



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/Not Reportable

Case no: 2025-164852

In the matter between:

MOOI PLAATS SOLAR POWER (RF) (PTY) LTD

Applicant

and

BOVLEI BOERDERY TRUST

First Respondent

CAREL LINDO VAN DER MERWE

Second Respondent

Neutral citation: *Mooi Plaats Solar Power (RF) (Pty) Ltd v Bovlei Boerdery Trust and Another* (2025-164852) (30 January 2026).

Coram: TYUTHUZA AJ.

Heard: 24 October 2025.

Delivered: 30 January 2026.

Summary: **Law of Property** – *Mandament van spolie* – urgency thereof – requirements – right of access and free possession.

ORDER

1. The application is dismissed with costs, which costs shall include counsel's costs on scale B.
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JUDGMENT

Tyuthuza AJ

INTRODUCTION

1. The applicant approached this Court for urgent relief based on the *mandament van spolie* and in the alternative, a temporary interdict. During oral argument counsel for the applicant indicated that, based on the respondents' version, it effectively abandons the relief for a temporary interdict.
2. The application was only confined to the *mandament van spolie*, wherein the applicant seeks an order restoring access to the primary access gate situated at the entrance to PV Area 1 on Remaining Extent of Portion 1 (Bovenvlei) Farm Leuwe Kop No.1[...], U[...] Municipality, Hanover District (the property).
3. The applicant basically seeks a final order that the status *quo* in respect of its access to the private road and gate be restored to enable the applicant and its contractors to have access the property.

BACKGROUND

4. The applicant, Mooi Plaats Solar Power (RF) (Pty) Ltd, is a private company with limited liability which is developing, constructing and operating a 240 MW (AC) Mooi Plaats Solar Facility on the property.
5. The first respondent, the Bovlei Boerdery Trust, is the owner of the property. The second respondent, Carel Lindo Van Der Merwe, is a trustee of the first respondent.
6. In December 2023, the parties executed a notarial lease agreement in terms of which the applicant was granted unrestricted access to and use of the property for the duration of the lease agreement.
7. A perpetual access servitude was registered in December 2023 which granted the applicant the right of access along the existing gravel roads and through the gates to the lease area.

Applicant's version

8. The applicant seeks an order that the respondent unlock and keep unlocked the primary access gate situated at the entrance to PV Area 1 and to restore to it undisturbed possession of, and twenty-four-hour vehicular access through the gate to the leased premises without any unilateral restriction or limitation as to the class, nature, load, frequency or timing of vehicles. The applicant alleges that the gate is the sole practical entrance to the construction site.
9. The perpetual access servitude registered in December 2023 secured the applicant's right of access along the existing gravel roads and through the gates to the leased area.
10. Until 2 August 2025, the applicant had been making use of the entrance in question for months and had free, unfettered access to the construction site at all relevant times. It is common cause that the gate was locked on 2 August 2025 but was subsequently unlocked on 9 September 2025 and remains unlocked.

11. Since 10 September 2025, the second respondent has implemented unilateral and unlawful restrictions, which interfere with and frustrate the applicant's access and use, which it previously enjoyed. The applicant argues that the respondents have curtailed access by way of these unilateral restrictions.

Respondents' version

12. The respondents submit that the applicant does not have a right to use the gate, and for it to be kept unlocked, for purposes of giving twenty-four-hour vehicular access, without any restriction or limitation as to the class, nature, load, frequency or timing of vehicles passing through the gate. The respondents submit that the applicant already has access through a bigger gate, which serves as the main gate to the leased area and the project.
13. The respondents dispute that the applicant had use of the gate in the manner which it seeks and denies that the applicant was deprived of the possession at the time the application was launched. It is submitted that the gate was securely locked from 18h00 to 06h00 every day and was not, as the applicant avers, kept unlocked at all times.
14. The gate at the centre of the dispute is a private gate and has, save on limited occasions, been used exclusively by the respondents. The applicant only started using the gate in July 2025, upon permission being granted to use the private gate and road on a temporary basis and on strict conditions. Such permission was granted to the applicant to set up a temporary concrete batch on the respondents' farm, outside the leased area for cement trucks to transport the cement by way of the private road.
15. Permission was also asked and granted on strict conditions that only delivery trucks may use the private road to transport raw materials from the public road through the private gate to the new concrete batch plant. Further, that the use of the private road was only for daytime as the gate would be securely locked during the night.

