REPORTABLE
CASE NO.: SA 3/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE THREE MUSKETEERS PROPERTIES (PTY) LTD	**FIRST APPELLANT**
PRETORIUS AND NEETHLING PARTNERSHIP	**SECOND APPELLANT**

And

ONGOPOLO MINING AND PROCESSING LTD	**FIRST RESPONDENT**
ONGOPOLO MINING LTD	**SECOND RESPONDENT**
ONGOPOLO PROSPECTING LTD	**THIRD RESPONDENT**

CORAM: Maritz, JA, Strydom, AJA *et* Mtambanengwe, AJA

HEARD ON: 2008/06/16

DELIVERED ON: 2008/10/28

APPEAL JUDGMENT

MTAMBANENGWE, A.J.A.: [1] This is an appeal against the dismissal by Smuts AJ in the High Court on 30 November 2006 of a spoliation application brought against respondents by the appellants.

[2] The spoliation application concerned a small fenced off portion of a Farm called Uris No 481 in the district of Tsumeb (Farm Uris/the farm) known as the Tschudi Mining Area (the Mining Area).

[3] The parties on both sides are associated entities but in reality those involved in this matter are only the first appellant and the second respondent. It is to these two I shall refer to in this judgment as appellant and respondent, referring only to the parties in the plural when and if necessary.

[4] The first appellant is the owner of Farm Uris, having purchased it from the original owner, the second respondent, in terms of an agreement of sale dated 22 August 2002 for N$400 000,00.

[5] At the time the agreement of sale was concluded respondent was the holder of a mining licence (ML125) over a portion of farm Uris including the Tschudi Mining Area. Respondent is still holder of that licence granted in terms of section 93 of the Minerals (Prospecting and Mining) Act, 1992 (the Act). The agreement of sale thus provides:

(i) that respondent retains all its prospecting and mining rights held over the farm (clause 8);

(ii) that respondent as seller shall pay compensation to appellant as purchaser for any mining activities on the farm at a certain rate to be

escalated in accordance with the Consumer Price Index (CPI) (clause 20)

(iii) that –

> "should the Seller re-activate mining activities at the Tschudi Mine, the Seller will ensure that the Purchaser is supplied with at least 10m² of water per day if the current water installation is to be used by the Seller." (Clause 20.3) and

(iv) that -

> "The Purchaser has acquainted himself with the exploration and mining rights on the farm and is aware of the fact that these sources may be exploited." (Clause 20.5)

[6] Before the farm was sold, mining had taken place in the Tschudi Mining Area from 1989 to 1992. That mining had then stopped but during that phase an access tunnel had been constructed for underground mining. This access tunnel, according to respondent, would entail a replacement cost of approximately N$50 million. The tunnel and the associated working are approximately 1.8 km in length.

[7] A site plan produced by appellant shows that the Tschudi Mining Area extends across into an adjacent farm called Tschudi 461, and that that part of the area on farm Uris is fenced off and access to it is through two gates shown on a sketch plan also produced by appellant as gate 1 and gate 2.

[8] After the farm had been purchased and after appellant had taken possession, mining and prospecting operations by respondent continued in a part of the farm called the Bobos.

[9] Certain structures had previously been erected by second respondent's predecessors within the fenced off area including an office, storing and ablution facilities and a workshop. After the purchase of farm Uris appellants claim to have made some improvements to these structures and to have made use of some of them as storage for some items and as accommodation for their staff.

[10] Of particular relevance in the spoliation application is the fact that within the fenced off area first appellant stored some fencing poles and porcelain insulators which were placed adjacent to gate 2. Exactly when that happened is not stated in appellant's affidavit. The poles and insulators were placed inside the fence in such a manner that they prevented access to the fenced off area through that gate. The gate itself was kept closed by use of wires.

