NOT REPORTABLE

CASE NO. A 281/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BERNARD BEUKES	**1st APPLICANT**
URSULA BEUKES	**2nd APPLICANT**
JAFETH UIRAS	**3rd APPLICANT**
ELSIE UIRAS	**4th APPLICANT**
VINEUL BEUKES	**5th APPLICANT**
HANS KAMUHANGA	**6th APPLICANT**
MARGARETHA KAMUHANGA	**7th APPLICANT**
GOTTFRIED BEUKES	**8th APPLICANT**
ERNA BEUKES	**9th APPLICANT**
LIZELOTTE BEUKES	**10th APPLICANT**
MARIA BEUKES	**11th APPLICANT**
THEODORE GAIB	**12th APPLICANT**
ENGELBERTHA GAIB	**13th APPLICANT**
CHRISTINA BEUKES	**14th APPLICANT**

and

JESKO WOERMANN **RESPONDENT**

CORAM: CORBETT, A.J

Heard on: **11, 24, 30 NOVEMBER 2011**

Delivered on: **27 MARCH 2012**

JUDGMENT

CORBETT, A.J: .

[1] The applicants brought an urgent application on 8 November 2011 seeking a rule *nisi* directing the respondent to *ante omnia* restore to the applicants their right to peaceful and undisturbed possession, use and enjoyment of a road (referred to as the "route") over the respondent's property, by the removal from the road of all obstructions, including locks, on access gates. The applicants further sought an order compelling the respondent to register a servitude over his property in favour of the applicants' farm and that, pending such registration of the servitude, the respondent be compelled to grant servitudinal rights to the applicants as owners of the dominant tenement. The applicants also sought an order that the relief referred to shall operate as an

interim interdict, pending the final adjudication of the matter on the return date of the rule *nisi*.

The timing of the application

[2] The application was served on the respondent less than two court days before the date of the hearing. On 11 November 2011 when the matter was called in Court, the respondent had opposed the application but had not as yet had an opportunity to file opposing papers. In the notice of motion, the applicants failed to set out a timeframe – as is usually done – within which pleadings in the matter were to be exchanged. The applicants also failed to set out a service address for pleadings in the matter. I requested the parties to address me on the timing of the application.

[3] Ms Conradie, who appeared for the applicants, contended that the delay in launching the application was occasioned by, *inter alia*, the difficulty in determining the identity of the spoliator, as well as the time it took to draft the papers and have them deposed to and finalized. Mr Barnard, who appeared for the respondent, contended that the manner in which the application was brought was unreasonable given the very short timeframe which had been afforded to the respondent, which prevented the respondent from being able to file answering papers.

[4] The applicants state that the act of spoliation occurred on 22 June 2011. No mention is made of the date as to when the applicants' legal practitioners were approached to render advice in the matter. However, on 23 August 2011 a letter was written on the applicants' behalf to the respondent alleging a spoliation and demanding that the respondent immediately restore a right of way to the applicants, failing which an urgent application would be filed within 24 hours. This did not happen. Instead on 9 September 2011 the respondent wrote to the applicants' legal practitioners in response to a letter from the applicants' legal practitioners dated 5 September 2011 (which was not annexed to the founding affidavit) indicating that the applicants would not be entitled to use a right of way over the respondent's farm. The applicants' legal practitioners responded thereto on 19 September 2011 requesting a meeting in an attempt to resolve the issue. There was no response to this letter. No further steps are referred to. The application was accordingly brought approximately 5 months after the alleged spoliation, but more importantly, more than 2 ½ months after legal action was threatened.

[5] The Court's power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one [1]. As Maritz J (as he then was) stated [2]:

[1] Bergmann v Commercial Bank of Namibia Ltd, 2001 NR 48 (HC), 49 G - H
[2] at 49 H – 50 A

> "One of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fides* or though his or her culpable remissness … It is more so when the relief being sought is essentially of a final nature and no or very little opportunity has been afforded to the respondent to properly present his or her defence."

