

SOUTH AFRICA / JUDGMENT

Limcroma Properties (Pty) Ltd v Jonker (2236/2024) [2024] ZANWHC 180 (14 May 2024) [2024] ZANWHC 180

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

2236/2024

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FLYNOTES:

CIVIL LAW – Spoliation – Cattle
on farm
– Applicant
purchased farm through sale agreement – Respondent has
dispute with seller – Respondent returned cattle
to farm –
Applicant can't use farm – Possession and spoliation –
Respondent has vacated property
as he should have – Left
behind moveable property in contradiction of cancellation
agreement – Does not bestow
respondent right to possession
of property – Applicant entitled to peaceful undisturbed
possession – Application
granted.
IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER: 2236/2024
Reportable: YES/NO

Circulate to Judges:

YES/NO

Circulate to Magistrates: YES/NO
Circulate to Regional
Magistrates: YES/NO
In the matter between:-
LIMCROMA
PROPERTIES (PTY) LTD
Applicant
And
BAREND
ANDRIAS JONKER
Respondent

JUDGMENT

FMM REID J

Introduction

[1] In this urgent application the applicant seeks a spoliation order in terms of which the respondent is to restore to the applicant undisturbed and peaceful possession of a farm known as Tosanjoley,

situated at Portion 25, a portion of portion 18, of the farm Section 3 Block C Second Railway Grant Number 2, Registration Division JM, North West Province (“the property”) to the applicant.

[2] The applicant is the lawful owner of the property and recently purchased it from the seller (who is not a party to these proceedings) on 4 January 2024. In terms of the deed of sale possession was granted to the applicant on 1 May 2024.

[3] The respondent is a tenant on the property whose lease agreement with the seller has terminated on 22 November 2023, in terms of which the respondent is to vacate the property, the respondent’s cattle and game on or before 30 April 2024.

[4] The respondent opposes the application on the basis that (a) the matter is not urgent, and (b) he never relinquished possession of the property to the applicant.

Factual matrix

[5] The following are the common cause salient facts that serve as background to the matter:

5.1. The applicant is a company which is represented by Mr Els in these proceedings. Els is the sole director of the applicant company.

5.2. On 4 January 2024 the applicant and Mystic Pearl 130 Pty Ltd (“the seller”) represented by Mr Prinsloo, concluded an agreement in terms of which the property was sold to the applicant. The property operates mostly as a crops (harvest) farm, game and livestock farm.

5.3. Neither the seller company nor Mr Prinsloo are part of these proceedings, but play an integral role in the events, as will be illustrated below.

5.4. When the sale agreement was concluded, the applicant was aware thereof that the respondent had a lease agreement with the seller and that the respondent resided on the property in terms of the lease agreement.

5.5. The respondent had 100 cattle (bonsmara's) and some game that grazed on the property during his tenancy.

5.6. The relevant clauses of the termination of the lease agreement (termination agreement) between the seller and the respondent read as follows in Afrikaans (I will translate it to English in the next paragraph):

“2.

Die reeds voorbetaalde huurgeld van 6 (ses) maande kragtens aangehegte huurooreenkoms wat reeds op 1 November 2023 betaalbaar was en reeds deur die HUURDER aan die VERHUURDER betaal en ontvang is (word) as die finale betaling van huurgeld geag.

3.

As vergoeding vir die vroeë beëindiging van die Huurooreenkoms op 30 April 2024, betaal die VERHUURDER aan die HUURDER die bedrag van R400,000.00 (Vier Honderd Duisend Rand BTW uitgesluit) en skenk ook al die wild op die plaas Tosanjoley, onderworpe aan die volgende voorwaardes:

Die bedrag van R400,000.00 sal stiptelik op 30 April 2024 betaalbaar wees.

3.1 Geen verdere kennisgewing sal deur die VERHUURDER aan die HUURDER gegee word ten opsigte van die beëindiging van die aangehegte huurooreenkoms nie;

3.2 Die HUURDER sal die plaas en alle geboue ontruim en die HUURDER se beeste en wild verwyder kragtens die aangehegte Huurooreenkoms voor of op 30 April 2024.

3.3 Die bepalinge en voorwaardes van die aangehegte huurooreenkoms bly van krag tot en met die 30ste April 2024.

4.

4.1 Indien enige dispuut as gevolg van hierdie ooreenkoms sou ontstaan, stem die partye toe tot Arbitrasie van enige dispuut deur 'n Arbiter.

