



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

JUDGMENT

Not Reportable/Reportable

Case no: A162/2024

In the matter between:

STELLENBOSCH DISTRICT MUNICIPALITY

APPELLANT

and

RASHID MAKHUBELA

RESPONDENT

Neutral citation:

Coram: Saldanha J; Da Silva–Salie J; Sher, J

Heard: 1 December 2025

Delivered: 16 April 2026

ORDER

The appeal is dismissed with costs, with the costs of counsel on Scale B.

JUDGMENT

SALDANHA, J (Da Silva-Salie concurring):

[1] This is an appeal against spoliatory relief granted by Thulare J against the appellant, in the context of a customary initiation school, which, at the time of the application, was being conducted on the property of the appellant. The opposition to the relief in the court a quo and the basis of the appeal is the reliance by the appellant on the contention that the respondent was not in possession of the property where the initiation school was being conducted. In its defence, it claimed that the name of the respondent did not appear on a list of persons whom the appellant had apparently allowed to conduct the initiation school on the property. The appellant further contended that neither the respondent nor any of the persons whom he claimed to represent in the application were in peaceful and undisturbed possession of the property. Inasmuch as there appeared to be a dispute of fact before the court a quo with regard to the appellant's possession of the property, the appellant relied on the application of the oft-quoted decision of *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd*¹ with regard to the resolution as to what it contended was the dispute on the papers.²

[2] The requirements for the invocation of the remedy of the possessory interdict of the *mandament van spolie* are well established. An applicant is required to prove:

- i) That he or she was in peaceful and undisturbed de facto possession of the relevant property at the time of spoliation and
- ii) The respondent had, without recourse to law or consent, dispossessed her or him and, in so doing, took the law into its own hands.

¹ 1984 ZASCA 51.

² 634E.

[3] In essence, the remedy seeks to protect the rule of law and is undergirded by the founding principles and values of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Van Blerk JA in *Yeko v Qana*³ succinctly stated:

‘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 the spoliation order, the *onus* is on the applicant to prove the required possession and that he was unlawfully deprived of such possession whether the 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, that he was unlawfully ousted’.⁴

The nature of the relief is that the court is required to restore the *status quo ante*, which was set out, way back in *Nino Bonino v De Lange* 1906 T.S. 120 at page 122.

[4] In the Notice of Motion, the respondent sought urgent relief in the following terms:

1. The Respondent is hereby ordered and directed to restore to the Applicant and his stakeholders, unrestricted access to, and occupation of, Idas Valley Nature Reserve, where the initiation school is currently underway.
2. Costs of this application on an attorney and client scale.

[5] The court a quo, having dealt with the matter on an urgent basis, granted the following relief:

1. The respondent is directed to restore and grant unrestricted access to:
 - 1.1 Care-givers;

³ [1973] 4 All SA 512 (A).

⁴ At 739 D-F.

- 1.2 Parents and family members of the initiates. Parents, family members and care-givers were to be given a broader meaning, including a meaning similar to the meanings of the Children's Act, 2005.
 - 1.3 Medical personnel, also to include traditional healers and herbs-persons and
 - 1.4 Mr Makhubela, the applicant as the principal.
2. The respondent to pay the costs.

[6] The court a quo refused an application for leave to appeal, with leave having been granted by the Supreme Court of Appeal ("SCA") to a full court of this Division.

[7] In the reasons for the order subsequently handed down, the court a quo dealt extensively with the customary rites and meaning of the initiation process and the conduct of the appellant and, in particular, the deponent to its answering affidavit, much of which, in my respectful view, was not necessary for the purposes of the determination of the spoliatory relief. In this regard, it bears recalling that an appeal lies not against the reasons for the judgment of the court a quo but against its order.⁵

[8] It appeared from the typed record of proceedings that the matter was initially argued on 7 December 2022 before Thulare, J, without the appellant having had the opportunity of filing an answering affidavit. The matter was therefore postponed to the following day to enable the appellant to file its answering affidavit, which it did. In dealing with the matter further, the respondent's legal representative indicated that the respondent had elected not to file a replying affidavit, and the matter was reargued on no more than the founding and answering affidavits filed by the respective parties.

⁵ See in this regard *Cape Empowerment Trust Ltd v Fisher Hofmann Sithole* 2013 (5) SA 183 SCA para 39.

[9] In light of the dispute that arose, particularly with regard to the requirement of possession, it is necessary to carefully consider the facts as set out by the respective parties in the affidavits to establish whether possession had in fact been established by the respondent. In doing so, I will set out in some detail the appellant's response to each of the claims made by the respondent in his founding affidavit. At the outset, it is necessary to record what was stated in the prelude by the appellant prior to its *seriatim* response to the founding affidavit of the respondent. The appellant's answering affidavit was deposed to by Ms Anna Maria Cornelia De Beer, who at the time was the Acting Municipal Manager of the appellant. She claimed that by virtue of that position, she was duly authorised to oppose the proceedings on behalf of the appellant. She specifically stated that the facts and the allegations contained in the answering affidavit fell 'within my personal knowledge and are true and correct and unless otherwise indicated or to the contrary appears from the context'. She further stated, 'Where I rely on information conveyed to me by others, the identity of such persons is disclosed, and I believe such information to be true and correct'.

[10] She pointed out that the applicable legislation governing the custom of initiation of 'African males' is the Customary Initiation Act 2 of 2021 ("Customary Initiation Act"). She correctly referred to the definitional section under section 1, which defines a "principle" (whom the respondent claimed he was) of an initiation school as "...the person who has permission to hold an initiation school and who is to be held accountable for the operations and management of such a school." She pointed out that the defence of the appellant to the *mandament van spolie* was that the respondent had not provided the court with any evidence proving that he was in possession of the property and that he was wrongfully dispossessed of the property. She claimed that on 25 November 2022, when the initiates commenced the school on the respondent's property, albeit without the permission of the appellant, the appellant had been given the names of persons who were

identified as the “principles and care-givers” envisaged in Section 21 of the Customary Initiation Act.⁶

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- ⁶ 21. (1) Principals and care-givers have the responsibilities, roles and functions assigned to them by this Act and are subject to the screening contemplated in section 20(2).
- (2) Principals and care-givers must –
- (a) have no history or criminal record related to the abuse of children, violent actions or conduct against any person or any substance abuse; and
 - (b) subject to the provisions of section 29, instil discipline amongst the initiates under their guardianship.
- (3) Care-givers must provide the parent or, where applicable, the customary or legal guardian of the initiate with health reports within the timeframes to be agreed upon between such care-giver and the relevant parent or guardian.
- (4) In the case of male initiation practices where circumcision is part of the initiation process, the care-givers must, subject to subsection (2), be males who themselves have been subjected to initiation and circumcision and must–
- (a) subject to sub-section (5), take precautionary measures to ensure the speedy recovery of initiates after circumcision; and
 - (b) take care of the relevant initiate or initiates until the completion of the initiation practices.
- (5)(a) Care-givers are responsible for the monitoring of initiates and must, if any initiate displays any symptoms of ill-health, serious injury, infection or excessive, recurring or continuous bleeding, whether as a result of circumcision or not, immediately inform the principal and the parents or legal or customary guardian of such initiate.
- (b) Immediately upon being informed of any of the conditions referred to in paragraph (a) by the care-giver or by a traditional surgeon as contemplated in section 23(3)(a), the principal must arrange for the initiate to receive medical attention.
 - (c) If the principal is not available, the care-givers must immediately arrange for the initiate to receive medical attention.
- (6) In the case of female initiation practices, the care-givers must, subject to subsection (2), be females who themselves have been subjected to initiation.
- (7) A principal must designate a specific area where sick initiates may be attended to, taking into account the provisions of section 22(4)(a).
- (8) A principal must ensure that all provisions of section 28, with the exception of section 28(9)(b), (10) and (11) are complied with.
- (9) A principal must provide the relevant PICC with the information contemplated in section 15(2)(f) and (g).
- (10) A principle must, subject to section 22 (1)(f), inform all role-players involved in initiation practices at the particular initiation school of any special needs of initiates who have disabilities, and must ensure that such needs are taken care of, including the provision of sign language practitioners and Braille services where applicable.
- (11) (a) For the purposes of a partnership or agreement contemplated in section 18(2)(b), a principal must engage the relevant municipality at least three months prior to the commencement of the specific initiation season.
- (b) A principal is responsible for the payment of municipal services provided by a municipality at an initiation school.
 - (c) The relevant municipality may exempt a principal from the payment contemplated in paragraph (b) and such exemption must be stipulated in the partnership or agreement contemplated in section 18(2)(b).

