IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION: BLOEMFONTEIN

Case No.: 1487/2015

In the matter between:-

TYJADERLIN PROPERTIES CC Applicant

and

STEPHANUS PHILIPPUS MALAN First Respondent
RUS 'N BIETJIE RESORT (PTY) LTD Second Respondent

CORAM: DAFFUE, J

JUDGMENT BY: DAFFUE, J

HEARD ON: 12 NOVEMBER 2015

DELIVERED ON: 22 JANUARY 2016

I INTRODUCTION

[1] This is the extended return date of a rule *nisi* issued *ex parte* and on an urgent basis by Kruger J on 2 April 2015. A dispute pertaining to the right of access to the Vaal Dam has to be adjudicated.

II THE PARTIES

[2] Tyjaderlin Propertgies CC is the applicant in these proceedings, a close corporation and owner of two properties, to wit erven 259 and 262 Deneysville (also known as 15 and 17 Waterkant Street

respectively). Applicant is represented by Cornelius and Partners, Heilbron while the Bloemfontein correspondents are Matsepes Inc. Adv M C Louw acted throughout on behalf of the applicant.

[3] First respondent is Stephanus Philippus Malan, a businessman residing at 20 Waterkant Street, Deneysville. He is a director of Rus ‘n Bietjie Resort (Pty) Ltd, the second respondent. Neuhoff Attorneys of Bloemfontein represent both respondents and Adv C Snyman argued the matter on behalf of the respondents before me.

III THE RELIEF CLAIMED

[4] Applicants seek confirmation of a rule *nisi* issued on 2 April 2015 which reads as follows:

> “1. Non-compliance with the forms, processes and service provided for by the Uniform Rules of Court is condoned and dispensed of.
> 2. A rule *nisi* is hereby issued and First and Second Respondents are called upon to appear before the above court on 7 May 2015 at 9H30 to show cause, if any, why the following orders should not be made:
> 2.1 First and Second Respondents are ordered to immediately restore Applicant’s undisturbed access to the Vaal Dam through a motor gate situated on the border of Erf 1871, Deneysville, at the area thereof commonly known as “Pierlaan”, where there is a servitude of right of way registered under Notarial Deed of Servitude no. 309s/62 and also depicted in annexures “F9” and “F10” to the founding affidavit;
> 2.2 First and Second Respondents are ordered immediately to open the motor gate depicted in annexure ”F9” to the founding affidavit and to refrain in any way whatsoever from restricting Applicant’s access to the right of way described in prayer 2.1

above;

2.3 First and Second Respondents shall jointly and severally pay the costs of this application;

3. The relief contained in prayers 2.1 and 2.2 shall operate as an interim interdict with immediate effect, pending the finalization of this application.

4. The Sheriff is authorised to serve a faxed copy of this order on the Respondents."

IV APPLICATION PAPERS TO BE CONSIDERED

[5] According to the index presented to me the application papers consisted of 303 pages. Whoever prepared the index and paginated the papers deemed it fit, incorrectly so, to file the heads of argument as part of the paginated papers. Also, applications for postponement and condonation for the late filing of the replying affidavit were placed before me as well notwithstanding the fact that these applications have been considered by Mocumie J who dismissed the condonation application. Consequently the only evidential material to be considered is to be found in the founding and answering affidavits which consist of just over a 100 pages.

V THE FACTUAL MATRIX

[6] As mentioned, applicant is the owner of two immovable properties, to wit erf 259 and erf 261 Deneysville (also known as 15 and 17 Waterkant Street respectively) which properties were registered in its name on 31 March 2014.

[7] First respondent, herein later referred to as Malan, is the registered

owner of 20 Waterkant Street, Deneysville. He is also a director of Rus ‘n Bietjie Resort (Pty) Ltd, a company that conducts a resort and caravan park on the property known as a portion of erf 1871, Deneysville (also referred to as “Pierlaan”). This property is presently owned by Willow Properties (Pty) Ltd which entity is not a party to these proceedings. Although Malan purchased the property, he was not yet the registered owner thereof when the dispute arose.

[8] Applicant’s properties are separated from the Vaal Dam by erf 1871 Deneysville and in particular the portion thereof known as Pierlaan.

