REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

11/5/2016

CASE NO: 19980/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

11 May 2016 E H Moosa

DATE SIGNATURE

In the matter between:

JOHAN ARTHUR TAPUCH **APPLICANT**

And

HENNING JONATHAN VAN ASWAGEN **1ST RESPONDENT**

HENNING JONATHAN VAN ASWEGEN N.O. **2ND RESPONDENT**

VANESSA VAN ASWEGEN N.O. **3RD RESPONDENT**

CORNELIUS JOHANNES PETRUS GERHARDUS MALAN N.O. **4TH RESPONDENT**

J U D G M E N T

KUBUSHI, J

[1] The matter before me emanates from a written Cattle Grazing Agreement ("the agreement") entered into between the applicant and Versatex Trading 486 (Pty) Ltd ("Versatex"). In terms of the said agreement the applicant leased the farm known as the Remaining Extent of Portion 2 of the farm Caywoodshope 324, Christiana measuring 922, 2164 hectares ("the farm"), from Versatex. Christiana is situated within the magisterial district of Lekwa - Teemane in the North West Province.

[2] It is common cause that the applicant was in terms of the agreement entitled to and did graze his cattle on the farm in exchange for a monthly consideration of R5 000, subject to the rights of all other occupants of the farm and provided that he will have the right to use the farm in such a way as to cause minimum interference to any other rightful occupiers of the farm. The agreement itself was terminated in July 2015 but the applicant did not remove all his cattle from the farm and also continued paying the monthly consideration of R5 000.

[3] It is alleged by the applicant that at all relevant times hereto he was in free and unfettered possession of the farm and that he was dispossessed of such possession when the first respondent moved about 250 cattle onto the farm.

[4] On 11 March 2016 the applicant prosecuted an urgent application, before Legodi J, against the first respondent. The first respondent is a trustee and representative of the Henning Van Aswagen Family Trust ("the Trust"). It needs to be said that in the initial application the first respondent was cited as the only respondent. The other trustees of the Trust attempted to join the proceedings and to lodge a counter application against the applicant but their applications were dismissed by the court. In the application before me all the trustees are cited hence, the four respondents. The first respondent is cited both in his personal capacity and in his capacity as a trustee of the Trust.

[5] Pursuant to the application launched on 11 March 2016, the applicant obtained an interim order ("*rule nisi*") directing the first respondent, in his personal capacity, to remove cattle allegedly owned by the first respondent from the farm.

[6] Prior to obtaining the said *rule nisi*, the applicant had on 10 March 2016 approached the North West Division of the High Court for the same order he was granted in this court, but the matter in that court was removed from the roll on the basis that the North West Division of the High Court, Mafikeng, did not have jurisdiction to adjudicate the matter.

[7] The *rule nisi* obtained by the applicant on 11 March 2016 was returnable on 21 April 2016. The first respondent anticipated the return date of the *rule nisi* to 22 March 2016. On that date, the matter served before Mabuse J and it proceeded

only on the issue of whether this court was endowed with the requisite jurisdiction to pronounce upon matters arising from and concerning the town of Christiana. The said issue of jurisdiction was raised by the first respondent as a point in law in terms of uniform rule 6 (5) *(e)* (iii) and also by the court *mero motu*.

[8] The matter was argued on that day but was postponed to 24 April 2016 for further argument on the question of jurisdiction. On that day, and after argument by the parties, the matter was further postponed to 6 April 2016. When the matter appeared before Mabuse J on the postponed date, he discharged the *rule nisi* and made a further declaratory order the terms of which are as follows:

"IT IS ORDERED THAT

1. The aforesaid *rule nisi* be and is hereby discharged with costs on the basis that this Gauteng Division lacks *locus standi*.

2. The jurisdiction of this Division over an area known as Lekwa – Teemane in which Christiana is located has been excluded by Government Notice 30 of 15 January 2016.

3. It is the North – West Division that has jurisdiction over Christiana by reason of it being situated within the Magisterial District of Lekwa – Teemane.

