

SOUTH AFRICA / JUDGMENT

Schoeman v Stapelberg (2070/2020) [2021] ZAMPMBHC 69 (27 January 2021) [2021] ZAMPMBHC 69

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

2070/2020

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

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: 2070/2020

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

DATE 27/1/2021

SIGNATURE

PETRUS ALBERTUS SCHOEMAN

Applicant

and

FRANS STAPELBERG

Respondent

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

[1] Both parties in argument approached the matter as an application for a mandament van spolie, but to appreciation the extent of the application and issues therein, it is necessary to set out the relief sought by the applicant in the notice of motion.

[2] The order sought reads as follows:-

“1. That the respondent be interdicted and is hereby interdicted from interfering in the peaceful and undisturbed possession of the applicant’s property and water use and water rights in any way;

2. That the respondent be interdicted and is hereby interdicted from interfering in any way with the unrestricted natural course and flow of water to the applicant’s property, or access to Furrow “A”

and “B” and associated boreholes, held under registration certificate 24005434 and registered servitude number 273/1957, as described in the applicant’s affidavit hereto attached;

3. That the respondent be interdicted and is hereby interdicted from interfering in any way with the applicant’s access roads to his property, more specifically from the N4 highway through Portion 16 to

the house of the applicant and to the cemetery situated on Portion 18 of the Farm Schoonspruit, 340 J.T., Waterval Boven, 1195.”

[3] The relief is not set out in the manner ordinarily expect in a spoliation application where an order is sought to restore the status quo ante. Although it references undisturbed and peaceful possession it leans towards interdictory relief. The affidavits and heads of argument by both parties in contrast deal largely with spoliation. As a spoliation order enjoys elements of an interdict I regard both cause germane to the application.

[4] The applicant is the registered owner of Portion 00, Schoonspruit, 340 J.T., Waterval Boven, 1195 (“Portion 00” or “the applicant’s property” interchangeably), which property is situated next to Portion 16, Schoonspruit, 340 J.T., Waterval Boven, 1195 (“Portion 16”). The registered owner of Portion 16,

since 10 February 2020, is Schoonspruit Macadamia Farm (Pty) Ltd (Registration No: 2019/411745/07) (“the company”). The respondent is a director of the said company and de facto in control although not exclusively of Portion 16. The two properties are situated adjacent to one another.

[5] The applicant states that during July/August 2019, Portion 16 was purchased from the applicant’s brother, Hendrik J Schoeman, by the respondent. At that point in time the respondent informed the applicant that he intended to convert the farm to a Macadamia farm. In response to which the applicant advised the respondent there were certain servitudes registered in his favour in respect of the water furrows crossing from Portion 16 into his farm, being Portion 00. The

applicant further alleges that he advised the respondent that the road which traversed both farms has been in place since 1956, and that said road has always been used to gain access to Portion 00.

POINTS IN LIMINE RAISED BY THE RESPONDENT

First point in limine: Misjoinder

- [6] The first point in limine raised by the respondent is that of misjoinder. According to the respondent, the applicant alleges real rights and/or limited real rights as vested in the properties, which are situated on Portion 16. As the respondent is not the registered owner of Portion 16, but that Schoonspruit Macadamia Farm (Pty) Ltd is, it is contended that the latter would be the rightful respondent, and therefore the respondent in his personal capacity has been mis-joined, and that the application ought to have been brought against Schoonspruit Madadamia Farm (Pty) Ltd.
- [7] The applicant argued that the conduct complained of in casu was instigated, negotiated, started and commanded by the respondent and not the company. Similarly it has never been the case for the respondent that the company gave all the orders to destruct and destroy, or that the respondent was acting on instructions of the company. Support for this contention is found in the correspondence exchanged between the respective parties' attorneys wherein the respondent's attorneys clearly identified the respondent as "their client" in reply to the applicant's attorneys. In aforementioned correspondence the respondent's attorneys also refer to "our client's water, access gates or road and property", thus being the respondent FJR Stapelberg. The applicant also contends that the company, being the registered owner of Portion 16, was not the owner of Portion 16 at the time of the conduct complained of, in that the interference with Furrow "A" already commenced in October 2019, whereas Portion 16 was only transferred to the company on 10 February 2020.
- [8] Although the respondent is not the owner he is not removed from the property or the company to the extent where he is not in de facto control of Portion 16 although such control might not be exclusive. Ownership is irrelevant in a spoliation application.[1] The same applies when seeking interdictory relief, the person against whom an interdict is the person responsible, either as principal or as agent, for the wrong committed or threatened conduct is interdicted depending on the facts relied on by the applicant.
- [9] I therefore, find no merit in this point in limine

