REPORTABLE

Republic of South Africa

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

Case No: A 488/2012

Before: The Hon. Mr Justice Yekiso
The Hon. Mr Justice Binns-Ward
The Hon. Ms Acting Justice Savage

Date of hearing: 24 July 2013
Date of judgment: 8 August 2013

In the matter between:

WERNER RUDOLPH VAN RHYN N.O. First Appellant
HELENA CATHARINA VAN RHYN N.O. Second Appellant
IBRAHIM MIA N.O. Third Appellant
(in their capacity as trustees of The Waterfall Trust)

and

FLEURBAIX FARM (PTY) LIMITED Respondent

Mandament van spolie *– alleged spoliation of a right of way over existing route in circumstances where alternative route provided – necessity for applicant to allege nature of the right concerned. Where right of way is a via simpliciter, closure of an existing route and its replacement by the servient tenement holder with an adequate and non-prejudicial alternative route does not amount to unlawful dispossession of the dominant tenement holder's right of way.*
Mandament van spolie *– right of way – quasi-possession. Use of established route of right of way does not in general equate to physical possession by the right holder of the road concerned. Earlier judgments suggesting otherwise distinguished or not followed.*

JUDGMENT

BINNS-WARD J:

[1] The appellants are the trustees of The Waterfall Trust. In that capacity they are the registered owners of Portion 6 of the farm Fleurbaai No. 1040, Stellenbosch. They have come on appeal from a judgment at first instance directing them '*to restore to* [the respondent] *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 aerial photograph-map attached and marked "A"*'.[1] The appeal is with the leave of the learned judge at first instance.

[2] The facts of the case are simple and not materially in dispute.

[3] The properties owned by the appellants and the respondent, respectively, comprise of adjoining subdivisions of Farm 1040 Stellenbosch. The parties acquired the properties from a company which had held both land units in common ownership. Access to both properties has been exercised via an extension of a nearby public road in a suburb of Stellenbosch (Van Rheede Road). The extension road runs over private land and is the subject of a servitude of right of way registered in favour of the property of the appellants, as well as that of the respondent. At the time that the parties acquired their respective properties from the common predecessor in title (in December 2011 in the case of the appellants, and six weeks later, at the end of January 2012, in the case of the respondent) a gravel road ran across the appellants' property from the point at which the aforementioned extension road transected the eastern boundary of the property to a point on its western border with the respondent's property. The route taken by that road was that marked by a red and blue line on the aerial photograph-map incorporated in the order made by the court *a quo*. The respondent's property is landlocked in the sense that it has no direct access to a public road, and, in order to exercise its aforementioned registered servitutal right of way to Van Rheede Road, the respondent would require access over the appellants' property.

[4] At the time of the proceedings at first instance the respondent company's property was undeveloped land. There was an intention, however, for a house to be built on the property to be occupied by one of the company's directors. All three of

[1] I quote from the order, which followed faithfully the wording of paragraph (b) of the notice of motion.

the respondent's directors resided in Stellenbosch and they regularly ('once or twice a week') used to jog along the road over the appellant's property for recreation and exercise. One of them also used to use the road when coming to the respondent's property in connection with the planning of the house to be built there.

[5] Early in 2012 (in fact on the very day that the respondent company took transfer of its property) the appellants caused one of the respondent's directors to be advised that they would be closing the gravel road across their property so as to enable, amongst other things, the area between the main house on the property and a nearby dam to be landscaped as part of a garden extension. The respondent was advised that an alternative access road contiguous to the Eerste River along the northern boundary of the appellants' property would be made available. The appellants thereafter constructed the alternative access road at a cost of nearly R3 million. Its availability coincided more or less with the closure of the gravel road.

[6] The remedy which the respondent claimed in its application for anti-spoliatory relief (a *mandament van spolie*) was on its face consistent with what might have been expected had it been asserting a defined right of servitutal access. The respondent's founding papers, however, conceded that it did not have a defined servitutal right of access over the appellants' property along the route of the original access road. The respondent relied in its application for spoliatory relief only on the disturbance of what it contended was its right of access via the established route. That this reflects a correct reading of the respondent's case was confirmed by the respondent's counsel during argument at the hearing of the appeal.

[7] The *mandament van spolie* is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status *ante quo*, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue;[2] peaceful and undisturbed possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for

[2] Cf. e.g. *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC), at para 23-24, citing *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at para 21; *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 511 I-512B.

a *mandament van spolie* has to show.[3] (Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor.[4]) The underlying principle is expressed in the maxim '*spoliatus ante omnia restituendus est*'. The fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help.[5] It is available both in respect of the dispossession of corporeal property and incorporeal property. 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.[6] 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.

