

# Regspraak

## VIA SIMPLICITER AND SPOLIATION\*

*Van Rhyn v Fleurbaix Farm (Pty) Ltd* 2013 5 SA 521 (WCC)

### 1 Introduction

It is suggested that this judgment is noteworthy, mainly for four reasons: first and foremost, the way in which Binns-Ward J, writing for the full court (Yekiso J and Savage AJ concurring), formulated the *ratio decidendi*: employing proper source materials – mainly case law and old authority – and not falling into the trap of merely relying on standard textbooks (for a critical appraisal of this trend, see Scott “A growing trend in source application by our courts illustrated by a recent judgment on right of way” 2013 *THRHR* 239). Secondly, it illustrates the fact that if more fundamental spadework had been done in the preparation of the case of the applicant (respondent in the appeal), the matter would probably not have ended up in court, although this suggestion is in some measure belied by the fact that the court of first instance actually decided in the applicant’s favour (albeit erroneously, to my mind). In the third place, one is again reminded of the fact that the *mandament van spolie* is a remedy that has over time proved itself to possess the uncanny ability of causing confusion, in particular where it is applied to obtain redress in situations where there is an averment of spoliation of *quasi*-possession. Finally, it is living proof of how rich our Roman-Dutch common law is in well-established rules to resolve the most minute problems that can arise in an everyday situation flowing from normal commercial activity such as property development involving the subdivision of land in modern times.

A brief discussion of the relevant facts of the case and the order made by the court will first be rendered, and this will then be followed up with an exposition and evaluation of the court’s reasoning. Finally, some conclusions will be offered on the relevance of this judgment for the law pertaining to the *mandament van spolie* as a remedy against infringements of *quasi*-possession.

### 2 The facts and order granted

The appellants and the respondent are the registered owners of two pieces of adjoining land in the Stellenbosch region. The two properties had been transferred to them in ownership by a predecessor in title who had held both land units in common ownership (as Farm 1040 Stellenbosch). These properties can be reached by way of an extension of a nearby public road in a suburb of Stellenbosch, which extension transects private land situated between the public road and the properties in question. This extension of the public road is the subject of a servitude of *via* which had previously been registered in favour of both the aforementioned properties.

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The servitude road reaches the eastern border of the appellants' property at a certain point, from where a gravel road leads over the property to reach its western border, which is simultaneously the eastern border of the respondent's property. This was the *factual* position when the parties acquired ownership of their separate properties (the appellants during December 2011 and the respondent six weeks later at the end of January 2012). The route of the gravel road was indicated by a red and blue line on an aerial photograph map incorporated in the court *a quo's* order. Apart from the gravel road, there was no other access route to the respondent's property; it can properly be described as "blokland", or landlocked.

Since the respondent's acquisition of its undeveloped land, its three directors made use of the gravel road on an irregular basis, for instance jogging along it "once or twice a week" (524A) and visiting the site in connection with the planning of a dwelling to be erected on it. However, on the day that the respondent company took transfer, the appellants notified one of the respondent's directors that they intended closing the gravel road in order to develop a landscape garden and to provide the respondent with an alternative access road, following the course of the Eerste River along the northern boundary of the appellants' property. The appellants duly set their plans in motion, closing the existing gravel road access after having constructed the alternative access road at a cost of nearly R3 million, which they immediately put at the disposal of the respondent.

The respondent's directors did not take kindly to this state of affairs and promptly brought an application for anti-spoliatory relief – thus relying on the principles of the *mandament van spolie* – which relief was "on its face consistent with what might have been expected had it [*viz* the respondent company] been asserting a defined right of servitural access" (524E). Of singular importance, as pointed out by Binns-Ward J, is the fact that the respondent did not rely for spoliatory relief on the deprivation of a *defined* servitural right of access over the appellants' property along the route of the original gravel access road, but "only on the disturbance of what it contended was its right of access via the established route" (524E-F). Whether this amounted to an averment of the existence of a servitural right *simpliciter*, or merely of the factual obstruction of the existing road, is not clear at all.

The order issued in favour of the applicant (respondent in appeal) by the court *a quo* directed the respondents (appellants in the appeal): "to restore to [the respondent in appeal] rights of access to its property, Portion 4 ... of the farm Fleurbaai ... over the [appellants'] property ... by way of the route to the south of the dam marked by a red and blue line on the original aerial photograph-map attached ...".