4.2 As Arbitere kom die partye ooreen dat die Voorsitter van die Vrystaatse Balie 'n Senior Advokaat sal aanstel vir die beregting van enige dispuut.

4.3 Die beslissing van die Arbiter sal finaal wees.”

The contract is roughly be translated to English by myself as follows:

“The rental that was paid upfront in the amount of six (6) months in terms of the lease agreement that was payable on 1 November 2023 and has already been paid by the TENANT to the LANDLORD, is deemed to have been the final payment of rent.

The amount of R400,000.00 is payable to the LANDLORD to the TENANT as compensation of the early termination of the rental agreement and all the game on the farm Tosanjoley, subject to the following conditions:

The amount of R400,000.00 will be payable on 30 April 2024.

3.1 No further notice need to be given to the TENANT by the LANDLORD in relation to the termination of the rental agreement.

3.2 The TENANT shall vacate the farm and all the buildings, the TENANT's cows and game in terms of the attached rental agreement before or on 30 April 2024.

3.3 The terms and conditions of the attached rental agreement will be in force up and until 30 April 2024.

4.1 If any dispute arises as a result of this agreement, the parties agree to resolve the dispute by means of Arbitration through an Arbitrator.

4.2 The parties agree that the Chairperson of the Freestate Bar will appoint a Senior Counsel as Arbitrator to resolve the dispute.

4.3 The decision of the Arbitrator will be final.

5.7. The property was duly registered and transferred to the name of the applicant on 12 April 2024.

5.8. Mr Els, the sole director of the purchasing company, is married to Ms Renken and they have 3 minor children. On 30 April 2024 Ms Renken and the children arrived at the property in order to take occupation of the property as determined in the deed of sale. Clause 4.1 of the deed of sale reads that “possession and vacant occupation of the property shall be given to the purchaser on 1 May 2024.”

5.9. On 1 May 2024 there remained cattle owned by the respondent grazing at the property. However, all the cattle were removed from the property by the respondent during the course of the day on 1 May

2024. This removal of the cattle was done in terms of the cancellation agreement.

5.10. On 1 May 2024 the seller handed the keys to the property to Ms Renken. The respondent also handed a set of keys to Ms Renken. The respondent evacuated the property. The applicant states (and the respondent disputes) that the property was handed over fully and that Ms Renken was placed in undisturbed possession of the property.

5.11. The respondent states that he remained in possession of certain items that remained behind on the property, which entitled him to possession of the property and is a clear indication of his intention to not relinquish control of the property. It is common cause that certain movable items and other property of the respondent

remained behind on the property.

5.12. Later in the evening of 1 May 2024 at approximately 20h00 the respondent informed the applicant that he had not yet received payment in the amount of R400,000.00 from the seller in terms of the cancellation agreement. The respondent further informed the applicant that he will return his cattle to the property in the absence of payment from the seller. For the sake of clarity: save for the sale agreement, there is no relation between the applicant and the seller.

5.13. It appears from the documents before this Court that a dispute about the compliance with the rental agreement and cancelation agreement between the seller and the respondent arose.

5.14. On 2 May 2024 Ms Renken and the children were present at the property to oversee some reparation work to be done at the property. When Ms Renken returned to the house on the property she encountered an unknown major male, whose presence surprised and shocked Ms Renken. She felt threatened as she was under the impression that no-one else was on the property. The applicant states that Ms Renken was “(in) a total state of anxiety” on this encounter, regard being had to the context of violence against women and children in our country.

5.15. The unknown man stayed at the labourer’s courters approximately 200 metres from the house on the property. Ms Renken went the nearest South African Police Service Station (SAPS), who accompanied

her back to the property. The unknown man informed the members of the SAPS that he remains on the property, and went to visit Ms Renken, on instruction of the respondent.

5.16. Ms Renken and the children stayed on the property for three nights: 1, 2 and 3 May 2024. They left the property on 4 May 2024. Ms Renken left the property as she had concerns about the safety of

herself and the children, since the unknown man had access to the property and to her, at the main house.

5.17. During 4 May 2024 the respondent returned approximately 100 cattle to the property.

5.18. On Sunday 5 May 2024 the applicant instructed his attorney to contact the respondent requesting to remove the cattle, any other possessions as well as to instruct any people occupying the property to vacate

the property.