[11] She claimed that there were seven identified principles and care-givers who were then in occupation of the property and taking care of the initiates. She claimed that the appellant was not on that list. She also claimed that, in addition to the seven persons, there were three elders who had been identified and all of whom had unrestricted access to visit the school at any time when they had to do so. She similarly claimed that the respondent was not on that list. She further claimed that the elders had been identified as “persons experts and emergency persons who had the knowledge and expertise to deal with the health issues that may arise at the school(sic)”. She claimed that their right to access was not restricted to the initiation school on the property, and they were allowed to come as and when they deemed it necessary. She therefore denied that the respondent and those she referred to as the ‘faceless persons’ he purported to represent were in possession of the property as of 25 November 2022 or any time thereafter. She therefore disputed that the respondent had discharged the onus to prove that he was in possession of the property and that he had been unlawfully deprived of that possession.

[12] The appellant further explained that it was the owner of the property that was the subject of the proceedings. As the owner, the appellant had a statutory obligation in terms of the National Veldfire Forestry Act 101 of 1998 (“the Act”) to comply with the rules set by the Winelands Fire Protection Association, and which had to be abided by. The appellant claimed that the restriction of access to persons other than those identified on the list was a step taken by the appellant to comply with its statutory obligation in terms of the Act and was taken to ameliorate the risk of veldfires at the property. The appellant also pointed out that the property bore fynbos and other natural vegetation, which were prone to catching fire if not properly managed. It was the management exercise of that risk ‘which informed the formulation of the identified list referred to.’ It also pointed out that there were other adjacent properties in the vicinity of the property and that the respondent owed such property owners a statutory obligation to take all the necessary steps to prevent the risk of fires emanating from the fynbos, which may catch alight if not managed. It then set out the appellant’s obligations under the Act and claimed that if the steps are not taken, it would be viewed as negligence. The Act under section 34(1) under the heading Presumption of Negligence provides:

- (1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which-
 - a) the defendant caused; or
 - b) started on or spread from land owned by the defendant, the defendant is presumed to have been negligent in relation to the veldfire until the contrary is proved, unless the defendant is a member of a fire protection association in the area where the fire occurred.
- (2) The presumption in subsection (1) does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful.

[13] The appellant submitted that non-compliance with these obligations could result in the appellant bearing liability itself, thereby potentially exonerating the property's insurers from assuming liability in the event of a fire. The appellant urged the court *a quo* to strike a balance between the appellant's statutory obligations, which would have severe consequences if not dealt with, compared to the cultural rights of the respondent and the initiates. She claimed that there were already ten persons who were trusted and competent experts to attend to any health and nutritional requirements of the initiates. She claimed that the respondent's inability to access the initiation school by virtue of not being on the list furnished to the respondent would not place their health and the nutrition needs of the initiates at risk.

[14] Before dealing with the averments as set out by the respondent in the founding affidavit and the *seriatim* response by the appellant, it is necessary to point out that the appellant did not attach to the answering affidavit deposed to by its acting municipal manager a copy of the list which was allegedly provided to it. Moreover, neither did she set out the names of any or all the persons who were apparently on the list. Nowhere in her affidavit did she state that she had at any stage personally attended upon the site and witnessed who was present. Nor did she identify any of the persons or officials of the appellant to whom the list was provided, nor the names of any persons who observed what was taking place at the site and who were in fact present. Significantly, and mindful that the application had been brought and dealt with by way of urgency, no confirmatory

affidavits were filed by any of the relevant persons associated with the appellant and who were implicated in the respective affidavits of the parties.

THE ACTUAL AVERMENTS BY THE RESPECTIVE PARTIES AS SET OUT IN THE AFFIDAVITS

[15] The respondent described himself as a member of the Basutu tribe who was at that stage a principle overseeing an initiation school that had been underway at the Idas Valley Nature Reserve in Stellenbosch. He claimed that he conducted the school under the guidance and supervision of the Nyanga Initiation Forum, the Stellenbosch Initiation Forum and the Basutu Mahlubi Metro NPO 274-516. He claimed that he was at that stage responsible for over fifty initiates who were undergoing the right of passage at the site. In response, the appellant denied that the respondent was a principle for the initiation school as he was not identified on the list furnished to it on 25 November 2022. The appellant also denied that there were over 50 initiates on the property, as the appellant was informed that there were only twenty-four initiates who entered the property on 25 November 2022. The deponent does not state who informed the appellant of this claim. The appellant claimed that the respondent had not been part of the management of the initiation school that was taking place at the site. The managers of the school, the appellant claimed, were the “ten gentlemen that were identified by the initiation forum to the respondent on 25 November 2022...”. The deponent, once again, did not identify who exactly informed her that the applicant was not part of the management of the initiation school, other than what she claimed were the persons on the list of 10 persons.

[16] The respondent claimed that as a principle who was overseeing the initiation of the initiates, he was obliged by law to ensure that the initiates were fed, hydrated and given the necessary care by the care-givers and he had therefore the necessary standing to bring the application on his own behalf and on behalf of the initiates who had been entrusted to him by their families. The appellant, in answer, simply noted the duties of the principle but denied that the respondent was one of the principles for the reasons already set out.

[17] Under the heading, The Nature of the Application, the respondent claimed that the application was urgent in order to compel the appellant to grant unrestricted access to the care givers, the parents of the initiates, medical personnel and himself to the property for the purposes of conducting the initiation school in that summer season which season began on 10 November and would be completed during the first week of January 2023. The appellant noted the contents of the paragraph save to deny that the respondent had made out a case of urgency as required in terms of the Rules. It once again claimed that there were seven care-givers already having unrestricted access to the initiation school, as well as three elders. The appellant claimed that these persons were identified to the appellant as persons who 'must be given unrestricted access to the property.' Once again, she does not state who identified these persons to the appellant, who had to be given unrestricted access to the property. The appellant also claimed that the respondent had not provided the names and identities of the care-givers and the parents he purported to represent. The appellant therefore claimed that it would not be able to fulfil its statutory obligations to manage access to a protected and fire-sensitive area if it was ordered by the court to give unfettered access to unidentified persons as the applicant sought in the application.

[18] The respondent advised that he had been informed by his legal representatives that he was entitled to seek a spoliation order as relief on the basis that:

- (i) Pursuant to conducting the initiation school following a historical pattern, we have gained a peaceful and undisturbed occupation of the site and;
- (ii) That the deprivation and hindered access to the site by the Municipality and the Metro Police were both wrongful and unlawful.

[19] The appellant denied these contentions and claimed that the only persons who were in possession of the property and who had right of access were the "identified 24 initiates, seven teachers and three elders." Likewise, the appellant did not identify who the twenty-four initiates were. The appellant further claimed that the respondent lacked *locus standi* to act on behalf of medical personnel, as he was not a medical doctor, a nurse or a traditional surgeon as envisaged in the Customary Initiation Act. The

respondent had claimed to be a principle to the initiation school, and not a medical practitioner nor a traditional healer.

[20] Under the heading, Factual Matrix, the respondent provided the background to the prohibition by the appellant for the holding of the initiation school at the site where it had traditionally been held at the Idas Valley Nature Reserve in Stellenbosch. The respondent pointed out that on 9 October 2022, the initiation forums of which he was an affiliate learnt that the appellant would not be granting them permission to conduct the initiation school for that current summer season at the Idas Valley site. The appellant, in answer, noted the contents of the paragraph and stated that at all material times the representative on behalf of the appellant had never identified the respondent as an affiliate or a member of the forums who engaged with the appellant or the Provincial Initiation Committee. Once again, the deponent had not identified who had informed her that the respondent was neither an affiliate nor a member of the initiation forums, nor that he had not engaged with the appellant or the Provincial Initiation Committee. Moreover, the deponent did not state that she was personally involved in any of the negotiations with the forums of the Provincial Initiation Committee.

[21] The respondent further claimed that no formal communication had been sent to them despite repeated requests for such communication. The only communication that they received was a WhatsApp message from an official of the appellant stating that the respondent would not grant them access to hold the initiation school at the Idas Valley site. The respondent further stated that on 8 November 2022, they had received an official communication from the appellant informing them (the forums) of the decision that the appellant had taken. That decision, it appeared, was the subject matter of another court application then pending in this Division. The deponent, on behalf of the respondent, simply noted the contents of these paragraphs.

