

SOUTH AFRICA / JUDGMENT

Walsh and Another v Rijks Cellar (Pty) Ltd (A305/2017) [2018] ZAWCHC 25 (27 February 2018) [2018] ZAWCHC 25

COURT

Western Cape High Court, Cape Town

BEFORE

Gamble, Tonjeni

CASE / FILE NUMBER

A305/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE

NO: A 305/2017

In

the matter between:

PIUS
WALSH First
Appellant
DARAHEEN
FARM
CC Second
Appellant
and
RIJKS
CELLAR (PTY)
LTD Respondent

JUDGMENT

DELIVERED ON TUESDAY 27 FEBRUARY 2018

GAMBLE, J:

INTRODUCTION

[1] The parties to this appeal are farmers in the district of Tulbagh. The first and second appellants (hereinafter conveniently referred to as “Walsh”) own a farm known as “La Rhone” which abuts the Klein Berg River (“the river”) in that district. The respondent (“Rijks”) is the holder of a licence issued in terms of Chapter 4 of the National Water Act, 36 of 1998 (hereinafter referred to as “the Water Act”) which entitles it to pump water from the river for

use on its farm some distance away.

[2] On 2 June 2017, in circumstances which will appear more fully under, Walsh precluded employees of Rijks from traversing La Rhone to obtain access to Rijks’ pump situated on the banks of the river. Rijks approach the local magistrate on an urgent ex parte basis for a spoliation order permitting its employees to enter upon La Rhone forthwith. An interim order was granted on 9 June 2017 (returnable on 23 June 2017) interdicting Walsh from denying Rijks and its employees “unhindered use and possession of its property [on La Rhone] being a pipeline, pump and pump house [belonging to Rijks] and denying [Rijks] its rights of access... thereto on... La Rhone.”

[3] Acting in terms of Rule 55(3)(d) of the Magistrates Court Rules, Walsh anticipated the return day on 24 hours’ notice, with the matter being heard on 20 June 2017. On that day the rule nisi issued on 9 June 2017 was confirmed, albeit in slightly amended terms, and a final order was made. Walsh appeals now against the granting of that final order. On appeal before us Walsh was represented by Adv DR Mitchell SC and Rijks by Adv WRE Duminy SC. We are indebted to counsel for their helpful heads of argument and submissions from the Bar at the hearing of the appeal.

THE RELEVANT FACTUAL BACKGROUND

[4] The founding affidavit in the court below was deposed to by Mr. Dorrington, a director of Rijks, on 6 June

2017. It is short and to the point. He said that a water licence had been granted in October 2004 permitting the withdrawal of water from the river and the storage thereof in nearby dams, the one on La Rhone and the other on land now owned by Rijks. It is common cause that the rights conferred under the license are now lawfully exercised by Rijks.

- [5] Mr. Dorrington says that in June 2016 a written agreement was concluded between Walsh and Rijks to regulate the extraction of water from the river by means of a pipeline which traversed La Rhone and for the registration of an appropriate servitude over that land in favour of Rijks. A copy of the agreement is annexed to the founding affidavit and contains the following recordal -

“The parties agree that Rijks accordingly has the pumping right from the Kleinberg (sic) River on the terms set out in the said licence to be exercised by way of a servitude pipeline and pump station over the property of La Rhone... which servitude still has to be registered.”

The agreement further makes provision for, inter alia, the precise location of the pipeline, the extent and size thereof, as also for the construction of a pump house to accommodate a pump to service the pipeline. It was further recorded that practical completion of “the works” would take place by 15 July 2016.

- [6] Mr. Dorrington says in the founding affidavit that Rijks’ rights flowing from the water licence and the agreement with Walsh comprise the following:

- the right to “extract water from the Klein Berg River by way of a pipe”; and
- the right “to install and maintain a pipeline, a pump house and a pump onLa Rhone...”

