IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG**

CASE NUMBER /97

In the Ex Parte Application of

JAPANI PIET LINDA

Applicant

and

WILLEM FRANCOIS BUHRMAN

First Respondent

MR DREYER in his capacity as

Second Respondent

Pound Master of Eike Pound

JUDGMENT

MOLOTO J :

This application was brought before the Court on an urgent basis on Monday 7th August 1997. The Court made an order on that day but gave no reasons. The following are the reasons for that order.

[1] Applicant brought proceedings by way of Notice of Motion in terms of which he sought an order in the following terms :

> "1 That the non-compliance with forms and rules of the Honourable Court be condoned.
>
> 2 That a writ of commitment for contempt of Court be issued against the First Respondent for failing to comply with the Order of the above Honourable Court granted on the 2nd April 1997 under Case Number LCC 11/97.
>
> 3 That the First Respondent be ordered to compensate the Applicant for the amount he spent in order to recover his livestock on the 1 August 1997, namely R2 547,50.

4 Alternatively that the First Respondent desist from interfering in any manner with the Applicant's rights as set out in the aforesaid Order and particularly, that the First Respondent desist from interfering in any way with the Applicant's right to the grazing land which forms part of the dispute in the pending proceedings.

5 That the First Respondent pay the costs of this application on attorney and own client scales.

6 further and/or alternative relief. "

[2] It was noted that the applicant did not mention the question of urgency in his Notice of Motion. The only point from which it was inferred that the matter was brought on an urgent basis was prayer no. 1 of the Notice of Motion. However in his supporting affidavit the applicant argued urgency and asked that the matter be dealt with on that basis.

[3] It is necessary to give a history of this case in order to give the context of the order prayed. On 2 April 1997 the applicant brought an urgent application under the same case number as this case. That application, which I will call the main application hereafter, was brought on an ex parte basis. An interim order was granted against the respondent in that case. On the return day it appeared that a whole number of facts were in dispute as a result of which the rule *nisi* extended and the case was referred to trial. Applicant brought this application seeking the committal of the respondent on the ground that the respondent acted in contravention of the Court Order that was given in the main application. I will return to these issues.

[4] Although this interlocutory application was headed "ex parte application", applicant served the papers on the respondent's attorneys before issuing them. The applicant also set the matter down for hearing on the day he came to issue the papers, namely Monday 7th August 1997 and the respondent came to oppose the application on that day. The respondent filed an opposing affidavit to the application and a Notice of Motion being a counter-application in the same matter. He prayed for an order as follows :

"1 Dat die nie-voldoening aan die Reëls van hierdie Agbare Hof, met betrekking to betekening en vorm, gekondoneer word en dat die onderhawige teenaansoek as een van dringendheid aangehoor word, tesame met die aansoek van die Applikant;

2 Dat die Respondent gelas word, om sy lewende hawe en ander diere, se teenwoordigheid, beweging en weiding te beperk tot die gedeelte van die plaas Welgevonden (no 325 : Registrasie Afdeling I.T. Mpumalanga Provinsie),[1] wat deur hom geokkupeer was voorafgaande tot die onderhawige dispuut tussen die partye, te wete die afgekampte gedeelte waarop sy woning geleë is, soos aangetoon op Bewysstuk "G" tot die Applikant (Eerste Respondent in hoofaansoek) se Opponerende Eedsverklaring, as ongekleurde driehoekige gedeelte in die Noord-Oostelike hoek van die plaas Welgevonden, ongeveer 13 hektaar in omvang.

3 Dat die Respondent verbied word, om enige ander gedeelte van die plaas Welgevonden, te betree, te okkupeer of te benut vir bewoning, beweiding of enige ander doel, hangende die finale beslissing van hierdie Agbare Hof in die hoofaansoek.

4 Dat die Respondent verbied word, om enige grensheinings op die plaas Welgevonden te verwyder of op enige wyse te beskadig.

5 Dat die Respondent verbied word, om op enige wyse in te meng met die boerdery van die applikant of die Applikant of enige van sy werknemers, op welke wyse ookal, te intimideer of enige kontak, van watter aard ookal, met die applikant of enige van sy werknemers te hê.

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1 Hereinafter referred to as "the farm".

