

SOUTH AFRICA / JUDGMENT

Stadler and Others v Orlowski and Others (2451/2021) [2021] ZAWCHC 285 (12 May 2021)

[2021] ZAWCHC 285

COURT

Western Cape High Court, Cape Town

BEFORE

Nel

CASE / FILE NUMBER

2451/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 2451/2021

In the matter between:

ADRIAAN JOHANNES STADLER First Applicant ADRIAAN JOHANNES STADLER N.O. Second Applicant LIZETTE STADLER N.O. Third Applicant JACOBUS CORNELIUS STADLER N.O. Fourth Applicant and FRANK ORLOWSKI (PASSPORT NO: C[...]) First Respondent ALETTA FRANCINA DU PLESSIS Second Respondent LEZMIN CC Third Respondent MAGISTRATE FOR THE DISTRICT OF LAINGSBURG Fourth Respondent

JUDGMENT:

DELIVERED 12 MAY 2021

NEL, AJ

INTRODUCTION:

1. This is an opposed application for an interim interdict, pending the outcome of an action instituted by the applicants against the first to third respondents on 11 March 2021 under case number 2254/2021, in terms of which action the applicants claim that they have acquired a right of way over the first to third respondents' properties by way of acquisitive prescription, alternatively by via necessitas ("the action").
2. A notice of intention to oppose was filed on behalf of the first, second and third respondents. Unsurprisingly, no opposition was filed by the fourth respondent.
3. No opposing affidavit or confirmatory affidavit has however been filed by the second respondent. Heads of argument which were filed by Mr. Murphy in February 2021 were done so on behalf of the first, second and third respondents as is evident from the second page thereof. When I requested Mr. Murphy, at the hearing of this matter, to address the court on the position of the second respondent in respect of the present application in light of the fact that there was no affidavit filed by her, I was informed that the opposition of the second respondent had been withdrawn. No such formal notice of withdrawal has been filed and such withdrawal took place in court. Reference in this judgment to the respondents shall therefore be reference to the first and third respondents.

FACTUAL**BACKGROUND:**

4. The AJ Stadler Familietrust ("the trust") is the first applicant's family trust. The second to fourth applicants are the trustees of the trust, which owns the remaining of extent of farm 139, Versche Bok Kraal, marked as farm 1 on the diagram annexed hereto as annexure "A". The first applicant is also the owner of Portion 2 of Farm 144, Paardefontein, marked as farm 5 on annexure "A".
5. The first and second respondents are co-owners of portion 1 of Farm 139 Versche Bok Kraal, marked as farm 2 on annexure "A" hereto.
6. The third respondent is the owner of Erf 6[...], Laingburg, marked as farm 3 on annexure "A".
7. As is evident from annexure "A" hereto, there is a road marked in blue ("the blue road") which runs through farm 3 from point G to E and continues through farm 2 from point E to F.
8. The applicants allege that they require access to both portion Y of farm 1 and farm 5 by making use of the blue road, which they have done for more than 30 years. It is upon this basis that they have instituted the aforesaid action which is pending before this court.
9. It is common cause between the parties that the applicants, and particularly the first applicant, and his employees, have been making use of the blue road for a number of years. The applicants allege that the first applicant, and his predecessors in title, have been making

use of the blue road since 1981 to access portion Y of farm 1 and farm 5, accordingly for more than 30 years. The applicants version is that they have made use of this road without force, openly, and not by way of concession during this time frame. The applicants contend further that the only time they sought permission to make use of the road was when it was sought to be used for unintended purposes such as for example when the first applicant wished to chase his herd of sheep across farm 2, or when he wished to offload onion bulbs on farm 3. This is the basis of his claim for acquisitive prescription for a servitude across farms 2 and 3. The applicants contend further that the blue road is the only suitable route available to the first applicant for purposes of his farming enterprise, specifically for tractors, lorries, trucks, and to transport the labourers employed by him. This is the basis of his claim for a right of way of necessity.

10. The respondents on the other hand allege the applicants use of the blue road was with the consent of the first to third respondents

and/or their representatives and/or their predecessors in title, which consent could be revoked at any time, and which in this

instance has been revoked, and as such did not give rise to a praedial servitude through acquisitive prescription. The respondents moreover allege that the applicants are able to access farm 5 and portion Y of farm 1 via an alternative road, albeit that some work will have to be carried out thereon in order to make it suitable for trucks, lorries, tractors, and any other vehicles which are not 4x4 driven motor vehicles. They accordingly allege that the applicants cannot claim a right of way whether by way of acquisitive prescription or via necessitas. These issues, together with a number of other disputes of fact between the parties, will be determined by the trial court in due course. Mr. Murphy argued, on behalf of the respondents, that due to these disputes of the fact, the matter should be referred for the hearing of oral evidence. When I informed Mr. Murphy that I had no such application before me and that these issues would in any event be determined by the trial court, he did not persist with such application.

