REPORTABLE

CASE NO: SA 20/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HORST KOCK t/a NDHOVU SAFARI LODGE	**APPELLANT**
and	
R WALTER t/a MAHANGU SAFARI LODGE	**FIRST RESPONDENT**
HAMBUKUSHU TRADITIONAL AUTHORITY	**SECOND RESPONDENT**
THE STATION COMMANDER OF MUKWE NAMIBIAN POLICE	**THIRD RESPONDENT**

Coram: MARITZ, JA, CHOMBA, AJA *et* LANGA, AJA

Heard on: 08/03/2010

Delivered on: 26/10/2010

APPEAL JUDGMENT

LANGA, AJA:

[1] This is an appeal from the judgment of Parker J in the High Court of Namibia, delivered on 23 June 2009, in which the application by Horst Kock trading as Ndhovu Safari Lodge (the appellant), was dismissed with costs. Three respondents were cited but only the 1st respondent, trading as Mahangu Safari

Lodge, opposed the application. The other two respondents did not oppose the applicant's claim and played no part in the litigation and will not be referred to any further. The 1st respondent will be referred to merely as the respondent. The matter concerns a dirt feeder road which connects two adjacent lodges to a public road in the Hambukushu Tribal Authority in the Kavangu Region.

[2] The facts are largely common cause. The feeder road, which traverses public space in a communal area, is not a proclaimed road as defined in the Roads Ordinance, 1992 (Ordinance 17 of 1992). As described by Parker J, in his judgment, "[a] part of the length of the feeder road lies in a flood plain and during rainy seasons the vicinity of the feeder road gets flooded and so it is not easily passable." Before the events that led to the dispute arose, the feeder road was used freely by the occupants, staff and guests of the two lodges. The trouble began when the respondent effected improvements on part of the feeder road by upgrading or building-up, as Parker J describes it, "a longitudinal part of the feeder road for a distance of about 200m in the vicinity of the flood plain and to the south of the point where there is a trifurcation of the feeder road to the two lodges and a third lodge." The respondent thereafter erected a lockable and manned gate on the longitudinal part of the feeder road that had been upgraded and allowed everybody, including the appellant's employees, to use the upgraded longitudinal part of the feeder road, but excluded the appellant and guests of the appellant's lodge. The respondent did not block the rest of the feeder road, namely, the unimproved portion, from use by the appellant. It is the exclusion described above that led to the appellant's challenge.

[3] Parker J posed the problem as follows: was the appellant in peaceful and undisturbed possession of the 200 metre upgraded longitudinal part of the feeder road at the time the appellant contends the respondent deprived him thereof? I would pose the question in a slightly different way, namely: did the appellant have peaceful and undisturbed use of the feeder road, including the 200 metre longitudinal part that was later upgraded, at the time respondent interfered with it and blocked that improved portion from being used by the appellant? Depending on the answer, the next question might be whether or not this use, which is referred to in the papers variously as the appellant's "right of way," "right to access," "right to use the road" or a "clear right to use the road," constituted a type of possession that, in law, qualified for the protection of the *mandament van spolie*.

[4] The remedy has found recognition in the modern Namibian common law (*Ruch v Van As* 1996 NR 345 (HC) and it is trite that it is available to protect possession. (*Kuiiri and another v Kandjoze and others* 2007 (2) NR 749;[1] *Nino Bonino v De Lange* 1906 TS 120; *Nienaber v Stuckey* 1946 AD 1049; *Yeko v Qana* 1973(4) SA 735 (A); *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994(1) SA 616 (W)). What gives rise to controversy is the nature and ambit of the remedy. What is clear is that since it is a possessory remedy, it serves as a counter against spoliation. (*Silberberg and Schoeman*: *The Law of Property*, 5th edition at 287). Its purpose is to provide robust and speedy relief where spoliation has occurred to restore the *status quo ante* because, as stated by Van Blerk JA in *Yeko v Qana*, 1973(4) SA 735 (A), of the "...fundamental principle that no man is

