REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO	
(2)	OF INTEREST TO OTHER JUDGES: NO	
(3)	REVISED: YES	
		10/03/2023
.....		.....
SIGNATURE		DATE

CASE NO: 1667/2022

In the matter between:

DROGEN INVESTMENTS CC APPLICANT

and

JACQUES GRUNDLING RESPONDENT

J U D G M E N T

GUMEDE AJ

1. This is an application for a final relief in a form of a mandatory interdict, to prohibit the respondent from demolishing a dam or interfering with water supply from the canal to the dam and dam to applicant's pumphouse. Applicant also seeks to interdict the respondent from interfering with the access road to and from the water supply system within the respondent's property.

BACKGROUND

2. The applicant and respondent are registered owners of neighboring properties which share a common boundary.

3. Applicant contends that its property has no water supply and has to rely on the water obtained from the respondent's property for its water needs.

4. Applicant alleges that in 1997, the previous owner of respondent's property, gave it (applicant) permission to install a pipeline from the dam to a pump house. Applicant's guests and staff, make use of an access road to and from the respondent's property, to attend to the service and repair of the water system which is situated at the respondent property.

5. According to the applicant, several other farmers in the area use the canal road to reach the main road leading to Nelspruit.

6. Applicant alleges that prior to taking transfer in 2022, the respondent informed it that he intended to demolish the dam and prevent anyone from using the access/canal road. Following this information, the applicant instructed its attorneys to send a letter to the respondent "cautioning him against taking the law into his own hands" by demolishing the dam and preventing use of the access road.

7. In response thereto, the respondent wished them luck in preventing him from doing as he pleases with his property.

8. In an email dated 18 March 2022, the respondent gave the applicant 30 days to remove all pipes from the respondent's property and 90 days to remove the driveway.

9. Applicant thereafter approached the court, seeking an interdict to prevent the respondent from interfering with the dam and access road.

10. In response to the application, the respondent raised two points in limine as follows:

    10.1 Respondent contends that there was never an intention on his part to commit spoliation as such, there was no need for this application at all as the matter should have been mediated.

10.2 Respondent also raised material non joinder and contends that applicant failed to join the Minister of Water and Sanitation, the Inkomati-Usuthu Catchment Management Agency and the Friedenheim Irrigation Board, who are the owners of the water canal in the respondent's property with a registered servitude on the respondent's property.

11. The respondent has since abandoned the argument on non-joinder. At hearing of this matter, the respondent submitted that the argument on mediation is not dispositive of the application but addresses the issue of costs.

12. On the question of consent to use the water, the respondent does acknowledge that the previous owner of the property, informed him that he had given permission to the applicant to use the access road to inspect the dam and pipeline. He however alleges that this permission was of a temporary nature and capable of cancellation upon notice as the permission was granted whilst the applicant was sorting out its own water supply from a borehole in its own property. The respondent contends that the balancing dam which supplies the applicant, only fills with water which may from time to time overflow from the canal and could never have been regarded or used as a sustainable water supply for domestic purposes.

13. The use of the road is also said to be a temporary measure to enable the applicant to gain access to the dam and pipeline leading to its property and also allow the

applicant to gain access to its property until it constructs a roadway from the road bordering its property as the property of the applicant is not landlocked.

14. It is common cause that no servitude was ever registered by the applicant over the respondent's property.

ISSUES FOR DETERMINATION

15. This court is required to determine whether the applicant has satisfied the requirements for granting of an interdict.

16. The requirements for a final interdict are trite and were confirmed by Froneman J in the Constitutional Court in the matter of ***Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited***[1] as follows, (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy.

17. It is common cause that various correspondence preceded the launching of this application where it was made clear that the respondent wanted the applicant out of his property and had given it notice to remove its belongings.

[1] 2017 (1) SA 613 (CC), para 8

18. The question therefore becomes whether at the end of the notice period, the respondent intended to take matters into his own hands by unilaterally removing the water supply system as well as the access road situated in his property.

19. When one reads some of the letters written by the respondent, it is not difficult to understand why the applicant would feel threatened that the respondent intended to commit spoliation.

20. Following a communication to the applicant that the respondent intended to terminate its access to the water supply and to the canal road, applicant caused a letter to be sent to the respondent cautioning him not to take the law into his own hands. The respondent responded by saying:

> "***I accept your caution. Good luck. There is no way you will impede my property rights and there is no way for you to force me to rebuild a dam I have instruction to remove.***"

21. In a separate email dated 2 March 2022 (***"JG7"***), responding to a letter from applicant's attorneys in which they had said to the respondent – "***if you had in fact obtained a legal opinion, you would have been well advised not to take the law into your own hands and simply deny our client the usage of the dam and road without due process***" the respondent had the following to say:

> "***I hope for your sake you have informed your client that I have provided notice to them in writing and its from that date. You do realize that is due process? You do realise the arguments you put forward have absolutely no baring or are you billing per letter you send me. In that case I will keep responding to each letter you send me. Good day"*** [sic]

22. On 18 March 2022 in annexure ***"N11"*** to the founding affidavit, the respondent wrote:

> "***Please note that your client has 30 days in which to remove all pipes and 90 days to remove their driveway. After 90 days all access and permission is removed. Your client will not have permission whatsoever to be on the property.***"

23. The above letters from the respondent, in my view, appear as a threat. Indeed any person in the position of the applicant is likely to have believed that at the expiry of the notice period, the respondent intended to demolish the water system without further ado. It is not difficult to understand why the applicant would bring an application for an interdict under such circumstances. However, the story does not end there.

