IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 82647/2015

DATE: 15/9/2016

In the matter between:

MANDLA LINX (PTY) LTD Applicant

and

EPHRAIM VERMAAK N.O First Respondent

MARIA PETRONELLA VERMAAK N.O Second Respondent

EPHRAIM VERMAAK Third Respondent

JUDGMENT

MAKHUBELE AJ

[1] This matter came before me in the opposed motion roll to determine the reserved costs of the urgent application and the scale on

obtained substantive relief in the urgent court before Ranchod J on 27 October 2015 and as such it is not only entitled to costs of the application, but such costs should be on the scale as between attorney and client. The respondents are alleged to have conducted themselves in a vexatious, unscrupulous, unlawful, dishonest and dilatory manner since the onset of the dispute that formed the subject matter of the urgent application.

2] The respondents are opposing the cost order, and particularly on a scale as between attorney and client as contended by the applicant. The first and second respondent are juristic entities. The allegations that formed the subject of the urgent application were made against the third respondent.

Reference to respondent in this judgment refers to the third respondent, Mr. Vermaak.

[3] The relief sought in the urgent application was phrased in the following terms:

> " I. *THAT the normal rules pertaining to the service, times* and *filing of applications be dispensed with and this application be determined on an urgent basis in terms of the provisions of Rule 6(12)(a) and (b) of the Rules of Court:*

2. *THAT the applicant's possession of the service entry to the immovable property, known as portion 2 (a portion of portion 22) of the farm Rooibank, 89 registration division JR, Province of Gauteng measuring approximately 21,4137 hectares ("the immovable property") be restored;*

3. THAT the respondents be directed to remove the steel fencing poles that have been planted into the ground and that block the service entry to the immovable property;

4. THAT pending the outcome and final determination of an action to be launched out of this court within 10 days of this order:

4.1 The respondents are interdicted and restrained from, in any manner whatsoever, interfering with applicant's, its representatives', its customers', its employees', its invitees' and/or its contractors' entry and access to the immovable property, such entry and access being depicted on the map and highlighted in blue, a copy of which is attached to the founding affidavit marked "M 3.2";

4.2 The third respondent is interdicted and restrained from harassing, intimidating or threatening the applicant, its representatives, its customers, its employees, its invitees and/or its contractors in any manner whatsoever, including

but not limited to interfering with the with the execution of its contractors' duties and */ or the execution of their instructions, informing members of the public that the business no longer operates, or that the business is closed for renovations or for any other reasons;*

5. *The respondents are interdicted* and *restrained from spoliating the applicant in any manner.*

5. *The respondents, jointly* and *severally, the one to pay, the others to be absolved are ordered* and *directed to pay the costs of this application on an attorney* and *own client scale;*

6. *The applicant is granted such further and/or alternative relief* as *the court deems meet" .*

[4] In his heads of argument counsel for the applicant submitted that the parties settled the matter after Ranchod J advised them that he was inclined to grant relief in the Notice of Motion. Costs were postponed because they could not reach an agreement thereto. As I have already stated above, the applicant's argument is that it obtained substantial relief in the urgent application and as such , costs should follow the cause. The only issue for determination is the scale according to counsel for the applicant is the scale on which costs should be paid.

[5] The respondents ' counsel did not concede that the applicant obtained substantive redress before Ranchod J. He argued that the respondents also obtained relief in terms of the counter-application and as such there should be no order as to costs, moreso on a scale as between attorney and client.

[6] The matter before me was argued on the heads of argument filed by the respective counsel as well as references to relevant parts of the papers filed in the urgent application. I did not have the benefit of the transcript of proceedings before Ranchod J.

[6.1] It appears from a reading of the order though that both parties obtained some relief although counsel for the applicant downplayed the respondents ' success by submitting that Ranchod J did not issue an interdict against his clients. According to him, the respondents only obtained an undertaking from the applicant.
I do not agree with this submission.

[6.2] My approach then will be to steer clear of the merits of the unresolved dispute and to look at the circumstances surrounding the issues that were finally disposed of in terms of the court order of 27 October 2015.

[7] The order of Ranchod J reads as follows:

" *Having perused the documents filed on* record, *it is* ordered *:*

I. *THAT, pending the outcome and determination of an action to be launched out of this court within 10 days of this order:*

I. I *The respondents undertake to be and* are *hereby interdicted and restrained from, in any manner whatsoever, interfering with the applicant' s, its representatives' , its customers' , its employees' , its invitees' and* /or *its contractors' entry and* access *to the immovable property, such entry and* access *being depicted on the* map *and highlighted in blue,* a *copy of which is attached to the founding affidavit marked* "M3.2";

1.2 *The third respondent undertakes to be and is hereby interdicted and restrained from harassing, intimidating* or *threatening the applicant, its representatives, its customers, its employees, its invitees* and/or *its contractors in any manner whatsoever, including but not limited to interfering with the with the execution of its contractors' duties* and /or *the execution of their instructions, informing* members *of the public that the business no longer operates,* or *that the business is closed for renovations* or *for any other* reasons;

1.3 The respondents undertake to be and are hereby interdicted and restrained from spoliating the applicant in any manner;

