

SOUTH AFRICA / JUDGMENT

Moshe and Others v Minister Of Agriculture, Land Reform And Rural Development (CIV APP FB 14/2022; UM131/2019) [2023] ZANWHC 39; [2023] 2 All SA 776 (NWM) (14 April 2023) [2023] ZANWHC 39

COURT

North West High Court, Mafikeng

BEFORE

Petersen, FMM Reid, A Reddy

CASE / FILE NUMBER

CIV APP FB 14/2022; UM131/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG

CASE NUMBER: CIV APP FB
14/2022

A QUO NO.: UM131/2019

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional
Magistrates YES/NO
In the matter between:-
TSHWARO
MOSHE First
Appellant
WHITE
BASIME Second
Appellant
AOBAKWE
MODISENYANE Third
Appellant
MRS
KEGAKILWE Fourth
Appellant

OLEBOGENG DAVID
THEBEYATSHIPI Fifth
Appellant
and
MINISTER OF
AGRICULTURE, LAND Respondent
REFORM AND RURAL
DEVELOPMENT
i)
The appeal is upheld.
ii)
The order of the court a quo of 12 July
2021 is set aside and substituted with the following order:
"The application is
dismissed with costs. "
iii)
The respondent is to pay the costs of
appeal, which costs shall include the costs of the application for
leave to appeal.

JUDGMENT

PETERSEN J:

Introduction

- [1] This is an appeal against the judgment of Gura J dated 12 July 2021. In short, the court a quo granted a prohibitory interdict against the appellants (who are included as parties being the first to twenty first respondents in the court a quo) from using property for residential or commercial purposes. The use of this property includes occupation of the appellants on the property, as well as the grazing of the animals belonging to, or under the care of, the appellants. The appeal is with leave from the court a quo.
- [2] As a point of departure it is necessary to identify the appellants vis-à-vis the respondents in the court a quo. The first appellant was the sixth respondent, the second appellant the twelfth respondent, the third appellant the fifteenth respondent, the fifth appellant the eleventh respondent and the fourth respondent was part of the group identified as the twenty first respondent cited as "any unknown persons who are already in occupation of the properties and/or who intend to invade the land in question and/or who associate themselves with the 1 st to 20th respondents".
- [3] A rule nisi was issued by the court a quo on an ex pane basis on 13 August 2019 with a return date of 19 September 2019. The application became opposed by the appellants and was ultimately heard on an opposed basis on 11 December 2020.

Factual Background

- [4] It is apposite to deal briefly with the background facts sketched by the Minister of Agriculture, Land Reform and Rural Development, which gave rise to the application in the court a quo. The court a quo captures the factual background to the application as set out in the founding affidavit. I similarly borrow from the factual background albeit not verbatim.
- [5] The factual background provides this Court with an appreciation of what the court a quo identified as the nature of the application it was seized with. This sets the tone and very basis on which the appellants come before this Court aggrieved by the relief granted by the court a quo in its interim order and ultimately its final order.
- [6] A number of farms were purchased by National Government from existing commercial farmers and placed under the control of the first respondent ("the Minister of Agriculture, Land Reform and Rural Development") — the "owner" of the farms. These farms include the remaining extent of Portion 5, Portion 6 and Portion 7 and the remaining extent of the farm Brulpan; the remaining extent of Farm Kromboom 516; the remainder of the Farm Vergelegen 517 IN; the remaining extent of portion 1 and 6 (Portion of Portion 1) of the Farm Vaalboschlaagte 444 IN; the remaining extent of Portion 4 (Rama No 1) of the Farm Vaalboschlaagte 444, Portion 5 of the Farm Vaalboschlaagte 444, Portion 7, Portion of Portion 4 of the Farm Vaalboschlaagte; Portion 2 (Gibeon) of the Farm Vaalboschlaagte 444, Remaining extent of Portion 3 (Rama) of the Farm Vaalboschlaagte 444; Portion 2 and 4 of the Farm Mamusa 459 IN; the remainder of the Farm Brandystake 898 IN and Portion 2 and 5 of the Farm Woodlands 415 IN; the remainder of the farm Mellowwood 420 IN; the remaining extent of Portion 4 of the Farm Boomplaats 643 HN; and the remaining extent of Portion 2 of Block C second railway Grant No 1 JM (Kalinora). These farms are referred to collectively as "the farms" in this judgment.
- [7] The land forming part of the said farms, was earmarked for redistribution to qualifying emerging farmers duly approved by the Minister of Agriculture, Land Reform and Rural Development. The process of redistribution was to be achieved through the placement of advertisements, inviting qualifying members of the public to apply for rights to farm on the said land. Members of the public who qualified had to meet certain pre-defined criteria, which included, being:
- (i) African, Indian or Coloured South African residents;
 - (ii) 18 years of age or older;
 - (iii) Experience in livestock farming or related business management experience and relevant capital/financial requirements; and
 - (iv) Preference would be given to subsistence and emerging farmers within the neighbouring villages.
- [8] All prospective applicants were required to collect application forms from the Department of Rural Development and Land Reform ("the Department") in Vryburg. Upon receipt of all applications, a District Screening and Beneficiary Selection Committee consisting of

