

SOUTH AFRICA / JUDGMENT

Shelldrake Game Range CC and Others v Scottco (Pty) Ltd (33487/2004) [2007] ZAGPHC 37 (25 April 2007)

[2007] ZAGPHC 37

COURT
High Courts - Gauteng

BEFORE
Pretorius

CASE / FILE NUMBER
33487/2004

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

Source record

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL
PROVISIONAL DIVISION)
Case number: 33487/2004
NOT REPORTABLE Date: 25 April

In the matter between: SHELLDRAKE GAME RANGE CC
 1st Applicant
 ESMELAU EIENDOMME (PTY) LTD
 2nd Applicant
 COUNTERPOINT TRADING 498 CC
 3rd Applicant
 PEREGRINE CONSULTING CC
 4th Applicant
 and
 SCOTTCO (PTY) LTD
 Respondent

JUDGMENT

PRETORIUS J.

The applicants apply for a declaratory order as follows:

"1. Declaring that the access road across the 2nd applicant's property may be permanently closed.

2. Interdicting any person from having access to the respondents property through the 2nd applicant's property
3. Directing the respondent to pay the costs of this application.
4. Further and/or alternative relief as the Honourable Court may consider necessary or desirable."

This application is opposed by the respondent and the respondent launches a counter application and requests an order in the following terms:

"1. That the late delivery and filing of respondents opposing affidavit be condoned;

2. It is ordered that applicants may not disturb respondent in the free and unhindered use of the disputed access road by respondent;

3. Alternatively:

3. 1 It is declared that respondent has a servitude of right of way along the disputed access road (marked "A", "B", "C" and coloured in green marker pen on Annexure "ES2") in terms of section 6 of the Prescription Act 68 of 1969 and

3. Section of Prescription Act of 1943 over second applicants farms Sheldrake 239 and Lucerne ;

3.2 Second applicant is ordered to take the necessary steps to register a right way over its farm Sheldrake and Lucerne 198 and over the route indicated from points "A" to "B" to "C" and coloured in green marker pen on Annexure "ES2";

3.3 That failing compliance by second applicant with the order in prayer 3.2 above within one month after granting this order, an order authorising the sheriff of the District of Musina to perform all the necessary acts on second

applicants behalf to effect registration of the right way
aforesaid;

4. Alternatively:

It is declared that the disputed access road is a public road in
terms of Ordinance of 1957 alternatively in terms of Act 7 of
1998 (Limpopo Province);

5. Alternatively:

5.1 It is declared that respondents has a right way
necessity (via necessitates) 7,5 metres wide along the
route of the disputed access road over the immovable
properties of second applicant as indicated from points

5.2 Second applicant is ordered to take necessary steps to
register a right of way over its farm Sheldrake 239 and
Lucerne 198 which right of way shall be 7,5 metres wide
and over the route as indicated from points "A" to "B" to
"C" and coloured in green marker pen on Annexure
"ES2";

5.3 That failing compliance by second applicant with the
order in prayer 5.2 above within one month after granting
of this order, an order authorising the Sheriff of the
District of Musina to perform all the necessary acts on
seconds applicant's behalf to effect registration of the
right of way as aforesaid;

6. Cost of suit on attorney and own client scale; and

7. That such further and/or alternative relief as the Honourable
Court may deem fit be awarded to respondent."

The applicant did not file a replying affidavit and neither did applicant file an answering affidavit
to the counter application of the respondent. It seems that when receiving the opposing affidavit
and counterclaim applicants conceded that the matter had to be referred to trial.

It is clear from the respondents opposing affidavit that when compiling the said affidavit the respondent was already of the opinion that a factual dispute exists and therefore the applicant should have issued summons to institute an action for the relief they claim.

5

"A factual dispute in this matter was foreseeable from the inception this matter and accordingly applicants should not have followed the procedure to apply by way of application but instead should have issued summons for the alleged relief they claim to be entitled to. "

The reason for this contention is that the third applicant had been aware that the road involved is a road that has been utilised by the public for more than 70 years. This was not denied by the applicants.

A letter by Solomon Nicolson, the attorney instructed by the respondent, dated 28 November 2006 also set out the fact that respondent regarded the matter one which could not be solved by application and I quote:

"It is our opinion that this matter is in fact a factual dispute and it is therefore impossible for us to furnish you with our client's opposing affidavit without all the facts and witnesses being duly investigated and interviewed. "

The applicants were warned that they should have issued summons, but nevertheless continued with the application, although they did not file a replying affidavit nor an opposing affidavit.

Mr Clavier for applicant, concedes in his heads of argument that the matter must be referred for oral evidence. He argues on behalf of the applicants that the applicants should not pay the costs of the application as the factual disputes only came to the surface when the respondent replied to the

6

founding affidavit of the applicant.

Mr Clavier further submitted that the applicants had made out a case for the relief they seek and therefore the costs for this application should be reserved.