[22] The respondent stated that despite the decision of the appellant disallowing access to the Idas Valley site, the initiation process commenced on 25 November 2022 at the

site. On the evening of 25 November 2022, he stated 'we' were informed that the initiation forums within the Congress of Traditional Leaders of South Africa ("CONTRALESA") had taken the matter of their access to the site to court on an urgent basis and that the forums representatives had showed them the court papers as proof that the matter was registered under case number 20135/22. They were informed that the application would be heard the following day, as not all the parties had been properly served. He further claimed that at the time of receiving that information, 'we, elderly men and the aspirant initiates were already camping on the site in question, as is tradition, and it was upon that information that we laboured under the impression that we could move in and set camp, while the matter was being resolved in court.' The deponent, on behalf of the respondent, simply noted the contents of the paragraph and once again denied that the respondent was part of the group that entered the property on 25 November 2022. Once again, the respondent had not identified who exactly had informed her that the respondent was not part of the group that had entered the property on 25 November 2022.

[23] The respondent further stated that on the following morning, 26 November 2022, they were confronted by members of the Stellenbosch metro police who sought to evict them from the camp and that they informed them that the matter was already pending in court and that they had no right to evict them without a court order authorising the evacuation from the site. The respondent further claimed that they, the metro police, were so intent on forcefully evacuating them from the site that they called for more backup and that they made it clear that they were acting on the instructions of the management of the appellant. The respondent further claimed that it was only through the intervention of the South African Police Services ("SAPS") that the metro police did not evacuate them by force. The deponent, on behalf of the respondent, denied these claims made by the respondent. She claimed that after the initiation had commenced, the respondent acceded to the request made by the seven care-givers who were identified to the respondent as teachers, for access to water and entry for vehicles to the site. The appellant provided no confirmation by any member or officer in charge of the metro police in respect of the allegations made against them by the respondent.

[24] The respondent further stated that in response to the intervention by the SAPS, there was a strong reaction and a rebuke by the appellant that was posted on its Facebook page, in which they were labelled as 'illegal occupants' whilst the appellant further threatened to hold the SAPS accountable for any damage by having refused to remove them. The respondent attached a copy of the Facebook post of the appellant to his affidavit. It is necessary to set out in some detail the content of the Facebook post by the appellant. The post was made on 26 November at 10h31. The appellant stated that it was 'aware of an illegal occupation of a piece of municipal property in the Idas Valley Nature Area by an initiation school'. The appellant also referred to an application that had been brought for an urgent interdict to set aside a decision of the appellant not to approve the initiation schools on the three sites that were requested. The appellant further stated in the post that the decision had not been taken lightly and that all the national legislation and the risk with regard to fires had been taken into account. It claimed that it was important to note that the Cape Winelands Fire Protection Association ("PWFPA") had not granted a fire permit.

[25] The appellant and the Western Cape Department of Cultural Affairs and Sport ("DCAS") then brought an exemption application to the National Ministry of Forestry, Fisheries and Environment, but that too was not granted. The appellant further pointed out that the High Court application had not been heard as it stood down to allow the appellant and other respondents an opportunity to file papers. It also stated that the appellant was opposing the application and that they were busy preparing the papers. The appellant stated that 'until the court makes a decision no approval for the initiation school on the three sites exist'. The appellant further stated that the SAPS had refused to remove the illegal occupants and that they would hold the SAPS responsible for any potential damage that occurred due to the illegal occupation. They also claimed that the Department of Cultural Affairs and Sport had provided the initiation school with alternative sites, but that was refused. The appellant further stated that, as the landowner, it has gone above and beyond to accommodate the initiation school and to assist with getting the necessary fire permits as per national legislation.

[26] In response to the claims made by the respondent with regard to the Facebook post and its content, the appellant simply noted it and denied that it constituted a strong reaction and a rebuke by the appellant. The appellant claimed that the Facebook note was 'for information purposes so the residents adjacent properties are aware of the presence of the initiation school, which requires strict privacy by the initiates, and to inform the residents to tread carefully during the initiation season.'

[27] It is abundantly clear from the appellant's response to the claim by the respondent about the Facebook page and the content of the Facebook page that the appellant's Facebook note was clearly not 'for information purposes' for the adjacent residents to be aware of the presence of the initiation school. More so, the Facebook note hardly included any information for the residents that they had to tread carefully during the initiation season. What was glaringly absent from the Facebook note was that, as at 26 November 2022 at 10h31, contrary to the appellant's claim that it had already on 25 November 2022 (as repeatedly referred to above) acceded to the initiation school on the basis of the list of ten names provided to it. The appellant clearly stated in its Facebook note that "no approval" existed until the High Court had made a decision. If anything, and in my respectful view, the deponent on behalf of the appellant clearly demonstrated in her response to the appellant's own Facebook post that she had not had any personal knowledge as to exactly what had taken place on the site. She did not deal with the alleged role of the metro police at all, but publicly threatened to hold the SAPS responsible for any damages suffered in the event of a fire. In my view, the appellant's response to the contents of its own Facebook page puts paid to its claim that it had, on 25 November 2022, granted restricted access to the site. There is absolutely no mention of a "list" of ten persons, nor the fact that, notwithstanding that there was no court decision as yet on 26 November 2022, the appellant had acceded to the conducting of the initiation school on a restricted basis.

[28] The respondent further stated in its founding affidavit that the initiation school had since been operating under very challenging and severe circumstances because of the

restricted access by the metro police on the instructions of the management of the appellant. In response, the appellant denied the respondent's claims and claimed that the presence of the law enforcement officers was to ensure compliance with the management rules set up by the appellant in order to deal with its statutory obligations. I should point out that, notwithstanding the appellant's own claim of having sought to obtain an exemption for a fire permit which had been refused, it still sought to contend that it had granted permission for the initiation school to proceed on 25 November 2022 on a restricted basis. Needless to say, that was wholly inconsistent with its own claim of its responsibilities and risks under the relevant statutory legislation relating to the prevention of veldfires.

[29] The respondent further claimed that the metro police had been posted by the appellant at the two entrance points to the site and had locked the gates with padlocks, and they were not allowing cars to enter the reserve into the site where the initiates were. The appellant, for its part, noted the contents of the respondent's claim and stated there was always a presence of law enforcement in order to open the gate for access by the ten identified persons. Once again, the deponent had not identified who had informed her as to what exactly the members of the metro police were doing and in the provision of access to the ten identified persons.

[30] The respondent further claimed that the presence of the metro police had hindered the provision of necessities such as food, water and medical equipment and that placed the lives of the initiates at high risk. The appellant, for its part, simply denied the respondent's contentions in this regard without confirmation by the metro police.

[31] The respondent further stated that walking from the gates to where the initiates were was difficult for the disabled and elderly who had children among the initiates. The appellant, for its part, once again simply denied the respondent's claim that there were any persons with disabilities who had sought to visit the property for the purposes of attending the initiation school. Once again, this claim could not have been in her personal

knowledge, as she had not been present at the site, nor at the gate, nor did she identify any persons who had informed her of her response to the claims made by the respondent.

[32] The respondent further stated that the distance from the locked gates to the initiation site was between eight and ten kilometers, and took a long time on foot and was dangerous in the evenings, as most of the parents could only do visits after work. The appellant, for its part, simply noted the contents of the claims by the respondent and stated that the respondent was never informed by the initiation forum representatives that “there would be persons that would visit the property in the evenings outside of the ten, which was listed as the management strategy of the property.” Once again, the deponent had simply failed to identify who informed her that no parents were to visit the initiates, given the very nature of the customary rite and the interests and role of the parents of the initiates in the ritual.

[33] The respondent pointed out that the first two weeks constituted a very sensitive part of the initiation and therefore the elderly had always to be present in order to oversee the process with the primary aim to avoid preventable deaths and botched circumcisions. Once again, the appellant simply noted the contents of the respondent’s claims and stated that the ten persons on the list had been identified as suitable and competent persons to oversee the initiation process and to address the issues identified by the respondent.

[34] The respondent further stated that in respect of the initiation rites, it was necessary for as many men as possible to assist initiates in many ways, such as having optimal care, training and teaching and that which contributed to the initiates’ mental fortitude, which was required to complete the course. The appellant noted the contents of the respondent’s claims and stated that “things had changed since the beginning of the current season and that the respondent had been required to fulfil its statutory obligations in terms of the Veldfires, Forestry Act” and that unfettered access was no longer possible. It claimed that for that reason “the initiation had selected and identified ten persons to ensure the school run seamlessly to its conclusion and in the light of the statutory

obligations on the respondent's which it claimed had to be balanced against the Basutu Mhlubi cultural rights of the initiation school." Needless to say, these claims by the deponent on behalf of the appellant were not supported by the identification or confirmatory affidavits of any of the relevant persons concerned.

