

SOUTH AFRICA / JUDGMENT

Krull v Els and Another (1064/2012)

[2012] ZAECGHC 44 (15 May 2012)

[2012] ZAECGHC 44**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

J.E Smith

CASE / FILE NUMBER

1064/2012

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

Source record

7

IN THE HIGH COURT OF SOUTH AFRICA**EASTERN CAPE DIVISION,****GRAHAMSTOWN****Case no: 1064/2012****Date Heard: 31/05/12****Date Delivered: 15/05/12**

In the matter between:

ELVIN VICTOR KRULL

.....APPLICANT

Versus

JOHAN WYNAND ELS

.....1st

RESPONDENT

DEPARTMENT

OF ECONOMIC DEVELOPMENT

AND

ENVIRONMENTAL AFFAIRS AND TOURISM2ND

RESPONDENT

JUDGMENT

SMITH J:

- [1] The Applicant ("Krull") seeks confirmation of a rule nisi which was granted by Sandi J on 12 April 2012 in the following terms:
1. That the First Respondent and/or any persons acting on his behalf or in furtherance of his objectives should not be interdicted and restrained from damaging and/or leaving open and/or restricting the Applicant's access and/or altering the gates and/or fencing of the Tyityaba reserve as approved by the Second Respondent in terms of the Certificate of Adequate Enclosure, number CR26/10/09, with immediate effect; and
 2. That the First Respondent should not be ordered to utilise the approved Gate A at Gateway 2 with immediate effect.

Krull has also subsequently applied for an order declaring the First Respondent ("Els") to be in contempt of this order.

- [2] Krull owns a game reserve in the Komgha district which shares a common boundary with the Glen Kei farm, in turn owned by a trust of which Els is a trustee.
- [3] Krull's farm is traversed by a provincial public road ("the Tyityaba road"). The Tyityaba road is also the only means by which Els and members of his family can gain access to Glen Kei farm. Krull has fenced off the entrance from the national road to the reserve by way of a remote controlled gate. He had also subsequently constructed a guard house, where he posted a guard to control access to the reserve. The other gates have been erected on the boundary between Krull's farm and the Glen Kei farm. A portion of the Tyityaba Road continues onto Glen Kei farm. Krull also uses that portion of the road to gain access to one of his

other farms.

- [4] It must be apparent from the above that it was undoubtedly in the best interests of both parties to conclude an amicable arrangement to regulate access to their respective farms. Unfortunately this was not to be. Instead the parties' belligerent posturing has led to a proliferation of rancorous and costly litigation. In fact, I was initially of the view that even at this late stage, a mutually beneficial agreement was still eminently possible. However this would have required cool heads and willingness by both parties to compromise. The depth of the almost palpable hostility apparent from the papers however convinced me that this was an unlikely scenario. It therefore now falls to the court to resolve the disputes.
- [5] I am of the view that despite the voluminous papers which had been filed in this, and the related applications, the case really turns on one issue only; and that is whether Krull had obtained the necessary permission from the relevant statutory authority before constructing the gates. Krull has averred that he had been granted permission by the Second Respondent,

being the Department of Economic Development, Environmental Affairs and Tourism ("the Department of Economic Affairs"), when he was granted approval for the establishment of the game reserve and issued with a Certificate of Adequate Enclosure ("CAE") in terms of the Nature and Environmental Conservation Ordinance, 19 of 1974.

- [5] Conversely, Els has contended that the Department of Economic Affairs does not have statutory power to approve the construction of gates on public roads. Krull therefore required the permission of the Department of Roads and Transport in terms of the provisions of the Roads Ordinance, 19 of 1976 ("the Ordinance") or the Eastern Cape Roads Act, 3 of 2003, ("the Roads Act"). It was on the basis of this assertion that Els and other members of the trust subsequently brought an application (under case number 1332/2012), wherein they seek an order declaring the gates to be unlawful, as well as an order that they be removed. They also seek an order compelling Krull to erect fencing along the Tyityaba road in compliance with his CAE.
- [6] In the meantime Krull has filed a counter-application in case no 1332/2012, wherein he seeks an order staying those proceedings pending an application which he intends to make to the Department of Roads and Transport for the necessary permission to construct gates at both ends of the Tyityaba Road. The counter-application was brought on the basis of a concession by Krull that he indeed requires permission from the Department of Roads and Transport to construct the gates. He stated in his founding affidavit in that matter that he had now been advised by the relevant authorities that the CAE does not sanction the construction of the gates, and that he still requires the permission of the Department of Roads and Transport.
- [7] In my view this concession was correctly made. Both the Ordinance and the Roads Act provide unambiguously that the sanction of the Department of Roads and Transport is required for any type of obstruction on public roads.
- [8] At the hearing of this matter Mrs Collet, who appeared for Krull, applied for both the main application and the contempt application to be postponed pending the finalisation of Krull's counter-application in case 1332/2012. I was however of the view that the postponement of these matters will serve no purpose other than to delay the inevitable. If indeed these gates were erected unlawfully (which Krull has now admitted is the case),

then I have no power to sanction the continued unlawful obstruction of a public road, even on an interim basis, pending the application

for the necessary permit. In the event it appears that while Sandi J was of the view that Krull was entitled to interim relief, he had inadvertently not granted the interim interdict. I have no doubt that he will in all probability rectify the order if he were approached by either party in terms of Rule 42 of the Uniform Rules of Court. This will result in the untenable situation where Krull will be the beneficiary of an interim interdict which had been issued on the basis of factual and legal averments which he has now admitted are incorrect. I therefore refused the application for postponement on this basis.

[9] Turning now to deal with the contempt of court application, I am of the view that it cannot succeed for the simple reason that Sandi J did in fact not grant interim relief. As I have stated before, while his ex tempore judgment clearly indicated that he was of the view that Krull had established all the requisites for interim relief, Sandi J inadvertently omitted to refer to paragraph 3 of the Notice of Motion (which relates to the interim interdict) when he had made the order. Neither of the parties has subsequently approached Sandi J for rectification of the order in terms of Rule 42. The result is therefore that no interim order had in fact issued and there can therefore be no question of Els having been in contempt of the order. The contempt application falls to be dismissed on this ground alone.

[10] I am similarly of the view that Krull cannot succeed with the main relief. Mrs Collet was constrained to concede that the application can only succeed if Krull was able to establish that the gates were lawful. Mr Ford SC, who appeared on behalf of Els, has in my view correctly submitted that it had now been established (and in fact conceded by Krull) that the gates and fences referred to in the rule granted by Sandi J on 12 April 2012, fall within the auspices of the Department of Roads and Transport. The Department of Economic Affairs did therefore not have any statutory power to grant permission for the construction of the gates on a public road. Krull was therefore obliged to seek the permission of the Department of Roads and Transport. He has failed to do so. The construction of the gates was therefore unlawful and the application must fail for this reason.

[11] In the result I make the following order:

The contempt of court application is dismissed with costs, such costs to include the costs of two counsel;

2. The rule nisi granted by Sandi J on 12 April 2012 is hereby discharged with costs, such costs to include the costs of two counsel.

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Advocate Collet

Attorneys for the Applicant : Netteltons

GRAHAMSTOWN

(Ref: Mr Nettelton)

Counsel for the Respondents : Advocate Ford, SC

Attorneys for the Respondents : Wheeldon Rushmere & Cole

(Ref: Mr Laing)

Date Heard : 31 May 2012

Date Delivered : 15 June 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/2012/44.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/krull-v-els-and-others-unknown-topic-aecghc-2012>

Prepared on 11 October 2026 · Esheria