[8] It follows that in a case in which the applicant for anti-spoliatory relief seeks restoration of a right of use, the nature of the alleged right upon which the use is founded must be identifiable on the papers because it is the subject matter of the alleged dispossession. This is not to suggest that a label must be provided; it is sufficient if the nature of the right involved may be inferred from the factual allegations. 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. This necessarily includes identifying what it is, whether it be corporeal or incorporeal, that was possessed by the applicant; for in order to show that one has been deprived of possession one has to be able to show what it is that one has been despoiled of. Thus where an interference with the exercise of a servitude of right of way is concerned, the applicant must allege the existence of the servitude and the manner in which its exercise has been frustrated by the respondent.

[9] In *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A), [1989] 1 All SA 416, for example, the applicant municipality alleged the existence of a servitude and its exercise over many years as the bases for contending that the

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[3] *Bon Quelle* supra, at 513E-G; *Nienaber v Stuckey* 1946 AD 1049 at 1053.
[4] Joubert et al (ed) *The Law of South Africa* Second Edition vol. 11, para 434.
[5] See e.g. *Mans v Loxton* 1948 (1) SA 966 (C), at 975-977.
[6] See *Bon Quelle* supra, at 514-5.

respondent's summary termination of the water flow from the spring on its land to the municipality's reservoir had dispossessed it unlawfully of a utility of which it had been in peaceful and undisturbed possession. The respondent disputed the existence of the alleged servitutal right, but, applying the *ante omnia* principle described earlier, the Court declined to engage with the merits of that contest. The Appellate Division determined that the municipality was entitled *ante omnia* to have the status *ante quo* restored on the assumption that the municipality did indeed have a servitutal right to the water supply. 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.[7] 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 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.[8]

[10] In *First Rand Ltd. t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA); [2007] 1 All SA 436, at para 13, the following basis for the need for the characterisation of the right in an application for a *mandament van*

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[7] Cf. *Plaatjie and Another v Olivier NO and Others* 1993 (2) SA 156 (O) (bearing in mind, having regard to the peculiar facts of the case – which concerned an application for the restoration of a water supply to the residents of an informal settlement - that the litigation was conducted and decided before the provision under the current constitutional dispensation of a basic right to sufficient water and the imposition of a duty on the state to implement measures directed at achieving the realisation of the right).

[8] Cf. the remarks of Thirion J in *Zulu v Minister of Works, KwaZulu and Others* 1992 (1) SA 181 (D), at 187H-188C, referred to with approval in *First Rand Ltd. t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA), at para 12, as follows: '*The mandement van spolie is available for the restoration of quasi-possessio of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the status quo ante and not the determination of the existence of the right. The quasi-possessio consists in the actual exercise of an alleged right or as formulated in Zulu v Minister of Works, Kwazulu, and Others in 'die daadwerklike uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word'*. 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) (underlining supplied for emphasis) if one does not know what such right is.

spolie was stated: '*The **mandement van spolie** does not have a 'catch-all function' to protect the **quasi possessio** of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the **mandement** is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of **quasi possessio** of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its **quasi possessio** is deserving of protection by the **mandement***' (footnotes omitted). What I have sought to suggest, by way of addition to what was held in *Scholtz*, is that the 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. Compare, for example, the exercise undertaken by PC Combrink J (McCall and Theron JJ concurring) in *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N) at 642D-645E,[9] where the court examined the juristic nature of the rights of a holder of shares in a company in order to determine whether the expungement of its name from the share register constituted dispossession for the purpose of being able to obtain relief in terms of the *mandament van spolie*. This is an incident of the requirements that the *spoliatus* must prove 'possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted'.[10]

[11] As mentioned, in the current matter the respondent did not rely on a defined or registered right of way.[11] So what was the nature of the right upon which the allegation of dispossession was founded? 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 respondent's property, and the need for a connection between it and the

[9] Referred to in note 14 of the Supreme Court of Appeal's judgment in *First Rand Ltd. t/a Rand Merchant Bank and Another v Scholtz NO and Others* supra.
[10] *Yeko v Qana* 1973 (4) SA 735 (A), at 739G-H.
[11] See para [6], above.

aforementioned servitutal right of way over a third party's property from the end of Van Rheede Street. 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.

