REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE №: 373/2023
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED

In the matter between: -

ARTHUR HENRY PICKWORTH N.O	**FIRST APPLICANT**
ERIKA PICKWORTH N.O.	**SECOND APPLICANT**
KATHRYN PICKWORTH N.O.	**THIRD APPLICANT**
ANDREW JONATHAN PICKWORTH N.O. (in their capacity as duly authorized trustees of the **OYSEKA FAMILY TRUST** with IT number 28[…])	**FOURTH APPLICANT**
ESTIENNE GERARD CHRISTIAN BRUERE	**FIFTH APPLICANT**
CHRIS COURTNEY – STONES	**SIXTH APPLICANT**

And

WILLEM JOHANNES JACOBSZ	**RESPONDENT**

JUDGMENT

PILLAY, AJ:

Introduction

[1] The parties come before Court by way of an urgent application. The applicant requires the Court to dispense with the normal requirements pertaining to the rules and formalities in respect of timelines in terms of rule 6(12) insofar as it pertains to urgency in respect of this application. The applicants have filed their founding affidavit in support of same. The application is opposed with the respondent filing his opposing affidavit. The applicant replied and the parties filed practise notes and heads of argument in respect of the said application. The applicants have sought the following orders in respect of this urgent application as follows;

[2] That the respondent be ordered to open and keep open the gate on portion 176 of the farm Pusela 5[…] T[…] district, Limpopo, which gate appears and is identified on the photograph attached as annexure “FA9” to the founding affidavit;

[3] That the Sheriff or his deputy be authorized and directed to open the gate, appearing and identified on the photograph attached as annexure “FA9” to the founding affidavit, with the assistance of the South African police services if so required, at the cost of the respondent in the event of the respondent failing to comply with the order set out in paragraph 2 supra within 24 hours this order being granted;

[4] That the respondent be ordered to pay the costs of this application on an attorney and client scale;

[5] Further and alternative relief.

Brief Background

[6] The parties to the proceedings, are residents on the farm Pusela 5[…]. A servitude of right of way (the servitude road) in favour of the general public was granted over portion 156 of the farm Pusela 5[…] (Portion 156) by the registered

owner thereof in terms of a notarial deed of servitude 3[…], executed on 10 December 1956. The notarial deed was registered in the Deeds office.

[7] This servitude road is admitted by the parties to be the source of this dispute. It is one of two roads that provide access to Portion 334. For purposes of this application and the issue in respect of prayers sought, the matter is contained to this servitude road.

[8] Portion 156 is made up of the following occupants be it businesses and or residents

a) James Marcellin Mitton, owner of Portion 172(a portion of 156)

b) Willem Johannes Jacobsz and his wife leased Portion 172 from James Mitton.

c) CJP 1063 Property (Pty)Ltd is the registered owner of Portions 176,177and 178 (portions of Portion 156)

d) Two Oaks Farming is the registered owner of Portion 325 of the Farm Pusela 555

e) The Juwil Trust (Willem Johannes Jacobsz and his wife are the trustees) is the registered owner of Portion 175(a portion of Portion 156).

[9] It is common cause that in 2016 the respondent erected a gate (the subject of this application) across the servitude road. It was locked with a chain and padlock. It would be opened at times. This gated restricted vehicular traffic to access the properties serviced by this servitude road. However, it allowed foot traffic as depicted on the photos.

[10] It is common cause that there is another spoliation application pending before this court under case number 7525/2021 involving another applicant. In June 2022 the applicant sought for this gate to be opened by the respondent in respect of the

servitude road for the benefit of the residents, employees and visitors. In response the applicants were offered a key to the lock on the gate. This was not going to be of assistance to everyone involved with the applicant's business and visitors resulting in the applicant persisting with the demand for the removal of the gate but without success.

[11] The various stakeholders had meetings concerning the opening of this gate so that access could be granted to the servitude road, but issues like security and alternatives like a motorised gate with remote access were discussed but without much success. In October 2022, the first applicants discovered the gate opened and access to this servitude road was obtained and used by vehicles accessing the various properties via this servitude road by the applicant, their staff and visitors

[12] In November 2022 a new bigger, stronger gate was installed some 50 meters before this gate, again restricting access to this road. An urgent application was sought and granted in the absence of the respondent by the High Court Polokwane under case number 12392/2022. The parties involved were the 1st to the 4th applicants and there were 7 respondents. The Court ordered on the 22 November 2022, that the respondents were to open and keep open the newly erected gate between Portions 175, 176 and 325 of the Farm Pusela 5[…] T[…]. The gate was identified in the attached photo. The new big gate was subsequently opened and the gate which is the subject of this application was consequently locked, placing the applicants in the same position as before with restricted access to the servitude road.

[13] There was further unsuccessful negotiations and ultimately this spoliation application was sought on an urgent basis, seeking that the Court order the respondent to open the gate and allowing the applicants unrestricted access to the servitude road.

[14] The respondent raised the following issues in response to the application;

1. The lack of urgency and if it exists that it was self created.

2. The fire break road being the Portion 334 road (2nd access road) which was the route that was used by the applicants and not this road.