The appeal brought against this order was successful and the order of the court *a quo* was set aside, dismissing the original application with costs (par 30).

### 3 Critical evaluation

#### 3.1 Introduction

In the main, one can divide the *ratio decidendi* into five parts: (a) an exposition of the requirements for a successful spoliatory application (par 7-8); (b) an overview of some of the case law illustrative of spoliation in respect of *quasi*-possession (par 9-11); (c) an evaluation of the case law relied upon by the respondent for establishing spoliation in the instant case (par 12-14); (d) the question of determining the nature of the right of way which the respondent purportedly enjoyed over the appellants' property and the application of the relevant rules in this regard to the facts at hand (par 15-26); and (e) an evaluation of an application by the respondent to adduce

additional evidence on appeal (par 27-29). I shall now treat each of these parts *seriatim*, except the last one, which has no bearing on the main theme.

### 3.2 Requirements for the *mandament van spolie*

The court commenced by briefly outlining facets of the nature of and requirements for the *mandament van spolie* (par 7). One can at this stage of our legal development state that the two requirements for this remedy are trite, *viz* that: (a) the applicant has to prove that he or she was in undisturbed possession or *quasi*-possession of the object in question; and (b) was unlawfully deprived of such possession or *quasi*-possession (see *eg* Van der Merwe “Things” XXVII *LAWSA* 1 re 179 186; Harms “Interdict” *LAWSA* 2 re 437; Badenhorst *et al Silberberg and Schoeman’s The Law of Property* (2006) 292 *et seq*; Van der Walt and Pienaar *Introduction to the Law of Things* (2006) 203). The underlying reason for granting a spoliation order, which determines its nature, also seems to be uncontentious: it is a robust remedy directed at effecting restoration of the status *quo ante*, and its fundamental purpose is to “serve as a tool for promoting the rule of law and as a disincentive against self-help” (525A; sources quoted are the recent judgments of the constitutional court in *Schubart Park Residents’ Association v Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) 330G-331D); and the well-known older cases of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) 511I-512B; *Nienaber v Stuckey* 1946 AD 1049 1053; and *Mans v Loxton Municipality* 1948 1 SA 966 (C) 975-977).

Thereafter Binns-Ward J laid the table for application of these principles to the facts at hand, by outlining the nature of a spoliatory act in respect of *quasi*-possession:

“In the case of incorporeal property it is the possession of the right concerned that is affected – a concept described as ‘*quasi*-possession’ to distinguish it from physical possession. The manifestation of the dispossession of the right in such a case will always entail the taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned” (525A-B).

He then pointed out that it follows logically from this that when anti-spoliatory relief is sought for the restoration of a right of use – as in the instant case – the applicant has to identify and set out the alleged right giving rise to the entitlement of use on the papers:

“Identifying the alleged right is something quite distinguishable from establishing that it actually exists or that it legally vests in the claimant. Something in the nature of a *prima facie* case has to be made out” (525D).

The reason for this cautious formulation is, of course, to comply with the requirement that the merits of the case may not be argued in spoliatory proceedings (see Van der Merwe “Things” *LAWSA* par 265 and extensive sources quoted in n 2). However, this does not detract from the logical requirements that an applicant must identify the basis (the right) on which he or she relies. Thus, where an application concerns the interference with a servitude, for example a right of way, the applicant bears the onus of alleging the existence of such servitude, as well as the way in which its exercise has been frustrated by the respondent (525E). It is suggested that this is a fair reflection of the existing law in this regard.

### 3.3 Overview of some judgments illustrative of spoliation in respect of *quasi*-possession

The first case referred to (in par 9) is the well-known one of *Bon Quelle*, where the applicant municipality alleged (see 511F of that judgment) the existence of a servitude to draw water from a spring and the respondent's unlawful dispossession thereof by summarily terminating the water flow to the applicant's reservoir. The applicant succeeded in both the court *a quo* and the appellate division, although it had not been required to prove the existence of the servitude. All that was required was an *alleged* servitude (see 514I of that judgment). However, this does not imply that an applicant can dispense with the requirement of *identifying* the basis of his case properly. It is suggested that the following *dicta* of Binns-Ward J convey the correct approach to be adopted in proceedings of this nature:

“Absent the allegation of the servitude – that is an identification of the nature of the right relied upon – it is difficult, however, to see how the Court could have granted the relief. It would not have been sufficient on the facts of the case had the municipality merely alleged that the water supply which it had enjoyed had been cut off because the respondent owner turned off his tap. *Thus where a right is concerned, dispossession is established by the applicant demonstrating that it has been deprived of a previously exercised utility and identifying the right in terms of which it contends it is entitled to exercise the utility.* It is the relationship between the two that prima facie establishes the possessory element that is an essential part of the case of an applicant for relief under the *mandament*, for it identifies the subject matter of the alleged despoilment” (525H-526B; emphasis added).

