IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE:
CASE NO: A28/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

8/10/2012 _____
DATE SIGNATURE

11/10/2012

In the matter between:

HENDRICK JOHANNES UYS KNOX	**1ST APPELLANT**
EB WELDING CC	**2ND APPELLANT**
and	
SECOND LIFESTYLE	**1ST RESPONDENT**
PROPERTIES (PTY) LTD	
ROBOW INVESTMENTS 115 (PTY) LTD	**2ND RESPONDENT**

JUDGMENT

MOTHLE J:

[1] This is an appeal heard by the Full Court, North Gauteng High Court Pretoria against the judgment and an order of the Learned Webster J dated 6 August 2010, in the North Gauteng High Court, Pretoria ("the Court *a quo*"). The Court a *quo* refused leave to appeal and the appellant successfully petitioned the Supreme Court of Appeal for leave to appeal to the Full Court.

[2] The first appellant also acting on behalf of the second appellant, his business Close Corporation, ("*the appellants*") jointly brought a spoliation application (*mandament van spolie*) wherein they claimed that the second respondent had spoliated their use of a gravel road by closing that road. The road passes through the property of the second respondent. The appellant alleges that he and other people have been using this road for sometime, to gain access to the main road, R511. The Court *a quo* dismissed the

application on the basis, amongst others, that the appellants had alternative routes which they could use.

[3] The facts of the matter are briefly that:

3.1 The first appellant acquired the property to the east of the second respondent's property in 2006. He then erected commercial buildings on this property and moved in the premises in December 2008.

3.2 The second respondent's property has been developed into an upmarket housing estate called "LA Carmargue". The roads in that estate are completed and the bulk services installed. There are however no houses built as yet.

3.3 The property is secured with a high electric fence and access to the premises is controlled by an access gate, services by security guards.

3.4 The appellants claims that they are in possession of the road in that

3.4.1 The road runs from R511 in an easterly direction along *inter alia* the southern boundary of second respondent's property and ultimately connects to Van Der Hoff Road Extension that runs to Pretoria;

3.4.2 The road is being maintained by the Madibeng Local Municipality who regularly graded and surfaced it with gravel and also has road signs and traffic signals. It is the road used for vehicular and pedestrian traffic by the applicants, their neighbours and other users as their only access to the R511.

3.5 The applicants further allege that during or about January 2009, the second respondent put up a notice that the road passing through his property will be closed to road users. On 16 January 2009, the respondents erected electrified fences on the portions of the road where it enters and exit their property. These measures effectively closed that road.

3.6 The appellants, through their attorney, wrote a letter to the second respondent dated 22 January 2012, raising their objection to the closure of the road and the fact that if it is

not opened, an application for spoliation will be made to the High Court for appropriate relief.

3.7 The road was not opened and the appellant lodged a spoliation application in the North Gauteng High Court, Pretoria.

[4] The appellants, in support of their spoliation application, alleged that they have been in peaceful and undisturbed possession of and that they used the road. The closure has thus disturbed them in their peaceful possession.

[5] The respondents on the other hand, contend that the appellants were not in physical control of the road and consequently they could not be heard to say that they were disturbed in their possession.

[6] The second respondent further contends that the appellants failed to object to the notice to close the road and consequently they acquiesced to the closure of the road.

[7] In response, the appellants' contention is that the concept of possession includes the use of the road and consequently the closure of the road by erecting a fence across that road, gives rise to spoliation.

[8] The appellants also deny that they acquiesced in the spoliation, that failure by them to respond directly to the notice of closure of the road does not amount to acquiescence. Further, the appellants contends that after the road was closed, their attorney informed the respondents that unless they open the road and make it available for use, the closure will be accepted as an act of spoliation and consequently, they would approach court for appropriate relief.

[9] Most of these facts are common cause to the parties. The issues that fall to be decided in this appeal are two fold, namely whether:

9.1 The appellants have demonstrated that they were in a peaceful and undisturbed possession of the road, at the time of its closure; and

9.2 The appellants acquiesced or consented to the closure of the road by not lodging an objection to the notice to close as posted by the second respondent.

