



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 5521/2024

In the matter between:

NOKWANDA JESSY WILLARD

Applicant

and

JAY WILLARD

1st Respondent

JOAN WILLARD

2nd Respondent

JUDGMENT

RUSI J

[1] On 30 December 2024, a rule nisi was issued in terms of which the first and second respondents were called upon to show cause why they could not be prohibited from unlawfully constructing or continuing with the construction of a certain structure on the piece of land possessed by the applicant and situated at

kwaGreen Farm in the District of Port St Johns. As an adjunct to the rule nisi, the construction of the said structure was interdicted pending the determination of the final relief.

[2] With the rule nisi accordingly extended, the application, which the first and second respondents opposed, served before me on 05 June 2025 for the determination of the final relief. As an alternative remedy, the applicant sought a *mandament van spolie*, stating that the construction of the impugned structure by the respondents unlawfully dispossessed her of the property which she previously possessed peacefully and free of disturbance.

The applicant's case

[3] The applicant states that she was married to the first respondent's late brother, Mr Neville Willard, in August 1991. At the time of their marriage, they resided at her husband's parental home with the rest of her husband's family. During the course of that same year, her father-in-law, Mr Byon Willard, gave her and her husband a piece of land (the property) adjacent to their family home, measuring '25 by 25 paces' to build their own home on it. They proceeded to develop the piece of land by building a single-room structure which the applicant later extended. Adjacent to this latter property is a vacant piece of land. It is on this vacant piece of land that, according to the applicant, the respondents unlawfully erected a concrete foundation.

[4] The applicant further states that the concrete foundation has been built within the parameters of the land which her father-in-law gave to her and her late husband to develop and occupy, and in so doing the respondents dispossessed her of the use and enjoyment of the property. It is her contention further that she obtained ownership of the property by means of acquisitive prescription in that as at the time of the alleged interference by the respondents,

she had occupied it for more than 30 years without any interference. She has no title deed, therefore, in respect of the property.

[5] The application for the interdict was impelled by the information she received from her son on 17 December 2024 that the respondents had begun erecting a structure on her property. On 22 December 2024, she visited the site of the construction with her son and saw for herself that there were building materials that had been delivered on the land. No further details of the building materials are provided in the founding affidavit.

[6] The applicant contends that she has established a clear right to the relief she seeks by virtue of her acquisition of ownership of the property by prescription. In the alternative, she contends that she has been in peaceful and undisturbed possession of the property and the respondents unlawfully dispossessed her of that property by erecting the impugned structure within its boundaries. She further states that an injury is thus committed against her by the respondents in unlawfully constructing the foundation and that she reasonably apprehends that the completion of the structure and its ultimate occupation will make it impractical for her to enjoy peaceful use of her property. Two photographs annexed to the papers filed of record as Annexure 'NW1' and 'NW2' depict the structure which the applicant occupies. It is flanked by the house which the applicant described as the house where her father-in-law lived with her and her late husband together with the rest of his family on the one side, and the impugned concrete foundation on the other.

[7] It is the applicant's contention further, that, the respondents have previously indicated their unwillingness to yield to her ownership of the property by acquisitive prescription. According to her, they have insisted that they are the owners of the property and they can only allow her continued use of it on terms stipulated by them. Those terms are that her use and occupation of the property is limited to the interior of the house and not the surrounding outer

parameters. Based on this, she contends that she has no other alternative satisfactory remedy available to her other than to seek an interdict against the respondents.

The respondents' case

[8] According to the respondents, it is untrue that the first respondent's father, who is the applicant's father-in-law, owned the property on which their family home, together with the applicant's structure, and the impugned structure, are situated. They state in this regard that the entire land was owned by a certain Mr Green. The first respondent's father merely had the right of use and possession of their family home since he was employed by Mr Green to guard his banana plantation. For these reasons, the respondents contend that the first respondent's father could never transfer to the applicant and her husband land to which he had no title.

[9] The respondents go on to state that it was in 1995 that the first respondent heard that a certain Mr Conradie had taken over the land that was previously owned by Mr Green and had subdivided it into several erven, which he sold to various persons. The first respondent bought the land on which his family home is situated, and which he identified as plot 10, as well as plot 9 being where the applicant's house is situated. The impugned structure forms part of plot 9.

