

SOUTH AFRICA / JUDGMENT

Husselman and Another v Transnet Soc Limited (413/2014) [2014] ZANCHC 28 (19 May 2014) [2014] ZANCHC 28

COURT

Northern Cape High Court, Kimberley

BEFORE

M.V. Phatshoane

CASE / FILE NUMBER

413/2014

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IN THE HIGH
COURT OF SOUTH AFRICA
(NORTHERN
CAPE DIVISION, KIMBERLEY)

Case

No: 413/2014

Heard

on: 26-03-2014

Delivered

on: 19-05-2014

In

the matter:

JOHAN
ARNOLD
HÜSSELMAN
FIRST APPLICANT
AUDREY
JOAN
RICHARDS
SECOND APPLICANT
And
TRANSNET
SOC
LIMITED
RESPONDENT

JUDGMENT

PHATSHOANE J:

1. Mr Johan Arnold Hüsselman and Ms Audrey Joan Richards are siblings. They are the first and second applicants and have approached this Court for an order that Transnet SOC Limited, the respondent, restore to Mr Hüsselman, his contractors or delegates the right of access to Portion 3 of Farm Riet Fonteins 185 and Portion 3 of Farm Riet Fonteins 165 situated in the administrative district of Kenhardt, Northern Cape, and to remove the locks on the gates through which access was gained.
2. In the second part of the relief the applicants seek an interim interdict restraining Transnet from removing or carting-away the

crusher-dust/gravel or to deal with it in anyway or dispose of it from the mentioned farms pending the outcome of the action already

instituted by Transnet against Hüsselman under case No: 2121/2012.

3. The two farms are adjoining each other and belong to Transnet. Many years ago Hüsselman's father, the late Mr Adreas Jacobus Hüsselman, owned the farms. In the 1970's the South African Iron and Steel Industrial Corporation (IsCOR) constructed the Sishen-Saldanha Railway Line for the transportation of iron ore from Sishen to Saldanha. Between 1970 and 1974 a quarry was established for the extraction of ballast stone on Farm Riet Fonteins 165 on the basis of the agreement between Hüsselman's

father and IsCOR in terms of which IsCOR would pay per cubic meter for the stone which was used for the construction of the railway

line. This stone was transported to Farm Riet Fonteins 185 where it was pulverized into crusher-dust/gravel. Out of this process a huge stockpile of crusher-dust was created. There is a dispute of fact on the ownership of the crusher-dust stockpile which I revert to later.

4. Around 1980 Transnet gave an indication to the Hüsselmans that it intended to buy 60 hectares of the farms and to continue extracting the stone. Following negotiations the farms were expropriated. Hüsselman senior had grazing rights on the farms for a period of three years and could thereafter exercise this right on a month to month basis until the grazing rights were terminated by Transnet. Hüsselman intimates that the grazing right was transferred to him by way of his father's testament. This right, he maintains, had not been terminated by Transnet or any of its predecessors in title and therefore still exists to date and includes the right of access to the expropriated land by him, his workers, other persons and contractors authorized by him to be on the land for any lawful purpose.

5. Hüsselman says that he has used the expropriated land since 1993 for grazing and had the undisturbed access thereto through gates “H”, “G”, “F”, and “E” appearing on the aerial photograph attached to the founding affidavit. He says a dispute over the ownership of the crusher-dust stockpile arose between him and Transnet in June 2012. This prompted Transnet to close gate “G”. He therefore approached this Court with a spoliation application to restore the status quo ante. On 06 July 2012 Lacock J issued a Rule nisi returnable on 10 August 2012 in terms of which Transnet was called upon to show course why an order compelling it to give Hüsselman, his employees and contractors the undisturbed access to the expropriated land should not be made final. On the return date the order was made final by Williams J.
6. Hüsselman explained that during his visit to the farms on 09 March 2014 he and his wife experienced difficulties in gaining entry. Some of his cattle went missing and they had to look for them on the farms. Gate “G” was closed with a cable tie as depicted on the photos attached to the founding papers marked “K”. There was also a notice on the gate to the following effect: “PRIVATE ROAD. TRANSNET FREIGHT RAIL (IRON ORE LINE) PLEASE CLOSE AND LOCK THE GATE. NO ENTRY WITHOUT VALID PERMIT. TRESPASSERS WILL BE PROSECUTED.” Such a notice has never before been placed on any of the gates.
7. Hüsselman says that because he did not want to damage the cable tie he and his wife climbed through the fence. They reached the stockpile and observed that a considerable amount of the crusher-dust had been removed. There was a warning notice on the fence near the stockpile that reads: “TAKE CARE-MEN WORKING”. He says it was clear to him that there were some operations with regard to the removal of the crusher-dust stockpile. Gate “F” was also locked. He also noticed significant amounts of loads of the crusher-dust of the same type found on the farms on the service road which appeared ready for use in the maintenance and upgrading of the road.

