

SOUTH AFRICA / JUDGMENT

Hillside Safaris (Pty) Ltd v Afrika Plains Limited (2789/2017) [2017] ZAECHGHC 88 (26 July 2017) [2017] ZAECHGHC 88

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Roberson

CASE / FILE NUMBER

2789/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 2789/2017

DATE HEARD: 21/07/2017

DATE DELIVERED: 26/07/2017

In the matter between

HILLSIDE SAFARIS (PTY) LTD APPLICANT

and

AFRIKA PLAINS LIMITED 1ST RESPONDENT

CUSTOCEL (PTY) LTD 2ND RESPONDENT

BUFFALO BILL TRADING CO (PTY) LTD 3RD RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The applicant has applied on an urgent basis for an interdict pendente lite. It seeks an order against the first respondent interdicting and restraining the first respondent from interfering with, impeding or otherwise obstructing the applicant's right to traverse over the first respondent's land known as Lilyvalley pending the determination of an action it has instituted against the first respondent for certain relief. I shall deal later in this judgment with the particulars of claim in that action and the relief claimed. The second respondent

filed a notice to abide in this application.

[2] In the limited time available to me to prepare this judgment I have not in my judgment dealt as fully with the contents of the affidavits and Counsels' submissions as I would have liked. I have dealt with what I believe are the most material aspects.

[3] The applicant is the owner of certain land on which it operates a private game lodge. On 28 June 2005 it concluded a conservancy

agreement with Bayeti Conservancy (Pty) Ltd (Bayeti) which was the owner of land on which it conducted a game reserve under the name Lalibela Game Reserve (the Reserve). In terms of the conservancy agreement the applicant's land was incorporated

into a Conservancy which, as defined in the agreement, was collectively the Reserve, the applicant's land, and any land incorporated in the Conservancy in terms of an agreement concluded with Bayeti on similar terms. It was recorded in the agreement

that the Conservancy was to be utilised by its members for commercial eco-tourism purposes. In terms of the agreement the applicant and its guests, employees, agents and invitees were granted access to the Reserve by Bayeti and the applicant would have reciprocal obligations to allow access to its property to Bayeti and other members of the Conservancy. The agreement was a lengthy and detailed one but for the purposes of this judgment I do not think it is necessary to refer to any other terms.

[4] The foundation for this application and the action, rests on an assertion that Lilyvalley was incorporated in the Conservancy and thus the applicant has the right to traverse Lilyvalley. The previous owner of Lilyvalley was Majormatic 125 (Pty) Ltd

(Majormatic). The first respondent purchased Lilyvalley from Majormatic during 2016. Leaving aside Lilyvalley, the other land incorporated into the Conservancy at the time the applicant concluded the agreement with Bayeti was that owned by Lalibela

Development No 3 (Pty) Ltd, Lalibela Development No 4 (Pty) Ltd, the second respondent Custocel (Pty) Ltd, and The Trustees for the time being of the Rockcliff Family Trust (Rockcliff) (this land is now owned by the third respondent). Prior to acquiring Lilyvalley, the first respondent also purchased the land owned by Bayeti (as well as the business of the Reserve), and the land owned by the two Lalibela companies. It is not in dispute that those lands are part of the Conservancy and that the first respondent is a member of the Conservancy. Lilyvalley is situated more or less in the middle of the Conservancy lands.

[5] The agreement of sale between Bayeti and the first respondent recorded that the seller had established a conservancy incorporating

neighbouring land in terms of written and oral conservancy agreements. The first respondent acknowledged that it had familiarised itself with the terms of the conservancy agreements which were annexed to the agreement, and "if need be" the terms of the oral conservancy agreements. The first respondent was to deliver an undertaking that following the implementation of certain transactions it would have the legal capacity, power and authority to replace Bayeti and perform all the obligations of Bayeti in terms of the conservancy agreements. The sale agreement concerning one of the Lalibela properties contained similar provisions.

[6] In terms of the sale agreement between Majormatic and the first respondent, Majormatic warranted that it was not party to the

conservancy agreement between Bayeti, the second respondent, the applicant, Rockcliff, and the Lalibela companies.

