THE AVAILABILITY OF THE *MANDAMENT VAN SPOLIE* WHEN UPON THE SUBDIVISION OF A FARM INTO TWO PORTIONS AND THE ALIENATION OF THESE PORTIONS TO DIFFERENT OWNERS, AN EXISTING EXIT ROAD IS REPLACED

Van Rhyn NNO v Fleurbaix Farm (Pty) Ltd 2013 5 SA 521 (WCC)

1 *Introduction*

This case concerns the availability of the *mandament van spolie* in a particular scenario. The context is the subdivision of a plot of land. After the subdivision the owner of one of the subdivided portions closed off a gravel road that provided access to a public road to the owners of both subdivided portions. In an application for a spoliatory order the court a quo directed the appellants to restore the respondent's right of access by way of the gravel road across their property to the road connecting the two properties to the public road. This case came on appeal to the full bench of the Western Cape division of the high court. For an excellent and more traditional comment on the case, see Scott "*Via simpliciter* and spoliation" 2014 *TSAR* 151-162.

2 *Facts of the case*

The two properties owned by the appellants and the respondent company respectively comprised adjoining portions of a larger subdivided farm in

Stellenbosch. The parties acquired the properties from a company which owned the farm prior to the subdivision. Access to the land and thus to both properties was exercised via an extension of a nearby public road in a suburb of Stellenbosch which ran over private land subject to a servitude of way registered in favour of the undivided land and thus in favour of both the appellants and the respondent. At the time that the parties acquired their respective parts of the subdivided farm from their common predecessor, a gravel road ran across the appellant's property from the point at which the extension road cut across the eastern boundary of the property to a point on its western border with the respondent's property. The route taken by the gravel road was marked by a red and blue line on the aerial photograph incorporated in the order made by the judge of first instance. The respondent's property was otherwise landlocked without access to the public road. In order to exercise the aforementioned registered servitude of way to the public road, the respondent would require access over the appellants' property via the gravel road or any other road (par 3).

At the time of proceedings in the court a quo, the intention was that the respondent company would build a house on its undeveloped property to be occupied by one of the company's directors. All three of the directors of the company resided in Stellenbosch and used to jog once or twice a week along the gravel road over the appellants' property for recreation and exercise. One director also used the gravel road to reach their property in order to carry out site visits to the proposed developments on their property. On the day that the respondent company took transfer of their property, one of its directors was advised that the appellant would close the gravel road across their property to enable the area between the main house on the appellants' property and a nearby dam to be landscaped as part of their garden extension and that an alternative access road to the extension road would be made available to the respondents along the northern boundary of the appellants' property. After that the appellants constructed the alternative access road at a cost of nearly R3 million and made it available to the respondent company almost simultaneously with the closure of the gravel road (par 4-5).

In its application for the *mandament van spolie* seeking to be restored possession of the gravel road, the respondent company conceded that it did not have a defined servitutal right of access (servitude of way) over the appellants' property along the original gravel road and relied only on disturbance of what it contended was its "right of access via the established route" (par 6).

3 *Decision of the court*

On the authority of *inter alia Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* (1989 1 SA 508 (A) 511I-512B and 513E-G), Binns-Ward J correctly stated that the *mandament van spolie* is a robust remedy directed at restoring possession to a party which has been unlawfully dispossessed. The remedy does not take cognisance of any underlying contest concerning entitlement to possession of the object or right in issue. An applicant need prove only peaceful and undisturbed possession of the property concerned and the unlawful despoilment thereof. The fundamental purpose of the *mandament* as expressed in the maxim *spoliatus ante omnia restituendus est* was to promote the rule of law and to act as a disincentive to self-help (citing *Mans v Loxton Municipality* 1948 1 SA 966 (C) 975-977). He continued that the *mandament* was available both in respect of the dispossession of corporeal property as well as incorporeal property with the quasi-possession or right concerned being affected in the latter case. He then correctly stated that the dispossession of a right will always

be manifested by the deprivation of an externally demonstrable incidence such as the use arising from or being integral to the right in question (par 7).

Binns-Ward J then continued:

> "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" (par 8).