11. The first applicant alleges that as a result of the draught, he has no longer been able to farm solely with livestock and game, and has had to investigate other alternatives in order to continue farming. This led him to planting onions during 2017, firstly on farm 5 and thereafter on portion Y of farm 1.
12. There is no love lost between the first applicant and first respondent. Following an incident which occurred between them

on 2 November 2020 on farm 2, whilst the first applicant was transporting bees on the blue road to farm 5 and portion Y of farm 1, both parties have laid criminal charges against the other for, inter alia, assault. The first respondent also brought an ex parte application for an interim protection order, which was granted on 9 December 2020 ("the interim protection order"). In terms of the interim protection order, the first applicant is prohibited from entering the first and second respondents' farm (farm 2). The applicants allege that they are thereby prohibited access to the onion fields via the blue road.

THE ORDER OF NDITA J:

13. The applicants launched an urgent application in this court which was issued on 8 February 2021 and argued before Ndita J on 18 February
2021. At this stage the parties had filed full sets of papers, including founding papers, answering papers and relying papers with a number of annexures and confirmatory affidavits running to some 406 pages. Both the applicants and respondents also filed written heads of argument.
14. After hearing argument on behalf of both parties, Ndita J granted the following order on 24 February 2021:
 1. The application is postponed to the first available date on the semi-urgent roll;
 2. Pending the determination of this application the following order is made:
 - 2.1 Applicants (or any other person to whom the Applicants give permission for the purposes of their farming business) are permitted to access the portion marked “Y” on the diagram annexed hereto marked “X” for their farming purposes, via the access road marked “G”, “E”, “F” and coloured in blue on the same diagram.
 - 2.2 The order granted by the fourth respondent under case number 104/2020 ordering the first applicant “...not to enter property Versche Bokkraal 139/1...” is varied to the extent required in order to provide for that which is set out in paragraph 2.1 above;
 - 2.3 The remainder of the aforesaid order of Fourth Respondent is unaffected by this order;
 - 2.4 First Respondent, his employees, family members and any other representative are ordered to refrain from blocking or preventing, in any way or form, Applicants and/or their employees from accessing the portion marked as “Y” on annexure “X” hereto for farming purposes via the access road marked as “G”, E”, “F” and coloured in blue pending the postponed hearing date of this application;
 - 2.5 Insofar as may be required Second and Third Respondent too are to permit the First Applicant access over the farms in question along the route referred to in the preceding paragraph for the purposes set out herein;
 - 2.6 It is recorded that the First Applicant has given the following undertakings and it is ordered:
 - 2.6.1 The First Applicant will not engage in any form of harassment of the First Respondent, his wife or their children;
 - 2.6.2 The First Applicant will not assault, or threaten to assault the First Respondent, his wife or their children;
 - 2.6.3 The First Applicant will not use any form of violence against the First Respondent, his wife or their children;

2.6.4 The First Applicant will not enlist the help of any third party to commit any act as listed in the above paragraphs 2.6.1 to 2.6.3;

2.6.5 The First Applicant (and his workers) will not enter and cross over the First and Second Respondents farm for any purposes other than to use the aforesaid road for farming purposes;

2.6.6 The First Applicant will not veer off the road indicated in blue on the diagram “X” in any manner whatsoever;

2.6.7 The First Applicant will ensure that none of the labourers employed by him veer off the road indicated in blue on the diagram “X” in any manner whatsoever;

2.6.8 The First Applicant will not make any contact in any manner whatsoever with the First Respondent or any member of his family while using the road indicated in blue on the diagram “X” for the aforesaid farming purposes.