- [7] Mr. Dorrington says that on 2 June 2017 he attempted to obtain access to the “property and equipment of [Rijks] situated on the farm La Rhone.” He goes on to explain that he was unable to do so, having been threatened and chased off the land by Walsh who addressed him in foul language which can only be described as “agricultural vernacular”. As a consequence of this, complains Mr. Dorrington, Rijks was unable “to have access to its property or to maintain its property.”

- [8] Turning to the question of urgency, Mr. Dorrington stated that the matter was urgent because of the persistent drought which then existed (and sadly continues to exist on a much more devastating scale in 2018) in the Western Cape. He stated that it was necessary to extract water from the river for purposes of watering crops and livestock and for supplying farm workers with drinking water. He went on to point out that a severe storm warning on 7 June 2017 made it necessary for Rijks to safeguard and secure its property on the riverbank and to prevent damage thereto. A suggestion was also made that urgent intervention was necessary “to prevent loss of life” but this was not explained in any detail.

PROCEEDINGS IN THE COURT BELOW

- [9] In seeking urgent spoliatory relief the following claim was made by Mr. Dorrington in the founding affidavit.

“[Rijks] has been unlawfully deprived of its possession and control of the pipeline, pump and pump house which it is entitled (sic) by agreement and permission of the Department of Water Affairs and hereby seeks that the status quo ante be restored.”

[10] In a written judgment handed down on 27 June 2017, the Magistrate noted that after Walsh had anticipated the return day of the rule nisi granted earlier, he filed a set of papers in which he requested that the interim order be set aside, on the basis of “absence of urgency and that the audi alteram partem rule was not adhere (sic) to, prior to the issuing of the interim order.” When Rijks sought a postponement to reply to Walsh’s papers, this was objected to and Walsh requested that the matter be determined

there and then on Rijks’ papers as they stood. He expressly abandoned any reliance on the opposing papers which he had filed.

[11] Walsh’s papers clearly formed part of the record but were not placed before this Court, evidently because the parties believed that they were not relevant to the determination of the appeal. While it is correct that the appeal falls to be determined only on Rijks’ papers, the record should have been augmented by the addition of all the papers which were before the Magistrate. In any event, counsel for both parties urged this Court to dispose of the matter in order that finality could be reached.

[12] In delivering his 2 page judgment[1] the Magistrate stated that he was satisfied that the matter was urgent and that an ex parte application was warranted, acknowledging in his judgment that the Western Cape was then in the grips of a severe drought. The Magistrate found too that Rijks had been deprived of the possession of its property, that Walsh had taken the law into his own hands in denying it access to its property and that a mandament van spolie was therefore the appropriate remedy.

ISSUES

RAISED ON APPEAL

Urgency

[13] Before us Mr. Mitchell SC raised 2 points. Firstly, he argued that there was a procedural defect in the lower court in that the Magistrate erred in hearing the matter ex parte. He relied on Office Automation [2] and submitted that this court had the power to reconsider the procedural defect alleged to have occurred. He urged us to do so and to find against Rijks on this ground alone.

[14] Mr. Duminy SC urged the court to consider that what is subject to appeal here is not the interim order granted on 9 June 2017 since such interim orders

are manifestly not appealable.[3] Rather, said counsel, the court of appeal could only consider confirming or setting aside the final order made on 20 June 2017. It was argued that at that stage the opposing party was before the Magistrate, had been afforded the opportunity to file an affidavit,

had done so and then tactically decided to withdraw that affidavit and then argue the case on the founding papers filed by Rijks. So, said counsel relying on Scenematic[4], any procedural defect that may have arisen as a consequence of the ex parte hearing on 9 June 2017 had been remedied by a full hearing on the anticipated return day. The principle of audi alteram partem, about which Walsh had evidently complained in argument, had been properly applied on the return day.