24. Immediately after serving the application for an interdict on the respondent, on 8 April 2022, instead of delivering a notice to oppose the application and filing an answering affidavit, the respondent chose to write a letter to the applicant's attorneys. The relevant parts of the letter read as follows:

> "***[2] our client has been served with the abovementioned application on 7 April 2022.***
>
> ***[4] As confirmed by the applicant in the founding affidavit***
> ***4.1 notice was given by our client on 18 March 2022 of cancellation of the permission provided by our client's predecessor in title for the applicant to use the relevant access road, pipeline and pump station.***
> ***[4.2] the notice period of such cancellation expires 90 days from date of notice, thus on 19 June 2022***
>
> ***[5] it has throughout been the intention of our client to at the expiration of the notice period and in the event of your client refusing to adhere to the notice of cancellation and disputing our client's rights, to approach the court for a declaratory relief, coupled with an interdict enforcing the (then properly declared) rights of our client.***

[6] Pending the outcome of the anticipated action or application for declaratory relief and ruling of the court, our client would have to tolerate and undertake not to interfere with the applicant's use of the relevant access road, pipeline and pump station.

[7] the applicant has also been informed of our client's intention to secure his property by installation of security gate on the road at the boundary of our client's property as he is entitled to do and will the applicant be provided with a remote allowing the applicant continued access pending the outcome of the intended declarator proceedings.

25. As early as 8 April 2022, the applicant was given an undertaking in writing that the respondent had no intention of spoliating the applicant but to apply to the court for a declaratory relief after expiry of the notice period which is said to be on 19 June 2022, in the event that the applicant does not adhere to the said notice.

26. More than a month later, in the answering affidavit, the respondent clarified his position by explaining that in the various correspondence exchanged, he always had the intention of approaching the court. Even if the applicant did not believe such an intention when it initially received those letters, in the letter of 8 April 2022,

cited above, that undertaking is very clear and unequivocal. That undertaking was again repeated under oath in the answering affidavit, as follows:

> "[31.7] ***the applicant is invited to withdraw this unnecessary and meritless application thereby avoiding the respondent to incur costs to oppose an application that was never necessary.***
>
> ***[31.8] my commitment to lawful process, initiated by the first step, being the 90-day notice, is confirmed."***
>
> ***[92] I reiterate that, when 90 day period ends, which will according to my calculation be on or about 16 June 2022, all rights in and to the use of my property by the applicant to the extent that such rights may exists, will lapse.***
>
> ***[93] immediately after 16 June 2022 and should the applicant have failed to remove the relevant waterworks and ceased using the relevant road on Portion 6, I will approach the court for appropriate relief.***
>
> ***[111.3] I reiterate that I never made any threat to take the law into my own hands or to unlawfully interfere with the applicant's access to and use of the dam and pipeline."***

27. Despite the above undertakings, the deponent to the applicant's replying affidavit states at paragraph 3.3 that "***I deny that the respondent has availed himself of any lawful process. He clearly intends taking matters into his own hands. If this were not the case, I humbly submit that he would have and ought to have approached the court for a declaratory order. he has not done so and he does not say he will do so anywhere in his correspondence to the applicant."***

28. The above statement by the applicant is simply untrue. The applicant later contradicts itself by saying at paragraph 22.1 that – had the respondent advised the applicant that he would seek relief from the court in the event that the applicant did not abide by his timelines, I confirm that this application would not have been launched.

29. Although the applicant may have been justified in its interpretation of the respondent's letters to subjectively perceive a threat to its use of the water system and canal (access) road, that justification falls away after the letter of 8 April 2022, where there is an express undertaking to the contrary. Applicant cannot be said to have any apprehension of harm and should not have persisted with this application.

30. An applicant who seeks a final interdict, has to prove existence of a clear right on a balance of probabilities.

31. In this case, whatever right the applicant may have had to access to the respondent's property, was granted by the respondent's predecessor in title and had been lawfully terminated by the respondent.

32. In its attempt to prove a clear right, the applicant relies on the principle of ubuntu and submits that this application concerns the principle of ubuntu which underlies not only our democracy but also the human and constitutional right to water. Applicant accuses the respondent of selfishness and contends that the respondent has not shown any prejudice why this application should not be granted.

33. In ***AB and Another v Pridwin Preparatory School and Others,***[2] the Constitutional Court confirmed that there is no positive obligation on a private individual to provide basic human rights to another.

34. Although the applicant seeks an interim interdict in the alternative prayer, it is not clear what will interrupt the operation of the interim order as no intervening event is stated in the notice of motion or in the founding affidavit. At the hearing of this matter, the applicant submitted that the respondent had since launched proceedings in which the respondent sought a declaratory order. The applicant submitted from the Bar that the interim interdict must run until the determination of that the declaratory relief sought by the respondent That is not the case for the applicant contained in the notice of motion and in any event, as stated above, there

[22] 2020 (5) SA 327 (CC) (17 June 2020) para 178

is no danger or threat to the applicant following the undertaking contained in the letter of 8 April 2022 and the various provisions in the answering affidavit.

35. I am not persuaded that the applicant has proved the existence of a clear right on a balance of probabilities.

36. Nor am I persuaded that after the undertaking in the letter of 8 April 2022, applicant had any apprehension of fear to persist with the application. Despite this conclusion, I am of the view that the applicant was justified in the initial launch of the application and for this reason, I will not apply the trite principle that costs follow the results.

37. In the result, I make the following order:

    1. The application is dismissed.
    2. Each party must pay its own costs.

ZE GUMEDE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 10 March 2023 at 10:00.

APPEARANCES

For the applicant	:	Mr J De Necker
Instructed by	:	WDT Attorneys, Mbombela
For the Respondent	:	Mr LC Rudolph Janse van Vuuren
Instructed by	:	Luneburg & Janse van Vuuren Inc, Mbombela
Date of hearing	:	27 October 2022
Date of judgment	:	10 March 2023