

IN THE FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No: A27/08
(previously case no: 2979/07)

In the matter between:

**THE SOUTH AFRICAN NATIONAL ROADS
AGENCY LTD**

1st Appellant / 1st Applicant
(in the application for leave to appeal)

SIYENZA ENGINEERS

2nd Applicant

THLAPANE CONSTRUCTION

3rd Applicant

and

**JOHANNA CATHERINE
LE ROUX N.O.**

1st Respondent / 1st Applicant
(in the main application)

**JOHANNES GERHARDUS
LE ROUX N.O.**

2nd Respondent / 2nd Applicant
(in the main application)

**CHRISTO BOERDERY
(EDMS) BEPERK**

3rd Respondent / 3rd Applicant
(in the main application)

HEARD ON: 20 NOVEMBER 2009

JUDGMENT BY: FISCHER, AJ

DELIVERED ON: 3 DECEMBER 2009

FISCHER, A.J.:

[1] The South African National Road Agency Limited (First Applicant) has brought an application seeking leave to appeal the granting of a final interdict in favour of Johanna Catharina le Roux N.O. and two others (the

Respondents) on 31 January 2008, it being common cause that due to administrative problems in the office of the Registrar of this Court the judgment together with full reasons was only made available to the Applicants early in October 2009. Circumstances relating to the problems this caused for not only the parties hereto but also their legal representatives have been dealt with in the judgment and reasons aforementioned and no purpose will be served in revisiting such, save to reiterate that on 9 October 2009 the application for leave to appeal was, by agreement, postponed to 20 November 2009 and the Applicants given leave to file further grounds if they so wished. The costs of such postponement were in addition thereto held over.

[2] Mr. Padayachee SC on behalf of the Applicants, whilst conceding that the first requirement for a final interdict, namely a clear right on the part of the Respondents had been shown, advanced the following further grounds which may be summarised as follows:

2.1 The Respondents must stand or fall by their founding affidavits and the facts alleged therein and in the circumstances they failed to show the remaining two requisites for a final interdict namely an injury actually committed or apprehended and the absence of any other satisfactory remedy;

2.2 The Respondents approached the Court on what was in essence spoliation proceedings which, having regard to the

approached adopted by Horn A.J. (as he was then) in the case of AUSSENKEHR FARMS (PTY) LTD v WALVIS BAY MUNICIPALITY 1996(1) SA 180 (CPD) at p. 189 as well as the judgment of this Court, now requires further consideration by a Court of Appeal;

- 2.3 The denial by the Applicants of the existence of any written record authorising access or egress to and from the farm in question was not as such a bland denial;
- 2.4 This Court should not have allowed Mr. Van Rooyen SC to rely upon interdict proceedings at the commencement of the original hearing in circumstances where such had not been dealt with in his Heads of Argument;
- 2.5 The incorrect finding by this Court that Section 44 of Act No. 7 of 1998 could be interpreted as meaning that the Respondents were not obliged to have in their possession a written authority for purposes of access or egress;
- 2.6 This Court erred in resorting to inferential reasoning in determining that there was evidence before it, on a balance of probability, that the requirements for a final interdict had been shown.

[3] In deciding whether or not to grant leave to appeal in cases in which leave is required, leave to appeal will only be granted when, amongst other things, there is a reasonable prospect of success. (See

AFRIKAANSE PERS BEPERK v OLIVIER 1949(2) SA 890 (O) at 892 to 893 and also **NZIMANDE v NZIMANDE AND ANOTHER** 2005(1) SA 80 (WLD) at 83.)

[4] The questions which fall to be answered are, taking into account that Mr. Padayachee SC has conceded that the Respondents have shown a clear right, namely the *de facto* enjoyment of access and egress to and from the farm onto the N1 Freeway, whether or not reasonable prospects exist for a Court of Appeal finding that, on the papers, the Respondents have failed to show an injury committed or reasonable apprehended as well as the absence of any other remedy. It is as simple as that.