[9] In order to obtain an order *ex parte,* applicant *inter alia* relied on the version of one Mrs Lisa Kruijer, the previous owner of the properties now owned by applicant, and also alleged that it and its members and the general public were entitled to access insofar as a servitude of right of way in terms of Notarial Deed of Servitude no 309s/62 had been registered over erf 1871, Deneysville as the servient property through a motor gate to the Vaal Dam. Applicant emphasised that it relied on the mandament van spolie in order for its undisturbed access to the Vaal Dam through the motor gate situated on the border of erf 1871, Deneysville to be restored, and therefore the reliance on a right of way is unfortunate. Furthermore, applicant relied on the fact that its deponent as well as its three other members had access over erf 1871 along the alleged servitude of right of way which access was undisturbed until 20 February 2015 when Malan locked the motor gate and parked an excavator (back actor) in front thereof.

[10] In acting as he did, as alleged, Malan prevented applicant, its deponent and other members to have access to a slipway on the Vaal Dam through the aforesaid motor gate for purposes of launching boats as they have done or a regular basis.

[11] The motor gate with the excavator parked in front of it and the Vaal Dam in the background are clearly depicted on annexure “F9” to the founding affidavit.

[12] Prior to the launching of the urgent *ex parte* application applicant tried to resolve the dispute by entering into e-mail correspondence with Malan. These e-mails are attached to the founding affidavit. The first e-mail is dated 3 March 2015. In his email of 7 March 2015 Malan made it clear in response to an e-mail of applicant’s attorneys that the particular portion of Pierlaan belonged to him, that he bought the property known as erf 1871, Deneysville from Willow Properties (Pty) Ltd although it was still not registered in his name and that he had never given any consent to applicant or any other company to have access to his property. Furthermore, applicant and any of its representatives did not have access to the relevant property and trespassing charges would be laid against them if found on the property. In an e-mail of 9 March 2015 Malan stated that applicant’s deponent and his family had access to his property by means of a season ticket for which they paid which was not renewed, but that no access was ever given to applicant. Again Malan refers to applicant, being a close corporation.

VI NO SERVITUTE OF RIGHT OF WAY

[13] Applicant's version that a servitude of right of way had been registered over erf 1871, Deneysville in favour of the general public is false. Notarial Deed of Servitude no 309s/62 is quite clearly a servitude of water storage as testified to by Malan in the answering affidavit as is evident from the relevant document attached as annexure "PM1".

[14] It is respondents' case that applicant willingly misled the court in order to obtain the interim relief and that applicant brought the application with full knowledge of the contents of Notarial Deed of Servitude no 309s/62 which is not a servitude of a right of way, but a servitude of water storage. Therefore the rule *nisi* should be discharged, the application dismissed and a punitive costs order on the basis as between attorney and client be granted.

VII MANDAMENT VAN SPOLIE

[15] There is no doubt that applicant, its deponent and its attorney presented incorrect facts to the court. However applicant in essence relied upon the mandament van spolie in so far as it alleged that it (referring to its deponent and its other members), and before them the previous owner and his wife, had undisturbed access to the Vaal Dam through the motor gate situated on the border of erf 1871, Deneysville. Reliance on a servitude of right of way was totally unnecessary if applicant was in a position to make out a proper case to meet the requirements of the mandament van spolie.

[16] In order to succeed with the mandament van spolie an applicant must allege and prove the following two requirements:

16.1 that he was in peaceful and undistubed possession of the object;

16.2 that he was deprived of possession unlawfully.

See: **Yeko v Qana** 1973 (4) SA 735 (AD) at 739 E and C G van der Merwe, **Sakereg**, 2nd ed, p 129 and further.

[17] The Constitutional Court summarised the applicable principles pertaining to the mandament van spolie in a recent judgment, to wit **Nggukumba v Minister of Safety and Security** 2014 (5) SA 112 (CC), and I quote paras [10] - [13]:

> "[10] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.
>
> [11] .....
>
> [12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches

> of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.
>
> [13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. ..... All that the despoiled person need prove is that—
> (a) she was in possession of the object; and
> (b) she was deprived of possession unlawfully."