[10] As proof of the sale of the two pieces of land, the respondents rely on six documents. The first document appears to be a file sheet with the letterhead of pathologists, Drs Du Buisson, Kramer, Swart Bouwer Inc. It is titled "*Requirements for Deed of Sale*". The Seller is recorded as Andries Francois Conradie who was born in 1927. The purchase price is recorded as R6 750.00 and the property and holding deed number is described as "09/296, Stand No 9, Part of Erf 2[...]. 900 square metres." The document contains no particulars of

the purchaser. It is further recorded under the heading “whereabouts of the title deed”, that, same is ‘held by a firm of Attorneys in Mthatha’. It is not signed by the seller or the purchaser.

[11] The second document, dated 11 November 1995, appears to be a sheet from a receipt book with the following content:

Green’s Farm 11/11/95

Received from GARY WILLARD

Plot No 9 or 10

(NEXT TO THE LAST ONE ON THE VALLEY)

R3 000-00 (THREE THOUSAND RAND)

(Signed).

[12] The third document is similar to the first one in form and is dated 29 January 1997. It records, inter alia, that payment of R2 000.00 was received from the first respondent ‘as further payment on stand 9’, with the balance at that time, of R1 750.00. The fourth document of the same form as the second and third documents is dated 02 February 1997 and it purports that the first respondent had paid R1 750.00, being full payment for stand 9, which would be combined with stand 10. It is further recorded in this document that ‘additional R5 000.00 ‘would be payable as arranged’. The second, third and fourth documents bear a stamp with the following details: “*Green’s Farm Workshop and Spares. Private Bag x 1[...], Port St Johns. Tel: (0[...].*”

[13] The fifth document appears to be a list of the several erven into which Mr Green’s land was subdivided, and also appears to be a file sheet with the letterhead of pathologists, Drs Du Buisson, Kramer, Swart Bouwer Inc. There are ten plots listed in this document alongside the supposed purchaser of each plot. The extent of each plot, and several amounts are recorded next to the name of each supposed purchaser. This information has been certified on the face of

the document as ‘correct as on 20 May 1996’. According to this document, the first respondent had bought plot 9, 900 square metres in extent, with the amounts supposedly paid by him recorded as R6 575.00; R3 000.00; R375.00 and R675.00. Plot 10, according to this document, is indicated as ‘still available’.

[14] The last document is on the letterhead of the ‘Green’s Farm Traditional House.’ By means of this document, the respondents seek to prove their ownership of plot 10 being where the applicant’s father-in-law and his family used to live. In this document which, on the face of it was signed by Sub-headman B. Puzi in 2015, the following is recorded, in iSiXhosa:

“Siyilenkundla siyangqina ukuba lomzi ngoka Mr Gary Mervin Willard ID no [. . .] ukusukela ngonyaka 1989 umzi ingowakhe.” *[My translation: As this Authority we confirm that this homestead is owned by Mr Gary Mervin Willard ID no [. . .] since 1989].*

[15] It is the respondents’ assertion further, that the applicant and her late husband’s occupation of the property that the applicant developed was authorized by the first respondent upon acquiring it from Mr Conradie. They further state that the applicant only has the right to use the internal parameters of the structure. According to the respondents, the external area had always been in their ownership and control and all the expenses for its maintenance have always been their sole responsibility.

[16] Regarding when the impugned structure was constructed, the respondents state that it is incorrect that they built that structure in December 2024. The correct position, according to them, is that when the first respondent acquired the properties from Mr Conradie, the impugned structure was already in place, but it was concealed by overgrowth of vegetation. It became conspicuous when the respondents hired a bush clearing service provider in 2018 to clear the area.

[17] In her replying affidavit filed on 29 January 2025, the applicant adduced evidence of two further photographs. The first one purports to have been taken

on 17 December 2024 at 10h37. It depicts a male figure standing on a levelled concrete foundation and there is a stamping tool placed on the foundation. According to the applicant, this picture was taken by her son on 17 December 2024 when he saw the building works on the site. The second photograph which purports to have been taken on 20 January 2025 at 11h36, depicts a house and a levelled concrete foundation close to it. As further evidence of his father-in-law's possession and control of plot 9, the applicant produced a copy of a pre-paid electricity token dated 15 November 2024. The applicant further relies on screenshots of WhatsApp text messages between her and respondents in which they demanded from her monies that they had paid on her behalf for the grass cutting on the front yard of her house.