3. The costs of the application will stand over for determination at hearing thereof on the semi-urgent roll;
4. The contemplated action must be instituted as soon as possible but not later than 10 (TEN) court days from the date of this order.
15. In terms of paragraph 4 of the order of Ndita J the proposed action was to be instituted by 10 March 2021, but was only instituted on 11 March 2021. Nothing however turns on this point as Ndita J did not order that the interim interdict would automatically lapse if the action had not been timeously instituted.
16. No further affidavits have been filed in this matter since it was argued before Ndita J on 18 February 2021.
17. Given that the papers were in excess of 406 pages, the matter required early allocation. Ms. Bosch, on behalf of the applicants, filed updated heads of argument on 4 May 2021 and sought condonation for the late filing thereof; such condonation has been granted. I requested my Registrar to telephone counsel for the respondents as they had no heads of argument in the court file. My registrar unsuccessfully attempted to contact both Mr. Murphy and the respondents attorney of record, Mr. Kilian, on 4 May 2021. On 7 May 2021 she managed to get a hold of Mr. Kilian who had informed her that the respondents had filed heads of argument in February 2021 already (when the matter had been argued before Ndita J), and such heads of argument were then emailed through to my Registrar together with the updated heads of argument filed on behalf of the applicants. There were no updated heads of argument filed on behalf of the respondents.
18. At the hearing of the matter I was handed supplementary heads of argument by Mr. Murphy, 13 pages in length. He however

explained the delay in the filing of such supplementary heads of argument at the hearing thereof.

19. Notably, in these supplementary heads of argument Mr. Murphy, in his opening paragraphs, contends the following:
 1. This application has been fully argued on the 18th of February 2021 before Judge Ndita in this division.
 2. On the 24th of February 2021, Judge Ndita made a ruling and in terms of the rule:
 - 2.1 The application is postponed to the first available date on the semi-urgent roll;
 3. This ruling was with respect rather confusing because the application was fully argued by both the Applicants' Counsel as well as the Respondents' Counsel and it was expected that a ruling would be made whether the application should be granted or not and therefore the fact that the application was postponed to the semi-urgent roll came as a bit of a surprise.
 4. What this means is that Counsel will have to submit exactly the same arguments again before another Judge in the same Division; which is why we are therefore in Court here on the 11th of May 2021, the date to which this matter was postponed.
 5. The Respondents submitted comprehensive heads of argument during the February hearing and those arguments have not changed and the heads of argument submitted at that stage are therefore still the Respondents' albeit that one or two aspects will just be highlighted in these short supplementary heads.
20. The respondents in those heads of argument (the February 2021 heads of argument) contended, inter alia, that although one was dealing with an application for an interdict pendente lite and not an application for final relief, the effect thereof would be final "as a result of the fact that it would take at least five years for any action about the purported right that the first applicant has to be adjudicated in this Honourable Court, because that is simply how long it takes". This bald submission by the respondents is without merit for two reasons.
21. Firstly, whilst it may take some time for trials to reach finality, such time periods are to some extent dictated by the conduct of the parties themselves. In the present matter for example, the first respondent having filed a notice of intention to defend, waited until being served with a notice of bar before filing a plea. I have been advised by counsel for the parties that such plea was filed last week. The plaintiffs replication, if any, is therefore due in approximately 2 weeks' time,[1] and absent any further subsequent pleadings, they will thereafter be considered to be closed.[2] The matter could then be enrolled on the pre-trial roll to be allocated to a pre-trial Judge. Whilst my experience is that being allocated to a pre-trial Judge may take approximately 12 months, if the parties have complied with the pre-trial procedures during that time, such as discovery and trial particulars, expert witness notices and summaries and the like, the matter can be marked as trial ready relatively quickly and trial dates are thereafter allocated within a few months. The respondents contention that it would accordingly take at least five years for the matter to reach trial is simply not accurate.

22. Secondly, the fact that the finalization of a trial which will determine the factual disputes between the parties, may take some time to conclude, does not without more, render the relief sought final in effect; and it is certainly not final in substance.[3]

23. In *Minister of Law and Order v Committee of the Church Summit 1994* (3) SA 89 at 97H, Friedman AJP held that:

A final interdict finally determines the rights of the respective parties to a dispute or litigation. It is referred to sometimes as an 'absolute' or 'perpetual' interdict.

24. The relief which the applicants seek is not a final determination of the rights of the parties. This will be decided at the trial in due course. The relief sought by the applicants therefore remains interim in nature.

25. In order for the applicants to have succeeded in the granting of an interim interdict before Ndita J they would have had to proven:

25.1 That they have a prima facie right; and

25.2 That there is a well-grounded apprehension of irreparable harm if the relief is not granted; and

25.3 That there is no other satisfactory remedy available to them; and

25.4 That the balance of convenience favours the granting of the interdict.[4]

26. It is abundantly clear that there are material disputes of fact between these parties which will have to be decided at the trial.

