IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

ADMINISTRATOR OF THE CAPE OF GOOD HOPE .....1st Appellant

MINISTER OF LAW AND ORDER .....2nd Appellant

and

THEMBA JOSEPH NTSHWAQELA .....1st Respondent

NDZINGO RICHARD MAYO.....2nd Respondent

NOTI ALFRED VANGA .....3rd Respondent

Coram: CORBETT C J et HOEXTER, NESTADT, STEYN J J A
et NICHOLAS A J A

Heard: 7 November 1989

Delivered: 30 November 1989

J U D G M E N T

NICHOLAS, A J A

/2.....

Dassenberg farm is in the Cape Peninsula. It lies in the angle formed by the Noordhoek main road, which runs between Fish Hoek and Chapman's Peak past the village of Noordhoek, and Ou Kaapseweg. Portions of the farm on the hill-side are scrub and unsuitable for farming. Dassenberg has for ninety years been owned by the De Villiers family and in 1987 farming operations were still being carried on there by Mr D C de Villiers.

Across the Noordhoek road from Dassenberg is a piece of land called The Tip. It is owned by the local authority which until June 1987 was the Divisional Council of the Cape and thereafter was the Western Cape Regional Services Council. One part of this land is an official refuse dump; other parts are scrub.

In June 1987 the owners of Dassenberg

granted an option for the sale of the farm to a syndicate of four persons who proposed to develop it as small-holdings. The purchase price was R800 000. It was provided in clause 10.14 :

> Die VERKOPER bevestig hiermee dat alle plakkers wat hulle tans op die EIENDOM bevind, onwettig daar is en nie die toestemming van die VERKOPER gekry het om aldus te plak nie. Die VERKOPER magtig hiermee die KOPER om die nodige stappe te doen ten einde van die plakkers ontslae te raak en vir die doel alle dokumente te teken wat nodig mag wees. Die koste verbonde aan die verwydering van die plakkers sal deur die KOPER gedra word.

A squatter problem had plagued Dassenberg and also The Tip for many years before 1987. Squatters had settled in large numbers on the land amongst the scrub and erected huts made of wood, corrugated iron and plastic. They ignored or resisted all demands to vacate. The problem was aggravated in 1987 by a sudden uncontrolled growth in the squatter population. The authorities (the Office of Community Services, Western Cape, an organ of the Cape Provincial Administration; and the South African Police) were gravely concerned. The situation was unacceptable for social and public health reasons: there was no water supply or toilet facilities or any other services; and the area was dirty and strewn with rubbish and paper.

The owners and the developers were also

gravely concerned. Unless the farm could be cleared of squatters, the developers would presumably not exercise their option to purchase it. They had heavy present and future financial commitments. Apart from the purchase price of R800 000, they had prospective development costs amounting to R3 057 500-00, including professional fees of R60 000-00 which had already been incurred. Various options under the Prevention of Illegal Squatting Act, 52 of 1951, had been considered and rejected, namely,

(a) Prosecutions under s. 1 and, in the event of conviction, ejectment orders under s. 3. This was rejected because the procedure might lead to long-drawn-out proceedings accompanied by undesirable publicity,which would not have the desired result unless convictions were obtained and orders of ejectment granted.

(b) Demolition and removal of the materials from the land by the owner without a court

order under s. 3 B(1)(a). This was not a practicable option having regard to the numbers of the squatters and the personal dangers involved, and it would not solve the problem of the resettlement of the squatters, who would presumably just go to neighbouring properties.

(c) An application to the magistrate under s. 5 that he exercise his administrative powers to effect the removal of the squatters. In the nature of things such a procedure would be expensive, would be accompanied by publicity and would be time-consuming.

For the owners the presence of the squatters was a running sore. From time to time after December 1982 D C de Villiers had taken steps to clear Dassenberg of squatters and to demolish their structures, but these were not attended by any success. By early 1987 De Villiers found that the ongoing task was too much for him. He laid charges with the police on 7 March 1987, but no prosecution followed.