[10] The nature of a *mandament van spolie* is described in the seminal case of **Nino Bonino v de Lange, 1906 T. S. 120,** where the Learned Innes C.J. at p122 stated that: "*spoliation is any illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable properly or even in regard to a legal right.*"

[11] Thus a possessor who has been despoiled of possession may avail himself of a speedy remedy to regain possession, by way of an application to Court, known as *mandament van spolie.*

[12] In support of their contentions, the applicants rely on the matter of **Willowvale Estates CC and Another v Bryanmore Estates Ltd 1990 (3) SA 954 WLD at 956I,** where the applicant (a company) held property adjacent to respondent's property. Its members, tenants, servants and invitees used a gravel road across the respondents land to gain access to its land. The respondent erected and locked the gates on this gravel road. The applicant then

brought an urgent application for a *mandament van spolie*. The court held that the use of a road or route was included in the concept of possession and that the locking of a gate across such road or route may constitute spoliation. The Court held further that exclusive possession of a route or road was not a necessary prerequisite to the right to claim a spoliation order.

[13] In reply Counsel for the respondent referred to the De Beers case. In 2007, The Natal Provincial Division (now KwaZulu-Natal High Court, in the matter of **De Beer v Zimbali Estate Management Association (Pty) Ltd 2007 (3) SA 254 (NPD),** the Court held that the remedy in *mandament van spolie* protects possession, not access. The possession sought to be protected has to be exclusive in the sense that it should not be multiple possession.

[14] The facts of the De Beers case are briefly that the applicant, who is an estate agent, had access to respondents upmarket, gated, and residential and resort development ("*the property*"). Access to this property is restricted and controlled by the Home Owners Association. The applicant had being allowed to gain access to the property through a use of the disk which enabled entry at the gates.

After a while, the computer rejected a disk and the applicant could not gain entry. The applicant then sought a spoliation order, seeking the restoration of her access to the property. It is common cause that the individual owners of the units within the development as well as visitors to the estate were all issued with disks which enabled them access to the property.

[15] The Court in De Beers referred to the matters of **Shoprite Checkers Ltd v Penbong Properties Ltd 1994 (1) SA 616 (WLD) as well as Zulu v Minister of Works, KwaZulu, and Others 1992 (1) SA 181 (D & CLD)** and concluded that: *"a summary of the above cases would seem to me to indicate that the mandament van spolie is there to protect possession, not access. Such possession must be exclusive in the sense of being to the exclusion of others. The possession of keys by a multiplicity of parties waters down their possession and in the present case it becomes so dilute that it ceases to be a sort of possession that is required to achieve the protection of the mandament."*

[16] Counsel for the respondents, with reference to the De Beers' case raised two issues, namely:

16.1 That the *mandament van spolie* does not protect access but possession;

16.2 Where possession is exercised by many other people, it becomes diluted and falls outside the protection of *mandament van spolie.*

[17] In my view, the **De Beers v Zimbali Estate Management Association** case *supra*, is distinguishable from the **Willowvale Estates CC and Another v Bryanmore Estates** case *supra* as well as the case before this court in one important aspect: the De Beers case deals with *access* to premises while the other cases have to do with *the use of a* route or road. The Court in the De Beers case is correct in holding that spoliation protects possession of which in my view, the use of a road is one such possession and not access.

[18] However, there appears to be a difference between these decisions in regard to the question whether possession in this context cannot be protected by *mandament van spolie* when exercised by multiple persons. On this question the Court in the **Willowvale v Bryanmore Estate** case is supported by the Appellate Division in **Nienaber v Stuckey 1946 AD 1049**, where the Appeal Court held that the fact that the applicant had not proven that he had exclusive possession of the land during the time he was exercising his rights, did not disentitle him to relief. This case is authority for the principle that a party may avail itself to spoliation where possession in the form of the use of a route or road that is also used by other persons, has been despoiled. See also **Van Wyk v Kleynhans 1969 (1) SA 22 (GWPA)**.

[19] I am thus respectfully unable to agree with the view expressed in De Beers case on this aspect and will follow the ***Nienaber v Stuckey and Willowvale Estate v Bryanmore Estate supra,*** as the correct reflection of the law on this point. The use of a road which has been despoiled, gives rise to protection under the *mandament van spolie* regardless of whether the road is subjected to multiple use by other person other than the applicant. The appellants in

casu were confronted with a situation where the road they have been using was closed. They can no longer use that road. Their peaceful and undisturbed possession of that road is therefore despoiled through the closure thereof. In my view, they are entitled to relief under spoliation.