[11] Respondents state that the mining area including the tunnel had been placed under "care and maintenance", a term which they say, is used in the mining industry to denote minimum maintenance as opposed to abandoning and rehabilitating. This, they say, was done with the purpose of possibly utilizing the facility again, and to this end the mining area remained fenced off and the site

was visited from time to time and was guarded except during the period the second respondent's predecessor was under liquidation.

[12] The reason why the site would have been placed under care and maintenance is explained by Mr R Webster, the current managing director of respondents. As summarized by the Court *a quo*, he says:

> "…improved technology or, more efficient means of extraction or price increases in ore would justify an operation being placed in care and maintenance and thus on hold until one or more of those factors were to eventuate which could result in mining recommencing on a viable basis".

And in Webster's own words (to clarify)

> "More often than not, new inventions and better scientific procedures as well as price increases allow reactivation. In fact, mines all over the world are often put on care and maintenance for many years while price increases are awaited. That is the inherent nature of mining. Since 1992, until now, the second respondent's engineers and personnel had free access to the Tschudi fenced off area and visited the site on a regular basis to do maintenance."

[13] I pause to say, in passing, that appellants admit at least that:

> "the enclosed area was fenced off by respondents' predecessors";

that –

> "Whether they initially intended to secure and maintain the site and tunnel, may well be so"

and, lastly, that –

> "The only employee of respondent that I am aware of who came into the area for any official purpose, was the person who read the electricity meter that was in the area."

[14] Also as to the care and maintenance of the Tschudi mining area, appellants do not categorically deny respondent's allegation but argue that this, if found to be the case, lacked the element of factual and physical control and did not constitute joint control as contended by respondents.

[15] According to appellant's founding affidavit respondent's first act of spoliation was a letter respondent wrote to appellant on 28 August 2006 in which respondent informed appellant that it intended "to commence mining operations in the Tschudi area" and stated further:

> "The mine area and buildings, which I understand are being used (unofficially) by Uris Lodge, will be immediately vacated, and secured by Rubicon."

[16] It is not necessary to recite the rest of the contents of that letter and its *sequelae*. Suffice it to relate that this led to Mr Neethling who deposed to the affidavit dwelling to some extent on the merits of the matter against advice by appellants' legal practitioners that the merits are not relevant to the application, and to say further that further correspondence and discussions between the parties took place as a result, during which appellant insisted that before mining could resume in the Tschudi area a surface agreement had to be entered into between the parties.

[17] During the said correspondence appellant clearly stated in a letter dated 20 September 2006 that

> 1. "…the personnel of respondent could not be allowed into the Tschudi mining area without such agreement"

and that

> 2. "…no personnel of respondent would be allowed on applicants' farm Uris 481 (with the exception of the Bobos Silica area) as from 21 September 2006".

Consequently appellant locked out respondent from farm Uris on that date.

[18] The Court *a quo* catalogued the events that followed the letter of 28 August 2006 in paragraphs [15] – [17] of its judgment and in paragraph [20] thereof stated that the alleged spoliation had taken place on 27 September 2006 when –

> "…second respondent moved a caterpillar scoop load haul dumper into the mining area by gaining entrance through gate no 2 of the enclosed area after 19h00 on that day".

[19] The notice of appeal states that the appeal is "against the whole of the judgment and orders handed down by Acting Judge Smuts on 30 November 2006".

[20] The last but one paragraph of the judgment *a quo* (Para [52]) appears to me to summarise the essential findings the Court *a quo* made on some crucial

aspects of the case and to explain why the Court made the order it gave: it reads as follow:

> "[52] In exercising my discretion against a referral, I stress that I am also mindful of the underlying purpose served by the remedy of spoliation and the harm the remedy is designed to prevent and the protection it is to afford in the interests of public order. In doing so, the relationship between the person deprived and the thing is to be considered in determining whether it requires the protection in the interests of public order as was stressed in *Ross v Ross supra*. As I have also stressed, the applicants have retained their possession of the area and their poles and insulators and have access to them. The deprivation of possession of the point inside gate 2 for the purpose of blocking that access to the second respondent does not in my view require protection in the interests of public order in all the circumstances of this case. In the exercise of my discretion, I would accordingly decline a referral to oral evidence and furthermore the relief now sought in any event for this reason as well. (My emphasis)