[15] Scenematic concerned an administrative decision taken by a functionary in the Department of Environmental Affairs and Tourism regarding the allocation of fishing rights. A party affected by the decision complained, in an internal appeal to the Minister, of procedural irregularities by the functionary due to defective delegated functions. The matter thereafter went on review to the High Court and eventually found its way to the Supreme Court of Appeal. In that court, the issue of procedural irregularities in the administrative process was dealt with thus.

“[34] Quite clearly, if the effect of whatever it was that vitiated the initial decision is perpetuated so as to taint the appeal process, there can be no question of the latter serving to cure the former.... On the other hand, even if the appeal process were not intrinsically tainted by the earlier proceedings, the circumstances may be such that considerations of fairness demand that both the initial administrative decision and the appeal process, judged separately, be lawful and procedurally fair. No purpose would be served by attempting to formulate some all-embracing rule. Each case will depend on its own facts.

[35] To return to the present case, once it is accepted that the Minister properly applied his mind to the respondent’s appeal and that the process was both lawful and procedurally fair, I can think of no reason why any shortcoming in relation to the delegation issue... should not have been cured by the appeal. There can be no question of the former tainting the latter.... It follows that the decision to reject the respondent’s appeal would have rendered irrelevant any complaint the respondent might have had with regard to the delegation issue.”

[16] In the circumstances, I am in agreement with Mr. Duminy SC that whatever shortcomings there might have been in the application arising from the failure to give notice to Walsh were adequately dealt with on the return day. On that day it was in fact Walsh who wanted the matter heard immediately, and he can hardly complain now that he wasn’t given a fair opportunity to answer Rijks’ case. In fact the stance adopted by Walsh suggests that he regarded the matter as sufficiently urgent to warrant the matter being dealt with without more. In my view there is no merit in the procedural point raised by Mr. Mitchell SC.

[17] Turning to the question of urgency itself, it bears mention that an application for a spoliation order in the Magistrates Court is governed by Rule 56(1) of the Magistrates Court Rules which directs that –

“(1) Application to the court for an order of an interdict or attachment or for a mandament van spolie shall be made in terms of rule 55.” (Emphasis added)

Rule 55(3)(a) of the Rules in turn is to the following effect.

“55(3)(a) No application in which relief is claimed against another party shall be considered ex parte unless the court is satisfied that-

- (i) the giving of notice to the party against whom the order is claimed would defeat the purpose of the application; or
- (ii) the degree of urgency is so great that it justifies dispensing with notice.”
- (b) The notice of motion in every application brought ex parte shall be similar to Form 1 of Annexure 1.
- (c) Any order made against a party on an ex parte basis shall be of an interim nature and shall call upon the party against whom it is made to appear before the court on a specified return date to show cause why the order should not be confirmed.
- (d) Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than 24 hours’ notice.
- (e) A copy of any order made ex parte and of the affidavit, if any, on which it was made shall be served on the respondent thereto.
- (f) Where cause is shown against any order made ex parte against a party the court may order the applicant or respondent or the deponent to any affidavit on which it was made to attend for examination or cross-examination.
- (g) Any order made ex parte may be confirmed, discharged or varied by the court on cause shown by any person affected thereby and on such terms as to costs as the court may deem fit.
- (h) Ex parte applications may be heard in chambers.”

[18] When Office Automation was decided the provisions of rule 56 read differently. As will be noted from the citation of the erstwhile section at 445E-I of the judgment in that matter, there was then no incorporation of the provisions of rule 55 into rule 56. Rather, at that time rule 56 contained a discrete set of procedural steps to be followed in an application for a spoliation order. In any event, it would appear that the case was decided upon a different factual footing to the present.

“Before the magistrate the application was opposed on a number of grounds. Only one of these grounds, which was raised as a point in limine, is relevant for purposes of this appeal.....

