

SOUTH AFRICA / JUDGMENT

Bundu Rocky Wildpark NPC v Kopkrap Beleggings 3 (Pty) Limited (1618/2017) [2018] ZAGPPHC 415 (12 June 2018)

[2018] ZAGPPHC 415

COURT

North Gauteng High Court, Pretoria

BEFORE

MF Legodi, H C Jansen van Rensburg, L D Vukeya

CASE / FILE NUMBER

1618/2017

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IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION

[FUNCTIONING AS GAUTENG DIVISION PRETORIA, MBOMBELA CIRCUIT COURT]

(1 REPORTABLE

(2 OF INTEREST TO OTHER JUDGES

(3 REVISED.

CASE NUMBER 1618/2017

12/6/2018

BUNDU ROCKY WILDPARK NPC

APPELLANT

(Applicant in court a quo)

And

KOPKRAP BELEGGINGS 3 (PTY) LIMITED

RESPONDENT

JUDGMENT

LEGODI JP

[1] A removal of a water pressure pump by the respondent (Kopkrap Beleggings 3 (Pty) Limited) from residential estate called Bundu Rocky Wildpark Estate (the estate) in White River Mpumalanga became the subject of a dispute on appeal before this court. At the heart of the

dispute the question is whether the court a quo (per Thobane AJ) was right in finding that the appellant, Bundu Rocky Wildpark NPC (the applicant for mandament van spolie in the court a quo) had no locus standi to represent and launch the application aforesaid on behalf of the residents or home-owners in the estate.

[2] In upholding the point in limine the court a quo inter alia, held:

"12. The interest must be direct and not be too remote. Hence my question to counsel whether the applicant is closely connected to the relief sought, whether there was sufficient nexus between the possession and the spoliation warranting the court's intervention.

13. It is settled law that a party must establish locus standi in the founding papers, in the launching papers. Failure to do so is not merely a technicality because locus standi is fundamental to the rights of the applicants to claim relief and if not set out in the founding papers the respondent would be prejudiced in his or her defence.

14 The question therefore is whether the late disclosure /ratification does not harm the administration of justice and this was discussed in *Trans Namib Limited v Inko Zink (Pty) Limited* 1994 NR 11 (FC) and in that judgment it was said that:

"If scanty material is furnished by the applicant in the founding papers he runs the risk of having the applicant dismissed by the court. The court is however not without discretion it may in filling circumstances and in the interest of justice allow late disclosure of information. The overriding principle being prejudice and the interest of justice

15. It is my view that the applicant has not in the papers established sufficient nexus between the relief sought as well as the other occupants of the property referred to in the papers."

[3] By way of background, the respondent in this appeal is or was a developer of the estate and supplies water for household and other purpose to the appellant and its members who occupy portions of the estate. The appellant who was the applicant in the court a quo represents the various owners and or occupiers of houses within the estate and remunerates the respondent for its services. About twenty four months before the application for mandament van spolie which was instituted on 14 August 2017, the respondent purchased and installed in the estate water pressure pump to ensure 'a constant flow and supply of water to all resident households in the estate.'

[4] Subsequent to the installation of the water pressure pump, the respondent sought to increase the tariffs for the services provided. This resulted in a dispute between the respondent, the appellant and or its members in terms of which the respondent's entitlement to levy such charges was challenged This dispute resulted in the respondent removing the water pressure pump on 4 August 2017, which removal prompted the appellant to launch mandament van spolie application in the court a quo.

- [5] It is that application to which the respondent raised a defence in the form of a points in limine, inter alia that spoliation, if any, was towards each individual home owners and not to the appellant as a legal persona. The contention was articulated as follows: 'the application should have been launched by each individual home owner as the spoliated party and not by the applicant who has not been spoliated by anything'. This challenge has been headed: "Second issue of locus" standi.
- [6] As it was expected, the respondent's counsel had difficulties in dealing with lack of locus standi without seeking to touch on the merits of the matter. He was clearly constrained not to argue the merits of the case in the course of his oral submission. The question whether the appellant and or its members have been dispossessed of the use of the water pressure pump providing 'constant flow and supply of water to all residential households in the estate' and the resultant infringement of the right thereof, was an issue in the court a quo and was sought to be an issue in the present proceedings in particular with reference to the alleged lack of locus standi. In my view, the issue should best be suited to be dealt with as a merit issue.
- [7] I had difficulties in understanding the essence of the argument insofar as it was meant to be confined to the alleged lack of authority to launch the spoliation application by the appellant instead of individual home owners. The appellant's cause of action was that it has itself been dispossessed of the water pressure pump and also that as a representative of its members, they too have been dispossessed of the water pressure pump that was meant to provide 'constant flow and supply of water' to them.
- [8] Perhaps something about the essence of the legal principle of mandament van spolie is necessary to talk about. Since an incorporeal right cannot be possessed in the ordinary sense of the word, the possession is represented by the actual exercise of a right. Therefore, refusal to allow a person to exercise the right will amount to a dispossession of the right. Possession need not to have been exclusive possession. Similarly, a spoliation need not have been exclusive possession. A spoliation claim will lie at the suit of a person who holds jointly with others. For example, client and his bank jointly control the funds in the client's account. There are instances in which use and enjoyment of a thing has an element of sufficient control to be said that the dispossessed person was in possession which qualifies him or her to be protected through the application of mandament van spolie.
- [9] In matters concerning the rights of possession, the requirement of dispossession thereof is satisfied by showing that a previously exercised utility has been disturbed. In that order, the emphasis of physical possession involves rather strained reasoning. For example, when a tenant is locked out, it is regarded as dispossession because his or her access rights have been disturbed. 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.

