

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 2456/2009

In the matter between:

GARY JEREMIA COETZEE

Applicant

and

KINGSRIVER ESTATE (PTY) LTD

Respondent

JUDGMENT DELIVERED ON 10 DECEMBER 2010

ALLIE, J

[1] The applicant seeks an order in the following terms:

1.1 Restoring applicant's access to the remainder of the Farm Klip Berg
No. 136, Robertson ("the property");

1.2 Directing respondent to remove any chains, locks or other
obstructions barring applicant's access;

1.3 Costs.

[2] Applicant described the relief sought as one for restoration of previously
undisturbed access to the property.

[3] It is common cause that:

3.1 the property is landlocked;

3.2 the single road leading to the property is the only access road. It is private and passes over privately owned property ending at the Klip Berg Dam used by the Department of Water Affairs and the local Water Board;

3.3 a gate owned by the Department of Water Affairs is located at the end of the road which leads to land owned by the Municipality;

3.4 respondent is the owner of the first property that the road passes, namely the farm Vrolikheid;

3.5 the registered owners of the property known as the remainder of Klip Berg Farm are 67 people including the respondent several of whom hold under a 1888 Title Deed;

3.6 the applicant is not a registered owner of the property;

3.7 there were several locks and chains placed on the gate but any one lock could open the gate.

[4] Applicant alleged that he is the legitimate heir of more than one of the original owners of the property. He had family excursions during his childhood to the property during vacations and visits to the Klipberg Dam. He is 37 years old and lives in Elsies River, Cape. He has caused the municipality to place the municipal rates accounts in his name.

[5] During January 2007, the McGregor Emerging Farmer Agricultural Co-Operative Limited was established by *inter alia*, descendants of the registered owners of the property.

[6] Acting together with the Co-Operative, he obtained soil samples from the property and had them tested at the beginning of 2008.

[7] He wished to make further investigations on the property. On 26 October 2008, applicant arrived at the gate with a tractor, a container and farming equipment because he wished to assess the property's suitability for farming.

[8] The representative of the respondent, Mr De Clercq prevented him from gaining access to the road. They left the tractor there and returned to Cape Town where he enlisted the assistance of an official of the Department of Land Affairs who facilitated his gaining access to the property for the purpose of turning the truck around and then leaving the property.

[9] Respondent alleged that applicant initially gained access to the property in 2007 by cutting the chains on the gate. Applicant only visited the property on a few occasions and never stayed the night.

[10] On 27 October 2008, a day after respondent blocked applicant's access through the road, applicant's attorney addressed a letter to respondent's representative demanding access to the road. On 30 October respondent's attorney replied and requested the basis of applicant's claim that he "operates on the land". Respondent's attorney further denied that applicant had a right of access to the property or right of way across the road. The attorney further requested documents proving applicant's interest in the property.

[11] On the same day applicant's attorney responded by saying that applicant is a descendant of certain registered owners. No mention is made of which registered owners and how descendency equates to a sole right to inherit a share in the property. The letter goes on to allege that the Co-Operative had authorised applicant exclusively to conduct farming activities on the property.

[12] On 10 November 2008, respondent's attorney wrote to applicant's attorneys and once again requested copies of documents that prove applicant's entitlement to share in the property. In that letter it is explained that as a co-owner, respondent was not consulted about the decision to conduct farming on the property.

[13] On 12 November 2008 applicant's attorney requested information concerning who conducts farming on the property, where on the property they do so and who gains access to the property. Respondent's attorney replied on 21 November 2008 explaining that respondent did not assert that it farmed or wished to farm on the property. Once again proof of entitlement to the property was requested but not provided.

[14] None of the correspondence is mentioned in the founding papers. Despite not providing any proof of his right to claim an entitlement to a share in the property, applicant alleged in these papers that he was so entitled. Applicant did also not disclose to the court the names of the persons that he claims to have inherited the property from nor did he disclose how he was entitled to so inherit.

[15] Applicant's counsel submitted that applicant brought the application in his own capacity and not on behalf of the Co-Operative. The allegation in the founding affidavit and in the correspondence is that applicant sought access to the property on 26 October 2008 to carry out a mandate of the Co-Operative. No supporting affidavit by the Co-Operative was filed. In fact, no supporting affidavit was filed by any of the alleged descendants of original owners who were part of the Co-Operative and who allegedly authorised applicant to conduct soil sample testing.