members of the Department of Agriculture, the Dr. Ruth Segomotsi Mompati District Municipality and the Land Bank, were tasked with considering all received applications. Once the screening process was complete, the District Screening and Beneficiary Selection Committee was required to make recommendations to a Provincial Technical Committee. The Provincial Technical Committee, in turn, would make recommendations to the National Land Acquisition and Allocation Control Committee for approval. Once approval was granted, the National Land Acquisition and Allocation Control Committee, all successful applicants (beneficiaries) would be required to enter into lease agreements with the Minister of Agriculture, Land Reform and Rural Development.

The relief sought in the court a quo

- [9] The factual background talks to what the Minister of Agriculture, Land Reform and Rural Development sought to achieve as part of its land redistribution programme. The endeavours of the Minister of Agriculture, Land Reform and Rural Development were, however, interrupted by certain actions on the part of the appellants. These actions of the appellants prompted the Minister of Agriculture, Land Reform and Rural Development to bring an urgent application on an ex parte basis, in the court a quo on 13 August
2019. This transpired at a time when all applications as called for had been received and captured on the appropriate system of the Department. The impasse was in fact at the stage when the District Screening and Beneficiary Selection Committee was expected to make its recommendations during August 2019.
- [10] It is apposite to have regard to the formulation of the relief sought in the Notion of Motion, to appreciate what lies at the heart of the appeal:
2. That a rule nisi be issued calling upon the Respondents to furnish reasons, in any, on Thursday, 19 September 2019 at 10h00, as to why the following order should not be made:
 - 2.1 That the First to Twenty-First Respondents be and are hereby ordered to immediately restore the undisturbed possession of the following property to the Applicant, to wit:
 - 2.2 That the First to Twenty-First Respondents be interdicted from:
 - 2.2.1 Entering the farm properties described above and from residing on the properties and/or erecting any structures.
 - 2.2.2 Inciting any other person to enter the farms properties.
 - 2.2.3 Grazing any livestock or permitting any third party to graze any livestock on the farm properties.
 - 2.2.4 Removing, cutting or damaging any existing infrastructure, trees and boundary fences.
 - 2.3 That the Respondents who graze livestock on the farm properties be ordered to remove their livestock within 2 days from this order.

2.5 That the First to Twenty-First Respondents be ordered not to interfere with the allocation process of the land to third parties by the Applicant.

4. That prayers 2.1 to 2.5 and prayer 3 be of interim force pending the return date herein. "

[11] In essence the basis of the application in the court a quo was predicated on the fact that the farms which had been transferred to the Minister, could not be handed over to the lawfully approved beneficiaries whilst the appellants remained on the farms. The court a quo found that the occupants were in unlawful occupation of the land, and that the individuals who were using the land for grazing of their cattle, were doing so unlawfully.

The order of the court a quo

[12] The court a quo, following the relief sought in the Notice of Motion, save for the relief on spoliation, which it dismissed, made the following order which is the subject of this appeal:

"Order:

[58] Consequently the following order is made:

58.1 The first to twenty first respondents are interdicted from:

Residing on the said farms and/or erecting any structures thereon;

Inciting any other person to enter the farm properties;

Grazing any livestock or permitting any third party to graze any livestock on the farms;

Removing, cutting or damaging any existing infrastructure, trees and boundary fences;

Interfering with the allocation process of land to third parties by the applicant;

58.2 The respondents who graze livestock on the farm properties are ordered to remove their livestock within two weeks from the date of this order;

58.3 Should the respondents not remove the livestock from the said farms, the Sheriff with the assistance of the South African Police Services are authorised to attach, remove and deliver such livestock to the nearest animal pound within five days from the expiry of the period in paragraph 2 of this order;

58.4 Should the first to twenty-first respondents fail to act in accordance with this order, the Sheriff with the assistance of the South African Police Service is authorised to take every step which is necessary to ensure compliance with this order;

58.5 The twenty-second to twenty-fifth respondents are ordered to render all necessan,/ assistance required by the Sheriff in the enforcement of this order;

58.6 Paragraph 2.1 to 2.2.10 of the rule nisi (the spoliation order) are discharged;

58.7 The respondents who opposed this application are ordered to pay the costs, jointly and severally, the one paying the others to be absolved. "

[13] The judgment of the court a quo was issued against twenty-five (25) respondents who were cited by name in their capacity as individuals.