Binns-Ward J illustrated this by a reference to the *Bon Quelle* case. In that case the applicant municipality alleged the existence of a servitude and its exercise over many years as the basis for contending that the respondent's summary closure of the water flow from the spring on its land to the municipality's reservoir had unlawfully dispossessed it of a utility of which it had been in peaceful and undisturbed possession. The appellate division held that the municipality was entitled *ante omnia* to have the *status quo ante* restored on the assumption that the municipality did indeed have a servitutal right to the water supply. Binns-Ward J commented:

> "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" (par 9).

For this statement he referred to *Plaatjie v Olivier NO* (1993 2 SA 156 (O)), which concerned an application for the restoration of a water supply to the residents of an informal settlement. This 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 such right.

Binns-Ward J then reiterated:

> "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 of 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" (par 9).

In footnote 8 he repeated that *quasi-possessio* consists in the actual exercise of an alleged right as formulated in *Zulu v Minister of Works, KwaZulu* (1992 1 SA 181 (D) 187H-188C) "in die daadwerklike uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word" and continued:

> "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*) ([italics] … supplied for emphasis) if one does not know what such right is."

He pointed out that *FirstRand Ltd t/a Rand Merchant Bank v Scholtz NO* (2008 2 SA 503 (SCA) par 13) identified the following need for the characterisation of the right in an application for a *mandament van spolie*:

> "'The mandement [*sic*] 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 [*sic*] 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 characterised to establish whether its *quasi-possessio* is deserving of protection by the mandement [*sic*].' 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" (par 10).

The judge went on to refer to the exercise undertaken by Combrinck J in *Tigon Ltd v Bestyet Investments (Pty) Ltd* (2001 4 SA 634 (N) 642D-645E), where the court examined the juristic nature of the rights of a holder of shares in a company in order to determine whether the removal 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*. He concluded that this is an incident of the requirement that the *spoliatus* must prove possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.

Having held that the characterisation of the right was material in the current matter, Binns-Ward J reasoned that this case differed from the situation in *Willowvale Estates CC v Bryanmore Estates Ltd* (1990 3 SA 954 (W)) and *Van Wyk v Kleynhans* (1969 1 SA 221 (GW)). The dispossession in the current matter did not amount to a frustration or removal of access; it merely entailed substituting the existing route of the alleged right of way with another. Far from losing its access, the respondent still enjoyed uninterrupted access over the appellants' land. He reasoned that if the servitude (right) was for example a *via simpliciter*, a change of route by the servient tenement holder might not derogate from the right of way in question (par 12).

Binns-Ward J then distinguished *Knox v Second Lifestyle Properties (Pty) Ltd* (2012 ZAGPPHC 223 (11 Oct 2012)) on the ground that the court gave no consideration to the content of the right upon which the applicant for spoliatory relief purported to rely and appeared instead to have treated the use by the applicant of the road in issue as having been equivalent to physical possession. This, according to Binns-Ward J, involved rather "strained reasoning". He continued: "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" (par 13).

In footnote 13 Binns-Ward J also distinguished *Koch v Backer* (2010 ZAGPPHC 245 (24 Dec 2010)) and concluded:

> "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 v Scholtz NO* supra in 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."

He pointed out that in contrast to the position in the *Knox* case, 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.* The respondent had therefore failed to show what it was that it had supposedly held in *quasi-possession*.

Binns-Ward J also distinguished *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 the *Nienaber* case 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. 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 led directly from appellant's farm to the land in dispute (at 1059). The property subject to the alleged spoliation in the *Nienaber* 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. Binns-Ward J reasoned that it was 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 and concluded that the question in the current case was 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. The respondent's reliance on the *Nienaber* case was therefore misplaced (par 14).

Having dealt with the above issues, Binns-Ward J reverted to the question as to the nature of the right of way that the respondent purported to enjoy over the appellants' property. He then stated that 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 in the nature of a *via necessitatis* or way of necessity which can be established only by an appropriate court order. The appellants' counsel laid emphasis on the exposition by Jansen JA in *Van Rensburg v Coetzee* (1979 4 SA 655 (A) 671D) that such an order will only be made on proof that a way of necessity is the only reasonably sufficient means of gaining access to the landlocked property, and not merely a convenient means of doing so. Appellants' counsel contended that in the absence of any allegation of a pertinent court order the respondents' founding papers fell short of establishing *quasi-possession* of an identifiable right entitling it to access over the appellant's property along the previous route by means of a way of necessity (par 15).

