THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 9/7/14

CASE NO: A221/2013

NOT REPORTABLE

In the matter between:

HANS MICHAEL HARRI	First Appellant
SILONQUE (PTY) LTD	Second Appellant
JAN WILLEM BERHNARD ALEXANDER STERK	Third Appellant
PATRICIA STERK	Fourth Appellant
DARNE ROSA JOUBERT	Fifth Appellant
PHILLIP JOSEPH JOUBERT	Sixth Appellant
DUPRETTE CALACA	Seventh Appellant
VINCENT CALACA	Eight Appellant
CAREL FREDERICK ZIMMERMAN	Ninth Appellant

and

MAHLATHINI LANDOWNERS ASSOCIATION (Association incorporated under section 21)	Respondent

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J U D G M E N T

MAKGOKA, J:

[1] The appellants appeal against a judgment and orders of a magistrate in Phalaborwa, in terms of which their application under *mandament van spolie* for the restoration of certain access points to a game reserve, was dismissed with costs. The game reserve is situated in Phalaborwa. The appellants are all either owners of properties in the game reserve or representing companies or trusts owning such properties. The game reserve is managed by the respondent through a Land Owners Association.

[2] All owners of properties in the game reserve are, by virtue of their ownership, members of the respondent. The deeds of transfer make special provision for that. One of the consequences of membership of the respondent is that every owner is subject to the respondent's constitution for the duration of the ownership of the property. Access to the game reserve is restricted and controlled by the respondent. Visitors are required to be identified and to sign in at the main entrance for this purpose.

[3] The main business of the respondent is described in clause 2 of the memorandum of association as being 'to ensure the proper management of the reserve including ... rehabilitation and maintenance of the land, building and maintenance of roads, management of the flora and fauna, providing security for the entire game reserve as well as to regulate access to and from the game reserve and such other task shall be decided by the landowners at their annual general meetings.'

[4] The access points which formed the subject of the application in the magistrate court are the Xihari gate, the emergency gate, and the staff gate. The

Xihari gate is the original access point to the game reserve, and is situated at the south- corner of portion 115. The emergency gate exists at the south-western corner of portion 112 and leads to the right of way servitude over portion 16 (or close to the border between portions 112 and 113. The staff gate is situated close to the border between portions 115 and 84.

[5] The appellants alleged that several people used the staff gate regularly, especially the third applicant (Sterk), who is the manager of several properties on behalf of their owners. It is said that Sterk, in the execution of his duties as a manager, always had a key to open the gate. The gate was also occasionally used by several other people, such as the directors of the companies which own properties on the farm, and contractors of various owners.

[6] The gate also provided access to employees of Eskom who used it on a monthly basis to take meter readings, as well as municipal employees for water meter readings. On a general basis, all the appellants (except appellant 9), together with their family members and guests who visited the game reserve made regular use of the Xihari gate. Employees of the game reserve and private employees of several owners, also used the gate on a daily basis.

[7] There was an earlier dispute between the parties regarding access points. This is the second one. The first application culminated in an order by the magistrate court in Phalaborwa on 27 February 2010 granting a spoliation order against the respondent and its manager, in favour of the third appellant and Xihari African Safaries (Pty) Ltd,[1] in terms of which possession of the Xihari gate was to be restored to the third appellant and Xihari. Subsequent to the court order, on 27 February 2010, a meeting of the directors of the respondent was held, during which it was recorded that the long-term plan was to close the staff gate in the near future.

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[1] Xihari's property was subsequently purchased by the second appellant.

[8] On 26 March 2011, during an annual general meeting (AGM) of the respondent, in which all the appellants were either represented or attended in person, the respondent's rules, regulations, articles of association and the memorandum of incorporation, were amended. I shall revert to the nature and effect of the amendment later in the judgment.

[9] On 16 April 2011, the respondent addressed a letter to the first appellant in which the latter was informed that pursuant to the amendment of the rules, only one entrance to the game reserve was allowed. On 18 April 2011 the first appellant, on behalf of the second appellant, responded to the letter, but did not pertinently join issue with the issue of a single access point as stated in the respondent's letter, but offered the following suggestion in respect of the access point:

> 'Why don't we remove the various properties as stands 112 to 115 and 84 and 85 from the LOA? I would even go as far as approaching the landowners presently situated on 82, 83 and 55 and offer them a swop of the property owned by my daughters; therefore a new fence line could be erected spanding from portion 111 to your own portion 56. Mahlathini therefore after such an exercise, would have its own access which is used presently and Silonque would have its access again as in the old days via Lulekani therefore neither my company or my daughters would have any interest at all in Mahlathini which would stop all unnecessary proceedings between the parties.'

