

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD IN RANDBURG

CASE NUMBER: LCC22/2010

DECIDED ON: 14 April 2010

In the matter between:

WAGENDRIFT SAFARIES (PTY) LTD	Applicant
and	
M P SHLEMEMBE	First Respondent
THE SHELEMBE COMMUNITY	Second Respondent

JUDGEMENT

MIA A J:

[1] On the 3 March 2010 I granted the order below and undertook to give reasons later.

1. That the respondents be ordered to forthwith remove the structures erected on the farm Warmbad and to vacate the farm Warmbad.
2. That the Respondents are interdicted and restrained from entering the farm Warmbad.
3. There is no order as to costs.

- [2] The reasons follow hereunder.
- [3] The applicant approached this Court on an urgent basis for a spoliation order that the respondents be ordered to remove structures erected on the farm Warmbad and to vacate the farm Warmbad. Further that the respondents be interdicted and restrained from entering the farm Warmbad as well as an order for costs.
- [4] The applicant in the present matter is a company duly registered and incorporated. The applicant is the owner of a number of farms around the remaining extent of the farm Warmbad (hereafter called “the farm Warmbad”). The applicant leases the farm Warmbad from the state. The applicant operates a game reserve on its own properties surrounding the farm Warmbad and the farm forms part of the area on which the game reserve is operated at present. The applicant took over the lease from the previous lessee. The lease is renewed annually and rental is paid on an annual basis. The applicant states that it has been in peaceful and undisturbed possession to date.
- [5] The first respondent is the representative of the second respondent. The second respondent is an association of persons contemplated in the Restitution of Land Right Act 22 of 1994 (hereafter the “Restitution Act”). The second respondent lodged a land claim with the Regional Land Claims Commissioner (hereafter the “RLCC”) in October 1998. The farm Warmbad forms part of the land claimed by the second

respondent.

[6] To obtain a spoliation order, the applicant must make and prove two allegations, namely:

- 1) that the applicant was in possession of the property and;
- 2) that the respondent deprived him of possession forcibly or wrongfully against his consent²

Possession

[7] The applicant is required to prove possession. This need not be possession in the juridical sense. It is sufficient if the applicant held or possessed the property with the intention of receiving some benefit for himself / itself. This must be accompanied by the physical element of *corpus or detentio*.

[8] The applicant avers that it was in peaceful possession and control over the farm Warmbad until the first respondent threatened to invade the farm Warmbad in order to occupy it. The threats were made in June, July and August 2009 respectively. In January 2010 the first respondents are alleged to have broken the lock on the entrance gate and commenced building structures. The applicant's possession in terms of the lease agreement was undisturbed until the alleged occupation by the respondents.

[9] The respondents deny that the applicant has a lease whether written or

² Reek v Mills and Others 1990 (1) SA757 at 755 E-J.

oral. The respondent refers to the correspondence from the Mkhondo Municipality in reliance of their denial of a lease agreement pertaining to the farm Warmbad. The respondents however do not deny that the applicant was in undisturbed possession of the property.

[10] The respondents further deny that they invaded or threatened to invade the remaining extent of the farm Warmbad. The respondents aver that they regularly entered the farm Warmbad to visit grave sites on the property prior to June 2009. They aver further that they were refused access to the property to visit the graves after June 2009 for reasons only known to the applicants' manager. The respondents state that their entry to the property was only to visit the graves of their ancestors. They concede that a hole was dug and a structure erected but submit that their actions do not constitute a land invasion. On the respondents version they entered the property and erected structures after June 2009 when they were refused entry.

[11] Prior to June 2009 the respondents visited the farm Warmbad regularly and aver that they notified the applicant on all occasions that they wished to have access to the applicant's properties and the remaining extent of the farm Warmbad to pay respects to their ancestors in keeping with their culture.³ The respondent's access was never refused until June 2009, whereafter the applicants' game reserve manager refused access.⁴ The statements indicate that respondent was aware

³ Respondents answering affidavit, paragraph 27

⁴ Ibid, paragraph 28

that the applicant exercised control over the remaining extent of the farm Warmbad. The respondent's knowledge or acceptance of the existence of the lease agreement was not necessary for them to accept that the applicant enjoyed possession and control of the property. The respondents answering affidavit confirms that the applicant controlled access to the properties.