Binns-Ward J observed that although the appellants' counsel conceded that the respondent company's founding papers might arguably have indicated that it had an expectation or claim to a way of necessity over the appellants' property, the appellants' counsel stressed that the founding papers nevertheless lacked the required

allegations to establish a purportedly cognisable right to use the gravel road on that basis. 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 by way of necessity. Even if the respondent could make out a sufficient case, it would only have been entitled to a *via necessitate simpliciter* by way of interim interdictory relief. This would be an unspecified right of way, as distinct from a right of way following a particular route. Therefore, even on the indicated approach, the respondent would not have been entitled to claim that access should be allowed along the route of the gravel road, as distinct from along the road constructed by the appellants near the river. Binns-Ward J therefore concluded that the appellants' arguments addressed on such a reading of the respondent's founding papers would be 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 reasonably claim to have been dispossessed (par 16).

On a more generous reading of the founding papers, Binns-Ward J conceded that the right relied upon by the respondent could have been a right of way over the appellants' property arising from the isolation of the respondent's land from direct or effective access to the public road by reason of the subdivision of the farm of which both properties originally formed part and the subsequent alienation of the two portions. On this reading of the founding papers, Binns-Ward J indicated that the respondent could be taken to have identified its property as being what the Roman-Dutch jurists called "blokland", brought about by subdivision (par 17). On the authority of the *Van Rensburg* case (673B-675C) in which Van Leeuwen *Roomsch-Hollandsch Regt* 2 21 12 is quoted in support, Binns-Ward J was willing to assume that in this context a right of way is taken to have been tacitly afforded (or impliedly granted in terms of the correlating English law as set out in XIV Halsbury's *Laws of England* (4 ed) *sv* "Rights of Way arising by Implication of Law" in par 152 ss) by the subdividing owner in favour of the subdivision that has been cut off over the other land units placed between it and a public road by the act of subdivision (par 17 and 18).

On the authority of Jansen JA in the *Van Rensburg* case (674H-675C), Van Leeuwen *Roomsch-Hollandsch Regt* 2 21 12 and *Beukes v Crous* (1975 4 SA 215 (NC) 220G-H), Binns-Ward J accepted that the original owner of *blokland* (land without outlet) created by subdivision is entitled to registration of a servitude of a *via simpliciter*. This right is far from perfect. The right of way does not follow a defined route, and if this right is not registered, would only bind the successors in title of the servient tenement (appellants' property) if they had knowledge of the servitude. Binns-Ward J also accepted the conclusion of Jansen JA in the *Van Rensburg* case (675C) that the establishment of a right of way on subdivision of land as discussed by Van Leeuwen must be construed as the granting of rights by tacit agreement and that in the absence of such an agreement this right could be enforced against the current owner of the land over which access is sought in accordance with the principle "ter minste lage en minste schade" (that which affords the most direct outlet and causes the least prejudice to the owner of the future "servient" land) (par 19).

From this, Binns-Ward J deduced that the right of way sought in terms of the founding papers of the respondent needed to be the right of way that was tacitly conferred in favour of the respondent's property upon subdivision of the farm and the separate alienation of the subdivided properties by the former owner of the

farm. Also implicit in the respondent's case as borne out by the conduct of the appellants, was that the appellants had acquired their property with knowledge of the unregistered right of way. He therefore concluded that the character of the only legally cognisable right of way arguably thus identifiable on the founding papers was that of a *via simpliciter*, not one over a defined route (par 20).

The judge cited Voet 8 3 8 to support the view that in the case of a right of access by means of a *via simpliciter*, the owner of the dominant tenement (the respondent's property in the current case) had the right to choose the route in a civil manner and that the gravel road constituted the chosen route on the founding papers. However, Binns-Ward J refused to accept that 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. He then pointed out that although it was previously required that the route of a servitude of way, once defined, could only be altered with the approval of both the owners of the servient and dominant land, the supreme court of appeal, in a recent development of the common law in *Linvestment CC v Hammersley* (2008 3 SA 283 (SCA) especially par 35), declared that the servient tenement holder may now achieve an alteration unilaterally, by offering a relocation of an existing defined servitude of right of way. The dominant owner is obliged to accept such relocation under certain conditions (par 21-22).