In respect of his opinion that the mere turning off of a tap could not form the basis of a spoliatory application, Binns-Ward J referred in passing (n 7; 526F-G) to *Plaatjie v Olivier NO* (1993 2 SA 156 (O)), which dealt with a case where the first respondent had disconnected the water supply to communal taps in an informal settlement due to non-payment. A crucial feature of the case was that none of the applicants had been in possession of the stands on which the taps were installed. After having referred to the *Bon Quelle* case (at 514H of that judgment), Hattingh J pointed out that “[w]hat is protected by the remedy is the actual performance of acts which, if lawfully performed, would constitute the exercise of a right, and the question arises what such acts are” (159H). Following the line of reasoning taken by Thirion J in *Zulu v Minister of Works, KwaZulu* (1992 1 SA 181 (D) 190G-I) that the *mandament van spolie* cannot be utilised to effect specific performance of an agreement – in other words to protect mere personal rights (later confirmed in *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA)) – the court rejected the application on the basis that the appellants' use of the water did not constitute the exercise of a servituted right, nor could it be viewed as an incident of their physical possession or control of their informal dwellings (160E).

The third case Binns-Ward J referred to in passing (n 8; 526H-J) was the judgment in the *Zulu* case (at 187H-188C), in which Thirion J explained the meaning of possession of an “incorporeal right” (*viz quasi*-possession) for purposes of granting a spoliation order by referring to the *Bon Quelle* case (514H and 516G of that judgment) and an interpretation thereof by Van der Walt (“Die mandament van spolie en *quasi*-besit” 1989 *THRHR* 444) as “die daadwerklike uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word” (188C).

The fourth case that came up for discussion was *Firstrand Ltd t/a Rand Merchant Bank v Scholtz NO* (2008 2 SA 503 (SCA)): for a thorough critical appraisal see Sonnekus 2007 *TSAR* 145). Binns-Ward J referred to it in the first place in the context of Thirion J's explanation of the concept of *quasi*-possession in the *Zulu*

case (referred to in the previous paragraph), stating that the latter explanation was accepted as accurate in the *Firststrand* case (in par 12 of that judgment). He applied the line of reasoning on *quasi*-possession contained in these cases as follows:

“Of course, one cannot determine if the utility involved amounts to ‘die daadwerklike uitoefening van handelinge wat in die uitoefening van *sodanige reg* uitgeoefen mag word’ (actual conduct consistent with the exercise of *such right*) if one does not know what such right is” (n 8; 526I-J; emphasis added).

To my mind the conclusion reached by the court in this regard cannot be faulted on grounds of logic. Although not important in this context, I would suggest an alternative English translation to reflect the inelegant Afrikaans phrase, equally inelegantly, but more literal, as follows: “the actual performing of acts that may be performed in performing such right”.

The court continued to quote extensively from the *First Rand* judgment (par 13 thereof) where it was stated that the nature of the professed right – even though it need not be proved – has to be determined or characterised in order to determine whether *quasi*-possession thereof deserves the protection of the *mandament van spolie*. However, the court deemed it necessary to make a further addition to those *dicta* to place even more emphasis on the importance of identifying the alleged right forming the basis of a spoliatory application:

“[T]he nature of the alleged right relied upon might also be relevant for the purpose of determining whether the allegedly spoliatory conduct did in fact amount to despoilment, for there cannot be dispossession if the conduct of the alleged despoiler does not in law infringe or derogate from the alleged right. Thus the nature of the right can be material for determining whether the conduct complained about by the applicant for a mandament van spolie amounts to a spoliation” (526E-527A).

Under this heading, the court’s final reference was to *Tigon Ltd v Bestyvet Investments (Pty) Ltd* (2001 4 SA 634 (N) 642D-645E), in which judgment the court examined the juristic nature of company shareholders with a view to ascertaining whether the expunging of its name from the share register amounted to dispossession for purposes of obtaining a spoliation order.