[12] The characterisation is material in the current matter because, unlike the position in some of the cases cited by the respondent's counsel, like *Willowvale Estates CC and Another v Bryanmore Estates Ltd* 1990 (3) SA 954 (W) and *Van Wyk v Kleynhans* 1969 (1) SA 221 (GW), the alleged dispossession did not amount to a 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. The respondent thus enjoyed uninterrupted access across the appellants' land. Depending on the nature of the servitude, if it were a *via simpliciter* for example, a change of route by the servient tenement holder might not derogate from the right of way involved. Before turning to consider the point it is convenient at this stage to distinguish some of the other cases on which the respondent's counsel relied to argue that a spoliation had been proved.

[13] Counsel referred to *Knox and Another v Second Lifestyle Properties (Pty) Ltd and Another* [2012] ZAGPPHC 223 (11 October 2012)[12]. In *Knox* the Court gave no consideration to the content of the right upon which the applicant for spoliatory relief purported to rely and appears instead to have treated the use by the applicant of the road in issue as having been equivalent to its physical possession.[13] [14] With respect,

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[12] The judgment is accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAGPPHC/2012/223.html .

[13] This much appears especially at para 20-21 of the judgment, where Mothle J stated:

> '*It is trite that in an application for spoliation, the applicants need to show only two grounds namely:*
> *20.1 That they were in peaceful and undisturbed possession of the thing - or in this case, the road; and*
> *20.2 That they have been unlawfully deprived of that possession. See in this regard Yeko v Qana 1973 SA 735A.*
> *[21] Once an applicant establishes these two grounds, he is entitled to relief in terms of mandament van spolie. The use of an alternative route has no relevance to the exercise of peaceful and undisturbed possession* [of] *the thing. Further, it is not a defence to the unlawful deprivation of the thing possessed.*'

(In *Zulu v Minister of Works, KwaZulu and Others* supra, at190 D-F, the view was expressed that a holder of a servitude of right does have physical possession of the road used for that purpose to the

that seems to me to involve rather strained reasoning. It is more realistic to regard the use of the road to exercise access merely as the manifestation of the right of way, that is as indicative of quasi-possession of the right, rather than as a manifestation of physical possession of the road. In contrast to the position in *Knox*, in the current case the appellants pertinently raised the respondent's failure to allege a cognisable 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.

[14] This case is also distinguishable on the facts from *Nienaber v Stuckey* 1946 AD 1049, on which the respondent's counsel sought to rely to support the respondent's claim that it had been despoiled by virtue of having been deprived of the use of the existing route of access irrespective of the provision of alternative access. In that matter the applicant for spoliatory relief relied on the locking of a gate that provided access directly from his land to an adjoining piece of land on the respondent's property, which he claimed to have leased for crop planting purposes. The spoliator in *Nienaber* pointed out that the gate in question was not the only means of access to the land in issue and sought on that basis to contend that the applicant had not been deprived of possession *of the land* by the act of the locking of the gate, which was the manifestation of despoilment relied upon by the applicant.

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extent of his use of it. That observation was made in the context of an articulation by Thirion J of the need to limit the availability of the *mandament van spolie* in respect of the exercise of rights if the remedy is not to be extended 'beyond its legitimate field of application and usefulness' -see p. 188H-I. *Zulu* did not concern an alleged despoilment of a right of way, and the learned judge had no cause to consider what the position as to spoliation would be in regard to the alteration by the servient tenement holder of the route of a right of way over his property. The equation of the exercise of a servitutal right of way with physical possession of the road used for that purpose was also evident in the unreported judgment in *Koch and Others v Backer* [2010] ZAGPPHC 245 (24 December 2010) (accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAGPPHC/2010/245.html), which was another judgment on which the respondent relied. I in any event respectfully disagree with the characterisation of the exercise of a servitutal right of way as amounting *pro tanto* to physical possession of the road by which it is exercised. That view is inconsistent with the view expressed in *Bon Quelle* supra, at 514H - I, and in *First Rand Ltd. t/a Rand Merchant Bank and Another v Scholtz NO and Others* supra, at para 13, that quasi-possession of a right is demonstrated by conduct which evidences the use of the right. It seems to me, with respect, that Thirion J's approach ignores the conceptual difference between possession and quasi-possession, with a resultant confusion as to what it is that is held in possession when a right is concerned.)