On 9 April 1987 the local authority gave De Villiers a warning to remove from Dassenberg unauthorised structures (i.e. the squatter's huts) on pain of prosecution. On 14 April 1987, De Villiers, together with two representatives of the Regional Services Council, and a member of the South African Police, met on the farm. They told the squatters that they had to leave Dassenberg. Arrangements had been made by the Divisonal Council (which still existed at the time) for alternative sites at Khayelitsha. The squatters were told that if they left voluntarily no charges would be laid against them, but if they declined to leave by 15 April 1987 they would be charged on 16 April 1987. The indications were that the squatters would leave voluntarily on 21 April 1987, for which date transport was arranged. On that day the squatters held a religious service. After it, most of the squatters had stated that they were not prepared

to go to Khayelitsha, and only two families left.

On 10 August 1987, a meeting was convened which was attended by representatives of the local authority, D C de Villiers and a representative of the developers. The purpose was to ascertain the best method of resolving the squatter problem. On 28 August 1987 and again in the early part of November 1987 notices requiring them to vacate the farm were delivered to the squatters. The notices were ignored. On 15 September 1987, a further meeting was convened by Lieut. Col. I J M van Niekerk, the South African Police District Commandant, Wynberg, in order to discuss possible action against the squatters. It was decided that the squatters be informed of the possibility of criminal charges being preferred against them, and that they be given the opportunity to vacate the site. This decision culminated in an operation aimed at the removal of

the squatters which took place on 2 December 1987.

On 12 October 1987 arrangements were made by the Cape Provincial Administration with Earthmovers United Western Cape (through Mr Vlok, who was one of the developers) to provide 15-ton trucks for the transportation of the squatters to Khayelitsha. On 20 October 1987 a further meeting took place in the office of Lieut. Col. Van Niekerk in regard to the matter of transport and the resettlement of the squatters at Khayelitsha. On 26 November 1987 a third meeting took place in the office of Lieut. Col. Van Niekerk when the final arrangements were made for the carrying out of the operation.

The main roles in its execution were to be played by the Cape Provincial Administration ("the CPA") and the South African Police ("the SAP").

The part of the CPA would be limited to

the making of arrangements for transporting the squatters and their possessions to Khayelitsha . It was stressed that, in accordance with policy, the Province would in no circumstances be involved in physical action against the squatters. The CPA was also to arrange with the local authority concerned for sites to be provided at Khayelitsha, where there would be tents and water and toilet facilities.

The role of the SAP appears from an "operation order" drawn up by Lieut. Col. van Niekerk. The object was stated to be the removal to Khayelitsha of 650 black squatters, living in 107 corrugated iron and plastic structures in an area between Ou Kaapseweg and Noordhoek road, and between Kommetjie and Noordhoek roads. The SAP were to take full control of the operation and to ensure that the squatters were removed, either voluntarily or by court order. The forces to be deployed were to be some 70 uniformed and

detective members of the SAP and 100 special constables, equipped with radios and vehicles (including "Vlokvoertuie", of which the Minister of Law and Order is presumably the eponym). For the execution of the plan, the forces were to be allotted to nine demarcated sectors. There was also to be a "grypgroep" consisting of thirty-five policemen, thirty of whom were to be uniformed; a group of people to man a roadblock; and a helicopter to provide air support in the event of squatters escaping from the net at the start of the operation. The men were to assemble at 04h30 on 2 December 1987 at a point near the junction of the Noordhoek road and Ou Kaapseweg, and to be ready to move to their respective positions at 04h45. On arrival at their sectors, the special constables were to cordon them off in order to ensure that no squatter escaped. The respective sector commanders, assisted by interpreters, were then to warn the squatters that they were

being removed to Khayelitsha and that they were immediately to pack up their personal possessions and load them onto trucks which would be waiting. The squatters were to be made to understand that should they refuse to move, the hut-owner would be arrested and taken to court. If arrests were effected, the prisoners were to be conveyed to Fish Hoek Charge Office and their fingerprints taken and charges drawn up. They were then to be taken to the Simonstown Magistrate's Court. The possessions of any squatter arrested because he refused to move were to be packed up by the other occupants of the dwelling concerned and loaded onto the trucks. After the squatters and their possessions had been loaded, the trucks were to proceed to an assembly point. From there the trucks were to be escorted by police along the Main Road and Baden-Powell Drive, Muizenberg, to Khayelitsha, where the the suatters were to be handed over to a branch of Community

Services of the Cape Provincial Administration.