[35] The respondent claimed that on 3 December 2022, he was denied access to the site by the metro police, and he was forced to go back home with the essential equipment he was carrying. The appellant admitted that the respondent was denied access. It claimed that this was on the basis that he was neither recognised nor identified on the list by the initiation forum representatives to the appellant. It appears from the respondent's version that he, together with all the initiates that he claimed to represent in the application, were in occupation of the site as from the 25 November 2022 and that he had at some stage left in order to obtain what he referred to as essential equipment to take to the school. On his version, he was denied re-entry onto the premises by the metro police.

[36] The respondent further stated that on the same date, there were reports from the care-givers that one of the initiates was coughing up blood and needed to be taken for urgent medical attention. The respondent claimed that 'we brought this to the attention of the metro police' and pleaded with them to allow vehicle access onto the site, but those pleas fell on deaf ears. He also claimed that it was brought to the attention of the appellant's lawyers, who immediately contacted, via email, the respondent's attorneys to intervene, but that their correspondence was not answered. The respondent attached a copy of the email from Potelwa Attorneys addressed to the respondent's attorneys and in which his attorney, Mr A. Leeuw and Ms L. Dzai (a member of the Cape Bar) were copied in.

[37] In the email, attorney Potelwa addressed her colleague and pointed to the medical emergency at the site. She advised that she had just heard that one of the initiates had fallen ill. She further claimed that a couple of elders who are custodians of the tradition needed to visit the site, assess the initiates' condition and determine the next steps. She

pointed out that it was dark, and the elders could hardly walk due to old age and medical conditions. She pointed out that vehicular transport was the only mode that could take them there quickly. She claimed that the municipality had denied the elders access to the site, and the attorney insisted that it could be a matter of life and death. She pointed out that the elders needed vehicular access to the site and requested that her client provide them with access. She also pointed out that Western medicine was the last resort in such situations, and as a humanitarian concern, they appealed for access. In response, the deponent to the answering affidavit again noted the contents of the respondent's claims and stated that when the incident was reported to the appellant, steps were taken to give access to 'the persons' to attend to the medical emergency. Once again, the appellant did not set out who exactly gave 'the persons' access" to attend to the medical emergency and more so, it did not refute the alleged conduct of the metro police who initially denied the elders access to the site in the face of the emergency.

[38] The respondent further pointed to the nature of the initiation rites and their customary significance and implications, and claimed that the conduct of the appellant would impact the dignity of the school as well as the initiates.

[39] The respondent further stated that his legal representative, Mr Leeuw, also wrote to the Provincial Standing Committee on Arts and Culture on 28 November 2022, wherein he sought its intervention to avert what they regarded as an impending crisis, but no response was received. The respondent attached a copy of the email by his attorney in which he confirmed that they were acting on behalf of the Basutu Makuba Initiation Forum, that they were in the midst of a legal battle with the appellant, that his clients, the initiates and their assistants had made their way onto the Idas Valley Nature Reserve which resulted in the appellant through its law enforcement police seeking to forcefully remove them from the site without any court order. He also pointed out that they had been informed that the appellant had since blocked access to the site at which the initiation was proceeding and that they had also blocked access to cars and any parents who had to attend to their children at the initiation school. He pointed out that this hindered the

provision of food and that it had placed the lives of the fifty-plus initiates at high risk. They therefore sought the intervention of the provincial government to prevail on the appellant to soften its attitude and to manage the situation reasonably and with the utmost sensitivity it deserved.

[40] Mr Leeuw pointed out in the letter that until there was a court order to the contrary, the initiation school would continue until the first week of January 2023. He further pointed out that there was no need for any hostility and that the issues had to be properly dealt with in a court without having to compromise the health and the lives of the innocent initiates. He also pointed out that, if the recipients of the communication were not the appropriate authorities, they should forward it to the relevant office as a matter of urgency. He awaited their prompt response, but none was received. The deponent to the answering affidavit again noted the respondent's claims and once more denied that the respondent formed part of the initiation forum that had engaged with the appellant, which 'agreed' to management controls in order to ensure that the appellant complied with its statutory obligations in terms of the Veldfire, Forestry Act. Once again, there was simply no confirmation that the appellant had obtained any confirmation from the provincial government that it had received the email from the respondent's attorney.

[41] The respondent further pointed out that as part of the attempt to have access to the site, their leaders had also involved the office of the Public Protector, the Human Rights Commission and the Commission for Cultural and Linguistic Communities. He attached a copy of the alternative dispute resolution report from a representative of the Public Protector. The report by the Provincial Public Protector, dated 24 November 2022, provided feedback as to what it referred to as a complaint against the Stellenbosch Municipality in its refusal of the Basutu and Mahlabi Heritage Group access to the Idas Valley site for the purpose of conducting an initiation school during the December holiday season. The report indicated that the Western Cape Office of the Public Protector had conducted a joint alternative dispute resolution session (mediation) with the offices of the Human Rights Commission, the Commission for Cultural, Religious and Linguistic

Communities and the Provincial Department of Environmental, Forestry and Fisheries in an attempt to resolve the complaint against Stellenbosch Municipality (the appellant). They referred to the fact that the mediation session took place on 22 and 24 November at the office of the Public Protector in Cape Town.

[42] The initial session had been postponed to the 24th of November in order to issue a subpoena for the attendance of the Chief Fire Officer of the Cape Winelands and Protection Association, who neglected to appear at the mediation session and also to request the Municipal Manager, Ms Metler, to attend the session as the delegated official had no authority to make binding decisions. The report recorded that every attempt had been made by all the parties in the mediation session to find an amicable solution, but that the Municipal Manager refused to grant permission to the heritage group to conduct the initiation school at the Idas Valley site. He concluded that as a result, the mediation session was unsuccessful.

[43] In light thereof, they were unable to proceed further with the investigation of the complaint, and the matter was accordingly referred to the Cultural, Religious and Linguistic Committee. They were also advised to seek the assistance of a private attorney to approach a competent court for the necessary relief. In response, the deponent on behalf of the appellant merely noted the contentions with regard to attempts at mediation by the Public Protector and other bodies to resolve the dispute with the appellant. This stood in contrast to the appellant's contention that the respondent and the forum he represented played no role in the negotiations with the appellant and other stakeholders prior to the institution of these proceedings.

[44] The respondent further invoked the provisions of Section 31 of the Constitution, which provides:

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with the members of that community:
 - a. To enjoy their culture, practice their religion and use their language and;

- b. To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

[45] Once again, in response, the deponent noted the constitutional provisions referred to by the respondent. The appellant requested the court however to consider, amongst others, the following: its obligations with regard to the prevention of the risk of veldfires, the costs involved in the event thereof and the risk of the insurance company denying liability and that the respondent would have to carry the responsibility of any damages, its inability on limited resources to be able to meet such claims. For that reason, it claimed that the appellant was not in a position to give unrestricted access to the respondent and everyone else sought by him and the initiates he represented. Despite urging the court to limit the customary rights of the initiates, nowhere does the appellant indicate that they had even considered or provided a water tanker(s) on the site to be easily accessed in the event of a veldfire. That notwithstanding its repeated claims about its concerns about the risk of veld fires and preventing their spread to adjacent properties. The appellant had moreover not even considered it as one of the less restrictive measures, rather than limiting the customary rites of the initiates.

[46] In concluding the founding affidavit, the respondent dealt with the grounds of urgency, which he claimed were self-evident given the nature of the spoliatory relief sought. Once again, in response, the appellant denied that there were any grounds set out for urgency. It also maintained by way of amplification that, despite the fact that the initiation school which the respondent sought access to was not permitted by the appellant and that the school was established by 'force' without the appellant's consent, the appellant had nonetheless 'showed Ubuntu' by acceding to the following requests. In this regard, it referred to the provision of water, access by the relevant experts, presumably the persons it referred to as on the list, that when the medical emergency arose, the appellant claimed that it relaxed the conditions of access and allowed persons who identified as medical personnel access to the initiation school. Moreover the appellant also claimed that the appellant had allowed the school to remain on the property,

despite its claimed legal right to institute eviction proceedings, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation Act, 19 of 1998 ("PIE") but rather, it benevolently invoked the value of Ubuntu and allowed the school to remain on the property for the duration of the initiation season pending the finalisation of the court case instituted by the Congress of Traditional Leaders.