[18] It bears mentioning that the issue regarding photographs that were taken of the impugned structure and the construction was raised by the applicant in her founding affidavit when she alleged that 'her son was seen by the respondents taking pictures of the structure. In as much as there was no confirmatory affidavit filed by the applicant's son at the time of filing of her founding affidavit, she went further to state that she had occasion to confirm the fact of the construction of the structure when she and her son visited the site on 22 December 2024.

[19] The respondents objected to the raising of new matter in reply as opposed to the applicant's founding affidavit. As held by the SCA in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Other*,¹ the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first

¹ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* (363/2011) [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (30 March 2012).

brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondents' answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant.²

[20] As regards the first photograph, it ought to follow from the applicant's own version that it was taken before she deposed to her founding affidavit. The second photograph was taken after the applicant's founding affidavit was filed. Nevertheless, the respondents deny having constructed the impugned concrete foundation, stating that it was already in place as far back as 1995 when the first respondent bought the land. Therefore, it cannot be said, in the context of the facts of this application, that the respondents have been prejudiced by the production of photographs depicting the impugned structure only when the replying affidavit was filed. In any event, if the respondents wished to ventilate the issue concerning the photographs, it was open to them to seek the court's leave to file such further affidavit or affidavits as would meet the exigencies of their defence. This was not done. It must follow that this Court's discretion should be exercised in favour of permitting the production of the photographs.

[21] I interpose to mention that, in their answering affidavit, at paragraph 35, and in response to the applicant's averment that she and her late husband were married in 1991, the respondents stated as follows:

"I do not dispute this paragraph except to state that it is doubtful his soul rests in peace. His son Patrick was always chasing the deceased threatening to kill him. He died of stroke and heart attack. Patrick also threatened my wife, she fainted and is still frightened of him even today and has to visit doctors regularly. Patrick is a dangerous man, he is in and out of prison. Applicant's husband, my brother Neville had a miserable life and used to say "ndilala ngehlwelinye ndisaba abantwana" "I sleep with one eye closed afraid of the children."

² Ibid, para 26; see also *Minister of Police v Kati* (CA 15/2024) [2024] ZAECHMHC 30 (15 May 2024), para 13.

[22] An application was made by the applicant as envisaged in Uniform Rule 6(15) for this paragraph to be struck out on the ground that it contains vexatious, scandalous and/or irrelevant matter. The applicant further sought the costs of the application to strike out. Uniform Rule 6(15) grants the court the discretion to strike out from any affidavit on application, any matter which is scandalous, vexatious or irrelevant,³ and to make any appropriate order as to costs, including costs as between attorney and client. In determining the application to strike out, the court considers prejudice on the applicant. The respondents conceded the strike out. There can be no doubt that the averments contained in paragraph 35 are not only irrelevant but are abusive, defamatory and are calculated to harass or annoy the applicant. The respondents' concession was well made.

The issues

[23] The narrow issue for this Court's determination is whether the applicant has made out a case for the final interdict, alternatively, the *mandament van spolie*.

The parties' submissions

[24] Mr *Mngunyana* submitted that the applicant has established a clear right in relation to the main relief. He further submitted that it is not the applicant's case that her father-in-law passed rights to her in respect of the property. This submission was made despite the applicant's version that the property was donated to her and her late husband by his father-in-law. He took the view that the documents produced by the respondents to counter acquisitive prescription are not availing to them as they do not meet the essential requirements for a sale agreement, they are unsigned and undated. Mr *Mngunyana* further submitted that the unlawful construction of the foundation constitutes irreparable harm and

³ Erasmus, Superior Court practice, Volume 2, 2nd Edition (Juta) [service 15, 2020] D1-90 -D1-91.

the applicant reasonably apprehends that the harm will continue since the respondents ignored the court order dated 30 December 2024.