[18] The right to the use of a road or access path qualifies for purposes of possession. See: **Nienaber v Stuckey** 1946 AD 1049 at 1056. Exclusive possession is not a requirement and it is not necessary that the road or path is used daily. See also: **Willowvale Estates CC and Another v Bryanmore Estates Ltd** 1990 (3) SA 954 (W) at 956H and further.

[19] The legal principles are clear. Very few defences can be raised. The pupose is clear: *Spoliatus ante omnia restituendus est*, i.e. applicant's possession must be restored first and foremost and thereafter the dispute as to the legality of any right relied upon could be considered. Refer again to **Willowvale** *loc cit* where the court dismissed a counter application.

[20] In so far as applicant mentioned the servitude of right of way, but it clearly relied on the mandament van spolie, the matter should be dealt with as in **Gowrie Mews Investments CC v Calicom Trading**

54 (Pty) Ltd and Others 2013 (1) SA 239 (KZD) and **Nienaber v Stuckey** *loc cit.*

[21] In **Fischer and Another v Ramahlele and Others** 2014 (4) SA 614 (SCA) the court found at 624I that in order to succeed with the mandament van spolie, the applicant must prove that his possession was stable and of sufficient duration.

[22] The issue to be considered is whether applicant has made out a proper case in order to succeed with the mandament van spolie. I have already shown that applicant incorrectly relied on a servitude of right of way. However, it needs to be established whether, notwithstanding such wrong allegation, a case has been made out for the rule *nisi* to be confirmed.

VIII CONSIDERATION OF FACTUAL DISPUTES

[23] A court should adjudicate factual disputes in application procedure having regard to the well-known **Plascon-Evans Paints** *dicta* recently approved and considered in more depth in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA). I quote from paras [12] and [13]:

> "[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in Ripoll-Dausa v Middleton NO 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

IX EVALUATION OF THE EVIDENCE AND APPLICABLE LEGAL PRINCIPLES

[24] I shall now proceed with an evaluation of the evidence in the light of the authorities and the submissions of counsel.

[25] It is stated in paragraph 11 of the founding affidavit on behalf of applicant that it as owner of the aforesaid properties, and its members, to wit the following Fletchers, Derick George, Jasen, Linda Louise and Tyronne, have continually, regularly, openly and without resistance or protest exercised access to a slipway on the Vaal Dam through a motor gate situated on the boundary of erf 1871, Deneysville, in particular the portion known as Pierlaan. Malan made a serious concession in paragraph 9.2 of the answering affidavit when he stated the following in response to applicant's deponent and other members' access to the Vaal Dam through the particular motor gate:

> "9.2 I do however confirm that although the applicant and the members of applicant had access as alleged to the Vaal Dam, such access does not grant a right of way and does not grant any rights in favour of the applicant to gain access to a slipway on the Vaal Dam through the motor gate as alleged."

This concession should really be the end of the matter especially as far as proof of the first requirement of the mandament van spolie is concerned, but I shall deal with other aspects as well.

[26] It is applicant's case that Malan locked the motor gate and parked

an excavator (back actor) in front of the gate to deny access to the Vaal Dam to applicant, its deponent and other members. This occurred on 20 February 2015. Applicant clearly regarded this as spoliation. Malan admitted that the excavator was parked as indicated by applicant, but denied the remainder of the contents of paragraph 20 of the founding affidavit. In paragraph 21 applicant's deponent stated that he had enquired from Malan why he did that whereupon Malan replied that he caused the motor gate to be locked and the excavator to be placed in front of it so as to deny applicant and its members access. In his answering affidavit Malan merely denied the contents of this paragraph. This is not only a bare denial, but also false.

[27] Applicant refers to an e-mail from Linda Fletcher's email address dated 3 March 2015 wherein she requested Malan to reconsider the dispute and mentioned the following:

> "In regards to our access to the water directly in front of our stand 259, Deneysville, denied by you; …"

Malan responded on 4 March 2015 as follows:

> "Good day Linda,
> I am sorry, but access through the public parking in front of your house to our property is denied, as it compromises our security, and you let anybody to our property without asking permission. I shall grant you access only through our resort's front gate and only on our standard conditions, payments and rules."

