but the question in regard to the other two-twelfths. Under these circumstances I do not think it would be equitable to make the respondent pay the costs of the application. I think that, as suggested by Mr. *Gregorowski*, it will be more equitable, in all the circumstances, to make no order as to costs. There will, therefore, be no order as to costs, but the attachment is set aside so far as regards the one-twelfth portion included in transfer deed 2291/97, in terms of the respondent's letter.

[Applicant's Attorneys, DE VILLIERS & DE KOCK.
Respondent's Attorneys, ROOTH & WESSELS.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]

DE VILLIERS, J.P.,
CURLEWIS, J.
Sept. 18th, 25th, 1911.

HALL *vs.* PITSOANE AND OTHERS.

Interdict.—Spoliation Order.—Appeal.—Finality.—Possession of Applicant.—Evidence.

A spoliation order made by a Magistrate is a final order from which an appeal lies (*Pretoria Racing Club* vs. *van Pietersen*, 1907, T.S. 687 followed).

In order to entitle an applicant to a spoliation order, he must show that, prior to being ejected, he was enjoying free and undisturbed possession. Consequently evidence on behalf of the respondent to show that the applicant had no such possession is admissible.

Appeal from a decision of the Resident Magistrate, Nylstroom.

Pitsoane and five other natives made applications of a similar kind for a spoliation order against Hall. They alleged that a certain agreement was entered into between one Gentleman Chaane, a headman, on their behalf, and the appellant Hall, the holder of a farm under the Crown Lands Disposal Ordinance, whereby it was agreed that they should be allowed to cultivate the lands upon said farm in return for services which they were

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to render as agricultural labourers. That they in pursuance of the said agreement did cultivate certain land on the said farm and were, therefore, entitled to the crops so raised on the said farm. That a dispute had arisen between them and Hall as to the period of the service to be rendered by them to Hall, and that in July and August, 1911, Hall, "in a highhanded and forcible manner took possession of the crops of the petitioners on the lands cultivated by them and harvested the crops and gathered the fruits of the petitioners' toil, and forcibly and unlawfully deprived the petitioners thereof, and is about to bag and dispose of petitioners' crops, by reason of all which the petitioners have suffered and will suffer damage." They asked that Hall should immediately "restore to and put your petitioners in possession of the said crops."

The Magistrate granted a rule in terms of the prayer, and on the return day the attorney for the respondent (Hall) offered to lead evidence to prove that the petitioners were trespassers and never had any permission or right to enter upon and cultivate the lands on respondent's farm, that they therefore were not entitled to the crops sown by them and had no right to enter the lands and reap the crops. He also offered evidence to prove that the petitioners were not *bona fide* possessors, and had been warned before they cultivated the lands that they had no right to sow without first having obtained his consent. Evidence was further offered to prove that petitioners were not, and had not, been living on the said farm.

The Magistrate refused to hear the evidence tendered on the ground that it was no defence, and granted the order as prayed with costs.

From this decision Hall appealed.

D. de Waal, for the appellant: There should have been an allegation of possession in the petition. The natives never had possession, and a spoliation order could therefore not be granted.

The evidence tendered should have been admitted, as it was a complete answer to the application. A trespasser

has no right; lawful possession is necessary. Appellant denied that respondents ever had possession. The Court should have satisfied itself on two points (1) that the natives had possession, (2) that they had been dispossessed by Hall. There was no evidence of possession nor of ejectment.

B. de Korte, for the respondents: The order granted by the Magistrate is an interlocutory order, and therefore no appeal lies. The case of the *Pretoria Racing Club* vs. *van Pietersen* (1907, T.S. 687) only decides that an appeal may lie from certain orders, see *ibid* pp. 694, 697. According to our common law no appeal lies, see *Neostadius and Coren, Vonnis* 107 p. 187; *Vroman De foro competenti* Ed. *Middelland* Bk. 1, Ch. 2, p. 69; *van der Linden, Judicieele Practyk* Vol. I., p. 342.

The only question is whether the natives had possession; it does not matter whether such possession was *bona fide* or *mala fide* or even that of a trespasser. See *Voet* 41, 2, 16; *Maasdorp, Institutes of Cape Law,* Vol. II., p. 26. An applicant need not prove his title to possession; the burden of proof was on the other side. See also *Blomson* vs. *Boshoff* (1905, T.S. 429 at p. 432). The Magistrate was perfectly entitled to infer that the applicants had possession. They had constructive possession. They state that they were in possession under an agreement, and the onus is on Hall to prove that they had no possession. The evidence offered only tended to prove that the natives were trespassers, and that in itself is an admission that they had possession.