[6] In the founding affidavit the following is stated in paragraph 7.39:

“7.39. Given the volatile nature of the respondent’s conduct and the real possibility of violence breaking out, the applicant opted to rather approach this Honourable Court to intervene and guide the counter spoliation process instead of the applicant taking the law into its own hands under circumstances where the applicant is in fact allowed to do so.”

- [7] The volatile nature of the respondent’s conduct as referred to by the applicant is the return of his cattle to the property, and his instruction to the unknown male who was a farm labourer to stay on the property.
- [8] At this stage the property is left unoccupied. The game and cattle remain grazing on the property. Ownership of this game and cattle forms the subject matter of the dispute between the seller and the respondent on the compliance or non-compliance of the cancellation of the lease agreement. The applicant has no interest in that dispute between the seller and the respondent.

- [9] On 6 May 2024 correspondence was directed by the respondent’s

attorney of record to the applicant’s attorney of record. In that correspondence the respondent concludes:

“We however wish to reiterate that we would rather have the matter resolved amicably and that we have a round table meeting at your convenience to discuss the resolution of the impasse.”

- [10] From Sunday 5 May 2024 several electronic mails (e-mails) what’s app (cellular what’s app applications) messages were exchanged between the parties in an attempt to settle the matter without the need to litigate.
- [11] The urgent application was issued on Tuesday 7 May 2024, granting the respondent 1 day to file an answering affidavit on 8 May 2024, a replying affidavit to be filed by the applicant on 9 May 2024 and the matter to be heard on the urgent roll on 10 May 2024.
- [12] The issue of urgency is to be addressed first.

Urgency

- [13] In consideration of whether a matter should be heard as one of urgency, this Court is to evaluate the facts before it and do a balancing act to determine whether the matter is so urgent that it needs to be heard on the “scale” of urgency as brought before court. As rightfully argued on behalf of the respondent, should an application be heard on an urgent basis, such urgency is not only prejudicial to the respondent, but to all the other litigating entities awaiting their day in court. The applicant has to prove and qualify why the application is of such an urgent nature that it is entitled to “skip the que” of the other litigants.
- [14] This was set out succinctly in the Marlow Caterers matter as follows:

“Held, further, that the loss that applicants might suffer by not being afforded an immediate hearing was not the kind of loss that justified the disruption of the roll and the resultant prejudice to other members of the litigating public.

and further on page 110 and 111:

“Applicants, by so doing, became obliged to persuade the Court that the matters were of such urgency that their non-compliance with the Rules should be condoned and that the matters should be heard forthwith. Respondents had no option; they were compelled

by applicants to adhere to the time periods chosen by applicants and to appear in Court on the day selected by applicants. Then only, save if respondents had anticipated the hearing and made an earlier application to Court, could respondents object to the procedure followed by applicants. See Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972

- (1) SA 773 (A) where at 782A - E this course and its implications are discussed by RUMPFF J A as he then was.

In terms of Rules 27 and 6 (12), applicants thus had to show good cause why the times should be abridged and why applicants could not be afforded substantial redress at a hearing in due course. The case for urgency had to be made out in the supporting affidavits. For discussions of this requirement, see Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another 1977

- (4) SA 135 (W) at 137F; Sikwe v SA Mutual Fire & General Insurance Co Ltd 1977

- (3) SA 438 (W) at 440H; Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd 1967

- (2) SA 491 (E) at 493C - D, G; Mangala v Mangala 1967

- (2) SA 415 (E) at 415H - 416A.”

- [15] This matter is brought on an extremely urgent basis, leaving the respondent with only 1 day to answer. I must add that the respondent has done a stellar job in providing a thorough and complete answering affidavit and heads of argument within the time-frames as set by the applicant.

- [16] A determining factor, in my view, is the amount of emails and what's apps that were communicated between the parties. This indicates to me fact that mediation would not easily be reached with any round-table discussions.

- [17] The circumstances in this matter is completely unique. The respondent refuses to vacate the property on the basis that the seller has not complied with certain terms of the cancellation agreement, to which the applicant was not a party. This in itself will make any negotiation or mediation process very difficult, as the applicant has absolutely nothing to do with the dispute between the seller and the respondent.

[18] I do not agree with the argument of the respondent that the dispute between the applicant and the respondent could have been successfully mediated. The applicant is figuratively caught in the “cross-fire” of the dispute between the respondent and the seller. There is no value that the applicant can add to the dispute between the respondent and the seller.

