



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3814/2020

In the matter between:

VAUGHN VICTOR

1st Applicant

MARITA MAGDALENA CATHARINA VICTOR

2nd Applicant

And

WONDERHOEK FARMS (PTY) LTD

Respondent

HEARD ON: 05 NOVEMBER 2020

JUDGMENT BY: DANISO, J

DELIVERED ON: 18 FEBRUARY 2021

- [1] The parties in this matter have been embroiled in serial litigations spanning from 2014.¹ All the disputes arise from their business relations.
- [2] The respondent (referred to as “*the third respondent*” by the parties) is the owner of twelve farms. Farm Jammer Bergsdrift, Aanvang 1, Einde, Erfdraai, Nantes, Riverside situated in the district of Wepener in the Free State and farm Klip Plaat, Valkfontein, Kalf Fontein and three portions of farm Morgezon Zon situated in the Eastern Cape.
- [3] The first applicant is an un-rehabilitated insolvent and a former director of the first respondent’s company Rohallion farms through which the respondent’s farming operations was conducted. The second applicant is the spouse of the first applicant. At all material times hereto the applicants were in occupation of the farm Aanvang 1 (hereinafter referred to as “*the farm*”) since 2005.
- [4] On 08 June 2020 the respondent and the trustees of the applicants’ liquidated trusts launched an urgent application against the applicants under case number 1634/2020 for an order granting the respondent access to the farm in order to prepare and maintain firebreaks on the farm in terms of Section 12 of the *National Veld and Forest Fire **Act 101 of 1998***. Chesiwe J granted the order (“*the court order*”) on the following terms:

¹ In case number 5049/2014 the first respondent sued the applicants for the re-transfer for the farms to the first respondent on the basis that the applicants had transferred the said farms to the applicants’ trusts without the knowledge and consent of the first respondent. In 5405/2014 The first respondent instituted proceedings against the first applicant and his trusts for rendering a statement of account and debatement thereof for R110 000.00 owed to the first respondent.

“2. Pending the final determination of the application dated 24 March 2020 by the First and Second Respondents inter alia against the First, Second and Third Respondents under case number 5049/2019:

2.1. That the First, Second and Third Applicants have undisturbed access to:

2.1.1. portion 2 of the Farm Jammerbergsdrift 540, Wepener, Free State Province;

2.1.2.the Farm Aanvag 1, Wepener, Free State Province;

2.1.3. the Farm Einde 241, Wepener, Free State Province;

2.1.4. the farm Erfdraai 243, Wepener, Free State Province;

2.1.5.the Farm Nantes 242, Wepener, Free State Province;

2.1.6.the Farm Riverside, Wepener, Free State Province;

(hereinafter referred to as the farms and /or properties)

As depicted on the yellow portion of annexure “A” annexed to the notice of motion, in order for the First, Second and Third Applicants to comply with and to prepare and maintain firebreaks on the said properties pursuant to Section 12 and Section 14 of the National Veld and Forest Fire Act 101 of 1998 at all reasonable times;

2.2. That the First and Second Respondents be interdicted, restrained from interfering with the First, Second and Third Applicants’ access to the said farms in order to maintain the firebreaks on the farms.

2.3. That the access and/or presence of the First, Second and Third Applicants at the farms and/or properties will not interfere with the possession of the said farms and/or properties by the First and Second Respondents.

3. The First, Second and /or Third Applicants are ordered to notify the Respondents' attorneys, Willers Attorneys at 21 Walter Sisulu Road, Park West, Bloemfontein in writing 24 hours prior to the First and/or Second and/or Third Applicants or their representatives attending to the said farms and /or properties;

4. Costs of the application is to be reserved for the adjudication under case number 5049/2019 under part B thereof."

[5] In this matter, the applicants launched an urgent application against the respondent on 07 October 2020 seeking a spoliation order. It was the applicants' case that the respondent has contravened paragraph 2.3 of the court order in that the respondent and all those acting on instruction of the respondent have interfered with the applicants' possession of the farm and all the buildings. The respondent and all those acting on instruction of the respondent must be ordered to immediately restore full and undisturbed possession of the farm Aanvag and all buildings situated thereon to the Applicants; be declared to be in contempt of the said order; be called upon to advance reasons why they should not be incarcerated for a period not exceeding 90 days for contempt of court and to pay the costs of the application on attorney and client scale.

[6] On 16 October 2020 the matter served before Reinders J who struck the application from the roll due to lack of urgency.