[20] One of the findings by the Court a *quo* in dismissing the application for spoliation is that the appellants had an alternative route that they could have used. Apart from the fact that the appellants in their affidavits give an explanation as to the inherent difficulties in the use of the alternative route, it is my view that this was a collateral issue which cannot be raised as a defence against spoliation. It is trite that in an application for spoliation, the applicants need to show only two grounds namely:

20.1 That they were in peaceful and undisturbed possession of the thing – or in this case, the road; and

20.2 That they have been unlawfully deprived of that possession.

See in this regard **Yeko v Qana 1973 SA 735A**.

[21] Once an applicant establishes these two grounds, he is entitled to relief in terms of *mandament van spolie.* The use of an alternative route has no relevance to the exercise of peaceful and undisturbed possession the thing. Further, it is not a defence to the unlawful deprivation of the thing possessed.

[22] It seems to me that the remedy provided by spoliation permits very limited defences. The only possible defences should be in the form of a response to the grounds stated above, namely that the applicant was not in peaceful and undisturbed possession alternatively that the deprivation of such possession was lawful. I accordingly respectfully disagree with the Learned Judge in the Court a *quo* that the application for spoliation should fail on the ground that because there was or there maybe an alternative route which the applicant could have used.

[23] The second respondent raised a further defence, that the closure of the road was consented or acquiesced to by the applicant. The applicants allege in the founding affidavit that during or about 2008, there was an attempt to close the road which attempt was resisted. The respondents are alleged to have proclaimed their right to close the road by blocking the road at both ends where it traverses its property. This they did by digging tranches across the one end of this road and putting on dirt on the other end. In response, the users of the road on their own removed the obstacles created by the respondent, by filling in the tranches at the one end and removing the dirt on the other end. They continued to use the road in defiance of the closure.

[24] It its answering affidavit, the respondent confirm the applicant's allegation, but allege that after the reopening of this road as a result of resistance by the road users, a meeting was held in the presence of the South African Police Services regarding the road closure. The second respondent does not give the details of what transpired in the meeting except to state that at that stage and subsequent to the meeting, the road was not closed. Another meeting was held in November 2008 between the respondent and the proximate land

owners to whom he had addressed and sent letters. On his version, the second respondent did not send the letter to the first applicant because the first applicant was unknown to it.

[25] It is clear that there is a history of resistance to the closure of the road. There is no evidence on the record that at anytime the applicants intended to consent or acquiesce in the road closure. On the contrary, and by the respondents' own version in the answering affidavit, there is evidence of every intent to resist the closure by the neighbours. The applicants were not informed of the measures taken by the second respondent in the letters which were sent to the neighbours.

[26] Counsel for the respondent did not refer us to any authority in law which suggest that failure to object to a notice amounts to acquiescence and is *ipso facto* a bar to the exercise of one's right to seek appropriate relief.

[27] Considering the evidence on the record, I am of the view that the Court a *quo* should have found that the applicants have succeeded on a balance of probabilities, to prove their application for spoliation, and were thus entitled to relief sought in the application itself. The application should have succeeded and consequently, the decision of the Court a *quo* should be set aside.

[28] In the premises I would therefore make the following order:

1. The appeal succeeds.
2. The decision of the Court a *quo* dismissing the application for spoliation is set aside and substituted by the following order:

   "The application is granted in terms of prayers 1 and 2 of the Notice of Motion."

3. The respondent is ordered to pay the cost of the appeal.

S. P. MOTHLE

JUDGE OF THE HIGH COURT

I AGREE.

N. P. MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

I AGREE.

N. B. TUCHTEN

JUDGE OF THE HIGH COURT

Heard on:	15 August 2012
For the Appellant:	Adv J. Moller
Instructed by:	Van Zyl Le Roux Inc 1st Floor, Block 3 Monument Office Park
For the Respondent:	Adv M. Segal
Instructed by:	Möller & Pienaar Inc Suite 1A, 1st Floor Hatfield Gables North 484 Hilda Street, Hatfield
Date of Judgment:	