[19] The applicant advances that the urgency of the application lies in the following:

19.1. He is lawfully entitled to undisturbed possession of the property.

19.2. He intends to farm and have game of his own on the property, which he cannot do as a result of the respondent’s cattle grazing at the property.

19.3. He is suffering potential harm in losing profit of farming and working at the property as purchased.

19.4. The applicant wishes to commence with its own farming activities and made preparations to commence with farming, which will result in monetary loss should he not have possession of the property.

19.5. He cannot claim any potential loss from the respondent, as there is no lis between him and the respondent in relation to the respondent’s refusal to remove his cattle and in the result would be left without any remedy.

19.6. The respondent’s cattle cannot simply be chased away from the farm, as this will result in damages suffered by the respondent and the cattle may suffer irreparable harm should they not have an enclosed space in which they are protected.

19.7. The applicant is mitigating his damages in the event that the respondent persists with his refusal to hand over possession and might cause damage to the property.

[20] The respondent denies urgency on the following basis:

20.1. The periods provided by the applicant is too short for the respondent to be placed in a position to answer to the founding affidavit.

20.2. The application is not one of extreme urgency, although it is brought as one of extreme urgency. The applicant should have enrolled the application as one of semi-urgency.

20.3. The urgency is not present to such an extent that it would render communication from the applicant on a Sunday afternoon necessary.

20.4. The matter should have been resolved by mediation, which was expressed in communication to the respondent stating the wish that the matter be resolved amicably and “... that we have a round table meeting at your convenience to discuss a resolution of the impasse.”

20.5. The relief sought is drastic as it not only seeks spoliation, but

also removal of all movable property and persons occupying the property at the respondent's behest.

20.6. A notice in terms of Rule 41(A) was filed by the applicant in which

the applicant indicates his opposition to refer the matter to mediation. The respondent has filed a notice in terms of Rule

41(A) indicating his willingness to resolve the dispute through mediation. The respondent holds the view that the matter can be successfully mediated.

20.7. The applicant did not demonstrate why the spoliatory relief could not be granted in the normal ordinary course of court proceedings.

20.8. That the court cannot conclude that there was dispossession of a property that has not been spoliated. In paragraph 31 the respondent states:

"... and even if a case for spoliation was made out, a Court can merely restore thereunder the dispossession that occurred. The

dispossession in this instance cannot include those items and animals which have been there prior to the alleged possession having taken place."

[21] I have sympathy with the fact that the applicant is caught in the cross-snares of the respondent and the seller. The undisturbed possession of the applicant to property that rightfully belongs to the applicant, should not be dependent on the determination of a dispute (between the seller and respondent) in which the applicant has no stake or interest. This can take an undetermined time to resolve, and would not be in the interest of justice.

[22] In consideration of the legal principles applicable to urgent applications, and the unique facts of this matter, I find that the matter is urgent and can be heard on the urgent roll.

Possession and spoliation

[23] The issue of whether the respondent remained in possession or in control of the property, and never intended to relinquish possession, is nothing but a moot argument. The common cause facts admitted, and the respondent concedes, that the cattle were removed from the property, only to be returned to the property when he was not paid R400,000.00 by the seller.

[24] The actions of the respondent are in stark contradiction with his argument in relation to possession. If he never had the intention to relinquish control of the cattle, he surely would not have encountered the costs of having 100 cattle moved from one farm to another.

[25] The further argument of the respondent that he remained in possession of the property, or at least partly-possession, also misses the mark. The property left behind by the respondent is property that should have been removed by 30 April 2024, as expressly provided for in the cancellation agreement. The respondent has vacated the property, as he should have, and left behind the moveable property in contradiction of the cancellation agreement.

[26] The movable property left behind by the respondent, was to be collected to comply with the cancellation agreement. The fact that this was not done, does not bestow on the respondent the right to possession of the property purely on the basis that some of the possessions remained behind.

[27] The respondent's arguments are not legally sound and tenable. I find that the applicant is entitled to peaceful, undisturbed possession of the property and that the 100 cattle of the respondent

has spoliated the applicant from peaceful undisturbed possession of the property.

Final interdict

[28] In addition to spoliation, the applicant claims interdictory relief that the respondent be ordered to remove any and all livestock under his control from the property, and that he be ordered to remove any and all farming equipment, implements and moveable assets belonging to him or under his control currently kept at the property.