27. However, insofar as interim relief is sought the court in *Simon N.O. v Air Operations of Europe AB and Others*

[1998] ZASCA 79; 1999 (1) SA 217 (SCA) held at 228F-I that:

The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant,

together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed. (*Gool v Minister of Justice and Another* 1955

(2) SA 682 (C) at 688B--F and the numerous cases that have followed it.)

28. Whether the requirements for an interim interdict had been met, and the version on which to decide whether they had been met, would have been considered by Ndita J when the matter was argued before her on 18 February 2021.

29. There is no legal basis upon which I can now reconsider the order already made by Ndita J on 24 February 2021. The same relief (an interim interdict) is being claimed on exactly the same papers.

30. The respondents submission that this application is a fresh application and should be considered anew, without regard to the

findings and order of Ndita J, is simply not correct.

31. Mr. Murphy moreover implored this court to find that the order of Ndita J was clearly wrong, on two fronts.

32. Firstly, Mr. Murphy contends that the applicants have not established that they have a right to use of the blue road, a right which he contends would only be acquired if the trial court found in the applicants favour. In this regard the respondents rely upon the matter of *Mazista Slate Quarries Ltd v Oosthuizen and Another* 1943 TPD p 28 where the applicant proposed to institute action against the respondents for the final grant of a way of necessity

over the latter's property and asked for an order pendente lite restraining respondents from hindering the applicant's use of a road over their property. Murray J held at p 31 that

an owner of property can only claim a right to a way of necessity over adjoining property where a servitude over the latter property

has been constituted by one of the recognized methods, for example, grant, prescription or order of court. The learned judge went on at p 32 – 33 to find that:

This being so, the contemplated action is one to acquire for the first time a right which applicant company does not at the moment possess and the applicant company in consequence is not asking the Court to protect pending action an actual existing right; it is asking for the grant in advance and as a temporary measure of a right or privilege which he hopes to acquire later on by means of the decision in the contemplated action... I have found no authority justifying the grant pendente lite of a particular right of way before the applicant has by order of court obtained the constitution of his servitude. On principle I do not see how, if his right depends for its creation on the order of court declaring him entitled to via necessitatis and fixing the particulars of such way, it is competent before the hearing of the action to compel his opponent, merely on the ground of balance of convenience, to allow the applicant as a temporary measure a particular right of way.

33. Whilst the *Mazista Slate Quarries Ltd* case (supra) has been cited with approval by the Appellate Division in *Van Rensburg v Coetzee* 1979 (4) SA 655 (A), Ms. Bosch correctly pointed out that the latter matter also concerned a claim to a right of way of necessity. In the present matter, Ms. Bosch states that the applicants rely firstly upon acquisitive prescription for their right of use of the blue road, and alternatively upon a right of use by way of necessity. This, she submits, distinguishes the present matter from the *Mazista Late Quarries* and *Van Rensburg* cases. Ms. Bosch further reiterates that the first applicant alleges that he has openly, freely, and without obtaining consent,

made use of the blue road over the past 30 years. The Mazista Late Quarries case was referred to in argument before Ndita J.

34. The second basis upon which Mr. Murphy implored this court to find that the order of Ndita J was clearly wrong is the submission that her order has the result of overturning the protection order granted by the fourth respondent. The order which was granted reads as follows:

In terms of the interim protection order:

3.1 The respondent is prohibited by this court from –

(a) engaging in or attempting to engage in harassment of –

(i) the complainant; and/or

(ii) the following related person/s:

· Katja Orlowski

· Helena Orlowski

· Anuschka Orlowski

· Tristan Orlowski

· Aurora Orlowski

(b) Enlisting the help of another person to engage in harassment of the complainant and/or above related person/s; and/or

(c) committing any of the following act/s:

(i) not to assault, threaten to assault abovementioned person, to use any form of violence; all [sic] above mentioned person 3.1(a)(ii);

(ii) not to enter property Versche Bokkraai 139/1 or to damage any property at Versche Bokkraal 139/1

35. It is evident that the only portion of fourth respondent's order affected by the order of Ndita J is part 3.1(c)(ii). This again, must have been an issue considered by Ndita J prior to granting paragraph 2.2 of the order on 24 February 2021.

Paragraph 2.3 of such order moreover continues to state that the remainder of the order granted by the fourth respondent is unaffected

by such order.