Spoliation:

8. The legal principles underlying a mandament van spolie are well known. Spoliation is the wrongful deprivation of another's right of possession. It aims to prevent self-help and seeks to prevent people from taking the law into their own hands. Two requirements should be satisfied for an order restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant. The second

is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute. See *Ivanov v North West Gambling Board and Others* 2012

(6) SA 67 (SCA) at 75 para 19.

9. In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at 520B-C para 21 the effect of the spoliation remedy was explained as follows:

[21]....“Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor — a fraud, a thief or a robber — is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property.”

10. Hüsselman contended that Transnet dispossessed him of his free and undisturbed access to the expropriated land and is unable to exercise his grazing rights. He argued that Transnet despoiled him without his consultation, consent and/or a Court order authorising this conduct.
11. What arises for consideration is whether Hüsselman seeks through this application the enforcement of his contractual right to grazing or whether he has been unlawfully deprived of his quasi-possession of an incorporeal right (the right of access to the farms for purposes of grazing).
12. Mr Smit, for Transnet, contended that Hüsselman did not make out a case for spoliation because he did not have possession or physical control or the *animus* to control the expropriated farms. He argued that the grazing right Hüsselman relies on is contractual in nature and terminable on a month's notice. That what Hüsselman seeks to enforce is specific performance of his contractual right to grazing. In any event, it was contended, the grazing right does not amount to possession of Transnet's farms for the purposes of spoliation.
13. For this submission Mr Smit relied on *Plaatjie and Another v Olivier NO and Others* 1993 (2) SA 156 (O). That case concerned an application for the restoration of water supply to the residents of an informal settlement who contended that the termination of the water supply was an act of spoliation. The Court held, *inter alia*, that the applicants, in essence, ask for an order compelling the first respondent to supply water to certain outlets (taps) which were situated not on any of their stands but at a distance from these stands. That none of the applicants ever had physical possession of the water and their claim could therefore not be founded on loss of physical possession. That the remedy was available for the

restoration of the lost possession of a right of servitude (ie lost possession in the sense of *quasi-possessio*, which consists of the actual use of the servitude) and that the applicants had claimed the restoration of a non-servitutorial right of having water supplied to them. That if the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense, then rights such as a right to performance of a contractual obligation would have to be included,

and that would extend the remedy beyond its legitimate field of application and usefulness.

14. The facts in *Plaatjie and Another v Olivier NO and Others* (supra) are materially distinguishable from the present matter. The issue central to this application is Hüsselman's right of access to Transnet farms which he claims to have had over the years and whether this constitutes quasi-possession of an incorporeal right.
15. To buttress his argument that Hüsselman had no physical control of the farms Mr Smit also relies on the unreported Judgment of this Court per Kgomo JP involving the same parties in *Transnet SOC Ltd v Arnold Hüsselman and Others* Case No 1302/2012 handed down on 21 September 2012 where Transnet had successfully approached this Court on urgency for an order

interdicting Hüsselman and others from carting-away and further dissipating the crusher-dust deposited on the farms pending the determination of the action. Of particular relevance are paras 23 and 24 of that judgment where the Court held:

"[23] A further issue that requires short shrift is Mr Van Tonder's argument that even if Hüsselman is unsuccessful with his bid that there existed an oral agreement between Iscor (excluding Iscor's successors in title) and his father, Hüsselman has nevertheless become the owner of the crusher-dust stockpile through acquisitive prescription by virtue of the provision of s 1 of the Prescription Act, 68 of 1969. This section provides:

"Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."