[7] By letter dated 3 February 2017 the first respondent's attorneys informed the applicant and the second respondent that

Lilyvalley had never been incorporated in the Conservancy and that Majormatic's permission to members of the Conservancy to traverse Lilyvalley for the purpose of game viewing was a precarium revocable at will upon reasonable notice by Majormatic or its successor-in-title. The applicant and the second respondent

were given notice that the first respondent withdrew any precarious permission that currently existed for members of the Conservancy to traverse Lilyvalley with effect from 1 August 2017. Correspondence ensued between the applicant's attorneys and the first respondent's attorneys, which correspondence ceased on 9 March 2017. This application was issued on 8 June 2017, for hearing on 21 July 2017.

[8] The deponent to the founding affidavit was Mr Timothy Fenner (Fenner). His life partner is the sole director of the applicant and Fenner is the general manager of the applicant's business. He recounted the background to the acquisition of the

applicant's land, following his meeting with Mr Frederick van Zyl (van Zyl) who was a director and shareholder of Bayeti.

According to Fenner, at the time the conservancy agreement with Bayeti was concluded, Majormatic and Rockcliff were already members

of the Conservancy having concluded agreements with Bayeti on the same terms and conditions as that concluded between the applicant and Bayeti. The applicant paid certain sums to Bayeti for its incorporation in the Conservancy.

[9] On 15 October 2012 the members of the Conservancy, that is the applicant, Bayeti, the two Lalibela companies, the second respondent

and Rockcliff signed a new conservancy agreement. Clause 2.6 of this agreement provided:

“Subject to Clause 3.4 below this agreement will replace all previous agreements between the parties who have signed this agreement whilst any party who has not signed the agreement shall continue to be bound by the terms of any prior agreement entered into between that party and Bayeti.”

Clause 14.1.2 provided that Bayeti had the right to add additional land to the Conservancy.

[10] Fenner could not say why Mr Gene Bishop (Bishop) of Majormatic had not signed the new agreement. Fenner maintained however that Majormatic continued to operate as part of the Conservancy and the applicant was able to traverse Lilyvalley. Fenner also maintained that despite Majormatic not signing the new agreement, it remained bound by a previous written or oral agreement whose terms were recorded in a conservancy agreement which was annexed to the sale agreements in respect of the Bayeti and Lalibela properties. The conservancy agreement Fenner referred to was one of two annexed to the sale agreement of one of the Lalibela properties (and annexed to the founding affidavit). It was not signed by Majormatic. It recorded inter alia that Majormatic was incorporated into the Conservancy in terms of an oral agreement terminable on reasonable notice. Clause 10.2 and 10.3 of the sale agreement provided:

“The owners of the land within the conservancy area are all members of the Conservancy and the members and their guests are entitled to reciprocal rights to traverse the entire Conservancy in terms of the Conservancy Agreement.

The Purchaser acknowledges and confirms that it has familiarised itself fully with the terms of the Conservancy Agreements as set out in Appendices B (1) and (2).”

B1 was the agreement to which Fenner referred and B2 was the conservancy agreement concluded on 15 October 2012.

[11] With reference to the applicant’s particulars of claim in the action, Fenner further maintained that the first respondent was bound by the rights and obligations which had rested on Bayeti and that Lilyvalley could not be withdrawn from the Conservancy.

[12] This brings me to the particulars of claim in the action. It is alleged that at the time the applicant became a member of the Conservancy, Majormatic was already a member in terms of a written alternatively oral agreement concluded between Bayeti and Majormatic in 2004. Reference is made to the provisions of B1 and the reciprocal rights of traversal of members of the Conservancy recorded therein. Reference is further made to the conservancy agreement of October 2012 (which was not signed by Majormatic) and its terms. It is alleged that in terms of the sale agreement between Bayeti and the first respondent, inter alia, the first respondent would have full power and authority to replace Bayeti and to perform all the obligations of Bayeti in terms of the Conservancy Agreements. Clauses 42 to 45 of the particulars of claim are as follows:

“The First Defendant, by virtue of the sale of the business of Bayeti, and the resultant cession and delegation of all Bayeti’s rights and obligations as contained in the conservancy agreements,, is bound by the provisions of the First Conservancy Agreement, alternatively the Second Conservancy Agreement, alternatively the Third Conservancy Agreement.[1]

At the time of the purchase of Majormatic’s properties by the First Defendant, both the First Defendant and Majormatic were members of the Conservancy.