The operation was carried out as planned. Themba Ntshwaqela, one of the squatters, gave an eyewitness account. In summary his story was this.. Since 1973 he had been living on Dassenberg, where he had built a shack of wood and corrugated iron, consisting initially of three rooms, and later, as his family increased, of five rooms. He lived there with his wife and four children. At about 5 o'clock on the morning of Wednesday 2 December 1987, he was awakened by the sound of raised voices outside his door. Peering out, he saw two white men, one of whom was carrying a gun. A helicopter was flying overhead and he heard an announcement over a loud-hailer calling everyone out of their houses. Outside he saw number of uniformed policemen. Over the loud-hailer the people were told to dismantle their houses and load their belongings and the materials of which they

had been constructed onto trucks which were waiting to take them to Khayelitsha. When they protested, they were told that if they did not co-operate their houses would be demolished. They deliberated for a time, but when a "bulldozer" arrived (actually it was a front-end loader) they decided to dismantle their houses rather than see them destroyed. Themba took the cupboards and beds and other articles out of the house, which he began to dismantle. All the time policemen were shouting at them to hurry up. Before the dismantling was complete, the "bulldozer" flattened what was still standing, and pushed the material into a pile. Themba transported his possessions on his own bakkie; those of others were loaded onto waiting trucks. All the trucks onto which the various families climbed, were escorted to Khayelitsha.

Arrived there, they found two rows of green tents on a flat, sandy strip of newly-cleared land, which was windswept

and without shade. There were two water taps and some corrugated iron latrines.

On the same day, and while the operation was still in progress, a firm of attorneys acting on behalf of some of the squatters telexed the Cape Town branch of Community Services, Cape Provincial Administration. They recorded that they had been instructed that certain dwellings in the Noordhoek area were being demolished and the residents were being forcibly removed to Khayelithsa. They asked to be advised as a matter of urgency "who has authorised the above demolition and forced removal and in terms of precisely which legislation such removals are being conducted." The reply was as follows:

> 2. Squatter control and the co-ordination thereof is the responsibility of the

C P A in terms of Proclamation 24 of 2nd January 1987, G.G. No 10565. However the squatters from Dassenberg, Noordhoek were not forcibly removed and resettled at Khayelitsha. They were advised that a complaint was received by the S A Police regarding their presence on the land in question.

3. They were informed that transport was available to convey them to Khayelitsha where tents, water and toilet facilities were made available.

4. The squatters voluntarily and personally packed their belongings and demolished their structures whereafter they loaded same on vehicles which transported them to Khayelitsha.

5. The S A Police were present to prevent crime and to keep law and order.

6. No public authority has instituted any action in terms of any legislation during the resettlement of the said squatters which was done on a voluntarily basis.

On the evening of 2 December 1987, no squatter remained on Dassenberg or The Tip; all of their huts had been demolished.

On 21 December 1987, an urgent application was launched. The first applicant was Themba Ntshwaquela; the other applicants were squatters who had been living either on Dassenberg or The Tip. The notice of motion cited as first respondent the Western Cape Regional Services Council; as second respondent the Administrator of the Cape of Good Hope; as third respondent the Minister of Law and Order; as sixth respondent David de Villiers, and as fourth, fifth and seventh respondents other members of the De Villiers family. In what follows I shall, where it is convenient, refer to the second respondent as "the CPA"; to the third respondent as "the SAP"; and to the fourth, fifth, sixth and seventh respondents as "the owners".

The notice of motion was supported by affidavits from each of the applicants and from certain other persons.

In paragraph 2.1, an order was sought

> 2.1 directing First, Second and Third Respondents to restore First Applicant to undisturbed possession of the site occupied by him on the farm known as Dassenberg in the district of Simonstown at Noordhoek, [and to reinstate the home previously occupied by him on the said site to the condition in which it was immediately prior to its demolition on 2nd December 1987.]