Deprivation

- [12] The second allegation the applicant must make and prove is that the respondent deprived him of possession forcibly or wrongfully and against his consent. The applicant states in his founding affidavit that the the first respondent threatened to invade the farm Warmbad in June 2009, July 2009 and August 2009.⁵ The applicants' attorney resisted attempts communicated per correspondence by the Mkhondo Municipality to enable the respondents to gain access to the game reserve which includes the farm Warmbad as indicated in correspondence sent by the applicants' attorneys on 7 January 2010 to the respondents' attorneys, the Regional Land Claims Commissioner⁶ and the Mkhondo Municipality ⁷. The applicant states that the first respondent and members of the second respondent invaded the farm Warmbad. The lock to the entrance gate was broken and holes were dug. The building of structures commenced; one structure was completed and further holes were dug. The applicant attaches photo's

⁵ Applicant's founding affidavit, paragraphs 11-14.

⁶ Applicant's founding affidavit, Annexure F

⁷ Applicants' founding affidavit, Annexure G

wherein he identifies the first respondent as well as a notice on the structure which reads 'DON'T TOUCH... IT'S DO OR DIE'⁸.

[13] The respondents indicate that they entered the farm Warmbad to visit graves. They do not deny the erection of the structure or digging a hole but dispute that this act constitutes a "land invasion". The respondents refer to a meeting with the Regional Land Claims Commissioner and the Mkhondo Municipality on 12 February 2010 where it was decided that the Shelembe Community would be granted controlled occupation of the farm Warmbad and that 5 caretakers were allowed on the property and 5 structures be erected.

[14] The respondents make no mention of how they gained access through the locked gate and do not deny the applicants statement that the lock at the entrance gate was broken.

[15] The applicant has placed before this court a lease agreement which provides that the lease runs from 1 April 1994 until March 2004, whereafter it will remain valid until either of the parties terminate it upon sixty days notice in writing. There is no indication before me that this has been done by the Mkhondo Municipality. The Mkhondo Municipality per correspondence dated 18 December 2009 requested access to regravell the road to the farm Warmbad to facilitate the Shelembe Community's access to the farm Warmbad. This request was met with resistance from the applicant who asserted his possession and control

⁸ Applicant's founding affidavit, paragraph 22

of the property.

[16] The defenses admissible in the present application are:

- (a) denial of the facts in issue
- (b) that restoration is impossible
- (c) a lapse of time

[17] The respondent does not deny possession of the property by the applicant or raise the other defenses applicable, rather it denies that there is a lease and that they have deprived the applicant of possession through stealth and that it was without consent.

[18] The lease agreement has been placed before me and appears to be in operation since there was no evidence placed before me proving that it was terminated in writing. The correspondence from the applicants' attorney refusing access to the game reserve⁹ as well as the respondents evidence that they were refused access after June 2009¹⁰ indicate that stealth was required to gain access and that it was without the applicant's consent. The respondents do not deny this.

[19] Notwithstanding the above it must be borne in mind that the respondent's have a right to visit and maintain family graves on land which belongs to another person, once suitable arrangements have been made. This right to visit the property is subject to any reasonable

⁹ Applicant's founding affidavit, Annexure F

¹⁰ Respondent's answering affidavit, paragraph 28

conditions imposed by the owner or person in charge of such land in order to safeguard life, property or to prevent disruption of working operations on the property.¹¹

Acting Judge : Shanaaz Mia

Land Claims Court

Appearances

For the Applicants

Advocate A. De Wit

Instructed by Cox and Partners (Vryheid)

For the Respondents

Advocate L. Sigogo

Instructed by Gilfillan du Plessis Inc.

¹¹ s 6(4) of the Extension of Security of Tenure Act 62 of 1997