[21] As to the grounds of appeal in the present instance, one has to refer to counsel's submission to see what it is that appellants find wrong with the Court *a quo's* judgment. I have done so and find only two areas where a direct allegation is made that the Court *a quo* erred and one area, where the allegation is made by implication. I refer first to paragraph 2 in the introduction section of Mr Mouton's heads of argument on behalf of appellants:

> "2. It is contended that the Court *a quo* erred when it found that the Applicants (First Applicant) was not dispossessed of its free peaceful and undisturbed possession of a portion of the farm Uris No 481 in the district of Tsumeb (the farm) known as the fenced off Tschudi Mining Area."

And secondly in paragraph 25 of the same heads:

> "25. It is respectfully submitted that his Lordship Mr. Justice Smuts (acting) erred when he found that:
>
> (a) there was joint possession whereas the facts before Court clearly indicate that there was not joint possession, but exclusive control and possession by the First Applicant."

[22] That the Court *a quo* erred in that it did not refer the dispute as to the alleged joint possession is indirectly and vaguely made when Mr Mouton says in the alternative to (a) of paragraph 25:

> "alternatively
>
> that a dispute as to the alleged joint possession exist which is capable and prudent to be referred to oral evidence".

Similarly when counsel (a) submits:

> "First Appellant contends that:
>
> (f) The Second Respondent by having addressed annexure 'F' to the First Appellant has disturbed the free and undisturbed possession by the First Appellant of the fenced off area in question."

and (b) emphasises:

> "…The Appellants had free undisturbed and peaceful possession of the fenced off Tschudi Mining Area until such free undisturbed and peaceful possession was unlawfully, disturbed by the letter (annexure 'F' and the breaking of the fence and the removal of the property of the appellants." (My underlining)

[23] In argument before this Court Mr Mouton for the appellant, in fact submitted that the addressing of that letter to appellant was an act of spoliation and that when appellant secured gate 2 with wires it was in fact counter-spoliating.

[24] Describing the contents of the letter (annexure “F”) of 28 August 2006 or the addressing of that letter to appellant as an act of spoliation is, in my opinion, stretching the meaning of the word spoliation beyond permissible limits, grammatically speaking, or is an interpretation beyond what common sense would allow. The most one can say of that letter is that it constitutes a threat and appellants’ remedy for that would be no more than to seek an interdict against respondent, as nothing done by the letter makes the principle *spoliatus ante omnia restituandus est* applicable.

[25] In paragraph 7 of his heads of argument Mr Mouton submitted that in order for an application for spoliation to succeed all that was required to be established was a disturbance of the free, peaceful and undisturbed possession without the consent and against the will of the possessor. He referred to *Beukes v Crous,* 1975(4) SA 215 (NC) and *Administrator, Cape v Ntshiwagela,* 1990(1) SA 705 (A) in support of this submission, and also in support of the proposition that the removal of the poles and insulators at gate 2 amounted to dispossession of appellant of those items. Counsel went onto say that it was also clear from the application as a whole that Appellants had factual and mental control over the

things dispossessed coupled with the intention of deriving some benefit 'from the thing.'

This he makes clear when he attacks respondent's defences in paragraphs 13 to 18 of his written submission, particularly in paragraph 18 where he says:

> "It is also submitted that the Second Respondent's defence that the First Appellant is not deprived of its possession of the property or things and/or that the Second Respondent is not in possession of the poles and/or insulators any longer and that possession cannot be restored, is no bar to the granting of an order for Mandament van Spolie."

