

SOUTH AFRICA / JUDGMENT

Khumalo v Len Smith Investment Holdings CC (LCC175/2016) [2020] ZALCC 28 (3 March 2020) [2020] ZALCC 28

COURT

Land Claims Court

BEFORE

M P Canca

CASE / FILE NUMBER

LCC175/2016

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT RANDBURG

BEFORE:

CANCA AJ

CASE

NO: LCC 175/2016

In

the matter between:

MUNTU

WELCOME

KHUMALO APPLICANT

and

LEN SMITH INVESTMENT

HOLDINGS

CC RESPONDENT

Judgment: 3 March 2020

JUDGMENT

CANCA AJ

Introduction

- [1] The applicant, Muntu Welcome Khumalo (“Khumalo”), seeks a spoliation order directing the respondent, Len Smith Investment

Holdings CC (“Len Smith”), to restore his right of way over its farm, Buffelskloof, to his homestead, which is located on a neighbouring farm, Kilham. Both farms are situated in the district of Bergville, KwaZulu-Natal Province.

- [2] Khumalo avers that he lost the right of way during March 2016, when representatives of Len Smith locked the gates on the route which he had, allegedly, used for numerous years, in order to reach his homestead by vehicle.

- [3] He further avers that, in addition to refusing to furnish him with a duplicate set of the keys to those gates, Len Smith’s

representatives constructed a makeshift gate close to his homestead, thereby further hindering his aforesaid access. The said gate is apparently not manned by any of Len Smith’s personnel and remains locked for 24 hours.

- [4] It is not disputed that the farms in question are all located on land in the Drakensberg mountain range, which land, in most cases, consist of steep gradients, deep-sided gullies, cliffs and watercourses. The roads are, from my observation during an inspection in loco, treacherous and, probably, doubly so during the rainy season.

- [6] Mr. Wijnbeek, for Len Smith, has raised a number of defenses to the application, including that the Court has no jurisdiction to hear this matter. The contention being that, although an owner of a dominant land (in this case, Kilham) may choose a particular route, having regard to the convenient use of the servient land (Buffelskloof), Khumalo was not the owner of the dominant land. The owner of Kilham was not before Court.

- [7] The application was argued in full on the papers on 25 May 2018. However, when certain factual disputes, regarding various alternative

routes to Khumalo’s homestead, arose during argument, the Court adjourned the hearing to allow for the inspection in loco alluded to in paragraph [4] above. The inspection took place on 14 September 2018. The hearing only resumed approximately a year later, on 18 September 2019, due to counsels’ busy schedules.

Khumalo’s Case

[8] Khumalo, who was born on 20 October 1951, describes himself as a farm dweller who lives on Kilham and avers that he started working there during 1969. Kilham is owned by the recently deceased Mr Cilliers and adjoins Buffelskloof, which is the subject of this application. Neither Cilliers nor his executor or executrix have been joined to these proceedings.

[9] It is common cause that Khumalo is an occupier, as defined in the Extension of Security of Tenure Act No. 62 of 1997 (“ESTA”)

and that he has never been an employee or a farm worker of Len Smith nor has he lived on Buffelskloof. His brother did at some point live on Buffelskloof but vacated the farm following litigation and a settlement with Len Smith. It is also not disputed that Khumalo had on various occasions visited his sibling on Buffelskloof. He avers that he also used the impugned route during those visits.

[10] Khumalo further avers that he and his family, have, save for the relatively recent blockade by Len Smith, been using “an established route that is running from the main road and traverses through the Respondent’s farm [Buffelskloof] which is and has always been used as an access road.” He further states that, “there is no other public road which guarantees me access to my place of residence except the one which goes through the Respondent’s farm.”

[11] In addition to the above, Khumalo also alleges that Len Smith fenced off an area which he and his family used, after getting off public transport, on those occasions when they walked to the homestead, instead of using one of his vehicles. It transpired from the inspection that Khumalo has both what is colloquially known as a “bakkie” (although not a 4x4) and a tractor.

[12] Mr. Chithi, for Khumalo, contended that the aforementioned hurdles made it near impossible for Khumalo, who, at the launch of this application, was approximately sixty-four years old, to purchase feed for the livestock he keeps at his homestead, given the distance from the public road to his homestead, his age and the weight of the feed.

[13] Khumalo would now have to carry the feed in view of the fact that he was unable to reach his home by vehicle, so the contention continued.

[14] Mr. Chithi further contended that to expect Khumalo to travel the distance from the main road by foot, carrying goods and to jump over fences in order to reach his home was cruel and inhuman. By locking the gates and constructing the makeshift gate, without making duplicate keys available to Khumala, Len Smith, through its representatives, committed an act of spoliation, so the contention

continued.

Len Smith’s Case

[15] It was contended on behalf of Len Smith that Khumalo, who is neither occupier, employee, farm worker nor labour tenant on Buffelkloof,

cannot premise any rights on his brother's former employment on that farm. It was further contended that there were different routes leading to the homestead other than through Buffelskloof, which Khumalo could use.