Second point in limine: Non-compliance by the applicant of Uniform Rule 41A

- [10] Although not strictly set out in the answering affidavit as a point in limine it is due to the sought consequence convenience to deal with this aspect as such and is therefore fittingly referred to as the second point in limine. In this respect the respondent contends that the applicant failed to comply with Uniform Rule 41A and therefore the application ought to be struck from the roll.

- [11] In terms of Rule 41A, an applicant in a new application shall, together with a notice of motion, serve on the respondent a notice indicating whether such applicant agrees to or opposes referral of the dispute to mediation. It appears that this application was served on 25 June 2020 and the applicant's Rule 41A notice followed on 10 July 2020. This is the same day the notice of intention to oppose was served. The respondent's Rule 41A notice is dated 3 August 2020.
- [12] In support of the argument, the respondent refers the court to matters in this Division wherein the court struck matters from the roll due to non-compliance with Rule 41A. The orders themselves were not encapsulated in judgments and are thus not available, nor was the facts of each matter placed before Court for consideration, therefore the probable value is only that another court in this Division has done so.
- [13] From the respective Rule 41A notices served in casu, it is apparent that the applicant does not wish the matters to be mediated, whereas the respondent state that mediation is possible. The matter is therefore not one where Rule 41A was completely ignored, but indeed not filed at the same time as service of the application. It was however filed before service of the answering affidavit.
- [14] It is so that the value of mediation and the importance of compliance with the Rules ought never to be watered down. However, to strike the matter from the roll as sought by the respondent in circumstances where both parties have seemingly resolved that the matter is an opposed application to be heard on the hearing date, have complied with the case management directive, have filed the requisite heads of argument and appears at the hearing day, seems nonsensical at this stage. In addition, an applicant or for that matter a respondent cannot be forced in terms of Rule 41A to mediate, it remains a remedy which can be utilised by agreement between the parties.
- [15] Furthermore, although the respondent, in his answering affidavit and in his Rule 41A notice, states that he considers the matter to be capable of mediation, the stance adopted in his attorneys' correspondence of 11 May 2020 does not support same. The stance adopted seems to have been the trigger which caused the applicant to move into action and launch the present application, pursuant to seeking an undertaking of non-interference from the respondent.
- [16] The belated filing of the Rule 41A notice by the applicant does not prejudice the respondent in any respect as it is still open to the parties to agree to mediate. Other than bemoaning the belated filing the respondent has not demonstrated any prejudice.
- [17] I am therefore not prepared to uphold this technical objection and grant the applicant condonation for as far as it might be necessary for the belated service of its Rule 41A notice.

FACTUAL MATRIX

- [18] On 3 October 2019 the applicant noticed that the respondent's bulldozer, alternatively someone instructed by the respondent, has begun clearing land south of the railway of Portion 16, and that they have commenced filling-in water Furrow "A". The applicant further noticed that the pipeline from the borehole and from the stock water supply from the weir, which was installed in 1975 by the applicant, have been damaged. This, the applicant states, was reported to the respondent, whom ignored the applicant's plea, where after the latter himself attended to the repairs of the damage
- to the piping.
- [19] During February 2020 the respondent's labourers, supervised by one Seun de Beer ("De Beer") commenced clearing indigenous trees along Furrow "A" and around the cemetery on Portion 18. Mr de Beer advised the applicant that he had been instructed by the respondent to inform the applicant that he intended to remove or destroy the access roads from the N4 to Portion 00, and that they were in the process of filling-in and/or altering the natural course of Furrow "A".
- [20] On 25 March 2020 the applicant caused a letter to be written through his attorneys to the respondent, seeking an undertaking from the respondent that he would not proceed as proposed. In reply the respondent's attorneys indicated that the applicant's son, whom had finished harvesting his soya beans, is no longer permitted to use the respondent's access gates and -roads. This letter further confirmed that the applicant ought to refrain from using any of the respondent's access gates and/or any roads on the respondent's property with immediate effect, and that the applicant was illegally utilising water from the dam situated on the respondent's property and that same must be refrained from with immediate effect.
- [21] According to the applicant Furrow "A" has been in existence since 1880 and is the main supply from the Schoonspruit to inter alia the applicant's property. Furrow "A" is also the main floodwater run-off and the applicant (in 1975) installed a weir in said furrow, which is still being used by the applicant. The applicant further alleges that Mr de Beer advised him that Furrow "B" will also be flattened, which furrow crosses from Portion 17 to Portion 16, and through Portion 00. According to the applicant, Furrow "B" is registered under servitude no: 273/1957.
- [22] The applicant alleges that he possesses extraction rights in respect of both dams, which are situated on Portion 16. In addition the applicant has a registered right to extract water from Schoonspruit via Furrow "A", under registration certificate 24005434. According to the applicant boreholes are situated on Portion 16 which have similarly been registered. These boreholes are connected to the applicant's house by pipelines.
- [23] In respect of the road access, the applicant alleges that the road which the respondent is refusing the applicant access to, is the main crossing over the railway line and the access to the N4. From the N4 it runs through Portion 16 to the applicant's property. The applicant alleges that the original entrance road to his property was closed in 1971 by the Transvaal