16. The respondents locked the gate in order to restore the status *quo* that existed prior to July 2025. Thereafter, the applicant and its contractors resumed the use of the other roads along which they maintained unfettered access to the leased area.
17. The relief sought by the applicant goes far beyond the restoration of the status *quo ante*.
18. It was submitted that the spoliation implies a deprivation of use and not a mere annoyance or disturbance of possession.

URGENCY

19. It is trite, as enunciated by the Court in the matter of *Mfuniselwa v Mfuniselwa and Others*,¹ that a spoliation remedy is designed as a “speedy remedy” which provides summary relief. This is because of its underlying purpose – to ensure the respect of the rule of law so that no resort to self-help should be tolerated.²
20. In *Mangala v Mangala*³, the Court held that an applicant seeking a spoliation remedy must either comply with the Uniform Rules of Court in the normal way or make out a case for urgency in accordance with the provisions of Rule 6(12)(b). This position has been affirmed in *Mans v Mans*⁴ wherein the issue of urgency in the context of spoliation proceedings was discussed as follows:

[6] ... it is trite that a litigant who relies on urgency in order to justify a departure from the strict provisions of the Rules is required in terms of Rule 6(12)(b) to “*set forth explicitly the circumstances which he avers render the matter urgent and the reasons he claims that he could not be afforded substantial redress at a hearing in due course*”. It is also true that there are numerous examples in our case law where applications have been dismissed because a party has failed to comply with these provisions.’

¹ (2818/2022) [2022] ZAEQBHC 47 (13 December 2022) para 10.

² *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) para 5.

³ 1967 (2) SA 415 (E) at 415G.

⁴ 1999 JDR 0450 (C) paras 6-10; see also *Du Preez v Du Preez* (597/2025) [2025] ZANCHC 28 (28 March 2025) para 14.

21. It is incumbent upon the litigant wishing to dispense with the ordinary rules of procedure of this Court to stipulate the reasons why the matter is indeed urgent, and further to stipulate specifically why it will not be afforded redress in due course should the ordinary procedures be followed.⁵
22. The respondents contend that the application is not urgent, or that the urgency is self-created, and that the applicant has been using an alternative route and/or entering through the main gate.
23. The applicant submits that this is a spoliation application and by its very nature, is urgent and that the restoration of the status *quo* should be ordered without delay. Nonetheless, the applicant proceeds with submissions to make out a case for urgency in terms of Rule 6(12).
24. The applicant submits that every additional day of restricted access compounds substantial and potentially irrecoverable loss of time and money. The alternative route is said to be commercially untenable as it yields additional costs of R600 000 per day. Further, the delay imperils national-grid connection milestones.
25. Commercial interests have been found to be equally worthy of protection to justify reliance on Rule 6(12).⁶ Based on the facts as a whole and the chronology of events since August 2025, I am of the view that the matter is urgent.

SPOLIATION

Legal principles

26. In *Du Preez v Du Preez*⁷, Mamosebo ADJP discussed the spoliation remedy in the following terms:

⁵ Rule 6(12)(b) stipulates that: "In every affidavit or petition filed in support of any application under paragraph (a) of the subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course."

⁶ *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586F-G; see also *Avis Southern Africa (Pty) Ltd and Others v Porteous and Another* 2024 (2) SA 386 (GJ) paras 17-21.

⁷ (597/2025) [2025] ZANCHC 28 (28 March 2025) para 16; see also *Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521 (WCC) para 7.

'In *Nino Bonino v De Lange*⁸ Innes CJ explained the nature of spoliation:

"Spoliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right."

The remedy is a possessory suit based on the maxim *spoliatus ante omnia restituendus est*. In simple terms, this means that possession must be restored to the dispossessed person before enquiring into anything else. The *mandament van spolie* is designed to be a robust, speedy remedy which serves to prevent recourse to self-help.'

27. Gilbert AJ in *Merveille IMP and EXP (Pty) Limited and Others v Apple INC and Others*⁹ explained the requirements for a *mandament* as follows:

'The requirements for a spoliation order are clear: an applicant must prove that he was in peaceful and undisturbed possession (occupation) of the property and that the respondent deprived him of his possession (occupation) forcibly or wrongfully or against his consent. Bristowe J in *Burnham v Neumeyer*¹⁰ is typically cited as authority:

"Where the applicant asks for spoliation he must make out not only a *prima facie* case, but he must prove the facts necessary to justify a final order – that is, the things alleged to have been spoliated were in his possession and they were removed from his possession forcibly or wrongfully or against his consent."¹¹

28. Accordingly, to succeed with an application for the *mandament van spolie*, the applicant must prove two requirements:¹²

27.1. First, peaceful and undisturbed possession at the time of dispossession: Generally, possession is established by physical control and the intention to possess. Nonetheless, continuous physical contact or use is not necessary for the retention of possession once it has been acquired, the degree of continuity

⁸ 1906 TS 120 at 122.