Binns-Ward J stated that once the nature of the right sought has been established, the facts surrounding the ambit of the right must be considered to determine whether the respondent was dispossessed. Applying the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (1984 3 SA 623 (A) 634E-635C) for the resolution of a factual dispute pertaining to the issue of dispossession, Binns-Ward J found that the closure of the gravel road would have constituted a dispossession only in the event that the facts showed that the alternative route of access that the appellants had provided was unreasonable and prejudicial (par 23). He reasoned that there was no basis for not applying the numerous decisions which confirm that dispossession effected by statutory authority does not give rise to a spoliation claim (provided that the act of dispossession was carried out strictly within the bounds of and according to the tenor of the statutory authority concerned), or where the alleged act of dispossession was permitted by the common law. Consequently he concluded that in the current case where the right relied upon by the applicant for spoliatory relief had integrated in it by law an entitlement of the servient tenement holder to alter the route, the dominant tenement holder could not claim to have been dispossessed of the right it enjoyed when the servient tenement holder exercised that entitlement 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 entitlement to change the route by stipulating an alternative that was prejudicial to the dominant tenement holder (par 23-24).

Binns-Ward J found that 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 ran over lower ground alongside the Eerste River, whereas the previously available gravel road was on higher ground. He pointed out that this was countered by the uncontested evidence adduced by the appellants that the alternative route provided consisted of a professionally designed and constructed road capable of sustaining heavy loads of up to 20 tons. He therefore concluded that the alternative route made available by the appellants was adequate and did not prejudice the respondent. In his opinion the appellants were merely exercising their prerogative as servient tenement holders under a servitude of *via simpliciter* when they closed the

gravel road and contemporaneously made an adequate alternative route of access available for the respondent to exercise its alleged right of way (par 25).

Binns-Ward J therefore held that the respondent had failed to prove that there was an infringement of or derogation from the right upon which it apparently relied. The utility or right of use available to the respondent by virtue of the right remained substantively unaffected. In the circumstances Binns-Ward J concluded that the respondent's application for spoliatory relief should not have been granted by the court of first instance because the respondent did not prove that it was dispossessed of the right.

4 *Evaluation*

It is submitted that counsel for the respondent categorised the issue incorrectly and thereby forced the court to enter into an unnecessarily complicated analysis of the issue. In my submission the issue at hand did not concern the despoilment of any incorporeal right held in *quasi-possession*. This is not a case in which a servitutal right, contractual right or even a constitutional right had to be characterised to discover whether it gives rise to a right of use ("gebruiksreg") that was capable of being spoliated unlawfully. What was at issue here was the despoilment of a corporeal immovable object, namely the gravel road used by the respondents to reach the connecting road to give them access to a public road. At issue is the physical use of the gravel road by the directors of the respondent company which was apparently despoiled by the appellants' incorporation of the latter road in the extended garden of the appellants' homestead.

If the respondent's case had been presented on this basis, I would doubt that the current matter could be distinguished from the scenarios encountered in *Willowvale Estates CC v Bryanmore Estates Ltd* (1990 3 SA 954 (W)) and *Van Wyk v Kleynhans* (1969 1 SA 221 (GW)). In the *Van Wyk* case the respondent closed off the road used by the appellant over his land as a way-out. The court decided that it was not necessary for the appellant to prove a servitude over the land due to the fact that he was in undisturbed possession of the road which must be restored until the parties makes another arrangement with regard to the road concerned or the road has been made public (224 D). Unfortunately De Vos Hugo J unnecessarily referred to the appellant's undisturbed possession of "the right to use the road". This was rectified in the *Willowvale* case, where the applicant applied for a spoliation order because the respondent had erected and locked gates across a road that the applicant had used over the respondent's adjacent land. Kirk-Cohen J decided that the right to use the road was included in the concept of possession and that the locking of the gates across the route or road constituted spoliation. The judge emphasised that the right or title to use the route or road was not relevant. In the present case the possession of the gravel road was not merely frustrated by the erection of locked gates but was in fact extinguished by its incorporation into the house garden of the appellants. I therefore do not agree with the analysis of the court that the dispossession in the current matter did not amount to a frustration or taking away of existing access but merely to the substitution of the existing road by another road over the appellant's property to the connecting road to a public road. The respondent should not have averred that their access had been despoiled but that their physical use of the gravel road to reach the connecting road to the public road had been demolished.