In my view this dictum finds application in the present case. The fact that the litigating parties attempted to negotiate a settlement of their dispute, does not *ipso facto* suspend the further exchange of pleadings or stay the proceedings. The Court accordingly concluded that [3]:

> "When an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. Urgent applications should always be brought as far as practicable in terms of the Rules. The procedures contemplated in the Rules are designed, amongst others, to bring about procedural fairness in the ventilation and ultimate resolution of disputes.
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> Whilst Rule 6(12) allows a deviation from those prescribed procedures in urgent applications, the requirement that the deviated procedure should be 'as far as practicable' in accordance with the Rules constitutes a continuous demand on

[3] at 50, H - I

the Court, parties and practitioners to give effect to the objective of procedural fairness when determining the procedure to be followed in such instances."

[6] Based on the facts and circumstances of this matter, I am of the view that the applicants' urgency is self-created due to the culpable remissness on the part of the applicants and their legal representatives. It is for this reason that I ordered that the applicants pay the costs of the hearing on 11 November 2011. However, I exercised the discretion not to strike the matter from the roll for a lack of urgency, given that the matter involves issues which render any such application of this nature urgent[4]. The facts of the matter relate to an allegation that the applicants have been spoliated in respect of their right of way over the respondent's farm and that by virtue thereof, the applicants are suffering substantial harm in the form of threats to their livestock and livelihood and a deprivation of their right to use the road and to benefit from its use. For this reason, I postponed the matter and was prepared to entertain the matter on a semi-urgent basis [5].

The ambit of the relief sought

[7] After the delivery of the answering papers, the applicants abandoned the prayers contained in paragraphs 2.2, 2.3 and 2.5 of the notice of motion. The effect thereof is that the applicants no longer seek an order that the respondent

[4] Mangala v Mangala, 1967 (2) SA 415 (ECD), at 416 E
[5] Bergmann –case, *supra*, at 51 C - D

take the necessary steps to register a servitude over his property in favour of the applicants' farm, the applicants no longer seek interim relief concerning such servitudinal rights, and furthermore, that no interim interdictory relief is sought pending the final adjudication of the matter. It was contended on behalf of the respondent that the applicants in effect seek final relief in respect of prayer 2.1, namely the spoliation relief. In the replying papers the applicants contend that they have made out a case for final relief. I am in agreement that the sole issue before Court is whether the applicants have made out a case for a mandament van spolie in the form of a final order.

The nature of the spoliation and the approach to the facts alleged

[8] The facts pertinent to this application are as follows: the applicants are co-owners of an undivided share of less than half of the farm "Kransneus" No. 219 ("Kransneus"). The respondent is a director of a company "Luxury Investments No. 6 (Pty) Ltd" which owns a portion of the farm "Verdruk" No. 268 ("Verdruk"). The farms Kransneus and Verdruk are not adjoining properties, but are separated from one another by the farm "Verdruk No. 2". This farm belongs to a Mr Jaco Strydom.

[9] The applicants state that the Beukes family has occupied Kransneus for a period in excess of 100 years. They claim that at all times the applicants only had access to Kransneus through Verdruk. The reason why it is impossible to access

Kransneus through the farm itself is that the terrain is mountainous to the east and no road can be built in this area of the farm to allow a vehicular access route to the eastern side of Kransneus. There is no alternative but to use an access route, which the applicants describe as "*the route*" by reference to a map annexed to the founding papers. The applicants further claim that for at least 62 years they have used the route in a free and undisturbed manner. They further state that they had been in undisturbed and peaceful possession of "*the right of way*" – a reference to the route. The respondent attempted to purchase Kransneus during December 2010, but the applicants refused to sell the farm. Shortly thereafter on 22 June 2011 the applicants allege the respondent "*blocked the road to our farm"* by piling mounds of sand across it with a bulldozer. This act constituted the spoliation relied upon by the applicants.

