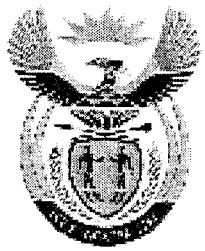


IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A46/2011

In the matter between:

KENNETH WILLIAM MOSS	1st Appellant
SANDRA MOSS	2nd Appellant

and

KEVIN PAXTON	Respondent

JUDGMENT : 7 SEPTEMBER 2011

TRAVERSO, DJP :

[1] This is an appeal against the decision made in the Somerset West Magistrate's Court.

[2] The facts giving rise to this case are simple and by and large common cause. The appellants are the owners of erf 146, Paarl Valley, Somerset-West, which is adjacent to erf 145, being the property of the respondent. Erf 146 is the registered holder of a servitude over part of erf 145. The servitude is recorded as follows on the title Deed:

> ***"G. SUBECT FURTHER to a servitude area 123 (ONE HUNDRED AND TWENTY THREE) square metres in extent, established for recreational use only and on which no buildings may be erected, as more fully depicted by the figures ABCDEFGH on Servitude diagram S.G.No 10013/1996 annexed hereto in favour of Erf 146 Parel Vallei, Measuring 1001 square metres, and Held by Deed of Transfer No T 32278/1992;***
>
> ***In addition it shall be a term of the servitude that:-***
>
> ***The owner of Erf 146 Parel Vallei shall be responsible for the payment of the rates in respect of the servitude area and shall at***

> ***all times maintain the water feature and the garden growing on the servitude area not allowing any vegetation to obscure or limit the view enjoyed by the owner of Erf 145 Parel Vallei over the servitude area and that the owner of Erf 145 Parel Vallei and her successors in title shall*** (have) ***unrestricted access to the servitude area for the purpose of access to and maintenance of the walls and windows of the building erected on Erf 145 Parel Vallei."***

[3] The area over which the servitude is registered is used as a garden which forms a unity with the garden area of erf 145 as well as the water feature thereon. From the registered servitude it becomes apparent that the owners of erf 146 are responsible for the maintenance of the garden and the water feature, and for the payment of rates and taxes in respect of the servitude area. The owner of erf 145 has unrestricted access to the property, but for the limited purpose of maintaining the walls and the windows erected on erf 145.

[4] When the appellants bought erf 146 during 1997, the boundary lines between the servitude area and erf 145 comprised of a concrete wall and a brick wall ("*the passage*

wall"). The garden area of erf 146 together with the area over which the servitude is registered comprised a private garden enclosed by the said walls. It is common cause that during October 2009 the respondent forcefully and without permission removed both the concrete wall and the passage wall. It is common cause that since the appellants became the owners of erf 146 during 1997, until the removal of the walls, the appellants exercised private, peaceful and undisturbed use of the garden area situated on the servitude area of erf 145. It is equally common cause that by removing the said walls the respondent destroyed the *de facto* peaceful and private use of the area in question. The removal of these walls therefore effectively destroyed the rights which the appellants enjoyed in terms of the servitude.

[5] The predecessor in title of the respondent's property in this appeal was a certain Mary Oxley. She presently resides in Australia. She filed an affidavit in support of this application, wherein she made the following allegations which I will quote in

full in order to demonstrate more clearly what the true issues in this case are:

"3. *I confirm that I purchased the immovable property situated at 63 Adam Tas Road (Erf 145), Somerset-West during 1997. As part of the purchase agreement between the sellers, Mr and Mrs Mann and myself, I was required to accept the existence of a servitude, which had already been registered over a section of Erf 145.*

4. *It was explained to me that the servitude was created because the property situated at 61 Adam Tad Road (erf 146), Somerset-West, had an established garden and water feature which formed part of the garden close to the swimming pool. I agreed to the erection of the boundary wall alongside the swimming pool on Erf 145 connecting to my house to give effect to the servitude. This wall would give privacy to both parties and ensure the private use of the servitude area by the owners of Erf 146 by maintaining the unity of the established garden and water feature.*

5. *There was also an existing wall connecting the two properties, which formed part of the original connecting stairway between the houses. This wall remained to give privacy and security to both properties. A bedroom window of my house on the south side overlooked the garden on Erf 146 and I agreed to have frosted glass for privacy.*

6. *I accepted the above situation but added, on legal advice, certain provisions to the servitude agreement including that access would be granted by the owner of Erf 146 when it was necessary to inspect or maintain the outside wall and window of the house*

on Erf 145, which was situated on the south side and within the servitude area.

7. ***Mr and Mrs Moss bought Erf 146 later during 1997 and we were neighbours until 2005 when I sold Erf 145. During all those years we never had any problems in regard to the peaceful and undisturbed private use of the garden servitude area by Mr and Mrs Moss."***

[6] It is trite that in construing a servitude regard must be had, firstly, to the meaning of the words themselves and then to the circumstances that prevailed at the time that the servitude was granted. Insofar as there may be any uncertainty about the terms of the servitude under consideration, (which I do not believe there is) regard may therefore be had to the facts that appear from Mrs. Moss' affidavit, as corroborated by the affidavits of the appellants. I hasten to add that the only uncertainty that could possibly arise from the wording of the registered servitude is whether it entitled the appellants to use the area for <u>private</u> recreational use.