[14] The judgment in *Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others* 2013 (1) SA 239 (KZD), to which the respondent's counsel referred extensively in argument, also concerned an application to restore physical possession of immovable property. The applicant in that matter contended that it had occupied a courtyard area in terms of a special condition of its lease with the respondent. It proved that it had in any event physically occupied the space for 12 years, having partly walled off the open end of the courtyard and used it as an outdoor extension of its restaurant with tables and umbrellas. See the judgment, especially at para 5, 6, 17 and 18.

Greenberg JA rejected this contention, observing that using the other gate would require the applicant to travel a distance of 'approximately 1¼ miles from his homestead, and that its use by him would necessitate his travelling about 350 yards over respondent's lands to the land in issue, whereas the gate in question leads directly from appellant's farm to the land in dispute'.[15] The property subject of the alleged spoliation in *Nienaber*'s case was the ploughing land that was occupied in terms of the alleged lease, not the right of access thereto, nor indeed, a servitude of right of way. It is clear on a proper reading of the judgment that the court regarded access through the locked gate as an incident of the applicant's physical possession of the land. 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.

[15] It is time to revert to the question of the nature of the right of way that the respondent purports to enjoy over the appellants' property. The averments in the respondent's founding papers were construed by the appellants' counsel as having amounted – if they were capable of being construed to have characterised any right at all - to an allegation that the respondent had a right of access over the appellants' property as a *via necessitatis* or way of necessity. The appellants argued that a way of necessity is established only when a court makes an appropriate order, which it will do only after the party requiring the right of way has proved that such will provide the only reasonably sufficient means of gaining access to the landlocked property, and not merely a convenient means of doing so.[16] In this respect the appellants' counsel laid emphasis on the exposition by Jansen JA in *Van Rensburg v Coetzee* 1979 (4) SA 655 (A), at 671D: *'…dat sonder 'n hofbevel dié aanspraak* [dws 'n aanspraak op 'n noodweg] *nie registrasie van 'n reg van noodweg tov 'n ander se grond moontlik maak nie; en, verder, dat alvorens sodanige bevel verkry is, betreding van die ander se grond skynbaar onregmatig sal wees. (Vgl* <u>*Neilson v Mahoud*</u> *1925 EDL 26 te*

[15] *Nienaber v Stucky* 1946 AD 1049, at 1059.
[16] Cf. e.g. *Aventura Ltd v Jackson NO and others* 2007 (5) SA 497 (SCA). at para 8.

34.)'[17] and contended that in the absence of any allegation of a pertinent court order the applicant's founding papers fell short of establishing - even only *prima facie* – quasi-possession of a cognisable right entitling it to access over the appellant's property along in the indicated route by means of a way of necessity.

[16] The appellants' counsel argued that although the respondent company's founding papers might arguably have described that it had an 'expectation' or 'claim'[18] to a right of way of necessity over the appellants' property, they were nevertheless lacking the required allegations to establish a purportedly cognisable right to use the gravel road on that basis. They submitted that the most that the respondent might have been entitled to was an interim interdict allowing it to traverse the appellants' property pending the determination of a claim for a servitude of right of way of necessity. In such a context, assuming it were able to make out a sufficient case, all that the respondent would have been entitled to by way of interim interdictory relief would have been a *via necessitate simpliciter*, that is an unspecified right of way, as distinct from one defined in the order to follow a particular route (cf. *Van Rensburg v Coetzee* supra, at 668F-G and the other authorities cited there). 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 respondent 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.

[17] On a more generous reading of the founding papers it might, however, be discerned that the company was relying on a right of way over the appellants' property arising from the consequences of the company's land having been

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[17] '*…without a court order, an entitlement to the registration of a right of way of necessity over another's property does not arise, and furthermore, until such an order has been obtained, entering onto the other person's property would apparently be unlawful. Cf.* Neilson v Mahoud *1925 EDL 26 at 34*'. (My translation.)

[18] The terms offered by the appellants' counsel to convey the effect of the Afrikaans word '*aanspraak*' in the sense in which it was employed in the quoted passage from Jansen JA's judgment.

sequestered from direct or effective access to the outside world by reason of the effect of the subdivision of the farm of which both properties originally formed part and the separate disposition of the two portions in question, which had previously been held in common ownership. I have described such a reading as generous because the history of the subdivision of the land was not set out with any particularity in the respondent's founding papers. Little more was expressly alleged than that, as already noted, the two subdivisional units of which the appellants and the respondent are currently the owners were previously held in common ownership and that both units enjoyed the same registered servitutal right of access over a third party's land to Van Rheede Road. On the generous approach to the founding papers that I am willing to take for present purposes the respondent could be taken to have identified its property as being what the Roman-Dutch jurists called '*blokland*', brought about by subdivision.