[10] On 29 April 2011 all land owners were informed that in terms of the amended rules and regulations, provision was made only for one access point, and that the staff gate would be locked on Friday 13 May 2011 in line with the amended rules and regulations adopted at the respondent's annual general meeting on 26 March 2011. This was indeed implemented, and the respondent locked the three access points.

[11] On 25 May 2011 the first appellant (on behalf of the second appellant) responded to the notice in writing, and demanded that the respondent remove the locks, failing which another application would be launched. On 27 May

2011 the respondent responded to the first appellant's letter, reminding him that the closure of the gates was pursuant to a resolution of the annual general meeting, during which he was present and participated in the voting process. It does not seem there was any response to the letter.

[12] It was also pointed to the first respondent that the second respondent could not place reliance on the court order of 27 February 2010, as that conferred the rights on the previous owner, Xihari, and not on the second appellant, as the new owner. This latter statement resulted in a written memorandum on 20 June 2011, in terms of which Xihari ceded its right, title and interest in and to the court order of 27 February 2010, to the second appellant.

[13] The appellants launched the spoliation application in the magistrate's court on 9 October 2012. The respondent opposed the application on the basis that its members had decided to do away with the three access points in terms of the amended memorandum of association and the rules promulgated in terms of the memorandum of association.

[14] The application was argued on 1 November 2012. Judgment was reserved and handed down on 21 February 2013, in terms of which the appellants' application was dismissed with costs. The learned magistrate based his judgment mainly on two grounds. First, that the majority of the members of the respondent had decided to do away with the gates, the decision to remove the gates did not amount to spoliation.

[15] Second, the learned magistrate took a view, on the authority of *De Beer v Zimbali Estate Association (Pty) Ltd* 2007 (1) SA 254 (N) and *Shoprite Checkers Ltd v Penborg Properties Ltd* 1994 (1) SA 616 (W) that the applicant sought to protect access to the game reserve through a spoliation application,

which is incompetent. The learned magistrate concluded that, in any event, the keys to the access points were not exclusively possessed by the applicants, but by a multiplicity of parties, which waters down and dilutes the possession.

[16] It is to be noted that the latter point was not raised by the respondent, and neither was it raised by the court for debate during argument. It was therefore raised *mero motu* by the court, for the first time in judgment. The appellants join issue with this. Given the conclusion which I come to, and the order of this judgment, I do not intend to consider the issue in any detail. Suffice it to say that there is nothing in principle barring a court from raising a point *mero motu*[2], except of course, in instances where this is specifically prohibited by statute, e.g. s 17 of the Prescription Act 68 of 1969. However, as it is clear from the authorities[3] that where the issue is raised *mero motu* by the court, the parties ought to be afforded an opportunity to fully canvass and argue the issue. In the present case, the issue was not canvassed or debated with the parties at any stage, and it emerged only in the judgment. This obviously is undesirable and should be avoided.

[17] Before us, as was in the magistrate's court, it was argued that the respondent cannot lawfully rely upon a mandate granted to it by any other person (like the members of the respondent) other than the appellants themselves. The respondents, so is the argument, need to show that the appellants granted the required consent to the respondent. It is thus submitted that there is no such proof.

[18] It was contended that there were no contractual provision between the parties in terms of which the respondent is authorized or permitted to resort

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[2] See for example, *Quartemark Investments (Pty) Ltd v Mkhwanazi & Another* (768/2012) [2013] ZASCA 150 (01/112013) paras [19] and [20].

[3] *Mamabolo v Rustenburg Regional LC* 2001 (1) SA 135 (SCA) para [10]; *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) para [18]

to 'self-help' by removing the gates. In its simplest form, therefore, the point made by the appellants is that the rule which authorises only one access point, does not entail transgression on the appellants' properties and the physical removal of the gates situated on an individual owner's land.

[19] In its opposition, the respondent took two preliminary points. First, that the second appellant had no locus standi because the latter could not claim the rights conferred on Xihari in terms of the court order of 27 February 2010, notwithstanding the purported cession of the rights as stated in para [12] above. It is argued that the cession is void, for the reason that only personal rights may be ceded, and physical possession, which is a factual state of affairs, is not capable of being ceded. The second point is that there has been an excessive and inordinate delay by the appellants in bringing the spoliation application.

[20] With regard to the substantive issue, the respondent contended that its conduct is authorized by a decision of the members of the respondent to do away with the other access points, and to remain with the main gate as the only access point to the game reserve.