[25] It was Mr *Mngunyana*'s submission, further, that, since the negotiations between the parties have reached a dead end and there are no prospects of further negotiations, the applicant has no other appropriate alternative remedy available to her. As regards the *mandament van spolie*, Mr *Mngunyana* submitted that the applicant has proven previous peaceful and undisturbed possession and the dispossession by the respondents. The dispossession took the form of the construction of the impugned structure as its effect is to deprive the applicant of the portion of the land on which it is built.

[26] On behalf of the respondents, Ms *Mxotwa* submitted that the applicant's case on the main relief ought to fail on the ground of the applicant's version that she and her late husband occupied property with the consent of Byron in 1991, which is at odds with the known requirements of acquisitive prescription. This is apart from persisting with the respondents' denial of the allegations that they erected the impugned structure. She persisted with respondents' contention that the applicant took occupation of the house in 1995 as opposed to 1991. On these bases, she argued that the applicant has failed to establish a clear right. She further submitted that in the light of the respondents' version that the structure had always been there from when the first respondent acquired the property, the applicant's contention that she will suffer irreparable harm if the interdict is not granted, cannot be sustained. Regarding the alternative remedy, Ms *Mxotwa* submitted that the applicant still has possession of the property with the first respondent's consent.

The legal principles

[27] In order to succeed in obtaining the final interdict, the applicant must establish (a) a clear right; (b) an injury actually committed or reasonably

apprehended; and (c) the absence of any other satisfactory remedy. As for the clear right, it is established that an applicant must prove the right it seeks to protect on a balance of probabilities. Whether an applicant has such a right is a question of substantive law, but whether it has been established is an evidential question.⁴

[28] Even if an applicant succeeds in establishing a clear right, she must still establish an injury actually committed or that she reasonably apprehends that such injury will be committed. On this score, she must establish that a reasonable person faced with certain facts would entertain such apprehension of injury. This is not to say she is required to prove that on a balance of probabilities of undisputed facts she will suffer harm. She need only show that objectively her fear of harm is well grounded in the sense that it is reasonable to apprehend that injury will result.⁵

[29] There is a material dispute of fact regarding the parties' title to plot 9 and whether the respondents are the ones who erected the impugned structure. This factual dispute strikes at the heart of the final interdict sought by the applicant in respect of the impugned structure.

[30] These being application proceedings, a final order may be granted if the facts alleged by the applicant in her affidavit which the respondents admit, together with the facts alleged by the respondents justify such an order. The version proffered by the respondents may only be rejected by the court on the papers where their allegations or denials are so far-fetched or clearly untenable. This is the well-known *Plascon-Evans* rule.⁶ Put another way, the court hearing

⁴ *Equistock Properties 8 (Pty) Ltd and Another v Oosthuizen and Others* [2025] ZASCA 06, para 17; *Setlogelo v Setlogelo* 1914 AD 221 at 227; see also *Dyalo v Mnquma Local Municipality and Another* (8490/2016) [2016] ZAECHMHC 36.

⁵ *Minister of Law and Order and Others v Nordien and Another* 1987 (2) 894 (AD) at 896F-I and all authorities cited therein; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (462/07) [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) (30 May 2008), para 21.

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635D.

the application where there is a factual dispute would accept the facts alleged by the applicant in so far as they are admitted by the respondent, and those alleged by the respondent in so far as his version is plausible and credible.⁷

Discussion

[31] As far as I understood the case advanced by the applicant, she bases her clear right to the interdict aimed at putting to an end the impugned construction, on the fact that she has acquired ownership of the property by way of prescription. In this regard she states that she and her late husband began occupying the property without disturbance and freely since 1991 when her father-in-law gave it to them. For the alternative possessory interdict, she relies on her previous peaceful and undisturbed possession of the property and the assertion that the construction of the impugned structure has the effect of dispossessing her of that previously peaceful and undisturbed possession.

[32] In order for the applicant to establish a clear right to the interdict she seeks she must prove that she is the owner of the land on which the construction is taking place. For as held in *Regal v African Superslate (Pty) Ltd*,⁸ even though an owner may normally do as he pleases on his own land, his neighbour has a right to the enjoyment of his own land. If one of the neighbouring owners uses his land in such a way that material interference with the other's rights of enjoyment results, the latter is entitled to the relief.