(The portion which I have enclosed in square brackets was later deleted). In paragraphs 2.2, 2.3 and 2.4, similar orders were sought in respect of of other applicants.

Preliminary answering affidavits were

filed on behalf of the CPA and the SAP, and subsequently affidavits were filed in amplification. Only the CPA and the SAP opposed the application. The owners did not formally oppose but made common cause with the second and third respondents by furnishing affidavits.

The affidavits filed on behalf of the CPA stressed its limited role: the CPA's representatives played no part in the removal of the squatters from the land or in any bulldozing activities; the first applicant and the other squatters voluntarily moved from Dassenberg, well-knowing that the alternative was criminal prosecution.

In the affidavits filed on behalf of the SAP, it was stated that the role of the police was merely to preserve order and not to play an active role in the demolition of any structures. The removal was voluntary. No member of the police force was guilty of any intimidation

or threat of violence or other form of misbehaviour. All behaved calmly and correctly. The police did not participate in the demolition of any structure. In the late afternoon individual members assisted female squatters at their request with the loading of heavy objects. The developers had a front-end loader on the scene. It was used to clear up rubbish which remained. This machine was not used to demolish any structures.

There were on the affidavits disputes of fact which could not be resolved on paper. By consent the application was referred for the hearing of oral evidence. On 2 March 1988, the applicants' attorneys gave notice that they would seek relief in significantly narrower terms than those set out in the notice of motion: certain words were deleted from the prayers, namely those which I enclosed in brackets in quoting prayer 2.1 above.

The matter came before HOWIE J.

Oral evidence was heard on 4, 8 and 9 March 1988, followed by argument. (As appears from para 2.1 of the notice of motion, relief had originally been sought only against the first, second and third respondents. As a result of a request made on behalf of the applicants at a late stage, however, the owners were included in the court's order.) Judgment was delivered on 15 April 1988, and an order was made against "Respondents" (who of course included the owners) as follows:

1. Respondents are directed to restore applicants to undisturbed possession of the respective sites occupied by them as at 2 December 1987 on the farm "Dassenberg" and on the land known as "The Tip" owned by the Western Cape Regional Services Council, both properties being at Noordhoek in the district of Simonstown.
2. Second and third respondents are ordered

to pay the costs of the application jointly and severally, the one paying, the other to be absolved.

A formal order in these terms was duly issued by the registrar. (The judgment is reported, sub nom. Ntshwaqela & Others v Chairman, Western Cape Regional Service Council & Others in 1988(3) SA 218 (C). I shall refer to it as "the reported judgment".)

The second and third respondents now appeal with the leave of the court a quo.

In the judgment HOWIE J said that to say that the squatters vacated the land voluntarily was to fly in the face of the evidence. He did not accept that the squatters were merely warned of possible arrest and demolition: he had no doubt that the essence of what was conveyed to them was an order to vacate, in circumstances which in all probability, by all objective criteria, would have led the

squatters to think that an alternative to immediate departure would in no measure be tolerated. The alternative to arrest was not a voluntary departure; it was an enforced evacuation. It must have been evident to anyone who might have chosen to face arrest and prosecution that those who were not arrested would in any case be removed and that possession of the land would then be lost to everyone, whatever the outcome of a prosecution. The applicants left against their will without consenting to do so. It followed that they were dispossessed by way of duress applied by the servants of the second and third respondents at the instance of the owners. (See the reported judgment at p 225 A-E.)

In my opinion that conclusion is unassailable. That was the view also of counsel who acted for the second and third respondents. Leave to appeal in this regard was neither sought nor granted. And in this

court their counsel conceded that for the purpose of the appeal it must be accepted that the second and third respondents were parties to a spoliation on 2 December 1987.

An initial question arises in regard to the interpretation of HOWIE J's judgment.

In legal usage the word judgment has at least two meanings: a general meaning and a technical meaning. In the general sense it is the English equivalent of the American opinion, which is

> The statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based.