The grounds of appeal

[14] The grounds of appeal, against the background set out above, can be summarised as follows:

14.1. That an order for final interdictory relief is incompetent in circumstances where final interdictory relief was not an issue before Court;

14.2. That no case for interdictory relief was made in the founding papers of the Minister, where the founding affidavit supported a case for spoliation;

14.3. That the final interdict is effectively an eviction in contravention of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) and as such unlawful;

14.4. That it was incorrect of the court a quo to grant a cost order against the appellants in circumstances where the appellants opposition was partially successful and the parties were not granted an opportunity to address the Court on costs; and

14.5. That no case had been made out against the fifth appellant in the Minister's founding affidavit, notwithstanding the fact that the Minister filed a supplementary affidavit on 5 September 2019 (three weeks after the rule nisi had been issued) in which the Minister included the fifth appellant as one of the occupants of the farm Kromboom.

[15] The court a quo categorised the allegations made by the applicant in relation to the occupation of the various farms by the appellants as follows:

"Eleventh respondent

9.1 The eleventh respondent is pan of the unlawful invaders of the farm Kromboom as explained in paragraph 10 of the founding affidavit (para 8.2 of this judgment).

Twelfth to fourteenth respondents

9.2 These respondents are in unlawful occupation of the farms Mellowood, Brandystake and Woodlands as explained in paragraph 13 of the founding papers (para 8.5 of this judgment). As mentioned earlier, due to a pure oversight the names of these respondents had not been included where these farms had been discussed in the founding papers.

Twentieth respondent

9.3. The twentieth respondent is in unlawful occupation of the farm known as Kalinora as discussed in paragraph 15 of the founding papers. The applicant introduced the information in paragraph 9.1 to 9.3 of this judgment through a supplementary affidavit. The applicant submitted that the supplementary affidavit could not be to the prejudice of the respondents as it would be served simultaneously with the rule nisi and the application. "

[16] The court a quo then, in turn, discusses the version of the appellants in detail. In summary, the appellants (being the respondents a quo) contended that they were not in unlawful occupation of the farms, on the basis that they have received

permission and made arrangements with the (then) lawful owners to avail the farms to the respondents for occupation and grazing of their cattle.

[17] Despite the factual disputes pertaining to meetings being held, whether permission was granted or not, it appeared to be common cause in the court a quo that the appellants were in occupation of the farms and were using the farms for grazing of their cattle.

[18] For the court a quo to have considered whether a final interdict should be granted to the Minister of Agriculture, Land Reform and Rural Development, the central question in this appeal is whether the facts or evidence set out in the founding affidavit justified a final interdict on the return date, having regard to the facts or evidence tendered in support thereof when the interim interdict was granted on 13 August 2019. If not, then it should not have been granted and the consideration of a final interdict would not have been competent.

[19] The first two grounds of appeal form the nub of the appeal, with the remainder of the grounds of appeal being secondary thereto. A consideration of the nature of interdicts and rules nisi, the requirements to justify such orders and how to interpret the orders of the court a quo merits consideration to answer the first two grounds of appeal.

The nature of interdicts (in general) and rules nisi

[20] In *National Director of Public Prosecutions v Mohamed NO and Others* [1] the Constitutional Court provides a useful exposition of the historical development of ex parte applications, the granting of rules nisi and interim orders, pending the return day of a rule nisi (footnotes included):

"The historical development of ex parte applications, the granting of rules nisi and the making of interim orders pending the return day of a rule nisi

[27] it is convenient to examine the common law practice relating to ex parte applications. the granting of rules nisi and the making of interim orders pending the return day of the rules nisi, as well as the importance of the audi rule for procedural fairness. For the purposes of this case "an 'ex parte application' in our practice is simply an application of which notice was as a fact not given to the person against whom some relief is claimed in his absence. '[2]

[28] Our common law has recognised both the great importance of the audi rule[3] as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the (vet)! rights sought to be enforced or protected. In such circumstances, the court issues a rule nisi calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final and at the same time orders that the rule nisi should act immediately as a temporary order ending the return day [4]. This practice has been recognised by the South African courts for over a century:

"The term 'rule nisi' is derived from English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a 'curious mixture of our practice with the practice of England' took place and the practice arose of asking the court for a rule returnable on a certain day but in the meantime to operate as a temporary interdict.[5]

[29] The flexibility and utility of the rule nisi acting at the same time as an interim order, has been recognised by the courts and it has been applied to modern problems in commercial suits. I would endorse the following passages from the judgment of Corbett JA, writing for a unanimous Appellate Division in the Safcor case. [6]

"The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law (see, generally, Van Zyl *The Judicial Practice in South Africa* 2nd ed at 355ff, 370-1; Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 89-90). This is recognised by implication in the Rules (see, eg, Rule 6 (8) and Rule 6 (13)). The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is com called to rely soley on the normal procedures for brin in disputes to Court by way of notice of motion or summons. "