3. The servitude road was always locked and that an indulgence was afforded the 1st applicant during the month of October 22nd and that from the 25th October 22 this gate was again locked.

4. That there was a necessity for security for the various occupiers and or owners residing or carring on business which is accessable via this road. The Respondent had made an offer for a key to the said lock on this gate to be made available to the 1st applicant for the 1st applicant's benefit.

5. That the applicants wanted to persist with this application only to avoid having traffic using the "fire break" alternative road over the 1st applicant property.

6. The allegation pertaining to the new gate being locked was denied by the respondent, but since the November Court order this gate is now open. Moreover it was suggested that said gate could be motorised and operated by remote control and with a key pad but this again was rejected by the applicants with the demand to keep this gate opened.

7. That the bonafide material dispute of fact could not be adjudicated on the papers and thus the application was doomed to fail.

8. That the applicant failed to join the other occupants/ residents ot this property and this non joinder was also fatal to the applicants securing the relief sought. This point was only raised in argument by the respondent.

[15] The respondent's answering affidavit consisted of approximately 219 pages, including a supplementary affidavit and the entire contents of the urgent application 7525/2021, the bulk of which was not required to answer to the allegations raised by the applicants

[16] The applicants motivated urgency in launching this spoliation application on the following grounds;

a) That a spoilation relief was manifestly urgent due to its nature.

b) That the applicants enjoyed free undisturbed use and enjoyment to this servitude road and was subsequently, deprived access to same.

c) That there is currently a Court order dated the 22 November 2022, directing that the new gate be opened and be kept open.

d) That the respondent was forewarned that this application would be sought if the respondent failed to open the current gate in issue.

The Legal principles

[17] Rule 6(12) allows for an application to be heard on an urgent basis. The applicant seeks that the Court dispense with the normal forms and services. The application is heard, based on the time frames set by the applicant and if the respondent fails to comply with same it can be accepted that the application is not opposed.

[18] The law on urgency is abundantly clear. Urgent applications must be brought in accordance with the provisions of rule 6(12) of the Uniform Rules of Court ("The Rules"), with due regard to the guidelines set out in cases such as ***Die Republikeinse Publikasies (Edms) Bpk vs Afrikaanse Pers Publikasies (Edms) Bpk***[1] as well as a well-known case of ***Luna Meubelvervaardigers (Edms) Bpk v Makin and Another***.[2]

[1] 1972(1) SA 773 (A) at para 782A - G.
[2] 1977(4) SA 135 (W), see further also Sikwe vs SA Mutual Fire and General Insurance 1977 (3) SA 438 (W) at 440G - 441A.

[19] The Court went and further stated that the procedure set out in Rule 6(12) is not simply there for the taking.[3] It confirmed the principle set out in a case of **East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and others** in which it was held:-

> "*The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial readdress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial readdress in the application in due course. The rules allow the court to come to the assistance of a litigant because of the latter, were to wait for the normal course laid down by the rules, it will not obtain substantial readdress.*
>
> *It is important to note that the rules require absence of substantial redress. This is not equivalent to irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in this regard."*[4]

[20] According to the applicants the matter is urgent. The applicants rely on the act of spoliation, by the respondent closing this gate, after the November order was granted, for the big gate to be kept open. The time provided to the respondent was sufficient to answer the application, file the relevant documents and be ready to argue the merits of the proceedings, which was heard on the 7 February 2023. That the current application is based on the right of undisturbed access to this servitude road specifically in October 2022. Moreover, the respondent disrupted their use and enjoyment by closing and locking the gate in question.

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[3] At para 7.
[4] (2012) JOL 28244 (GSJ) at para 6 and 7.

[21] The mandament van spolie is a possessory remedy. Spoliation is the wrongful deprivation of another's right of possession. Spoliation orders are aimed at ensuring that no man takes the law into his own hands. The Court accepts that an applicant who seeks a spoliation order, seeks final relief and generally such relief may be granted only if the allegations of fact made by the applicant which are admitted by the respondent, together with the allegations of fact made by the respondent, justify the granting of such relief.[5]

[22] In ***Ivanov v North West Gambling Board 2012 (6) SA 67 (SCA)*** at 75 B - E,

> *"the Supreme Court of appeal observed that an applicant upon proof of two requirements, is entitled to a mandament van spolie restoring the status quo ante. The court noted that first is proof that the applicant was in possession of the spoliated thing. In this regard, the cause for possession is irrelevant hence that is why possession by a thief is protected. The second requirement is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute. The onus rests on the applicant to prove these two requirements. Furthermore, when the proceedings are on affidavit the applicant must satisfy the court on the admitted or undisputed facts, by the same balance of probabilities required in every civil suit, of the facts necessary* for his success in the application."

[23] In opposing this application with specific reference to the issue of urgency the respondent referred the Court to various case law and practise directives of other High Court Divisions dealing specifically with, what needed to be established, for urgency to be addressed fully by the applicants. The respondent highlighted that there was an obligation on the applicant to set out sufficient detail so as to assist the Court to properly determine whether there is merit in this matter being brought on the basis of an urgent application. According to the respondent the application must fail as this was not accomplished by the applicant and that this matter was not urgent.