4. Application for intervention is similarly dismissed with costs."

[9] It needs to be said that on 12 March 2016 and in compliance with the *rule nisi* of Legodi J, the first respondent removed all the cattle from the farm. However, on 12 April 2016 and after the order granted by Mabuse J, the first respondent in his personal capacity and in his capacity as a trustee and representative of the Trust again moved approximately 120 heads of cattle onto the farm which is now the subject of the application before me.

[10] The applicant's contention is that prior to 10 March 2016, he had unfettered use of the farm and that the actions of either the first respondent in his personal capacity and/or his capacity as a trustee of the Trust by putting their cattle on the farm for grazing purposes effectively deprived the applicant of the use of the grazing facility on the farm. The first respondent refused to remove the said cattle from the farm. This resulted in the applicant launching the application serving before me now. The application was issued *ex parte* on an urgent basis and called for a spoliation order on the following terms:

> "[1] That the non-compliance with the rules pertaining to service and form be condoned and that this application be heard as an urgent application.
>
> [2] That, pending the finalization of an appeal to be filed by the applicant against the order made by Mabuse,J on 6 April 2016, the *rule nisi* issued by Legodi,J on 11 March 2016 be revived with interim and immediate effect.
>
> [3] That the first respondent be ordered to pay the costs of this application, which costs will include the costs of 2(TWO) counsels and in the event of any other respondent or respondents oppose this application, such respondent or respondents be ordered to

pay applicant's costs, which costs will include the costs of 2(TWO) counsels, the one to pay, the others to be absolved.

[4] Such further and/or alternative relief as may be necessary be granted to the applicant.

ALTERNATIVELY

[5] That a *rule nisi* be issued, calling upon the respondents to show cause, if any, on 7 June 2016 at 10:00 or as soon thereafter as the matter may be heard, why:

5.1 The first respondent alternatively, the second, third and fourth respondents shall not be ordered to immediately restore applicant's free and unfettered occupation of the property known as the remaining portion of portion 2 of the farm Cawoods Hope 324 ("the farm").

5.2 The first respondent alternatively, the second, third and fourth respondents shall not be ordered to immediately remove and vacate the cattle brought onto the farm by either the first respondent or the second, third and fourth respondents on 11 April 2016.

5.3 That, should the respondents refuse or neglect to remove and vacate the cattle, the sheriff be authorized to effect such removal.

5.4 Why the first respondent shall not be ordered to pay the costs of this application, which costs will include the costs for 2(TWO) counsels and in the event of any other respondent or respondents oppose this application, such respondent or respondents be ordered to pay applicant's costs, which costs will include the costs for 2(TWO) counsels, the one to pay, the others to be absolved.

[6] Prayers 5.1, 5.2 and 5.3 above shall operate as interim order and interdict with immediate effect."

[11] The application served before Pretorius J on 26 April 2016 who struck it from the roll, and reserved costs, due to lack of urgency. The matter was re-enrolled in the urgent court of 3 May 2016 when it appeared before me. It is common cause that on 28 April 2016 the applicant instituted an application for leave to appeal to the Full Bench of the Division, alternatively to the Supreme Court of Appeal, against the whole of the judgment, including the judgment on costs delivered by Mabuse J on 6 April 2016.

POINTS *IN LIMINE*

[12] In their opposing papers, the respondents besides opposing the matter on the merits, is raising four points *in limine*, thus

1. Urgency – The issue of urgency was disposed of when on 26 April 2016 Pretorius J struck the matter from the roll due to lack of urgency.

2. The relief sought in paragraph 2 of the notice of motion is without basis in law;

3. This court does not have jurisdiction to adjudicate upon the alternative relief sought by the applicant – The parties are *ad idem* that this court cannot adjudicate on the issue of jurisdiction because the issue was heard and determined by Mabuse J on 6 April 2016 and as such this court cannot review that judgment. Therefore, this issue is not before this court for consideration; and

4. No case is made out in the applicant's papers for the alternative relief.

[13] Before turning to the merits of this application I shall deal first with the two remaining points *in limine*, namely

The relief sought in paragraph 2 of the notice of motion is without basis in law:

[14] Prayer 2 in the applicant's notice of motion is for an order that, pending the finalization of the appeal filed by the applicant against the order of Mabuse J on 6 April 2016, the *rule nisi* issued by Legodi J on 11 March 2016 be revived with interim and immediate effect.