Mr Louw, the respondents counsel, argued that the court should deal with the application on the papers as they stand and not refer the application to trial, Mr Louw urged the court to apply the so-called Plascon-Evans rule. The general rule was stated in *tellenbosch Farmers Winery Ltd v Stellenbosch Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E-G, by Van Wyk J (De Villiers JP and Rosenow AJ concurring):

"...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. "

In the Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) Corbett JA clarified and qualified the general rule as follows at p634 and p 635:

"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification

7

and, perhaps, qualification. 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 (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5;

Da Mata v Otto NO 1972

(3) SA 858 (A) at 882D - H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6

(5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is

satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks... "

The facts of the matter is that there is a dispute regarding an access road, where applicants want to the court to declare the access road on second applicant's property from the Venetia mine tar road to respondent's property to be permanently closed and that respondent be interdicted from making use

8

of this access road.

The respondent's counterclaim deals with a request for an order that applicants may not disturb respondent in the free and unhindered use of the disputed access road; alternatively that a servitude of right of way exists in favour of respondent over second applicant's farms Sheldrake 239 and Lucerne 198 in terms of section 6 of the Prescription Act 68 of 1960 and the Prescription Act 18 of 1943. In the alternative the respondent applies for a declaration that the disputed access road be declared a public road in terms of Ordinance 22 of 1957, alternatively in terms of Act 70 of 1998 (Limpopo Province) and in a further alternative, for a right of way of necessity and alternatively that the disputed access road is a public road on grounds of vetustas.

The respondents concede that there is a dispute of fact on the papers and this dispute resulted in the counter-application.

I have perused all the papers and considered argument by both counsel for the applicants and for the respondent.

In *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D&CLD) Kumleben J found at p 93 F-H:

"To summarise my conclusions on the legal arguments raised:

(a) As a matter of interpretation, there is nothing in the language of Rule 6 (5) (g) which restricts the discretionary power of the

9

Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

(b) The illustrations of "genuine" disputes of fact given in the *Room Hire* case at p. 1163 do not - and did not purport to - set out the circumstances in which cross-examination under the relevant

Transvaal Rule of Court could be authorised. They a fortiori do not determine the circumstances in which such relief should be granted in terms of the present Rule 6 (5) (g).

(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d)

In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised. "

I am of the opinion that there is a bona fide, genuine dispute of facts which cannot be decided without oral evidence. As the issues are too wide-ranging to be referred to oral evidence only, the matter should be referred to trial. Mr Clavier, on behalf of the applicants, argued that the costs of the application should be reserved to be determined by the trial court.

10

Even if the court should be of the opinion that the applicants had made out a case for the relief they seek, the court would be hesitant to reserve the costs in this instance. The applicants were aware of the factual disputes, but chose to try and expedite the matter by launching an application. The court cannot condone this and the respondent should not be penalized as a result of the applicant choosing the wrong option.

It must, however, be emphasized that the applicants did not file a replying affidavit or an opposing affidavit as it seems that they had conceded that the application can only be resolved by referring it to trial in terms of rule 6(5)(g) of the Uniform Rules.

The main reason according to Mr Clavier, for not granting costs to the respondent at this stage, is that the dispute of fact have only surfaced after the opposing affidavit was filed. The respondent in the opposing affidavit alleged:

"Third applicant is fully aware of the fact that the road involved in this

dispute is a road utilized by public for more than 70 years and was in fact a party to an action in terms whereof one of the farms connecting to the disputed access road relevant in these proceedings, was declared a servitude road and accordingly the representatives of third applicant have full knowledge of the fact that the applicants are not entitled to the relief sought. "

Due to the fact that no replying or opposing affidavits to the counterclaim were filed, this evidence regarding the knowledge of a factual dispute by the third applicant has to be the evidence on which the court has to adjudicate the question of costs.

The third applicant had known of the facts relating to the disputed road when the application was launched and this knowledge should have resulted in summons being issued. This however does not, in my opinion, warrant a punitive cost order as requested by respondents.

I make the following order:

1. The application is referred to trial;
2. The notice of motion shall stand as a simple summons;
3. The notice of intention to oppose shall stand as a notice of intention to defend;
4. The applicant shall deliver a declaration within 20 (twenty) days of this order;
5. Thereafter, the rules relating to actions shall apply;
6. The costs of this application is to be paid by the applicants.

Judge Pretorius

Case number: 33487/2006

Heard on: 17 April 2007

For the Applicant I Applicant

Instructed by

For the Respondent I Respondent:

Date of Judgment: 25 April 2007

Adv E B Clavier

Brazington Shepperson & McConnell

Adv A J Louw SC

Solomon Nicolson

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/ZAGPHC/2007/37.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/shelldrake-game-range-cc-and-others-v-scottco-unknown-topic-agphc-2007--6a3ea51e3b1caa91298146ca>

Prepared on 11 October 2026 · Esheria