[26] The first case he cited is in Afrikaans. I have looked at the English head note and found in it nothing to show whether the case supports the proposition. The second case is cited without reference being made to the relevant pages. A perusal of the judgment however, reveals that in that case, both in the Court *a quo* (before Howie J) and on appeal, the question whether a spoliation order was competent where the spoliator has no possession of the thing, as in this case (the poles and insulators) was debated. In both Courts the statement of De Wet J in *Potgieter en 'n Ander v Davel,* 1966(3) SA 555 (O) at 559 D – E to the effect that no spoliation order is competent where the spoliator has no possession or control of the thing despoiled was said not to have any support. In the course of dismissing that statement, Nicholas AJA said (in the *Administrator's* case, *supra,* at 719 G):

> "The policy of the law being what it is, it would be strange if it required of an applicant for a spoliation order that he should prove as part of his cause of action that the *spoliator* had acquired possession."

[27] In discussing the *Potgieter* judgment Howie J referred to various views in disagreement with it by various writers more or less the same as Nicholas AJA did at p 227 A – J in *Ntshiwaqela v Chairman, Western Cape Regional Services Council*, 1988(3) SA 218 (C). The learned Judge said at 227 H:

> "According to Kleyn, the spoliator need not himself have possession. It is sufficient if he has merely impeded or disturbed the possessor's freedom to control and to use the property concerned. He agrees with the views of the other writers referred to and submits that the learned Judge in the *Potgieter* case, having confused the question whether there had been spoliation with the question whether restoration of possession was possible, wrongly concluded that because the spoliator had not acquired possession it necessarily followed that restoration of possession was impossible."

[28] Correct as Mr Mouton is in the submission, the question remains whether what respondent did on 27 September 2006 in regard to gate 2 and the poles and insulators made it a spoliator or a counter spoliator. The Court *a quo* addressed that question as I will later show in this judgment.

[29] The Court *a quo* pointed out that initially the notice of motion complained of the unlawful dispossession of the Tschudi Mining Area, but that at the hearing of the matter counsel for the appellants submitted that the restoration of the appellants *ante omnia* would only be with respect to the possession of the site adjacent to gate 2, "submitting that the prior possession of that specific area

should be restored by the second respondent by returning the pile of poles and insulators to that precise location from their present location a short distance away within the enclosed area, that is to the area from which they had been removed by the second respondent, in effecting access through gate 2"

[30] I will consider how the Court *a quo* dealt with this new stance of the appellant shortly hereunder. But before that I must briefly mention certain relevant events that took place immediately before the incident of the removal of the poles and insulators from the site adjacent to gate 2, and immediately thereafter.

[31] To begin with I refer to respondent's stance which was that, though no mining operations took place within the Tschudi Mining Area since 1992, it (respondent) always had access to the area through gate 1 to take care and maintain the tunnel. When respondent wrote annexure "F", appellant's response was, *inter alia*, to dispute respondent's entitlement to resume mining in the Tschudi mining area and to declare that respondent would not be allowed into the area.

[32] Thus on 27 September 2006 appellant locked out respondent from the area. This was preceeded by a letter to respondent's legal practitioners dated 20 September 2006 in which appellant's legal representative stated, *inter alia*,:

> "Your refusal, despite numerous written requests and invitations to that effect, to enter into negotiations with TTM leaves little alternative other than to prohibit any and all employees and/or representatives of Ongopolo Mining Ltd., (hereinafter referred to as 'OML'), from entry onto Farm Uris, No. 481, with the exception of the Bobos Silica development. This prohibition is effective as from 09h00 on 21 September 2006 until further written notice and does not in any way limit the right to make use of the existing proclaimed road over the Farm Uris.
>
> This restriction is in line with the stipulations of section 52 of the Minerals (Prospecting and Mining) Act, Act 33 of 1992."

[33] The locking out included securing gate 2 with wires in addition to it having been blocked by the pile of poles and insulators, and the padlocking of gate 1 on 27 September 2006 for the first time, with the expressed intention of denying access to respondent.