D. de Waal, in reply, referred to *Pietersen's* case (*supra*) at p. 697. The appeal was brought on the ground that the Magistrate refused to hear the evidence; that was an irregularity which appeared from the record.

Cur. adv. vult.

Postea (September 25).

DE VILLIERS, J.P.: This is an appeal against a spoliation order granted by the Magistrate of Waterberg

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against one Hall, the owner of a certain farm in that district, at the instance of the applicants (now respondents), Pitsoane and some five other natives, who all made applications of a similar kind against the appellant. The first point taken on behalf of the respondents is that the order is interlocutory, and as such is not appealable. On behalf of the appellant it was sought to distinguish the present case from the case of *Pretoria Racing Club* vs. *Van Pietersen* (1907, T.S. 687), in which, by a decision of the full Court, it was laid down that a spoliation order was in the nature of a final order, and as such was appealable. If the matter had been *res integra* it is possible that I might have taken a different view, but in view of the decision in the *Pretoria Racing Club* case, and inasmuch as it is very important that the practice of the Court should be continuous, I propose to follow the above case, and to treat the order as a final order within the meaning of sec. 26 of Proclamation 21 of 1902.

The only question which remains is whether, upon the merits, the Magistrate was justified in granting the order. Now the very essence of a spoliation order is that the possession enjoyed by the party who asks for the order must be clear. Not only must he state that he enjoyed possession at the time of the alleged spoliation, but that he enjoyed peaceful and undisturbed possession. I have referred to the practice in the Dutch Courts on this point, and I find that *Bort,* in his treatise upon Complaints (sec. 21) gives a model of what used to be set forth in *mandament van spolie.* It is therefore not a mere technicality, but, as I have said, the very essence of the right of being restored to possession is that the party who claims it was actually enjoying peaceful and undisturbed possession. Nothing is said about peaceful and undisturbed possession in this petition. The petition is very vague. It avers that a certain agreement was entered into between one Gentleman Chaane, a headman, on behalf of certain natives (amongst them the petitioner), and one Henry Hall, the holder of certain rights to a farm under the Crown Lands Disposal Ordinance, whereby it was agreed that the natives should be allowed to cultivate land in return for services which they were to render as agri-

cultural labourers. Nothing is said as to when the agreement was entered into; there is no affidavit from Gentleman Chaane, and nothing is said about the nature of the services which were to be rendered under the agreement. Then the petitioners go on to allege that in pursuance of the agreement they did cultivate certain land on the farm. There is no allegation that in consequence of the agreement they entered into possession of the land and enjoyed it for any period of time; they merely allege that they cultivated certain land, and that therefore they are entitled to the crops raised upon the farm. Then they go on to allege that a dispute arose as to the period of the service to be rendered by the natives, and that in July and August Hall, "in a high-handed and forcible manner took possession of the crops of the petitioner on the lands cultivated by the petitioner, and harvested the crops and gathered the fruits of the petitioners toil forcibly and unlawfully deprive the petitioner thereof, and is about to bag and dispose of petitioner's crops." Then there is a prayer that Hall should immediately "restore to and put your petitioner in possession of the said crops." It may be said that the absence of an allegation of possession was due to oversight, and that the prayer for restoration of possession implies that the petitioners had possession. My own view is that the petitioners should have alleged that as a fact they did have peaceful and undisturbed possession, and that they were, either without their consent or against their will, deprived of that possession, and are, therefore, entitled to be restored. But my brother CURLEWIS does not feel that he can go so far, and I feel that there is just a possibility (a doubt which I expressed during the argument) that the petitioners may as a fact be able to establish their possession. At the hearing in the Court below the attorney for the respondent offered to lead evidence to prove that when the natives started sowing the respondent gave them notice that they had no right to do so without his consent, and also that they were not and had not been living on the farm and therefore they never had possession. But it is possible that as a fact they did enjoy possession, and that the petition

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was not cleverly framed in order to avoid the point of possession, but that the omission is merely an oversight. For this reason, therefore, I am prepared to go so far as to remit the case to the Magistrate in order to decide the question of possession. He should have heard the evidence tendered by the respondent as to the point whether the petitioners ever had possession or not. He comes to the conclusion, in his reasons for judgment, that the applicants tended the crops and exercised physical control over them. Where, however, the Magistrate gets the evidence that the applicants exercised physical control over the crops, I do not know, because it does not appear on the record. The case is referred back to the Magistrate, and the Magistrate will have to decide the question whether the applicants have made out their case (which they should have clearly stated in the petition) that they were as a fact, at the time when they were forcibly ejected, in undisturbed and peaceful possession of the land. *Prima facie,* I should say that the owner of the land was in possession of it, but it is possible that the petitioners may be able to establish their possession. If so, they will be entitled to succeed. But the Magistrate must give the respondent also an opportunity of placing his facts before him, and then decide the matter.