[18] As a general rule in such circumstances a right of way inures in favour of the isolated property over the adjoining subdivisions to afford access to a public road. Taking this generous view of the evidence in favour of the respondent distinguishes the position from that which ordinarily obtains when the issue of a way of necessity arises in a general context. This much is evident from the discussion in *Van Rensburg v Coetzee* supra, at 673B-675C. In the context which I am willing to assume pertained, a right of way is taken to have been tacitly afforded by the subdividing owner in favour of the sequestered subdivision over the other land units interposed by the act of subdivision between it and a public road. Jansen JA quoted Van Leeuwen's commentary in *Roomsch - Hollandsch Regt* 2.21.12 in this regard as follows:

> So wanneer een stuk land aan twee, of meer deelen werd gedeeld, en gesplitst, moet het agterste syn uitpad over het voorste houden, al waar't dat daar van niet was gesprooken: om dat de splitsing van het land de gebuuren geen dienstbaarheid kan opdringen. *arg 1.23. in fin ff de servit Rusticor Praed junct 1.66. ff de contr empt*. Ten ware het sodanig gelegen was, dat het voor te land, en agter te water uit mogt, sou het verkogte met het uitpad te water tevreden moeten zyn: Volgens het geen hier voor is gezegd. Van gelyken so iemand het voorste had verkogt, en het agterste behouden. *arg d 1.23. in fin ff de servit Rust praed junct 1.12. ff commun praedior*.

> So mag ook een stuk land, het welk een dienstbaarheid van uitpad, of uitweg op, of over een ander heeft, aan so veel deelen gedeelt werden als men wil: en verkrygt elk deel het selve regt van overpad, of uitweg, van het agterste over het voorste, en so voort. *per d 1.23. # 3. ff eod Bart Caepoll de Servit Rusticor Praed cap. 1. num 12. & cap 3. num 7.*[19]

and, in the course of a consideration of how South African jurisprudence has given effect to the concepts thus articulated, noted a close correlation between the approach adopted by our courts and the position under the English law set out in Halsbury's *Laws of England* 4th ed vol. 14 sv. '*Rights of Way arising by Implication of Law*' at para 152 *et seq*. The learned judge of appeal referred in this respect in particular to the following passage at para 153 (which should be read, I would respectfully suggest, conscious that it seeks to draw no distinction between the Roman Law concepts of a servitude of *via* and one of *via ex necessitate*):

> A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted to him, or over the land of the grantee where the land retained by the grantor is land-locked. Such a way cannot exist over the land of a stranger. It is an easement without which it is impossible to make any use of the dominant tenement. The doctrine which gives rise to a way of necessity is based only upon an implied grant.

[19] In *Van Rensburg v Coetzee*,[20] the Appellate Division would appear to have approved the following construction of the first part of the abovementioned passage from Van Leeuwen in *Beukes v Crous en 'n Ander 1975 (4) SA 215 (C)* at 220G-H:

> Die oorspronklike eienaar van die blokland, assulks geskep deur onderverdeling, sou dan waarskynlik ook aanspraak kon maak op registrasie van 'n serwituut van *via simpliciter* (dws langs geen bepaalde roete nie).

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[19] 'So when a piece of land is divided into two or more parts and transferred separately, the one that is cut off by being at the back must take its access over the one in front, even if nothing has been expressly agreed to that effect. This is so because the subdivision of the land cannot give rise to the imposition of a servitude on the neighbours *arg 1.23. in fin ff de servit Rusticor Praed junct 1.66. ff de contr empt*. In truth if they were so situated that the one in front had access by land and the one behind by water, the sold off portion would have to be satisfied with taking its access by water. Nothing requires to be stipulated to this effect. The same would apply *mutatis mutandis* if one sold the front portion and retained the rear portion. *arg d 1.23. in fin ff de servit Rust praed junct 1.12. ff commun praedior*.
So also one can have one piece of land that enjoys a right of way over another's land and subdivide it into as many pieces as one wishes and each will enjoy the same right of way or access from the rearmost to the foremost and so forth. *per d 1.23. # 3. ff eod Bart Caepoll de Servit Rusticor Praed cap. 1. num 12. & cap 3. num 7*' (My translation.)

[20] At pp. 674H-675C.