The rationale for the court’s review of the case law in respect of the requirement of identification of the alleged despoiled right clearly emerged only at this stage of the judgment, where the question as to the nature of the right upon which the applicant’s (respondent’s) averment of dispossession had been founded, was pertinently posed (527C). The court set out the difficulty which it faced in this regard as follows:

“The answer was not clearly provided in the respondent’s founding affidavit. What was plainly contended for was a right of access over the appellants’ property by reason of the landlocked character of the respondents’ property ... But that was not the question that gave rise to the proceedings in the court of first instance; it was the respondent’s claim to have been dispossessed of the *right to use the route described by the gravel road*. It is that feature of the claim that required a closer examination of the nature of the right relied upon” (527C-E; emphasis added).

It is suggested that it would have been better had the court commenced its overview of the above-mentioned cases with this brief explanation, in order to have alerted the reader at the outset of the specific problem involved.

### 3.4 The court’s evaluation of case law relied upon by the respondent

Binns-Ward J did not regard any of the cases cited by the respondent as authority for its assertion that spoliation had taken place as being of any value in this regard.

The facts of the first two judgments referred to, namely *Willowvale Estates CC v Bryanmore Estates Ltd* (1990 3 SA 954 (W)) and *Van Wyk v Kleynhans* (1969 1 SA 221 (GW)), were easily distinguished from those in the instant case. In both those cases a spoliation order was sought where the respondents had barred access to the applicants' properties by closing the roads which the applicants had been using for a substantial period of time, whereas the alleged dispossession in the instant case did not entail such "frustration or taking away of existing access; it merely entailed substituting the existing route of the alleged right of way over the appellants' property with another, also over the appellants' property" (527F). The court reiterated that the respondent therefore continued to have uninterrupted access across the appellants' land.

The third case relied on by the respondent, *Knox v Second Lifestyle Properties (Pty) Ltd* ([2012] ZAGPPHC/2012/223.html), was swiftly dealt with by the court. One could distinguish the facts of the *Knox* case from the present application on the same basis as had been done in respect of the latter two judgments (it also entailed the closing of a gravel road providing access to the applicants' properties), but Binns-Ward J chose another angle for this exercise: He pointed out that in the *Knox* case the court completely failed to consider the content of the right upon which the spoliatory application had been based, for the simple reason that the court regarded the use by the applicant of the road in question "as having been equivalent to its physical possession" (528A), whereas, in the present case, "the appellants pertinently raised the respondent's failure to allege a cognizable basis for its claim to access *along the route of the gravel road* to contend that the respondent had not shown what it was that it had supposedly held in *quasi-possession*" (529A). It is clear that the reason why the court chose this basis for distinction is its preference for the conceptual construct of *quasi-possession*, as distinct from actual possession or control of a tangible object, in the context of incorporeals, such as servitudes. The court in fact referred to the approach followed in the *Knox* case, and therefore indirectly to the school of those who favour the application of the concept of "physical possession" to cases such as the current one, in rather critical fashion, opining that such an approach "involve[s] rather strained reasoning". Binns-Ward J referred (n 13; 528E-H) to the judgments in the *Zulu* case and in *Koch v Backer* ([2010] ZAGPPHC 245 (24 Dec 2010)), the latter quoted as additional authority on behalf of the respondent, both in which the exercise of a servituted right of way was equated with physical possession of the road used for that purpose. This rejection exercise was deftly done by a simple application of the old Latin adage "*Roma locuta est, causa finita est*", substituting Rome with the supreme court of appeal – namely by referring to the two judgments in the *Bon Quelle* (514H-I) and *Firstrand* cases (par 13), to the effect that "*quasi-possession of a right is demonstrated by conduct which evidences the use of the right*" (528H).

The fourth case relied on by the respondent, *Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd* (2013 1 SA 239 (KZD)), was also distinguished on account of its facts, which concerned an application for restoring physical possession of immovable property to the applicant, who physically occupied it for a long period of time (n 14; 528I-529J).