The requirements for an interim interdict and a final interdict

[21] The requirements for the granting of an interim interdict are trite. The locus classicus which sets out the test for the granting of interdicts is *Setlogelo v Setlogelo* 7 albeit that the case dealt with a final interdict. The test is referred to on a daily basis as matter of course with reference the requirements set out in *Setlogelo*. It would be prudent, rather to revisit exactly what was said in *Setlogelo* in respect of the requisites for an interdict:

"The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. Now, the right of the applicant is perfectly clear. He is a possessor; he is in actual occupation of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession. True, the law does not allow him to buy land, or to lease it, or to take transfer of it. But it does not forbid him from occupying it, more especially as it would seem to have devolved upon him by way of inheritance. It would indeed be a remarkable state of things if a native could be deprived of his right of occupation of land which he had honestly come by at the instance of any person Who took a fancy to it, merely because he was not and could not become the registered owner. And yet that would be the result of the order appealed from if it were allowed to stand.

But it was urged that in any event no irreparable injury had been sustained. That was not the ground upon which the learned judge based his refusal; but in any event it is not a ground which can avail the respondent in this case. The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's Institutes where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though *prima facie* established, is open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party: Van der Linden, Inst. (3, 1, 4, 7). But he certainly does not lay down the doctrine that where there is a clear right the injury complained of must be irreparable in order to justify an application for an interdict. "

[22] From the aforesaid authority, as is commonly accepted, the test formulated in *Setlogelo* with the necessary changes is such that, an applicant has to establish:

- (a) a *prima facie* right, though open to some doubt;
- (b) a reasonable apprehension of irreparable and imminent harm to the right;
- (c) the balance of convenience; and
- (d) the applicant must have no other satisfactory remedy.

[23] The requirements for the granting of a final interdict are similarly trite. The requirements for a final interdict differs in two material respects from the requirements for an interim interdict. The test, for the granting of a final interdict, requires of an applicant to establish:

- (a) a clear right;
- (b) a reasonable apprehension of irreparable harm and imminent harm to the right;
- (c) no other satisfactory remedy available to the applicant.

[24] The first difference between an interim and final interdict lies in the nature of the right to be asserted. Whereas an applicant need only prove a *prima facie* right (though open to some doubt) in the case of an interim interdict, the requirement for the granting of a final interdict is much more stringent in that a clear right must be proven. The second difference is that in an application for an interim interdict, an applicant must show that the balance of convenience justifies the granting of the interim interdict. No such requirement exists for the granting of a final interdict.

[25] The facts relied on by the Minister of Agriculture, Land Reform and Rural Development in support of the relief sought for what was an interim interdict on an ex parte basis on 13 August 2019 and the interpretation of such relief by the court a quo on the return date which led to the granting of a final order needs careful scrutiny. This begs the question how the orders which are assailed by the appellants should be interpreted by this Court.

The nature of the interdict sought by the Minister

[26] Prayer 2.2 of the Notice of Motion finds applicability to typify the nature of the interdict which the Minister sought on an ex parte basis and which was granted as an interim interdict coupled with a rule nisi. It is repeated here for ease of reference:

"2.2 That the First to Twenty-First Respondents be interdicted from:

2.2.1 Entering the farm properties described above and from residing on the properties and/or erecting any structures.

2.2.2 Inciting any other person to enter the farms properties.

2.2.3 Grazing any livestock or permitting any third party to graze any livestock on the farm properties.

2.2.4 Removing, cutting or damaging any existing infrastructure, trees and boundary fences.

23 That the Respondents who graze livestock on the farm properties be ordered to remove their livestock within 2 days from this order.

25 That the First to Twenty-First Respondents be ordered not to interfere with the allocation process of the land to third parties by the Applicant.

4. That prayers 2.1 to 2.5 and prayer 3 be of interim force pending the return date herein. '

[27] For purposes of this appeal, three forms of interdicts are implicated; prohibitory, mandatory and restitutionary. Prohibitory interdicts seek to prevent a certain cause of action being taken a persons. Mandatory interdicts seeks to compel a person to act in a certain way. Restitutionary interdicts seek to order a persons to return property to an applicant. I intentionally do not traverse the structural interdict in this judgment as it does not find applicability to the peculiar facts of this matter.

[28] The interdictory relief which the Minister sought was a hybrid of a prohibitory and mandatory interdict, which was conflated with a restitutionary interdict sought through the relief for a spoliatory order.

[29] With this in mind, I turn to an interpretation of the court order of the court a quo.