[34] On being informed about the lock out, respondent's legal representative wrote to appellant's legal representatives on 27 September 2006. The letter was a protest against the said lock out and demanded immediate access to the mining site, it sets out facts that the writer considered formed the basis of respondent's entitlement to access to the area. More significantly, it states in paragraph 10 thereof:

> "I have advised my client that, inasmuch as I am instructed that they always had unhindered access and possession of the mining site, that they are entitled to counter-spoliate, by immediately retaking possession of the site."

[35] It is common cause that the respondent acted as advised and made forced entry through gate 2 into the mining area on 27 September 2006. Appellant's reaction was relayed to the legal representatives of respondent in a letter on 28 September 2006 in which the writer disputes respondent's entitlement to mine in the area. It states in the second and third paragraphs:

> "It came to our knowledge that Ongopolo Mining Ltd., (hereinafter referred to as 'OML'), after 09h00 on 27 September 2006 moved certain machinery and equipment onto a portion of Farm Uris No. 481 with regard whereto TTM had peaceful and undisturbed possession for more than the past three years. This action constitutes an unlawful deprivation of TTM's peaceful and undisturbed possession.
>
> We herewith demand that OML restores TTM's aforesaid possession with immediate effect, failing which we shall advise our client to approach the High Court for appropriate relief."

[36] A Mr Barend Mattheus Nel, formerly a Health and Safety Manager of Rubicon Security CC, swore an affidavit in support of respondent, wherein he states, in paragraph 1:

> "…In 2002 I became Managing Director of Rubicon. I still serve in that capacity. I have personal knowledge about the facts stated herein as I have visited Farm Uris during the last 10 years, on numerous occasions, and at least once a month when detailed inspections were held at guards and the mine itself…."

In paragraph 3.1 of the same he states:

> "since at least from 1992, Rubicon and its predecessors were specifically tasked to guard the area referred to as the Tschudi fenced off area on a 24 hour basis. We did so

continuously and successfully and I visited the guards there on numerous occasions, and at least once a month".

And in paragraph 3.5:

"gates 1 and 2 were never locked during the time the Tschudi fenced off area was guarded by us. Mr Neethling locked gate 1 for the first time on or about 27 September 2006. Until then, both the second respondent and Mr Neethling's employees had free and undisturbed access to the Tschudi fenced off area. …second respondent always had free access to the tunnel through gates 1 and 2. …the parties always had joint access to the Tschudi fenced off area…".

See record pp 257 – 259.

[37] Mr Neethling seems to downplay the importance of Mr Nel's affidavit in the way he dealt with it in his replying affidavit; he indirectly but partially deals with Nel's affidavit in replying to paragraph 2 of Rod Webster's affidavit, when he states:

"3.8 Applicants started utilising the enclosed area when it constructed the lodge. This is when it was initially used as a storing area for building materials. This is also when a padlock was placed on gate 1 to secure the material and regulate access to the area. Obviously during the day when work was done in the area and where an employee or employees of applicant was in the area, the gate was not locked. It was however locked when no one was present. This situation prevails for at least the last two years. It is simply untrue to state that a padlock was only utilised during September 2006. The only employee of respondent that I am aware of who came into the area for any official purpose, was the person who read the electricity meter that was in the area. This employee either has to obtain the key from an employee of applicant who lived there or has to come during the day when the gate was not locked due to the presence of

> employees of applicant in the area. If other employees of respondent came there when the gate was open, they would not have been refused access but they would have no business there as there was nothing to do on behalf of respondents. They would have been mere transient visitors."

This was later followed by a mere reference at paragraph 11 of the same:

> "**AD AFFIDAVIT OF BAREND MATTHEUS NEL**
> I have already dealt with the allegations contained in the affidavit of deponent Nel and stand by what I have stated."