The last case which the respondent strongly relied on was the *locus classicus* of *Nienaber v Stuckey* (1946 AD 1049). In that case the appellate division ruled in favour of the applicant, whose access to leased premises on which he had been planting crops had been cut off by the respondent's locking of the access gate, notwithstanding the fact that a (longer) alternative route had been provided by the respondent. This gave counsel for the respondent in the present case reason to believe

that it had a strong case to argue that the respondent had been despoiled of its right of access, irrespective of the provision of an alternative access route (529C). However, Binns-Ward J also rejected this authority, finding that on a proper reading of that judgment the appellate division regarded the applicant's previous access through the gate that was later locked as "an incident of the applicant's physical possession of the land" (529F). To reiterate his line of reasoning, he expressed himself in the following words:

"As I seek to demonstrate below, the question in the current case is not about physical possession of the route of access, but about whether changing the existing route of a right of way amounted to a despoilment of the respondent's alleged right of way over the appellants' property. In my judgment the respondent's reliance on *Nienaber* was misplaced" (529F-G).

### 3.5 Evaluation of the nature of the respondent's right of way

#### 3.5.1 Introductory remark

In this part of the judgment, which can be described as its heart, the court essentially affords two different interpretations of the respondent's averments in its founding papers – in the first place, that of appellants' counsel, proceeding on the basis of an application for a way of necessity (*via necessitatis*), and, secondly, its own more benign reading, proceeding on the basis of the Roman-Dutch "blokland" rule regulating the granting of an access road upon the subdivision of property.

#### 3.5.2 The way of necessity approach

The gist of this approach is that a way of necessity comes into being only when a court order to that effect is granted after the applicant has complied with the necessary requirements (referring to *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 671D; on the establishment of a way of necessity in general, see *inter alia* Van der Merwe and Lubbe "Noodweg" 1977 *THRHR* 111 121 *et seq*; Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 715 *et seq*; Sonnekus "Noodweg en wysiging van omstandighede" 1995 *TSAR* 165. Notwithstanding the authoritative statements of Jansen JA in *Van Rensburg v Coetzee*, a measure of academic controversy – irrelevant for our present discussion – is still to be perceived on this point). Such being the case, the fact that the applicant's founding papers did not contain an allegation of such court order having been granted had the effect that they fell short of complying with the first requirement for granting a spoliation order in respect of the alleged right, namely the *quasi*-possession by the applicant of a "cognizable right entitling it to access over the appellants' property along the indicated route by means of a way of necessity" (530C).

However, the appellants' counsel conceded that the respondent's papers could possibly be construed as containing an averment that it had had an "expectation" or "claim" (an attempt to translate the Afrikaans word "aanspraak", employed by Jansen JA in *Van Rensburg v Coetzee*) to a *via necessitatis*, which would at most entitle it to an interim interdict allowing it to travel across the appellants' property pending the determination of a claim for a *via necessitatis* (530D-E). However, in light of numerous precedents (see *Van Rensburg v Coetzee* 668F-G and several judgments quoted there) the applicant would not have been able to obtain an order to utilise a specific route *pendent lite*; it would merely be entitled to a *via necessitatis simpliciter* over the appellants' property (530F), which led Binns-Ward J to conclude as follows in respect of this approach:

“Thus, even on the indicated approach, the respondent would not have been entitled to claim that access should be given along the route of the gravel road, as distinct from along the road constructed by the appellants near the river. Had the argument been addressed on a proper reading of the respondent’s founding papers, I consider that it would have been unassailable, and the appellants would have succeeded in demonstrating that the purported right upon which the defendant relied was one that was not legally cognisable, and therefore in reality nothing more than an illusion in respect of which it could not sensibly claim to have been dispossessed” (530G-H).

### 3.5.3 The Roman-Dutch “blokland” rule in respect of subdivided property

The court’s approach, in terms of its more “generous” interpretation of the respondent’s founding papers, was that the previous owner’s subdivision of the land later transferred to the appellants and the respondent triggered a rule of Roman-Dutch law, distinct from the rules pertaining to the granting of *viae necessitatis*. For argument’s sake the court accepted that the respondent had identified its property as so-called “blokland” – that is, land isolated and lacking any form of access to a public road (531D). The source of the common-law “blokland” rule is Simon van Leeuwen’s *Roomsch-Hollandsch Regt* 2 21 12, which had been followed in several earlier South African decisions (see, eg, Van der Merwe and Lubbe 123 n 82) and authoritatively affirmed in *Van Rensburg v Coetzee* (673B-675C). Although Binns-Ward J quoted this entire text from the original Dutch version (and supplied his own commendable English translation (n 19; 531J-532I)), I shall employ the excellent English translation of the same by Kotzé (I *Simon van Leeuwen’s Commentaries on Roman-Dutch Law* (1921) 297; emphasis added):

“If a piece of land is divided into two or more portions, the back portion will retain its right of outlet over the front portion, *even although nothing was said about this at the time*, for the partition of the land cannot impose a servitude upon the neighbours ... But if the land had been so situated that there was an outlet by land in front, and by water behind, then the land sold must be satisfied with the outlet by water, according to what has already been said. The same rule applies where a man has sold the front portion of his land, and retained the back portion....

