

SOUTH AFRICA / JUDGMENT

Phillips v South African National Parks Board (4035/07) [2010] ZAECHGC 27 (22 April 2010)

[2010] ZAECHGC 27

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Eksteen

CASE / FILE NUMBER

4035/07

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GRAHAMSTOWN
NOT REPORTABLE**

PARTIES:

DAVID COLIN PHILLIPS V SOUTH AFRICAN NATIONAL PARKS BOARD

Case

Number: 4035/07

High

Court: GRAHAMSTOWN

DATE

HEARD: 3

MARCH 2010

DATE

DELIVERED: 22

APRIL 2010

JUDGE(S):

EKSTEEN

J

LEGAL

REPRESENTATIVES –

Appearances:

For

the Plaintiff(s): ADV

BEYLEVELD S.C.

For

the Defendant(s): ADV

VORSTER S.C.

Instructing

attorneys: Plaintiff(s): NETTLETONS

Defendant(s): WHEELDON
RUSHMERE & COLE
CASE
INFORMATION -
Nature

of proceedings: Key

Words:

Summary: IN
THE HIGH COURT OF SOUTH AFRICA NOT
REPORTABLE
EASTERN
CAPE, GRAHAMSTOWN
Case
No.: 4035/07
Date
delivered: 22 April 2010
In

the matter between: DAVID
COLIN PHILLIPS Applicant
and
SOUTH
AFRICAN NATIONAL PARKS BOARD
Respondent

JUDGMENT

EKSTEEN J:

- [1] The applicant is the owner of two adjoining farm properties known as Wildemanskraal and Bloukrantz (“the applicant’s properties”). On the southern side of the applicant’s properties they border onto the Nyati concession area (“Nyati”), an area of approximately 12 000 hectares which forms part of the greater Addo Elephant National Park and is managed by the respondent. It is common cause that the respondent has erected a fence across a portion of Wildemanskraal thereby effectively incorporating approximately 6,3 hectares of Wildemanskraal (“the SANParks portion”) into Nyati.
- [2] The applicant herein seeks an interdict to compel the respondent to remove the fence which presently encroaches on Wildemanskraal and to relocate the fence to the cadastral boundary between Wildemanskraal and Nyati, alternatively onto Nyati.
- [3] History of Application.

The applicant launched this application on 30 October 2007. The respondent opposed the application and raised a number of defences which may be summarised as follows:

1. The respondent alleged that it had purchased the SANParks portion of Wildemanskraal from one Van Rooyen (who has since died), the applicant's predecessor in title to Wildemanskraal and that it is accordingly entitled to transfer of ownership thereof. It further contended that the applicant did not purchase the property as a bona fide purchaser, that he knew of Van Rooyen's sale of the SANParks portion to the respondent, and that the sale of the SANParks portion was therefore enforceable. I pause to mention that the SANParks portion has indeed been subdivided and currently forms a separate unit being farm 416.
 2. In any event, as far as the encroachment of the Wildemanskraal boundary fence is concerned, the respondent alleged that Van Rooyen had agreed to the placement of the fence, that the applicant purchased the property well-knowing that Van Rooyen had consented to the encroachment of the Wildemanskraal boundary fence and that he is therefore bound to such agreement.
 3. Further, in any event, the respondent alleged that fairness requires that the Wildemanskraal boundary fence remain as it is.
 4. In the alternative, in the event that I should find against the respondent in respect of the three defences set out above the respondent sought, by way of a counter-application, a declaratory order that the applicant is entitled only to damages to be determined and that the respondent is entitled to transfer of ownership of the SANParks portion.
 5. In the further alternative, in the event that I should find against the respondent in respect of all of the above the respondent contends that this court does not have jurisdiction concerning the dispute regarding the Wildemanskraal boundary fence and that the dispute falls to be determined in accordance with the procedures prescribed under section 29 of the second Schedule of the Fencing Act, No. 31 of 1963.
- [4] In respect of the first defence the respondent relied upon a written agreement of sale allegedly concluded between itself and the said Van Rooyen on 17 March 2004, prior to the purchase of Wildemanskraal by the applicant. The second defence relating to the agreement in respect of the location of the fence, which effectively amounts to an agreement of servitude, is founded upon an alleged oral agreement between the said Van Rooyen and the respondent. Both these defences were met by a denial on the part of the applicant of the existence of any valid agreement between the respondent and the said Van Rooyen. The applicant also opposed the relief which the respondent seeks by way of counter-application and denied the lack of jurisdiction for which the respondent contends in its final defence.
- [5] In these circumstances, at the initial hearing of the application an order was made by agreement between the parties in the following terms:
- "1. THAT this application be and is hereby postponed to a date to be arranged with the Registrar of the above Honourable Court for viva voce evidence;*