[38] In paragraph 20 of the judgment *a quo* Smuts AJ noted the dispute revealed on the facts as stated by appellant and as reflected in Mr Nel's affidavit. Suffice it to say that the Court *a quo* then related events immediately prior to and after the alleged spoliation and counter-spoliation on 27 September 2006 and later events relating to the locking of gate 2 by first appellant and the breaking of the lock by respondent up to the time the spoliation application served before it.

[39] I note in passing that counsel appearing for the appellant (in the Court *a quo*) apparently did not in his submissions, unlike Mr Mouton before us, deal with appellant's claim that respondent committed an act of spoliation by addressing annexure "F" to first appellant. Instead he "understandably submitted that the restoration of applicants *ante omnia* would only be with respect to possession of the site adjacent to gate 2, submitting that the prior possession of that specific area should be restored by the second respondent by returning the pile of poles and insulators to the precise location from their present location a short distance

away…" (see judgment *a quo* p445 para [33]). As the Court *a quo* rightly observed, what was:

> "now sought in these proceedings is the restoration of the *status quo ante* so that these items are piled up for the purpose to block access to gate 2 in their prior position".

[40] I also note that in the Court *a quo* counsel for appellants raised the issue of reference of the matter to oral evidence and that before us the issue is raised indirectly and somewhat tentatively by Mr Mouton. In this regard Mr Mouton relies particularly on *Hillkloof Builders (Pty) Ltd v Jacomelli,* 1972(4) SA 228 (D). The facts in that case are very different from the facts in the present matter. Suffice it to quote what Harcourt, J said at p 229 G as to the facts in that matter, which led his Lordship to adjourn the application "to be heard in conjunction with the action at present pending":

> "In the view I take of the case and the conclusion to which I have come, it is not desirable that these differences should be set out in details or canvassed extensively. Suffice it to say that they disclose substantial dispute in regard to both the question whether there was sufficient effective possession in the applicant to entitle it to have such possession protected by means of a spoliation order and also in regard to the facts constituting the alleged spoliation, that is the removal, or activities of the respondent resulting in the removal, of Zondi."

[41] Regarding possession of the Tshudi mining area by respondent in the present case, there are no substantial area of dispute. The question of

possession and referral to evidence was adequately dealt with by the Court *a quo*, as I will show when I come to address these issues.

[42] In paragraph [34] of the judgment the Court *a quo* questioned the usefulness of the relief "now sought" and appellant's counsel then, in response referred the Court to *Ross v Ross,* 1994(1) SA 865 (SE) at 869 H – 871 A where that Court stressed:

> "There is however, in my view, clearly no *numerus clausus* of persons to whom the remedy is available. Neither is it necessary for the applicant to place himself in a special legal category of persons who have a possessory relationship with an object: proof of the existence of any such sufficient relationship at the relevant time will do. The question of the nature of the requisite possession has been approached from the point of the objects of the remedy, with regard to the harm it is designed to prevent. (My emphasis)"

The Court *a quo* then pointed out that the Court in *Ross's* case at p 869 referred to a difference among academic writers "as to whether the Mandament van Spolie is a remedy for protection of the public order rather than a parely possessory remedy" declining to enter this controversy, but pointing out further that the Court in *Ross's* case concluded that the Court:

> "(s)hould consider *inter alia* the question whether the relationship between the person deprived and the thing itself was such as to require protection in the interest of public order."

[43] Smuts AJ then made the factual finding in paragraph [36] of his judgment:

> "In this instance, and unlike in Ross v Ross *supra*, the applicants have not been deprived of their possession of the poles and insulators themselves. Nor are they deprived access to the mining area. Nor are they deprived of access to those poles and insulators located within the mining area. They have been placed a short and otherwise insignificant distance away. The applicants thus have possession of their poles and insulators and of the site including the area inside gate 2. They are merely deprived of the opportunity of blocking access and thus causing an obstruction to the mining area by having those items placed or even dumped at a certain point with the apparent purpose to thus prevent that access."