The interpretation of court orders

[30] In *HLB International (South Africa) v MWRK Accountants and Consultants Font* (112)2021) [2022] ZASCA 52 (12 April 2021), the Supreme Court of Appeal dealt with the principles applicable to and the interpretation of a court order. Meyer AJA (as he then was) writes as follows in this regard:

"[24] I now turn to the relevant rules of interpreting a court's judgment or order. In *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1.19771 4 All SA 600 (A) this Court said this:

'The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smartt and Another*, 1928 A.D. 82 at p. 87; *West Rand Estates Ltd. v New Zealand Insurance co. Ltd.*, 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no intrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. (cf. *Postmasburg Motors (Edms.) Bpk. v. Peens en Andere*, 1970 (2) S.A. 35 (N.C.) at p 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see *infra*. But if -any-uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the or order may be investigated and regarded in order to clarify it: for example, if the meaning of a judgment or order granted on an appeal is uncertain. the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it.

See *Garlick's case*, *supra*, 1928 A.D. at p. 87, read with *Delmas Milling co. Ltd. v Du Plessis*, 1955 (3) S.A. 447 (A.D.) at pp. 454F-455A, • *Thomson v Belco (Pvt.) Ltd. and Another*, 1960 (3) S.A. 809 (D). ' (Footnotes omitted.)

[25] Since *Firestone* there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. The modern approach to interpretation was set out thus by this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

'Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax: the context in which the provision appears: the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermine the purpose of the document... The "inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[26] The now well established test on the interpretation of court orders is this:

The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention... ' (Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others 2013

(2) SA 204 (SCA) para 13 and endorsed by the Constitutional Court in Eke v Parsons 2016

(3) SA 37 (CC) para 29).

[27] The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made. (Cross-Border Road Transport Agency para 22, see also Speaker, National Assembly and Another v Land Access Movement of South Africa

and Others (2019) 1 ZACC 10 (CC); 2019 (6) SA 568 (CC) para 43.) For as was said in KPMG Chartered Accountants (SA) v Securefin Ltd and Another, 'context is everything'.

[28] A fairly recent illustration of the linguistic, contextual and purposive approach to the interpretation of a judgment or order is to be found in Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd, in which it was said that '[an order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole', and- '[a]s part of the "usual well-known rules" of interpretation, according to Olivier JA, is-

"One should not stare blindly at the black-on-white words, but t to establish the meaning and implication of what is being said. It is precisely in this process that the context and surrounding circumstances are relevant. '

The facts adduced in support of the interim interdict on 13 August 2019

[31] The only evidence of relevance in support of the relief sought for the interim interdict, on which the Minister relied for the granting of "an urgent interdict coupled with a spoliation order", as sought on 13 August 2019, as stated in the founding affidavit, is as follows:

"PURPOSE OF THE APPLICA TION

6.1 From the Notice of Motion the above Honourable Court would have noted that this is an application for an urgent interdict coupled with a spoliation order.

6.2 The above Honourable Court will shortly see that the First to TwentyFirst Respondents invaded land which belongs to the Applicant.

6.3 These invasions are unlawful and the First to Twenty-First Respondents are suing the aforesaid land for their own benefit without the consent of the Applicant.

6.4 The First to Twenty-First Respondents are accordingly busy with a self-help exercise which this application seeks to end.

RELEVANT BACKGROUND

FACTS

7.8 However, the presence of First to Twenty-First Respondents on the State farms in question makes it impossible for the Applicant to give undisturbed possession of the farms to the successful beneficiaries.

7.9 This spoliation also prevents the Department Officials from doing proper asset verification on these farms.

7.10 The Applicant therefore has no control over its assets on the farms and its assets can be damaged or even stolen at any time.

16. REQUIREMENTS FOR AN INTERDICT

16.1 Prima facie right

It is respectfully submitted that the Applicant has more than a prima facie right, as it is the owner of the property as the proofs of ownership confirm. The Respondents have no right to invade and to spoliolate the Applicant from its lawfully obtained property which is in peaceful and undisturbed possession.

16.2 Well grounded apprehension of irreparable harm if relief is not granted

16.2.1 Experience has shown that once land invasions start it can in a short scope of time escalate to numerous invaders.

16.2.2 Clearly if the Applicant is losing possession of its immovable property it suffers irreparable harm, as if the relief is not sought the unlawful invaders will remain on the farms unlawfully.

16.2.3 The entire purpose of purchasing the farms was in order to distribute it to upcoming farmers in an organised fashion. If the relief is not granted the allocation of the land to lawful beneficiaries will be a futile exercise.

16.2.4 On the other hand the applicants will demand answers from the Applicant Department regarding the allocation of the land which might eventually cause unrest between the unlawful occupants and the beneficiaries.

16.3 Balance of Convenience

Given all the aforesaid facts it is respectfully submitted that the balance of convenience indeed favours the Applicant for granting of the relief sought.