The full bench of the North Gauteng high court employed this reasoning in the *Knox* case. In that case the appellants brought a spoliation application on the ground that the respondent spoliated their use of a gravel road that passed through the

respondent's property when the road was closed off by the erection of electric fences at the access points to the property. The court referred to *De Beer v Zimbali Estate Management Association (Pty) Ltd* (2007 3 SA 254 (N)). In that case the applicant, an estate agent, gained peaceful and undisturbed access for more than two years to Zimbali, an up-market residential development by means of a disc. When the disc was disabled on account of her alleged non-accreditation, she applied for a spoliation order restoring her access to the development. It appeared that the individual unit owners and their visitors were all issued with the same discs. The court reasoned that the disc issued to the applicant was analogous to a key by which access was gained to residential property. In dismissing the application, the court pointed out that the *mandament* protected possession and not access and that the possession sought to be protected had to be exclusive in the sense of being to the exclusion of others. The court therefore held that the possession of discs by a multiplicity of parties diluted the possession to such an extent that it ceased to be the kind of possession that was protected by the *mandament*.

In the *Knox* case the court distinguished the *De Beer* from the *Willowvale* case and the *Knox* case itself in the circumstance that the *De Beer* case dealt with access to premises while the other two cases concerned the physical use of a route or road (par 13 and 17). The court in the *Knox* case therefore granted spoliatory relief on the ground that the appellants had proved that they were in peaceful and undisturbed possession of the road and that they were unlawfully deprived of their possession. I do not agree with Binns-Ward J that the court in the *Knox* case employed rather "strained reasoning" by treating the use by the applicant of the road in issue as having been equivalent to physical possession and that the court should rather have given consideration to the content of the right upon which the applicant purported to rely for spoliatory relief. In the *Fleurbaix* case the respondent had been despoiled of their physical use of the road. They did not purport to protect a servitude or any other right in terms of a lease or any other contract. The only argument the respondent should have used was that they wanted spoliatory relief against the unlawful disturbance of their quiet physical possession of the gravel road.

I also disagree with Binns-Ward J's finding that the respondent's reliance on the *Nienaber* case was misplaced. The property subject of the alleged spoliation in that case was the ploughing land that was occupied in terms of an alleged lease. Although the court accepted on the ground of Wassenaer *Practyk Judicieel* (ch 14 a 1) that not only corporeal but also incorporeal rights are protected by a spoliatory order, the court did not regard access through the locked gate as part of the rights of use ("gebruiksregte") exercised in terms of a lease but decided directly that the locked gate destroyed physical possession of a corporeal, namely the ploughing land cultivated in terms of the alleged lease (1056). In my opinion the respondent in the *Fleurbaix* case need not have characterised a right in terms of which his right of use (*gebruiksregte*) was sufficiently physical for them to be entitled to spoliatory relief when despoiled, but could rely directly on the fact that its physical possession of a corporeal immovable object (namely the gravel road) was despoiled.

In footnote 14 to his discussion of the *Knox* case, Binns-Ward J referred to the judgment in *Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd* (2013 1 SA 239 (KZD)), employed extensively by respondent's counsel in argument. He pointed out correctly that it *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 twelve years, having partly walled off the open end of the courtyard and used it