Malan's version in this regard is that applicant wished to gain

access over his property to which it has no right. Applicant's version that Malan's response constituted an unequivocal admission that he had spoliated applicant and its members/beneficiaries is met by a mere denial. The Vaal Dam is clearly visible on the relevant photographs, but notwithstanding this, Malan's version is that there is no access to the Vaal Dam via the access route alleged by applicant. In paragraph 28.2 of his answering affidavit Malan stated the following:

> "The fact that the applicant had access to the Vaal Dam over a portion of land referred to as "public park", is no clear right to such access. Such right to access does not exist and there is also no right to obtain access as requested by the Applicant."

[28] Me Lisa Kruijer, the previous owner of the properties which now belong to applicant, confirmed under oath that she had access via the motor gate and along the aforesaid pathway to the slipway on the Vaal Dam for approximately ten years which access she exercised and enjoyed openly, regularly and without protest and objection. Malan responded as follows in paragraph 16 of the answering affidavit to this version:

> "The contents hereof are noted but it clearly once again does not grant any right in favour of the beneficiary properties or any person."

He mentioned in paragraph 8.2.1 of the answering affidavit that Mrs Lisa Kruijer and her late husband had access from their properties "because of a temporary arrangement between her late husband and I, and then only via a small gate." This is in direct conflict with Kruijer's version and Malan failed to indicate where the so-called small gate

was located.

[29] Malan's version that he did not lock the gate or caused it to be locked is far-fetched and untenable. His denial must be seen in light of his very next averment in paragraph 29.2 of the answering affidavit to the effect that when the interim order was obtained he opened the entrance. Whether or not it was locked, access through the gate was denied bearing in mind the parked excavator. There is no reason not to accept applicant's version that the gate was in fact locked although this is immaterial to the outcome of the application.

[30] Malan referred in paragraph 8.2.4 totally out of context to a new motor gate in the fence of erf 1884 apparently erected by applicant and which it intended to use. This is irrelevant to the present dispute. As mentioned, Malan made several concessions in support of applicant's case, but many times he made bare denials. Where there are factual disputes, save for the existence of the servitude, I am satisfied that Malan's version should not be accepted. He did not play open cards and his version should be rejected as improbable to the extent that it is untenable and/or false. I therefore accept applicant's version as supported by Mrs Kruijer. I am satisfied that application has made out a proper case for the relief claimed and that the rule *nisi* should be confirmed, save for the costs issue which shall be dealt with in the next paragraph.

X ***EX PARTE*** **APPLICATIONS**

[31] Applicant made it clear in paragraph 19 of the founding affidavit that it did not seek any determination by the court pertaining to the

ownership of the various properties or the rights of the respective parties to the properties, specifically referring to the servitude of right of way, but that it merely wanted to obtain relief in terms of the mandament van spolie. However, fact of the matter is that applicant made a serious misstatement and in so doing did not comply with the obligation of observing utmost good faith expected when orders are sought *ex parte*. I cannot find that it was done with a fraudulent motive or *mala fide,* but a culpable remissness is apparent. See **Schlessinger v Schlessinger** 1979 (4) SA 342 (W) at 348I – 349B and **National Director of Public Prosecutions v Basson** 2002 (1) SA 419 (SCA) at para [21]. The reliance on a servitude of right of way that, unknown to the presiding judge did not exist, might have persuaded him to grant urgent relief *ex parte* in circumstances where he might have insisted on service of the application papers if he was aware of the true facts.

[32] In certain circumstances a court may even discharge a rule *nisi* obtained *ex parte* based on the failure by the applicant to withhold or suppress material facts or making material misstatements. *In casu* I am satisfied that this is not such a case although I am of the view that applicant should be penalised to show my displeasure for making false allegations by not allowing it its full costs.

[33] Bearing in mind all the circumstances and the warnings sounded too often to litigants who wish to burden the court rolls with urgent applications without obtaining true facts and/or correct information beforehand, I am of the view that applicant should only be entitled to 50% of its party and party costs and that is the order I intend to make.

XI ORDER

[34] Therefore I make the following order:

The rule *nisi* of 2 April 2015 is confirmed on the basis that respondents are ordered to pay 50% only of applicant's party and party costs of the application, jointly and severally, the one to pay the other to be absolved.

_____

J. P. DAFFUE, J

On behalf of the applicant: Adv. M.C. Louw
Instructed by:
Matsepes Inc.
BLOEMFONTEIN

On behalf of the respondent: Adv. C. Snyman
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