⁹ (2025/198671) [2025] ZAGPJHC 1139 (10 November 2025) para 31.

¹⁰ 1917 TPD 630 at 633.

¹¹ See also *Nienaber v Stuckey* 1946 AD 1049 at 1053 and *Painter v Strauss* 1951 (3) SA 307 (O) at 311H-312C.

¹² *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-G.

required depends, *inter alia*, upon the nature of the thing possessed and the type of use to which it is put.¹³

- 27.2. Second, unlawful deprivation of possession by the respondents: Spoliation occurs when dispossession happens without the consent of the possessor or recourse to law, regardless of how it is effected (for example, by force, deceit, or stealth).
29. In *Blendrite (Pty) Ltd and Another v Moonisami and Another*,¹⁴ the Supreme Court of Appeal (SCA) held that possession is '(m)ost commonly defined as the combination of a factual situation and of a mental state consisting in the factual control or detention of a thing (*corpus*) coupled with the will to possess the thing (*animus possidendi*)'. *Quasi* possession refers to possession of some incorporeal rights by virtue of using or exercising them in relation to landed property such as servitudes (rights of way, access, etc.) and rights of use.¹⁵
30. The party alleging dispossession must show that its use of the property in question was open, peaceful, undisturbed (i.e. without having to ask for permission, or being subject to control/interference) up to the moment of the alleged spoliation.¹⁶ Having established possession/*quasi* possession, deprivation (e.g. locking gates, blocking a road, erecting an obstruction) must be wrongful/unlawful.
31. Possession is an important juristic fact because it has legal consequences, one of which is that the party dispossessed is afforded the remedy of the *mandament* in addition to remedies such as an interdict or a possessory action.¹⁷

¹³ Badenhorst *et al Silberberg and Schoeman's The Law of property* 6 ed (2019) LexisNexis at 314. See also *Northern Cape High School v Hansen Elite Wellness (Pty) Ltd and Another* (155/2025) [2025] ZANCHC 117 (28 November 2025) para 35.

¹⁴ 2021 (5) SA 61 (SCA) para 5.

¹⁵ *Kwamanzi Investments (Pty) Ltd v Jacob Jacobus Haasbroek and Others* (5061/2025) [2025] ZAFSHC 332 para 13.

¹⁶ *Ibid.*

¹⁷ *Shoprite Checkers Ltd v Pangbourne Properties (Pty) Ltd* 1994 (1) SA 616 (W) at 619E-F.

32. In *Kwamanzi Investments (Pty) Ltd v Jacob Jacobus Haasbroek and Others*,¹⁸ the Court affirmed that the right to use a road or route is included in the concept of *quasi* possession, and that locking gates across such a route can constitute spoliation. It stated:

‘In a case involving a public road servitude or right of way and access, if the user has been using the road or servitude openly, peacefully, without disturbance, and that use amounts to *quasi* possession, then an unlawful obstruction or interruption could give rise to a *mandament van spolie*.

Given the above, if someone was using a route as a right of way (servitude) in an undisturbed manner, without asking permission, that use can amount to *quasi* possession of that route. The relevant test is whether the use was peaceful, undisturbed, and the route was exercised as right of use, not a mere license or a contract.’

33. It is therefore trite law that, although the professed rights upon which the *mandament* is premised need not be proven in spoliation proceedings; the nature of the rights must be established to determine the appropriateness or applicability of a spoliation remedy.¹⁹
34. In *First Rand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*²⁰, the SCA confirmed that the *mandament van spolie* is not the appropriate remedy where contractual rights are in dispute, or where specific performance of contractual obligations is claimed. Its purpose is the protection of possession or *quasi* possession of certain rights.
35. Similarly, the SCA held in *Telkom SA Ltd v Xsinet (Pty) Ltd*²¹ where an order was sought essentially to compel specific performance of a contractual right to resolve a contractual dispute, that the *mandament* is not available.²²

¹⁸ *Supra* fn 15 paras 19 and 20.