Provincial Administration when the N4 was upgraded, and the entrance to Portion 16 was then deemed to be the entrance to the farm. At the time both Portions were owned by the same family.

- [24] According to the applicant the dam situated on Portion 16, the water piping on Portion 16, the access to Furrow “A” and “B”, the access road from the N4 to Portion 00 and the access road from Portion 00 to the cemetery on Portion 18 have been utilised for more than thirty years, therefore acquisitive prescription applies. The

applicant confirms that he had undisturbed possession of the aforementioned, which has been interrupted by the respondent. This

deprivation he contends is evidenced by the response from the respondent’s attorneys, wherein it is stated that neither the

applicant nor his son is permitted to use the access gates and –roads on Portion 16 and to utilise water from the dams situated on Portion 16.

- [25] The respondent’s submission is essentially that of a denial. Although the respondent denies that the applicant informed him of the servitudes registered in the applicant’s favour in respect of the water furrows crossing Portion 16 to Portion 00, the respondent confirmed being aware that the applicant used the private road on Portion 16 and Portion

17. The respondent confirms that no right of servitude is registered in this respect.

- [26] The respondent admits that a water furrow servitude is registered under servitude no: 273/57, and that this relates to Furrow “B”. The respondent further admits that land were cleared south of the railway on Portion 16, and explains that this was done to construct the second furrow and/or to re-channel Furrow “A” to maximise the water flow from the water source Schoonspruit into the main dam on Portion 16.

- [27] The respondent confirms that before re-channelling Furrow “A” enquiries were made to Inkomati-Usuthu Catchment Management Area (IUCMA) (being an agency in terms of the National Water Act 36 of

- 1996) in respect of the area of Portion 16, whether it would be necessary for a water use licence for the construction of the secondary furrow and/or the re-channelling of Furrow “A”. Pursuant to a site investigation by IUCMA it was confirmed that it was not necessary to obtain a water use licence, and that construction could commence as long as same is not going to affect the neighbours. According to the respondent the re-channelling of Furrow “A” does not affect the applicant’s water supply and/or extraction from Furrow “A” at all, as during the construction of the secondary furrow and/or re-channelling of Furrow “A”, the original portion of Furrow “A” running from the Schoonspruit water source into the main dam was never closed off. Only after the construction of the secondary furrow and/or re-channelling of Furrow “A” was that portion of Furrow “A” filled in.

- [28] Although the respondent admits that the pipeline on Portion 16 was damaged during construction of the secondary furrow and/or the re-channelling of Furrow “A”, he denies that the applicant ever informed him of these pipelines and that the respondent therefore was not aware of same. The respondent further contends that he is not aware of any borehole or pipeline servitude registered against Portion 16 in favour of Portion 00. According to the respondent’s knowledge, the pipeline which was damaged was never used by the applicant, as he was using the main dam on Portion 16, which is filled by Furrow “A”, to extract water.
- [29] According to the respondent the whole dispute arose when security gates were installed on Portion
16. Upon the applicant and his son (Jimmy Schoeman) neglecting and refusing to close the security gates, the respondent informed the applicant that should the applicant fail to adhere to the security requirements on Portion 16, the applicant ought to construct his own road on Portion 00, leading from the applicant’s residence to the railway servitude, which servitude is also used by the other neighbouring farms in order to gain access to their respective properties.

