IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 7934/2011

DATE: 21 APRIL 2011

In the matter between:

HERSCHEL ZETLER N.O.	1st Applicant
DENNIS LOUIS ZETLER N.O.	2nd Applicant
JEFFREY MARK ZETLER N.O.	3rd Applicant
JULIAN MARK GRUFT N.O.	4th Applicant
DENNIS LOUIS ZETLER	5th Applicant

and

MINISTER OF TRANSPORT AND PUBLIC WORKS, PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	1st Respondent
EXECUTIVE MANAGER: ROAD AND TRANSPORT MANAGEMENT, PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	2nd Respondent
MUNICIPAL MANAGER: WINELANDS DISTRICT MUNICIPALITY	3rd Respondent
THE MINISTER OF LAW AND ORDER	4th Respondent

J U D G M E N T

FOURIE, J:

This is a spoliation application which is opposed by the first and second respondents. The parties are agreed that the matter requires the urgent attention of the court and should be

disposed of without delay. I have come to a firm conclusion as to the order which I intend to make and I intend furnishing only brief reasons for such order. I, therefore, accept that any person who is interested in this judgment is fully conversant with the allegations of the parties set out in their respective affidavits.

Applicants are the owners of a farm in the Stellenbosch district, on which they conduct farming operations. This includes a farm stall business which has become a popular tourist destination in the area. One point of access to the farm and in particular to the farm stall business, leads off the R44 arterial road between Stellenbosch and Somerset West. It is not in dispute that this point of access has been used for many years and has provided access to the farm stall business, in particular, since the 1960's.

It also appears to be common cause that on the morning of 8 April 2011 and on the instructions of the third respondent, a few large digger-loaders and five tipper trucks, accompanied by a number of traffic officers and police vehicles, arrived at this access point and commenced, without the applicants' consent, to dig up the access road and stormwater pipes beneath the access road. I should add that the applicants had constructed this access road many years before by using their

own materials, gravel, tar and pipes.

It further appears that, after some intervention by applicants on 8 April 2011, this digging up process was halted, whereafter applicants restored the access point by relaying the pipes, filling up the ditch which had been dug and by reinstating the access road to the farm. However, on 11 April 2011, the digging up was recommenced, apparently by employees of second and third respondents, with the assistance of armed police officers, resulting in the applicants' said access road to the farm being dug up again. This prompted applicants to bring the present application.

At the outset it is necessary to emphasise the trite principles which apply in a spoliation application. An applicant has, first, to prove that it was in peaceful and undisturbed possession of movable or immovable property. What is required in this regard is that the applicant must prove that it had factual control of the property, coupled with the intention to derive some benefit from such possession. Secondly, the applicant has to prove that it was unlawfully deprived of such possession. This requires proof that the disturbance of possession was without the consent and against the will of the possessor. See in general The Law of South Africa, Volume 27, 1st Reissue, paragraphs 263-269.

In George Municipality v Vena & Another 1989 (2) SA 263 (A) at 271-2, the following was said regarding the principles of the law of spoliation:

> "The clear principle of our law is that ordinarily speaking, persons are not entitled to take the law into their own hands to enforce their rights. There is a legal process by which the enforcement of rights is carried out. Normally speaking, it is carried out as a result of an order of court being put into effect through the proper officers of the law. In most civilised countries there exists the same principle that no person enforces his legal rights himself. For very obvious reasons that is so; if it were not so, breaches of the peace, for instance, would be very common."

In the instant matter the respondents raised two main grounds upon which they contend that the applicants have failed to make out a case for the granting of the spoliation order. First, they submit that the applicants have failed to establish that they were in possession of this access point, as it is situated entirely within the road reserve which falls under the jurisdiction of the Western Cape Department of Transport &

Public Works. Moreover, respondents submit that the applicants have failed to establish that they have been unlawfully deprived of a right of access to their property, where, as is common cause, there are two other points of access to their farm.

As far as the latter submission is concerned, I believe that it fails to take account of the fact that we are here not concerned with the deprivation of access to the farm *per se*, but with an alleged spoliation. What applicants say, is that their possession of this access point has been disturbed by respondents without due process of law. The fact that there may be other points of access to applicants' farm, is not the issue. The existence of such other points of access cannot constitute a bar to applicants obtaining spoliatory relief with regard to this specific point of access. See Nienaber v Stuckey 1946 AD 1049.