[21] When considering the contentions of the parties, it should be borne in mind that the appellants challenge, in the main, a factual finding of the learned magistrate (that there has been a decision taken to allow only one access point). The proper approach to be adopted by a court of appeal is trite and well-settled. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact by the trial court, the presumption is that its conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion,

then it will uphold it[4].

[22] As a point of departure in considering the contentions on behalf of the parties, I find it necessary to determine whether indeed, a decision was taken to allow only one access point to the game reserve. This is because the appellants seem to aver that no such decision was made. The determination of that aspect has an obvious bearing on whether the locking and physically closure of the gates amounted to spoliation.

[23] Earlier in para [8] I referred to the annual general meeting of the respondent held on 26 March 2011. It is during this meeting that the respondent alleges that such a decision was taken. But even a cursory regard to the minutes of the meeting reveals that no such decision was taken. Paragraph 6 of the minutes sets out seven resolutions taken at that meeting. None of them specifically concerns the closure of the gates.

[24] It seems that the respondent relies on resolutions approving the amended articles of association; the amended memorandum of association and the amended rules and regulations, for its stance that there is provision made only for one access point. The minutes are silent as to the contents of the amended documents referred to above. However, that does not mean that such contents do not contain the provision contended for by the respondent.

[25] In paragraph 15 of the answering affidavit, it is alleged on behalf of the respondent that rule 22.3 of the amended rules provides that in order to comply with its duty to secure the game reserve in a manner it deems most suitable, access to the game reserve will only occur through the main gate, and that all landowners and others interested parties are to abide the security protocol laid down by respondent.

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[4] *R v Dlhumayo* 1948 (2) SA 677(A). See also *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W) at 472.

[26] In the replying affidavit, this assertion is not seriously disputed. All what is said on behalf of the appellants is that the rules were adopted to circumvent the obligations arising from the court order of 27 February 2011. It is further stated that the validity of the resolutions adopted at the annual general meeting of 26 March 2011 were being challenged in this court; in that 11.37% of the members present voted against adopting the applicable resolution for the approval of the amended rules.

[27] Having regard to the above factors, the appellants' assertion that no resolution had been taken to allow only one entrance point, is hollow, and unsustainable. The very fact that the appellants have challenged the adoption of the amended rules, is proof that the decision was made. What is more, that only 11.37% of the members present voted against adopting the resolutions, is an indication that the majority were in favour of such amendments.

[28] I therefore conclude that finding of the court below, that the land owners of the game reserve, by majority, have taken a decision to allow only one access point to the game reserve, cannot be faulted. Implicit in that decision, is that all other access points, including those in issue in this matter, had to be closed. It is a logical consequence - otherwise how else would that resolution be implemented? The closure and removal of the gates was therefore pursuant to a properly adopted resolution of the members of the respondent. It was, in the result, justified, and did not amount to spoliation or self-help, as contended for on behalf of the appellants.

[29] To hold otherwise, would mean that the respondent had to obtain a court order to close or physically remove the gates. That would be an untenable proposition. It would seriously hamper the functioning of associations like the respondent, if each resolution had to first receive the imprimatur of the court before it is implemented.

[30] The fact is, the appellants have voluntarily purchased properties in the game reserve, and automatically became bound by the rules of the respondent and all the decisions of the respondent validly taken within its powers (including those the appellants do not like). This is necessary for an orderly arrangement and regulation of the affairs of the respondent, otherwise chaos would reign were every member to do as they pleased.

[31] To sum up, I find no misdirection in the factual finding and conclusion of the court below that a decision had been taken by members of the respondent to allow for only one access point to the game reserve. It follows therefore that the conduct of the respondent was justified, and did not amount to spoliation. On that basis the appeal has to fail. Given this conclusion, it becomes unnecessary to consider the other issues, namely the preliminary points raised by the respondent and the appellants' complaint concerning the *mero motu* point raised by the court below. Costs should follow the event.

[32] The following order is made:

1. The appeal is dismissed with costs.

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T.M. MAKGOKA
JUDGE OF THE HIGH COURT

I agree

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

DATE OF HEARING : 22 NOVEMBER 2013

JUDGMENT DELIVERED : 09 JULY 2014

FOR THE APPELLANTS : ADV. A.M HEYSTEK

INSTRUCTED BY : *JACOBSON & LEVY INC.*, PRETORIA

FOR THE RESPONDENT : ADV. G.C. MULLER

INSTRUCTED BY : *COETZEE & VAN DER MERWE*, PHALABORWA AND *BARNARD & PATEL*, PRETORIA