[15] The respondent's submission is that there is no legal basis in law for the revival of the *rule nisi* issued by Legodi J in that, interim orders are not independent of final orders. An interim order, it is argued, which is granted in the absence of the other concerned parties is by its nature provisional and conditional upon subsequent confirmation by the same court (albeit not the same judge) in the same proceedings after having heard the other side's side of the case. Therefore, when an appeal is sought to be brought against a discharge of an interim order there is nothing to revive, for it is as if no order was made in the first place, so it is said. In support of

this submission the respondents rely on the judgment in *National Director of Public Prosecutions v MC Rautenbach and Another.*[1]

[16] Consequently, it is submitted on behalf of the respondents that the order made by Mabuse J on 6 April 2016 discharged the *rule nisi* that was granted by Legodi J and as such there is nothing to revive. Thus, the relief sought by the applicant to revive that *rule nisi* is not sustainable and should be dismissed with costs, so the argument goes.

[17] The applicant in argument before me concedes that the noting of an appeal against a discharged interim order does not automatically revive the interim order but what is required is for a litigant to apply for such revival from the court. As a basis in law in respect of this submission the applicant relies in the judgment in *Ismael v Keshavee* [2], wherein the following was said:

> "It seems to me that if a litigant desires further protection by way of interdict pending the determination of an appeal he must make application therefor. . . In my opinion the noting of an appeal does not automatically revive an interdict granted *pendente lite*. Mr Beyers asked for such relief in the event of my being against him on his main argument and I proceed to consider such application which was strongly contested by the applicant."

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[1] [2005] 1 All SA 412 (SCA) para [12].

[2] 1957 (1) SA 684 (TPD) at 688A

[18] The law in this regard is set out succinctly in Erasmus: *Superior Court Practice* [3] as follows:

> "The noting of an appeal against the refusal of a final order where interim interdictory relief was granted (but the final relief refused) does not revive the interim order unless the parties have specifically agreed to the continued existence of the interdict pending an appeal. A party who desires further protection by way of interdict pending the determination of the appeal could also make application for the renewal of the interdict. Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed. There is accordingly no order that can be revived by the noting of the appeal and there is nothing that can be suspended. Interdicts, which endure until a specified event, fall away on the happening of the event. Should an appeal be noted against the decision which formed the conditional event, the interdict does not remain operative nor does it revive. Where application for leave to appeal was delivered against an order setting aside an order which was granted in an *ex-parte* application for attachment to found or confirm jurisdiction, the court held that the *ex-parte* attachment order was *ex lege* the uniform rules of limited duration pending the determination of the application to have it set aside. Once set aside, a notice of appeal could not have a positive effect of creating an order, which did not exist. It therefore does not revive or perpetuate the order discharged or set aside."

[19] The following was further said in *Southernwind Shipyard (Pty) Ltd v Jacobs and Others* [4] at para [23]

> "[23] What was strange for the Court in respect of the interim order that was granted on 26 September 2008 was that it sought to revive the interim interdict, which on proper consideration of the authorities cited above, such an order could not be revived. The true position, therefore, is that an Applicant, if it seeks further protection has to bring a fresh application which sets out the basis upon which the court should grant a temporary interdict."

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[3] See Erasmus: *Superior Court Practice* Vol 2 2ed A2-66 – A2-67 and the judgments quoted thereat.

[4] (C 700/2008) [2008] ZALC 142; [2009] 4 BLLR 390 (LC); (2009) 30 ILJ 1369 (LC) (7 November 2008)

[20] The authorities are clear, a discharged interim order, cannot be revived as there is actually nothing to revive. A litigant in such a situation, that is, where an interim order is discharged, and who desires further protection by way of an interdict pending determination of an appeal, is urged to apply for a new interim order pending the appeal.