[7] In a letter from the Chief Executive Officer of the Helderberg Municipality, in terms whereof the approval for the registration of the servitude is recorded, it is stated that the servitude area is for purposes of private recreational use. The word "*private*" does not appear in the registered servitude. The respondent contends that, accordingly, the appellants were not entitled to the private use of this garden. This submission is without substance. This is a spoliation application and a Court therefore does not have to decide the appellants' entitlement. It is common cause that *de facto* the appellants enjoyed the private use of the garden. In addition there is no *bona fide* dispute between the parties that the walls were erected and/or retained with a view to giving the owners of erf 146 privacy in the garden. It is clear on the facts that the appellants have been dispossessed of their private, peaceful and undisturbed use, and that is what they want restored. (See, *inter alia,* Cliffside Flats (Pty) Ltd v. Bantry Rocks (Pty) Ltd, 1944 AD 106.)

[8] The respondent chose not to deal with Mrs. Moss' affidavit. Instead the allegations contained therein were either met with a bald denial, or with an allegation that they are irrelevant to these proceedings. There is, in my view, no *bona* fide dispute of fact in this regard. For the reasons already stated, the allegations are not irrelevant, and this submission is accordingly without foundation.

[9] The requirements necessary for a party to obtain a spoliation order are trite, and I do not believe that it warrants any further discussion herein.

[10] The respondent in this matter raised various defences, namely:

10.1 That appellants did not prove that they were entitled to a *mandament van spolie* because they failed to show that they were unlawfully deprived of the alleged *quasi* possession;

10.2 That because it was common cause that the walls had been demolished and destroyed, possession could not be restored because the *mandament,* being a possessory remedy, was not available to reconstituted equivalence;

10.3 That the appellants did not show that the Magistrate's Court had jurisdiction.

[11] I need not repeat what I have stated above. In my view the appellants demonstrated clearly that they have been dispossessed of their peaceful, private and undisturbed possession of their use of the garden and that this was brought about by the demolition of the walls.

[12] As I understand the appellants' case, it is not that they ask for the exact walls to be re-erected. Clearly such an order would, in law, be untenable. They are asking the respondent to

put up structures which would result in their private, peaceful and undisturbed possession of the garden (which includes the servitude area) to be restored.

[13] Much was made of the fact that the walls were not situated on the servitude area. It was submitted that accordingly the appellants could not have enjoyed *quasi* possession of the walls.

[14] This argument ties in with the one that because the walls have been demolished, the appellants are not entitled to a spoliation order because the respondent cannot restore the possession of the same walls, and that, in any event the respondent was entitled to demolish the walls because they were not <u>on</u> the servitude area.

[15] These submissions appear to be based on the notion that a spoliation order can only be granted where the possession has passed to the spoliator. But this point of view was

jettisoned by the Supreme Court of Appeal as far back as 1990, where it was once again emphasised that the rationale of the *mandament* is that no man is allowed to take the law into his own hands. (See Administrator, Cape, & Another v. Ntshwaqela & Others, 1990(1) SA 705 at 717 – 721.)

[16] This case is not about the walls *per se*, but about the applicant's *quasi* possession of the servitude. This can only be restored if the respondent is ordered to erect walls which would restore the status *quo ante* in respect of the appellants' right of private, peaceful and undisturbed possession of the servitude.

[17] In my view the Court a *quo* erred in finding that the appellants were not unlawfully dispossessed of their *quasi* possession of the servitude. Similarly, the Magistrate erred in finding that because the walls had been demolished it will be impossible to restore possession thereof. The fallacy of this finding is demonstrated by what I have stated above and does not bear repetition. As regards impossibility in the context of

the *mandament van spolie,* see Administrator, Cape, & Another v. Ntshwaqela & Others, *(supra)* at 720 H - I :

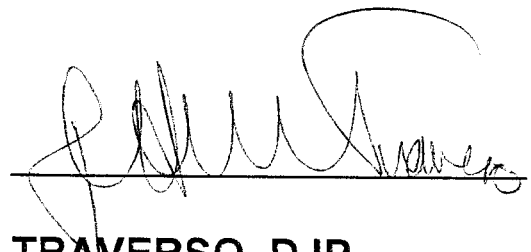
> ***"An order to restore possession of a movable is generally performed by the physical handing over of the article. In the case of an order to restore possession of an immovable, on the other hand, there can in the nature of things be no physical handing over. Such an order may be mandatory in part, as where it requires the spoliator to vacate the property, or to procure that it be vacated, or to hand over the keys to premises, or to remove fences or other obstacles or to perform other acts requisite for the restitution of the status quo."***

[18] I do not believe that the contention that the Magistrate's Court did not have jurisdiction, was seriously made. I therefore decline to deal with it.

[19] In the circumstances the appeal succeeds with costs. The Magistrate's order is set aside and the following order is made:

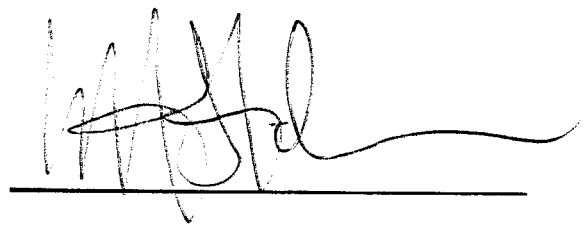
(a) The respondent is directed to restore the appellants' peaceful, undisturbed and private possession of the garden, including the servitude area by erecting walls similar to those which previously existed on lines **ax** and **dy** respectively on Plan C 2625/1;

(b) Respondent is ordered to pay the costs of this application.



TRAVERSO, DJP

I agree:



VAN STADEN, AJ