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[5] See *Kinnear and Others v Traviso (Pty) Ltd (A567/2007) [2008] ZA GPHC 389 (4 December 2008)*

[24] The issue of spoliation was also argued by the respondent in that the access to the servitude road was an indulgence to the 1st applicant especially as the 1st applicant's hired motor vehicle was unable to be driven on the Portion 334 road. Further that the applicant was not in any quazi possession of the servitude right over the said road and as such there was no spoliation as the 1st applicant was only afforded an indulgence by the respondent to the use of this road. He further argued that the applicant deliberately neglected the maintenance of the alternative road as he was aiming to close it and prevent traffic on his property.

[25] In argument it was highlighted that the applicants were under an obligation to join the other interested parties to this application as it materially affected their rights if an order is granted as sought since the consequence of the gate being opened would materially affect their rights as well.

[26] The Court requested further heads of argument from both parties concerning the order in November 22 in case number 12392/2022 wherein the 2nd new gate was ordered to be opened and kept open. Both parties argued that this order was having no bearing on this matter. The applicants argued that had the gate in question also been locked in November 22, it would have been included in that application, as a matter of common sense and logic. The respondent argued that the November 22 order supported the non – joinder argument in that the applicant was aware of the various parties involved and rather elected to only proceed against the respondent, which was prejudicial to the other parties. In response the applicant indicated that the only person involved in the locking of this gate, blocking the servitude road was the respondent and he was required to open that gate and restore the status quo ante.

[31] Considering this issue of non –joinder I had regard to the arguments raised by the parties and the various relevant case law. In ***Judicial Service Commission and Another v Cape Bar Council and another***[6] the Court held that:

[6] 2013 (1) SA 170 (SCA) at par [12]

"It has now become settled law that the joinder of a party is only required as a matter of necessity- as opposed to a matter of convenience- if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned…."

[32] In ***Mahlangu v Mahlangu and another***[7] the Court stated the following;

A court, including a court of appeal, is entitled mero motu to raise the question of non-joinder to safeguard the interests of third parties. It is, however, important to distinguish between necessary joinder, where the failure to join a party amounted to a non-joinder, on the one hand, and joinder as a matter of convenience, where the joinder of the party was permissible and would not give rise to misjoinder, on the other hand. In cases of joinder of necessity, a court could, even on appeal, mero motu raise the question of joinder to safeguard the interests of third parties and decline to hear a matter until such joinder had been effected or the court was satisfied that the third parties had consented to be bound by the judgment or waived their right to be joined.

[33] In as much as the applicants argue that the parties mentioned by the respondent would not be affected by the Court order as all the Court would be doing is returning the situation to the way it was prior to the respondent's act, I have to disagree with this submission as the applicant deemed it relevant to include all the parties that were to be affected by the November 22 application in that application. This was to ensure that everyone involved complied with the Court order.

[34] That Court order in essence prevented the restriction of access to the servitude road by that big sliding gate. The dispute of whether the gate in this matter was locked, or not, is not relevant at this stage for determination. From the facts it is accepted that this application was launched after the November 22 Court order and it was based on this act of spoliation involving the current gate in issue. The time frame concerning this act of spoliation occurred in the period October 22 to the time of instituting this urgent application.

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[7] See 2020 ZAMPMHC 5(14 May 2020)

[35] Considering the history of this matter and the fact that the applicants already identified the various parties who have a vested interest in the outcome of this application, to have excluded them, not only prejudices them but also exposes the Court order of this matter suffering the same fate as the November 22 order in that the affected parties were not afforded the opportunity to be heard in respect of the order sought, and thus, as a natural consequence, not required to comply with said order, were it to be granted as they were not ordered to comply with said order.

[36] Therefore, having regard to all the evidence placed before me I am satisfied that the applicants, amidst the circumstances of the gate in issue being closed by the respondent, were under the same obligation they were under, at the time of the launching of the November 22 application. The applicants involved those parties previously as the applicants appreciated that they would be impacted by the Court Order directly or indirectly and thus their presence at the proceedings were necessary. It is for this reason that the matter cannot be adjudicated without the other relevant parties being joined in respect of this matter.

[37] It is by normal course that costs follow the successful party, however in this matter without going into the merits, it was unnecessary that the respondent over burden the proceedings with evidence of another matter which is still *sub-judice* before the Court as well as practise directives of another High Court division. These documents merely served to overburden the proceedings and must be censured.

[37] In the result I make the following order:

1. The application is struck from the roll on the basis of non- joinder of the other relevant role players being the identified respondents as reflected in the November 22 case under case no 12392/2022.

2. No order as to Costs.

K L Pillay

Acting Judge of the High Court

Limpopo Division Polokwane

APPEARANCES:

HEARD ON:	7 FEBRUARY 2023
JUDGMENT DELIVERED ON:	7 MARCH 2023

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