- [24] Hüsselman is free to raise this issue at the trial in due cause, if so advised. I cannot see how he can claim to have been in possession of the crusher-dust stockpile which had been on Transnet's land since it became the owner of the stated land. Hüsselman had no physical possession, which is a requirement or one of the elements of prescription. See *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972
- (2) SA 464 (W) at 474A-475D; and *Morgenster 1711 (Pty) Ltd v De Kock NO and Others* [2012 (3) SA 59 (WCC)] at 63B-64E (paras 12-18)." (With emphasis).
 16. The judgment of my brother Kgomo JP referred to hereinbefore was concerned with the physical possession of the crusher-dust stockpile

and not the quasi-possession of the access road or access to the farms. The issue of ownership of the crusher-dust is much more

relevant on the interdictory relief sought which I turn to later.

17. Mr Van Niekerk SC, for the applicants, contended that Hüsselman is not attempting to enforce his contractual right to grazing over Transnet land but his access to the land in issue. He argued that until 09 March 2014 Hüsselman was in possession of the access road to Transnet's property.
18. An act of spoliation can be committed with regard to movables, immovable and quasi-possession of incorporeals such as a right. The right can either be a real or a personal right that entitles the holder thereof to some kind of use of a thing, inter alia, servitude or the right to the supply of electricity or water. See Silberberg and Schoeman's, *The Law of Property*, fifth edition 296-297. In Joubert's *LAWSA Vol 27* at 179 para 264 the learned author states:

"(I)t is trite law that the principle peculiar to spoliation has since the early days of Roman-Dutch law, been applied to cases of quasi-possession of incorporeal rights. This has been followed in South African Law where the mandament has always been held to be available in cases where the quasi-possession of incorporeals has been spoliated, although the court has warned that the application of the principles require closer investigation and more subtle treatment. Since the spoliatus ante Omnia restituendus est applies also in the case of spoliation of quasi-possession, the applicant need not prove his right to the incorporeal, but merely that his actual or factual exercise of the right has been disturbed. By requiring the applicant to prove on a preponderance of probabilities that he has a right to exercise control would frustrate the very basis of mandament van spolie.."

19. Exclusive possession is not a requirement for the success of spoliatory relief. Greenberg JA puts it as follows in *Nienaber v Stuckey* 1946 AD 1049 at 1055-1056:

"... (T)here appears to be good reason for holding that exclusiveness of possession is not an essential element. In Nino Bonino v De Lange 1906 TS 120 Innes CJ says (at p. 122) that "spoliation is any illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property or even in regard to a legal right". Wassenaar (Practyk Judicieel, Chap. 14, Art.

- 1) says that the remedy following on spoliation is competent to anyone who has been deprived of "eenige goederen of gerechtigheden" which seems to include incorporeal rights. (See also Voet 43.16.7; Lee's *Introduction to Roman-Dutch Law*, 3rd ed. At p. 167.) The fact that these authorities state generally, and without any limitation or exception, that the possession of incorporeal rights is protected against spoliation means that the holders of such servitudinal rights as rights of way, where clearly the person who holds the servitude does not have exclusive possession of the land, are entitled to the relief against dispossession by spoliation. See also De Blecourt *Kort Begrip van het Oud-Vaderlandsch Burgerlyk Recht* (5th ed. At p. 189), where he says that, in respect of the same piece of land, there may be different rights, vested in different persons, all entitled to the protection of spoliation proceedings. Moreover, apart from authority, I can see no reason why the relief should not be available merely because the person who has been despoiled does not hold exclusive possession."

20. In *Zulu v Minister of Works, KwaZulu, and Others* 1992 (1) SA 181 (D) at 188E-I the Court pronounced:

"In Nienaber v Stuckey [1946 AD 1049] (supra at 1055-6) Greenberg JA observed with reference to Voet 43.16.7; Wassenaar Practyk Judicieel ch 14 art 1 and Lee's Introduction to Roman Dutch Law 3rd ed at 167:

'The fact that these authorities state generally and without any limitation or exception that the possession of incorporeal rights is protected against spoliation means that the holders of such servitural rights as rights of way . . . are entitled to the relief against dispossession by spoliation.'