- [10] In *Tigon Ltd v Bestgel Investments (Pty) Ltd* 2001 SA (4) 634 (W), the court examined the justice nature of the rights of a holder of shares in a company. This was an order to determine whether the removal of its name from the share register constituted dispossession for the purpose of being able to explain relief in terms of mandament van spolie. The court held that mandament van spolie was available in such an instance because the act of removing the name constituted dispossession for the purpose of spoliation remedy.
- [11] Consequent to the fact that right to possession does not need to be physical, exclusive or personal, it is important to revert to the facts of the present case. This should be measured against the defence of lack of locus standi which was raised as the second point in limine in the court a quo. The statement: '... if there were any spoliation which occurred, which in any event is denied such a spoliation would have been towards each individual homeowner,' appears to be a defence raised in the alternative to the merits of the case clothed under denial of spoliation almost as a plea of admission and avoidance.
- [12] The difficulty with this defence is that it ignores what is pleaded by the appellant. The appellant manages the affairs of the home owners in the estate and it is a channel by which the respondent if it so cares, negotiates with the appellant on behalf of home owners. I understand the essence of the defence to be that the appellant as a legal persona is not capable of having the use and enjoyment of the 'constant flow and supply of water' generated by the water pressure pump to all residential households in the estate.
- [13] The court a quo also moved from the same premise, that is: 'the applicant has not in the papers established sufficient nexus between the reliefs sought as well as the other occupants of the property'. For two reasons I am unable to agree with this conclusion. I do so without seeking to make a final factual finding on the merits of the application. This too must apply to section 38 of the Constitution insofar as it is relevant to the suggestion that the interest of the applicant is too remote and not closely connected to the relief sought and in particular whether there was sufficient nexus between the possession and spoliation warranting the court's intervention.
- [14] The appellant 'represents the various owners and or occupiers in a wildlife estate'. In the course of oral argument, counsel for the respondent identified the issue before us as follows: 'Whether the Company (referring to the appellant) can act on behalf of its members where its members were directly spoliated.' Two issues arise from this formulation. Denial of possession and spoliation insofar as it relates to the appellant and challenge to authority to represent home owners in a spoliation application. I dealt with some facts relevant to refute the denial of possession in paragraphs [12],
- [13] and [14] above. I also revert to deal with the context or facts from paragraph
- [16] below.

- [15] Having identified the issue as he did, counsel for the respondent made a concession as follows: "I am not disputing that the applicant is acting in the interests of its members." The concession is vital and shows the meritless of the persistent argument on behalf of the respondent based on the alleged "Second issue of locus standi."
- [16] If one concedes generally that the applicant can represent its members being the homeowners, it must of necessity bring to an end an argument of lack of authority by the appellant to act on behalf of the home owners in a spoliation application. The basis for this argument appears to be twofold. That is, there is nothing the appellant physically possesses or possessed as on the date of alleged spoliation. And that neither is there any protectable right in the form of mandament van spolie to the use of water by the appellant. Clearly this argument borders around merits as a defence.
- [17] Secondly, the argument in my view is flawed as it fails to take into account the fact that the removal of the water pressure pump was a physical act to which the appellant in its representative capacity manages the affairs of the home owners within the estate. It is in the context of its representative capacity that everything which concerned the water pressure pump was done or negotiated through the appellant. For example, invoices titled, "water pump" were directed to the appellant and not to individual home owners.
- [18] It is the return of the water pressure pump that is demanded to restore the status quo. The home owners look up to the appellant as their agent or representative for whatever services that had to be provided or rendered for their own interest. The appellant is the engine for them. Therefore there can be no merits that the appellant lacks locus standi to act in the instant case both in its own capacity and or for the interest of its members.
- [19] Speaking about the interest of the appellant's members, referring to the home owners, it is appropriate to consider the effect and interpretation of section 38 of the Constitution insofar as it is relevant to the facts of the present case. The home owners ought to be seen as 'group of-persons' contemplated in section 38(c) of the Constitution. Dealing with enforcement of rights, of relevance, paragraph (c) of section 38 provides that "the persons who may approach a court are anyone acting as a member of, or in the interest of, a group ... of persons."
- [20] The underlining above is my emphasis. Therefore any notion that the provision of section 38 is not applicable to the present case cannot be correct. The concession made in the course of argument referred to in paragraph [15] of this judgment should have brought to an end any resistance to the present appeal and pave the way for the parties to revert to the court a quo to settle their scores on merits.
- [21] The supply of 'constant flow' of water generated by the water pressure pump removed by the respondent should also be seen as a right to water supply infringement occasioned by the removal of water pressure pump, ought to be the subject of ventilation on merits and not the point in limine. The initial suggestion in the course of argument by counsel on behalf of the respondent was that, as I understood him, no right to water has been infringed in that