With the First Defendant’s purchase of Majormatic’s properties, these properties were incorporated into the First Defendant’s portfolio of properties that form part of the Conservancy, becoming subject to the First Defendant’s rights and obligations in terms of the First, alternatively the Second, alternatively the Third Conservancy Agreements.

The Plaintiff is, accordingly, entitled to exercise its rights of traversal over Majormatic’s properties granted to it in terms of the First and/or Second and/or Third Conservancy Agreement in perpetuity.”

[13] In the alternative it is alleged that if it is found that the first defendant is entitled to withdraw Majormatic’s properties from the Conservancy, reasonable notice is a period of 5 years.

[14] The relief claimed in the action is as follows:

“MAIN CLAIM

- (a) An order declaring that Majormatic was a member of the Conservancy at the time of sale of Majormatic’s Properties to the First Defendant;
- (b) An order declaring that Majormatic’s Properties remain part of the Conservancy;
- (c) An order declaring that Majormatic’s Properties were incorporated into the First Defendant’s portfolio of properties that form part of the Conservancy, becoming subject to the First Defendant’s rights and obligations in terms of the First, alternatively the Second, alternatively the Third Conservancy Agreements;
- (d) An order declaring that the plaintiff is, in perpetuity, entitled to undisturbed traversal rights over Majormatic’s Properties as provided for in the First, alternatively, the Second, alternatively the Third Conservancy Agreements.

ALTERNATIVE CLAIM

- (e) An order declaring that the period afforded the Plaintiff before termination of the Plaintiff’s rights of traversal over Majormatic’s Properties is unreasonable and setting aside the Notice;
- (f) An order declaring that reasonable notice in respect of withdrawing from the Conservancy is 5 years;

- (9) An order declaring that the plaintiff is, for a period of 5 years from the date of the service of the Notice upon it, entitled to undisturbed traversal rights over Majormatic's Properties as provided for in the First, alternatively the Second, alternatively the Third Conservancy Agreements."
- [15] The first respondent's answering affidavit was deposed to by Mr Mark Rippon (Rippon) who is employed by Lalibela Management Services (Pty) Ltd and has been appointed by the first respondent as the manager of the Conservancy. He has personal knowledge of the history of the Conservancy and Lilyvalley. He was previously a minority shareholder and director of Bayeti. During 2007 he was employed by Majormatic and Bishop, whom he referred to as Majormatic's "controlling mind." Bishop was introduced to Lilyvalley through van Zyl and Majormatic purchased Lilyvalley in 2004. Bishop initially allowed limited traversing of Lilyvalley. Bishop however did not want Lilyvalley to be part of the Conservancy and did not want Lilyvalley to be exploited commercially. Bishop declined to enter into a conservancy agreement. According to Rippon Majormatic did not pay conservancy fees or any other type of member contribution.
- [16] Rippon maintained that Fenner always knew that Majormatic and Lilyvalley were never part of the Conservancy. He referred to various emails written by Fenner which he said demonstrated such knowledge. I shall reproduce a portion of the content of some of these emails.
- [17] In an email dated 26 September 2007 to one Herman Stegman Fenner wrote:
- "Gene never actually signed the traversing rights agreement as he never had any intention of running a commercial lodge so there is nothing in writing. Lots of things were agreed verbally between him and [van Zyl] most of which [van Zyl] ignored or went back on. What verbal agreements would carry over after my purchase of Gene's shares is subject to debate."*
- [18] On 2 June 2008 Fenner emailed Mr Vernon Wait (Wait). The opening paragraph was as follows:
- "I have been thinking about the request to get Gene to sign a document to confirm that he is prepared to put his land into the conservancy if Lalibela is sold and I have to admit feeling a bit uncomfortable about pushing this too hard."*
- [19] On 6 June 2008 Fenner wrote in an email to Attorney Brin Brody:
- "Gene is meeting with Vernon next week and he will be given a Conservancy Agreement for him to consider which will give the new owners of Bayeti traversing rights through his land."*
- [20] On 12 June 2008 Fenner wrote in an email to Wait:

“I think Brin’s involvement will now largely be in respect of the Conservancy agreement that Gene will be asked to sign with the new owners. Gene is understandably a bit nervous/suspicious about this document and doesn’t want to be back in a position where someone tries to enforce an agreement which he didn’t sign and which is not relevant to his particular circumstances.”

[21] On 14 November 2008 in an email copied to Wait Fenner wrote:

“It’s a similar situation with Gene…… [van Zyl] got him to commit to buying land and building a lodge and then tried to force him into accepting a totally one sided Conservancy Agreement which he was never going to sign.”

[22] In an email to Wait dated 20 November 2008 Fenner wrote:

“…… Gene swears by the fact that he never agreed to accept that Conservancy Agreement or agreed to [van Zyl] filling his lodge with Lalibela guests.”

[23] On 30 April 2009 Fenner wrote as follows to Bishop:

“The logic behind this request was that this would be the likely outcome of the court cases anyway and if you could get this agreement without going to court, it would save time and money plus create a more convivial atmosphere for reaching a settlement on the other issue, namely the terms you would require for including Lilyvalley in the Conservancy.”

And:

“I do think that it has finally sunk in that [van Zyl] needs Lilyvalley to be included in the Conservancy and he needs a harmonious reserve with all parties working together if he is ever going to sell Lalibela.

[24] The court cases mentioned involved litigation between van Zyl and Bishop, one of which was an action whereby Majormatic sought a declaratory order that it was entitled to re-erect the fence along the boundary between Lilyvalley and Lalibela, an order that Bayeti (the defendant) was to remove its game from Lilyvalley and an order that Bayeti was to cease traversing or otherwise entering Lillyvale. It was specifically alleged in the particulars of claim that Majormatic had permitted Bayeti to remove the fence on the boundary and that Majormatic had permitted Bayeti’s game-viewing vehicles to traverse Lilyvalley, but that such permission constituted a precarium revocable at Majormatic’s will. Bayeti made an offer of settlement in terms of Uniform Rule 34 which was made an order of court on 15 June 2009. In terms of the order, inter alia, Bayeti was to remove its game from Lilyvalley, was to erect a fence at its cost on the boundary, and Bayeti would cease traversing Lilyvalley on 30 November 2009.

[25] Fenner was sent a copy of the Rule 34 offer on 8 May 2009 by Bayeti’s then attorney. The attorney suggested that Fenner discuss the offer with Bishop.

[26] On 18 June 2009 Fenner emailed Wait setting out what he believed was required to achieve a settlement with Bishop. Two of his suggestions were:

“A simple traversing agreement is drawn up which gives Gene traversing rights over Lalibela and members of the Conservancy traversing rights over Lilyvalley.

Compensation is offered to Gene for his perceived depreciation in the value of Lilyvalley resulting from him signing a traversing agreement.”

[27] On 31 July 2009 Fenner emailed Wait stating:

“I also appear to have fallen out with Gene over this fence issue and we are barely talking at the moment but he has emailed me today to say that he is prepared to enter into negotiations “in regard to the traversing issues””

[28] On 10 August 2009 the applicant’s former attorneys addressed a letter to Bayeti’s attorneys, copied to Majormatic’s

attorneys, accusing Bayeti of a breach of the conservancy agreement between Bayeti and the applicant as a result of the court order of 15 June 2009. It was further alleged that the applicant had been despoiled of its traversing rights over Lilyvalley. The letter indicated that the applicant would bring an application for the applicant to intervene in the action and to have the court order set aside. No such application materialised.

[29] Bishop died in March 2011.