[1] Although this decision was overruled by the Supreme Court of Namibia in an unreported judgment of the same name delivered on 3 November 2009 under case no. SA42/2007, it was not on the point cited. The principle was in fact endorsed.

allowed to take the law into his hands and no one is permitted to dispossess another forcibly or wrongfully and against his consent 'of the possession of property, whether movable or immovable' ...."[2] In *Shoprite Checkers Ltd v Pangbourne Properties* 1994(1) SA 616 (W) Zulman J stated:

> "It is trite that the purpose of the mandament van spolie is to protect possession without having first to embark upon an enquiry, for example, into the question of the ownership of the person dispossessed. Possession is an important juristic fact because it has legal consequences, one of which is that the party dispossessed is afforded the remedy of the mandament van spolie..."

[5] Does the protection of the mandament van spolie extend to incorporeals? In *Nienaber v Stuckey* 1946 AD at 1056 it was held that the possession of incorporeal rights is protected against spoliation and in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) 508 (A)*,* the Appellate Division of South Africa held that the mandament van spolie is available for the restoration of lost possession in the form of quasi-possession which, in that case, consisted in the actual use of a right of servitude. I understand this to refer to the limited role of the mandament van spolie and to mean that although an incorporeal thing like a servitude was incapable of physical detention, it was indeed capable of being quasi-possessed by the actual use of the servitude. Hefer JA stated that, "[t]he status *quo* that the spoliatus desired to restore by means of the mandament van spolie was the factual exercise of the servitude, and not the servitude itself." What one extracts from these decisions, and others such as *Shoprite Checkers supra, Zulu v Minister of Works, KwaZulu and Others,* 1992 (1) SA 181 (T) is that

[2] *Yeko v Qana*, 1973 (4) SA 735 (A) at 739D-H. See also Silberberg *supra* at 292.

the true purpose of the mandament van spolie is not the protection and vindication of rights in general, but rather the restoration of the status *quo ante* where the spoliatus has been unlawfully deprived of a thing, a movable or immovable, that he had been in possession or quasi-possession of. Thus in *Zulu*, where the applicant had sought an order for the respondent to supply him with water, the Court held that the applicant had never had possession of the water and could not therefore found his claim on loss of physical possession. Mandament van spolie had no role there. As a concept or a form of relief, it is not concerned with the protection of rights "in the widest sense" but with the restoration of factual possession of a movable or an immovable. This extends to incorporeals such as the use of a servitudal right. It is the limited nature of the scope of the mandament van spolie that excludes, for instance, the right to performance of a contractual obligation from its operation. (See also *Plaatjie and Another v Olivier NO and Others,* 1993 (2) SA 156 (O) at 159F). These principles, with which I respectfully agree, were further clarified, specifically in relation to quasi-possession, in *ATM Solutions (Pty) Ltd v Olkru Handelaars cc and Another,* 2009 (4) SA 337 (SCA) at 340 - 341 where Lewis JA quoted with approval remarks by Malan AJA in the *First Rand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others,* 2008 (2) SA 503 (SCA) at p 510:

> "... The cases where quasi-possession have been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes, or the purported exercise of servitudes ... or an incident of the possession or control of the property. The law in this regard was recently succinctly stated in *First Rand Ltd v Scholtz* (footnote omitted) where Malan AJA pointed out that - ... [t]he mandament 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 as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of specific obligations is claimed. Its purpose is the protection of quasi-possession of certain rights. It follows that the nature of the professed right, even if it indeed not be proved, must be determined or the right characterized to determine whether its quasi possession is deserving of protection by the mandament." (See also *The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and 2 Others (unreported)* Supreme Court case SA 3 of 2007.

Finally, spoliation is committed also when a co-possessor unlawfully takes over exclusive control of the thing. (See *Du Randt v Du Randt* 1995 (1) SA 401 (O)).