1.1 That the issues to be resolved at such hearing are:

1.1.1 whether a valid agreement of sale was concluded between Van Rooyen and the Respondent;

1.1.2 whether the Applicant had knowledge of such agreement and, if the Applicant did have knowledge, when did the Applicant acquire such knowledge;

1.1.3 whether or not the Respondent, in the absence of a contractual entitlement enforceable against the Applicant to take transfer of the sub-divided portion is entitled to keep the encroachment (the placing of the fence) in place against payment to the Applicant of damages sustained as a result of such encroachment and the quantification of such damages.

1.2 ...

1.3 ...

1.4 ...

1.5 ...

1.6 That the costs of the application stand over for later determination.”

[6] Against this background the matter came before me. The applicant tendered the evidence of Ms Palm, a handwriting expert. She testified that she had obtained a number of known specimen samples of the handwriting of the said Van Rooyen. She has undertaken an extensive analysis of the specimen samples of the handwriting of Van Rooyen and compared that to the signatures attributed to Van Rooyen which appear on the written contract of sale upon which the respondent relies. She concluded that the signature of Van Rooyen was a forgery and that Van Rooyen did not sign the agreement. Her evidence was not seriously contested and the respondent did not tender any evidence before me in respect of the authenticity of the agreement. In argument it is conceded on behalf of the respondent, correctly in my view, that the sale agreement between Van Rooyen and the respondent has not been proved. The first defence accordingly fails.

[7] The second defence, the alleged agreement between the respondent and Van Rooyen to erect the fence on the property in question was abandoned in argument before me. The respondent accepts that the oral agreement which had allegedly been entered into between the respondent and Van Rooyen to erect the fence on the property of Van Rooyen was conditional upon the respondent purchasing the land from Van Rooyen. This condition was not fulfilled.

[8] The defence relating to jurisdiction was not persisted in and no argument was advanced before me in this regard.

[9] What remains for consideration is accordingly whether or not the respondent, in the absence of a contractual entitlement enforceable against the applicant to take transfer of the subdivided SANParks portion, is entitled to keep the encroachment (the placing of the fence) in place against payment to the applicant of damages sustained as result of such encroachment. In the event of my holding in favour of the respondent, the respondent seeks

an order that the SANParks portion should be transferred to the respondent upon payment of damages and I am then called upon to decide the quantification of the applicant's damages.

[10] The Evidence.

A great deal of the evidence in this matter deals with the alleged agreements between the respondent and Van Rooyen. In view of the concessions made by the

respondent as set out above I do not intend to traverse this evidence, save to the extent that it impacts upon the relief which

remains in issue.

[11] I have stated above that the applicant is the owner of both the farm Wildemanskraal and the farm Bloukrantz, which farms adjoin one another. Each of these farms also border onto Nyati. The cadastral boundary between Nyati and the applicant's properties runs for its entire length over rugged terrain on the southern slope just below the main ridge of the Zuurberg Mountain. It is common cause that the southern slope of the Zuurberg Mountain along the area of the cadastral boundary is forested with ecologically sensitive, pristine, afromontane forests which occur both on Nyati and on the upper limits of the southern slope extending onto the applicant's properties up to the ridge of the mountain. The SANParks portion of Wildemanskraal contains portion of this afromontane forest vegetation. This matter concerns only the SANParks portion of Wildemanskraal, however, a similar dispute between the parties rages in separate proceedings in respect of portion of Bloukrantz situated below the ridge of the Zuurberg Mountain along the length of the southern boundary of Bloukrantz. This area, similarly, contains sensitive, pristine and biologically important indigenous forest.

[12] The farm Bloukrantz had previously belonged to the applicant's father. During or about 2004 the applicant approached Van Rooyen in order to negotiate the purchase of Wildemanskraal with the view to conducting Wildemanskraal and Bloukrantz as one business unit. The applicant contends that he wished to conduct an eco-tourism enterprise on the applicant's properties and did not intend to use the properties for conventional farming purposes. The indigenous forest which occurs on the applicant's properties featured significantly, both in relation to his election to purchase the properties in question and in relation to the plans which he developed in respect of the eco-tourism enterprise. He has indeed commenced the process of developing the operation on the properties concerned and he says that were he to be deprived of the SANParks portion it would dramatically and materially adversely affect the extent to which he would be able to conduct an eco-tourism enterprise and would deprive both properties of spectacular locations at which to site viewing decks and tented accommodation and from which walking trails through the forested areas could be conducted.