> Waar die serwituut nie geregistreer word nie, is die volgende vraag of dit opvolgers *titulo oneroso* van die eienaar van die dienende erf nietemin bind.
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> Hier skyn die consensus te wees: ja, indien hy kennis dra van die serwituut; andersins, nee. Vgl Nathan *Common Law* band 1 para 689 te 493 - 4; Wille *Principles* 6de uitg te 224.[21]

Jansen JA concluded on this aspect as follows at p. 675C of the judgment:

> Mi behoort nou wel bevestig te word dat die geval van onderverdeling met gevolglike ontstaan van regte van weg, deur *Van Leeuwen* bespreek, gekonstrueer moet word as die verlening van regte van weg deur stilswyende ooreenkoms. Dit volg dat by ontstentenis van sodanige ooreenkoms wat teen die huidige eienaar van grond waaroor 'n uitweg aangevra word, afgedwing kan word, die keuse van grondstuk waaroor 'n noodweg moet loop volgens die beginsel "ter naaster lage en minster schade" moet geskied, soos hierbo verduidelik.[22] [23]

[20] It seems to follow that on the facts of the current case as they are discernible from the respondent's founding papers the right of way for which the company contends - it bears reiteration that we are concerned here only with the identification or characterisation of the right contended for, and not with its actual existence - must be 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. I say this accepting that it was implicit in the respondent's case, as the conduct of the appellants would appear to have borne out, that the appellants had acquired their property with knowledge of the unregistered right of way. As will be apparent from the earlier discussion, the character of the only legally

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[21] 'The original owner of the sequestered land, brought into being as such by reason of subdivision, could then probably claim an entitlement to the registration of a servitude of *via simpliciter* (i.e. by no defined route).
Where the servitude has not been registered, the next question is whether it is nevertheless binding on onerous successors in title of the servient tenement.
Here the consensus appears to be in the affirmative if the successor had knowledge of the servitude, otherwise not. Cf. Nathan *Common Law* vol 1 para 689 at 493 - 4; Wille *Principles* 6th ed at 224.' (My translation.)

[22] 'In my view it should now be confirmed that the incidence of subdivision with the consequent arising of rights of way discussed by *Van Leeuwen*, must be construed as the granting of rights of way by tacit agreement. It follows that in the absence of such an agreement which could be enforced against the current owner of property over which access is sought, the choice of land over which a way of necessity must be given falls to be determined in accordance with the principle "*ter minste lage en minste schade*" (that which affords the most direct and least prejudicial route), as explained above.' (My translation)

[23] The judgment had held in an earlier passage that the '*ter minste lage en minste schade*' principle did not fall to applied inflexibly, but with due regard to the practical considerations arising in the given case.

cognisable right of way arguably thus identifiable on the founding papers is that of a *via simpliciter*, not one over a defined route. (Indeed on any reading of the papers, no basis for a defined right of way was made out.)

[21] It appears to be well established that in the case of a right of access by means of a *via simpliciter* the owner of the dominant tenement (i.e. of the respondent's property in the current case) has the right to choose the route; see Voet 8.3.8.[24] It was also implicit in the respondent's case, on the basis I have been willing to construe its founding papers, that the gravel road constituted the chosen route. Those conclusions beg the question whether the closure of the gravel road by the appellants and the contemporaneous provision by them to the respondent of an alternative route for the exercise of the right of way amounted to dispossessing the respondent of its purported right of way. I think not.

[22] As set out in Voet, *loc cit*, whereas the owner of the dominant tenement is thereafter bound by the chosen route, the owner of the servient tenement has liberty to vary it and to allot for that purpose a different part of its land, provided that no prejudice is occasioned thereby to the dominant tenement holder.[25] [26] Whether an alternative route occasions prejudice to the dominant tenement holder is a question to be determined objectively. (In a recent development of the common law, the Supreme Court of Appeal declared that even in the case of registered defined right of way,

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[24] I had reference to Gane's translation.

[25] The position was expressed thus in *Wynne v Pope* 1960 (3) SA 37 (C), at 39F-G (per Van Winsen J):

> *As I understand the law, a via ex necessitate can be claimed by an owner where it is necessary for him to have ingress or egress from his property by such a way in order to reach a public road. Such a servitude is created simpliciter, and could be altered by the owner of the servient tenement if he can afford to the owner of the dominant tenement another route as convenient as the old route. For the owner of a dominant tenement to be able to claim the right of via ex necessitate along a specific or defined route it would be necessary for such servitude to have been duly constituted, for example, by an order of Court, or by prescription, or by any form recognised by the law. (See Wilhelm v Norton, 1935 E.D.L. 143 at pp. 151 - 152; Gardens Estate Ltd v Lewis, 1920 AD 144 at p. 150).* See also *Rubidge v McCabe & Sons and Others* 1913 AD 433 at 441, where Lord De Villiers CJ said of an undefined right of way '*The legal position is, therefore, that a servitude exists, the plaintiffs' farms being dominant tenements and the defendant's farm servient tenement. As owners of the dominant tenements the owners must exercise their rights in the manner least oppressive to the defendant and as owner of the servient tenement the defendant has the right, after due notice to the plaintiffs, to divert the course of the road provided - and this is a most important proviso - he does not by such diversion make the use of the road less convenient or more expensive to the plaintiffs.*'

