



**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 4901/22

LOUIS PHILLIP LAMBRECHT STEENKAMP NO

First Applicant

INDEPENDENT TRUST MANAGEMENT (PTY) LTD NO

Second Applicant

SUSANNAH MARIE HOLZ NO

Third Applicant

versus

PHILLIP NOLAN NEL

First Respondent

COLLEEN JEAN NEL

Second Respondent

JUDGMENT DELIVERED ON THIS 26th DAY OF MAY 2023

FORTUIN, J:

A. INTRODUCTION

[1] The parties are owners of neighbouring farms and the dispute relates to the boundary line between the farms and the use of the access road that runs across both farms. This road is indicated in blue on the Annexure to the Founding Affidavit (“the blue road”). Interdictory relief is sought by both parties in this application. The nature of the relief sought by the applicant is in dispute.

[2] The relationship between the parties became murky before the first respondent erected the fences on the blue road during March 2022. The dispute started earlier during November 2021 when first respondent cleared veldt on portion 23, owned by the applicants.

[3] As a result of the dispute between the parties on whether this was the green road that was in existence for more than 30 years or whether it was a newly established road, the applicants laid criminal charges against the first respondent and reported the incident to Cape Nature. Subsequent to this, the first respondent appointed a land surveyor to establish the boundary lines and place beacons. The first respondent’s surveyor established a clear and visible boundary line between the farms.

[4] During December 2021 the first respondent instructed a bulldozer operator to do work on the applicant's land. This resulted in a criminal charge being laid against the first respondent. A dispute resulted after the first respondent claimed ownership of the piece of land (Land X) by way of acquisitive prescription. On the first respondent's own version this claim was instituted 5 days after the bulldozer was on site.

[5] Three days after the above incident, the second respondent threatened that the applicant's use of the blue road "now stands in jeopardy". Hereafter, the first respondent instructed a contractor to treat Land X to make it suitable to plant olive trees. The contractor subsequently stopped working but the land was already treated at this stage.

[6] During January gates were installed by the respondents at points A and B on Annexure LS5. On 15 March 2022 and 1 April 2022 the gates at points A and B on the blue road were closed by the respondents. The effect of these gates are in dispute between the parties.

[7] Also during January 2022, respondents had poles planted on the applicants' side of the boundary line i.e. on Portion 23. A number of endangered red plant species were

uprooted and dug up in the process. A further criminal complaint was laid against the respondents in this regard.

B. COMMON CAUSE BACKGROUND FACTS

[8] The relationship between the parties first broke down during December 2018. Almost two years later, during the weekend of 12 March 2022, the first respondent erected fences over the blue road at two different points. As a result, the applicants were unable to use Portion 23 as easy access was not possible. There is limited access available to Portion 22 to the applicants but only via a shortcut with an unloaded 4x4 vehicle and only during dry periods.

[9] It is common cause that the fences erected over the blue road were removed after launching of this application.

[10] It is further common cause that the applicants operate an environmentally friendly farming operation.

C. APPLICANT'S CASE

[11] It is the applicant's case that the first respondent spoliated their use of the blue road and that they were entitled to bring the application on an urgent basis. On their version, the fact that the use of the blue road was restored only after the application was launched, illustrates the need for the application.

[12] On the applicant's version, the sole aim of Portion 23 is to preserve the farm's natural habitat and promote biodiversity. This includes reseedling of indigenous plants, removing alien vegetation and trees. It also includes testing the veldt which allows pioneer plants to settle and provide shelter for more diverse species.

D. RELIEF SOUGHT BY APPLICANTS

[13] In the notice of motion, the applicant sought the following relief:

13.1 A ***mandament of spolie*** for the restoration of their possession, access and use of the blue road. This relief fell away after the first respondent complied with this relief;

13.2 An **interim interdict** prohibiting the respondents from obstructing their access and use of the blue road. This relief was sought, pending the adjudication of action proceedings to be instituted by the applicants;

13.3 A **final interdict**-

13.3.1 Prohibiting the respondents from using the green road;

13.3.2 Prohibiting the respondents from entering the Eco Farm; and

13.3.3 Compelling the respondents to remove any fencing that encroaches on their Eco Farm. The applicants have subsequently abandoned this relief.