[21] The applicant's submission that where an interlocutory order has been discharged it can be revived on application thereof by a litigant, is thus, not correct. One cannot revive something that is not there. It is quite clear that once an interim interdict is discharged same is gone and cannot be revived, except by agreement or through making a fresh application. The applicant misconstrued the principle as laid down in the *Ismael*-judgment above which he used in support of this submission. The passage at 688A of that judgment requires no interpretation as it aptly sets out this principle as follows:

> "It seems to me that if a litigant desires further protection by way of interdict pending the determination of an appeal he must make application therefor. . . In my opinion the noting of an appeal does not automatically revive an interdict granted *pendente lite*."

[22] In terms of that passage the application that must be done is for a fresh interdict that will continue to protect the litigant pending the appeal and not the application to revive the discharged interim order.

[23] The applicant contends that he is relying on the provisions of s 18 (2) of the *Superior Courts Act* 10 of 2013 ("the Act") for the revival of the Legodi J's *rule nisi.* The submission by the respondent is that, the repealed uniform rule 49 (11) which dealt with appealable orders excluded interim orders from its scope of application, hence, the decision taken by the court in the judgment in the *Rautenbach*-judgment above. It is submitted by the applicant that *"an interlocutory order not having the effect of a final judgment"*, presupposes the suspension of an interlocutory order having the effect of a final order. As such, it is argued, the interlocutory order, in this instance, did not have the effect of a final judgment as same was dependent on the adjudication of the merits of the application.

[24] The respondent on the other hand was at pains to explain what is meant by an interlocutory order in an effort to show the court that the order which the applicant seeks to revive was not an interlocutory order that is referred to in the section and that the section did not apply.

[25] In my opinion, the arguments by both parties around s 18 (2) of the Act are not on point as I shall more specifically indicate hereunder.

[26] Section 18 (2) of the Act, which is apposite for purposes of this discussion provides that

> "(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal."

[27] Section 18 (2) of the Act provides that, subject to subsection (3) thereof, the operation and execution of a decision which is an interlocutory order not having the effect of a final order, is not suspended pending the decision of an application for leave to appeal or appeal, unless the court under exceptional circumstances orders otherwise. [5]

[28] In the matter before me, it is not the interlocutory order that is the subject of the application for leave to appeal. What is sought to be appealed as *per* the application for leave to appeal is the final order of Mabuse J which discharged the interlocutory order granted by Legodi J, which is the order the applicant seeks to revive in this application. Thus, the issue, in this instance, is whether the discharged *rule nisi* of Legodi J can be revived.

[29] Section 18 (2) of the Act, on the other hand, provides for the appeal of an interlocutory order not having the effect of a final judgment and which is the subject of an application for leave to appeal or of an appeal. It is my understanding that, s 18 (2) of the Act now makes it possible for a litigant, under exceptional circumstances, to note an appeal against an interlocutory order not having the effect

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[5] See Erasmus: *Superior Court Practice* Vol 2 2ed pD6 26

of a final judgment, which was not the case under the repealed uniform rule 49 (11). The applicant, in this instance, seeks to revive a discharged interim order. It is my view that his reliance on s 18 (2) of the Act, is misplaced because the sub-section does not talk to the revival of interlocutory orders whether discharged or not.

[30] The law as it stands, despite the introduction of s 18 (2) of the Act, is that, when an interim order is discharged, the noting of an appeal against the discharge does not revive or perpetuate the order so discharged.[6] In the *Rautenbach*-judgment above at para [12], the court went further to state

> 'It follows that when an appeal is sought to be brought against the discharge of such an order there is nothing to revive for it is as if no order was made in the first place.'

[31] I have to conclude, therefore, that the point *in limine* ought to be upheld.

No case is made out in the applicant's papers for the alternative relief:

[32] The alternative relief sought by the applicant in prayer 5 in the notice of motion pertains to the mandatory interdictory relief which requires the respondents (in the alternative) to restore the applicants free and unfettered occupation of the farm by removing their cattle on the said farm.