[33] It is expedient to dispose of the acquisitive prescription contention at this earliest stage. Section 1 of the Prescription Act 68 of 1969 provides, inter alia, that a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of 30 years or for a period which, together with any periods for which

⁷ *Airports Company South Africa Soc Ltd v Airports Bookshop (Pty) Ltd t/a Exclusive Books*, 2017 (3) SA 128 (SCA) para 26.

⁸ 1963 (1) SA 102 (A).

such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years. In *Stoffberg NO and Others v City of Cape Town*,⁹ it was said of acquisitive prescription under the Prescription Act 18 of 1943 Act:¹⁰

‘[14] The meaning of these provisions is well established. The continuous possession required by this section is the common law *civilis possessio*, that is, the physical detention of the thing (*corpus*) with the intention of an owner (*animus domini*). In addition that possession must be *nec vi, nec clam, nec precario*. *Nec vi* means peaceably. *Nec precario* postulates the absence of a grant on the request of the possessor.¹¹ *Nec clam* means openly, particularly ‘so patent that the owner, with the exercise of reasonable care, would have observed it. In *Bisschop v Stafford*, Jansen JA said the following with reference to the judgment in *Malan v Nabygelegen Estates*:

‘In *Malan*’s case, *supra*, the Court, however, went further than merely deciding the matter of *precario*; in order “to avoid misunderstanding” it also said:

“... mere occupation of property ‘*nec vi nec clam nec precario*’ for a period of thirty years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognizes the ownership of another”. This appears, in effect, to be a reference to the Roman law requirement, as understood to-day, of *civilis possessio* for the acquisition of ownership, and quasi *possessio* for the acquisition of rights.’¹² (footnotes omitted).

[34] There can be no controversy regarding the fact that the provisions of the old Prescription Act regarding acquisition of ownership by prescription mirror those of the 1969 Act. The above quoted dictum from *Stoffberg NO*, with respect, finds application in the context of the present case.

⁹ *Stoffberg NO and Others v City of Cape Town* (1325/2017) [2019] ZASCA 70 (30 May 2019).

¹⁰ Section 2 of the of the Prescription Act 18 of 1943 Act. That section provided:

‘(1) Acquisitive prescription is the acquisition of ownership by the possession of another person’s movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years *nec vi, nec clam, nec precario*.

(2) As soon as the period of thirty years has elapsed such possessor or user shall *ipso jure* become the owner of the property or the servitude as the case may be.’

¹¹ My emphasis.

¹² *Ibid*, para 14.

[35] The high-water mark of the applicant's case is that she and her late husband acquired the ownership of the property when in 1991 they occupied it with the permission of her father-in-law who donated it to them. One of the requisites for acquisitive prescription is that the property must be occupied without the permission of the true owner. It must not be occupation by virtue of some contract or legal relationship such as lease or usufruct which recognizes the ownership of another party.¹³

[36] The applicant's assertion that the property was donated to her by her father-in-law undermines her contention that she acquired its ownership by means of prescription, both as to substantive law and the cogency of the evidence she adduced. It should not matter, therefore, that she has been in interrupted possession of the property for more than 30 years. The applicant has failed to surmount the first hurdle of establishing a clear right. This is where her quest to obtain the interdict stopping the construction of the impugned structure fails.

[37] I must still consider whether the alternative relief of the *mandament van spolie* may be granted. The relief of the possessory interdict has as its basis the rule of law, and its main purpose is to preserve public order by preventing persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts.¹⁴

[38] It is trite that the essence of the spoliation remedy is that the person who has been deprived of his or her possession must first be restored to his or her former possession before the merits of the case can be considered.¹⁵ In this

¹³ *Stoffberg NO*, supra, see also, *Cillie v Geldenhuys* [2008] ZASCA 54; 2009 (2) SA 325 (AD) at page 331G-H.

¹⁴ *Nino Bonino v De Lange* 1906 TS 120 at 122; *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) para 22; *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) paras 10-12;

¹⁵ *Ngqukumba*, footnote 7 supra, para 10.

sense, the basis (causa) for possession, or whether possession is wrongful or illegal, is irrelevant, as that would go to the merits of the dispute.¹⁶ As held in *Street Pole Ads Durban (Pty) Ltd v Ethekweni Municipality*, good title is irrelevant in a spoliation application.¹⁷ I shall therefore not need to deal with the validity of the respondents' title to the property, and, in any event, I have already found that the applicant's assertion of acquisition of ownership by prescription cannot succeed.