supply of water has not been stopped. I see no reason how this point can be relevant to lack of locus standi. In any event, even if the point in limine was good, the difficulty for the respondent would still remain. Entitlement to full accessibility

and use of water at a pressure generated by the removed pressure pump, in my view, would still have entitled the appellant to be heard as a merit issue than as a lack of authority. In other words, the issue of lack of authority overlaps with merits that an appropriate recourse was to get into the merits of the matter. That was displayed by the nature of the oral argument alluded to in the preceding paragraphs. Counsel for the respondent simply, had the difficulty in insulating his address on lack of authority from merits.

[22] For the purpose as articulated in the preceding paragraphs, the appeal ought to succeed. But before I conclude, there are two issues I need to touch on. Firstly, after judgment was reserved, my attention was drawn to the decision in the case of *First Rand Ltd v Scholts* NO [2006] SCA 98 RSA and to other case laws. I do not find it necessary to allude to all the case laws we have been referred to. One should be careful not to deal with this case and in references to the cases we have been referred to, as if this case is about the merits of spoliation application. It is not and therefore, the discussion of the case law insofar they sought to persuade this court otherwise, is limited because here we are dealing with whether the court a quo was correct in upholding the second point in limine opined by the respondent in the court a quo.

[23] In the *First Rand Ltd*, for example, the granting of spoliation order by the court a quo was set aside on appeal because the use of a pipeline installed for the supply of water to various farmers by the opening of a tab controlled by the appellants was subject to a contractual period from 1 January 2004 to 31 December 2004. Upon the expiry of the period the appellants closed the tab and as a result the respondents could not access water through the pipeline aforesaid, an act which the respondents saw as spoliation. The Court of Appeal inter alia, held:

"... The source of any rights the respondents may have had to the use of the pipeline is contract. They were deprived not of quasi possessio of their statutory water rights which they still have and may exercise in any manner they wish but of an expired contractual right for conveyance of water through the pipeline. Any obligations the appellants had to the respondents and any rights the latter had in this respect terminated when the water Conveyance Agreements with them expired..." (My emphasis).

It is clear that no reliance can be placed on this case to thwart the present appeal more so that one is dealing here with the point in limine and not with the merits of spoliation application per say.

[24] Lastly, I need to make remarks which I also made in the course of oral argument. This case appears to be one of the matters that should never have been pursued vigorously up to this stage. The dispute is all about what is referred to in the invoices addressed to the appellant (applicant in the spoliation application) as "estate water pump". The water pump was bought

for about R5000.00, so was the indication given in the course of oral argument. The institution of this matter followed by the hearing thereof in the court a quo, followed by the application for leave to appeal and subsequent present appeal proceedings before us, by now should have tripled by far in legal costs. Upholding of the present appeal will effectively mean remitting the matter to the court a quo to deal with the merits of the spoliation application. That would mean more legal costs than the purchase and installation

of the water pressure pump.

[25] In my view, the dispute in this matter is not on a matter of principle where money would not matter in defence thereof. Why parties and or their respective legal representatives had allowed this matter to go up to so far, is mind boggling. I hope that these remarks would make the parties to sit back and reflect in the best interest of every one of them and to resolve the dispute instead of further litigating in court against each other.

[26] Be that as it may, the matter for now is before us as an appeal. As I said, the appeal ought to be upheld and at the same time the matter has to be case managed. And for this purpose, pre-trial conference is to be ordered.

[27] Consequently, an order is hereby made as follows:

- The appeal is upheld with costs.
- The court a quo's decision to uphold the point or points in limine on lack of authority and or locus standi are hereby set aside and substituted as follows:
- "The points in limine on lack of authority and or locus standi are hereby dismissed with costs."
- The matter is hereby remitted to the court a quo and is case managed as follows:

"Mandament van spolie application on merits in the court a quo is hereby to be enrolled for pre-trial conference before a judge on a date to be determined by the Registrar upon the handing down of this judgment during which date for the hearing of the spoliation on merits will be determined."

MF LEGODI

JUDGE PRESIDENT OF THE HIGH COURT

I agree

H C JANSEN VAN RENSBURG

ACTING JUDGE OF THE HIGH COURT

I agree

L D VUKEYA

And it is so ordered

DATE OF HEARING:

18 MAY 2018

DATE OF JUDGMENT:

12 JUNE 2018

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