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[6] See MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd 2000 (4) SA 746 (SCA) at 751 – 752.

[33] The submission by the respondent is that no case has been made out for this relief in the applicant's founding affidavit. I seem to be in agreement with the respondent's submission in this regard, although for different reasons.

[34] In terms of the alternative relief the applicant seeks as set out in paragraph [10] of this judgment, it appears that the relief sought is for the respondent to *'restore the applicant's free and unfettered occupation of the farm.'* But, the applicant's case in the founding affidavit is that he had an unfettered use of the farm and that actions of the respondents, by moving their cattle onto the farm for grazing purposes, will effectively deprive him of the use of the grazing facilities on the farm.

[35] The relief the applicant seeks in the notice of motion is not supported by the evidence in the founding affidavit. The evidence is in support of 'the right to use' the grazing facilities on the farm whilst the relief sought is for 'the occupation' of the farm.

[36] From what is stated above, it is evident that in circumstances where an interim order has been discharged, a litigant has two options. The first option is to seek an agreement to have the interdict issued earlier to continue to exist. The second option is to bring another application for an interdict which ought to be considered on its own merits, that is, independent of the earlier issued interdict.

[37] It is common cause that, in this instance, there is no agreement between the parties for the continuance of the interim order granted by Legodi J. It follows that the applicant should bring an application for a fresh interdict which must be considered by the court afresh. [7]

[38] It is my view that in the circumstances of the matter before me, since there is a pending application for leave to appeal or an appeal noted by the applicant, the alternative relief sought in the notice of motion ought to be for an interim interdict pending the outcome of the application for leave to appeal or the appeal.

[39] It is trite that interim interdicts are generally and in their nature granted *pendente lite*. In this sense, they are designed to protect the rights of a litigant pending the finalization of pending proceedings or proceedings to be instituted by such litigant. When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who ultimately is successful will receive adequate and effective relief.[8]

[40] One of the aims of an interim interdict is said to be to preserve the *status quo ante* pending the final determination of the rights of the parties to pending litigation.

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[7] See Kelly Group Ltd v Solly Tshiki & Associates(SA) (Pty) Ltd 2010 (5) SA 224 (GSJ) at 231F – G

[8] Pikoli v President of RSA 2010 (1) SA 400 at 404 A-D.

That is, there must be legal proceedings on the same facts pending between the parties.[9]

[41] From the perusal of the papers before me, it is, quite clear that the alternative relief sought by the applicant is not made *pendente lite*. It is my view that in the manner in which the alternative relief is sought, should it be granted, it will render the appeal noted by the applicant academic.

[42] Having said that, the applicant would still not succeed with his claim for an interdict for he does not in his founding affidavit establish the fundamentals of either an interim interdict or final interdict. It should be remembered that the application before me should be considered on its own merits and all the requirements of the interdict must be established failing which an interdict may not be granted.

[43] It is on that basis that I have to conclude that from the outset the applicant had not made out a proper case for the alternative relief he seeks. This point *in limine* should therefore be upheld as well.

COSTS

[44] The respondents are the successful parties and are entitled to their costs including the reserved costs of 26 April 2016 when the matter was struck from the roll for lack of urgency.

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[9] Pikoli v President of RSA 2010 (1) SA 400 at 403H.

ORDER

[35] In the circumstances the application is dismissed with cost including the costs reserved.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE	**: 05 May 2016**
DATE OF JUDGMENT	**: 11 May 2016**
APPLICANT'S COUNSEL	**: ADV. W. COETZEE SC**
	: ADV. J. GOUWS
APPLICANT'S ATTORNEYS	**: GOODES &SEEDAT ATTORNEYS INC.**
1ST, 2nd, 3rd & 4TH RESPONDENTS' COUNSEL	**: ADV. P. LOURENS**
1ST, 2nd, 3rd & 4TH RESPONDENTS' ATTORNEY	**: VAN DEVENTER&THOABALA INC.**