Too much should not be read into this statement. Greenberg JA was here simply pointing out that possession need not be exclusive in order to qualify for protection by the mandament. The question of what kinds of rights the possession of which is protected by the mandament did not arise because the spoliatus there had clearly been in physical possession of the land. It is true that Wassenaar states in the passage referred to that the mandament van spolie may be obtained in any case of a spoliation of 'enige goederen of gerechtigheden' but I would not conclude from this bald statement that the dispossession of just any right can be made

the subject of spoliation proceedings.

If the protection given by the mandament van spolie were to be held to extend to the exercise of rights in the widest sense then supposedly rights such as the right to performance of a contractual obligation would have to be included

- which would be to extend the remedy beyond its legitimate field of application and usefulness."
21. The facts in *Nienaber v Stuckey* supra although somewhat distinguishable have striking similarities to the present matter. A reading of the judgment indicates that the Court considered access through the locked gate as an incident of the applicant's physical possession of the land. In that case the appellant alleged that he hired a portion of a farm from the respondent for three years. He had proved that under a contract he had the right to plough and cultivate the piece of land although the respondent was entitled to exercise such other rights over the land as would not derogate from the appellant's rights. He averred that he had been in peaceful and undisturbed possession of the land from the commencement of the lease until he was despoiled through the closure of the only gate giving him access to the land. The Court held that he had made out a case that the closing of the gate had deprived him of possession of the property.
22. It is not in dispute that Hüsselman had undisturbed access to the farms for grazing purposes since the 1980s. The fact that his grazing right is terminable on a month's notice is not an issue of substance. Transnet did not gainsay the allegation that it locked gate "G" and "F" which Hüsselman used to gain entry onto the farms. It should be mentioned that on the first day in which this matter was set down Transnet sought a postponement on the basis that it was not responsible for the spoliatory acts. I must also add, in all fairness to Mr Smit, that he

was not representing Transnet at the time. What Mr Smit argued is that Hüsselman still had access through the unfenced portions of the farms and gate “E” and maintained therefore that he cannot claim to have been despoiled. Hüsselman states that for him to access gate “E” he has to go through gate “G” which is currently barricaded by means of a cable tie. In *Nienaber v Stuckey* supra at 1059 Greenberg JA states:

“It was also contended on respondent’s behalf that inasmuch as there was another gate which would give the appellant access to the land, the closing of the one gate did not deprive him of possession.....Mr Grobler contends that the remedy lies not only when there is a deprivation but also when there is a disturbance of possession, and he refers to Wassenaar (op cit. Ch. 13, Art 1), who says that the remedy is available “als iemand binnens jaars geraakt of geturbeert is uit de possessive.” The words “geraakt of geturbeert” seem to connote anything which touches or affects or disturbs the possession and not to require complete deprivation. But I do not think that this point need be pursued as it is clear that the appellant was in possession of the right of access through this gate of which he has been deprived, and the remedy is there available.”

23. Lastly, Mr Smit argued that the application should fail because it is not urgent. He contended that Hüsselman did not make out any case that the sheep do not have feed or that the provision for feed cannot be supplied. In my view, the urgency insofar as spoliation is concerned is not persuasive but nevertheless the matter is still semi urgent regard being had to the interdictory relief in which it is averred that Transnet is in the process of dissipating the crusher-dust to the detriment of the applicants.
24. On the whole I am satisfied that Hüsselman has the required possession of access to the farms. There is nothing in the papers

suggesting that the deprivation of this possession through the locking of the gates had been lawful. It follows that Hüsselman

has fulfilled the requirements of the mandament van spolie remedy and must succeed on this leg of the application.

The interdict:

25. As already highlighted, there is a dispute of fact on the ownership of the crusher-dust/gravel stockpile. Hüsselman says after 1974 Iscor did not conduct any further operations on the farms and left the crusher-dust in one stockpile behind without laying any claim thereto. He explained that from then on his father openly, as if he was the owner of the crusher-dust, had exclusive control and possession of the crusher-dust and in his absolute and exclusive discretion sold that to third parties, donated it and used it. He also made the crusher-dust available to the South African Transport Services, the predecessor in title of Transnet, for the maintenance of the road which runs parallel to the railway lines because his father was allowed to use the road in the execution of his farming operations. Hüsselman intimates that when Transnet required the crusher-dust it sought permission from his father who would make it available to it. He says that Mr Van Dorp of Transnet on occasion also sought permission from Hüsselman to cart-away the gravel.