[30] On 18 October 2011 the applicant’s former attorneys wrote to Bayeti’s new attorneys concerning the draft conservancy

agreement. It was recorded in the letter that the Conservancy properties consisted of the properties of Bayeti, the

second respondent , the applicant, the Lalibela companies, and Rockcliff. It was further stated:

“The agreement is silent on Majormatic’s participation in the Conservancy.

Bayeti must warrant that it has or will obtain Majormatic’s participation in the Conservancy agreement. Lilyvalley constitutes a traversal area of fundamental importance both as to size and as to position (its exclusion and re-introduction of fencing will diminish the amenity of the reserve).”

[31] On 31 March 2016 Fenner, on behalf of the applicant, signed a document headed “Waiver and Consent” in which he stated that the applicant was a party to the written conservancy agreement of 15 October 2012 between Bayeti, the applicant, the second respondent, Rockcliff, and the Lalibela companies. This document concerned the proposed sale of the Bayeti and Lalibela

properties to the first respondent.

[32] An “Accession Agreement” signed by Fenner on 29 March 2016 on behalf of the applicant recorded inter alia that the rights and obligations of a selling member of the Conservancy in terms of the Conservancy Agreement would be assigned to the first respondent. The selling members were recorded as Bayeti and the Lalibela companies.

[33] A confirmatory affidavit from van Zyl was filed in which he stated that he was the majority shareholder and a director of Bayeti.

He stated that Lilyvalley did not and does not form part of the Conservancy. Bayeti and Majormatic did not conclude any valid

and enforceable conservancy agreement pertaining to Lilyvalley. Van Zyl confirmed that Bayeti had no traversing rights over

Lilyvalley and that is why Bayeti had agreed to the court order granted on 15 June 2009.

[34] In reply, Fenner raised matter much of which is the subject of a striking out application on various grounds, which I shall deal with later. Suffice it to say at this stage that Fenner’s response to the court order of 15 June 2009 was that the order had been abandoned by Bayeti and Majormatic and that an oral agreement had come into being subsequent to the court order. That agreement, so Fenner stated, was between Majormatic and the other members of the Conservancy, including the applicant.

Majormatic’s verbal agreement to remain within the Conservancy superseded the court order and created a new cause of action.

To support this contention, Fenner stated that Majormatic did not re-erect the boundary fence and continued to permit members of the Conservancy to traverse Lilyvalley.

[35] Fenner also alleged that an email from Wait, who he described as the first respondent’s marketing manager, to various tour operators, demonstrated that the first respondent was marketing the Conservancy as including Lilyvalley. In the email Wait referred to the notice given to the applicant to cease traversing Lilyvalley and stated that the area available to the applicant would be significantly reduced. A “conservancy map” attached to the email showed Lilyvalley as an area to which the applicant had no rights. A further map displayed the whole of the Reserve, including Lilyvalley.

[36] The first respondent opposed the application on three main grounds: lack of urgency, non-joinder of Majormatic, and no prima facie right established.

Urgency

[37] In the founding affidavit, Fenner dealt with the grounds of urgency. He referred to the exchange of correspondence, the last letter of which was dated 9 March 2017. The inclusion or otherwise of Lilyvalley in the Conservancy was discussed in detail in the correspondence. The applicant’s attorneys also proposed a without prejudice meeting during March 2017, saying that this would be the last opportunity because Fenner was leaving the country on 28

March 2017. The first respondent's attorneys indicated that the first respondent was willing to meet but did not foresee any prospect of resolving the matter because the parties' views were so fundamentally opposed. One of the pre-conditions to such a meeting was that the applicant would acknowledge that the first respondent was entitled to give the notice terminating the permission to traverse Lilyvalley. According to Fenner the attempt to settle was futile and it was necessary to bring the application on an urgent basis. Fenner gave no explanation for the failure to launch the application in the three months prior to 8 June 2017.

