**IN HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: 3537/2016P**

**In the matter between**

**ROLAND IVAN DRIEMEYER** **APPLICANT**

**And**

**IVAN HERMAN LYNNVIE DRIEMEYER** **RESPONDENT**

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**JUDGMENT**

**Date Delivered: 01 July 2016**

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**MBATHA J**

[1] On 14 April 2016 I heard an urgent application whereby I granted the following order:

> '1 This application is to be heard as one of urgency and that the Rules pertaining to services of these papers in terms of Rule 6(12) be and are hereby dispensed with.

2 The respondent be and is hereby directed to allow the Applicant, its legal representatives and expert access to the farm described as Portion 2 of the farm K…. No 1…… held by Deed of Transfer No T…… also known as the farm R…….. situated in the district of W……..

3 The Respondent be and is hereby directed to allow the Applicant together with its legal representatives and experts access on the farm R…… on dates and times determined by the Applicant's Attorneys, which dates and times would be conveyed to the Respondent's Attorneys on 48 hour notice prior to the allocated dates and times.

4 The Respondent is to pay the costs of the application on the party and party scale.

5 This order is suspended for a period of two (2) weeks, up and until 28 April 2016.'

The respondent has since brought an application for leave to appeal which was argued before me on 21 June 2016.

[2] The applications for leave to appeal are now governed by the provisions of Section 17(1) of the Superior Courts Act[1] which provides as follows:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

*(a)* (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

*(b)* …'

[1] Act 10 of 2013

The Superior Courts Act has raised the bar regarding the required standard for granting of applications for leave to appeal. The court in *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others*[2] has stated as follows:

> 'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another will differ from the court whose judgment is sought to be appealed against.'

[3] The effect of the judgment that this court granted on 14 April 2016 is of a final nature only in so far as granting the applicant in the main application the relief sought. The relief sought satisfied the requirements of a final interdict as stated in *Setlogelo v Setlogelo,*[3] whereby the applicant has to establish a clear right, injury actually committed or a reasonable apprehension of harm and the absence of any other remedy.

[4] The respondent's grounds of appeal are as follows:

[4.1] That the respondent has failed to establish a clear right as a prerequisite for a final interdict, as another court can come to a conclusion that the respondent should not be afforded 'some reasonable access when required';

[4.2] That the applicant failed to make out a case that an injury was actually committed or that there is a reasonable apprehension of injury as it relied on unsupported hearsay evidence in its founding affidavit in that:-

[2] LCC14R/2014, (an unreported judgment delivered on 3 November 2014)
[3] 1914 AD 221

(a) the respondent has been advised and verily believes that the applicant is contravening the provisions of Sections 21(a), 21(b), (21(c) and 21(i) of the National Water Act;[4]

(b) that he has reason to believe that the applicant contravenes the provisions of the National Environmental Management Act 107 of 1998 ('NEMA') as he had not obtained authorisation to construct water works in the Kholisa River, the tributary of the Little Tugela River;

(c) that the applicant has constructed a dam wall across a perennial river, and from where he releases water to run along the river to a weir constructed by the applicant in the river on the respondent's farm, from where water is finally reticulated to other dams on the farm and used for irrigation.

The respondent believes that this constitutes transgressions of the Water Act and NEMA, which conduct the respondent believes to be unlawful. The respondent also states that he had been informed by the Department of Water Affairs that even if the irrigation on the farm has been registered, it could be unlawful; and

(d) That it has recently come to his attention that the actions conducted by the applicant on his farm may be unlawful.

[4.3] That another court may come to a different conclusion regarding the factual findings made by this court, in that the respondent is not granted access at dates and times to be arranged with the applicant's attorney, but rather on the dates to be arranged with the respondent's attorney at the applicant's election and discretion on 48 hours' notice;

[4.4] The appeal is also based on the lack of urgency of the matter. It was submitted that it lacked that degree of urgency for the short service made by the applicant.

[4] Act 36 of 1998

[5] The application for leave to appeal is opposed by the respondent.

[6] I previously ruled that the application was urgent and that the applicant was entitled to the relief sought.

[7] I will first deal with the issue of urgency. The applicant filed a five page affidavit opposing the application on the basis that he needs time to deliver an answering affidavit. The application papers had been served on his attorneys of record and his gardener on 7 April 2016. He had been away since 5 April 2016. The gardener handed over to him the application papers on 9 April 2016. He contacted his attorneys on 11 April 2016 and consulted with counsel on 12 April 2016 from 14h00 till after 17h00. He effectively spent three hours in consultation with counsel. The matter was to be heard on 14 April 2016, two days after the consultation.

[8] He filed an opposing affidavit to the application whereby he selectively dealt with certain issues on the merits of the application, inter alia, that the respondent had not been specific about when certain knowledge came to his attention, that the applicant has had access to the farm on numerous occasions for other purposes and that the respondent was aware of the extent of his farming operations and water usage on the farm.

[9] He averred that he was entitled to normal time limits in terms of the Uniform Rules of Court to file his answering affidavit. He also stated that he was requested to furnish further information and documents to his legal representative, but does not

state what documents he was required to produce. This affidavit was commissioned in Winterton on 13 April 2016.