as an outdoor extension of its restaurant with tables, chairs and umbrellas for the exclusive use of its clients. The positioning of the tables was not limited and no one else put out tables or attempted to serve customers in that space, nor did anyone obstruct the restaurant when it did so. After twelve years of such use, access to the area was boarded up, preventing the restaurant from putting out tables and chairs. When the applicant (lessee of the restaurant) approached the court for a spoliation order, the respondent submitted that the lessee enjoyed a right of access to the open space, and not possession, and that this was not protected by the *mandament van spolie*. However, Gorven J held that the lessee of the restaurant controlled the area in question by using it as an integral part of its offering of tables to its clientele and afforded significant weight to the fact that no one else attempted to use that area for such a purpose than the restaurant. Consequently, Gorven J found that the available access to the contested area, together with the contested area itself used for placing tables, chairs and umbrellas for the enjoyment of its patrons, was integral to the possession of the premises by the applicant (par 17-18). He therefore held that neither the fact that the open area was also used by customers of a neighbouring liquor store, nor the fact that the restaurant removed the tables, chairs and umbrellas each night (par 19), militated against a finding that the restaurant exercised the type of possession required to qualify for the *mandament*. The recent case of *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd* (2010 1 SA 506 (ECG)) is also noteworthy in this regard when contrasted with the *De Beer* case and *Shoprite Checkers Ltd v Pangbourne Properties Ltd* (1994 1 SA 616 (W). In the latter case the court decided that the mere fact that the applicant's lease might have allowed him to make use of designated parking bays in a parking lot did not amount to the possession required for the *mandament van spolie* (622B-C).

This is precisely how the facts in the *Fleurbaix* case should have been handled. It should have been treated as an instance of spoliation of a corporeal immovable, namely the gravel road. The real issue should have been whether the respondent exercised the type of possession over the gravel road to qualify for relief in terms of the *mandament*. I therefore do not agree with the argument in favour of the appellants, and the acceptance thereof by the full court (par 9), that the case concerned dispossession established by the applicant demonstrating that it had been deprived of a previously exercised utility *and* identifying the right in terms of which it contended to exercise the utility. The subject-matter of the alleged despoilment was not a right of *quasi-possession*, but the factual exercise of possession over a part of the land. This case did not concern the deprivation of *quasi-possession*.

Furthermore, in my opinion the references to a way of necessity (*noodweg*) in the *Fleurbaix* case were not necessary because it was only an endeavour on the part of the court to establish the content of the averred despoiled right of the appellant. It was therefore irrelevant to conclude in terms of way-of-necessity language that the alleged right of the appellant was a right of way *simpliciter*. To argue from this conclusion in traditional servitude-of-way language that the servient tenement was at present entitled under the *Linvestment CC* case to change the route of a defined servitude of way (par 21-22) is unacceptable. This particular question arises only where the servient owner wants to change the route of a defined registered servitude of way over his land which he now can do unilaterally if certain conditions are complied with. Finally, the provision of an alternative route over property has never been recognised as a manner in which a *mandament van spolie* can be averted. The outcome sought for in a spoliatory action is always restoration of the despoiled possession. Therefore all the arguments and consequences concerning the spoliation

of *quasi-possession* of an alleged right introduced in this matter in the *Fleurbaix* case only served to complicate the issues.

The crucial question, never entertained by the court, was whether or not the respondent in the *Fleurbaix* case exercised the type of possession over the gravel road to qualify for relief in terms of the *mandament*. Due to the fact that the respondents did not follow this line of argument, there was only scant evidence of the respondents' and their predecessor's physical exercise of possession over the gravel road. There is evidence that the respondent company intended to build a house on their undeveloped subdivided property and that one director used the gravel road to reach their property in connection with the planning of the house to be built. Furthermore, it was recorded that all three directors of the respondent company resided in Stellenbosch and used to jog once or twice a week along the gravel road over the appellants' property for recreation and exercise. In my opinion these facts are not sufficient to prove that the respondent exercised the kind of physical possession over the gravel road to qualify for relief under the *mandament*. Consequently, their application based on this line of reasoning would also have been dismissed.

Where does that leave the respondent company? In actual fact, the alternative road established by the appellants is still available to the respondent. It is important that some permanent arrangement should be made about the use of the road between the parties, if possible by the registration of a servitude of way in favour of the respondent property. If the appellants are unwilling to enter into any kind of permanent arrangement, the property of the respondent would qualify as *blokland* and the respondent would be entitled to approach the court for the granting of a way of necessity over the property of the appellants based on the fact that it had been cut off from the public road on account of the previous subdivision of the farm. In such a case the respondent is allowed to exercise a civil choice as to the route of the way of necessity based on the principle that it affords the shortest way to a public road which causes the least damage and inconvenience to the owner of the future servient land. Thus in the present scenario, the respondent would in all likelihood need to make do with the alternative road provided for by the appellants.

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