REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

APPEAL NO. AR467/08

In the matter between:

YAGAMBARAM GOUNDER **First Appellant**
KRISH NAICKER **Second Applicant**

and

ANJALAY GOVENDER **Respondent**

	Delivered on
JUDGMENT	6 March 2009

MSIMANG, J:

1] This appeal is directed against the spoliation order granted by the Magistrate, Umzinto in an application brought by the respondent (the applicant in the Court *a quo)* against the appellants (the respondents in the Court *a quo).*

2] The respondent and her late husband had been married in community of property and were joint owners of a certain immovable property described as Sub 33 of lot 25 number 1955 situate in the county of Alexandra Province of Natal (respondent's property). Adjoining this property is another property described as Sub 32 of lot 25 Number 1955 situate in the county of Alexandra Province of Natal, which is owned by a person who was cited as the first respondent in the Court *a quo* and in respect of whom the application was dismissed with costs. (the dominant tenement).

3] In terms of the deeds of transfer of the two properties they are subject to a servitude of right of way or road in favour of all the owners of the subdivisions of the said lot 25 and both properties bear a corresponding benefit of right of way over such roads shown in the sub-divisional diagrams of the said lot 25. This registered servitude accordingly accorded the owners of the respondent's property a right of way over property described as sub 32.

4] It would appear that, upon the demise of the respondent's husband, the respondent found herself in financial straits and, as a result, she was compelled to sell the property to the Department of Agriculture. Indeed, an agreement of sale was concluded and the Department took occupation of the property. At the same time, the Department concluded a caretaker agreement with the second appellant in terms of which the latter commenced farming operations on a portion of the property.

5] However, during 2007 before the Department took transfer of the property, the respondent was able to save sufficient money to be able to rescue the property. The Department was accordingly approached and a request made for the cancellation of the sale agreement. The Department agreed and, upon payment of what was owed to it, the agreement was duly cancelled. The Department then dispatched a letter to the second appellant cancelling the caretaker agreement it had earlier concluded with him and, during July of 2007, the respondent dispatched her own to the second appellant giving him one month's notice to vacate the property.

6] During May 2007 the respondent had concluded a lease agreement with a

certain close corporation authorizing the same to conduct sand mining activities upon the property. The second appellant had apparently not taken kindly to this development. During the same month and year the respondent was informed by her new tenant that, when they were attempting to enter the leased property, they established that a trench had been dug across the road within the servitude area of the property and that various forms of thorny bush had been placed on the road as a means of creating an obstruction and preventing access across the property. A chain and lock access control point had been created preventing anyone from crossing this point within the servitude area without first removing the chain across the road. A sign had also been erected informing all and sundry that unauthorized persons were not allowed beyond that point.

7] All subsequent attempts to resolve the conflict proved fruitless. It was for that reason that, on 7 March 2008, the respondent approached the Magistrate's Court seeking interim relief on the following terms :-

> "(a) that the first, second and third respondents remove forthwith all obstructions within the right of way or road servitude upon sub 32 of lot 25 number 1955 and to restore the status quo ante the deprivation of the right of way or road servitude so as to enable the applicant and all persons directed by her to enter and travel upon the right of way or road servitude and to gain access to and from sub 33 of lot 25 number 1955;
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> (b) that in the event of the respondents failing to do so within twelve (12) hours of the service upon them of this Court order, the Sheriff of Umzinto is authorized to attend to the removal of the obstructions upon the servitude area on sub 32 of lot 25 number 1955."

and calling upon the appellants and the first respondent in those proceedings to show cause on 8 April 2008 why the interim order should not be made final. The said interim relief was duly granted. However, the confirmation of the same was strenuously resisted by the appellants and,

after the matter had been argued, the Court *a quo* confirmed the rule against the appellants but dismissed the application with costs in respect of first respondent in those proceedings.

8] This appeal is directed against that finding and, though a number of defences had been raised by the appellants in their opposing affidavit, during argument in the Court *a quo* and before us, those defences appeared to have whittled down to primarily one defence which, as I understood Mr. **Naidu,** who appeared for the appellants before us, is the following.

9] To the respondent's founding affidavit had been attached a sub-divisional diagram marked "D3" reflecting a layout of the entire Lot 25 number 1955 of which sub-divisions 32 and 33 form a part. Drawn across the diagram is a green line which, according to the respondent, depicted the road which is subject to the registered servitude.

10] In their opposing affidavit the appellants denied that this was the case. They averred that the road which is reflected on annexure "D1" is not the same road which is depicted as the green line traversing the dominant tenement on annexure "D3". They annexed to their affidavits two photographs which were, respectively, marked "KN4" and "KN5" showing the road running west of the photographer as well as another road which branches off to the left of the first road. It is the first road that formed part of the registered servitude and not the one that branches off to the left to which they referred as the second road.