[26] In *Koch and Others v Backer* (see note 13, supra) the alternative route provided by the alleged spoliator was not over the same land unit as the previously subsisting route. It also had a number of characteristics which rendered it an inadequate alternative.

where previously the law was that the route of such servitude could be altered only by consensus,[27] the servient tenement holder may now achieve an alteration unilaterally on the basis declared by the court as follows: '…if the owner of a servient tenement offers a relocation of an existing defined servitude of right of way the dominant owner is obliged to accept such relocation provided that: (a) the servient owner is or will be materially inconvenienced in the use of his property by the maintenance of the status quo *ante*; (b) the relocation occurs on the servient tenement; (c) the relocation will not prejudice the owner of the dominant tenement; [and] (d) the servient owner pays the costs attendant upon such relocation including those costs involved in amending the registration of the title deeds of the servient tenement (and, if applicable, the dominant tenement)'; see *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA); [2008] 2 All SA 493.)

[23] The nature of the apparently contended for right having been established, the question of whether the respondent was dispossessed falls to be determined on the facts with regard to the ambit of the right. The *Plascon-Evans* rule[28] falls to be applied to resolve any factual dispute on the papers pertaining to the issue of dispossession.[29] If the facts were to show that the alternative route of access that the appellants had provided was unreasonable and prejudicial, then the closure of the gravel road would have constituted a dispossession; but otherwise not.

[24] There are numerous decisions which confirm that dispossession effected by statutory authority does not give rise to a spoliation claim, provided that the act of dispossession is carried out strictly within the bounds of and according to the tenor of the statutory authority concerned. I can see no basis for distinguishing the position where the alleged act of dispossession is permitted by the common law.[30] Where, as in the current case, the right relied upon by the applicant for spoliatory relief has

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[27] See *Gardens Estate Ltd v Lewis* 1920 AD 144, at 150.
[28] See *Plascon-Evans Paints (Tvl) Ltd. v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[29] Cf. e.g. *Nienaber v Stucky* supra, at 1053-1054, where Greenberg JA observed that an applicant for spoliatory relief is required to prove his possession of the property in question on the basis required of an applicant for final relief.
[30] The position with regard to a contractual provision purporting to afford one of the parties to the agreement a right to unilaterally dispossess another party thereto of something at will (see e.g. *Nino Bonino v De Lange* 1906 TS 120, at 123-124) is distinguishable for it arises as a result of a stipulation by the parties and not as an incidence of law.

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 has been dispossessed 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.[31]

[25] Turning then on the aforementioned basis to examine the facts more closely. The only indication in the founding papers of a possible ground for regarding the alternative route provided by the appellants as unacceptable was that it runs over lower ground alongside the Eerste River, whereas the previously available gravel road was on higher ground. Against that there is the uncontroverted evidence adduced by the appellants that the alternative route provided consists of a professionally designed and constructed road able to sustain heavy loads of up to 20 tons. Mr Jaco van Zyl, an associate employed by Nortje & De Villiers Consulting Engineers CC, the entity responsible for designing and supervising the construction of the alternative road, averred that the road is 'of a much higher standard than any other gravel road on the farm' and that '[t]here is sufficient storm water drainage, including sub-surface drains to protect the road layer in wet conditions. The sub-base material is non-plastic and is therefore of an acceptable material for a surface layer'. The respondent did not challenge or contradict this evidence. It is thus apparent in my view that the alternative route made available by the appellants was adequate and does not prejudice the respondent. The appellants were merely exercising their prerogative as servient tenement holders under a servitude of *via simpliciter* when they closed the

[31] The respondent contended in its supplementary written argument submitted at the request of the court that the servient tenement holder could not alter the route without the dominant tenement holder's agreement save under authority of a court order. The contention is not in accord with the law and is not borne out by anything in the passage in *Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty) Ltd* 2011 (5) SA 306 (SCA), at 309 A-B, upon which the respondent's counsel sought to support it. The argument missed the point that it is incumbent on the *spoliatus* to allege and prove dispossession and that when a right of way *simpliciter* is concerned no dispossession occurs when an existing route is replaced by an adequate alternative route. In order to establish dispossession in such a case the *spoliatus* must prove (as was done, for example, in *Koch and Others v Backer* supra) that the alternative route afforded by the servient tenement holder is inadequate or prejudicial. The judgment in *Bedford Square Properties* was not concerned with any questions of law that are even remotely relevant in the current case.

gravel road and contemporaneously made an adequate alternative route of access available for the respondent to exercise its alleged right of way.