[16] Len Smith's answering affidavit was deposed to by its sole member, Mr. Andrew Wilson Dott ("Dott").

[17] Dott purchased Buffelskloof from a CG Badenhorst and took transfer thereof on 26 March 2013. It appears from the papers that Dott found Khumalo's brother on Buffelskloof, where he kept livestock in return for guarding the farm, warding off trespassers and controlling and/extinguishing fires as well as other threats which might harm the property. Dott retained his services on the same basis.

[18] The relationship between the two, for reasons that are not germane to this matter, soon soured. The upshot was that, following litigation, Dott and Khumalo's brother parted company and the latter vacated Buffelskloof. According to Dott, the way was now clear for him to establish a nature conservancy and to introduce game on Buffelskloof and two neighbouring farms in which he apparently has a financial interest, namely, Greenfire and Rockcliff.

[19] In anticipation of the above, "all access points to BuffelsKloof were secured with gates..." as there was an ongoing poaching problem in the area, mainly done by local herdsmen with dogs, according to Dott. He also avers that he then constructed a two-track concrete track for vehicles to travel on, so as to stop vehicles travelling on the veld as it contained scarce vegetation which was essential to the area's eco-system. The concrete track is part of the impugned route.

[20] Dott was firm in his belief that he was "entitled to secure and make his property safe, as no third party had any right of access to or through the property, whether by agreement, or by an existing servitude. There is no encumbrance noted on any of the deeds annexed hereinabove, and no right of way has ever been granted to any person and specifically not the applicant." During the inspection, he pointed out a number of routes, other than the one through his property, which Khumalo could use to access his home.

[21] Mr. Wijnbeek, raised a number of issues which he submitted the Court should take into consideration when adjudicating the matter. These, inter alia, include the following:

21.1 Does the Court have jurisdiction to rule on access roads against a landowner where the claimant is not the owner of the "dominant" land?

21.2 Is Khumalo entitled to the specific access route other than via the land on which he is resident;

21.3 Does the obligation to provide for an access route reside with the owner of the land where the claimant is resident, or on the neighbour?

21.4 Does Khumalo have any right to use the cement path constructed by Len Smith during 2002?

Jurisdiction

[22] The preliminary point advanced on behalf of Len Smith is that this Court has no jurisdiction to hear the matter. This, so it was argued, is because the dispute does not arise from the provisions of the Restitution of Land Rights Act, No. 22 of 1994 (“the

Restitution Act”) and ought to have been launched in the High Court of South Africa.

[23] Section 22(2)(c) of the Restitution Act allows me to determine an issue which is ordinarily not within this Court’s jurisdiction.

The aforesaid sub-section reads as follows:

“(2) subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have-

(c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so”

[24] Given that Khumalo is an occupier, this matter pertains to the rights of an occupier as defined in ESTA, which Act falls within this Court’s jurisdiction. The dispute between the parties is, therefore, one which “is incidental to an issue within [the Court’s] jurisdiction...” and, consequently, falls within the ambit of my jurisdiction in terms of section 22(2)(c).

Spoliation

[25] This matter turns on whether the requirements for a spoliation order have been met.

[26] According to Erasmus Superior Court Practice, Second Edition, Van Loggerenberg, Volume 2 Appendices, pp D7 seqq, a mandament van spolie has the following characteristics:

“(a) it is a possessory remedy;

(b) it is an extraordinary and robust remedy;

(c) it is a speedy remedy.”

[27] One of Mr. Wijnbeek’s contentions is that Khumalo has not met the “speedy remedy” requirement of a mandament van spolie as he was dilatory in launching this application.

[28] Was Khumalo dilatory in launching the application?

[29] Mr. Wijnbeek contended strongly that there can be no argument of spoliation at this stage, given that there was a lapse of

approximately two years and eight months, after the alleged dispossession, before Khumalo brought the matter to Court. Khumalo,

apparently waited eight months, after becoming aware of the alleged spoliation, before launching the application.

