, there was much debate at the hearing of the appeal in respect of the manner in which the respondent sought to enter into the merits of its ownership and possession of the expropriated property. A position affirmed by the court a quo. In fact, in heads of argument the respondent contended that unlike the dwelling unit on the expropriated property, the remainder thereof was “unoccupied.” Needless to say, such a hopelessly incorrect assertion was made blinded to the fact that there were citrus trees and grazing sheep on the property which the appellant was farming at the time of the spoliation. Moreover, in heads of argument the respondent contended that in the light of the threat and risk of flooding and damage to properties below the dam and possible injury and disaster to people thereon, the court should exercise its discretion in dismissing the appeal. Counsel for both the appellant and respondent correctly accepted though that the court enjoyed no such discretion. Moreover, the respondent’s own dilatory conduct over many years undermined the urgency which the respondent sought to act upon on that Monday morning in October 2022. There was no evidence of any immediate threat of flooding and that anybody or property was in danger that would not have enabled the respondent to have obtained an appropriate court order for the eviction of the appellant from the subject property. The reliance on the exigencies of the respondent’s conduct in the interest of life and property was no more than opportunistic. If anything, it demonstrated on the respondent’s own version, that if any such exigencies existed there was a woeful and unexplained dereliction on the respondent’s part in failing to have obtained an appropriate court order to have properly and lawfully

secured the expropriated property for use in the extension and remedial work on the dam wall.

The Expropriation Act

[20] For the purposes of our findings in the appeal, it is, in our view, not necessary for any detailed examination of the interpretation to be accorded to various provisions of the Expropriation Act on which the respondent sought to rely. Suffice to say, the *de facto* possession of the property by the appellant had not as a matter of law ‘been euthanized’ by the provisions of the Expropriation Act nor to hold otherwise ‘would violate the expropriation legislation’. There is in our view simply no basis for such a contention in the Expropriation Act.

[21] In the respondent’s heads of argument, it was submitted that in terms of the Expropriation Act the respondent was placed in possession of the expropriated area retrospectively to 1 October 2013. Therefore, so the argument ran, when the heavy machinery moved onto this area on 17 October 2022, ownership and possession had vested in the State by operation of law. It was also submitted that in so far as the appellant remained in possession of the area, it did so for and on behalf of the respondent. In oral argument it was contended that the respondent had not resorted to self-help as he invoked the provisions of the Expropriation Act. Counsel sought to draw an analogy with legislation which allows for the seizure of stolen property. There are several difficulties with these arguments, both factual and legal.

[22] Section 8(3) of the Expropriation Act provides that: 'The State shall take possession of any property expropriated on the date stated in terms of section 7(2)(b) or such other date as may be agreed upon between the owner concerned and the Minister'. In terms of section 7(2)(b), the notice of expropriation must 'state the date of expropriation or, as the case may be, the date as from which the property will be used, as well as the period during which it will be used, and also state the date upon which the State will take possession of the property'.

[23] In this matter the notice of expropriation was dated 19 June 2014 and stated: 'The date of expropriation **was 1 October 2013** and the State took possession of the expropriated property as from **1 October 2013**' (the bold is in the notice). The Expropriation Act contemplates notice being given of a prospective date when possession will be taken. It does not contemplate a retrospective taking of possession. Furthermore, notwithstanding the statement in the notice, the State did not take factual possession of the property from 1 October 2013, nor from any other time before 17 October 2022. In fact, in 2013 the expropriated property was leased back to the appellant for an indefinite period.

[24] Nor did the appellant possess the property on behalf of the respondent. The appellant used the property for its own purposes. On the date of the spoliation the property was being used by the appellant to graze sheep and grow citrus trees for its own profit. Plainly the

respondent did not benefit from these farming operations, and there was no agency relationship between the respondent and the appellant.

[25] There is a further, more fundamental problem. Even if the notice of expropriation had stated that the State would take possession on 17 October 2022, or if this had been the date agreed by the parties, the State would still not be entitled to take possession of the property without either the consent of the appellant, or the sanction of a court. In *Sithole v Native Resettlement Board* 1959 (4) SA (WLD) 115 at 118H, the court held that if a statute confers a right to enter upon certain property, it is implicit that if the proposed action is not acquiesced in by the person in possession, then the process of law must be sought in order that the action may be carried out. It is not implied that any official or body or anybody else can take the law into their own hands (See also A Gildenhuys *Onteieningsreg* 2 ed (2001) at 122). The court in *Sithole* observed that Parliament may alter the ordinary principle of law that a person entitled to property is not entitled to enter upon it and take possession by force. But the right to do so must be conferred in clear language (at 117C-D, confirmed in *George Municipality v Vena and Another* 1989 (2) SA 263 (A) at 271F-G). Although this judgment was delivered in the pre-constitutional era, we consider that it accords entirely with constitutional norms, specifically the rule of law which is one of the founding principles of our democracy (*South African Human Rights Commission* above para 25), as well as sections 25(1) and 34 of the Constitution (see in this regard *African Billboard Advertising (Pty) Ltd v North and South Central Local Councils, Durban* 2004 (3) SA 223 (N) at 228A-D).

