213/54

G.P.-S.918—1950-1—2,000. U.D.J. 219. 213/54

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

MARIA ELIZABETH MUNNICH Appellant,

versus

WENTZEL NORVAL Respondent.

Appellant's Attorney / *Prokureur vir Appellant* J. S. Webber & Son
Respondent's Attorney / *Prokureur vir Respondent* V. d. Wall & P

Appellant's Advocate / *Advokaat vir Appellant* D. Greeff, Q.C.
Respondent's Advocate / *Advokaat vir Respondent* Steyn.

Set down for hearing on / *Op die rol geplaas vir verhoor op* Monday 7th March 1955

(9.45 — 11.40.)

— Appeal allowed, with costs, —
Rule Nisi set aside.
Reasons will be handed in later.

Centlivres, C.J.
Greenberg, et Steyn, J.J.A.
7/3/55.

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

MARIA ELIZABETH MUNNICH Appellant

&

WENTZEL NORVAL Respondent

CORAM :- Centlivres C.J., Greenberg et Fagan JJ.A

Heard :- 7th March 1955. Reasons Handed In :- 10 : 3 55

J U D G M E N T

CENTLIVRES C.J. :- The respondent obtained an order on motion in the Eastern Districts Local Division interdicting the appellant from (1) erecting any boundary fence or any portion thereof in any other position than that occupied by the original fence between the appellant's farm Molensrus and respondent's farm Eben unless the respondent consented thereto or an order authorising such erection had been obtained from a court of competent jurisdiction and (2) interfering with the respondent's use and possession of the twenty-four morgen (approximately) in dispute in any illegal manner.

The order referred to above was granted on the extended return day of a rule nisi which had been granted ex parte in the Aliwal North Circuit Local Division. For the purposes of

this judgment it is necessary to set forth the facts as revealed by the affidavits filed in the proceedings before the Court a quo.

In June 1951 J.P. Viljoen bought the farm Eben and occupied it until about July 1952. During his occupation there was an old fence between Eben and Molensrus the property of the appellant. An agreement was entered into between Viljoen and the appellant that the services of a surveyor should be engaged in order to determine the beacons between the two farms, that a fence should be erected along the correct boundary and that the appellant would forgo a debt of £250 which was owed to her by Viljoen in consideration of erecting the fence in the correct position. Since the date of that agreement the appellant's stock had, according to Viljoen, grazed on the Eben side of the old fence which was not in such a condition as to prevent stock proceeding through it.

In 1952 P. J. Greyling became the owner of Eben. He alleged on affidavit that he in fact got possession of the whole property as fenced when Viljoen was the owner and used the area in dispute during the full term of his ownership. This was denied by the appellant.

In about July 1953 a land surveyor surveyed the boundary line between Eben and Molensrus and found that the old fence was not situated on the true boundary, that approximately 24 morgen

belonging to Molensrus was on the Eben side of the old fence and that according to the diagram and title held by the owner of Eben he was not the registered owner of the 24 morgen.

On August 3rd, 1953, the respondent bought Eben. The deed of sale recited that the area was 538 morgen and 527.5 square roods. One of its terms was that the property was sold as described in the existing deed of transfer thereof and that the seller would not be responsible for any shortage in case of a re-survey nor have the benefit of any surplus. In an affidavit by the appellant's husband it was alleged and not denied by the respondent in his replying affidavit that, before Greyling sold Eben to the respondent, he (the appellant's husband) informed the respondent that the old fence was not on the true boundary.

In about the middle of September 1953 the appellant caused the old fence to be removed and on October 1st, 1953 the respondent entered into possession of Eben. He apparently demanded that Greyling should re-erect the fence in its original position and at the end of April 1954 Greyling's workmen attempted to re-erect the fence. They were detected by the appellant's husband who caused them to abandon the attempt, after threatening them with a rifle. It was apparently after this attempt that the appellant took steps to erect a new

fence along the line which she claimed as the true boundary and it was this action on the part of the appellant which led to an ex parte application being made in the Circuit Court for an inderdict.

The respondent's petition was based on two grounds. Firstly it was alleged that at the time of the signing of the deed of sale Eben was completely fenced "and the p roperty was purchased "as it was at that date." On the papers before us there is no substance in this ground in view of the affidavit (which was not denied) made by the land surveyor that the 24 morgen in dispute did not form part of Eben. The second ground relied on by the respondent was that the old fence had been in existence for over 30 years, that he or his predecessors in title had held the disputed 24 morgen for a period exceeding 30 years nec vi, nec clam and nec precario and that he had thus acquired a prescriptive title to those 24 morgen. The second ground is also without foundation as it was admitted before the Court a quo and before this Court that the survey and deduction of Eben only took place in 1926 and 1927 i.e. less than thirty years ago.

When the matter came before the Court a quo on the extended return day of the rule nisi the respondent abandoned the grounds on which he originally moved the Court and contended that he was

wrongfully and unlawfully disturbed in his possession of the 24 morgen in dispute. That contention was accepted by the Court a quo and the appellant appealed against that order. The appeal was allowed with costs, the order made by the Eastern Districts Local Division was set aside and the following order substituted : rule nisi discharged with costs. It was intimated that reasons would be filed later. The following are the reasons.