(Black's Law Dictionary, 5th ed., s.v. opinion). In its technical sense it is the equivalent of order. See Rule

42 of the Rules of Court, which deals with the rescission or variation of "an order or judgment", and secs 20 and 21 of the Supreme Court Act, 1959, which provide for appeals from a judgment or order. In Dickinson & Another v Fisher's Executors 1914 AD 424, it was explained at 427 that the distinction between a judgment and an order would probably be found to be this,

> ... that the term judgment is used to describe a decision of a court of law upon relief claimed in an action, whilst by an order is understood a similar decision upon relief claimed not by action but by motion, petition or other machinery recognised in practice.

When a judgment has been delivered in court, whether in writing or orally, the registrar draws up a formal order of court which is embodied in a separate document signed by him. It is a copy of this which is served by the sheriff. There

can be an appeal only against the substantive order made by a court, not against the reasons for judgment. See Western Johannesburg Rent Board & Another v Ursula Mansions (Pty) Ltd 1948(3) SA 353 (A) at 355. In Holland v Deysel 1970(1) SA 90 (A) WESSELS JA said at 93 A-B:

> ... die woorde "uitspraak", "bevel", "beslissing" en "vonnis" almal dui op die uitsluitsel wat 'n hof gee in verband met die bepaalde regshulp wat in gedingvoering deur 'n party aangevra is...

The word judgment when used in the general sense comprises both the reasons for judgment and the judgment or order. Cf. Holland v Deysel (supra) at 93 E.

In Firestone South Africa (Pty) Ltd v Gentiruco A.G. 1977(4) SA 298 (A) TROLLIP JA made some general observations about the rules for interpreting a court's judgment or order. He said (at 304 D-H) that the basic principles

applicable to the construction of documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it.

The position is essentially no different from that where a patent specification is interpreted. That consists of three main parts: the title, the body of the specification and the claims. And the interpreter must be mindful of the objects of a specification and its several parts. The purpose of the claims is to delimit the monopoly claimed. If the meaning of a claim is clear and unambiguous, it is decisive and cannot be restricted by anything else stated in the body or title of the specification. On the other hand, if it is ambiguous, the body or title of the specification must be invoked to ascertain whether at least a reasonably certain meaning can be given to the claim. See Gentiruco A G v Firestone SA (Pty) Ltd 1972(1) SA 589(A) at 615 (B-D). Similarly, the order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the court requires to be

done or not done, so that the defendant or respondent, or in some cases the world, may know it.

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment.

Counsel for the applicants, led by MrGauntlett, submitted that on a proper construction HOWIE J's order directed the CPA and the SAP to effect the return of the applicants to Dassenberg and the Tip; it was a "transportation order". For this submission counsel relied on two statements which HOWIE J made when dealing in the reasons for judgment with a submission that a spoliation order should

not be made against the second and third respondents, who were not in possession of the sites and, so it was said, could not perform the order. The learned judge said:

> ... it cannot be suggested that restoring possession to applicants by taking them back on to the land is something physically beyond second and third respondents' servants. What they were capable of doing in effecting the process of dispossession is just as possible were that process to be reversed. What was done can be undone.

and again,

> .....the respondents can, physically and lawfully, through their servants, effect the return of applicants to the sites in question and thereby assist the owners in the restoration to applicants of the possession they claim. Therefore it is competent to grant a spoliation order against second and third respondents.

(See the reported judgment at 226 F-G and 229 B respectively).

It might be argued that the order was equivocal: it may mean that the respondents were directed to physically restore the applicants to the respective sites; or it may mean that the respondents were directed to restore possession of the sites to the applicants. If there is ambiguity (I express no opinion on the point), then it would be permissible to resort to the reasons for judgment in order to resolve it.

In my opinion, even if regard is had to the passages quoted, the order is not to be construed as a transportation order.

The order itself contains no specific mention of transportation. If the learned judge had intended to order transportation of the applicants back to the sites,

one would have expected that he would have set out exactly what each of the respondents was required to do: when was the transportation was to take place; what persons were to be transported (the applicants alone, or the applicants and their families and other members of their households ?); whether the order applied to Thembe Ntshwaqela, who had used his own bakkie to go to Khayelitsha; what things were to be transported (personal possessions, furniture, building materials ?); who was to perform the transportation ? (were the owners directed to provide transport?) Moreover, a transportation order could only be carried out with the co-operation of the applicants. Could HOWIE J in the circumstances have intended to make an order obliging the respondents to effect transportation ?