26. Hüsselman alleges that he became the owner of the crusher-dust and used it in the same way as his father did following his father's passing in 1993. His sister, the second applicant, explained that it came to her knowledge around 17 March 2014 that she may probably be the owner of half of the crusher-dust. Hüsselman says he brought a counterclaim in the action proceedings for a declarator that he is the owner of the crusher-waste. He says that although this was based on prescription he intends amending his papers to include a claim of ownership of the stockpile along the lines of what is set out in the preceding paragraph.
27. Mr Van Niekerk argued that the applicants established a prima facie right to ownership of the crusher-dust or to lay a claim thereto which right is at the moment being infringed by Transnet. He contended that the stockpile is movable property and could not have been expropriated. He further argued that the applicants have at least a 'triable issue' capable of protection by way of an interim interdict regard being had to the disputed ownership of the stockpile.
28. It was further argued on behalf of the applicants that, by its earlier application, Transnet sought to prevent Hüsselman from removing the crusher-dust on the basis of the pending action, but it has resorted to the same activity of carting-away the crusher-dust. The applicants contended that this poses the same potential prejudice to them in the event they succeed in the action. They further argued that if Transnet continues to cart-away the crusher-dust without any independent record keeping of the quantities removed they stand to suffer irreparable harm because it would be difficult for them to compute or quantify the damages suffered as a result of the removal of the crusher-dust by Transnet.
29. Mr Van Niekerk contended that Transnet did not say if it is a holder of a right or permit, as envisaged in s 5A (b) of the Petroleum and Mineral Resources Development Act, 28 of 2002, to remove the crusher-waste. This latter issue was not raised in the founding

papers to enable Transnet to answer thereto. In motion proceedings, the affidavits constitute both the pleadings and the evidence. The issues and averments in support of the parties' cases should appear clearly therefrom. See *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008

(2) SA 184 (SCA) at 200 para 43.

30. Transnet maintains that Iscor owned the crusher-dust since 1977 and never abandoned same. Iscor's assets and crusher-dust were transferred to it and utilized by it to maintain the roads. In its deposition it pressed that the crusher-dust was available to it because it was the owner thereof and denies that it sought permission from the Hüsselmans to remove the crusher-dust. It intimates that the Hüsselmans never acquired ownership of the waste-dumps or dealt with it as if they were the owners thereof. It further says that it is aware that Hüsselman sold the crusher-dust to third parties unlawfully and this, it says, prompted it to bring the application to restrain Hüsselman from doing so pending the action.

31. Where the right upon which an interim interdict is sought is not clear, the position is as follows according to *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another* 1973

(3) SA 685 (A) at 691C - F:

*“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 at 227. In general the requisites are -*

- (a) a right which, "though prima facie established, is open to some doubt";
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities. . . .”

32. The question of ownership of the crusher-dust stockpile in issue is not new. It was raised before my brother Kgomo JP under case No 1302/2012 referred to earlier. On this issue the learned Judge held:

“Transnet has attached the Title Deed that shows that they are the owners of the land on which the stockpile rests. The presumption is that it is the owner. The gravel/crusher-waste/mineral or by-product was excavated/extracted from its land. Where else should it have been deposited? Whoever claims ownership of the crusher-waste must prove it. At this stage annexure FA8 seems to demonstrate the converse.”

33. For the sake of completeness Kgomo JP made an order in the following terms:

“1. The first respondent (Arnold Hüsselman), the second respondent (Martin & East (Pty) Ltd) and the third respondent (Van Zyl Blasting-Earthworks CC), and any contractor who operates through the first respondent, are hereby forthwith interdicted and restrained from removing and dissipating the crusher-waste or crusher-dust material stockpile from the applicant's (Transnet SOC Limited's) property (Portion 3 (of portion1) of the farm Riet Fonteins 165, held under Deed of Title No T7570/93 and Portion 4 (a portion of portion 1) of the farm Riet Fonteins 165 held under Deed of Title 907/93 pending the determination of action proceedings to be instituted within 30(thirty) days from date of this order.