[13] It is common cause that on 14 June 2004 at the time of the purchase of Wildemanskraal by the applicant a letter signed by Van Rooyen had been forwarded to the respondent in respect of the alleged earlier oral agreement relating to the proposed purchase of the SANParks portion of Wildemanskraal by the respondent. The letter records as follows:

“I refer to the agreement concluded between ourselves on 8 December 2003.

In terms of the aforesaid agreement you were to pay to me the sum of R14 000 (fourteen thousand rand) in respect of the purchase of “the piece of Wildemanskraal” which was fenced into the Addo Park.

The purchase price was to be paid to me by 2 February 2004. Despite the lapse of four months I have not yet received any money from you.

In my view more than sufficient time has passed in order for you to have complied with your obligations in terms of the agreement. Your conduct in my view constitutes a repudiation of the agreement, which I hereby accept. In the circumstances kindly consider the agreement cancelled with immediate effect.”

[14] It emerges from the respondent’s papers that one Adendorff, a conservation manager in the employ of the respondent, confronted Van Rooyen in respect of this communication. The respondent contends that Van Rooyen had informed Adendorff that the applicant had insisted on Van Rooyen signing the letter. Van Rooyen informed Adendorff that the applicant had told Van Rooyen that if he did not sign the letter, the applicant would not buy the property. Van Rooyen said that the applicant was not prepared to purchase the property without the SANParks portion. This evidence accords with the applicant’s version relating to the importance which the applicant attached to the slither of indigenous forest along the extreme southern portion of the applicant’s properties.

[15] During 2004, shortly after the applicant acquired ownership of Wildemanskraal and whilst the applicant’s father was still the registered owner of Bloukrantz negotiation was conducted between the parties in respect of the maintenance of the fence in the position in which it had been erected across both Wildemanskraal and Bloukrantz, encroaching upon the applicant’s properties. At that time the applicant attempted to negotiate with the respondent, as a quid pro quo for retaining the fence, that certain concessions be granted in respect of the conduct of walking trails onto the property of the

respondent down the southern slope of the Zuurberg Mountains which, it is common cause, would greatly have advanced the prospects and extent of the applicant’s eco-tourism dream. To this end the applicant commissioned an extensive business plan for presentation to the respondent. Regrettably, this vision did not come to fruition and no concession has been obtained by the applicant in respect of walking trails on the property of the respondent. The applicant is accordingly limited to his own properties. This, however, has not deterred the applicant and he states that he is presently developing the establishment of an eco-tourism enterprise on the properties which he owns. He states that it is his intention to increase tourism

opportunities and to undertake extensive conservation on the properties which he owns. In this regard, he has developed three on-suite units on his property. In oral evidence the applicant testified that he indeed conducts business, albeit currently at a subdued level, attracting visitors only by word of mouth.

- [16] It is common cause that it is essential that a sturdy predator proof fence should be erected between Nyati and the applicant's properties. In this regard leopard and caracal occur naturally in the Zuurberg and the respondent has recently released buffalo and elephant in Nyati. Respondent is furthermore contractually bound to the concessionaries in respect of Nyati to release other predators, including lion into the area.
- [17] The respondent contends that it would be impractical to run a predator proof fence along the cadastral boundary. In the papers filed on behalf of the respondent it contends that it would not be possible to effectively maintain such a fence, due to the steepness of the terrain, making it ineffective against movement of wildlife, especially predators. It states that an effective predator proof fence through a forest area such as the forest along the cadastral boundary in question, requires a clearing of at least 12,5 metres on both sides of the fence. Such a clearing would prevent predators from escaping by utilising the trees contained in the forest, especially when they capsize, due to wind or elephant activity. The respondent contends that the maintenance of a predator proof fence requires a well maintained road running alongside or close to the fence, to facilitate inspection and physical maintenance of the fence. To maintain such a fence, it says, it is important not only to effect day to day physical maintenance but also regularly to inspect it for breakouts. It is alleged that it would not be possible to effectively maintain such a fence due to the steepness of the terrain and not being able to build a road alongside or close to such a fence. To build a fence on the cadastral boundary, so the evidence goes, would furthermore destroy large tracks of forest, the protection of which is the very reason why the Addo Elephant National Park is currently being expanded, and would contribute to erosion. This, it is contended, would be contrary to all sound principles of biodiversity conservation lying at the heart of the respondent's existence and maintenance. The respondent contends that the top of the range of hills presents the natural position for a boundary fence. A gravel road, which has been used for many years by officials of the Department of Water Affairs and Forestry and its predecessors, already exists immediately north of the current position of the Wildemanskraal boundary fence. The applicant, and his predecessors in title, have accommodated officials of the Department of Water Affairs and Forestry and their predecessors in utilising this gravel road.
- [18] The respondent argues that the provisions of section 55(1)(a) and (b) of the National Environmental Management: Protected Areas Act, No. 57 of 2003 ("NEMPA") sets out the respondent's mandate. It contends that its mandate set out in these sections includes the managing of National Parks and other protected areas assigned to it as well to protect, conserve and to control such National Parks, including their biological diversity. It states that it is important to it, in order to carry out such mandate in respect of the Addo Elephant