No transportation order was ever expressly asked for by any of the applicants. In his replying affidavit

the first applicant said only -

> The import of the order sought, insofar as it relates to (third respondent) is that it is bound to abide the decision and not thereafter disturb the applicants in their possession.

He did not suggest that the applicants desired a transportation order.

The question whether an order can be made for the transportation of the spoliator is one which is not covered by authority and would be controversial. It is hardly conceivable that the learned judge would have made such an order without discussing the problems which it raised.

These considerations all point strongly to the conclusion that there was no intention on the part of the trial judge to make a transportation order. All that he was concerned with in the passages above quoted was to show that it was not impossible for the second and third

respondents to comply with the order asked for.

The position is then that the order was a simple mandament van spolie. It is consequently not necessary to decide the question, which was debated at some length in the argument before us, whether a transportation order could ever be a competent one in spoliation proceedings. It may well be that it could be competent. The accepted principle is that the mandament van spolie envisages not only the restitution of possession but also the performance of acts, such as repairs and rebuilding, which are necessary for the restoration of the status quo ante. If, for example, a spoliator, in order to deprive a spoliatus of the possession of immovable property, physically removes him therefrom and transports him to a remote part of the country in order to prevent him from resuming possession, there would seem to be no reason in principle why the court should not, if requested by the applicant to do so,

make a transportation order as part of a mandament van spolie. But that is by the way.

I turn now to the main question, namely, whether the court a quo was correct in granting a spoliation order against the second and third respondents.

The general principle is clear. It was stated by INNES C J in Nino Bonino v De Lange 1906 TS 120 at 122, namely,

> It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property,whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.

One can appreciate the sense of frustration which must have been experienced by the owners, the developers, the CPA and the SAP. It appears that the squatters had moved on to Dassenberg Farm and The Tip without the consent of the respective owners. They had no right to be there. The structures which they had erected were unlawful. They were (no doubt, because they had nowhere else to go) unresponsive to notices and demands to quit, and remained impervious to threats of criminal prosecution. The owners and the authorities were, so far as any practicable remedy was concerned, impotent.

All this is, however, irrelevant. It is common cause that a spoliation was committed, and the rights or wrongs of the applicants' possession, and the difficulties which the respondents faced, have no bearing

on the question whether a spoliation order should have been granted.

There can be no doubt that the CPA and the SAP were co-spoliators with the respective owners. The operation of 2 December 1987 was a combined operation in the execution of a single cohesive plan to which all of the respondents in the court a quo were parties.

The role of the owners was, it is true, largely a passive one, but it was mainly for their benefit that the operation was carried out. They encouraged it and they permitted the police to go onto the properties for the purpose of executing it.

Mr Comrie, who appeared for the second and third respondents in this Court, said that although the CPA was vitally involved in the pre-planning, its role was essentially that of providing transport for the removal of

the squatters from Dassenberg Farm and The Tip to Khayelitsha. It played no part in the demolition of structures or bull-dozing activities or anything else. This is no doubt correct, but the part played by the CPA was nevertheless a vitally important one: without its assistance and support there could have been no removal of the squátters.

Mr Comrie said that the role of the SAP was essentially to maintain order and to prosecute if that should prove necessary; the police were not involved in the demolition of any structures. I do not think that this is a correct assessment of the part played by the police. They provided the driving force for the operation. The dawn swoop on the unsuspecting squatter population; the presence of numerous armed policemen; the stentorian threats and instructions over loud-hailers; and the waiting trucks - all these must have created a climate which was pregnant with menace.

Even if they did not themselves engage in the demolition of huts, the police effectively achieved what they set out to do - to cow the squatters and intimidate them into moving quietly.