In like manner a piece of land having a servitude of way or outlet over or across another piece of land, may be divided into as many portions as we please, and each portion will acquire the same outlet of way or road, the hindermost over the front part, and so on. ...”

There is ample jurisprudential and academic support for the court’s interpretation of the first part of this text as authority for the proposition that the act of subdivision is accompanied by a tacit granting of a right of way in favour of the isolated subdivided part over all other units interposed by such act of subdivision between it and the nearest public road (531E-F; see *Van Rensburg v Coetzee* 675C; Van der Merwe *Sakereg* (1989) 488; Van der Merwe and Lubbe 123; Sonnekus 1995 *TSAR* 165 167). What is of cardinal importance here is that the servitude is created by the mere act of subdivision and not, as in the case of a *via necessitatis*, by an order of court. This interpretation opens the way for recognising, in the case under discussion, the existence of a servitude of way on the respondent’s part, thus constituting a cognisable right which could form the basis of a successful spoliation order. However, the nature of such right would determine whether the respondent had been despoiled of it. The court consequently diligently set about its task of ascertaining the nature of this tacit servitudinal right.

Binns-Ward J construed this right by referring to Jansen JA’s judgment in *Van Rensburg v Coetzee* (674H-675C), in which that judge entirely accepted the interpretation in *Beukes v Crous* (1975 4 SA 215 (NC) 220G-H) to the effect that the

original owner of the “blokland”, which came into being as a result of a subdivision, would be able to bring an application for registration of a servitude of *via simpliciter* – therefore, not along a defined route – over the remaining part of the land which affords access to a public road; and further, that where such registration has not taken place, successors in title of the owner of the remainder would be bound to recognise such unregistered servitude on the basis of the doctrine of notice. This persuaded Jansen JA to conclude that it can now be accepted that an instance of subdivision giving rise to rights of way, as discussed by Van Leeuwen, should be construed as *the granting of rights of way by means of tacit agreement*. (In this context the court referred, by way of comparison (532A-D), to the similar situation in the English law of easements applicable to situations where land grants have caused a grantee’s right of access to be terminated and where that legal system also regards the grantor’s remaining property to have been burdened by an easement (servitude) on the basis of a tacit agreement (XIV Halsbury’s *Laws of England* (4th ed)) *sv* “*Rights of Way arising by Implication of Law*” (par 152 *et seq*); see also *Van Rensburg v Coetzee* 674H-675B, in which reference was made to the same passage from Halsbury’s.)

The court thereupon embarked on an exercise in which this interpretation was applied to the facts of the current case (533C *et seq*), based on the court’s own more generous reading of the respondent’s founding papers. For reasons of clarity, the developing thought process in this judgment can best be illustrated by numbering the steps thereof:

- (1) The nature or character of the right contended for by the respondent is identified by the court as “that which is taken to have been tacitly conferred in favour of its property upon the subdivision of Farm 1040, or upon the separate disposition of the properties by a former common owner” (533C-D). Although the terminology is nowhere applied in this case, or in the case law referred to on this point, it is evident that this right can more accurately be described as a *ius in personam ad servitutum acquirendam* (see, *eg*, Van der Merwe *Sakereg* 526; Sonnekus and Neels 683; Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* (2012) 282).
- (2) It is clear from the facts that the appellants had acquired their property with full knowledge of the unregistered right of way. The court accepts this on the basis of their conduct (533D). Although not expressly stated by the court, the effect of this knowledge is that the appellants are bound to recognise and give effect to such unregistered servitude of way (see, *eg*, *Grant v Stonestreet* 1968 4 SA 1 (A); and authorities quoted by Van der Merwe *Sakereg* 527 n 519).
- (3) The court points out that the nature of the respondent’s identifiable right is that of a *via simpliciter*, *viz* a right of way along no defined route (533E).
- (4) Where a *via simpliciter* exists, the dominant owner is in law entitled to choose the applicable route (533F-G). Although the court referred only to Voet *Commentarius ad Pandectas* 8 3 8 as authority in this respect, there is an abundance of case law in point (see, *eg*, *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd* 1987 2 SA 820 (A) 831C-D; see further Du Bois *et al Wille’s Principles of South African Law* (2007) 598; Van der Merwe and De Waal par 406 and authorities quoted in n 2).
- (5) The previous point gives rise to the question whether the appellants despoiled the respondent of its purported right of way when they closed the gravel road and simultaneously made an alternative route available (534A-B). After having