CURLEWIS, J.: I agree that the case should be referred back to the Magistrate. The first objection taken by Mr. *de Korte,* on behalf of the respondents, is that the order granted by the Magistrate is of an interlocutory and possessory nature, and therefore no appeal lies against it. It seems to me that the present case cannot be distinguished from the case of *Pretoria Racing Club* vs. *Van Pietersen,* where the Court held that an order of a similar nature—that is, to restore to a person property of which he had been forcibly dispossessed—was a final order against which an appeal could be brought. It is true that in that case the order had been given in the first instance by a judge in chambers, and in the present case the order was given by a Magistrate. But sec. 26 of the Magistrates' Courts Proclamation, 1902, provides that "It shall be lawful

for any person being a party to any civil suit or action depending in any court of Resident Magistrate to appeal against any final judgment decree or sentence of such court, or against any rule or order made by such court in any such civil suit or action having the effect of a final or definitive sentence." I see no sufficient reason to distinguish this case from that of the *Pretoria Racing Club* vs. *Van Pietersen*, and on the authority of that case the order in question is, in my opinion, one from which an appeal lies.

As regards the merits of the appeal, counsel for the appellant has urged on us, first of all, that *ex facie* the petition there was no ground for an order of spoliation, and that the Magistrate therefore should not, in the first instance, have granted a rule *nisi*, and that at any rate on the return day he should have discharged the rule. It was contended that the petition disclosed no ground for the relief prayed for inasmuch as it contained no allegation that the applicants were in possession. Counsel also contended that this was not a case contemplated by our procedure of spoliation; that the crops were still on the land where they had been reaped, and in possession of the person alleged to be the owner of the farm, and therefore the applicants should proceed by action. While recognising the force of this argument, I feel that though the petition is not very clearly worded, there is sufficient material in it from which the Court can infer that the applicants allege that they were in possession of the lands which they had sown, and the crops which had grown thereon, and that therefore *ex facie* the petition there was sufficient to justify the Magistrate in granting a rule, and in refusing to discharge the rule on the return day merely by reason of the want of clearness, or insufficiency of the grounds set out, in the petition. But I think that when the respondent appeared before the Magistrate and tendered evidence as set out in the record, the Magistrate erred in not allowing him to lead the evidence. The record states that the respondent's attorney offered "evidence to prove that the petitioners are trespassers and never had any permission or right to enter upon and cultivate the lands on respondent's

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farm, and therefore they are not entitled to the crops sown by them, and that they had no right to enter the lands and reap the crops." He also offered to bring evidence "that petitioners were not *bona fide* possessors, and were warned, before they cultivated the lands, by the sub-native commissioner, that respondent had leased the farm from Government with the option of purchase, and that applicants had to obtain the consent of respondent." Also, "that the applicants did not and do not reside on the farm on which the lands are." I take this last portion of the defendant's offer—to lead evidence to show that the applicants did not and do not reside on the farm, together with the evidence previously offered—as raising the defence that the applicants were not in possession of the ground on which they had sown or of the crops which had grown thereon. If this is so, it is a good defence. *Prima facie* the owner of the land is the person in possession of the crops, and is entitled to the crops on the land, unless some other person can show a better right to them. A man cannot go on another's farm without any right whatever, sow crops, and then, months afterwards, when the crops have matured, say, "I wish to come on to your land to reap the crops I sowed." *Prima facie* what grows on the land belongs to the owner of the soil, and not to a third person. The latter must show some right to sow, and some right to reap. That is essential, it seems to me, for the applicant's case. The Magistrate ought therefore to have heard the evidence which the appellant tendered. The procedure in the Magistrate's Court is not, like in the superior Court, to show cause by affidavits, but the Magistrate hears oral evidence. In my opinion the appeal should be allowed and the matter referred back to the Magistrate to hear the evidence on the defence raised by the appellant. This includes, of course, that he must hear any rebutting evidence which the applicants may wish to bring.

[Appellant's Attorneys, PIENAAR & MARAIS.
Respondent's Attorney, BUTLER.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]