[26] In this instance, we do not consider that the Extradition Act may be construed to authorise the State to take possession by force. Granted, the Extradition Act provides that the State 'shall' take possession, whereas *Sithole* concerns a statute which used the word 'may'. Nonetheless, in our view the language employed in the Expropriation Act does not suffice to show, clearly, that the State may take possession by force (for legislation which uses the word 'shall', see *Sterling and Mockford NO v Bensusan* 1930 WLD 236). As pointed out in *African Billboard*, were this the intention of Parliament, it would be a simple matter to say that no court order would be required (at 228E-F).

[27] As to legislation concerning the seizure of stolen property, we agree with the finding in *Sithole* that different considerations of interpretation apply in connection with such legislation (at 118H-119A).

[28] Therefore, the effect of section 8(3) of the Expropriation Act is that the State shall take possession of the expropriated property on the applicable date only in the sense that it is entitled to compel the possessor to hand over possession on this date. This section does not authorise the State to take the property by force (compare *Sterling* above at 241). If not given, the State 'shall take possession' by instituting legal process to obtain possession.

[29] Thus, the respondent was not placed in possession of the expropriated area retrospectively to 1 October 2013. Nor did the appellant possess the property for and on behalf of the respondent. When the heavy machinery rolled onto the property on 17 October

2022, factual possession had not vested in the State by operation of law, and no law or court order authorised the respondent to take possession against the wishes of the appellant.

The question as to the merits of the conflicting rights of the parties

[30] The respondent contended that, by seeking relief additional to the spoliation order in the proceedings *a quo*, the appellant enjoined the court to consider the merits of the parties' competing rights, and of the appellant's claim.

[31] Reliance in this regard was placed on the judgment of Selikowitz J in *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) at 86E-G where it was held that as the City of Cape Town, the applicant, had introduced a wide range of issues and sought various orders, including declaratory relief to define its rights, in the alternative to relief in terms of the *mandament*, it had opened the door to the court considering the further relief on the merits.

[32] In the counter-application in *Rudolph*, the respondents, the occupiers of the property, sought *inter alia* an order declaring that the housing programme of the City of Cape Town failed to comply with their constitutional and statutory obligations, by not making short-term provision for people in crisis living in Valhalla Park, and interdicting the City of Cape Town, from evicting the applicants from the property until such time as suitable alternative accommodation or land was available to them. The applicant argued that the respondents' counterapplication

was not competent, because the main application was for spoliatory relief.

[33] It is well-established that the court in determining such relief ordinarily avoids engaging with complex issues regarding the merits or legal rights of the parties. The sole question to be determined in such matters is whether the applicant was unlawfully dispossessed.

[34] However, the court in *Rudolph* found that the applicant did not limit itself to spoliation relief alone. The application also includes a restraining interdict to prevent respondents from occupying the municipality's property, a declaratory order confirming the applicant's right to possess the park as the owner thereof, an interim eviction order under section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (the PIE Act), and a request to have parts of the PIE Act declared unconstitutional.

[35] The court found that by claiming such relief, even in the alternative, the applicant expanded the scope of the application to include declaratory and eviction relief, and in so doing opened the door to legal arguments about the merits of the case, including the lawfulness of the respondents' occupation.

[36] *In casu* the respondent contended that as was found by the court a quo in the application for leave to appeal, the appellant did not merely seek spoliatory relief, and in so doing opened the door to the court considering the merits of the parties' respective rights to possess the property. The appellant, in addition to the spoliatory relief, sought an

order interdicting the respondent from interfering with its farming activities and / or removing any plants, irrigation system or movable assets. It also sought an order that the costs associated with regaining possession of the spoliated areas or any part of the immovable property be paid by the respondent.

[37] It is apposite to note that the court *a quo* in the present matter only sought to justify that it entered into the merits of the matter on the basis of the prohibitory interdict, as was the case in *Rudolph*, in the application for leave to appeal, where the court found that as the appellant sought an ‘additional interdict’ against the respondent and its agents, the appellant ‘put the merits of its alleged peaceful and undisturbed possession “on the table” by seeking this additional interdictory relief’.