[40] Two requirements must be met before the spoliation remedy may be granted. There must, firstly, be clear proof of peaceful and undisturbed possession of the property. Secondly, unlawful dispossession (or deprivation) by the spoliator must be proven.¹⁸ Once the two requirements have been proven by the applicant, she is entitled to a *mandament van spolie* restoring the status quo ante. The applicant's previous possession of the property is not disputed by the respondents who state, though, that such occupation was at their instance and is only limited to the inside of the structure and not on any of its outer parameters. The respondents deny dispossessing the applicant of the property.

[41] A proper characterization of the respondents' alleged conduct which the applicant complains of is paramount to the determination of the alleged act of dispossession. An important allegation is made by the applicant, that, the impugned structure was built within the parameters of the 25 by 25 paces boundary of the land she occupies. I made an observation earlier, that from Annexures 'MW1' and 'MW2', the property that the applicant occupies is flanked by the property she alleges was his father-in-law's house and the impugned structure. Notably, the front yard of the property that the applicant

¹⁶ *Ivanov v Northwest Gambling Board and Others* (312/2011) [2012] ZASCA 92; 2012 (6) SA 67 (SCA)2012 (2) SACR 404 (SCA) [2012] 4 All SA 1 (SCA) (31 May 2012), para 19.

¹⁷ 2008 (5) SA 290 (SCA), para 15.

¹⁸ *Nino Bonino* footnote 6, supra; *Yeko v Qana* 1973 4 SA 735 (A) 739; *Blendrite (Pty) Ltd and Another v Moonisami and Another* (case no 227/2020) [2021] ZASCA 77 (10 June 2021); *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co* 1948 (1) SA 91 (W) at page 98.

occupies is depicted as being free of any construction or obstructions. I may add, however, that the respondents' contention that the applicant's occupation and use of the property is limited to the inner parameters of the structure she occupies is rather out of kilter with the principles of property and possessory rights of use and enjoyment of property. Its result would be that an owner may willy nilly impose arbitrary and unreasonable restrictions on the possessor's use and enjoyment of the property. This is notwithstanding that ownership is indeed superior to possession.

[42] With this said, nowhere does the applicant state in her papers, how the peaceful and undisturbed possession of the property has been taken away from her by the construction of the impugned concrete foundation apart from saying that 'the respondents are attempting to loot her land'. It may very well be that the construction of the impugned structure brings about inconvenience of one form or the other. However, the applicant has not shown that she had lost the physical detention and control of the property as a result of the construction of the foundation. It cannot be said, in the present context, that she has been deprived of the peaceful and undisturbed possession of the property. For this reason, the *mandament van spolie* would not be the appropriate remedy. The alternative remedy fails too on the issue of failure to prove dispossession.

[43] I may add, in conclusion, that my eyes are not closed to the fact that the parties' title to the property forming the subject of this application is a matter of high controversy. It is open to the parties, if so advised, to assert their respective rights of ownership of the property in the appropriate manner, which, if upheld, would entitle the successful party to develop the property in any manner as they wish and to protect their right not to be subjected to unlawful interference with their use and enjoyment of the land they own.

Costs

[44] The general rule is that costs follow the result, unless there are exceptional circumstances which warrant a deviation therefrom. In the present case there are no such circumstances. The successful party ought to be awarded its costs.

Order

[45] In the result, I make the following order:

1. Paragraph 35 of the respondents' answering affidavit is struck out, and the respondents shall pay the costs of the application to strike out jointly and severally, the one paying the other to be absolved.
2. The rule nisi is discharged, and the application is dismissed with costs.

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the applicant : *Adv. L J Mngunyana*

Instructed by : Mbali Halu Attorneys Inc., Mthatha

For the respondents : *Adv. N Mxotwa*

Instructed by : Chris Bodlani Attorneys, Mthatha

Date delivered: 06 January 2026

(This judgment was transmitted to the parties' legal representatives by electronic mail on 06 January 2026. Its deemed date of delivery is 06 January 2026).