FACTUAL DISPUTE

- [30] As held in the matter of National Director of Public Prosecutions v Zuma[2] by Harms DP, motion proceedings were really designed for the resolution of legal disputes based on common cause facts. The reality

is however that disputes of fact, arise almost in each application. The degree obviously differs from case to case. In order to deal with this rules have developed to determine the facts upon which matters must be decided where disputes of fact have arisen and the parties do not want a referral or have not sought a referral to oral evidence or trial.

- [31] In proceedings for final relief such as this matter, the approach to determine the facts was authentically set out in Plascon-Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd[3] wherein it was held as follows:-

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact...”

... there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...”

[32] Simply put, factual disputes in motion proceedings are resolved on the papers by way of an acceptance of those facts put up by the applicant which are common cause or not denied by the respondent, together with the facts put up by the respondent, even though they are in dispute. In *National Director of Public Prosecutions v Zuma* (supra) it was held that the general rule may not apply if the respondent's version consists of bold or uncreditworthy denials, raised fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[33] Aforesaid leaves the question as to what is an adequate denial by a respondent in motion proceedings. In the matter of *Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another*[4] the following was said in this respect:-

"[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers ...

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed... There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his

client disputes and to reflect such

disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

MANDAMENT VAN SPOLIE

[34] The nature of a mandament van spolie is described in the seminal case of *Nino Bonino v De Lange* 1906 T.S. 120 where the learned Innes CJ at page 122 states as follows:-

“Spoliation is any illicit depravation of another of the right of possession which he has whether in regard to moveable or immoveable property or even in regard to a legal right.”

[35] In order to succeed with the mandament van spolie, an applicant must allege and prove the following two requirements:-

(i) That the applicant was in peaceful and undisturbed possession of the object.

(ii) That the applicant was deprived of possession unlawfully[5].

[36] The applicable principles in respect of the mandament van spolie were neatly summarised by the Constitutional Court in the matter of *Ngqukumba v Minister of Safety and Security*[6] as follows:-

*“[10] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.*

[11] ...

[12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.

[13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law.... All that the despoiled person need prove is that —

(a) she was in possession of the object; and

(b) she was deprived of possession unlawfully.”

- [37] The right to make use of a road or access path qualifies for purposes of possession.[7] Exclusive possession is not required and it is not necessary that the road or path is used daily. [8]
- [38] Very few defences can be raised in respect of a spoliation application.[9] As set out above, the purpose is quite clear, i.e. the applicant's possession must be restored and thereafter the dispute as to the legality of any right relied upon can be considered.
- [39] It has been recognised that the use of a servitude can be protected by the mandament without proof of the existence or otherwise of the servitude.[10] It is the factual exercise of the servitude, and not the servitude itself, which is protected by the remedy. The possession, accordingly, arises from the exercise or use of servital rights. In such a case it is necessary to show that the possessor derives a benefit from the possession asserted, or that his possession is a natural incident of possession of other property.
- [40] Having regards to the facts of the matter, it should be dealt with in accordance with the matter of *Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others*[11] and *Nienaber v Stuckey*. [12] In the latter a spoliation order was refused by the court a quo where the gate, through which the appellant had previously gained access to a farm occupied by him, had been closed to him. On appeal it was held that he had made out a case that the closing of the gate had deprived him of possession of the property. It was held that: "...which touches or affects or disturbs the possession and not ... complete deprivation. But I do not think that this point need to be pursued as it is clear that the appellant was in possession of the right of access through this gate of which has been deprived, and the remedy is therefore available." [13]
- [41] In *First Rand Ltd t/a Rand Merchant Bank v Scholtz N.O.* [14] it was held that the remedy does not have a catch-all function to protect the quasi possessio of all kinds of rights, irrespective of their nature. The right held in quasi possessio must be a "gebruiksreg" or an incident of that possession or control of the property concerned. A right of an occupier of land to lead water has likewise been afforded protection by way of mandament. [15]

Access road

- [42] It is common cause that the applicant, being the owner of Portion 00 restant, regularly and openly, and without prior resistance, utilised the access road from the N4 through Portion 16 to his property. In the answering affidavit, at paragraph 9.5 thereof, the respondent states as follows:-

"... the applicant used the private road on Portion 16 and 17, Schoonspruit, 340 J.T. Watervalboven, 1195 ("Portion 17") to gain access to Portion 00 restant and to the cemetery on Portion 18 situated on Portion 16... However there is no right of way servitude (servitude road) registered against Portion 16 in favour of Portion 00 restant ..."