posed this question, the court immediately answered it in the negative (534B). Binns-Ward J then continued to substantiate this finding as follows:

- (a) The common-law rule in this regard is that once the dominant owner (such as the respondent) has exercised a choice of route, he is thereafter bound by the chosen route, whereas the owner of the servient tenement is entitled to vary the route over his property, provided that such a variation does not prejudice the dominant owner. (534B-C. It is suggested that the court's reference to *Wynne v Pope* 1960 3 SA 37 (C) 39F-G is not really apposite here, as that case dealt with a *via necessitatis* proper, which is not at stake in the current matter. However, as the further reference to *Rubidge v McCabe & Sons* 1913 AD 433 441 indicates, the legal position regarding normal servitudes and ways of necessity are essentially similar in this regard, which probably makes my observation regarding the *Wynne* case rather academic.) What therefore has to be determined is whether the change of route by the appellants had prejudiced the respondent.
- (b) The court thereupon declared that an objective test must be applied to determine whether such an alteration of route had been prejudicial to the dominant owner (534C. This was said on the strength of the well-known recent judgment of *Linvestment CC v Hammersley* (2008 3 SA 283 (SCA)), where an unassailable rigid common-law rule regarding servitudes was altered to serve the ends of justice and to conform to the standards of modern society.)
- (c) The way in which this objective test should be conducted is to have recourse to the facts of the case, in the context of the ambit of the applicant's (the present respondent's) purported right. After referring to the so-called "*Plascon-Evans* rule" (for which, see Harms par 395, 397 who refers to it as the "*Plascon-Evans* test"), which has to be applied to factual disputes arising in application proceedings for a final interdict, the court declared that if the facts were to show that the alternative route of access that the appellants had provided was unreasonable and prejudicial, the closure of the gravel road would have constituted a dispossession, but otherwise not (533C).
- (d) The court then proceeded to evaluate the appellants' conduct in respect of the closure of the gravel road and its substitution by an alternative route, by drawing an analogy between the facts of the current case and an instance where dispossession is caused by statutory authority, where such dispossession is not regarded as spoliation, provided that such act strictly complies with the statute concerned. The court concluded this exercise as follows:

"I can see no basis for distinguishing the position where the alleged act of dispossession is permitted by the *common law*. Where, as in the current case the right relied upon by the applicant [the respondent on appeal] for spoliatory relief has bound up in it by law a prerogative of the servient tenement holder to alter the route, the dominant tenement holder cannot be heard to say that it had been dispossessed [unreasonably] of the right it enjoys when the servient tenement holder exercises that prerogative within the bounds of the applicable law. In such a case cognisable dispossession would be established only if the applicant showed that the servient tenement holder acted outside the bounds of its liberty to change the route by stipulating an alternative that was prejudicial" (535E-F; italics provided).

Two brief comments on this quotation will suffice for present purposes: first, seeing that dispossession can indeed be reasonable and lawful, I have inserted the word “unreasonably” for the sake of clarity. Secondly, it is suggested that the word “prerogative” is misplaced in this context, as it is a term strictly applied in the field of constitutional law, where it denotes the discretionary authority of the executive branch of government. (In *Sachs v Dönges NO 1950 2 SA 265 (A) 275* Watermeyer CJ pointed out that it has an even more restricted meaning in that branch of law, in that it is usually limited to the customary and common-law powers and privileges of the executive.) It is suggested that the term “entitlement” (of which the Afrikaans equivalent is “inhoudsbevoegdheid”) in its ordinary meaning of denoting the content of a subjective right – *in casu*, the appellants’ right of ownership of the servient tenement – would have been more apposite.