[38] The appellant criticised the court *a quo* for delving into the merits and determining that the respondent lawfully moved onto parts of the expropriated land (having revoked the appellant’s permission to occupy). The court *a quo* concluded that the respondent therefore did not dispossess the appellant of property in its possession.

[39] The court *a quo* held that possession of the property ‘as a matter of law had passed to the Respondent’ by virtue of expropriation. The appellants contend, correctly in our view, that the court erred in this regard as it introduced the merits into a spoliation application and it was common cause that the respondent had, for many years following the expropriation, allowed the appellant to remain in possession.

[40] The respondent in its answering affidavit in the proceedings *a quo* conceded that the appellant had remained in 'continued possession' of the property after the expropriation and had refused to vacate same.

[41] The court held that the appellant's continued occupation of the property constituted a spoliation, and that the respondent had thus lawfully and *instante* counter-spoliated the appellant. The respondent argued that this once again encroaches upon the merits of their existing dispute.

[42] In *Street Pole Ads Durban (Pty) Ltd and Another v Ethekwini Municipality* 2008 (5) SA 290 (SCA) (*Street Pole Ads*) the Supreme Court of Appeal referred to the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property:

'That is because good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims'. This is because such an applicant 'in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered.' (at para 15 and the authorities there cited).

[43] This case is, however, distinguishable from *Street Pole Ads*. The applicants in *Street Pole Ads* sought classically spoliatory relief in demanding the restoration of the posters the municipality had despoiled; however, it further claimed an interdict, not directed only to the despoiled property, but in wide terms embracing all the various street poles in the Ethekewini metropolitan area covered by the disputed agreements. As pointed out by Nicholson J, that claim spoiled for a fight about its title to those poles, and it was this fight in which the municipality was entitled to and did engage.

[44] The relief sought by the appellants in this matter, for an order prohibiting the respondent from interfering with the appellant's farming activities or its possession of the spoliated areas or any other part of the aforesaid immovable property and / or removing any plants, irrigation system or movable assets of the applicant, was ancillary to the spoliation relief and did not require the court *a quo* to engage with the merits of the appellant's right to possession.

[45] The appellant did not claim a substantive right to possession, based on title of ownership or on contract. The court *a quo* was accordingly not required to consider the merits as it did. Put differently, the court need not have decided whether the respondent had a stronger claim to possession, by virtue of the expropriation, than the appellant. In *Ivanov v Northwest Gambling Board and Others* 2012 (6) SA 67 (SCA), the SCA noted that the 'principle is simple: possession must first be restored to the person spoliated, irrespective of the parties' actual rights to possession'.

[46] Even if the alternative claims sought by the appellant justified the respondent in adducing evidence in relation to the lawfulness of the appellant's possession, such evidence would only have been relevant to the interdictory relief. It would not have been relevant to the spoliatory relief. For this reason also, the court a quo should not have had regard to the merits of the appellant's possession in deciding whether to grant the spoliatory relief.

[47] In as much as the respondent invited the court to enter into the merits of its ownership and alleged possession of the expropriated property, that even if the court did so, it would not, in our view, lead to any justification of the respondent's conduct of the 18 October 2022, in spoliating the property on which the appellant had been farming. Any debate on the merits of the matter and a finding would and could not have justified the conduct of the respondent in having taken the law into its own hands.

Relief

[48] For the reasons set out above we conclude that the appellant was entitled to the relief described in paragraphs 2.1 and 2.2 of the notice of motion, and the court a quo therefore ought to have granted this relief. To this extent the appeal falls to be upheld.

[49] At the hearing counsel for the appellant correctly accepted that the appellant had not established a claim for an interdict, as requested in

paragraph 2.3 of the notice of motion. In addition, he submitted that this relief was meaningless and went too far. Counsel also agreed that the appellant was not entitled to an order for the costs ‘associated with regaining possession of the aforesaid Spoliated Areas or any other part of the aforesaid immovable property’, as sought in paragraph 2.4 of the notice of motion.

[50] Both parties employed two counsel, and both sought costs of both counsel to be taxed on scale C. In our view, the nature of the matter warranted two counsel, and we are satisfied that the appellant is entitled to costs of two counsel on scale C for the proceedings a quo, as well as the proceedings on appeal.

V SALDANHA

JUDGE OF THE HIGH COURT

M HOLDERNESS
JUDGE OF THE HIGH COURT

D COOKE
ACTING JUDGE OF THE HIGH COURT

Appearances

For appellant: R van Riet SC and C Burke

Instructed by: Tiaan de Jager Attorneys

For respondent: MC Erasmus SC and HA Mpshe

Instructed by: State Attorney