The learned judge in the Court a quo dealt with the matter on the footing that it was an application for a spoliation order and came to the conclusion that the respondent, having been in possession of the 24 morgen in dispute, was entitled to an interdict. With respect we were unable to agree with the view taken by the learned judge. The ground for the conclusion arrived at by the learned judge is set out as follows by him, the reference to the "Respondent" being, of course, a reference to the present appellant :-

" In replying affidavits the Respondent and her husband again revert to the theoretical legal position, namely that, according to the Title Deeds the 24 morgen belong to her and not to the Applicant, that he never bought this land from Greyling and could therefore not lawfully occupy

" and possess it. In addition the Respondent's husband states that before the 1st. October, 1953 the Respondent's stock also grazed on the 24 morgen after the fence had been removed. He makes this further allegation in para. 6 of his affidavit replying to the Applicant's affidavit of the 9th August :

' 6. Applicant, never at any time had legal or other possession of the said 23 morgen, nor was it occupied, possessed or controlled by him ; nor was he peacefully or otherwise allowed to go onto and graze his stock thereon, he being excluded from the use of the said land. '

In my view this is a bald and bare denial. It rests partly on the legal contention referred to above. The words 'nor was he peacefully or otherwise allowed to go onto and 'graze his stock thereon, hebeing excluded from the use of 'the said land', are difficult to understand. Does it mean that his lack of ownership which the Respondent alleges, prevented him from using the land peacefully and excluded him therefrom ? If it means the above, then the contention has been disposed of.

If it means that steps were taken to exclude the Applicant physically from access to the land, one would have expected mention of the steps taken, and the Applicant would certainly

" in his application have mentioned such steps on the part of the Respondent as additional illegal interference with his possession. The Applicant stated that he used the land for grazing but had to employ a herd as his farm was open on that side. All that the Respondent does is to meet this allegation with a bare denial dominated by the legal attitude based on title which she and her advisors have placed in the forefront of their contention throughout these proceedings. "

We were unable to agree with the learned judge's reasons for coming to his conclusion on the papers before him. The allegation in paragraph 6 of the affidavit of the appellant's husband that the respondent "never at any time had legal or "other possession of the said 23 morgen" was probably meant to convey that the respondent had neither acquired a right in law to possession of the disputed area (as alleged by implication in respondent's petition) nor had he acquired de facto possession. But be that as it may it appeared to us that the learned judge had erred in ~~fastening~~ concentrating on an isolated passage in one affidavit made by the appellant's husband and ignoring other facts in the case. I have already referred to Viljoen's affidavit that after the agreement between him and appellant

her stock had grazed on the disputed area. What happened in Viljoen's time is of some importance because it shows that from that early date the appellant took up the attitude that the 24 morgen belonged to her and that she exefcised the right she claimed by grazing her stock thereon. It is unlikely that she adopted any different course of action when Greyling and respondent successively became owners of Eben. Immediately preceding the paragraph quoted by the learned judge is paragraph 5 which is as follows :-

" The fence in dispute was removed and the stock of the Respondent grazed on the said 23 morgen as well as on the remainder of her property Molensrus."

The clear implication from paragraph 5 is that after the removal of the old fence, which removal was effected about the middle of September 1953, the appellant's stock grazed on the area in dispute. We fully realised that Viljoen's and appellant's husband's allegations were made on affidavit and that it was not possible for the court to say, without hearing oral evidence, whether their allegations were true in fact but it was for the respondent to show that he and not the appellant had de facto possession of the area in dispute before he could obtain a spoliation order. He failed to do this. In the absence of any denial by rèspondent that he was told before

he bought Eben that the old fence was not on the true boundary he must have known at that time that the appellant was claiming that her property entended beyond that fence. The appellant's actions after the date of the sale to respondent were consistent with what he was told. She caused the fence to be removed before he took possession of the farm. When Greyling attempted to re-erect the fence along the old line in April 1954 his workmen were driven off by appellant's husband who throughout acted on her behalf. This constituted strong proof that the appellant was exercising control over the ~~disputk~~ disputed area. She continued to exercise this control when she attempted, until she was prevented by interdict, to erect the fence along what, according to the undisputed affidavit of the land surveyor, was the true boundary line of the two farms.

The learned judge also referred to a statement made on affidavit by the respondent to the effect that he used the disputed area for grazing but had to employ a herd to prevent his stock from straying on to Molensrus. Assuming the truthfulness of this statement, the fact that the respondent did graze his stock on the disputed area is, insufficient <u>per se</u>, to prove that he had the necessary <u>detentio</u> required by law in spoliation proceedings. As has been pointed out the

appellant avers that she grazed her stock on that area and it cannot be held in these motion proceedings that that averment is false. The case sought to be made by the respondent is not that he and the appellant possessed that area jointly but that he possessed it to the exclusion of the appellant. The whole object of the present proceedings was to ensure that the dividing fence should be erected along no other line than the old and incorrect one in order to enable the respondent to have exclusive ~~xxxxx~~ use of the disputed area. To succeed the respondent had to prove that he was in possession of the dis-puted area to the exclusion of the appellant. On the papers before us he has not succeeded in proving this. On principle there seemed to us to be no reason why a spoliation order should issue where, there being no boundary fence between two farms and stock from both farms having grazed on portion of one of them, the owner of ~~that~~ the latter farm erects a fence along what is admittedly the true boundary. This is in essence the position in the present case seeing that the fence was not in existence when respondent took possession of Eben and that it may be that both the appellant's and the respondent's stock grazed on the

24 ~~xxxxxx~~ morgen.