- [30] Khumalo's explanation for the delay in instituting the application is that he is "an unsophisticated man, who only has a standard two education [and who] did not immediately know what to do when the Respondent locked the gates..."
- [31] Mr. Chithi submitted that what was cardinal in the determination of an issue of this nature was that the person, who alleges that he or she has been despoiled, should act within a reasonable period. Bringing the application within eight months was, in Mr. Chithi's view, reasonable and was not evidence of dilatoriness on Khumalo's part.
- [32] According to the authors of Silberberg & Schoeman, *The Law of Property*, 4th Ed, p271, "The mere fact that the application is one for a mandament, does not automatically imply that the matter becomes one of urgency". See *Mangala v Mangala* 1967
- (2) SA 451 (EC) 416D-E. Also, see *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 892 – 893; *le Riche v PSP Properties CC and Others*, 2005 SA 189 (CPD) at 198, par [25] and T.W. Price, *The Possessory Remedies in Roman Dutch Law*, p. 61 which supports the contention that a possessor should act within a reasonable time to have his possession restored.
- [33] Consequently, an application launched within a reasonable period, from when the applicant became aware of the act complained of, is no bar to a spoliation order.
- [34] A delay of eight months by an unsophisticated rural person is, in my view, not unreasonable in the circumstances. I can also take judicial notice of the fact that, regrettably, it can be a protracted and a time-consuming exercise for legal representatives to be appointed by the Department of Rural Development and Land Reform, via its Land Rights Management Facility, which facilitated Mr. Khumalo's legal representation, to represent persons in matters involving this Court.
- [35] In the circumstances, I find that the delay complained of does not constitute a bar to the proceedings and that Khumalo was not lax in launching this application.
- [36] It is trite that there can be spoliation when an incorporeal right has been invaded, that is, in cases of quasi-possession. See the commentary in Silberberg and Schoeman *supra*, at pages 275 and 276, as well as the cases cited therein, including *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (AA).

What was the nature of the right that Khumalo had?

- [37] It was not denied that Khumalo had used the impugned route for a number of years prior to Len Smith acquiring ownership of

Buffelskloof and up to the time when use of the route was denied to him during 2016. I am of the view that the right of access Khumalo acquired over the years to use the route on Buffelskloof is akin to a precarium, which is a species of contract where the subject is lent at the pleasure of the lender, and which can be redeemed at any time. See *Adamson v Boshoff* 1975 (3) SA 221 (C) at 226; *Wood v Baynesfield Board of Administration* 1975 2 SA 692 (N) 697; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1971 2 SA 464 (W))

[38] The nature of a precarium, is discussed in *Jordaan v Koekemoer and Another* [2010] ZAECHGHC 46, where at paragraph [50], it was said:

“...In Malan v Nabygelegen Estates Watermeyer CJ defined a precarium as the legal relationship which exists between parties when one party has the use and occupation of property belonging to the other on sufferance, by leave and licence of the other.” ...its essential characteristic is that the permission to use and occupy is revocable at the will of the person granting it. Van Winsen AJP held that in the case of a precarium ‘it is a tacit condition, a conditio jursi, of the grant thereof that it can be withdrawn by the grantor at will.’ As to the notice that must be given, he held:

‘I have been unable to find authority amongst the old writers as to the period of notice required where the circumstances were such that it was open to the grantor to withdraw his concession whenever he chose. I think, however, that in the light of the South African case law it can be said that the grantor withdrawing the concessions to the holder of the precarium must give him reasonable notice of his decision to do so. What length of notice is reasonable must be determined in relation to the nature of the concession and the circumstances of the case.’

[39] In similar vein, in *Hendricks and Another v Darmane Investments (Pty) Ltd and Another* [2019] ZAWCHC 137, at paragraph [32], it was said:

“A precarium falls to be terminated only on reasonable notice. The occupation of the property by the appellants accordingly remained lawful pending the lawful termination thereof and the lapse of a reasonable time period as set out in an appropriate notice of termination.”

[40] It is not disputed that Khumalo used the impugned route with the knowledge of the representatives of Len Smith prior to them locking the gates on the route and constructing the makeshift gate. He, therefore, had the tacit consent of Len Smith to use the route. The evidence does not suggest that Khumalo was given lawful and reasonable notice of the termination of his concession. Given my finding that Khumalo had a precarium, the questions posed at paragraphs 21.2 to 21.4 above must be answered in the affirmative

until such time as the precarium is lawfully terminated upon reasonable notice.

[42] In the circumstances, I find that the closure of the route was an act of spoliation by Len Smith.

Costs

[43] In keeping with the practice of this Court not to grant cost orders except in exceptional circumstances, of which I find none present in this matter, I intend making no order as to costs.

[44] In the result, I order as follows:

1. The respondent is directed to provide the applicant with unhindered access to his homestead, situated on Kilham Farm, Bergville, KwaZulu-Natal, through its farm, Buffelskloof, Bergville, KwaZulu-Natal.
2. The directive issued in paragraph 1 of this Order shall be executed by the respondent upon forty-eight (48) hours' notice by the applicant of his intention to use the route on Buffelskloof, Bergville, KwaZulu-Natal.
3. The applicant and the respondent are directed to engage meaningfully, within five (5) days from the date of this order, with due regard to their respective rights and interests, on the applicant's future use of the route on Buffelskloof, Bergville, KwaZulu-Natal.
4. There is no order as to costs.

M P Canca

Acting Judge, Land Claims Court

Appearances:

For the applicant: Advocate MM Chithi

Instructed by: MC Ntshalintshali Attorneys, Durban.

For the respondent: Advocate DH Wijnbeek

Instructed by: Allen and Associates Attorneys, Braamfontein.

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Prepared on 9 October 2026 · Esheria