[10] In addition to the reasons that I gave when I delivered the *ex tempore* judgment, I wish to state further that this court still holds the view that he had ample time to file an answering affidavit as he was in a position to file an opposing affidavit. The respondent was only seeking reasonable access to the farm for a specific purpose which does not require him to furnish any documents to any attorney. He personally has the knowledge relating to the application.

He chose to selectively deal with certain issues raised in the founding affidavit. His conduct is dilatory as demonstrated by the correspondence exchanged between the parties prior to the hearing of the application in which he displayed an uncooperative attitude to a request by the applicant's attorneys.

I find that he was in a position to have filed a detailed answering affidavit if he wished to do so and give the matter the urgency it deserved in the circumstances.

[11] It is trite that a lessee is entitled to full use and enjoyment of the property during the full term of the lease, what is termed the "*commodus usus*" of the property. A lease is also a contract with reciprocal obligations. The lessee enjoys the full use of the property, but he must also comply with the terms of the contract in that rent needs to be determined. This is one of the reasons that the respondent sought access to the property. In the opposing affidavit the applicant herein did not dispute that.

The landlord has a right to enter and conduct routine inspections, but only after arranging with the tenant to do so at reasonable times, and with reasonable notice. The tenant may not unreasonably deny the landlord access to inspection. If it is unreasonably withheld, he can approach the court.

The applicant in the main action did not just rush to court, but had sent email requests for permission to the respondent's attorneys in the main action as early as 26 February 2016 requesting access to the farm, after having been chased from the farm. These emails are marked urgent, indicating that the urgency did not arise as at the date of filing the application but at the beginning of the year. The applicant in this application flatly refused these requests. In the meantime, transgressions were continuing on the farm.

[12] In support of its case the court was referred to *Soffiantini v Mould*[5] by the applicant which is considered to be an authority in such cases. In that case the court held that the fact that a landlord may have a reasonable purpose for entering leased premises does not entitle him to do so without the permission of the tenant.

In this case the landlord stated the purpose for his request to enter the premises, but this was never considered by the applicant.

[13] The respondent cannot be said to be speculating about the transgressions on the premises. He acts as a reasonable man would be expected to in the circumstances. He wants to investigate these himself with the assistance of experts. He has a reasonable apprehension of harm. Pothier in *Letting and Hiring* paragraph 73 states that there are circumstances in which a lessor is entitled to claim the right to enter for instance, when he reasonably requires such right in order to inspect the property or to make repairs the leased property.

The submission made on behalf of the applicant that he can report the unlawful activities in terms of NEMA is of no assistance to the respondent if the extent thereof is not ascertained. The request for access by the respondent is two-fold, namely to determine rental and to check the extent of the unlawful activities, with the use of experts. In the event that the breaches of the law are left to continue unabated like

[5] 1956 (4) SA 150 (E)

the building of a dam in breach of the Water Act, the respondent would be liable as the owner of the land.

[14] Pothier's *Treatise on the Contract of Letting and Hiring* at page 34 states as follows:

> 'It is not a disturbance of the lessee's enjoyment if the lessor goes himself, or sends others on his behalf, to inspect, nor is it a disturbance when he goes himself or sends others to hunt, provided he causes no damage to the fruits: for hunting is not included in a farm lease, and indeed cannot be, as we have seen above.'

[15] I also agree with the views expressed in *Madrassa Anjuman Islamia v Johannesburg Municipality*[6] where the court stated as follows:[7]

> 'For the question after all is one of construction, and if a Court should be satisfied from the language of the Legislature that the intention was that the special remedy provided by the Act should be not in substitution of but in addition to the common law remedies, then no doubt effect must be given to that intention.'

In the very same case the court went on further to say:[8]

> 'To exclude the right of a Court to interfere by way of interdict, where special remedies are provided by Statute, might in many instances result in depriving an injured person of the only really effective remedy that he has, and it would require a strong case to justify the conclusion that such was the intention of the Legislature. In the present instance it is clear that the remedies provided by the Act might be successfully evaded.'

In the light thereof I still find that the respondent had no alternative remedy save to approach this court.

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[6] 1917 AD 718
[7] At 723
[8] At 725

[16] In consideration of a request for costs for both counsel employed by the respondent I have taken into account the following in the exercise my discretion to award costs to both counsel. An important principle of the law was argued. It was ‘a wise and reasonable’ precaution that was taken by the respondent to engage the services of senior counsel when faced with a litigant who could not grant him a concession or a reasonable request even after obtaining a court order to that effect. The circumstances of the case were exceptional in nature, as the relief sought by the respondent could have been considered by the applicant, without forcing the respondent to resort to a legal process.

The application for leave to appeal is dismissed with costs, including costs of two counsel.

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**MBATHA J**

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| Date of hearing | : | 21 June 2016 |
| Date delivered | : | 01 July 2016 |

**Appearances:**

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| For the Applicant | : | Adv. MG Roberts SC<br>Adv E Roberts |
| Instructed by | : | Calitz Crockart & Associates<br>19 Village Road<br>Kloof<br>3610<br>C/o Austen Smith & Company<br>191 Pietermaritz Street<br>Pietermaritzburg<br>3201 |
| For the Respondents | : | Adv C Pretorius |
| Instructed by | : | Tatham Wilkes Inc<br>200 Hoosen Haffejee (Berg( Street<br>Pietermaritzburg<br>3200 |