The essence of the point in limine was that no allegations of urgency had been made by the respondent; that the matter was in fact not urgent; that in the circumstances the respondent should not have brought the application ex parte; and that the magistrate should have required that notice be given to the appellants in the absence of any allegation that the giving of such notice would be prejudicial to the respondent and in the absence of any case having been made of urgency. This was also the basis of the argument advanced on appeal.”[5] (Emphasis added)

[19] The Full Court in Office Automation held as a matter of fact that there were no allegations of urgency whatsoever made in that matter and that the magistrate should, in the circumstances have refused to entertain the application. In the present matter the position is different. In Mr. Dorrington's founding affidavit specific allegations are made in relation to the alleged urgency of the matter. And, to the extent that no allegation was made in that affidavit that the provisions of rule 55(3)(a)(i) were applicable, the matter could only otherwise be determined in accordance with sub rule (ii). In other words the Magistrate had to be persuaded, not that notice would defeat the object of the order, but that the matter was sufficiently urgent to be heard without notice

[20] And, that is precisely how the Magistrate approached the application. He initially decided on the papers before him that the matter was sufficiently urgent to justify a hearing without notice and he granted an interim order under rule 55(3)(c). That order, once served, was anticipated by Walsh in terms of rule 55(3)(d) and the Magistrate reconsidered the application under rule 55(3)(g). When he did so, he viewed the matter in the absence of any factual allegations (both in regard to urgency and the merits) to the

contrary made by Walsh, for that is how Walsh elected to handle the matter: he effectively withdrew his answering affidavit and asked the court to reconsider the application on the basis of Mr. Dorrington's founding affidavit.

[21] There is no doubt that Mr. Dorrington could have beefed up the founding affidavit and amplified the allegations regarding urgency. That having been said, if one reads the affidavit in its entirety, and in the context of the facts upon which Rijks relied[6], together with the allegation of an impending winter storm (which any reasonable person would have appreciated might cause flash flooding and loss of property at the very least), it cannot, in my view, be said that there was not an element of urgency in the application. It is trite that on appeal a court will not easily interfere with the exercise by a lower court of its discretion unless such court "exercised its discretion capriciously or upon wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons." [7] In the result, I am unable to say that the Magistrate improperly exercised his discretion regarding urgency under rule 55(3)(a)(ii)

and the appeal cannot succeed on this ground either.

Possession

[22] The next argument advanced by Mr. Mitchell SC was that Rijks had failed to assert and/or establish a right of possession which was capable of protection under the mandement. Allied to that was an ancillary argument that at best for Rijks it enjoyed a contractual right which was not capable of protection under the mandement.

[23] The mandement van spolie is an extraordinary possessory remedy which derives from the common law and has been part of our law for centuries. Its purpose is to protect possessory rights and when these are infringed, to restore possession to the party unlawfully deprived of possession before any enquiry into the merits of the matter is embarked upon. In Nienaber [8] Greenberg JA crisply described the position thus.

“... A spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored...”

[24] The fundamental principle underlying the recognition of the remedy of the mandement is that the law sets it face against any form of self-help by a party before it.

“It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so the Court will summarily restore the status quo ante and will do that as a preliminary to any enquiry or investigation into the merits of dispute.” [9]

Accordingly, it has been repeatedly said, the remedy is available to even a mala fide possessor of property or a thief in the event that such person's peaceful possession has been unlawfully disturbed.

[25] A party relying on the mandement must establish factual possession although it is not necessary to prove possession in the juridical sense as such.[10] It is enough if the holding by an applicant seeking the mandement is with the intention of securing some benefit. So, for example, a lessee who is deprived of the use and enjoyment of premises is

entitled to rely on the mandement even in circumstances where s/he is not a possessor in the truly juristic sense.[11] I shall revert to this point later in this judgment.

[26] The facts before the Magistrate showed that the parties concluded a contract in June 2016 in which a servitude was conferred on Rijks to permit it to lay a water pipe over La Rhone, to construct a pump house on the banks of the river and to place a pump therein. The pump was to be electrically driven via an underground cable which was to be buried adjacent to the water pipe. The parties agreed that all of this work was to be completed by 15 July 2016.