National Park, that the boundary fence remain where it currently stands. Removing it, so the respondent argues, from its present position would prevent the respondent from accomplishing its long term vision of a single fenced Addo Elephant National Park.

- [19] In oral evidence, Dr Knight, who testified on behalf of the respondent, did not put the difficulties associated with the fence on the boundary as strongly as it is recorded on affidavit. He conceded that it would be perfectly possible to erect a predator proof fence along the cadastral boundary between Nyati and the applicant's properties but, it would involve far greater cost of construction and of maintenance which would make it impractical and inexpedient for the fence to be erected upon the cadastral boundary. He expressed the view that erecting a fence on the cadastral boundary would be both difficult and inexpedient, given the nature of the terrain and the indigenous bush that would have to be cleared. Clearing the vegetation, which includes indigenous forest and valley thicket, would be a loss to these already threatened vegetation types and would raise possibilities of erosion down the steep slopes which, in itself, poses an environmental risk. The difficult terrain, he testified, would also increase management costs with regard to patrolling and maintenance of the fence. It would not allow for a service road along its length, necessitating the need for new access roads and resulting in increased manpower costs associated with accessing the fence by foot where required. This, Dr Knight says, would increase the environmentally damaging footprint. By contrast the fence on the ridge would be shorter which would in itself constitute a saving in costs and it would run along the old road used by the Forestry Department thus facilitating maintenance and patrolling which would offer enhanced conservation effectiveness. The terrain along the cadastral boundary, he says, would also give rise to less effective management of the fence thereby impacting on the exercise of the respondent's mandate and being to the prejudice of the public.

- [20] Approach to Interdicts.

The applicant seeks a perpetual interdict. In order to succeed in interdict proceedings the applicant must establish:

1. A clear right;
2. An injury actually committed or reasonably apprehended; and
3. That he has no alternative remedy.

- [21] There is some uncertainty as to whether a court has a discretion to refuse the grant of a final interdict when the applicant has establish a clear right and a reasonable apprehension of harm. This has been the subject of conflicting decisions. On the one hand it has been held that where a clear right has been established the discretion of a court to refuse a final interdict is very limited and depends exclusively upon the question whether the alternative remedy is adequate (see *Transvaal Property and Investment Company Ltd and Reinhold and Co. v SA Townships Mining and Finance Corp Ltd* and the Administrator 1938 TPD 512 at 521; and *United Technical Equipment Company v Johannesburg City Council* 1987

- (4) SA 343). On the other hand it was held in *Candid Electronics v Merchandised Buying Syndicate* 1992 (2) SA 459 at 464G that “the grant or refusal of an interdict is a matter within the discretion of the Court hearing the application and depends on the facts peculiar to each individual case and the right which the applicant is seeking to enforce or protect”.

See also *Kemp, Sacs and Nell Real Estate (Edms) BPK v Soll en ‘n Ander* 1986 (1) SA 673 (O) at 689; and *Wynberg Municipality v Dreyer* 1920 (AD) 439 at 477. It has, however, consistently been accepted that where an applicant seeks a demolition order in respect of an encroachment constructed on its property the court does have a discretion. See *Rand Klaterraad v Bothma en ‘n ander* 1997 (3) SA 120 and the authorities set out therein; and *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 at 290 para [26] to 291 para [28] and p. 292G-H. I shall assume, without deciding same, that I do have a wide and equitable discretion (see *Trustees, Brian Lackey Trust* (supra) at 291 para [28]) which is not dependent exclusively on the question whether an alternative remedy is adequate (compare *Transvaal Property and Investment Company* (supra) at 521).