There is a dearth of authority on the question of the liability of co-spoliators. In his unpublished doctoral thesis, Die Mandament van Spolie in die Suid-Afrikaanse Reg (1986), Prof. D. G. Kleyn says the following at 253:

> 7.2.2.7 Teen wie mandament aangevra word
>
> Die mandament is in die eerste plek teen die spoliator self gerig. Voorts kan ook diegene wat opdrag gegee het tot 'n daad van spolie (prinsipaal), asook diegene wat dit ratifiseer (rationem habere) aangespreek word. Die rede vir laasgenoemde persone se aanspreeklikheid is volgens Zoesius "quia ratihabitio in delictis mandato comparatur". Die gedagte is dus dat die ratifiseerder as 'n prinsipaal en derhalwe as 'n socius delicti, beskou

> word. Waar die spoliator wat in opdrag gehandel het aangespreek word, word geen tussenkoms van die prinsipaal toegelaat nie aangesien spolie 'n "species delicti" is. Die vraag of beide die prinsipaal en die lashebber en of net een van die twee aangespreek kan word, word onbeantwoord gelaat deur genoemde skrywers.

In support of these statements, the learned author refers to Christinaeus, Schrassert, Zoesius and Nassau la Leck. Although Prof Kleyn does not specifically discuss the liability of co-spoliators, the principle is clear and there can be no doubt that they are liable as joint wrongdoers.

It was submitted on behalf of the second and third respondents that the application did not lie against them because the mandament van spolie can be granted only where possession has passed to the spoliator, and that where the latter has not himself acquired possession, the order

is not competent. For this submission reliance was placed on Potgieter en 'n Ander v Davel 1966(3) SA 555 (O) where DE WET J said at 559 D-E:

> Na die oorweging van die gesaghebbendes, is ek egter van mening dat 'n mandament van spolie alleenlik van toepassing is op gevalle waar persone ontroof word van hul goed of 'n deel van hul goed of van hul regte van besit daarvan, waar die besit oorgegaan het na die persoon of persone wat verantwoordelik was vir sodanige ontrowing en derhalwe in staat is om sodanige besit te herstel aan die persoon of persone wat daarvan ontneem is.

Consequently, it was submitted, a spoliation order could in this case have been properly granted only against the owners, because at the end of the day the representatives of the CPA and the SAP had departed, leaving the owners in sole possession of the squatter's sites.

DE WET J's statement appears, with respect, to be unsupported by authority, and it is contrary to principle. As appears from Nino Bonino v De Lange (supra), the rationale of the mandament is that no man is allowed to take the law into his own hands. Than this no principle is more clearly established in our law. See Shahmahomed v Héndriks & Others 1920 AD 151 at 165-166, referring to Goudsmit on The Pandects. The following is from Gould's translation, p 234:

> A person assumes to do justice to himself, when, by his own mere authority, and without intervention of law, he attacks the person or the property of another, in order to maintain the rights which he really has, or which he believes himself to have. Such a proceeding is illicit, because it is incompatible with the mission and purpose of the State, whose proper duty it is, (a duty which it accomplishes

> by its organs), to examine and decide disputes, and to re-establish the lawful condition, momentarily disturbed.

The policy of the law being what it is, it would be strange if it required of an applicant for a spoliation order that he should prove as part of his cause of action that the spoliator had acquired possession.

Several academic writers have criticized the decision in Potgieter v Davel. See Scholtens, 1966 Annual Survey of South African Law 222; M J de Waal, Die Moontlikheid van Besitsherstel as Wesenselement vir die Aanwending van die Mandament van Spolie (unpublished LLM dissertation 1982) at 44; Delport en Olivier Sakereg Vonnisbundel, (2nd ed) at 83; Van der Walt (1984) 47 THRHR 220 at 229-30. In the thesis referred to above Prof. Kleyn

subscribed to the view of these academics, giving the following three reasons at 380:

> Eerstens is dit in ooreenstemming met die gemenereg. Tweedens is dit in ooreenstemming met die geval van spolie van quasi- besit. waar 'n servituutgeregtigde verhoed word om die gebruiksreg oor 'n saak waarvan die spoliator deurentyd in besit was, uit te oefen sonder dat daar sprake is van 'n oorgang van besit op die spoliator. Derdens wil dit voorkom asof die regter in die Potgieter-saak die kwessie van spolie met die verweer van onmoontlikheid van besitsherstel verwar, deur te redeneer dat indien die besit nie op die spoliator oorgegaan het nie, besitsherstel noodwendig onmoontlik sal wees.