Application to file a further affidavit

- [7] At the hearing of the matter the respondent sought leave to file a further affidavit. It was the respondent's submission that the purpose of the said affidavit was to place before court facts on which the respondent contends that there has been a non-joinder of the parties who have a direct and substantial interest in the relief sought by the applicants, specifically with regard to prayer 3 and 4 of the notice of motion.
- [8] Furthermore, except for the respondent, the other alleged contemnors are not identified, the applicants have merely made reference to "all those acting on instruction of the respondent" without identifying those persons. It was contended by counsel for the respondent Mr Kloek that these unidentified individuals who are in terms of prayer 3 and 4 of the notice of motion to be declared to be in contempt of court and should thus come to court to give reasons why they should not be committed to gaol were not parties in the proceedings in which the said order was granted.
- [9] The application was not opposed except for the submissions made from the bar by the applicants' counsel. He was of the view that the application was unnecessary as the allegations pertaining to non-joinder were already alluded to in the respondent's answering affidavit page 14, paragraph 23 and page 15 paragraph 68. The submission of this additional affidavit will not have any effect on the applicants' case.
- [10] Ordinarily only three sets of affidavits are filed in Motion proceedings. The court has a wide discretion to allow the filing of

further affidavits if good cause is shown by an applicant (*the respondent in this matter*) by providing a valid explanation why the further affidavit should be permitted and that the other party will not be prejudiced thereby.

- [11] Having regard to the litigious history of the parties, the facts that no prejudice will be suffered by the applicants if the additional affidavit is admitted, it was my firm view that it would be in the interest of both the parties that I apply my discretion in favour of the respondent and grant leave for the filing of the further affidavit for the application to be progressed. I accordingly granted leave for the filing of the additional affidavit.

Non-joinder

- [12] In its answering affidavit the respondent raised a point in *limine* objecting to non-joinder by way of necessity. It was argued by counsel for the respondent that the unidentified persons who are simply referred to as “*all those acting on instruction of the first respondent*” against whom the order is sought must be joined to the proceedings as no order can be made against unidentified individuals. The unidentified individuals in these proceedings were not parties in the court order alleged to have been violated.
- [13] The orders prayed for in the notice of motion will thus amount to *res judicata* against these individuals as there is no rule *nisi* calling upon them to give reasons why they should not be found in contempt of court instead they must give reasons why they should

not be incarcerated. Essentially, the applicants require that these unidentified persons be sentenced to gaol without having been found guilty of the alleged offence that they are accused of having committed. Until they have been granted an opportunity to file their affidavits in response to these allegations, no order can be granted against them. The applicants were aware of the identity of the people who accessed the applicants' farm as they did so in terms of the court order² by notifying the applicants in writing of the date on which the farm was to be accessed and by who. *Annexure "AA23"* of the respondent's answering affidavit, is a copy of the letter dated 28 September 2020. In the said letter, the respondent informed the applicants' attorneys that the respondent will be inspecting the farm on 30 September 2020 and the inspection will be carried out by Messrs Derek Urquat (the director of the first respondent), Jaco Kotze and Cloete Buys together with the attorneys if so required.

[14] By the time the applicants launched this application they were well aware of the identity of the persons who were at the farm and allegedly contravened the terms of the court order. The names of those persons were also mentioned in the respondent's further affidavit at page 8 paragraph 15.1 to 15.10. The applicants still failed to join them in these proceedings.

[15] The application must therefore be postponed *sine die*, the applicants be ordered join those persons and pay the costs occasioned by this postponement.

² Paragraph 3.

- [16] On the other side, the applicants' case was that of confusion. Mr van Rensburg countered that the objection of non-joinder was merely an opportunistic attempt by the respondent to delay the finalization of the matter. It was not necessary. He argued that the respondent was a party in the proceedings which resulted in the court order. The individuals who accessed the farm did so on his instructions therefore they were aware of the terms of the order.
- [17] He then argued that the applicant could not identify and join the individuals who accessed the farm as their details were only known to the respondent. The respondent had refused to provide the details to the applicants. It was also his contention that the notice of motion can be amended to the effect that prayer 3 refers to those people identified at paragraphs 23 and 68 of the respondent's answering affidavit and paragraphs 15.1. to 15.10 of the further affidavit.
- [18] The point in *limine* must accordingly be dismissed with costs.
- [19] It is tested law that joinder is necessary if the party sought to be joined would be prejudicially affected by the judgment. In *Judicial Service Commission and Another v Cape Bar Council and another* **2013 (1) SA 170 (SCA)** the court held at par 12:
- "It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest*

which may be affected prejudicially by the judgment of the court in the proceedings concerned.”

- [20] I was referred to *Matshabeng Local Municipality v Eskom Holdings Limited and 4 others* **2018 (1) SA 1 (CC)** by Mr Kloek and I'm persuaded that the *Matshabeng* matter sums up the issue of contention succinctly in paragraph 92, namely that:

“No court can make findings adverse to any person’s interests without that person being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position and prepare themselves adequately in the knowledge that there are personal consequences...”

- [21] The above confirms that no order can be made against a person who has not been cited in the proceedings. That would be offending the *audi alteram partem* rule which is a fundamental principle of our law.

- [22] In the circumstances, I hold that the respondent’s objection is well founded and it is accordingly upheld. I see no reason why costs should not follow the result.

Order

- [23] I make the following order:

- (a) The application is postponed *sine die* pending the joinder of the necessary parties by the applicants.
- (b) The applicants to pay the respondent's costs jointly and severally one paying the other to be absolved.

Dated at **BLOEMFONTEIN** on this the **18th** day of **FEBRUARY 2021**.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. Janse van Rensburg

Instructed by: Willers Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondent: Adv. Kloek

Instructed by: MDP Attorneys

BLOEMFONTEIN