- [22] Section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides as follows:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

- [23] Law of general application includes the common law. (See *The President of the Republic of South Africa v Hugo* 1997

- (4) SA 1 (CC); and *Midi Television (Pty) Ltd v Director of Public Prosecutions* (WC) [2007] ZASCA 56; 2007 (9) BCLR 958 (SCA) at 962 para [9].) In the circumstances the discretion which I have assumed that the court has at common law, to grant or to refuse an interdict constitutes law of general application. (Compare *Trustees, Brian Lackey Trust* (supra) at 288 para [18].)

- [24] It is indisputable that an encroachment of the nature in issue in the instant case constitutes an interference with the applicant’s

property rights such as to constitute a deprivation in terms of the provisions of section 25 of the Constitution. It follows that, in exercising its discretion the court will accept, as a starting point, that the owner is entitled to claim a demolition order in respect of the encroaching structure. The primary remedy is therefore an order for removal of the structure (see *Trustees, Brian Lackey Trust* (supra))

- p. 292; and *Rand Klaterraad* (supra) at 138F; compare also *Meyer v Kaiser* 1980 (3) SA 504 (D)). In respect of the exercise of the court’s discretion Hefer JA, in the context of a claim for specific performance, in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 stated as follows at 783C-E:

“This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. ...”

[25] Upon these principles I consider the facts of the matter.

[26] Circumstances giving rise to the Encroachment.

The applicant’s clear right to the enjoyment of his property is not in issue nor can it be contested that the encroachment infringes upon that right so as to constitute an injury in the context of the requirements for a final interdict.

[27] The game fence currently in place was erected by the respondent on land which belonged at the time to Van Rooyen. It was erected pursuant to an oral agreement concluded with Van Rooyen. The oral agreement entered into was conditional upon the respondent purchasing the land from Van Rooyen. This condition, was not fulfilled.

[28] Prejudice to the Applicant if the fence is not removed.

The applicant contends that at the time that he purchased Wildemanskraal from Van Rooyen he was aware of the existence of the fence. Van Rooyen informed him that an informal agreement had been entered into between himself and the respondent in terms of which the respondent would purchase the SANParks portion for an amount of R14 000. Van Rooyen advised that the respondent did not effect payment of the agreed sum in terms of their agreement and that he accordingly regarded the agreement as cancelled.

[29] It is not in dispute between the parties that the applicant asserted, prior to the purchase of Wildemanskraal, that he was not prepared to purchase the property unless he was able to obtain the SANParks portion.

[30] It is argued on behalf of the respondent that the applicant had relied in his replying affidavit on a business plan (the business plan referred to above) which was attached to the affidavit and which envisaged an eco-tourism enterprise on the part of the applicant to be conducted on Wildemanskraal property and the adjoining Bloukrantz property which is also owned by the applicant. It is now common cause that that business plan did not come to fruition and that the applicant did not obtain any concessions from the respondent. On this basis it is submitted on behalf of the respondent that it is clear that the proposed eco-tourism enterprise of the applicant will be meaningless without the collaboration of the respondent who, in terms of the business plan, is called upon to grant a concession area which lies within the boundaries of the Addo Elephant National Park as well as rights of access to game viewing and sightseeing trips within the greater Addo Elephant National Park.

- [31] I do not consider this to be a fair reflection of the applicant's evidence. It is true that the applicant did annex a business plan, which was drawn up in 2004, to his replying papers. The applicant explained that this business plan was drawn up in the course of negotiations with the respondent relating to the retention of the game fence in its current position. The applicant sought, as a quid pro quo, to obtain certain concessions.
- [32] Notwithstanding that these concessions were not forthcoming it is clear from the affidavits filed and the evidence of the applicant that he has developed plans in respect of an eco-tourism enterprise on the applicant's properties which he is in the process of developing for operation on the properties. He states that it is his intention to increase tourism opportunities and to undertake extensive conservation on the properties which he owns, ultimately for the benefit of the local community. In this endeavour the applicant contends that he would be deprived, inter alia, of the prospect of conducting walking trails through the natural forests which occur on his property. The slither of natural forests which occur on the southern most boundary of his property is the only natural forest vegetation on the applicant's property and it seems to me that the failure to obtain the envisaged concessions from the respondent would render the retention of the natural forest area on his properties more important to his envisaged eco-tourism enterprise than the case would have been had such concessions been obtained.
- [33] It is submitted on behalf of the respondent that the applicant's use does not relate to the SANParks portion fenced in. In this regard the applicant conceded in evidence that he did not venture over the top of the ridge as this would have been "unreasonable"

