

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

DON'T JUST CLOSE A GATE ON YOUR NEIGHBOUR'S HOLIDAY ROUTINE

**Tyjaderlin Properties CC v Malan and Another (1487/2015) [2016]
ZAFSHC 5 (22 January 2016)**

Public order is preserved if disputing persons are restrained from taking the law into their own hands and induced to follow due process. The mandament van spolie is the tool by which transgressions of this basic principle are set right, illustrated in this judgment where a resort owner was ordered to restore his neighbour's access to a gate on the resort property by which the neighbour had all along acquired access to the Vaal dam.

The Judgment can be viewed [here](#).

FACTS

Tyjaderlin Properties CC (Tyjaderlin) is the owner of two properties close to the Vaal Dam. It gained access to the dam by, amongst other things, traversing a neighbouring property on which a camping site and the Rus 'n Bietjie Resort (Pty) Ltd (the resort) were established. Malan, the owner of the resort business, had recently acquired the land on which the resort was situated, although at the time of the present matter, transfer was not yet registered in his name.

Malan attempted to block Tyjaderlin's members from gaining access to the resort property via the gate on Tyjaderlin's property and insisted that they proceed through the resort's main gate (and pay the applicable entry fee). He thus closed the gate and parked an excavator in front of it. In doing so, Malan prevented access to Tyjaderlin through the motor gate to a slipway on the Vaal Dam for the purpose of launching boats, as they have previously done on a regular basis.

Tyjaderlin then approached the High Court for an order obliging Malan to immediately restore Tyjaderlin's undisturbed access to the Vaal Dam through the motor gate, on the basis of the principles of the *mandament van spolie*. Tyjaderlin alleged that there was a servitude right of way registered in its favour over the resort's property and the court granted the interim order.

The present matter was the return day to argue whether the order must be made final.

The evidence before the court showed that there was in fact no servitude right of way. The servitude that was registered over the property related to water storage rights. Tyjaderlin however averred in addition that its members had undisturbed access over the resort

property and so did the previous owner. This was confirmed by that owner. Malan argued that he never gave anyone access to the property via that gate and that he would lay trespassing charges against Tyjaderlin and its members.

HELD:

- To succeed with a *mandament*, it must be shown that (i) the applicant was in peaceful and undisturbed possession of the object; and (ii) that he was deprived of possession unlawfully. Reliance on a servitude of right of way was thus unnecessary if Tyjaderlin proved the aforesaid requirements.
- The essence of the *mandament van spolie* is the restoration, before all else, of unlawfully deprived possession to the possessor and aims to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.
- The right to the use of a road or access path qualifies for purposes of possession. Exclusive possession is not a requirement and it is not necessary that the road or path is used daily.
- In order to succeed with the *mandament van spolie*, an applicant must prove that his possession was stable and of sufficient duration.
- On the facts this was shown. Malan's concession that Tyjaderlin's members had been using the gate continuously and regularly disposed of the matter.
- But the application also succeeded on the other leg as Malan did not prove that the gate was locked for any other reason than prohibiting Tyjaderlin's members from gaining access.

A proper case was thus made out for the relief claimed and the *rule nisi* was confirmed.

(A *rule nisi* is in effect an interim order and the present application dealt with the question whether the rule should be made final.)

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