[47] Rather strangely, and in my view, indicative of the appellant's misguided view of the customary rite, the appellant described the initiates as "patients" who despite the initiation rites of male initiates includes their circumcision, the initiates are nowhere referred to as patients and in particular not in the Customary Initiation Act 2 of 2021 and besides that, the appellants response in the answering affidavit to the urgent intervention by the lawyers acting on behalf of the initiates when a medical emergency arose was certainly not indicative of them being treated as patients. If so, there would have been no need for the urgent and patently desperate intervention by the respondent's lawyers against the conduct of the metro police and the appellant. In any event, the appellant's invocation of the value of Ubuntu was certainly not relevant to its defence against the spoiliatory relief sought against it, other than to sugarcoat its conduct. In my view, the reliance on the value of *Ubuntu* on the part of the appellant was, moreover, both patronising and cynical when, by all accounts, its conduct, even on its own version, amounted to at best a superficial view and at worst a poor understanding and appropriation of the very value and praxis of the customary value of Ubuntu.⁷

[48] That is the factual context to which the court a quo was confronted in the dispute between the parties. It was clear that in the absence of the appellant placing before the court a quo, amongst others, the much vaunted list, identifying her sources of alleged factual averments and the failure to attach both the necessary and relevant confirmatory

⁷ As indicated, the appellant invoked the value of Ubuntu to self-acclaim its conduct when it was not relevant to the proceedings. The philosophical approaches to the complex value of Ubuntu are very much contested. I do no more than refer to the abundance of writings, debates and polemics on the issue and to a very informative and useful overview of the topic and the debates it invokes in the article: C.W. Maris (2020) Philosophical racism and ubuntu: In dialogue with Mogobe Ramose, South African Journal of Philosophy, 39:3, 308-326, DOI:10.1080/02580136.2020.1809124.

affidavits, that the respondent had, in my view, on the facts asserted in the founding affidavit established his presence on the site as from the 25 November 2022. The respondent had furthermore established, supported by the annexures, his involvement through his attorneys the engagement with the various relevant stakeholders (at a provincial level and through the Public Protector) and that he had in fact established his locus standi in the matter and his involvement with the initiation school and, more importantly, his possession of the initiation site on the property for the purpose of the spoliatory relief. Moreover, the initiates he claimed to represent already had physical possession of the school site and each of them held such possession with the entitlement to the benefit of being visited by their parents (as provided for in the customary rite and in terms of section 22(4) of the Customary Initiation Act) as part of the initiation ritual, which on the appellant's own version, it denied them access, apparently for not having been informed by those "principles and care-givers on the list" that the initiates were entitled to be visited by their parents and elders as part of the customary ritual (See the dicta in *Yeko v Qana* (above) in respect of the nature of the possession).

[49] Needless to say, the initiates were also denied access to their care-givers and medical assistants in the form of traditional healers, whom the appellant barred access to with the use of the metro police. That despite their possession of the site with the benefit of such access. The appellant had, moreover, simply relied on the bare denials by the deponent in its answering affidavit and its reliance on the list. Of particular significance, as alluded to earlier, and repeated here for emphasis, her response and version in respect of the appellant's own Facebook note of 26 November 2022 at 10h31, did, in my view, demonstrate a lack of coherence (and congruence) when considered in the context of the appellant's own version.

[50] I am more than satisfied that on the invocation of the principles of the *Plascon-Evans* rule, the appellant's assertions that the respondent had not proved possession were to be rejected as hopelessly untenable and far-fetched in the circumstances. In my view, the list that the appellant relied upon was no more than an illusion. In arriving at

such a view, I am mindful that the deponent deposed to the answering affidavit in the acting capacity as Municipal Manager and was constrained by the exigencies of the application before the court a quo. Nonetheless, it was incumbent on her to have provided the court a quo with, at the very least, a copy of the list that she so much relied upon and on which the appellant based its defence. Moreover, no explanation was given by the appellant in the answering affidavit of its failure or any inability to do so. So too, for the lack of identifying the names of the persons who provided the deponent with the information she relied upon (as undertaken in the prelude to her affidavit), and so too, for any reason proffered for the lack of any confirmatory affidavits by any of its officials and relevant persons in support of its defence.

[51] Moreover, I am satisfied that the respondent had established his role as a principle of the initiation school and with its ensuing responsibilities, which, as already stated, were clearly set out in the definitional section of the legislation. He was, moreover, together with others, responsible for the initiates at the site, which had amongst other responsibilities to ensure access to the site by the parents and elders of the initiates and any other relevant care-givers, including traditional healers who were required to interact with the initiates in the rituals that were to be undertaken at the initiation school. So too were the initiates at the school entitled to the benefit of their possession of the property on which the school was conducted to access by their parents, elders, traditional healers and other care-givers. In that regard, the court a quo, in my view correctly invoked the provisions of the Children's Act 38 of 2005 in its broad definition of family member, in particular that of a parent and also that of a caregiver.⁸

⁸ 'family member', in relation to a child, means-

- (a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

furthermore, the section defines "care-giver" as follows:

"care-giver" means any person other than a parent or guardian, who factually cares for a child and includes-

- (a) a foster parent;

[52] I am satisfied that the respondent established the essential requirements of the spoliatory remedy and that the appellant had simply taken the law into its own hands. I propose to dismiss the appeal with costs, with the costs of counsel in the appeal to be taxed on Scale B.

[53] I have had the benefit of reading the judgment of my colleague Sher J in its dissent from mine. He is correct that I considered the matter to have resorted under the ambit of the remedy of the *mandament van spolie*. He, however, misconstrues the basis for the relief I upheld in the order of the court a quo. In this regard, he states that in the concluding paragraphs (51 and 52), I held that the respondent established the essential requirements for the grant of the spoliation order “both in his own right, and on behalf of parents, care-givers, elders and traditional healers.” While I certainly found that the respondent established the essentials of the possessory remedy in his own right, I did not extend the remedy to parents, care-givers, elders and traditional leaders. They simply never had possession of the site. Neither did I find that they did.

[54] Moreover, the respondent stated in his founding affidavit that he filed the application on behalf of the initiates, claiming their number exceeded fifty. This contrasts with the appellant’s assertion that only twenty-four initiates were present on the site. The respondent also claimed that all of these initiates had physical possession of the site as of 25 November 2022, which included more than just the twenty-four individuals mentioned by the appellant.⁹

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- (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child.
 - (c) a person who cares for a child whilst the child is in temporary safe care;
 - (d) the person at the head of a child and youth care center where a child has been placed;
 - (e) the person at the head of a child-headed household; If. Child and youth care worker the keys for a child who is without appropriate family key in the community; And G the child at the head of a child headed household;

⁹ See paragraph 16 of his founding affidavit.

[55] In paragraphs 48,49 and 51 of my judgment, I clearly state that the initiates, all of whom were in possession of the site, were entitled to the benefit of being visited by their parents as part of the initiation ritual, which the appellant prevented with the use of the metro police to restrict access to the site (the parents were also entitled to access under Section 22 of the Customary Initiation Act but the remedy of the mandament van spolie is not concerned with the determination of competing rights.) The initiates occupied the site for the sole purpose of attending an initiation ritual that also entitled them to be attended to by their care-givers and medical personnel that included traditional healers and herb-persons as provided for in the order of the court a quo.

[56] The respondent, having established his possession and control of the site in his role as a principal, was likewise entitled to have the persons referred to in the order of the court a quo attend the site (para 5). In my view, they were entitled to do so not as possessors (which they were not) of the site but on the basis that the respondent and the initiates had established their own possession of the site. By simple analogy, where a group of people unlawfully invade land, they are entitled to be visited by family, friends, and medical personnel and so too, where a lessor unlawfully changes the locks of a shop or business run by a lessee, the natural consequence of spoliatory relief would entitle the lessee to receive customers and continue with its business. The act(s) of spoliation against the possessors in this matter, occurred when the metro police on the instruction of the appellant were placed at the entrance to the site, locked the gate with padlocks and restricted entry by visitors and vehicles (which included parents, family, care givers and medical personnel) to the initiates and the respondent on the basis of some illusive list despite them (the initiates and the respondent) having been in possession of the site. That was the mischief that the spoliatory remedy was asserted against. The presence of the metro police and the padlocking of the gates to restrict access to the site did not exist when the respondents and the initiates initially invaded the site on the 25 November 2022. That was the status quo that had to be restored by the spoliatory relief (see *Nino Bonino v De Lange*, above) in favour of the respondent and initiates. In this regard, the background and events that occurred on the site were set out in detail in the founding affidavit by the respondent and in my judgment. The appellant had simply taken

the law into its own hands(para 52.) Visitors (parents and family) and medical personnel (including traditional healers), could not in my view, nor did they assert the remedy of the Mandament and neither did the respondent nor the initiates seek to assert possession on their behalf. Nor, did I in my judgment.