to do. This, seems to me, does not recognise the totality of the applicant's evidence. The applicant intended at all times to utilise his properties, both Wildemanskraal and Bloukrantz, as one unit. Although the area in dispute on Wildemanskraal is merely 6,3 hectares a far greater area of natural forests occurs along the southern boundary of Bloukrantz which joins the SANParks portion. In total it comprises approximately 45 hectares which may provide a prospect of conducting walking trails as is envisaged by the applicant. The SANParks portion can accordingly not be viewed in isolation.

- [34] The fact that the applicant had, prior to the purchase of Wildemanskraal, made it abundantly clear to Van Rooyen that he had no intention of purchasing the property unless he was able to obtain the SANParks portion as well is indicative of the value which the applicant attaches to the area. This is borne out by the development of the property for eco-tourism purposes, notwithstanding that the concessions which he sought from the respondent were not forthcoming. The applicant's conduct on his properties is evidence of the fact that the applicant has every intention of developing an eco-tourism enterprise on his properties with or without concessions from the respondent. He has recently completed three on-suite units on Wildemanskraal for tourism purposes and has entered into negotiations with the Sundays River Municipality in respect of the erection of two units on the SANParks portion of Wildemanskraal and two units on Bloukrantz. He regards this slither of indigenous forest along the southern boundary of his

property as being vital to his plans.

[35] Prejudice to the Respondent if the fence is removed.

Dr Knight, the Head: Park Planning and Development Conservation Services at the Addo Elephant National Park testified both by way of affidavit and viva voce evidence. I have set out above the essence of his evidence.

[36] Dr Knight concedes that it is perfectly possible to construct the predator proof fence along the cadastral boundary between the applicant's property and Nyati. He persists, however, in his view that it is both impractical and inexpedient to do so. The alleged impracticality and inexpedience arises from a number of features including the inevitable destruction of a corridor of vegetation on either side of the fence, the rugged terrain which would complicate the construction of the fence, both from a technical perspective and a costs perspective, the inability to construct the road alongside the fence with the consequent complication that regular inspections of the integrity of the fence would have to be conducted on foot, maintenance and repairs of the fence would be more difficult and expensive for the same reason and, because of these difficulties, the predator fence may be less effective thereby increasing the risk of dangerous and valuable animals escaping onto the applicant's property.

[37] Dr Knight concluded that in the event that a predator proof fence had to be erected along the cadastral boundary between Wildemanskraal and Nyati, a distance of approximately 800 meters, it would costs approximately R80 000 - R100 000.

[38] It is argued on behalf of the respondent that the prejudice which the respondent would suffer if the fence were to be relocated along the cadastral boundary between the applicant's property and Nyati is fourfold:

1. The conservation of the sensitive bush area in question would be lost to the control of the respondent who is mandated and under an obligation to do that conservation in the national interest;
2. The fence, if erected on the cadastral boundary, would entail a financial loss to the respondent in the region of R80 000 - R100 000 as opposed to the position which would obtain if the fence remains in its present position. There is also, of course, the problem that a fence along the cadastral boundary would be more difficult to maintain and administer because of the problematic terrain. If the fence remains in its present position on top of the ridge it would facilitate the task of the respondent significantly as it would be one continuous fence along the ridge which is enclosed within the area of conservation of the sensitive bush areas below on the slopes and it would be much easier to administer and maintain the fence in that position than would otherwise be the position.

3. Substantial portions of the afro-montane forests would be destroyed in erecting the fence on the cadastral boundary, which would be contrary to the respondents' mandate to protect the important ecology in the area; and
4. The fence would pose a greater risk to the public as far as predators are concerned and increase the respondent's potential liability.

[39] The functions of the respondent upon which reliance is placed in section 55(1)(a) and (b) are as follows:

"55. Functions

- (1) South African National Parks must-
 - (a) manage the National Parks and other protected areas assigned to it in terms of Chapter 4 and section 92 in accordance with this Act;
 - (b) protect, conserve and control those National Parks and other protected areas including their biological diversity; and

..."