- (e) The court then followed the next logical step, which is suggested by the last sentence of the quotation under (d) above, namely to determine whether the appellants’ conduct fell short of its legal entitlements as owners of the servient tenement for being unreasonable. After justifiably rejecting (in light of the content of par (d) directly preceding) the respondent’s argument that a route alteration by the servient owners could be achieved only on the strength of a court order (n 31; 535J-536J), the court examined the alternative route offered by the appellants. The only negative feature of that route was that it ran along lower ground, whereas the gravel road in question ran over higher ground. Apart from that, the alternative road was unquestionably in all respects a far better road (536A-D).
- (f) The final step was taken when the court came to the following conclusion on the basis of its finding referred to in (e) above:

“The appellants were merely exercising their prerogative as servient tenement holders under a servitude of *via simpliciter* when they closed the gravel road and contemporaneously made an adequate alternative route of access available for the respondent to exercise its alleged right of way.

It follows that the respondent failed to prove that there was an infringement of or derogation from the right upon which it apparently relied. The utility available to the respondent in terms of the right remained substantively unaffected. In the circumstances its application for spoliatory relief [by the court of first instance] should not have been granted because the respondent did not prove that it was dispossessed of the right” (536D-F).

#### 4 Conclusion

It is respectfully suggested that this judgment is fundamentally sound. Apart from the fact that the court rendered a useful restatement of the rules pertaining to the requirements for the granting of a spoliation order where the alleged despoiled *res* was a *res incorporalis* such as a servitude, held by way of *quasi*-possession, the way in which the judge applied the law to the facts should satisfy both the black-letter lawyer and the less technical, more socially inclined academic jurist. It is further suggested that the court’s insistence on an applicant’s identifying the basis of its *quasi*-possession for purposes of obtaining a spoliation order is to be preferred instead of merely requiring an applicant to rely on possession or *quasi*-possession

as such. If the latter were to be the case, one can even foresee the *precario tenens* applying for a spoliation order when the grantor of a *precarium* lawfully terminates his grant, or even the trespasser applying for the same remedy, when the land owner finally locks the gate through which the former gained unlawful entry to the latter's property. Surely, a moment's reflection will reveal that this is not the purpose for which the *mandament van spolie* was introduced into our law.

Having said that, and on re-reading the text, it is evident that Binns-Ward J had in fact given an immense amount of leeway to the respondent, taking into account how flawed its founding papers had been. One can safely assume that a modern English judge, or even an older South African judge, would summarily have rejected the application on the basis that the first requirement for the granting of a spoliation order could not be met (due to its inadequate formulation), namely to prove the element of *quasi*-possession on the applicant's part. The court's willingness to accept an extremely generous reading of the applicant's founding papers, and in the process condoning serious flaws, raises the uneasy feeling that the court's detailed exposition on the first two parts and of a substantial portion of the fourth part of the *ratio decidendi* (parts (a), (b) and (d) in terms of my classification in 3.1 above) was in fact "much ado about nothing". However, in the final analysis these parts do in fact constitute the court's *ratio decidendi*, and as such they lay an important basis for the solving of similar difficult situations in future.

It is also noteworthy that the outcome of this case can in the main be ascribed to the court's application of Van Leeuwen's "blokland" rule, and not the rules strictly pertaining to the granting of a *via necessitatis*, as the latter could from the outset not avail the respondent due to the lack of a previous court order establishing such way of necessity.

Finally, one can only speculate as to the reason why the respondent (the original applicant) pursued this issue so fervently, for even if the court would finally have found in its favour, in the process confirming the judgment of the court of first instance, such a finding and corresponding order would at most have constituted a Pyrrhic victory or, in strict legal parlance, a *brutum fulmen*, for the law is quite clear that the owners of the servient tenement (the appellants) would immediately have been able to apply successfully for a change of route in accordance with well-established principles of the law pertaining to real servitudes. Thus, even victory in the sphere of application for a spoliation order would simply have yielded the same result as that achieved by the granting of the order of the full court: ultimately the alternative route would be the route along which access to the landlocked property of the respondent would be gained.

Finally, it is suggested that this judgment be prescribed to students of property law as an illustration of how an apparently simple set of facts, involving seemingly easily applicable rules, can prove to be very complex and difficult to resolve. It can also serve as an example of an instance where it would have been wiser for a litigant such as the respondent (the original applicant) to have kept the broader picture in mind, instead of becoming fixated upon a course of action that could at most have brought mere temporary relief.

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