[57] My colleague in the dissent also misconstrues my finding as to the application of the *Plascon-Evans* principles in accepting the version of the respondent (was initially para 11 now para 12 of the dissent) I did not do so on a balance of probabilities, given motion proceedings and in light of the apparent disputes of fact as asserted by the appellant (and repeated in argument by counsel on behalf of the appellant.) I rejected the appellant's version as hopelessly untenable and far-fetched, as evidenced by its own answering affidavit.

[58] In the result I make the following order:

1. The appeal is dismissed with costs, with the costs of counsel on Scale B.
2. The order of the court a quo is upheld.

Order of the court a quo;

1. The respondent is directed to restore and grant unrestricted access to:

- 1.1 Care-givers;

- 1.2 Parents and family members of the initiates. Parents, family members and care-givers were to be given a broader meaning, including a meaning similar to the meanings of the Children's Act, 2005.

- 1.3 Medical personnel, also to include traditional healers and herbs-persons and

- 1.4 Mr Makhubela, the applicant as the principal.

2. The respondent to pay the costs.


VC SALDANHA
JUDGE OF THE HIGH COURT

I agree.


G DA SILVA-SALIE
JUDGE OF THE HIGH COURT

SHER J, dissenting

1. I am indebted to my colleague for his judgment. I agree with his proposed order insofar as the respondent and the costs of the appeal are concerned. Save for the terms of the order which was made by the court *a quo* in regard to family members and 'herbs-persons' (sic) and the unrestricted access which it granted to the remaining categories of persons, which I am of the view was not warranted, I am also in agreement that the appeal falls to be dismissed, albeit that I differ in the route I take and the conclusions and findings I arrive at to get there.
2. My colleague considers the matter to be one that properly resorts within the ambit of the *mandament van spolie*. I understood that in the concluding paragraphs¹⁰ of the initial draft of his judgment he held that the respondent had established the essential requirements for the grant of a spoliation order, both in his own right, and on behalf of parents, caregivers, elders and traditional healers.
3. In his revised draft in response to my dissenting judgment my colleague says that I misconstrued the basis for his upholding of the relief which was granted by the

¹⁰ Paras 51 and 52.

court a *quo*. He says that, having established his possession and control of the site in his role as principal, and in acting on behalf of the initiates, the respondent was entitled to have the other persons referred to in the order of the court a *quo*, attend the site, in the same way that an unlawful land invader or tenant businessman would be entitled to be visited by family, friends, medical personnel and customers, as this would be no more than the consequence of the spoliatory relief which was granted to him and the initiates..

Ad spoliatory relief

4. It is trite that the *mandament van spolie* is an extraordinary common law remedy¹¹ which is aimed at preventing '*rusverstoring*' i.e. a disturbance of the peace.¹² It is essentially a 'possessory' remedy which is available to a person whose possession of property (movable or immovable) has been disturbed.¹³ It provides relief by way of a *mandamus* which summarily directs the restoration of possession, without ruling on the merits of any underlying dispute regarding the parties' rights (expressed by the maxim *spoliatus ante omnia restituendus est* -spoliation must be restored before anything else).¹⁴ The underlying rationale for the remedy is that the law does not countenance resort to self-help and entitlement to possession must be resolved by the courts.¹⁵
5. Two requirements must be met for the grant of the remedy: the applicant must establish that they were in so-called peaceful and undisturbed possession of the property concerned and that they were dispossessed of it i.e. that they were wrongfully deprived of it.¹⁶ These requirements must be proven on a balance of

¹¹ Which owes its origins and development to Canon law, the Roman *interdictum unde vi* and the Roman-Dutch authorities. The 'doctrinal basis' of the remedy was approved by the SCA in *Tswelopele Non-Profit Organization & Ors v City of Tshwane Metropolitan Municipality & Ors* 2007 (6) SA 511 (SCA), and the CC in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* [2012] ZACC 26; 2013 (1) SA 323 (CC).

¹² *Malan v Dippenaar* 1969 (2) SA 59 (O) 64H-65F.

¹³ *Vide* the long line of authorities cited by Erasmus *Superior Court Practice*, RS 27 (2025), D7-1 *et seq*; Jones & Buckle *The Civil Practice of the Magistrates' Courts in SA* RS 33 (2025) Act p 200 *et seq*; *Monteiro & Ano v Diedericks* [2021] ZASCA 15; 2021 (3) SA 482 (SCA) para 14.

¹⁴ *Nino Bonino v De Lange* 1906 T.S. 120.

¹⁵ *Monteiro* n 4, *id*.

¹⁶ *Id*, para 17 (majority) para 43 (minority); *Ivanov v North-West Gambling Board & Ors* [2012] ZASCA 92; 2012 (6) SA 67 (SCA) para 18.

probabilities and a *prima facie* case will not suffice since the grant of a *mandament* is a final order, albeit interim in form.¹⁷

6. As far as the first requirement is concerned, as is evident from the extract my colleague quoted from the decision in *Yeko*¹⁸ (where the possession in issue concerned the physical occupation of a shop in a building), the SCA has emphasized that the 'very essence' of the remedy is that the applicant must establish that they enjoyed possession of the property concerned. In this regard it noted that for the purpose of obtaining spoliatory relief it need not be shown that the applicant was in possession 'in the juridical sense' and it may suffice if the applicant establishes that he 'held' the property 'with the intention of securing some benefit for himself'.
7. Possession in a juridical sense usually assumes factual, physical control or 'detention' (*corpus* or *detentio*) coupled with an intention to possess (*animus possidendi*),¹⁹ but for the purposes of obtaining relief under the *mandament* it has been held that this may extend to a non-physical 'holding' or *detentio*, and an intention simply to derive some personal benefit (such as that which comes from use of a property), as opposed to an intention to possess.²⁰ Consequently, in the case of immovable property, physical possession at the time of spoliation is not necessary. As Van Blerk JA said in *Yeko*²¹ 'all that the *spoliatus* has to prove is possession of a kind which warrants the protection accorded by the remedy, and that he was ousted'.
8. As a result of this distinction, it has been held that for the purposes of obtaining a spoliation order in cases concerning immovable property the applicant need not necessarily establish that they were in physical, or continuous occupation of it at the time when, and until, they were dispossessed. Thus, in *Malan*²² although the applicant vacated an immovable property he had bought after cancelling the purchase agreement, on the grounds that there were latent defects in it, but had retained the keys to it with the intention of thereby exercising control over it, it was

¹⁷ *Monteiro* n 4 para 43; *Schubart Park* n 1 at 332H.

¹⁸ *Yeko v Qona* 1973 (4) SA 735 (A) at 739D-E.

¹⁹ CG Van der Merwe *The Law of Things*, LAWSA Vol 27 (2nd Ed) paras 70, 74-75.

²⁰ *Monteiro* n 4 para 48.

²¹ Note 9, 739G.

²² Note 3.

held that he had retained possession of it for the purposes of obtaining spoliatory relief. In similar vein, in *Nienaber*²³ the court held that although the applicant had left land which he had a contractual right to use and cultivate after ploughing it in the winter, and was then barred from re-entering it on his return in the spring in order to plant it, he had not lost possession thereof.