[14] The first respondent brought a counter application in which he sought a final interdict prohibiting the applicants from damaging the gates and/or gate posts on his farm.

[15] When the application was heard on the urgent roll, the parties agreed to postpone the matter for hearing on the semi-urgent roll, pending final adjudication. An order in the following terms was agreed to:

"1. The first respondent shall not interfere with or block the applicants' use, possession or access to the access road established over the respective

farms, as indicated in blue on the aerial photograph attached as
"X" ("the blue road") in any manner whatsoever;

2. The first respondent shall be entitled to use the blue road from points "B"
to "C" on Annexure X for any and all farming purposes and the applicants
shall not interfere with or block the first respondent's use of the
blue road for farming purposes.

3. The first respondent shall be entitled to do maintenance only in respect of
the water runoff of the dam and the removal of silt, to be accessed from
the blue road from point "B" to "C" on Annexure X.

4. The first respondent shall be entitled to close, but not lock the gates that
have been erected on points "A" and "B" on Annexure X, or any further
gates that may be erected by the first respondent;

5. Other than the use of the blue road as is set out hereinabove, the first
respondent shall not be entitled to enter the applicants' farm on the right
side of the established boundary line between the farms or do any
work on the right side of such boundary line;

6. The applicants shall not damage the gates and/or gate posts erected at
points "A" and "B" or any further gates that may be erected by the first
respondent; and

7. Cost to stand over for later determination."

[16] This is the return date for the relief claimed by both parties, as provided in the abovementioned interim order.

[17] The applicants instituted action in this court in which they claim that they have acquired a servitude right of way over the portions of the blue road that runs across Portion 1 by way of acquisitive prescription, alternatively by way of necessity. Further, that the fences erected at the boundary line on Portion 23 be removed. The relief initially sought in terms of paragraph 4.3 in the Notice of Motion is abandoned by the applicants and shall be dealt with in the action proceedings.

E. RESPONDENT'S CASE

[18] The respondents do not oppose the applicants' condonation application.

[19] The respondents oppose the applicants' change of relief and in its answering affidavit dealt with the relief sought in the notice of motion. It is the respondents' case that the applicants cannot introduce amended relief in its application under the prayer for alternative relief.

[20] It is further the respondents' case that the applicants were well aware of a serious dispute of fact in relation to the ownership of Land X and elected to proceed with the present application and sought final relief directly impacting on the first respondent's right as the owner. On their version, this is an abuse of process which should be frowned upon by this court.

[21] It was submitted by the respondents that, allowing the applicants to change their relief at such a late stage is prejudicial to them. The grounds for this was pointed out in the light of the distinction between the requirements for a final and interim interdict. On their version, the applicants changed tact because the court would have had to apply the **Plascon-Evans** test, resulting in acceptance of the respondents' version. Accordingly, the applicants' application for final relief would have been dismissed. It was this realisation, according to the respondents, which gave rise to the applicants' changing their relief to that of an interim interdict.

[22] It is therefore the respondents' submission that the court should dismiss the application on this basis alone.

[23] Moreover, it is the respondents' case that the application against the second respondent should be dismissed.

[24] According to the respondents, the applicants did not allege facts justifying a reasonable apprehension that the harm of putting up fencing over the blue road was likely to be repeated. Further, it is their case that the applicants did not establish that the further gates were to be erected and that they intend to close the gates thereby depriving the applicants from possession. Accordingly, no apprehension of future harm was established.

[25] Finally, it was submitted that there was an obvious alternative remedy available i.e., the *mandament van spolie*, which was successfully employed by the applicants. Accordingly, it is the respondents' submission that the requirement for an interim interdict that no alternative remedy is available, was also not established.

F. RESPONDENTS' COUNTER APPLICATION

[26] The first respondent seeks a final interdict against the applicants prohibiting them from damaging the gates and/or gate posts erected on the first respondent's farm. It is

the first respondent's case that he has a clear right to erect gates on his farm by virtue of his ownership and as provided for in the Fencing Act. Moreover, that, on his version, the first applicant committed the injury or harm by vandalising the posts and, in addition, he has no other remedy available to protect his rights.