I entirely agree.

In connection with Prof. Kleyn's third reason, it may be noted that in the reported judgment HOWIE

J treated Potgieter's case as holding that the spoliator's non-possession renders restoration of possession impossible for him to effect. (See 226 H to 227 J).

In this court it was again argued on behalf of the second and third respondents that there is nothing they can do to comply with an order for the restoration of the possession of the sites concerned, because they have neither dominium nor a right of control. It is the owners who are in possession, and the second and third respondents have no means, legal or otherwise, to compel the owners to give possession to the applicants. The order is therefore a brutum fulmen.

It is trite that a court will not engage in the futile exercise of making an order which cannot be carried out. So, an order for specific performance of a contract will be refused where performance is impossible;

and an order ad factum praestandum will similarly be refused in such circumstance (e.g. an order for maintenance where the defendant is destitute). The principle is embodied in the maxim lex non cogit ad impossibilia, which is discussed in Broome's Legal Maxims, 10th ed. at 162:

> This maxim, or, as it is also expressed, impotentia excusat legem, must be understood in this qualified sense, that impotentia excuses when there is a necessary or invincible disability to perform the mandatory part of the law, or to forbear the prohibitory. It is akin to the maxim of the Roman law, nemo tenetur ad impossibilia, which, derived from common sense and natural equity, has been adopted and applied by the law of England under various and dissimilar circumstances.
>
> The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue

> laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.

The same principle must apply where the question is one not of obeying the law but of complying with an order of court.

In the context of the *mandament van spolie*, impossibility is a question of fact, and where it is contended that an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts.

An order to restore possession of a movable is generally performed by the physical handing over of the article. In the case of an order to restore possession

of an immovable, on the other hand, there can in the nature of things be no physical handing over. Such an order may be mandatory in part, as where it requires the spoliator to vacate the property, or to procure that it be vacated, or to hand over the keys to premises, or to remove fences or other obstacles or to perform other acts requisite for the restitution of the status quo. And it is prohibitory in part, requiring the spoliator to forebear from preventing or hindering the spoliatus in resuming possession. In Rex v Canestra, 1951(2) SA 317 (A) SCHREINER J A said at 324 D:

> I turn now to the defence based on the maxim lex non cogit ad impossibilia. Strictly speaking this maxim and the variant nemo tenetur ad impossibilia seems to be applicable only to a failure to carry out a positive obligation imposed by law. .....The maxims can only be applied to

> prohibitory provisions by translating them into the language of necessity, namely, that it was impossible to refrain from doing the prohibited act because it was necessary to do it.

In this case the order made by HOWIE J,when applied to the facts, is seen to be solely prohibitory in content. Neither the owners nor the second and third respondents are required to do anything. There is therefore no room for an argument that the order is impossible of performance.

It was argued that if all that the applicants wanted was that the CPA and the SAP should not interfere with their regaining possession, their remedy lay in an interdict. The argument is beside the point : the question here is whether it was shown that it is impossible for the CPA and the SAP to perform the order; it is not what relief the applicants could have claimed. And in any event, they

are entitled to the mandament van spolie whereas if they had applied for an interdict, they would have had to show, prima facie at any rate, that they had a right to possession: and that they would have been unable to do.

The conclusion is, therefore, that HOWIE J was clearly right in granting the order which he did.

It was contended finally that the applicants should not, even if they were entitled to suceed on the merits, have had a costs award against the second and third respondents. Until the amendment at a late stage in the proceedings no order was sought against the owners and it was the order against the owners which was the "peg" on which relief against the second and third respondents was hung. I do not agree. Relief was claimed against the respondents ab initio because they were spoliators and the grant of this

relief did not depend on the inclusion in the order of the owners.

The appeal is dismissed with costs, including the costs of two counsel.

H C NICHOLAS A J A

CORBETT CJ
HOEXTER JA Concur.
NESTADT JA
STEYN JA