[10] The respondent denies that he has spoliated the applicants' use and enjoyment of the route. Several material disputes of fact arise in this context. This raises the issue as to the test to be applied in determining the disputed facts. The mandament van spolie is aimed at every unlawful and involuntary loss of possession by any possessor, and its object is no more than the restoration of the *status quo ante* as a preliminary to any enquiry or investigation of the merits of the respective claims of the parties to the thing in question[6]. As has been stated by Maritz JA [7]:

[6] Ness & Another v Greef, 1985(4) SA 641 (C), at 647 B - C
[7] Kuiiri v Kandjoze, 2009 (2) NR 447 (SC), para [3]

"Even though the mandament is therefore not intended to bring about the ultimate determination of the competing proprietary or possessory claims of the litigants to the things in contention, it nevertheless constitutes a final determination of the litigants' 'immediate right' to possess them for the time being. In this regard, Greenberg JA noted in *Nienaber v Stuckey* that –

> '(a)lthough a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order.'

Consequently, it falls to be noted for purposes of the approach to be followed in this appeal that a litigant who is seeking a spoliation order bears the burden to prove the facts necessary for the success of the application on a balance of probabilities."

[11] In approaching the facts of this matter, it is well established that where such facts are disputed by the respondent the Court must approach the matter on the basis of the facts as stated by the respondent together with the admitted facts in the applicants' affidavit [8].

[8] Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd, 1957 (4) SA 234 (C), 235 E – G
Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A)

Possession of the route

[12] The applicants must establish one of the constituent elements of the mandament, that is, that on the evidence before Court they were in possession of the route when spoliation occurred[9]. The nature of the possession required, has been stated as follows[10]:

> "…not just any measure of possession – however technical, remote, tenuous, or brief will suffice: the court must be satisfied, regard being had to the nature of the thing dispossessed, that the despoiled possession of the thing was sufficiently stable and durable to constitute 'peaceful and undisturbed possession'."

[13] In the context of possession of a road or right of way, the question arises as to whether the protection of the mandament van spolie extends to incorporeals, or quasi-possession. In *Nienaber v Stuckey* [11] the Court held that the possession of incorporeal rights is protected against spoliation. It has further been stated that [12] the mandament van spolie is available for the restoration of lost possession in the form of quasi-possession which, in that case, consisted of the actual use of a right of servitude. The Court distinguished between the *status quo* that the spoliatus desired to restore by means of the mandament van spolie

[9] Yeko v Qana, 1973 (4) SA 735 (A), 739 D – H, quoted with approval in the Kuiiri –matter, *supra,* at 462, para [4]; Ruch v Van As, 1996 NR 345 (HC)
[10] Kuiiri –case, *supra*, at 462 – 463, para [4]
[11] 1946 AD 1049, at 1056
[12] Bon Quelle (Edms.) Bpk v Munisipaliteit van Otavi, 1989 (1) SA 508 (A)

which was the factual exercise of the servitude, and the servitude itself. In *Kock v Walter* [13] Langa AJA stated [14]

> "…the true purpose of the mandament van spolie is not the protection and vindication of rights in general, but rather the restoration of the status quo ante where the spoliatus has been unlawfully deprived of a thing, a movable or immovable, that he had been in possession or quasi-possession of. …As a concept or a form of relief, it is not concerned with the protection of rights 'in the widest sense' but with the restoration of factual possession of a movable or an immovable. This extends to incorporeals such as the use of a servitudal right."

[14] The question then arises as to whether the applicants as a fact enjoyed peaceful and undisturbed use and enjoyment of the route. In the context of the use of a road or the route the applicants would have to establish that they had been deprived of the use of a portion of the route that they enjoyed use of freely "*without having to ask anybody for permission*"[15].

[15] In the founding papers, in alleging the spoliation which occurred on 22 June 2011, the applicants refer to an act of spoliation in respect of "*the road*" and not "*the route*", the latter term being the precise description of the road alleged to have been spoliated. The precise term "*the route*" also gives meaning to the relief sought in prayer 2.1 of the notice of motion. This lack of specificity in the

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[13] 2011 (1) NR 10 (SC),
[14] at 13 – 14, para [5]
[15] Kock –case, *supra*, at 15, para [6]

identification of the road allegedly spoliated undermines the factual substratum upon which the applicants seek to rely. The road needs to be identified in specific terms in order to ensure clarity as to the subject-matter of the quasi-possession to ensure that, should a case be made out for the relief sought, that the Court can give effective relief.