16.4 Absence of an other satisfactory remedy (16.4 mis-numbered in founding affidavit as 16.3)

16.4.1 The Respondents are by their very nature aggressive and rumors had are that they will only leave the farms in coffins. Consequently the Respondents are not approachable in order to try to persuade them to come to their senses and persuade them that they are acting unlawfully.

16.4.2 It is also a difficult, if not impossible, task to obtain the cooperation of the South African Police Services without a court order. Surely the Applicant is also not allowed to take the law into its own hands to restore its possession if an order from the above Honourable Court is not obtained. '

The judgment of the court a quo on the spoliatory relief sought and the final interdict which it granted

[32] The court a quo in its judgment deals with the relief sought at prayer 2.1 of the Notice of Motion which is for spoliatory relief (a mandament van spolie). It is prudent for purposes of this appeal to quote from the judgment of the court a quo in this regard:

...However, the presence of the first to twenty-first respondents on the state farms in question make it impossible for the Applicant to give undisturbed possession of the farms to the successful beneficiaries.

[7] This spoliation also prevents the Department Officials from doing proper asset verification on these farms. The Applicant therefore has no control over its assets on the farms and its assets can be damaged or even stolen at any time. It recently came to the Department's attention that some individuals (the first to twenty-first respondents) have unlawfully invaded the land so advertised. have taken possession of same and are grazing their livestock on the farm properties. The majority of the premises are also locked with padlocks from unknown persons having the effect that the Applicant does not have access to certain portions of the farm. "

(my emphasis)

[33] Later in the judgment of the court a quo, the court a quo elaborates on the narrative of spoliatory relief and dismisses the spoliatory relief sought by the Minister of Agriculture, Land Reform and Rural Development. The following appears from the judgment of the court a quo:

"Legal Principles:

[49] In order to succeed in an application for a spoliation order the applicant must allege and prove that it was in peaceful and undisturbed possession and that it was unlawfully deprived of such possession.

[50] Nowhere in its papers does the applicant allege that it was ever in possession of any of these farms. In an attempt to prove possession of the said farms the applicant submitted that it was the owner of the farms and that the respondents took occupation of the farms without its consent. It is trite law that the right of ownership is irrelevant when considering an application for a Mandament van spolie.

[51] Our law recognises possession in relation to the spoliation remedy as either quasi-possession of physical possession. The former being possession in respect of incorporeal property whilst the latter is in respect of corporeal property.

[52] Once the court has found that the applicant failed to prove that it was in possession of the land, it becomes unnecessary to deal with the second element of spoliation being "unlawful dispossession". On that basis, the spoliation application is doomed for failure. .. "

[34] After dismissing the spoliatory relief, the court a quo, goes on to say at paragraph [52] of its judgment:

"[52] ... The matter does not end there however. In its prayers in the Notice of Motion the Applicant has applied for an interdict against all the respondents to restrain them from; inter alia, residing on the farms and/or grazing their livestock on the land. I now consider the latter application (for an interdict). "

[35] The only reasons in the judgment of the court a quo for granting the final interdict are found at paragraphs

[54] and [55] under a heading FINAL INTERDICT, which reads as follows:

"[54] All these farms have been purchased by the government and the ownership on the properties has been transferred to the government. The Applicant, as a state department of the Republic of South Africa, has a clear right over these farms. The purpose of purchasing the land was to lease it out to deserving farmers. Each applicant or interested person has to be allocated a farm after a rigorous process of selection. The respondents admit that none of them holds any lease agreement with the government over these farms. They are therefore grazing their livestock and utilizing the land for their benefit free of charge. They refuse to vacate the properties. They are hostile as against the Applicant's official. Some of them have threatened that they would only leave the land when they are in coffins. In the meantime, the Applicant has already entered into lease agreements with other farmers over the same properties. These farmers should have taken occupation of these farms some two years ago. These lessees have been

waiting rather too long to take occupation of their respective farms but the respondents are not prepared to move out of the land. It becomes integrative therefore that the have to be moved forcefully . Every day that passes whilst these farms are occupied by the respondents, the Applicant suffers loss; it does not receive any

rental. Yet government spent millions of rands to acquire the properties.