[38] It was submitted on behalf of the first respondent that any urgency was self-created. I agree. Fenner knew of the court order of 15 June 2009 which confirmed that Bayeti traversed Lillyvale in terms of a precarium. Through his former attorneys he had threatened an application to intervene in that action and to set aside the order but did not do so. In their letter of 10 August 2009 the applicant's attorneys asserted the applicant's right to traverse Lilyvalley and alleged that Majormatic and Bayeti had concluded a similar agreement to that concluded between Bayeti and the applicant. They called upon Bayeti and Majormatic to give an undertaking that the terms of the court order would be suspended pending the application to intervene. This letter shows that Fenner was already at that stage asserting a right to traverse Lilyvalley and was aware of the grounds for the assertion of that right. This knowledge and the knowledge of the court order

should have triggered an urgent response on receipt of the letter giving six months' notice. This letter was only responded

to about two weeks later. It was clear from the first respondent's attorneys' letter of 9 March 2017 that the

first respondent remained steadfast in its position that Lilyvalley did not form part of the Conservancy. In the absence of an explanation to launch the application earlier so that it did not have to be heard on an urgent basis during recess and so close to the deadline of 1 August 2017, it can only be concluded that the urgency was self-created. In view of all these circumstances, despite the looming deadline of 1 August 2017 and despite the fact that the all the affidavits have been delivered, the delay of three months is unacceptable. For this reason alone the application should be removed from the urgent roll. An attempt was made in the replying affidavit to explain the three month delay. I shall deal with this attempt when I deal with the striking out application.

Non-joinder of Majormatic

[39] In *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C), Corbett J (as he then was) after referring to various authorities on the question of a direct and substantial interest in the issues involved in a matter and in the order which a court might make, stated at 415 H:

"..... it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court"

It was submitted on behalf of the first respondent that Majormatic had a direct and substantial interest in the subject matter of the interdict and the action.

[40] It will be remembered that in the action the applicant seeks an order that Majormatic be declared to have been a member of the Conservancy at the time of the sale of Lilyvalley to the first respondent. In view of the warranties given by Majormatic in the sale agreement, such a declaratory order would expose Majormatic to a claim by the first respondent. Similarly, if this court was to find that the applicant had established the requirements for the interdict it seeks, including a prima facie right to traverse Lillyvale, the effect of the interdict would impact on the contractual relationship between Majormatic and the first respondent. The prima facie right asserted rests on Majormatic having entered into an agreement with Bayeti. It would mean that the applicant could continue to traverse Lillyvale pending judgment in the action. The point of non-joinder should therefore be upheld. This means that the application should not be determined in the absence of Majormatic.

No prima facie right established

[41] In spite of my view in respect of the first two grounds of opposition, I propose to deal with the merits of the application.

[42] In *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont, and Another* 1996 (3) SA 706 (C) the following was said at 714B-F:

“The well-known requirements for the grant of an interdict are (1) a clear right or a right prima facie established though open to some doubt; (2) a well-grounded apprehension of irreparable harm if the interim relief is not granted

and the ultimate relief is granted; (3) a balance of convenience in favour of the granting of interim relief and (4) the absence of any other satisfactory remedy.

Save that the requirement of a prima facie right established though open to some doubt, is the threshold test, the factors are not considered separately or in isolation, but in conjunction with one another in the determination of whether the Court should exercise its overriding discretion in favour of the grant of interim relief. I refer here to *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D); *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) and *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T).

In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is prima facie established though open to some doubt.

The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.”

[43] In its founding affidavit the applicant relies on a written or oral agreement concluded between Bayeti and Majormatic which was in existence at the time that the applicant and Bayeti concluded their conservancy agreement. It is now accepted that there was no written agreement. Fenner acknowledged that Majormatic did not sign the agreement B1 annexed to the Lalibela sale agreement nor did it sign the conservancy agreement of 15 October 2012. However he maintained in his affidavit that Majormatic remained bound by its previous conservancy agreement with Bayeti. The portions of Fenner's emails I have quoted above demonstrate conclusively, in my view, that there was no such agreement and that Fenner knew that there was no such agreement. In his replying affidavit he attempted to explain these portions of the emails as a contention that Lilyvalley was "not "formally" (i.e. in terms of a written agreement)" part of the Conservancy and his view was always that it was part of the Conservancy in terms of an informal oral agreement. In my view this explanation is disingenuous and in clear contradiction to the portions of the emails quoted. The overall meaning and impact of those emails was that there was no agreement at all. Bishop had never agreed that Lilyvalley was to be part of the Conservancy. The applicant therefore failed to establish, even prima facie, that there was such an oral agreement. Van Zyl's affidavit confirms the position.

