IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 16980/2015

A908/2015

12/5/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED. ✓

12/5/17 ..... DATE

..... SIGNATURE

In the matter between:

DOTCOM TRADING 849 CC **APPELLANT**

And

RAND WATER **RESPONDENT**

JUDGMENT

Fabricius J,

1.

This is an appeal against the order made by Potterill J on 24 March 2015, by which she dismissed with costs an urgent application brought by the Appellants for hearing on 17 March 2015.

2.

The relief sought was that Respondent be ordered to restore the Applicants' possession of Respondent's sludge disposal site *ante omnia* by allowing the Applicant and its contractors undisturbed access to the site for the purpose of conducting its business.

3.

Appellants' claim was based on the principles of the *mandament van spolie* and it merely had to prove possession and dispossession. It is a speedy remedy aimed to protect possession and does not concern the legal right to the property.

See: ***Yeko v Qana 1973 (4) SA 735 (A) at 739.***

4.

All that was required therefore was that Appellant file short affidavits expeditiously on the limited issues of possession and dispossession.

See: ***Willowvale Estates CC and Another v Bryanmore Estates Ltd 1990 (3) SA 954 W at 961.***

5.

In the context of urgency it was alleged that there was expensive equipment on site that could be exposed to the risk of theft and damage.

6.

Instead of limiting itself to the real issues, if that was what was intended, of the relevant relief sought, Appellant provided a lengthy disclosure of how it came into possession of the relevant site. This was however a partial version only. In the Founding Affidavit, which must set out the facts and the evidence, Appellant relied on an agreement, which it annexed. It then alleged that it operated its business in terms of this agreement and has complied with all its obligations in terms thereof.

7.

Respondent denied that Appellant had been in possession of the Panfontein site and alleged that no lawful contract had been concluded with Appellant. It averred that the true purpose of the application was to enforce a contractual obligation which did not exist.

8.

It also denied that any equipment belonging to Appellant was on the Panfontein site.

9.

In the Replying Affidavit, Appellant made further detailed and new allegations how the contractual relationship with Respondent came about. It relied on an agreement of cession which has expired.

It also admitted that it was not the owner of the equipment on the particular site.

New facts and grounds for relief may ordinarily not be raised in a Replying Affidavit.

See: ***Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635 H - 636 B.***

10.

In essence, the Court a quo found that the *mandament van spolie* could not be used when contractual rights are disputed or where in effect specific performance of contractual obligations is claimed. It was in my view fully justified in doing so, having regard to the facts put before it by Appellant itself, and the disputes that arose as a result.

See*: **First Rand Ltd T/A Rand Merchant Bank v Scholtz N. O. and Others 2008 (2) SA 503 SCA at 510 B - D.***

The learned Judge therefore held that the validity of possession need not be proven but the nature of the right must be determined to establish whether it is a quasi-possession deserving of protection.

See: ***Impala Water Users Association v Lourens N. O. and Others 2008 (2) SA 495 (SCA).***

In this case, the alleged (but disputed) right to possession was based on a contractual arrangement to enter the premises. It was not an incident of possession to use the premises. Here the usage arose out of a disputed contract which was sought to be enforced. This could not be done by way of the *mandament van spolie.*

11.

The authorities relied on by the learned Judge are clear and her reasoning cannot be faulted. She was however also satisfied that spoliation had not been proven, because Applicants' right had not been proven. Reliance was placed on ***National Director of Public Prosecutions v Zuma 2009 (2) SA 277 SCA at par. [26]***, where the following was said: "Motion proceedings, unless concerned with interim relief,

are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities".

See also: ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 - 635.***

12.

The learned Judge also held that Applicant had not shown that it could not be afforded substantial redress in due course. This is a *sine qua non* in most urgent applications, and the Court would have been entitled to have struck the application off the Roll.

13.

Apart from the above it is also abundantly clear that Appellant had introduced substantial and material facts in the Replying Affidavit, which it ordinarily cannot do, as I have said.

Having regard to the facts that need to be proven in spoliation proceedings, Mr J. Cilliers SC, on behalf of Appellant asked us to merely and solely have regard thereto, and to ignore the agreements relied upon by Appellant, and the explanations given in that context. This we cannot do as Appellant's whole cause of action was based thereon. They also explained the nature of the right relied upon.

14.

Respondent contended that quite apart from its lack of merits, the appeal falls to be dismissed on the ground that the relief sought has now become moot within the context of the provisions of Section 16 (2) of the ***Superior Courts Act 10 of 2013***. A Court will not grant an order that will not have a practical result. Whatever agreement Appellant had relied upon, had either been terminated in September 2014, or had been terminated in January 2015 by effluxion of time.

In ***Rundel Cape v South African National Roads Agency [2016] ZASCA 23*** it was again held that a Court may decline to deal with a matter where an order will have no practical effect. The relevant contract herein has expired.

In my view, the provisions of Section 16 (2) (a) (i) of the ***Superior Courts Act*** should be applied to the present facts. A claim to access to equipment has also fallen away, as it has been retrieved by the lawful owner in the mean-time. Ownership of this equipment is not in dispute between the parties. A Court will also not grant an order that has no content and does not have reference to any rights and obligations by parties affected thereby.

See: ***Cordiant Trading CC v Daimler Chrysler Financial Services 2005 (6) SA 205 SCA at par. 16.***

In the present instance, no-one would know what the parties' rights and obligations would be if prayer 2 of the Notice of Motion were to be granted.

15.

In the result, the following order is made:

The appeal is dismissed with costs, including costs of two Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

I Agree

JUDGE N. RANCHOD

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

I Agree

JUDGE S. P. MOTHLE

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

12 MAY 2017