- [55] The respondents allege that they have occupied the farms with permission; first from the previous farm owners or occupants and secondly from the applicant. Almost all previous owners of these farms have filed confirmatory affidavits to the Applicant's replying affidavit. They deny that they ever gave any of the respondent's permission to occupy or to graze their livestock on the land. Therefore, the respondents were dishonest to Court when they said they got permission to occupy and graze livestock on the farms the respondents point a finger at the deponent to the founding affidavit (Mr Keothaile). The latter vehemently denies that he or any other official of his department was part of the Brulpan meeting of 31 May 2019 where the respondents were given "caretaker" permission to utilize the farm. The minutes which the respondents allege reflect the attendance and deliberations in that meeting have been disavowed by Mr. Keothaile. He denies that these minutes reflect the truth. In my view, if there was such a meeting the minutes would have been taken by an official of the department. In casu this was not the case. The minutes have not been signed by anyone. The respondents have already shown that they are not faithful to this court in relation to the first permission to occupy the farms. This court therefore finds that no representative of the Applicant attended the Brulpan meeting. "
- [36] The Minister sought a spoliatory order on an ex parte basis, which was subsequently dismissed by the court a quo on the return date. The Minister conflated the relief sought for a spoliatory order with further relief for an interim interdict.
- [37] The interim interdict granted on 13 August 2019 was coupled with a rule nisi. As made plain by the Constitutional Court in emphasizing what a rule nisi is, it is an order by Court "...calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at the same time orders that the rule nisi should act immediately as a temporary order, pending the return day." The interim interdict coupled with a rule nisi is temporary and provisional. On the return date, the applicant would ordinarily move for the rule to be made final.
- [38] Once Gura J dismissed the Minister's application for spoliatory relief, he stated that the matter did not end there as the Minister had applied for an interdict against all the respondents to restrain them from; inter alia, residing on the farms and/or grazing their livestock on the land. Gura J then proceeds to consider the application for an interdict under the heading FINAL INTERDICT.
- [39] It is clear that what the Minister sought from the Court was spoliatory relief, which the court a quo dismissed and correctly so, on the requirements for spoliatory relief. However, Gura J erred in our view when he went on to consider the interdict which was sought as a final interdict (prohibitory interdict). The Minister at no stage sought a final interdict. What the Minister sought, procedurally, was confirmation of the interim interdict which was granted on 13 August 2019 and coupled with the rule nisi. The

interim interdict was temporary and provisional by nature and being coupled with a rule nisi it could only be confirmed or discharged on the return date. (See *Development Bank of Southern Africa Ltd v Van Rensburg NNO* 202 (5) SA 425 (SCA)).

[40] More often than not a rule nisi and interim interdict are issued simultaneously and are legally intertwined, but that should not be mistakenly interpreted to mean that the rule nisi and interim interdict are the same. In *Nzwalo Investments (Pty) Ltd and Infoguardian (Pty) Ltd Case 6950/2020* (23 July 2021), an unreported judgment of the Gauteng Local Division, Johannesburg, the following was said regarding the difference of these two legal instruments:

"[13] The concept of a rule nisi is to be distinguished from a provisional or interim order. A rule nisi is an order to show cause on a return day why a particular order should not be made. On its own, a rule nisi has no legal effect other than to put those to whom it is addressed on notice that the specified relief will be sought on the return day.

[14] An interim or provisional order is different. The order has specified legal consequences beyond there mere notice of the prospect of final relief being granted.

[15] Often a rule nisi and an interim order are issued in the same order at the same time, but that does not mean they are the same thing. When a rule nisi is coupled with an interim interdict, the order sought to be confirmed on the return day will have the effect until the return day. If the return day passes then both the rule and the interdict expire. '

[41] From a procedural perspective, in circumstances when a rule nisi is coupled with the interim interdict, the order that is sought to be confirmed on the return date will have interim effect. The interim relief remains intact and specified. The existence of a return date does not alter the nature of the specified relief. The specified relief in the period between the granting of the rule nisi and return date was not altered. The factual and legal foundational facts remained the same before the court a quo on the return date. It was a superfluous exercise to have engaged on the prerequisites of a prohibitory interdict. This was simply not before the court a quo. The court a quo conflated the legal terminology of the final confirmation of the interim interdict with a final (prohibitory) interdict. That aside, the final relief sought by way of rule nisi was in fact only for spoliatory relief.

[42] On the return date, neither the appellants nor the Minister were requested or afforded an opportunity to address the court a quo on the issue of "final interdictory relief". I reiterate that was not the relief sought by the Minister. Arguments were premised only the issue of the spoliatory relief as sought by the Minister. The heads of argument drafted in the Minister's case for consideration on the return date, bears this out, where at paragraph 3.3 thereof, the following is said: .the only issues for determination were therefore the lawfulness of the occupation and whether the applicant (respondent before us) had been unlawfully deprived of its possession of the farms by the respondents (appellants before us). That is it and that is all.'

- [43] For the reasons as stated aforesaid, it was not competent for the court a quo to grant the final (prohibitory) interdict in favour of the Minister, both in law and on the very terse facts set out in the founding affidavit. The Minister proverbially did not get out of the starting blocks on the evidence in support of the relief it sought for a prohibitory interdict, and the relief sought for a spoliatory order was correctly dismissed.
- [44] The appeal accordingly stands to be upheld with costs. The effect of the final (prohibitory) interdict which was granted being unsustainable both in fact and law, should signal the end of this appeal. I have read the judgment of my sister Snyman J in respect of the effect of the order of the court a quo and I concur therein.