36. I have moreover been informed that the protection order application has been postponed to 22 July 2021 by agreement between the parties at which date the learned Magistrate will make a finding in respect of the remainder of the relief set out above.

37. There is no application to rescind or vary the order granted by Ndita J. There has moreover been no application for leave to appeal such order.
38. The test for appealability of interim orders has been set out in the matter of City of Tshwane Metropolitan Municipality v Afriforum and Another 2016

(6) SA 279 (CC)[5] where Mogoeng CJ held at para [39] to [42] that:

The appealability of interim orders in terms of the common law depends on whether they are final in effect. . .

The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in OUTA [National Treasury and Others v Opposition to Urban Tolling Alliance and Others [2012] ZACC 18; 2012

(6) SA 223 (CC); 2012

(11) BCLR 1148 (CC) para 50], by Moseneke DCJ in these terms:

“This court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is the “interests of justice”. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.”

...

What the role of interests of justice is in this kind of application [ie interdicting an organ of state from performing its functions] again entails the need to ensure that form never trumps any approach that would advance the interests of justice. If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. . . .

Consequently, although the final effect of the interim order or the disposition of a substantial portion of issues in the main application are not irrelevant to the determination of appealability and the grant of leave, they are in terms of our constitutional jurisprudence hardly ever determinative of appealability or leave. . . .’

39. What the respondents effectively seek is for this court, sitting as a single judge, to find that another judge, not in a different case,[6] but in the same case on exactly the same facts, was clearly wrong. This I cannot do.
40. I cannot and do not make any finding whatsoever in respect of the correctness or otherwise of the order granted by Ndita J.
41. In the circumstances, I find that the pendent lite order granted in paragraph 2 of the order of Ndita J on 24 February 2021 must stand, save for it to read that it is pending finalization of the action, and not the application, instituted by the applicants.
42. The applicants seek a variation of paragraph 2.1 of the order of Ndita J in that they seek to include a proviso, which (i) restricts

the use of the road to the applicants, their employees or subcontractors to whom the applicants give permission, as opposed to

simply “any other person to whom the Applicants give permission”; and (ii) limits the use of the blue road to trucks, lorries, tractors pulling farming implements, or vehicles to transport the first applicant’s labourers, or any other vehicle not able to travel on the 4x4 alternative route, being the route which the respondents have suggested. It therefore limits access only to vehicles which are unable to make use of the 4x4 route.

43. There can be no doubt that such proviso narrows the relief granted, and is to the benefit of the respondents. Mr. Murphy also submitted that were I to confirm the order of Ndita J the respondents would have no difficulty with it being amended as proposed by the applicants.
44. Given that I have found that I cannot interfere with the pendente lite order granted by Ndita J on 24 February 2021, I am not inclined to amend or vary the order in any respect. The parties are at liberty to enter into an agreement along the lines of the narrower relief now sought by the applicants should they wish to do

so.

45. I accordingly make the following order:

ORDER:

- (a) The order granted pendente lite by Ndita J on 24 February 2021 stands, save that it shall be pending final determination of the action instituted by the applicants against the first to third respondents.
- (b) The costs of this application, including the costs of 18 February 2021, shall stand over for determination by the trial court.

NEL AJ

- [1] It is trite that Rule 25 of the Uniform Rules of Court provides for a replication to be delivered within 15 days of service of a plea.
- [2] See Rule 29.
- [3] See in this regard the matter of Apleni v Minister of Law and Order and Others 1989 (1) SA 195 (AD) at 200I-201(D).
- [4] See Msomi v Biyela and Others 2011 (2) SA 311 (KZD) at 317.
- [5] Cited with approval in United Democratic Movement v Lebashe Investment Group (Pty) Ltd 2021 JDR 27 (SCA) at para [7] and [8].
- [6] Were it to have been a different case altogether, the principles enunciated in Shabalala v Attorney-General, Transvaal 1995
- (1) SA 608 (TPD) would find application. In that matter at 618 D-E Cloete J held as follows: It is settled law that a Court can only depart from the previous decisions of a Court of equivalent status in the same area of jurisdiction where it is satisfied that the previous decision is 'clearly wrong'.
- [6] Were it to have been a different case altogether, the principles enunciated in Shabalala v Attorney-General, Transvaal 1995
- (1) SA 608 (TPD) would find application. In that matter at 618 D-E Cloete J held as follows:
- It is settled law that a Court can only depart from the previous decisions of a Court of equivalent status in the same area of jurisdiction where it is satisfied that the previous decision is 'clearly wrong'.

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