[29] In the event that the respondent fails to comply with the afore-said order, the applicant request that the applicant be authorised to remove the livestock at the cost of the respondent, take them to the nearest pound and place any of the respondent's farming equipment and movable assets still remaining on the property in storage.

[30] The respondent, in acting out against the claims that the seller did not perform in terms of the cancellation agreement, should not be permitted to have his cattle on the property. The same relates to farming equipment, implements and moveable assets belonging to the respondent, under his control and currently kept at the property.

[31] The relief sought by the applicant that is relief in addition to the spoliation order, amounts to that of a final interdict. It is trite law that the following requirements need to be met for an applicant to be successful in the application for a final interdict:

31.1. The applicant must demonstrate a clear right to the relief sought;

31.2. The applicant must have a reasonable apprehension of irreparable harm; and

31.3. The applicant must have no other remedy available.

See: *Setlogelo v Setlogelo* 1914 AD 221 at 227

Van Deventer v Ivory Sun Trading 77 (Pty) Ltd 2015

(3) SA 532 (SCA) para 26

Red Dunes of Africa v Masingita Property Investment Holdings [2015] ZASCA 99 para 19

Pilane and Another v Pilane and Another 2013

(4) BCLR 431 (CC) para 39

[32] I have already made my finding that the applicant is entitled to peaceful possession of the property, thereby establishing a clear right to the relief sought.

[33] The applicant has established a reasonable apprehension of irreparable harm. The applicant is prevented from farming and using the farm as an income generating venture. At this stage, the applicant is also left to the mercy of the respondent on when the respondent's items will be removed from the property.

[34] There is no indication when the dispute between the seller and the respondent can be expected to be resolved. Whilst that dispute is to be resolved, the applicant suffers daily potential harm to the farm, whilst the farm is left with cattle and game grazing. I am satisfied that the applicant has proven that there is a reasonable

apprehension of irreparable harm.

[35] Lastly, and for the reasons as set out above, I hold the view that the applicant has exhausted all avenues before approaching the Court and that the applicant is left with no alternative remedy at its disposal.

[36] The applicant thus has established all three requirements of a final interdict. In circumstances such as these, the Court will have a very limited discretion in deciding whether to grant final interdictory such relief or not.

[37] The question of whether the Court has a general discretion in granting a final interdict or not, after the applicant has indeed established all three the requirements, has been decided as follows in the matter of Hotz and Others v University of Cape Town 2017

(2) SA 485 (SCA):

[29] The law in regard to the grant of a final interdict is settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Once the applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief. That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict, that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes, and potentially infringe the rights of security of the person enjoyed by students, staff and other

persons on the campus.”

(own emphasis)

Consideration

[38] The applicant exhausted all avenues in relation to a possible settlement before approaching the Court. The applicant states that he approaches this Court as a law abiding citizen in the alternative to taking the law into his own hands and counter-spoliating the respondent.

[39] The applicant has also proven the three requirements that entitle it to a final interdict to be granted in its favour.

[40] On this basis I find that the application is urgent. I also find that the applicant has made out a case for spoliation, and for a final interdict as requested.

Costs

[41] The normal principle is that the successful party is entitled to its costs.

[42] I find no reason to deviate from this principle.

Order:

[43] In the premises I make the following order:

- i) The forms and services provided for in the Uniform Rules of this Court is dispensed with and the matter is treated as an urgent application in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.
- ii) The respondent is ordered to restore, within 1 (one) day from date of receipt of this order with service by Sherriff, the undisturbed and peaceful possession of Portion 25 (Tosanjoley) (a portion of portion 18 of the Farm Section 3 Block C Second Railway Grant Number 2, Registration Division JM, North West Province (the property) to the applicant.
- iii) The respondent is ordered, in order to give effect to paragraph (ii) above, to do the following within 2 (two) days from date of this order:
 - a. To remove any and all livestock under his control from the property;
 - b. To remove any and all farming equipment, implements and moveable assets belonging to him or under his control currently kept at the property.
- iv) Should the respondent fail to comply with paragraph 3 above, the applicant is authorised to, at the cost of the respondent, remove the respondent's livestock and take them to the nearest pond and place any of the respondent's farming equipment and movable assets still remaining on the property in storage.
- v) The respondent is ordered to pay the costs of this application.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

The judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 14 May 2025 at 16:00

DATE OF HEARING: 10 MAY 2024

DATE OF JUDGMENT: 14 MAY 2024

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