11] During 2000 the owner of the dominant tenement (the first respondent in the Court *a quo)* , had leased his property to the second appellant and since that year the latter had been in occupation of the property. He deposed that he had put a chain across the entrance to the second road for his protection and for the protection of his workers. He admits having dug a trench across that road and avers that he did that for his own purposes.

12] He, however, denies having ever interfered with the first road and contends that the same remains open for use in terms of the registered servitude by all the owners of the adjoining properties including the owner of the respondent's property.

13] In her replying affidavit, while she conceded that annexure "D3" may not correctly depict the exact location of the servitude, she contended that, at all material times, she had used what the appellants termed a second road to gain access to her property. She submitted that she accordingly had a peaceful and undisturbed possession of the said road until she was unlawfully deprived of that right by the appellants. She submitted that it did not matter that, in her founding affidavit, she had based her claim on the appellant's interference with the exercise of her right over a registered servitude.

14] From the papers filed in this matter it then became clear that the primary issue for resolution was whether, in her replying affidavit, the respondent ought to have been permitted to insert facts which should have been in her founding affidavit.

15] It is trite that :-

> "…….in application proceedings the affidavits constitute not only the pleadings but also the evidence….." [1]

and therefore that an applicant should in his/her founding affidavit set out sufficient facts to entitle him/her to a relief sought. The general rule is accordingly that the Court will not permit the applicant to insert facts in his/ her replying affidavit which should have been set out in his/her founding affidavit. However, this rule, like all general rules, is not without limitation. As it was stated in **Shephard v Tuckers Land and Development Corporation (Pty) Ltd** [2]

> "This is not however an absolute rule. It is not a law of Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit……. This indulgence, however, will only be allowed in special or exceptional circumstances."

16] A variety of factors can be taken into consideration by the Court when exercising such a discretion. What is of overriding importance in the consideration of those factors is that the applicant should not be permitted –

> "…..to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view it is essential for applicant to make out a *prima facie* case in its founding affidavit." [3]

17] It must, however, be emphasized that once such a discretion has been exercised by a lower Court the role of an Appeal Court becomes a limited one. As once remarked by **de Villiers J** in **Kleynhans (supra) :-**

> "…….once such a discretion has been exercised in favour of an

1 Kleynhans v van der Westhuizen N.O. 1970(1) SA 565 (O) at 568 E;
2 1978(1) SA 173 (W) er Nestadt J at 177 H – 178;
3 Per Broome J in Poseidon Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and another 1980(1) SA 313 (D) at 315 – 316 A;

> applicant a Court of Appeal will only interfere when it comes to the conclusion that the Court *a quo* has not exercised its discretion judicially." [4]

17] One of the factors which is usually found to be compelling in exercising the discretion in applicant's favour in these matters is lack of prejudice. In **Pienaar v Thusano Foundation and another** [5] **Friedman AJP** formulated the position as follows :-

> "Although technically there may have been some new and vexatious matter the second respondent was not prejudiced thereby ….."

18] Returning to the facts of the present appeal, in exercising its discretion in favour of the respondent and in permitting the insertion of new facts in her replying affidavit, the Court *a quo* made the following remarks :-

> "It was contended that it was the second road, not the servitude, that was indeed closed off. It is clear from the papers before Court that it was indeed this closing of the second road which caused the applicant to approach the Court in order to seek relief and it is clear that in all the opposition reference is made to this specific road and the respondents are clearly aware of which road forms the subject/object of the application before Court." [6]

19] It is therefore clear from this passage that the learned Magistrate gave a rational basis for the exercise of his discretion in respondent's favour and that this Court cannot find that he did not do so judicially.

20] During argument, it was not disputed that the respondent would use the second road to gain access to her property. The Court *a quo* accordingly correctly found that she was in peaceful and undisturbed possession of that road. Mr. **Naidu's** submission that the respondent cannot rely on the *mandament van spolie* by reason of the fact that she never had and could

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4 At 568 H;
5 1992(2) SA 552 at 577 I;
6 At page 136 of the record;

not have had the exclusive use and enjoyment of the dominant tenement, is clearly without merit. The issue was dealt with in **Nienaber v Stuckey** [7] where at 1055 **Greenberg JA** held :-

> "On the other hand there appears to be good reason for holding that exclusiveness of possession is not an essential element." [8]

21] Finally, that the servitudal rights, such as the right of way, can be protected by means of a *mandament van spolie* is now trite. [9]

For the aforegoing reasons I would dismiss the appeal with costs.

I AGREE

MNGUNI, J

It is so ordered

MSIMANG, J

7 1946 AD 1049;
8 See also Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989(1) SA 508 at 513 B-D;
9 See Nienaber (supra) on Bon Quelle (supra).

For the Appellants: Adv. K Naidu (instructed by Singh & Gharbaharan c/o K Ramkaran & Co)

For the Respondent: Adv. A D Collingwood (instructed by S Parshotam & Company c/o Shamola Dasrath)

Date heard: 2 February 2009

C A V

Judgment delivered: 6 March 2009