9. As is apparent from his founding affidavit the applicant averred that on 25 November 2022 he and certain unidentified elders and initiates illicitly took physical occupation of a portion of the Idas Valley nature reserve by setting up camp thereon, for the initiation school. He does not say how long he remained in occupation of the site, but it is evident that at some stage he left it, before attempting to return to it on 3 December 2022, when he was denied access by the Metro police and was forced to return home with the essential equipment he was carrying.
10. In her answering affidavit the appellant's municipal manager contended that the respondent had not provided the court with any 'evidence' that he had been in possession of the property and had been wrongfully dispossessed of it. In support of this contention, she said that the respondent's name was not on a list of 7 persons, which had been provided to the appellant, who were identified as principals and caregivers who would be occupying the site. She accordingly denied that the respondent and the 'faceless' (sic) persons who he purported to represent had been in possession as of 25 November 2022, or thereafter. She did admit that the respondent was refused entry to the site when he tried to access it on 3 December 2022.
11. As my colleague has pointed out, the appellant's response was not an answer to the averments which were made by the respondent as to his possession. The municipal manager had no personal knowledge of whether the respondent had taken occupation of the site on 25 November 2022, or at any time thereafter, and could accordingly not refute his averment in this regard by way of a simple, and bald, denial. The appellant did not file any confirmatory affidavits from persons who would have been able to pertinently refute such an averment, if it was untrue,

²³ *Nienaber v Stuckey* 1946 AD 1049.

based on their personal knowledge, such as members of the Metro police. The fact that the respondent's name did not appear on the list which the appellant had of who was supposed to be on the site as part of the initiation school, did not mean that the respondent was not on the site whilst the school was underway and/or was not in occupation of it from 25 November 2022 onwards.

12. As the respondent was seeking spoliatory relief for himself, whether he had a right to be on the site was not pertinent or germane, only whether he showed that he had been in possession/occupation of the site. On this aspect, given the deficiencies in the appellant's case I agree with my colleague that on the application of the trite *Plascon-Evans* principles the respondent made out a case of possession, on a balance of probabilities, as far as he was concerned.
13. Although it is so that after taking physical occupation of the site the respondent left it at a stage, based on the cases previously referred to this did not result in him losing his possession thereof, in the sense required for a spoliation order. He clearly did not leave the initiation site with the intention of abandoning it. He left because he needed to collect equipment or necessities that were required for the initiation process and the school. It is evident that in doing so he was discharging his duties and responsibilities as a principal of the school, and he retained the necessary intention to occupy and 'possess' the site to secure some benefit for himself i.e. the ability to discharge his duties and responsibilities as principal. In this regard, as was pointed out by my colleague, in terms of s 21(1) of the Customary Initiation Act²⁴ ('the Act') the principal of an initiation school has certain responsibilities, roles and functions and is accountable for the operations and management of it.
14. Although the respondent no longer had physical detention of the site when he left it, he still seemingly exercised some control over it via the caregivers he left behind who were attending to the carrying on of the initiation rites, and he clearly still had the necessary *animus* required in respect of holding possession of the site, and

²⁴ Act 2 of 2021.

thus in refusing him access to it by locking him out and barring him entry via the Metro police, the appellant committed an act of spoliation.

15. Our courts routinely grant spoliation orders in matters where a person (such as a tenant or a co-owner) has a right of occupation of immovable property, which they exercise by occupying it, before vacating it without intending to relinquish the right to return to it, and are then barred from re-entering it by a landlord or co-owner. Equally, such orders have been granted in the case of the illegal occupation of immovable property, where an occupier without such a right is wrongfully evicted by force, without an order from the court.
16. That said, I am not aware of any reported decision in which a 3rd party who has never had physical occupation or legal possession of immovable property, has effectively been granted spoliatory relief vicariously, via an illicit occupier of such property who has been spoliated from it (or even via an occupier who had a right to occupy or access it, such as a tenant or co-owner, who was spoliated).
17. Nowhere in his founding affidavit did the respondent assert that any of the other persons to whom the court *a quo* granted relief i.e. caregivers, parents, family members, medical personnel, traditional healers and 'herbs-persons' (sic), were ever in physical occupation or some form of 'possession' of the site, at any time, and were deprived of such occupation or possession.
18. The basis of the court *a quo*'s order in respect of these persons is to be found in para 23 of its judgment, where it held that closing off the area and preventing movement into the nature reserve had deprived not only the respondent (as principal), but also (some of) the other persons to whom it granted relief viz family members and caregivers, of 'control and power' over it, and on this basis they had accordingly been dispossessed of the site 'and the initiates'. On what basis it granted spoliatory relief to the other categories of person is not clear.. As is patently evident from the papers there was no assertion, let alone evidence, that family members and caregivers had ever exercised any possession in the form of 'control or power' over the site, and were dispossessed of it. The only person (in terms of the order which was granted) who was alleged to have been in possession and control of the site was the respondent. In similar vein, there was no allegation in

the papers that any caregivers or family members of the initiates were denied access to them, and as will be evident from what follows below, there was no allegation that family members within the extended sense adopted by the court *a quo* (i.e. persons other than parents) were entitled to access and were deprived of it.

19. As previously pointed out, the *mandament* is a possessory remedy that seeks to restore possession, which in the case of immovable property is synonymous with occupation, to those who have been deprived of it. As the additional persons to whom the court granted relief were never in possession of the site, in either a physical or an extended legal sense, spoliatory relief was not available to them.
20. In seeking nonetheless to uphold the judgment of the court *a quo* in favour of such persons, on the basis of spoliation, my colleague holds²⁵ that the *initiates* held physical possession of the site with the entitlement to the benefit of being visited by their parents, as provided for by customary rites and s 22(4) of the Act. Further in his judgment²⁶ my colleague holds that the initiates were also entitled to the benefit of access by their parents, elders, traditional healers and 'other' caregivers.
21. Section 22(4) provides²⁷ that parents or, where applicable, guardians have the right to attend to initiates who fall sick and to remove them from an initiation school when they require medical attention or request to be removed, or when a family emergency or natural disaster warrants their removal, or when they are subjected to abuse, or when the school does not meet the requirements of the Act, which regulates the holding of customary initiation practices. Parents and guardians would surely also have such rights at common law, given the duty of care which they owe to their children.
22. In my view these rights and circumstances did not serve to establish the fundamental requirement of physical or legal possession and the despoiling thereof, on which the *mandament van spolie* is premised.
23. Neither a personal right of access by a non-possessor/non-occupier to the occupier/possessor of immovable property, nor a duty of emotional and/or physical

²⁵ Para 48 of his judgment.

²⁶ Para 51.

²⁷ Sections 22(4)a) and (b)(i)-(vi).

support or care which may be owing by or to them, vis-à-vis an occupier/possessor, entitles them to a spoliation order, vicariously.

24. The logical extension of holding that it does would mean, by way of example, that a married person who unlawfully invades a property and takes up occupation of a dwelling on it, while the owner is absent, with the intention of moving their family into it in due course, and who is then forcefully evicted without an order of eviction, would be entitled to claim spoliatory relief not only for themselves, but also for their spouse and children, who were never on the property, and never possessed or occupied it, on the basis that as *spoliatus* they have an entitlement to the benefit of their family's access to them, or have a duty to support and care for them, or vice versa. It would also mean that they would be entitled to obtain a spoliation order for their physiotherapist or doctor, from whom they have a right to receive treatment or assistance, if and when required, while they remain in illicit possession of the property in terms of the *mandament*, even though they were never in possession or occupation of the property and were never personally deprived thereof. I am not aware of any reported decision where relief in terms of the *mandament* has been extended to 3rd parties in such circumstances, and in my view to do so would go against the fundamental principles on which the remedy is predicated.
25. In *Dennegeur Estate*²⁸ the SCA emphasized that in the case of immovable (and movable) property the remedy is available to a person who has been deprived of their *actual physical possession* or co-possession thereof, and in order for such possession to be established it needs to be shown that the applicant was in effective physical control of the property at the time. As previously pointed out, it was never asserted in the respondent's papers that any of the other persons to whom the court a *quo* extended spoliatory relief, were ever in effective physical control of the site and were deprived of it.

²⁸ *Dennegeur Estate Homeowners Association & Ano v Telkom SA SOC LTD* 2019 (4) SA 451 (SCA) para 10, on appeal from a decision of this court (per Saldanha J).