[6] What is the essence of the relief sought by the appellant? Quite clearly he approached the court to seek the restoration of the *status quo ante* that had been disturbed by the respondent. It is indeed the exercise of a right that appellant has been unlawfully deprived of and all he wants is the restoration of the exercise of the specific right that has been unlawfully taken away from him. He is not suing for the realisation or enforcement of a right in the widest sense. What is sought is not specific performance of a contractual obligation; but the restoration of the factual position that had obtained, until the respondent intervened. That factual position bears repeating: The feeder road was in the communal area and was used by both the appellant and the respondent, their guests and their employees, freely and for an appreciable time. The respondent changed this state of affairs *vis-a-vis* the appellant. He blocked appellant's right to use that particular portion of the feeder road and, by his conduct, claimed exclusive control over it. It is irrelevant that the appellant could have created for himself, other routes or

adopted other means of self-help. He had been deprived of the use of a portion of the road that he had enjoyed usage of freely, without having to ask anybody for permission, and that gave him access to the public road. However one characterizes the right that had been exercised by the appellant, it came to an abrupt stop and that constitutes a deprivation perpetrated by the respondent, and this without invoking an order of a court of law. It is a classic case of taking the law into one's own hands. In this context, it is relevant to highlight the public character of the feeder road. It is common cause, and judicial notice may be taken of these facts, that in terms of legislative provisions, the communal land on which the feeder road is was vested in and placed under the control of the Government of Namibia by Article 124 read with Schedule 5 of the Constitution[3]. The respondent has argued that the mandament van spolie is not available or applicable in this case because there is no question of the applicant having had possession, or quasi possession of the improved portion of the feeder road. Instead, the essence of the argument went, the appellant was seeking to exercise some non-descript right and had failed to demonstrate that it was a right in respect of which the relief of mandament van spolie was available. By now it is settled law that the possession of incorporeal rights is protected against spoliation. (See

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[3] See also Section 17 of the Communal Land Reform Act 5 of 2002 which reads:

"17 Vesting of communal land

(1) Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.

No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land."

Nienaber v Stuckey, 1946 AD at 1056). In the *Bon Quelle* case it was held that the mandament van spolie is available for the restoration of lost possession, in the sense of quasi possession, which in that case consisted in the actual use of a right of servitude. However, Hefer JA, speaking for the Court, refused to accept that a servitudal right had to be proved for the institution of a spoliation order, since that would amount to an investigation of the merits of the case. I am in respectful agreement with the learned Judge of Appeal. In this context, I hold further that the usage exercised by the appellant was one protected by the mandament van spolie. The decision in *Zulu* is accordingly distinguishable from the present case. It follows that the appeal must be upheld and the judgment of the court a quo must be set aside.

[7] There is, to my mind, no reason why the order of costs should not follow the result. Both in the rule nisi and in argument before this Court, the appellant insisted on a special order of costs in the application *a quo.* It is true that the respondent had taken the law into his own hands, and that is in fact the essence of the wrong that he committed. His attitude towards the appellant could be described as rather high-handed, particularly, if one has regard to the proprietary terms with which he referred to the disputed portion of the feeder road as “his” road. It is precisely this type of conduct which could easily lead to the disturbance of the public order. (See *Ross v Ross,* 1994(1) SA 865 (SECLD)). I however consider that this is not a case in which a special order for costs should be ordered. It may well be that the respondent was badly advised (and the Court *a quo* apparently agreed with that advice). The circumstances in my view do not

justify a special order of costs and I have accordingly proposed an ordinary costs order.

[8] In the premises, the following order is made:

(a) The appeal is upheld and the judgment and order of the Court *a quo* are set aside and replaced with the following:

"Paragraphs 2.1 – 2.3 of the rule *nisi* issued on 15 February 2008 are confirmed with costs, such costs to include the costs of one instructing and one instructed counsel."

(b) The First Respondent is ordered to pay the costs of the appeal, such costs to include those consequent to the employment of one instructing and one instructed counsel.

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LANGA AJA

I agree.

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MARITZ JA

I agree.

CHOMBA AJA

Counsel on behalf of Appellant:	**Mr. J. A. N. Strydom**
Instructed By:	**Diekmann Associates**
Counsel on behalf of 1st Respondent:	**Mr. H. Geier**
Instructed By:	**Du Pisani Legal Practitioners**