[5] In the founding affidavit relied upon by the Respondents the following averments are made in support of the submissions by Mr. Van Rooyen SC that these two requirements have been met. As regards the question as to an injury actually committed or reasonably apprehended the following:

“Soos getoon, lê die trust se plaas, Willow, aan weerskante van die N1 tolpad aan die noordekant van Kroonstad. Die pad deel die plaas Willow sodat gedeeltes van die plaas aan die westekant van die tolpad lê en ’n gedeelte van die plaas aan die oostekant. Die bou van die tolpad het tewens tot gevolg gehad dat die plaas in twee gesny is.”

[6] The founding affidavit goes on to allege that since approximately 1989, and with the assistance of Tolkon, the builders of the original highway, Respondents have been making use of two gates to access and egress not only the highway but in addition thereto the farmlands on the other side thereof and the founding affidavit goes on to state the following:

“Sonder die twee betrokke hekke is dit prakties onmoontlik vir die trust en Derde Applikant om boerdery aktiwiteite weerskante van die tolpad op die plaas Willow, ... te beoefen.”

[7] Approximately eighteen years later the Applicants advised that they intended closing the gates in question and a lawyer's letter was written demanding an unequivocal undertaking within 72 hours from the Applicants that the gates in question would not be closed failing which “het ons instruksies om ‘n verbiedende interdik teen u te bekom”. (See annexure “B” to the founding papers.) Discussions were subsequently held between the parties, the details of which were not elaborated upon. It would however appear that representatives of the Applicants inspected the gates in question after the aforementioned letter was written, whereupon a representative of the Applicants, one Frank Joubert advised as follows:

“... dat daar nou enige dag voortgegaan sal word met die sluiting van

die hekke.”

[8] The foregoing allegations must be seen within the context of the further allegations regarding the inability of a bridge over the highway in the immediate vicinity of the gates to accommodate a wide plough required for farming activities as well as Respondents concluding averments that they are entitled to the relief sought to prevent Applicants from the “ontneem van die gebruik van die hekke, anders dan by wyse van ‘n hofbevel of ‘n behoorlike administratiewe proses”.

[9] I am of the opinion that, in the absence of any denial regarding the apprehended threat to close the gates and the subsequent consequences this would have for the Respondents, the Respondents have shown the presence of the remaining two requisites for a final interdict. A reading of prayer 1 of the Notice of Motion furthermore shows that the Respondents approached this Court seeking such an interdict.

[10] I am not convinced that Horn A.J. (as he was then), in the **AUSSENKEHT FARMS (PTY) LTD**-case *supra* at p. 189 was suggesting that the legal basis for the *mandament van spolie* should be expanded as he quite clearly expressed his unequivocal support for the dictum followed in the case of **SETLOGELO v SETLOGELO** 1914 AD 221 AT (227). In both these cases a clear right for purposes of an interdict was found to be no more than *de facto* possession/occupation and did not

require proof of any *ius possidendi*. Views to the contrary were clearly rejected by Horn A.J. (as he then was). (See **AUSSENKEHR**-case *supra* at p. 189 B to E and G to I.)

[11]I find, with reference to the grounds of appeal set out earlier, that there is no reasonable prospect of success on appeal and that the application should be dismissed with costs. Mr. Padayachee SC agreed that if leave to appeal be refused, the Applicants should pay the costs of 9 October 2009. The following order is accordingly made:

11.1 The application for leave to appeal is dismissed with costs;

11.2 The Applicants in the application for leave to appeal, being the Respondents in the main application 2979/2007 are ordered to pay the costs occasioned by the postponement on 9 October 2009.

P.U. FISCHER, AJ

On behalf of applicants:

Adv. Padayachee SC
Instructed by:
Bokwa Attorneys
BLOEMFONTEIN

On behalf of respondents:

Adv. P.C.F. van Rooyen SC

Instructed by:
Symington & De Kok
BLOEMFONTEIN