



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 486/2025

In the matter between

WALMA URSULA WHITTEN

APPLICANT

and

**OPPERMANSGRONDE COMMUNAL PROPERTY
ASSOCIATION**

FIRST RESPONDENT

[Registration No: CPA 05/0792/A]

LEON PATRICK CORNELLISSSEN

SECOND RESPONDENT

Neutral citation: *Whitten v Oppermansgronde Community Property Association and Another* (486/2025) [2026] ZAFSHC 235 (10 April 2026)

Coram: MOLITSOANE J

Heard: 4 September 2025

Delivered: 10 APRIL 2026

Summary: Mandament van spolie – motion proceedings – dispute of fact – principles restated.

ORDER

The application is dismissed with costs which include the costs of counsel on scale B.

JUDGMENT

Molitsoane J

[1] The applicant seeks an order against the respondents for the restoration of the applicant's alleged possession of a property known as Camp 78, situated on the land known as Oppermansgronde, Jacobsdal. The application is based on the *mandament van spolie*. The applicant alleges that she was in peaceful and undisturbed possession of Camp 78. What necessitated the application for the spoliation is that the applicant alleges that the respondents erected a fence on Camp 78 and thus diminished the occupation of her possession. The respondents deny that the applicant was spoliated of the land and further oppose the application on the basis that there is a dispute of fact on the issue of the occupation or possession of the land alleged to be spoliated. On this basis, the respondents contend that the relief sought in any event cannot be granted in motion proceedings.

[2] Oppermansgronde, the land on which Camp 78 is situated, is over 34 000 hectares in extent. It is comprised of four farms and was transferred to the first respondent (the OCPA) on 10 October 2006. Before the registration of transfer, the land was divided into more or less 160 camps which are 150 to 200 hectares in size. Camp 78 is about 160 hectares in extent. It is common cause that members of the community occupy and farm or use divided camps including Camp 78 as if they were owners thereof.

[3] It is the applicant's case that she took possession of Camp 78 after the demise of her parents and had been in peaceful and undisturbed possession thereof since. She farms on the camp, although she does not essentially reside there. She alleges that on 16 December 2024 she was advised by her son that there was a fence erected across Camp 78 without her knowledge or consent. Suspecting that the second respondent

might have erected the fence, she voiced her suspicion by sending him a WhatsApp message. The essence of the message was that the second respondent had erected a fence that traversed her camp.

[4] In response, the second respondent also sent a WhatsApp message to the applicant and stated that the applicant should take the matter up with the OCPA as the property was awarded to him in terms of a contract. The applicant then instructed her attorneys of record who communicated the sentiments of the applicant to the respondents. On 15th January 2025 the respondents responded to the allegations of spoliation by the applicant and said that the applicant had no legal right to the property; further, that the second respondent had a legal rental agreement with a CPA since 2020 and; lastly that it was the second respondent who actually was in peaceful and undisturbed possession of camp 78, presumably on the basis of the conclusion of the alleged rental agreement

[5] The applicant contends that the erection of the camp has diminished the size of her camp and effectively prevented her livestock access to water and grazing land which is fenced on the portion of the camp allegedly spoliated.

[6] The respondents deny that they erected a fence across Camp 78. They accordingly deny that the applicant was in peaceful and undisturbed possession of the Camp 78. The second respondent specifically points out that he merely effected repairs to a certain portion of the fence forming part of the boundary. The respondents instructed Mr Coen Fraenkel, a land surveyor, to inspect the property and to ascertain if any of the fences were erected over the property of the applicant' as alleged by her. Following the investigation, Mr Fraenkel submitted a report and concluded that the beacons as he found on 4 March 2025, of Portion 137(Camp 78) of the farm Oppermansgronde No 414, as proposed on General Plan L.G. No 2397/2007, were the same as those he found in his previous survey in 2007. In his confirmatory affidavit, he confirmed that no fence had been erected over the boundary lines of the property. He also confirmed that he could not find any exceedance of the property.

[7] The applicant takes issue with the report of Mr Fraenkel. According to her, the second respondent might have erected a fence on the boundary of portion 137 but she asserts that she only became aware of this portion of the land when she read the opposing affidavit of the respondents. She is adamant that the fence that forms the subject of this dispute runs across Camp 78. She asserts that the southern part of portion 137 as depicted on the General Plan attached to the report of Mr Fraenkel does not form part of Camp 78. She references the

presence of a pivot which appears on the General Plan as being part of portion 137 and asserts that Camp 78 has no such equipment. In my view, it appears that according to her, portion 137 and Camp 78 are two different parts of land and consequently the survey of Mr Fraenkel was not done on Camp 78.

[8] Because there's a dispute about whether portion 137 and Camp 78 are the same things, the respondents sought permission to file a further fourth affidavit. The acceptance of a further affidavit is in the discretion of the court. The issues raised in the replying affidavit necessitated some form of explanation from the respondents to enable this court to have the full information for the purposes of adjudication of this dispute. I accordingly ruled that the affidavit ought to be admitted as part of the record.

[9] The following issues call for determination:

- (a) whether there is a dispute of fact that cannot be resolved in these motion proceedings, if so, whether the application must be referred for oral evidence; and
- (b) if not, whether the applicant has satisfied the requirements for a *mandament van spolie*.

[10] Motion proceedings or application proceedings are designed to deal with legal issues based on common cause facts.¹ Prior to the decision of *National Director of Public Prosecutions v Zuma*,² the court in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*³ explained this rule as follows:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

[11] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁴ the court further held that 'an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.'