26. Whilst the SCA also noted in *Dennegeur Estate*²⁹ that relief in terms of the *mandament* has been extended to persons who have been unlawfully deprived of their so-called 'quasi-possession' of incorporeal or servitudal-type rights, it pointed out that the necessary element of possession which is required for the grant of spoliatory relief in such instances must be constituted by the 'actual or factual' exercise of such rights.
27. In that matter it held³⁰ that Telkom's right to access underground ducts, sleeves/pipes and manholes in a security estate (in which it had installed telecommunications cables), in terms of s 22 of the Electronic Communications Act,³¹ was such an incorporeal right, which was servitudal in nature, which was capable of protection by the *mandament*. The section stipulates that electronic communications network providers may access any public or private land for the purposes of constructing, maintaining, altering or removing electronic communications networks or facilities.
28. Inasmuch as Telkom had exercised its rights under the section by installing cables into underground ducts and sleeves/pipes on the estate, the SCA held that it had the required quasi-possession of a servitudal-type right which was capable of being protected by means of a spoliation order. However, contrary to the decision of the court *a quo*, it held that Telkom had not been dispossessed of this right by a competitor, (who entered the estate and laid fibre optic cables in the selfsame underground ducts, sleeves and pipes), as it had not lost possession of the infrastructure or its right of access thereto, and the services it provided had not been disturbed as its networks remained functional.
29. In *Eskom Holdings*,³² a decision which was also reported in 2019, a few months after *Dennegeur Estate*, the SCA remarked, with reference to its decision some 11 years earlier in *Scholz*,³³ that although the *mandament* has been extended to the

²⁹ Id, para 9, with reference to LAWSA Vol 27 2 ed para 94 and the authorities cited therein; *Telkom v Xsinet* 2013 (5) SA 309 (SCA).

³⁰ Para 15.

³¹ Act 36 of 2005.

³² *Eskom Holdings SOC Ltd v Masinda* [2019] ZASCA 98; 2019 (5) SA 386 (SCA) para 14.

³³ *FirstRand Ltd t/a Rand Merchant Bank & Ano v Scholtz NO and Ors* 2008 (2) SA 503 (SCA) para 13.

quasi-possession of incorporeal rights, not all such rights will be the subject of its protection. In each instance the nature of the right relied upon must be determined or 'characterized' to establish whether quasi-possession thereof is worthy of protection by way of the *mandament*.

30. Consequently, it endorsed its earlier dictum in *Scholz* that in substance the *mandament* may afford protection to incorporeal 'use rights' ('gebruiksregte') which attach to immovable property, such as servitudes and rights of way or access, as well as rights ancillary thereto, such as rights to the supply of water or electricity, which are an incident of the possession or control of the property by the *spoliatus*. In contrast to this, rights which do not attach to the property and/or which are not an incident of the possession and control thereof by the possessor, such as personal or contractual rights, will not qualify.³⁴ In this regard it pertinently held³⁵ that in order to justify the grant of a spoliation order in respect of incorporeal rights, the right concerned must be of such a nature that it 'vests in the person in possession of the property as an incident of their possession'.
31. Unlike the access rights in *Denngeur Estete*, the access rights on which my colleague relies i.e. those in s 22(4) of the Act are clearly not servitudal-access type rights which attach to the immovable property in question, nor did they vest in the respondent, as an incident of his possession and control of the property. They were personal rights of access to initiates attending an initiation school, in certain defined circumstances, which were expressly granted to, and which vested in, their parents and guardians (customary and legal). Other family members, and caregivers, elders, and traditional healers and 'herbs-persons' do not enjoy such rights in terms of the section or the Act .

³⁴ Thus in *Impala Water Users Association v Lourens NO & Ors* 2008 (2) SA 495 (SCA) and *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) spoliation orders were granted directing the restoration of the supply of water, on the basis that the applicants were in quasi-possession of incorporeal rights thereto as an incident of their possession of the immovable property, but were not granted in *Scholz* n 24, on the basis that the applicant's right to the supply of water was a contractual one, exercisable on payment of a fee. In the same vein, in *Eskom Holdings* n 23 the SCA held that the applicant's right to the supply of electricity was a personal, contractual right which was also exercisable on payment of a fee for a pre-paid meter and was not a right which vested in her as an incident of her possession of the property, and it accordingly set aside the spoliation order which was granted by the lower court.

³⁵ *Id*, para 22.

32. In the circumstances, extending spoliatory relief to such other persons was, in my view, not warranted or permissible, as the necessary possession of property or quasi-possession of incorporeal rights was not present, and those persons were accordingly not despoiled of them, and the court *a quo* erred in this regard.

Ad relief in respect of access by parents, caregivers and medical personnel

33. That said, in my view an order granting limited access to the initiates by parents/guardians and caregivers, as well as medical 'personnel', was warranted, on the basis of the facts raised by the respondent in his founding affidavit, the common law duty of care which parents and guardians have towards children, and the provisions of the Act.
34. In this regard the respondent alleged that the lockout had hindered the supply of food, water and medical equipment to the initiates, and placed their lives at risk, and on 3 December 2022 there had been a report from one of the caregivers on site that the Metro police had refused access to an initiate who was coughing blood and who needed possible medical treatment. In its answering affidavit the appellant simply denied the first allegation in bald terms, and admitted the second, which it sought to counter by claiming that when the incident was reported steps were taken to provide access to 'persons' who could attend to the medical emergency.
35. Given these circumstances, in my view the respondent was entitled to obtain an order on behalf of himself, parents, caregivers and medical personnel, for access to the initiates, to attend to their basic needs and their health and safety. The Act requires that the principal and caregivers of an initiation school must ensure that initiates always have access to clean water and are provided with food,³⁶ as well as access to health care facilities whenever the need arises.³⁷ Caregivers are responsible for monitoring initiates and if any of them display symptoms of ill-health, serious injury, infection or excessive, recurring or continuous bleeding, they must immediately inform the principal and the parents/guardians thereof.³⁸ On being so

³⁶ Section 30(1).

³⁷ Section 30(3).

³⁸ Section 21(5)(a).

informed, the principal must arrange for the initiate to receive medical attention and if he/she is not able to do so the caregivers must attend to this.³⁹

36. Although at the commencement of its judgment⁴⁰ the court *a quo* noted that the request for access which was made by the respondent was only in respect of caregivers, parents and medical personnel, it took it upon itself to also grant 'unrestricted' access to family members of the initiates, as well as 'traditional healers' and 'herbs-persons'; notwithstanding that there was no allegation by the respondent that the latter 2 categories of persons were not on site from the start of the initiation rites on 25 November 2022, or that they were barred from entry on 3 December 2022, or were ever denied access.
37. In granting access to 'family members' the court referred to the definition which is contained in the Children's Act,⁴¹ which includes not only immediate and distant blood relatives of a child such as its parents, siblings, grandparents, uncles, aunts and cousins, but also any other person with whom the child has developed a 'significant' relationship. It did so notwithstanding that, as is apparent from the Act, customary initiations include the performance of 'sacred and secret' traditional and religious customs and rituals, which for traditional or religious reasons are not to be made public.⁴²
38. Furthermore, notwithstanding that the Act expressly defines a caregiver as any person other than a parent or guardian of an initiate, who takes care of them during an initiation process, the court *a quo* wrongly adopted the extended definition of a caregiver which is set out in the Children's Act, which includes foster parents or persons who care for a child with the consent of its parents or guardians, child and youth care workers who are caring for a child, and even a fellow child in a child-headed household, who may be caring for them.
39. As a result, and notwithstanding that the initiation school had invaded the Idas Valley nature reserve unlawfully, contrary to the refusal which was communicated

³⁹ Section 21(5)(b).

⁴⁰ Para 2.

⁴¹ Act 38 of 2005.

⁴² *Vide* the definition of 'sacred and secret' in s 1.

to its principals and other role players by the municipality on 8 November 2022, the court a *quo* granted open and unrestricted access to it, by a whole range of persons for whom such access was not sought (family members and non-initiation school caregivers), and in terms contrary to the Act. In this regard it may also be pointed out that the Act makes no reference to 'traditional healers' and 'herbs-persons'. Presumably, the reference to traditional healers was intended to be a generic reference to traditional health practitioners and/or traditional surgeons (who perform circumcisions at initiation schools), for which the Act caters.

Conclusion

40. In the result, and for the foregoing reasons, I would have made an order as follows:
 1. Save to the extent set out in para 2, the appeal is dismissed with costs, including the costs of counsel on scale B.
 2. Paragraphs 1.1-1.4 of the order of the court a *quo* are set aside and replaced with the following:
 - '1. The respondent is directed to restore the applicant, as principal, in his possession of the initiation site in the Idas Valley Nature reserve, for the duration of the initiation school which commenced on 25 November 2022.
 2. The respondent is directed to grant access (to the aforesaid site and the initiates attending the aforesaid initiation school), to:
 - 2.1 Caregivers (as defined in terms of s 1 of the Customary Initiation Act 2 of 2021), and parents (for the purposes of s 22(4) of said Act); and
 - 2.2 Medical personnel, including traditional health practitioners and traditional surgeons, insofar as may be required for the health and medical treatment of initiates and the performance of initiation rites, rituals and/or practices in terms of said Act.'



M SHER
Judge of the High Court

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