[27] The respondents claim that the applicants were not deprived of possession of their right to use the blue road.

G. ISSUES

[28] The issues to be decided are whether the applicants made out a proper case for the interdictory relief. Likewise, whether the first respondent has made out a proper case for final interdictory relief.

H. DISCUSSION OF RELEVANT LEGAL PRINCIPLES

a. MANDAMENT OF SPOLIE

[29] An application for the *mandament van spolie* was brought by the applicants for the restoration of their possession, access and use of the blue road. As the first respondent complied with this relief, it has fallen away.

b. INTERDICTIONARY RELIEF

[30] The parties in *casu* claimed different interdicts.

i. INTERIM INTERDICTS

[31] The applicants sought an interim interdict prohibiting the respondents from obstructing their access and use of the blue road. This relief was sought pending the adjudication of action proceedings still to be instituted.

[32] The requirements for an interim interdict are trite:

32.1 a prima facie right;

32.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

32.3 that the balance of convenience favours the granting of an interim interdict; and

32.4 no other satisfactory remedy.

ii. **FINAL INTERDICTS**

[33] The applicants also sought a final interdict prohibiting the respondents from using the green road, from entering the Eco Farm and compelling the respondents to remove any fencing that encroaches on their Eco Farm. The last mentioned relief was subsequently abandoned by the applicants. The first respondent brought a counter application in which he sought a final interdict prohibiting the applicants from damaging the gates and/or gate posts erected on his farm.

[34] It is trite that where final relief is sought, the case that a respondent has to meet is whether the applicant established a clear right. Moreover, any factual disputes must be resolved by applying the test pronounced in **Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd**¹ namely, that the interdict sought can be granted only if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the granting thereof.

[35] In *casu*, the applicants do no longer seek final relief. Instead, they seek only interim relief, prohibiting the respondents from:

35.1 using the green road where it runs across Portion 23; and

¹ 1984 (3) SA 623 (A).

35.2 entering or doing any work on Portion 23.

35.3 erecting any further fences and/or structures and/or gates over the blue road where same would deprive or dispossess the applicants from their possession, access or unfettered use of the blue road;

35.4 closing the gates that have been erected over the blue road at points A and B or any further gates that may be erected by the respondents.

[36] It is common cause that the green road was cleared on the instruction of the first respondent during November 2021. The parties however disagree on the origins of this road. The applicants allege that the green road unlawfully constructed by the respondents during November 2021 is not the original green road established 30 years ago, as alleged by the first respondent.

[37] On the other hand, the case for the respondents is predominantly procedural, based on the fact that they were initially required to answer to a request for a final interdict. This was done and they are now asked to answer to a request for an interim interdict only in the replying affidavit. No amendment of the notice of motion was sought in terms of Rule 28.

[38] I agree with the respondents that this is prejudicial to them. The law in this regard is well-established. No amendment of relief is allowed unless it is sought in terms of Rule 28. The question is whether the relief sought in the replying affidavit and during argument is valid and to be entertained. This was the issue in **Eke v Parsons**²

“[40] Under our constitutional dispensation, the object of the courts is twofold. The first is to ensure a fair trial or hearing. The second is to ‘secure the inexpensive and expeditious completion of litigation and ... to further the administration of justice’. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts’ judicial functions. ... ”³

[39] In line with this and other decisions, I am in agreement with the respondents that this change in tact by the applicants, is prejudicial to them. The question is however whether this court is enabled to dismiss the application merely on this ground or whether an interrogation of the merits is still required.

² 2016 (3) SA 37 (CC).

³ *Supra*, para 40.

I. CONCLUSION

[40] In my view, the applicants did show *prima facie* proof of facts that established the existence of a right in law. It is trite that this right can be *prima facie* established even if it is open to some doubt. Ultimately, the application has to be decided on the applicants' version, unless the respondents raise facts that cast doubt on the applicants' case.

[41] In my view, the applicants have established a *prima facie* right to have undisturbed and unfettered possession and use of the blue road since they became the owners of Portion 23.