2. The costs of this application shall be costs in the aforementioned action proceedings.”
34. In my view there is an element of some doubt cast upon the applicants’ right to lay claim to the ownership of the crusher-dust. I am not swayed that the applicants have strong prospects of success. To my mind, for them to succeed with this application, they have to satisfy the remaining prerequisite of an interim interdict. What stands out is the prejudice to be suffered by the parties in the event the interdict is or is not granted. On this aspect, on the applicants’ own version, Transnet has used the gravel for several decades albeit with the Hüsselmans’ consent.
35. Transnet contended that it be allowed to remove the crusher-dust as and when required because its situation differs from that of the applicants. To this end it explained that the balance of convenience favours it because it has built roads from Sishen to Saldanha, a route of some 800 km. These roads service the railway line. The roads are in need of constant maintenance and repair and the crusher-dust is used for that purpose. The road in the area around the farms is resurfaced by using the crusher-dust obtained from the farms. It states that the nearest alternative supplier of the crusher-dust to the farms is 300 km away. In the event it is interdicted from removing the crusher-dust it would have to travel that distance to obtain the crusher-dust when the supply is readily available at its doorstep. It argued that this would be prohibitively expensive and time consuming.
36. Not much is being said by the applicants regarding the balance of convenience except the bare statement that it favours them. They

further say that Transnet cannot claim prejudice because since 2012 up to February 2014 it did not remove any crusher-dust from the farms.

37. All things considered I am of the view that the balance of convenience weighs heavily in favour of Transnet on this aspect. In any event, the applicants have an alternative remedy in the form of damages should they succeed in the pending action. Transnet tendered to keep full records of the grade and quantity of crusher-dust removed from time to time. Mr Van Niekerk argued that one cannot let the wolf watch over the sheep. That may well be but I am unable to discern how proper record keeping cannot be attained. It matters not that the applicants are resident far away from the farms as Mr Van Niekerk submitted from the bar. They clearly have some sort of farming operations around the farms. In my view the ball is in the applicants’ court to ensure that proper recording of the amounts of the crusher-dust removed is maintained. Accordingly the application for an interim interdict should fail.

Costs:

38. This matter was brought on urgency on 19 March 2014. On this day Transnet brought an application for postponement which the applicants opposed. In order to afford Transnet the opportunity to file its answering affidavit I postponed the matter to 26 March 2014. The issue of costs stood over for later determination. In *Persadh and Another v General Motors South Africa (Pty) Ltd* 2006

- (1) SA 455 (SE) at 459 para 13 the principles applicable to an application for a postponement were summarised as follows:

“[13] The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.” (Footnotes omitted)

In my view Transnet was not afforded sufficient time to file its answering affidavit. Its application for postponement was justified and should not attract an order of costs against it.

39. Insofar as costs of the main application are concerned each party has achieved partial success. Under these circumstances it is just and fair that each party bear its own costs.

40. In the result the following order is made:

ORDER:

Transnet SOC Limited, the respondent, is ordered to restore to Mr Johan Arnold Hüsselman, the first applicant, his workers, contractors or any of his authorised persons a right of access to the immovable property, known as Portion 3 of the Farm Riet Fonteins 185 and Portion 3 (a Portion of Portion 1) of the Farm Riet Fontein 165.

The respondent is ordered to remove all the locks and/or barricades to the gates which give the first applicant access to the immovable properties referred to in paragraph 1 of this order.

In the event that the respondent refuses to comply with the terms set out in paragraph 1 and 2 of this order the sheriff/deputy sheriff of the district of Kenhardt, Northern Cape, is hereby directed and authorized to remove the locks and/or barricades to the gates.

The prayer for an interim interdict pending the outcome of the action under case No 2121/2012 restraining the respondent from removing or carting-away the crusher-dust/gravel from Portion 3 of the Farm Riet Fonteins 185 and Portion 3 of Farm Riet Fonteins 165 situated in the administrative district of Kenhardt, Northern Cape, is dismissed.

Each party is to bear its own costs.

M.V. PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the Applicants Adv J.G Van Niekerk SC Instructed by Elliott Maris Wilmans & Hay On
behalf of the Respondent Adv M. Smit Instructed by Engelsman Magabane Inc

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