[40] Section 92, to which reference is made in section 55(1) provides for South African National Parks to be the management authority for any protected area it managed immediately prior to the commencement of NEMPA, unless such area had been otherwise assigned by the Minister.

[41] Section 55 strikes only at National Parks and other protected areas assigned to the respondent in terms of Chapter 4.

[42] Section 37 of the NEMPA, being the first section contained in Chapter 4, provides as follows:

"37. Except where expressly stated otherwise in this Chapter, this Chapter only applies to a protected area which is a special nature reserve, national park, nature reserve or protected environment, and the expressions "protected area", "national protected area", "provincial protected area", "local protected area" and "protected environment"

must be construed accordingly in this Chapter."

[43] Each one of these concepts is defined in section 1 of the NEMPA. On the papers before me there is no basis to conclude that the area falling outside of the cadastral boundary of Nyati and on the private property of the applicant is a special nature reserve, national park, nature reserve or protected environment as defined in the Act. In the circumstances the management of the SANParks portion of Wildemanskraal does not fall within the territorial mandate of the respondent as set out in section 55 of the NEMPA.

[44] Dr Knight states, however, that in order for the respondent to carry out its mandate in respect of the territory of the Addo Elephant National Park, it is important for the Wildemanskraal boundary fence to remain where it is at present. Removing it from its

present position would, so the argument goes, prevent the respondent from accomplishing its long term vision of a single fenced Addo Elephant National Park. This statement is readily understood if it would have the inevitable consequence of having to move the entire boundary fence on the northern side of the Addo Elephant National Park to the valley below, which was the evidence of Dr Knight on affidavit. Once, however, it is accepted, as Dr Knight concedes in his viva voce evidence, that it is possible, although inexpedient, to construct a predator proof fence along the cadastral boundary of the Addo

Elephant National Park, it is difficult to understand why it would prevent the respondent from accomplishing its long term vision of a single fenced Addo Elephant National Park. In my view this argument cannot succeed.

[45] It is argued further that the conservation of the ecology dictates that the loss of the use of some 6,3 hectares of the applicant's land if the fence remains in its present position cannot receive priority over the conservation of that land in the public interest for posterity by the respondent. The difficulty for the respondent is that, on the evidence, there is no threat to the conservation of the ecology. The SANParks portion of the applicant's property has always been in private ownership. On the evidence of Dr Knight, and as viewed at an inspection in loco, the area in question, although extremely sensitive and biologically important, remains in pristine condition. It appears that it is precisely this consideration which appealed strongly to the applicant in a consideration of whether or not to purchase the property. He insisted on the SANParks portion being included in the purchase as he envisaged an eco-tourism enterprise which, on his evidence, is aimed at increasing tourism opportunities and to undertake extensive conservation on the properties which he owns. It is accordingly, on the evidence, the applicant's intention to conserve the ecologically sensitive forest area.

[46] I was referred in argument to the unreported decision of the Supreme Court of Appeal of in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* (case no. 25/08) in which the Supreme Court of Appeal had occasion to consider the right to have the environment protected for the benefit of the present and future generations through reasonable and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and the use of natural resources as envisaged in section 24 of the Constitution. I am in full agreement, with due deference, with all that is stated in this judgment in respect of environmental

conservation. The matter of *Oudekraal Estates*, however, dealt with the applicant's enforcement of its rights in respect of township development on an ecologically sensitive

terrain. What the applicant sought to achieve in those proceedings was to develop a township with the inevitable destruction of the vast majority of the vegetation. In the present instance it is the applicants declared intention to conserve the natural vegetation. I think that the present situation is very different and no case is made in these proceedings of any material threat to the vegetation on the 6,3 hectares comprising the SANParks portion of Wildemanskraal, save

for the limited and inevitable destruction of some of the vegetation along the fence line. I shall revert to this matter below.

[47] I do not consider that it is correct, on the evidence, to suggest that the erection of the predator proof fence on the cadastral boundary would entail a financial loss to the respondent in the region of R80 000 – R100 000. It is true that Dr Knight indicated that it would involve a financial expense of approximately R80 000 – R100 000 to erect an effective predator proof fence along the cadastral boundary between the SANParks portion of Wildemanskraal and Nyati. It must, however, be considered that if I were to exercise my discretion in favour of the respondent the respondent would be required to pay damages to the applicant. There is considerable dispute between the parties as to what constitutes a fair award for damages. The applicant contends that an amount of R3 million would constitute a reasonable compensation. The respondent, on the other hand, asks of me to hold that damages in the amount of R85 000 would be fair compensation. It seems to me that, at best for the respondent, from a monetary prospective the damages payable to the applicant would at least equal, if not exceed, the costs of erecting a fence upon the cadastral boundary between the properties.