[16] While applicant alleged in his founding affidavit that he only sought access to the property to investigate the viability of farming, his attorney stated clearly in his letter that applicant had the sole right to farm. The intended purpose for which applicant seeks access has accordingly become vague.

[17] Applicant has produced no evidence to explain why he as an alleged descendant of registered owners, should be preferred above other descendants or co-owners without them being cited as interested parties in this application.

[18] Respondent admits that Mr De Clercq had blocked applicant's access to the road on 26 October 2008. Respondent alleged that De Clercq did that because applicant had not established a right to gain access to the property and to place equipment and a shipping container on the property.

[19] Applicant clearly seeks a *mandament van spolie*. Mr Abrahams, on behalf of applicant pointed out that applicant seeks to have his peaceful and undisturbed rights of access to the road restored. The relief sought in the Notice of Motion is not access to the road but the restoration of access to the property. In the concluding allegations of the founding affidavit, applicant alleged that Mr De Clercq deprived him of possession of and access to the property. In paragraph 10 of his replying affidavit, applicant stated that the issue of his right to use the road in question is irrelevant to these proceedings and promised that further argument in that regard would be presented at the hearing.

[20] As mentioned, earlier, the argument presented on his behalf was that the use of the road is the relief sought and by implication, is relevant to the proceedings. In paragraph 14 of the replying affidavit, applicant said that respondent did not deny prior, peaceful and undisturbed access over the road. That paragraph was in response to respondent's allegation that prior visits were to the Dam and not the property and a denial that applicant enjoys a right of access.

[21] Applicant, on his own version placed his own lock on the gate. When this is read with respondent's allegation that applicant had cut the old locks and chains which applicant did not deny, then it is not possible to conclude that applicant had peaceful and undisturbed access to the road immediately prior to 26 October 2008. Applicant's alleged visits to the dam as a child can clearly not establish the type of peaceful and undisturbed access he attempts to prove. Although the courts have held that possession can be established in the form of access to incorporeal rights, there has to be actual quasi-possession of the right which had to be exercised peacefully and without disturbance [See **Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi in 1989 (1) SA 508 (A) at 515 C – D**]

[22] To the extent that applicant's papers seek a spoliation order to restore access to the property, I have to consider whether applicant has shown that he had peaceful and undisturbed possession of the property and actual possession. Visits to the property intermittently during 2007 and 2008 by replacing locks to

the gate of the access road cannot establish possession or that of a peaceful and undisturbed nature. [See **Pieter v Muller 1973 (4) SA 126 (E)**; Joubert: **The Law of SA Volume 27**; first reissue at paragraph 269]

[23] Applicant has not shown that he had physical control with or without the consent of all owners of the property [see **Nienaber v Stuckey 1946 AD 1049**.] He has not proved that he used the property. He has had neither continuous nor exclusive control over the property. Even though Mr De Clercq blocked applicant's access without a court order, applicant can only lay claim to due process if he established peaceful and undisturbed possession.

[24] In **Nino Bonino v De Lange 1906 TS 120 at 122** the rationale for a *mandament van spolie* was aptly described as follows:

"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 inquiry or investigation into the merits of the dispute."

[25] The facts in the case of **Willowvale Estates CC & Another v Bryanmore Estates Limited 1990 (3) SA 954 (W)** which applicant relied upon are substantially different from the facts *in casu*. In the Willowvale Estate's case, the

person allegedly despoiled had shown that it was in undisturbed possession of access to the property to which the road provided access.

[26] Applicant has not disputed respondent's allegation that he was previously confronted and questioned by Mr De Clercq about his assertion of a right to enter the property by using the road in question. This fact, together with applicant's conduct in forcibly gaining access to the road by cutting the locks show that whatever limited access applicant had, was neither peaceful nor undisturbed.

[27] I am not persuaded that the applicant has discharged the onus of proving, on a balance of probabilities, that he was in peaceful and undisturbed possession of the property nor that he had peaceful and undisturbed possession of a right of access to the road in question. For a discussion of this onus see **Erasmus' Superior Court Practice at E9 – 4.**

[28] The application is accordingly dismissed with costs.



ALLIE, J