[26] 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 should not have been granted because the respondent did not prove that it was dispossessed of the right.

[27] The respondent applied for leave to adduce additional evidence before us on appeal in the form of a so-called supplementary affidavit by the respondent's attorney. The application was opposed. The essence of the new evidence that the respondent wishes to introduce concerns the conduct of the appellants after the hearing at first instance. It was averred that in subsequently instituted proceedings in the North Gauteng High Court the appellants had stated on affidavit that although they had in the past been willing to afford alternative access via the road contiguous to the Eerste River, they had reconsidered matters and were no longer prepared to enter into discussions with the respondent regarding an alternative route or any other access road over the appellants' property. It was argued that the additional evidence should be received on appeal because it would be in the interests of justice to do so in view of the appellants' reliance before us, and at first instance, on the provision of an alternative route of access.

[28] In a recent full court judgment,[32] the general approach adopted in principle to such applications was rehearsed as follows:

> Applications of this nature are rarely successful; the court's power under s 22 of the Supreme Court Act 59 of 1959 is exercised sparingly. The proper approach is summarised in the following dicta of E.M. Grosskopf JA in *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 489 (A), at 507C-F:
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> > It has often been laid down that, in general, this Court in deciding an appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which

[32] *Comitis N.O. and Others v Fairbridge Mall (Pty) Ltd* [2013] ZAWHC 99 (5 February 2013), accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAWCHC/2013/99.html .

> came into existence afterwards. See *Goodrich v Botha and Others* 1954 (2) SA 540 (A) at 546A; *S v Immelman* 1978 (3) SA 726 (A) at 730H; *S v V en 'n Ander* 1989 (1) SA 532 (A) at 544I-545C; and *S v Nofomela* [1992 (1) SA 740 (A)].
>
> In principle, therefore, evidence of events subsequent to the judgment under appeal should not be admitted in order to decide the appeal. Whether there may be exceptions to this rule (the possibility of which was not excluded by Schreiner JA in *Goodrich*'s case supra at 546C) need not now be decided because there are in my view no exceptional circumstances in the present case which would render it desirable to hear such evidence. The new evidence sought to be adduced in effect amounts to instances of further infringements of the interdict allegedly committed after the judgment was given in the present case. As such they might have formed the subject of new contempt proceedings before an appropriate Court of first instance. There does not seem to me to be any ground of principle or convenience why we should, in effect, perform the functions of such a Court.

In *Van Eeden v Van Eeden* 1999 (2) SA 448 (C), at 454D-E, this Court (per Comrie J, Griesel J concurring) held that evidence of events subsequent to the judgment under appeal could well be received in principle, but added the *caveat* that 'the circumstances in which a Court would exercise its discretion in favour of such a re-opening would have to be very special'.[33]

[29] The circumstances in the current matter do not warrant taking the exceptional course of accepting new evidence on appeal. The respondent applied at first instance for a *mandament van spolie*. It failed to establish that it had been despoiled of quasi-possession of the right of way on which it appeared to rely. Even if this court were to admit the new evidence, the respondent would not be entitled to the relief it sought and obtained at first instance. As at the hearing of the appeal the road contiguous to the river was still being made available. At best the new evidence demonstrates a threatened spoliation. Unless and until the threat is carried out, and a consequent loss of quasi-possession is established, the respondent is not able to avail of the remedy.

[30] The following orders are made:

1. The application by the respondent to introduce additional evidence on appeal is dismissed with costs.

2. The appeal is upheld with costs, including the costs of two counsel.

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[33] At para 20 of the judgment.

3. The order of the court a quo is set aside and replaced with an order dismissing the application with costs, including the costs of two counsel (to the extent that such were engaged).

A.G. BINNS-WARD
Judge of the High Court

We concur:

N.J. YEKISO
Judge of the High Court

K. M. SAVAGE
Acting Judge of the High Court

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