6 Dat die Respondent gelas word om die koste te betaal, op ‘n skaal soos tussen prokureur en kliënt.

7 Verdere en/of alternatiewe regshulp.”

Applicant filed neither a replying affidavit to respondent’s answering affidavit nor an answering affidavit to the counter-application.

[5] Mr Dreyer, counsel for the respondent, raised a point in limine challenging the urgency of the application. He pointed out that there was nothing urgent about seeking an order of committal. Mr Skosana, counsel for the applicant, replied by saying that if the prayer for committal was not granted, then the respondent would, between 1 August and the finalisation of the main application, impound applicant’s livestock for no good reason and thereby cause applicant financial loss. The Court, however, indicated that the parties were before court and it was probably more productive to hear argument none the less on the merits of the case notwithstanding that the question of urgency had been opposed. The matter was then heard on the merits without respondent abandoning his opposition as to urgency. On the conclusion which I came to, it was not necessary to consider this issue as a separate ground of opposition but only in relation to the question of costs.

[6] It became immediately clear that there would be disputes of fact in this matter. The major point of dispute related to the area that the applicant claimed to be his allotted area for occupation and enjoyment by him and his livestock. Applicant contended that the area to which he was entitled to graze his livestock and plant crops was the unmarked 13 hectare triangular area on the north-east corner of the farm and the area marked camps 8, 10 and 11 on a chart issued by the Department of Agricultural Technical Services which was annexed to applicant’s affidavit as Annexure NA1. I will refer to this area cumulatively as area A. Respondent disputed this area. He stated that the area that the applicant was entitled to live on and graze his livestock was the 13 hectare triangular area which had no number and was on the north eastern point of the map that was referred to by the applicant as the chart submitted by the Department for Agricultural Technical Services. I shall refer to this area as area B. It needs be mentioned that this was also a point of dispute in the main application.

[7] The next point of dispute was where the livestock was found when it was impounded. According to applicant the livestock was impounded on camps 8, 10 and 11 which applicant called the commonage and on which he claimed to be entitled to graze his livestock. Respondent however stated that the livestock was not on that area that was referred to as the commonage by the applicant, but that it was in an enclosed area called the game reserve in which respondent kept game, viz blesbok. This game reserve, according to respondent, is fenced with game fencing which prevented livestock, even small livestock, from going in or out unless the fence was deliberately lifted by some human act.

[8] The question that arose and needed to be answered from the two points of factual dispute mentioned above was whether or not respondent had in fact contravened the Court Order that was given on an interim basis in the main application. This is so because it was not clear what area of the farm was subject to that Court Order, and perhaps it is important at this point to mention the relevant paragraph of the Court Order of the main application to show

the difficulty. Paragraph B(iii) of the Order dated 2 April 1997 reads as follows :

> "That first Respondent thereafter desist from interfering in any manner with the Applicant's right of occupation or use of portion of the farm Welgevonden (District Ermelo) Farm No 325 registered division IT Mpumalanga Province (previous description - LG 573/966 diagram number G1265/868) - which portion Applicant occupied with his associates, cattle, goats, horses, dogs - which portion Applicant used for grazing his stock and for planting his crops"

[9] The Order in the main application was given in an ex parte application without anticipating a dispute as to the precise area of the portion of the farm that applicant was entitled to occupy. However it became a point of dispute. Therefore the Order as it stood was not clear as to what area of the farm or what portion of the farm was allocated to applicant which he could use without interference. In addition it was noted that in his founding affidavit in the main application at paragraph 4.5, applicant stated that at the time of impounding his livestock on 27 March 1997 that the livestock had been in his kraal. Then in the same affidavit at paragraph 4.10 he stated "I further submit that at the time of impoundment my stock was grazing peacefully on the land around my homestead".Applicant also filed a supplementary affidavit on 2 April 1997 and at paragraph 5.2 thereof stated the following :

> "on the 27th day of March 1997 and in the morning at or about 08:00 my livestock was grazing peacefully and undisturbed on the commonage on which they have always grazed and which had been allocated for such purpose and was so used over the years".

[10] The applicant had not defined what area constituted the commonage in that supplementary affidavit. The first indication of what area was covered by the commonage, was in the founding affidavit in the interlocutory application where applicant stated that the commonage was composed of camps 8, 10 and 11.