¹ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) 277 (SCA) 290 para 26.

² *Ibid.*

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-I.

⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 12.

[12] The applicant seeks final relief in these proceedings. When she contacted the second respondent about the erected fence, she informed him that the fence had been erected on her property. The second respondent immediately disputed that the erection of the fence was on her property but contended that it was on the property, he leased from the OCPA. He also referred the applicant to the OCPA for further clarity. In a letter dated 8 January 2025, the applicant's attorneys of record addressed a letter to the second respondent in which the following was said:

'I understand that you and all your workers or agents entered the mentioned property (Camp 78) and erected a fence thereon. It is also my instructions that it is your clear intention to take possession of the property in that you also wrote a WhatsApp message of which the content indicates that the property was awarded (toegeken) to you by the OCPA. I understand that OCPA means the Oppermansgronde Communal Property Association.'

[13] The initial WhatsApp message and the response to the letter of the applicant's attorneys ought to have alerted the applicant that there was a material dispute of fact looming in the horizon. The respondents through their attorney's respondent to the letter of the applicant averred as follows:

'We confirm that it is our client's instructions on behalf of Mr Cornelissen to inform your client that she has no legal right onset property. As our client, Mr Cornelissen has a legal rental agreement with the OCPA since 2020 and therefore Mr Cornelissen enjoyed peaceful and undisturbed possession of sad property since last mentioned date.' (Emphasis added.)

[14] In my view, there is a clear indication that there is a serious dispute about who is in occupation of the land in dispute. This dispute was clearly discernable even before the application was launched. The applicant should have foreseen that were she to institute the application, there was a strong likelihood that a serious dispute would arise. This notwithstanding, she persisted with motion proceedings. As expected, after the application was served, the respondent raised the issue of the occupation of the land in dispute. The respondent tendered the evidence of a Mr. Fraenkel whose report indicated that portion 137 and Camp 178 is the same thing. This is the camp, on the version of the respondents, which is being occupied by the second respondent. Interestingly, it does not appear to me that the applicant does not deny the existence of portion 137 but her concern is simply that she was unaware of it. This dispute about which camp the second respondent is occupying and had erected a fence is central to the adjudication of an application for mandament van spolie. If the applicant and the second respondent lay claim to their respective occupation, the better court to resolve that dispute would best be by way of a trial.

[15] On this basis alone, the applicant ought not to have proceeded by way of motion proceedings. When the applicant realized during the hearing that the dispute of fact was a reality, her counsel sought this court to invoke uniform rule 6(5)(g). This rule provides:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[16] It is indeed so that rule 6(5)(g) grants the court seized with an application where a dispute of fact arises a discretion to dismiss or refer the matter for oral evidence. The evidence before me indicates that the applicant was aware that there was a likelihood of a dispute arising about the occupation of the land in question. That should have prompted her to proceed by way of an action. She cannot expect the court to come to her assistance where clearly, she was aware that the central issue in her application could not be resolved on papers, especially in view of the fact that she sought final relief in these proceedings.

[17] In her notice of motion, or at least in her founding affidavit, or at the outset of these proceedings, notwithstanding her knowledge of the dispute about the occupation, she did not ask for referral as an alternative to the main relief. In *Law Society, Northern Provinces v Mogami*⁵ the court stated:

'An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.'

[18] It became apparent that the dispute could not be resolved on the affidavits and that oral evidence was necessary. I am unable to agree with the applicant that the application be referred for oral evidence as the dispute was clearly crystalized before the application was launched. The application must accordingly fail.

[19] The award of costs is in the discretion of the court. I, however, wish to refer the parties to the case of *Williams v Harris*⁶ in which the court made the following remarks:

⁵ *Law Society, Northern Provinces v Mogami and Others* [2009] 107; 2010 (1) SA 186 (SCA), 2020 (1) SA 186 (SCA) para 23.

⁶ *Williams v Harris* [1998] ZASCA 51; 1998 (3) SA 970 (SCA)

'Who chooses to ride a tiger will find it difficult to dismount it unscathed. Much the same can be said of the decision of the parties to this appeal to indulge in litigation rather than settle their differences in a less acrimonious and costly way. A spat between neighbors about a boundary line, the source of water allegedly finding its way onto the property of one of them, and some overhanging ivy has generated a record on appeal of 501 pages. A petition in which leave to appeal was sought from the Chief Justice generated a further 400 pages. A further petition in which to leave to place further evidence before the court was sought has spawned another 378 pages. All this expense has been incurred in an attempt to resolve by litigation issues which would have lent themselves to relatively easy resolution if the parties had at the outset joined in appointing and allowing appropriate independent experts to do on both properties what they regarded as necessary in order to arrive at the truth. Instead, they have fought a long and costly battle in the courts. It is not possible to say who has to blame for no settlement of the dispute having been reached. However, it is now too late for tears.'

I hold that the applicant was successful in defending the application and is entitled to her costs, although the resistance was granted on the procedural aspect of the application.

[20] I accordingly order as follows:

The application is dismissed with costs which include the costs of counsel on scale B.



PE MOLITSOANE
JUDGE OF THE HIGH COURT

Appearances

For the applicant: JHD Bloem
Instructed by: Spangenberg Zietaman & Bloem
Bloemfontein

For the respondents: WJ Groenewald
Instructed by: Kramer Weimann
Bloemfontein