[43] As far as proof of the first requirement of the mandament van spolie is concerned, this is conclusive in respect of the access road.

[44] It is the applicant's case that the respondent, through De Beer, advised that the road from the N4 to Portion 00 restant will be destroyed, pursuant to which the exchanges between the attorneys commenced. This was also communicated to the respondent by the applicant in a text message, which remained unanswered by the respondent. In the correspondence between the parties' attorneys, it is confirmed by the respondent that the use of the respondent's access gates or roads will no longer be allowed. Aforesaid does not align with the attitude adopted in the respondent's answering affidavit, to the extent that the applicant was not deprived of access and use of the gates and road. What provides further credence to the complaint of the applicant is that set out in the respondent's answering affidavit at paragraph 12.4, where it is stated:-

"I then informed the applicant that if he is not going to adhere to the security requirements on Portion 16 that he must construct his own road on Portion 00 restant leading down from his residence to the railway servitude which servitude is also used by all neighbouring farms to gain access to their respective properties."

[45] The question remains whether aforesaid intention or threat to spoliare constitutes deprivation of said possession/use. In answering this question regard has to be had to the fact that there are fundamental differences between the mandament van spolie which is aimed at the recovery of lost possession, and a final interdict to prohibit a threatened spoliation or dispossession.

[46] In the unreported judgment of Boruchowitz J (30 May 2014) in *Outdoor Network Limited v Passenger Rail Agency of South Africa*[16] it was pointed out that the mandament van spolie cannot be invoked to prohibit a threatened spoliation – it is only available to a de facto possessor who has been despoiled. In such instance and where the facts relied on are that a threat of deprivation was committed the correct remedy is seeking interdictory relief.

[47] Therefore, even if the applicant reasonably and bona fide believed that his right of access to the road from the N4 to portion 00 stemmed from a servitude or the purported exercise

of a servitude ('gebruiksregte') or an incident of possession or control of the premises, without an actual deprivation

of his right of possession. Without de facto deprivation or de facto interference the remedy of spoliation is not available to the applicant.

Water supply

- [48] In respect of Furrow “A” the applicant contends that water from Furrow “A” flows from the high lying ground and through Portion 16 and Portion 00 restant. From this Furrow “A” the applicant uses water conveyed by it. Similarly pursuant to Mr de Beer advising that the respondent instructed him to flatten Furrow “A” as well as Furrow “B”, the correspondence between the parties’ attorneys ensued.
- [49] The applicant alleges that he was in undisturbed possession of the usage of Furrow “A” and Furrow “B”, as well as the extraction of water from the dams and boreholes situated on Portion 16. He contends he was deprived of aforesaid (excluding Furrow “B”) by the filling in of Furrow “A”, alternatively re-channelling it, affecting the applicant’s use thereof, and by implication affecting his right to extract water from Schoonspruit via Furrow “A” in terms of registration certificate 24005434 and the boreholes.
- [50] The respondent admits that Furrow “B” is a servitude registered under title deed no: 273/57, but denies interference therewith. In respect of Furrow “A” the respondent admits that the applicant had use of this furrow and that construction was done, affecting Furrow “A” when a secondary furrow and/or a re-channelling of Furrow “A” was undertaken to maximise the water flow from the water source Schoonspruit into the dam on Portion 16, and along Portion 16 south of the railway for purposes of future farming needs. The respondent qualifies this by stating that
- the applicant extracts his water from the main dam on Portion 16, and that Furrow “A” was not filled in before the secondary furrow and/or re-channelling of Furrow “A” was completed. As stated above, this was done pursuant to engagement with IUCMA.
- [51] It is thus undisputed that the applicant used Furrow “A”, extracted water from the dams on Portion 16 and was therefore in possession thereof. Similarly the respondent does not deny that he actively altered the flow of Furrow “A” and that damage was caused to the pipeline whilst construction was in process. It is therefore unavoidable that the applicant possessed the use of Furrow “A”, of which the applicant was deprived of, even if only partially or to an extent of a disturbance of the status quo by the conduct of the respondent. Notwithstanding the advice of IUCMA the respondent proceeded with constructing a secondary furrow and/or re-channelling Furrow “A”, seemingly without consultation with his neighbours and well knowing the applicant extracts water from the dam on Portion 16 through this furrow.
- [52] For as far as the respondent contends that the secondary furrow or re-channel farrow maximises waterflow and did not affect the applicants water supply and or extraction, the respondent failed to grapple with the dispute so as to seriously and unambiguously address same.[17] But for the conclusionary statements that secondary furrow or re-channel farrow maximises waterflow and did not affect the applicants water supply no specificity is provided to evidence same. For it to be found that the respondent seriously and unambiguously addressed the facts in dispute, one would have expected an engagement with the material facts disposed to by the applicant, an explanation as to the location, depth, with, distance, topography of the secondary furrow. The aforesaid applies to the applicants