¹⁹ *First Rand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA) para 13; see also *Dotcom Trading 849 CC V Rand Water* (16980/15) [2015] ZAGPPHC 166 para 16.

²⁰ *First Rand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* (*Supra*).

²¹ 2003 (5) SA 309 (SCA) para 14.

²² See also *ATM Solution v Okru Handelaars CC* 2009 (4) SA 337 (SCA) para 2.

36. Finally, Gilbert AJ in *Merveille IMP and EXP (Pty) Limited and Others v Apple INC and Others*²³ also explained the applicable standard of proof in spoliation proceedings as follows:

‘Greenberg JA in what is perhaps the *locus classicus* of *Nienaber v Stuckey* agreed as to the level of the proof required:

“Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict, and not of a temporary interdict.”

What this means is that if there are two *bona fide* but conflicting factual versions, the respondent’s version is effectively to be preferred in terms of the usual *Plascon-Evans* approach.’

Analysis

37. In its founding affidavit, the applicant at paragraphs 60.1 and 60.2 makes the following averments:

‘60.1. The provisions of the Lease as cited above confer on the applicant (and all of its contractors, subcontractors and invitees) an unequivocal, “unrestricted” right of ingress and egress to the Lease Area for purposes of constructing, operating and maintaining the Energy Facility. In parallel, the Servitude grants the applicant a perpetual real right to traverse the existing gravel road and any gates on the Property. These rights are not contingent on the respondents’ precarious consent and arbitrarily exercised review on a day-to-day basis and are enforceable irrespective and the applicant has (at the very least) a *prima facie* right in accordance with the Lease and the Servitude;

60.2. By padlocking the Gate on 2 August 2025 and subsequently re-imposing restrictions from 10 September 2025 notwithstanding assurances given on 8 September 2025 and the unlocking on 9 September 2025, the respondents are persistently and deliberately violating the applicant’s contractual and servitudinal rights.’

²³ *Supra* fn 9 paras 32-33.

38. It is clear from the papers that the applicant has approached this Court to enforce rights that it has in terms of the lease agreement which it concluded with the respondents. The applicant is seeking specific performance based on the rights and obligations in terms of the lease agreement. However, it cannot be said that the applicant is seeking to enforce personal rights in the same sense as in *Telkom SA Ltd v Xsinet (Pty) Ltd*,²⁴ for example. This is because in *casu* the notarial lease agreement and the servitude also give rise to real limited rights more than mere personal rights.
39. On the other hand, the mere fact that the applicant was granted permission to use the private gate from time to time does not amount to undisturbed *quasi* possession. According to the applicant, it had such possession from April 2025, it used the gate during the daytime and the gate would be closed and secured in the evenings. On this version alone, it is clear that the applicant never had twenty-four-hour vehicular access through the gate as the gate was not kept unlocked during all hours of the day. Thus, I am of the view that the applicant did not exercise free and unfettered use of and access through the gate.
40. According to the minutes of a meeting held on 26 August 2025, the purpose of that meeting between the applicant's representatives and the second respondent was to "negotiate access to PV1 through the farmer's private gate". The applicant avers that negotiation was only necessary because the respondents refused to grant access on the terms agreed to in the lease. This submission does not take the applicant's case any further. The fact that access through the private gate had to be negotiated in itself is demonstrative that the applicant did not have free and unfettered use of and access through to the gate. For the same reason, the applicant's averment that the rights of access are not limited to a single route or gate and that it requires unfettered access as and when needed for the project is unhelpful.
41. In these circumstances, I am of the view that the applicant failed to prove that it had had peaceful and undisturbed possession of the property at the

²⁴ *Supra* fn 21.

relevant time. Consequently, the applicant failed to prove the requirements for the *mandament van spolie* and the application falls to be dismissed.

COSTS

42. The respondents have successfully opposed this application. There is no reason why costs should not follow the result.
43. As a result, I make the following order:
1. The application is dismissed with costs, which costs shall include counsel's costs on scale B.

T TYUTHUZA
ACTING JUDGE, HIGH COURT
NORTHERN CAPE DIVISION

Appearances

On behalf of Applicant:	Adv AJ Daniels SC
Instructed by:	Bowman Gilfillan Inc. c/o Elliott Maris
On behalf of Respondents:	Adv RB Engela
Instructed by:	Vanderspuy Cape Inc. c/o Haarhoffs Attorneys