[44] This position was determined by the court order of 15 June 2009 which remains in place. Majormatic alleged that Bayeti's right to traverse Lilyvalley was in terms of a precarium (in other words not in terms of a conservancy agreement) and in terms of the order Bayeti was not allowed to traverse Lilyvalley.

Counsel for the applicant sought to interpret the order differently by submitting that it did not refer to a precarium nor did it declare that Lilyvalley was not part of the Conservancy. Such an interpretation cannot be sustained. The order determined what was claimed in the action.

[45] The basis for the asserted prima facie right therefore falls away.

[46] Counsel for the applicant submitted that Lilyvalley was incorporated in the Conservancy because at the time of its acquisition, the first respondent was already a member of the Conservancy. By adding land to the Conservancy it granted other members of the Conservancy the right to traverse Lilyvalley. I do not agree with this submission. Although in terms of the 2012 conservancy agreement Bayeti had the right to add land to the Conservancy, that did not mean that the mere acquisition of land resulted in the incorporation of that land in the Conservancy.

[47] I do not think that the email from Wait to the tour operators assists the applicant. The email did not emanate from the first respondent. In the email Wait explicitly referred to the notice given by the first respondent to the applicant and one of the maps attached to the email separated Lillyvale from the rest of the reserve.

[48] It follows from the above and applying the test in *Spur Steak Ranches* (supra) that I am of the view that the applicant failed to establish a prima facie right. It is not necessary to consider the other requirements for an interim interdict. The application therefore cannot succeed.

Application to strike out

[49] This application related to the applicant's replying affidavit

[50] Paragraphs 59 – 88

This was new matter relating to urgency. In the bulk of the paragraphs Fenner elaborated on the period over which correspondence

was exchanged between the parties' attorneys and then recounted events which occurred thereafter, including his departure from South Africa on 28 March 2017 and further travels to Australia, the United Kingdom and France, and the consequent difficulty in communicating with his attorney. This was new matter which had not been included in the founding affidavit. Counsel for the applicant submitted that it was matter in response to the answering affidavit challenging urgency. I do not agree. It was matter which was available to the applicant from the outset and should have been included in the founding affidavit. The case on urgency which the first respondent had to meet was contained in the founding affidavit and the admission of the further evidence on urgency would be prejudicial. The following paragraphs are therefore struck out: 60 – 78, 81 and 86.

[51] Paragraphs relating to the alleged oral agreement which came into existence after the court order of 15 June 2009

With the exception of two of the impugned paragraphs, these paragraphs are clearly new matter in support of an oral agreement concluded after the 2009 court order. Neither the court order nor this oral agreement was referred to in the founding affidavit. Fenner himself said it was a new cause of action. An applicant should not make out his case in reply. The case the first respondent had to meet was an agreement concluded between Bayeti and Majormatic prior to the conclusion of the agreement between Bayeti and the applicant. The first respondent would be clearly prejudiced if this material was not struck out. Accordingly the following paragraphs are struck out: 20, 29, 30.5, 52, 55, 56, 57, 58, 125, 126, 134, 136, 144, 147, 182, 219, and 301.

[52] Paragraphs relating to Bishop's and his partner's subjective thinking

Fenner speculated about the reason why Bishop had agreed to remain in the Conservancy following the litigation against Bayeti, the relationship between Bishop and Rippon, the relationship between Bishop and van Zyl, Bishop's attitude towards an oral agreement, and Bishop's partner's reason for selling Lilyvalley. It was submitted that these allegations should have been included in the founding affidavit, alternatively that they were irrelevant. In my view they should be struck out on the basis that they are irrelevant. I do not include all the paragraphs sought to be struck out on this ground. The following paragraphs are struck out: 30.6, 125, 130,

143, 144, 145, 147, 151, 152 and 161.