I respectfully agree with the Court's finding of facts.

[44] The Court *a quo* next considered the crucial issue, whether there was joint possession of the Tschudi mining area by the parties. In this regard, note should be made of the fact that appellant does not challenge the correctness of any of the legal propositions upon which the Court proceeded to consider the issue, namely that a joint possessor may invoke a spoliation remedy and that counter-spoliation is a defence. It goes without saying that if there was no joint possession of the Tschudi mining area respondent's act on 27 September 2006 of moving into the area (accepting it took no property of appellant away) merely amounted to a trespass. On the other hand if there was joint possession the only remaining question is whether respondent's action on 27 September constituted counter-spoliation.

[45] The question of joint possession hinges on the meaning to be ascribed to what respondent called "care and maintenance". In other words the question is

whether the Tschudi mining area had been abandoned by respondent since 1992 as appellant contended.

[46] First, for reasons it gave in its judgment the Court *a quo* refused the application for reference to oral evidence of "the question as to whether respondents had joint possession for the purpose of care and maintenance work". I fully agree with those reasons and consider it superfluous to repeat or try and summarise the reasoning of the Court *a quo* in this regard. Suffice it to say that in reaching the conclusion that there was joint possession of the area, Smuts AJ took into account various relevant factors, including relevant provision of the sale agreement between the parties of the Farm Uris No. 481, (annexure "A" to appellant's founding affidavit), the present replacement value of the tunnel, the nature of possession as described in *Law of South Africa* vol 27 at para 247 and 261 and most importantly, the uncontradicted evidence of Mr Barend Mattheus Nel.

[47] The learned Judge *a quo* found in para [50] of its judgment:

> "The factual disputes which arise on the papers on certain confined issues would not in my view in these circumstances need to be referred to oral evidence. Even if I were to be incorrect as far as the bases I have set out upon which the application would fall to be dismissed, I would, in the exercise of my discretion, in any event decline to refer the factual disputes to oral evidence. This is not only by reason of the fact that the applicants should have anticipated certain factual disputes prior to the bringing of this application

> given what is stated in the correspondence but a referral would not be justified given the disputes themselves."

[48] The Court *a quo* went on to discuss the question of counter–spoliation. It stated in this regard that –

> "Once it is accepted, that there was possession on the part of the second respondent, then it would follow that the locking of the gate by applicants on or around 27 September 2006 would amount to a spoliation of the second respondent."

The Court then considered whether respondent was entitled to counter–spoliate through gate 2 and by moving the poles and insulators a short distance away from the gate to gain access through that gate.

[49] The question of counter–spoliation was raised and debated both before the Court *a quo* and before us on appeal. The crucial point in this debate was whether second respondent was entitled to counter–spoliated as it did by seeking access through gate 2 (instead of gate 1) removing in the process the pile of poles and insulators which had been placed against it in such a manner that they prevented access into the mining area. In this connection the argument of counsel for appellants in the Court below, which was repeated in more or less the same terms before us on appeal, can be summarized briefly. It was that counter–spoliation, to afford a defence, must be part of the *res gestae* of the

spoliation, in other words it should take place *instanter* or forthwith and it should not be disproportionate or exceed permissible limits.

[50] Thus in the Court *a quo* counsel for the appellant's argued that the removal of the poles and insulators had not taken place *instanter* since those items had been there for some time, and that the act of removing them was disproportionate, suggesting that for respondent to rely on counter–spoliation it should have merely removed the lock on gate 1. In this Court Mr Mouton went as far as submitting that it was incumbent on respondent to prove that it had not acted disproportionately in removing the poles and insulators.