[27] While the servitude conferred on Rijks had not been registered at the time of the alleged spoliation, it is common cause that it was enforceable inter partes.[12] It was therefore open to Rijks to seek enforcement of the terms of the contract through the courts as it possessed a personal right ad servitutum adquirendam. That right is now statutorily entrenched through the provisions of ss127 and 128 of the Water Act which are to the following effect.

“127. Acquisition of servitudes

(1) A person who is authorised under this Act to use water may claim-

(a) a servitude of-

- (i) abutment;
 - (ii) aqueduct; or
 - (iii) submersion...
- (2) The servitude claimed under subsection (1)(a) may be-
- (a) a personal servitude in favour of the claimant; or
 - (b) a praedial servitude in favour of the claimant in the claimant's capacity as owner of the property and which the claimant may use the water.

128. Rights and duties of servitude holders and landowners.

- (1) A holder of a servitude contemplated in this Chapter has a reasonable right of access to the land which is subject to the servitude for the purpose of constructing, altering, replacing, inspecting, maintaining, repairing or operating the relevant waterwork[13], or for any other purpose necessary for the effective enjoyment of that servitude."

[28] Given that we are dealing here with a personal servitude, the provisions of s128(1) are applicable and Rijks acquired, as part of the agreed servituted right of aqueduct[14], the statutory right of access to the pipeline and pump house for purposes of inspection, maintenance, repair and operation thereof.

This accords with the common law obligation imposed on Walsh that he must permit (or at least tolerate) Rijks' entitlement to do what is necessary for the enjoyment of its servitude of aqueduct, but then only within the ambit of the servitude.[15] Manifestly, access to the pump house for purposes of maintenance or even temporary removal of the pump to avoid flood damage would be the very essence of such entitlement. It follows, in my view that Rijks was lawfully entitled to demand access to the pipeline and pump house on 2 June 2017 as Mr. Dorrington sought to do.

[29] The question that then follows is that when Walsh so rudely ordered Mr. Dorrington off the land on that day, was the latter entitled to rely on the mandement or was he limited to interdictory relief against Walsh? It is well established that the mandement is available for the protection of servitude rights[16]. However, Mr. Mitchell SC urged us to find that Rijks had not established in the founding affidavit that it was in possession of

the pump house and/or the pipeline on the day in question and that it had therefore not established the foundational basis for spoliatory relief.

[30] While the founding affidavit of Mr. Dorrington is, as I have already suggested, rather lean and without unnecessary muscle, it does contain the following material allegations -

- "On 2 June 2017 at 11h30 I tried to obtain access to the property and equipment of [Rijks] situated on the farm La Rhone;

- By chasing me...away from the farm La Rhone..and denying the staff and personnel of..[Rijks] access to the pipeline, pump and pump house...[Walsh]...is making it impossible for..[Rijks]...to have access to its property or to maintain its property;
- A storm warning on 7 June 2017 and subsequent cold fronts also make it urgent that...[Rijks]...safeguards and secures his (sic) property on the riverbank and safeguard its future water supply;
- [Rijks] has been unlawfully deprived of its possession and control of the pipeline, pump and pump house...”

[31] I regret that I am unable to agree with counsel’s submission on this point. In my view, the only reasonable inference and conclusion which a reasonable reader can draw from these allegations is that prior to 2 June 2017, Rijks’ equipment and pipeline were already in place and that it had commenced exercising its rights of servitude in the terms of the agreement of June 2016, which as we know had contemplated completion of the works nearly a year before - by 15 July 2016.

[32] Furthermore, if the pump and pipes were not in place, it would have made no sense for Rijks to have approached the Magistrate for urgent spoliatory relief which, in such circumstances, would have had no practical effect. Finally, if Rijks had not placed its equipment on the river bank, laid its pipes and commenced exercising its right under the servitude agreement, it is reasonable to assume that Walsh would have said so when he approached the court on the anticipated return day. But rather than do so, he played ducks and drakes with the court and seemingly for reasons of expediency sought to withdraw his affidavit from the suit. He must now bear the consequences of that decision.