[42] Moreover, the applicants have a *prima facie* right to protect their ownership in respect of the green road and Land X.

[43] In respect of the requirement of a **well-established apprehension of harm** it is trite that a court cannot be bound by an applicant's fears. In this regard see **Ex parte**

Lipschitz⁴. Considering the evidence in *casu*, I found that the respondents erected fences over the blue road with the sole purpose of preventing the applicants from using the blue road at the relevant points. Moreover, he instructed contractors to do work on Portion 23 on an area which he claims to be the owner of, while the ownership of this land (Land X) is in dispute. Likewise, he took the law into his own hands in clearing the green road while, on his own version, he had no access to since December 2018. Furthermore, he erected fences along the boundary line on the applicants' side while being fully aware of where the boundary is situated.

[44] In my view, there is indeed a well-grounded apprehension of harm to the applicants if the respondents are allowed to close the gates on the blue road. I am in agreement with the applicants that it is an inconvenience to the applicants but it also pose a risk to the lives of the applicants.

[45] I am satisfied that the applicants' rights should be protected pending the finalisation of these disputes in the action proceedings.

[46] In respect of the requirement of **the balance of convenience** favouring the granting of an interim interdict, I am not convinced that the respondents would suffer

⁴ 1913 CPD 737.

any prejudice in the event that the interim interdict is granted. In fact, the relief sought would merely confirm the position that existed between the parties that existed prior to the disputes in November 2021 i.e. that the applicants have always used the blue road.

[47] Interdicting the respondents would not prejudice them in any way. Not granting the interdict would, however, prejudice the applicants should the respondents deprive them again from use of the blue road. Moreover, the ownership of Land X has not been established. Pending the outcome of the action, any work done by the respondents would prejudice the applicants' farming purposes, should the respondents' action be unsuccessful.

[48] Prohibiting the respondents from doing work on Portion 23, pending the outcome of the action, would not prejudice the respondents. In addition, as stated above, on the first respondent's version, he has not had access to the green road since December 2018. Granting the interim relief would accordingly not cause any prejudice to the respondents.

[49] It was also submitted that the respondents have a more direct access road and do not generally use the blue road. The closing of the gates accordingly do not impact the respondents in any significant way and would not prejudice them.

[50] Accordingly, I am of the view that the balance of convenience favours the granting of the interim interdict.

[51] Lastly, in respect of the requirement that there should be **no alternative remedy available**, I am satisfied that this is the only remedy available to the applicants. On the papers before me, it is clear that no attempts to resolve the disputes between the parties prior to the institution of these proceedings were successful. Referrals to outside bodies like Cape Nature, the South African Police Services, land surveyors and numerous settlement attempts, were not successful.

[52] In my view, there is no alternative remedy available to the applicants.

[53] The respondents brought a counter application for final interdictory relief, prohibiting the applicants from damaging and/or removing gates that were erected on the blue road. In line with my findings above in respect of the applicants' application for

an interim interdict, in particular in respect of access to the blue road, it is my view that the counter-spoliation was needed as result of the respondents taking the law into their own hands. There is no apprehension of injury being committed to the first respondent's property in the future. Hence, the first respondent's counter application stands to be dismissed.

[54] In the circumstances, I make the following order.

J. ORDER

1. An interim interdict is granted in the following terms pending the outcome of the action already instituted:

a. Respondents are prohibited from:

i. Erecting any further fences and/or structures and/or gates over the blue road where such fences and/or gates would deprive or dispossess the applicants from their possession, access or unfettered use of the blue road;

- ii. Closing the gates that have been erected over the blue road (marked “A” and “B” on annexure “LS5”) or any further gates that may be erected by the respondents.
- iii. Using any portion of the green road on Portion 23; and
- iv. Entering or doing any work on Portion 23 in terms of the established boundary lines.

2. Applicants are awarded the costs of this application.

3. The respondents’ counter application is dismissed with costs.

FORTUIN, J

Date of hearing: 11 November 2022

Date of Judgment: 26 May 2023

Counsel for Applicants: Adv S Bosch

Steyn Prokureurs

Counsel for Respondents: Adv W Jonker

De Klerk & van Gend