Further, the fact that the access has been constructed within the road reserve, does also not constitute a bar to spoliation proceedings. The question simply is whether applicants had factual control of the access point, coupled with the intention to derive some benefit from such possession. Whether such possession was legal or not, is not a relevant issue in spoliation proceedings. The reason is that the remedy is

aimed at the restoration of possession in circumstances where the possessor had been deprived of his possession without due legal process. It is, therefore, often said that even a thief can bring a spoliation application if he or she has been unlawfully deprived of his or her possession of the stolen property. I, therefore, find that the applicants have discharged the onus of showing that they were in peaceful and undisturbed possession of this access point.

Secondly, respondents contend that applicants were not unlawfully deprived of possession of this access point, as respondents were lawfully entitled to act as they did, by virtue of the provisions of section 18(1)(a) of the Cape Roads Ordinance No. 19 of 1976. The relevant portion of section 18 reads as follows:

> "Any road authority may, by written order served on the owner of land abutting on any public road in respect of any existing access to such land, in the interests of road safety, close such access in such manner, to such extent and either permanently or for such period as may be specified in such notice."

What respondents have to show is, first, that the prescribed notice in terms of section 18(1)(a) had been given and,

second, that the giving of such notice to applicants, entitled respondents thereafter to deprive applicants of their possession of the access point without recourse to due process of law.

It has been recognised by our courts that a statute or other legislation such as a Provincial Ordinance may confer a right to act without due process of law. However, such a right is one which, obviously, must be conferred in clear language and the party relying on it bears the onus of showing that its actions were covered by the legislation relied on. See George Municipality v Vena & Another supra, and Impala Water Users Association v Lourens N.O. 2008 (2) SA 495 (SCA). In the Vena-case at 272, it was emphasised that such legislation would have to be narrowly construed and construed in a way which gives rise to the least deprivation of the citizen's rights. In my view, section 18(1)(a), on a proper interpretation thereof, does not necessarily confer the right upon respondents to deprive applicants of the possession of the access point without due process of law.

A reasonable construction thereof, in my opinion, is that the legislature contemplated a written order to be served on the relevant owner of the abutting land, thereby informing him or her of the closing of the access to or from the public road, as

well as the manner and extent of such closure. However, if the owner of the abutting land would thereafter still utilise such access, the relevant authority would be entitled to enforce its order of closure by means of appropriate legal means, i.e. by obtaining a court order against the recalcitrant landowner. I do not believe that, in this instance, the legislature intended to allow respondents, on compliance with section 18(1)(a), to take the law into their own hands in the manner that they did. I should mention that, in the instant matter, the wording of section 18(1)(a) is, for example, far removed from the wording of the statute in the Vena case, which specifically provided that:

> "The owner of land may, without an order of court, demolish any building or structure erected on the land without his consent."

Further, I am in any event not persuaded that the written notice on which respondents rely for compliance with section 18(1)(a) of the Ordinance, constitutes a proper notice. This is a letter dated 25 March 2011, addressed to applicants' attorneys by the Western Cape Department of Transport & Public Works. Firstly, it expressly refers to a condition imposed in 2002, when applicants apparently applied for the rezoning of their property to conduct the business of a wine

centre, to the effect that:

> "The existing access off the R44 be removed and permanently closed."

This is a reference to the access which forms the subject of the present application. What is clear, is that the letter of 25 March 2011 states that the Department is to close this access as the existence thereof is in breach of the condition imposed in 2002. Section 18(1)(a) of the Ordinance authorises closure of access to or from a public road "in the interests of road safety". The reasonable inference, in view of the content of this letter, is that the necessary prerequisite for the exercising of the power to close the access, namely "the interests of road safety", was not considered when the letter was addressed to applicants' attorneys. Secondly, this letter does not, in my view, constitute a written order closing the relevant access point, as required in terms of section 18(1)(a) of the Ordinance. The highwatermark thereof is to be found in paragraph 4, which states that:

> "This department will now take the necessary steps to close the access permanently."

This conveys that steps are to be taken in the future to close

the access and not, as required by section 18(1)(a), that this letter serves as an order that the access is, in fact, closed.

I, therefore, conclude that the applicants have also discharged the onus of proving that they were unlawfully deprived of their possession of the access point. In view of my findings, it follows that the applicants are entitled to the relief sought. In the result an order is made in terms of the draft handed up by Mr Smit as amended by me and marked X.

FOURIE, J