[53] Paragraphs relating to the inclusion of Lilyvalley in the Conservancy levy calculations

Fenner maintained that Majormatic had been factored in to the members' levy calculations. He did not mention this in the founding affidavit although he was aware of the nature of the dispute concerning Lilyvalley's inclusion in the Conservancy.

These allegations were not included in the case which the first respondent had to meet and amounted to new matter. The following paragraphs are struck out: 140, 141, 142 and 311.3.

[54] Paragraphs relating to Fenner's interpretation of agreements

I do not think that the first respondent is prejudiced by these paragraphs and decline to strike them out.

[55] Paragraphs containing scandalous matter

Counsel for the applicant conceded that these paragraphs should be struck out. They are accordingly struck out. I shall refer to them when I deal with costs.

[56] Paragraphs relating to Wait's email

It was contended that these constituted new matter which the first respondent had not had the opportunity to answer. This was matter which arose subsequent to the signing of the founding affidavit and the first respondent would have been entitled to answer the new matter. I decline to strike out these paragraphs.

Costs

[57] The first respondent sought a punitive order of costs, including the costs of two counsel. In my view there are a number of factors justifying such an order. The prominent factor is the applicant's failure to disclose the court order of 15 June

2009. This was fundamental to the issue of a conservancy agreement between Bayeti and Majormatic. Fenner was aware of the action, the proposed settlement offer and the order. In his attorney's letter of 10 August 2009 he challenged the order and said that the applicant had been despoiled of its right to traverse Lilyvalley. The order was of enormous import for the applicant. Fenner knew it was still in existence. The inclusion of Lilyvalley in the Conservancy was canvassed in the correspondence between the attorneys prior to the launching of the application and the applicant was expressly told that Majormatic's permission to the members to traverse Lilyvalley constituted a precarium. In these circumstances Fenner's contention in his replying affidavit that he did not think it necessary to mention the order because "nothing came of the order" is simply disingenuous. The failure to disclose the order in the founding affidavit brings his honesty and the bona fides of the application into question.

[58] A further factor was Fenner's suggestion/hint of a written agreement between Bayeti and Majormatic. In the applicant's

particulars of claim it is alleged that at the time the applicant became a member of the Conservancy, Majormatic was already a member "in terms of a written, alternatively verbal, agreement concluded between Bayeti and Majormatic during 2004". It was alleged that insofar as the agreement was written, the applicant was not in possession of a written agreement. This allegation is misleading, in the light of Fenner's emails where he acknowledged that there is no written agreement. In the replying affidavit he said that Bishop had reasons why he never wanted to sign a written conservancy agreement. He denied saying in his founding affidavit that Bishop had signed a written agreement. However in his founding affidavit, when dealing with the fact that Majormatic had not signed the 2012 conservancy agreement, he said:

"In any event, why exactly Majormatic refused to sign the New Conservancy Agreement is a moot point as Majormatic remained bound to its previous Conservancy Agreement (whether written or oral)" (My emphasis.)

Clearly he was attempting to suggest that there might be a written agreement, when he knew that there was no written agreement. Again this factor brings his honesty and the bona fides of the application into question.

[59] Lastly, in his replying affidavit Fenner made a gratuitously insulting remark about the first respondent, said that if the

applicant had employed Rippon at a higher salary, Rippon would have deposed to an affidavit in support of the applicant, and accused the first respondent's attorneys of dishonesty. This was the scandalous matter which was struck out.

[60] In the result, the following order will issue:

The application is dismissed with costs on the attorney and client scale, including the costs of the application to strike out. Such costs are to include the costs of two counsel where so employed.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv J H Loots, instructed by Burger Potgieter Attorneys, Bellville, c/o Wheeldon Rushmere & Cole, Grahamstown

For the 1st Respondent: Adv M R Hellens SC with Adv G W Amm, instructed by Werksmans Attorneys, Sandton, c/o Netteltons, Grahamstown

-
- [1] According to the particulars of claim the first agreement is that between the applicant and Bayeti, the second is B1 and the third is the agreement of 15 October 2012.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2017/88.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hillside-safaris-pty-ltd-v-afrika-unknown-topic-aecghc-2017>

Prepared on 13 October 2026 · Esheria