[51] Smuts AJ dealt with the requirements of counter–spoliation and reasoned as follows:

> "The requirement for counter–spoliation that it should take place *instanter*, namely that the act of counter–spoliation should be part of the *res gestae* of the spoliation, would not in my view necessarily imply that the act of counter–spoliation to secure access need be in respect of the same access where the immediate spoliation had taken occurred. Thus, a party who has been spoliated by being impeded at one access point may be permitted to secure access at another point to secure possession even if the blocking of the second point may have occurred at a prior date. After all the primary purpose of counter-spoliation and the remedy of spoliation is the restoration of possession. This would in my view meet the requirement of *instante*r and obviate the need to determine the question as to the timing of these items having been placed in front of gate 2 to impede access through gate 2."

[52] The learned Judge went on to refer to cases where a liberal interpretation of *instanter* was urged as "against an overly detached arm chair view of matters *ex post facto"* to illustrate that the Court has a wider discretion, e.g. *De Beer v Firs Investments Ltd,* 1980(3) SA 1087 (W); *Ness and Another v Greef,* 1985(4) SA 641 (C).

[53] As to whether respondent justified the counter–spoliation through gate 2, it should be remembered first, that the gate was secured by wires, and the pile of poles and insulators was moved a short distance from their previous position. Secondly, it should be remembered that gate 1, through which respondent had hitherto had unhindered access, was now locked with a padlock. To suggest or argue that by gaining access through gate 2 in the manner respondent did, respondent exceeded what was permissible in the circumstances, but would have been within the permissible limits if he had broken the lock at gate 1 is akin to saying that an estranged husband or wife would be justified to break a new lock installed on the front door of a common house through which he had hitherto had unhindered access, but not justified to enter the house, in the absence of the other estranged spouse, through a half open window.

[54] Smuts AJ cited a number of cases in support of his statement at par [44] of his judgment that counter–spoliation is accepted by the common law as a defence to an act of spoliation, to mention but one, in *Mans v Loxton Municipality and Another,* 1948(1) SA 966 (CPD) Steyn J considered the question at length

(pp 976 – 978) citing a number of authorities including common law writers on the subject to illustrate various formulations of the doctrine: (Van Leeuwen, Voet, Salkowski, Savigny and Huber) and ended with the following statement (at 977 – 978):

> "Breaches of the peace are punishable offences and to prevent potential breaches the law enjoins the person who has been despoiled of his possession, even though he be the true owner with all rights of ownership vested in him, not to take the law into his own hands to recover his possession: he must first invoke the aid of the law: if the recovery is *instanter* in the sense of being still a part of the *res gestae* of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery, but if the dispossession has been completed, as in this case where the spoliator, the plaintiff, had completed his rescue and placed his sheep in his lands, then the effort at recovery is, in my opinion, not done *instanter* or forthwith but is a new act of spoliation which the law condemns."

Smuts AJ pointed out that in *Ness and Another v Greef, supra*, a full bench at 648 approved of a statement by Van der Merwe in *Sakereg* at 93 "that a Court has a wide discretion to approve an act of counter–spoliation and to refuse the original spoliator against the original possessor" and "in that matter even though a period of 11 days had elapsed between the appellant's occupation until he was locked out by the respondent, the Court held that the respondent's conduct amounted to an *instanter* recovery of the premises."

[55] To sum up, Smuts AJ considered that securing access through gate 2 amounted to *instanter* recovery by respondent and respondent's conduct justifiable, alternatively that respondent had a right to dispossess by securing

access through gate 2, that there had been a form of consent in the form of the sale agreement. He refused the application for referral to oral evidence as unjustified in view of the nature of “the relief now sought”, “namely, to restore the poles and insulators to a place purely for the purpose of blocking access to gate 2, and that possession of those items remained in place and need not be restored.

[56] I find the careful reasoning by the Court *a quo* on every aspect of this matter unassailable. It follows that the appeal should be dismissed with costs and costs to include the costs of one instructing and one instructed Counsel.. I so order.

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MTAMBANENGWE, AJA

I concur.

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MARITZ, JA

I also concur.

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STRYDOM, AJA

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