[48] It is undoubtedly correct that the maintenance and administration of a predator proof fence along the cadastral boundary would be inconvenient and more expensive than what the position would be if the fence were to remain in its present position. It is equally true that maintaining the fence in its present position on top of the ridge would facilitate the task of the respondent significantly. I do not consider however that the expedience of the respondent can, of itself, constitute a sufficient ground for depriving the applicant of his rights of ownership. In *Prinsloo v Luipaardsvlei Estates & Gold Mining Co. Ltd* 1933 (WLD) 6 at 26 Tindall J stated as follows:

“It seems to me that the mere fact that an interdict would cause inconvenience and expense to the defendant is never in itself a sufficient ground for confining the plaintiff to damages; otherwise the Court would be assisting confiscation of private rights. But that fact may be one of a number of factors which may influence the Court in exercising its discretion.”

I agree with the views expressed by Tindall J.

[49] I have recognised above that it is common cause that the inevitable result of relocating the fence, whether to the cadastral boundary or elsewhere, would be the destruction of some vegetation on either side of the fence. There is a dispute on the papers as to the extent of the corridor which would be required. Whatever the position, it seems to me, that the prejudice which the respondent would suffer as a result thereof would not be prejudice flowing from the demolition of the encroachment. Had the respondent constructed the fence on the cadastral boundary in the first instance, which represents the limits of the respondent's territorial mandate, such destruction of vegetation as will now become necessary would in any event have occurred. It comes about because the respondent's property extends only to the cadastral boundary.

[50] Finally, it is argued that a fence on the cadastral boundary would pose a greater risk to the public as far as predators are concerned and increase the respondent's potential liability. There is very little evidence before me as to the specific reasons why the predator proof fence along the cadastral boundary would be less effective in retaining predators than one along the ridge of the mountain. The evidence of Dr Knight that the unevenness of the terrain along the cadastral boundary gives rise to greater technical difficulty in the construction of the fence is not in dispute. I accept too that the administration and maintenance of the fence would, for the reasons which I have set out above, be more difficult. It is not, however, the evidence of Dr Knight that the construction of an effective predator proof fence is not possible nor that it cannot be properly administered and maintained, albeit at greater inconvenience and expense. Like the limited destruction of vegetation, it seems to me that the additional expense and effort required to maintain a predator proof fence on the cadastral boundary does not arise from the destruction of the encroachment. This is an expense which the respondent would have had to incur in any event had it erected the fence in its proper position in the first instance.

[51] Conclusion.

In weighing up all the factors giving rise to the existence of the current fence, the prejudice which the applicant would suffer if the fence were to be maintained in its present position and the prejudice which the respondent may suffer if the fence were to be moved to the cadastral boundary between the applicant's property and Nyati, I do not consider that there is a "striking disproportionality of prejudice" (compare *Trustees, Brian Lackey Trust*, (supra))

p. 293) if the fence were to be taken down and moved to the cadastral boundary between the properties. In these circumstances I do not consider that the evidence establishes any compelling reason to require the applicant to give up ownership of his land. To order otherwise would be to sanction the forced sale of land which in my view, on the facts of the present matter, is not justified. I think that the applicant is entitled to the relief which he seeks. In these circumstances it is not necessary to consider the evidence of the valuers who testified on behalf of each of the parties. In the result the applicant is successful in his application and the respondent is unsuccessful in the counter-application. I can conceive of no legitimate reason why the costs of the application

should not follow the result.

[52] In the result:

1. The respondent is ordered to remove the predator fence which presently encroaches on the applicant's property known as Wildemanskraal and to relocate the fence in question to the cadastral boundary between the applicant's property and the respondent's property, alternatively, onto the respondent's property.
2. The respondent is to make good the land upon which the fence is presently erected.

3. The respondent is ordered to pay the costs of the application and of the counter-application.
4. The respondent is to pay interest on the applicant's taxed costs calculated at the legal rate from a date fourteen (14) days after taxation to the date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

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Prepared on 13 October 2026 · Esheria