[33] In Nienaber[17] the court of appeal expressly held that the mandement van spolie is available where a party, who is in possession of a right of access to land, is deprived thereof through the unlawful conduct of another.[18]

“(I)t is clear that the appellant was in possession of the right of access through this gate of which he has been deprived, and the remedy is therefore available.”

[34] But even if it be said, contrary to what I have already found, that Rijks had not established that it had physically taken possession of the land which was the subject of the servitude, the mandement was still available to it on the basis that its servitugal right of aqueduct afforded it a right to possession of the land in question.

In terms of Bon Quelle[19] that right is regarded as a right of quasi possession which is similarly capable of enforcement through spoliation proceedings.

CONCLUSION

[35] In the circumstances I am of the view that the order of 20 June 2017 was correctly granted.

ORDER OF COURT

The appeal is dismissed with costs.

GAMBLE, J

I agree:

TONJENI, AJ

JUDGE:Gamble J et Tonjeni AJ

JUGDMENT DELIVERED BY: Gamble J

FOR APPELLANTS: Adv. D Mitchell SC

INSTRUCTED BY: Joubert Van Vuuren Incorporated

FOR RESPONDENT: Adv. W R E Duminy SC

INSTRUCTED BY: H Pretorius Attorneys

DATES OF HEARING: 9 February 2018

DATE OF JUDGMENT (Reasons) : 27 February 2018

[1] The brevity thereof is, in part at least, attributable to the fact that use was made of a particularly small font.

[2] Office Automation Specialists CC and Another v Lotter 1997 (3) SA 443 (E)

[3] In terms of s 83(b) of the Magistrates' Court Act, 32 of 1944, an appeal to the High Court lies against "any rule or order in such suit or proceeding and having the effect of a final order.."

[4] Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen (Pty) Ltd

[2005] ZASCA 11; 2005 (6) SA 182 (SCA) at [33]- [35]. See also Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union and others 1995 (1) SA 742 (A) at 756D-757A.

[5] 444D-F

[6] The on-going crippling drought in the Western Cape was (and remains) a fact of daily life of which every inhabitant is acutely aware.

[7] Minister of Education, Western Cape and others v Governing Body, Mikro Primary School and another 2006 (1) SA 1 (SCA) at [25].

[8] Nienaber v Stuckey 1946 AD 1059 at 1053

[9] Nino Bonino v De Lange 1906 TS 120 at 122

- [10] Yeko v Qana 1973
- (4) SA 735 (A) at 739E-G; Ness and another v Greef 1985(4) SA 641 (C) at 647D-G.
- [11] Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977
- (1) SA 230 (E) at 232H; Outdoor Network Ltd and another v The Passenger Rail Agency of South Africa and another [2014] ZAGPJHC 271 (30 April 2014) at [23]
- [12] Willoughby's Consolidated Co Ltd v Copthall Stores Ltd 1918 AD 1 at 16
- [13] "Waterwork" is defined in s1 of the Water Act to include "any borehole, structure, earthwork or equipment installed or used for or in connection with water use" and would therefore include Rijks' pump and pump house.
- [14] According to LAWSA (2nd ed) Vol 24 para 565 "aquaeductus" is a "rural servitude of water [which includes]...the right of leading water over or out of another's land..."
- [15] Van der Merwe Sakereg (2nd ed) at 465; Van der Walt The Law of Servitudes at 230-1; Johl and another v Nobre and others [2012] ZAWCHC 20 (20 March 2012) at [14].
- [16] Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) SA 508 (A) at 516C.
- [17] At 1059
- [18] In that matter the respondent had precluded access through a farm gate to the applicant who claimed to be a lessee of the land and wished to recommence ploughing thereon.
- [19] At 514D-F; 515C-F
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