[16] Even if the Court is to assume that "*the road*" is a reference to "*the route*" doubt still exists as to the precise location of the route. In response to a challenge by the respondent as to the accuracy of the route depicted in the applicants' founding papers, the applicants tellingly concede that the route depicted may not be accurate. No explanation is advanced as to why, given the confusion created by the applicants' map, this was not clarified by way of annexing a new map with a revised and accurate route depicted thereon. It is not sufficient for the applicants to allege that the respondent was well aware of the route. As I have indicated, the Court needs certainty on the precise route in order to give effective relief.

[17] On the other hand, the respondent describes the route claimed by the applicants by reference to specific points on a map annexed to its papers. The route is also described in detail in the respondent's affidavit, starting at point A in the west and ending at point H in the east. It passes through points B, C, D, E, F and G. Given the admitted inaccuracy of the applicants' map, and applying the principle applicable to disputes of fact, I accept that the relevant route is the one

depicted on the respondent's map and described in his opposing affidavit. This route follows in part a proclaimed road. On the western side where it crosses into the Farm Verdruk No. 1, owned by Mr Jaco Strydom, there are locked gates at points C and D, which have been in place for 4 years. During this time the applicants have not had access along this route. This is expressly not disputed by the applicants, which in my view fundamentally undermines the applicants' case that they have had unimpeded access along this route for the past 62 years. Access to the route is thus controlled by the possessors of the keys. The fact that keys to the gates are kept by Mr Jaco Strydom and respondent's employee, Mr Christoffel Esterhuizen, is a manifestation of their possession of the route to the exclusion of the applicants[16]. This possession precedes the act of alleged spoliation.

[18] The respondent makes reference to the fact that due to losses of approximately N$250,000.00 in respect of theft on his farm, he locked the farm gate on the southern border of Verdruk at point I on the map, which adjoins the communal area to the south. The purpose was to control access to the farm and to prevent further theft. It was only when the gate locks at point I on the respondent's map were broken four times that he blocked the road from point I to point G on Verdruk by means of earth mounds. This occurred in early 2010. As already indicated, this stretch of road traverses Verdruk south of the route and only intersects with the route at point G.

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[16] Wightman t/a JW Construction v Headfour (Pty) Ltd, 2007 (2) SA 128 (C)at 134 G – 135 A

[19] Shortly thereafter the first applicant, the sixth applicant and a certain Manuel Pieters and Victoria Kondjore requested the respondent to give them access over his farm along the route indicated by points I to G on the map. The respondent refused to do so based upon the thefts that had occurred when there had been uncontrolled access to Verdruk from the southern boundary of the farm. In my view, the fact that such persons requested the respondent to consent to such access meant that they acknowledged that at that stage they had no access along the routes I to G. The implication is thus either that the applicants never had access along this route, or alternatively, that should they indeed have had access along this route as of the beginning of 2010, this access was terminated. Should the latter interpretation be the correct one, the spoliation would have occurred at the beginning of 2010. However, the spoliation referred to is alleged to have taken place in June 2011 and I am accordingly inclined to the former view.

[20] The respondent states further that had the applicants asked permission to use the route over Verdruk from point E to point G he would most probably have considered this. However, the applicants never made any such request but wanted access at point I and permission to traverse the route to point G over Verdruk.

Conclusion

[21] On the basis of the above, I find that the applicants have failed to establish that as of 22 June 2011 they were in peaceful and undisturbed possession of the route depicted on their map. The applicants have also failed to establish that on such date they were in peaceful and undisturbed possession of the route depicted as points A to H on respondent's map.

[22] Having failed to establish possession, the applicants have not met the first requirement of the mandament van spolie. It is accordingly not necessary to consider the further arguments raised by the respondent in relation to a consideration of the underlying rights due to the fact that such rights are traversed by the applicants in these papers.

[23] In the circumstances, I make the following order:

1. The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The costs referred to in paragraph 1, shall also include the costs of the hearings on 11 and 24 November 2011.

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CORBETT, A.J

ON BEHALF OF THE APPLICANTS:

Ms L. Conradie

Instructed by Legal Assistance Centre

ON BEHALF OF THE RESPONDENT:

Adv. P Barnard

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