Costs in the court a quo

- [45] The appellants appeal against the cost order granted against them on the basis that they were partly successful in opposing the application. The appellants further argue that they did not get an opportunity to address the court a quo prior to the cost order being granted. In light of the conclusion reached in this appeal, nothing more needs to be said on this ground of appeal.
- [46] The appellants are entitled to the costs of appeal which costs include the costs incurred in the court a quo. We can find no reason why the court should deviate from the general rule that costs should follow the result.

FMM REID J (concurring in the judgment of Petersen J)

The effect of the order of the court a quo: Was the order in effect an eviction order?

- [47] I concur in the judgment of my brother Petersen J and the proposed order. I elaborate on the effect of the order of the court a quo. It is trite that evictions are governed by the provisions of the PIE Act, save for commercial property. The word "evict" is defined in the PIE Act as "'evict' means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning".
- [48] In the founding affidavit that served before the court a quo, it was stated in relation to the farm Kromboom that the 6th to 10th respondents are occupying the aforesaid premises" (own emphasis). Further, in relation to the farm Vaalboschlaagte it is stated that "Despite attempts to establish exactly who is occupying the farm, the best information that was obtained is that it is the 18th respondent. It is however clear that other unknown individuals are occupying the property unlawfully together with the 18th respondent" (own emphasis). In relation to the farm Mamusa, it was stated that "It however became evident that this farm is occupied by the 15th to 17th Respondents as information confirming the occupants had been received by Mr Kagiso Moretlwe" (own emphasis).

- [49] The information at the disposal of the court a quo thus clearly indicates that there were individuals occupying the property. The order of the court a quo expressly interdicts the appellants from residing on the farms, utilising the farms for grazing purposes or erecting any structures on it.
- [50] The practical outcome or effect of the order, and not the legal classification of the order, determines the nature of the order. As such, an interdict can also be an eviction order. In this instance, the practical effect was clearly to prevent any further occupation or utilization of the farms by the respondents.
- [51] The order granted by the court a quo is nothing other than an eviction order.

The Prevention of Illegal Eviction Act

- [52] Having found that the order of the court a quo is an eviction order, the legal requirements of eviction has to be fulfilled for the order to maintain legal integrity and survive legal scrutiny.
- [53] The quotations as referred to in paragraph
- [8] above, reflect that the respondents were well aware thereof that the majority of the appellants are in occupation of the farms. The court a quo had to be alive to the fact that the order sought, will have the practical effect of evicting occupants from the farms.
- [54] The correct approach that the respondents should have commenced with would have been to follow the requirements of the PIE Act in as far as the occupants on the farms are concerned.
- [55] Section 4 of the PIE Act determines that the following procedural steps must be taken prior to any eviction of an occupant, and reads as follows:

"4 Eviction of unlawful occupiers:

- (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.
- (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and

effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

- (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

- (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.
- (5) The notice of proceedings contemplated in subsection (2) must(a) state that proceedings are being instituted in terms of subsection
- (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.
- (6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.
- (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women. "
- [56] Despite the applicant in the court a quo having details of the identities of the occupants as cited in the founding affidavit, the appellants were not served with notices as required in terms of the PIE Act. The application in the court a quo appears to have conveniently overlooked this reality.

Order

[57] In the result the following order is made:

- i) The appeal is upheld.
- ii) The order of the court a quo of 12 July 2021 is set aside and substituted with the following order:

"The application is dismissed with costs. "

iii) The respondent is to pay the costs of appeal, which costs shall include the costs of the application for leave to appeal.

F M M REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

MAHIKENG

I agree

A REDDY

Appearances

For the First to Fifth Appellants: Adv

MA Pahlane

For Respondent: Adv

HJ Scholtz

For the Twenty First Respondent: Adv

LA Konnie

HEARD: 21

October 2022

HANDED DOWN: 14 April 2023

[1] (CCT44/02)

[2003] ZACC 4; 2003 (1) SACR 561; 2003 (5) BCLR 476 ; 2003 (4) SA 1 (CC) (3 April 2003).

[2] Simross Vintners (Pty) Ltd v Vermeulen 1978 (1) SA 779 (T) at 783B.

[3] The High Court rightly cited the judgment of R v Ngwevela 1954 (1) SA 123 (A) at 131 B-C in which Centlivres CJ referred to the audi rule as "a sacred maxim."

[4] See, for example, Erasmus Superior Court Practice BI-52-3 (Juta Service 17, 2002); Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa (Juta 1997) 4ed 232-3 and Network Video (Pty) Ltd v Universal City Studios Inc and Others 1984 (4) SA 379 (C) at 381 F-H.

[5] Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A) at 18J-19B.

[6] **Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A) at 674H to 675A.**

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