[11] Applicant's counsel persisted in arguing the matter on the papers as they stood. In reply to a question by the Court whether the applicant did not want to postpone the matter, even for a day, in order to enable him to file replying affidavits to respondent's answering affidavit in the application and also to file answering affidavits to the respondent's counter-application, Mr Skosana stated that he was prepared to argue the matter on the papers as they stood. He further argued that the papers were in order and that the applicant had made a case for committal of respondent for contempt of court, alternatively for an interdict against respondent from further impounding applicant's livestock pending the finalisation of the main application.

[12] Mr Skosana argued further that area A was the area of the farm allotted to applicant and that it was the land of which respondent had to give applicant *vacua possessio*. In response to this argument, Mr Dreyer argued that there was a dispute of fact in this matter. According to respondent applicant was entitled to area B only and this fact stood to be determined finally in the main application. A further point of dispute was the place where the livestock was found. Whereas applicant claimed it was found on camps 8, 10 and 11, respondent denied this and avered that it was impounded inside the fenced blesbok game reserve. Respondent further stated that although he had not impounded applicant's livestock while grazing on camps 8, 10 and 11 since the interim court order of 2 April 1997, he nonetheless disputed that applicant was entitled to graze his livestock on the said camps 8, 10 and 11. He sought an order confining applicant to area B pending finalisation of the main application. Mr Dreyer went on to dispute urgency as already mentioned above, and stated that respondent brought his counter-application on an urgent basis purely because it had to be heard contemporaneously with applicant's application.

[13] Mr Dreyer submitted that there being disputes of fact, the application stood to be decided on the version of the respondent together with those admissions by respondent of applicant's averments[2]. On this

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2 *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 at 634F; *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 at 235E-G.

authority, Mr Dreyer prayed for dismissal of applicant's application with costs on an attorney and own client scale. As regards the counter-application, he submitted that as applicant filed no answering affidavit and no notice of opposition, the applicant-in-reconvention was entitled to an order as prayed.

[14] Mr Skosana submitted that the court must be "robust" and decide the matter on the facts as set out in applicant's affidavit. He referred to the cases of *Mynhardt v Mynhardt*[3] and *Soffiantini v Mould*[4] as his authority for this proposition. I found no support for this approach in the *Mynhardt* case and the reference in the *Soffiantin* case[5] fell short of providing a formula for dealing with disputes of fact in motion proceedings. In my view, the correct approach was that in the *Stellenbosch Farmers Winery* case as confirmed by the *Plascon-Evans* case.

[15] The questions that were to be answered related to : -

(a) the portion of the farm applicant was entitled to graze his livestock on; and

(b) the portion of the farm where applicant's livestock was impounded on 31 July 1997.

[16] On the authority of the case law[6] I found that for purposes of these interlocutory applications only (and without in any way attempting to pre-determine the main application), the applicant was entitled to graze his livestock in area B and that his livestock was found and impounded on 31 July 1997 inside the enclosed game reserve. I accordingly could not find that respondent acted contemptuously and had to find in respondent's favour on the counter- application.

[17] It remained to resolve the question of costs. Respondent asked to be awarded costs on an attorney and own client scale, because applicant clearly did not follow the Rules of Court, and also alleged urgency in circumstances which did not dictate urgency. While I agreed with these propositions, I did not believe that applicant was *mala fide* in bringing these proceedings. After all, his livestock was impounded when he was under the honest, albeit mistaken, belief that he was protected by the interim order. That interim order did not delineate the area so protected and the point still remains to be resolved. I could therefore not order costs on an attorney and own client scale, even though I accepted that applicant ought to be punished with a costs order for failing to comply with the Rules for urgent applications.

[18] The following order was made :

1 Applicant's application is dismissed with costs on a party and party scale.

2 An order in terms of paragraphs 1, 2, 3 and 5 of respondent's Notice of Motion is granted with costs on a party and party scale.

3 The grant of prayer 2 of respondent's Notice of Motion shall not be interpreted as determining the area allotted to applicant and applicant shall not be precluded from adducing evidence in the main application to show that he was entitled to an area different from and larger than the area referred to in paragraph 2 of respondent's Notice of Motion.

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3 1986 (1) SA 456.

4 1956 (4) SA 150.

5 At 154G - H.

6 Supra n 1.

4 Paragraph 2 of this order to operate as an interim interdict against applicant pending the finalisation of the main application.

J MOLOTO

Dated : 4 September 1997