admitted extraction from the dams on Portion 16.

- [53] In respect of Furrow “B” and the boreholes the position is somewhat different. The respondent concedes that Furrow “B” this is a registered servitude and denies any spoliation thereof or of the boreholes which according to him is situated on Portion 00 restant. In this respect the applicant similarly to the access road relies on only a threat of spoliation as opposed to an actual event. The applicant does not allege that pursuant to the threat his undisturbed use of Furrow “B” and the boreholes were interfered with. Consequentially, the mandament of spolie is not available to the applicant in these respects.

INTERDICTIONARY RELIEF

- [54] Having concluded as aforesaid, its stands to be determined if a case has been made out for interdictory relief founded on the content of the notice of motion as read with the founding affidavit. It is trite that the requirements for final and interim interdicts are as follows:[18]

(a) for a final interdicts:

- (i) there must be a clear right on the part of the applicant. What this means is that an applicant must prove on a balance of probabilities the right which he or she seeks to protect;
- (ii) there must be an injury actually committed or reasonably apprehended.

This means that there must be proof of some act interfering with the applicant’s right or a well-grounded apprehension that such an act will occur;

(iii) there must be no other satisfactory remedy available to the applicant. An interdict is an extraordinary remedy, and a court will not grant an interdict if the applicant is able to obtain adequate redress by some other form of ordinary relief.

(b) for an interim interdict:

- (i) a prima facie right, though open to some doubt;
- (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (iii) a balance of convenience in favour of granting the interim interdict; and
- (iv) the absence of any other adequate ordinary remedy

- [55] These requirements should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of granting interdictory relief.

- [56] The applicant’s allegations in respect of the N4 access road and the access road to the cemetery on Portion 18 have been dealt with above and need not be repeated here. From aforesaid and the respondent’s concession that the applicant are and have been using the roads, duly noting that no servitude has been registered and that the N4 access road is

currently and has for years been the only access road to Portion 00 restant there can be no dispute that the applicant enjoys a right of use in respect of this road. Although such right of use unlike the right in respect of Furrow “B”

might not be a clear right it has been prima facie established by the applicant.

[57] In respect of the access road, road to the cemetery and Furrow “B”, the applicant has not alleged an injury actually committed but the reasonable apprehension of harm is founded in the communication of De Beer and message sent to the respondent. Even if same is disregarded and this aspect is considered only on the respondent’s facts

the apprehension is unavoidable from the respondent’s attorneys letter dated 11 May 2020 considered together with the respondent’s

indication that should security measures not be adhered to the applicant ought to construct his own road and the bare denial in

respect of any interference with Furrow “B”.

[58] As concluded above only a prima facie rights have been established by the applicant as such the consideration of the balance of convenience is relevant. The scale in this respect tips to the applicant. I don’t belief that the applicant has a suitable alternatively remedy to ensure his rights although prima facie are in the interim protected. However, the applicant cannot enjoy interim protection ad infinitum and for this reason ought to exercise his available remedies in order to fortify his continued use of the prima facie rights.

COSTS

[59] Having concluded as aforesaid, the only issue which remains is that of costs. The applicant seeks costs on an attorney and client scale. It is trite that costs ordinarily follow the result, and a successful party is therefore entitled to his or her costs. The guiding principle being:

“costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly

compelled either to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an order is seldom a complete indemnity; but that does not affect the principle on which it is based.”[19]

[60] The following was held in relation to costs on an attorney-and-client scale in the matter of *Nel v Waterberg Landbouers Kooperatiewe Vereeniging*[20]

‘The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special

considerations arising either from the circumstances which give rise to the action from the conduct of the losing party, the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation.

Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. See *Hearle and McEwan v Mitchell's Executor* (1922 TPD 192). Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say 'as far as it can' because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party ...'

[61] It is also trite that cost is in the discretion of the court. The basic rules were against restated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*:

'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'

[62] Having regard to the aforementioned principles and the applicable circumstances in this matter, I am not persuaded that an attorney-and-client cost order is justified.

[63] In the premises, the following order is made:-

1. The respondent is hereby directed to restore the status quo ante in

respect of possession and usage to the applicant of water Furrow "A" and the boreholes and pipelines leading from the dam situated on Portion 16, Schoonspruit, 340 J.T. Waterval Boven, 1195 to Portion 00 restant, Schoonspruit, 340 J.T. Waterval Boven, 1195.

2. Pending the institution of legal process in respect of the applicant's entitlement in respect of/ or to water Furrow "B", the dam situated on Portion 16, Schoonspruit, 340 J.T. Waterval Boven, 1195, the access road from the N4 to Portion 00 restant, Schoonspruit, 340 J.T. Waterval Boven, 1195 and access road to the cemetery on Portion 18, Schoonspruit, 340 J.T. Waterval Boven, 1195, within 30 days from the date of this order, the respondent is interdicted from interfering, frustrating or causing to interfere and/or frustrate the applicant's use and enjoyment of:

- 2.1. the water Furrow “B”;
- 2.2. the access road from the N4 to Portion 00 restant, Schoonspruit, 340 J.T. Waterval Boven, 1195; and
- 2.3. the access road to the cemetery on Portion 18, Schoonspruit, 340 J.T. Waterval Boven, 1195.
3. The interim order referred to in 2 above shall lapse on failure by the applicant to institute the legal process within the time limit set out in 2 hereof.
4. The respondent is ordered to pay the costs of this application.

DATE OF HEARING: 29 October 2020

DATE OF JUDGMENT: 27 January 2020

FOR THE APPLICANT: Advocate De Necker

Instructed by WDT Attorneys

Ref: SCH44/1 (D Holling) [HS1/20]

E-mail: liscelle@wdtattorneys.co.za

doug@wdtatt.co.za

FOR THE RESPONDENT: Advocate Kruger

Instructed by Pieter Nel Attorneys Inc

Ref: SCH40/0002

E-mail: zanne@pieternelattorney.co.za

anelle@pieternelattorney.co.za

[1] Mankowitz v Loewenthal 1982 (3) SA 758 (A) at 763; Lottering v Palm and Another 2008 (2) SA 553 (D)

[2] 2009

(2) SA 277 (SCA)

[3]

[1984] ZASCA 51; 1984

(3) SA 623 (A) at 634H – 635C

[4]

[2008] ZASCA 6; 2008

(3) SA 371 (SCA) at par [11] – [13]

-
- [5] Yeko v Qana 1973 (4) SA 735 (AD) at 739E
- [6] 2014
- (5) SA 112 (CC)
- [7] Nienaber v Stuckey 1946 AD 1049 at 1056
- [8] Willowvale Estates CC and Another v Bryanmore Estates Ltd 1990 (3) SA 954 (W) at 956H
- [9] Umtata Municipality v Small 1939 EDL 358 at 366; Malan v Green Valley Farm Portion 7 Holt Hill 434 CC and Others 2007 (5) SA 114 (E) at 124E
- [10] Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) SA 508 (A) at 514D-H
- [11] 2013
- (1) SA 239 (KZD)
- [12] 1946 AD 1049 at 1056
- [13] At 1059
- [14] 2008
- (2) SA 503 (SCA)
- [15] Sebastian v Malelane Irrigation Board 1950 (2) SA 690 (T); Painter v Strauss 1951 (3) SA 307 (O)
- [16] 2014 JDR 2283 (GJ) para 25
- [17] Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)
- [18] V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Service (Pty) Ltd 2006 3 All SA 523 (SCA); Setlogelo v Setlogelo 1914 AD 221 at 227
- [19] Cilliers AC 'Law of Costs' Butterworths p124; Thusie v Minister of Home Affairs and Another and 71 other cases 2011 (2) SA 561 (KZP) at 605 - 611
- [20] 1946 AD 597 at 608

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMBHC/2021/69.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/schoeman-v-stapelberg-unknown-topic-ampmbhc-2021--6a3ea5203b1caa91298167c4>

Prepared on 12 October 2026 · Esheria