1.4 The applicant in turn undertakes not to harass the respondents.

2. THAT the applicant's possession of the service entry to the immovable property, known as *portion 2 (a portion of portion 22) of the farm Rooibank,* 89 *registration division* JR, *Province of Gauteng measuring approximately 21, 4137 hectares ("the immovable property") be restored up to and until 1 March 2016,*

3. *That for the purpose of order 2 the third respondent will remove the steel fencing poles that have been planted into the ground and that block the service entry to the immovable property;*

4. The costs of the application are reserved."

[8] The dispute pertaining to the issues under paragraphs 1.1 to 1 .4 of the order will be finally determined in the action that is still to be launched as per paragraph 1 thereof. The issue that has clearly been finally decided is applicant's possession of the service entry to the immovable property

(paragraph 2 of the order) . The respondents have been ordered to restore applicant's possession up to and until 1 March 2016 and to this end the respondents were ordered to remove the steel fencing.

[8.1] The fact that the disputes pertaining to the issues in paragraphs 1, 1 ,1 to 1 .4 are still to be finally adjudicated makes it difficult to base the argument of costs on which party obtained substantive relief. Ideally, the costs should have stayed reserved until finalization of the action.

[8.2] As I have already stated above, the only issue that has been finally adjudicated is restoration of applicant's possession of the service entry. The possession was restored up to 1 March 2016. In this regard, I am inclined to agree with the respondent ' s counsel that it obtained some relief with regard to its counter-application for restoration of this contested entry.

BACKGROUND FACTS

[9] On 10 April 2015, the applicant, represented by Mrs Elize Morin, entered into an agreement of sale with the Expan Family Trust, represented by the third respondent ("the respondent") in terms of which

the applicant purchased certain immovable property known as Portion 2 of [2..] Rooibank [8..] JR . Hammenskraal.

[9.1] The parties signed an addendum to the sale agreement on 20 April 2015. It provides for amongst others an undertaking by the seller to repair the refrigerator, tangle (3 phase protector) on the borehole and audio system and that it would issue all certificates.

The parties also agreed that the seller purchases the business on the property as a going concern. The business purchased was described as a restaurant. I may mention in passing though that there is a dispute as to exactly what this "going concern " included. The respondent contends that it did not sell Xombana Game Ranch CC. I am not required to rule on the dispute of facts with regard to the undertakings made during the negotiation of the sale agreement.

[1O] The purchase agreement and the addendum thereto did not make provision for the right of way or access road depicted in blue in Annexure M3.2. This is the access road that passes through the respondent's property. The respondent contends in their answering affidavit that initially the applicant was interested in purchasing two properties, Portion 2 of Portion 22 as well as Portion 7, the property belonging to the respondents.

If this had happened, access would have been given because they would be owners of both properties.

There is a dispute with regard to whether, the respondent showed the applicant any other access route to its property other than the one depicted in Annexure M3.2.

> [10. l] In an email enquiry and response dated 22 May 2015 the parties dealt with several issues, amongst which is the access road and the existing Xombana sign boards coming off the tar road.. The applicant requested the respondent to give written consent *" for continuous use of the current* access road *to Xombana that is in front of the Safari M all."* The respondent answered that this will be automatic when the applicant "sign the Paradise Link agreement".

It is common cause that the applicant only signed the Paradise Link Agreement on 14 October 2015.

[11] On 17 July 2015, the applicant' s attorneys wrote a letter to the respondent's attorneys and raised issues such as (a) the validity of the electrical certificate, (b) the threats by Eskom to switch off the electricity due to non-payment of amount owed, (c) the respondent' s unlawful diversion of internet traffic from www.xombana.co.za website, (d) the

discrepancies in the inventory and missing items and; (e} failure by the respondent to repair of fridges and other appliances.

The applicant made a request for a meeting to discuss these issues.

[11 .l] It appears from the papers that whilst the parties were resolving the issues in the snag list, a dispute arose with regard to access route to applicant 's property from the tar road.

Several letters were exchanged between the respective attorneys in this regard.

[1 1 .2] Whilst discussions were underway to resolve these and other issues, the relations between the parties soured with allegations and counter-allegations of harassment and intimidation being leveled by one party against the other.

The first incident of alleged unlawful conduct on the part of the respondent was highlighted in a letter dated 18 September 2015 from the applicant's to the respondent 's attorneys.

In this letter, it was alleged that the applicant was informed by one of its contractors, Messrs.Falcon Fencing that the respondent had threatened to erect a fence to cut off the applicant and its patron' s access to their restaurant.

The respondent was warned that such conduct would constitute spoliation and was advised that the applicant would approach the court for urgent relief should he carry out the threat.

[1 1 .2] The respondent' s attorneys responded to this letter in writing on the same day , and whilst there was no denial of the threat to cut off the access, it was pointed out to the applicant 's attorneys amongst other things that " *Your clients are not entitled to* access *their property by* means *of* Our *client' s entrance. They have been using it* as a *concession by* Our *client, even though it was never discussed or* agreed *upon between the parties. It is* our *instructions that not* once *during the sale negotiations* or *subsequent thereto was* access *to the property via* Our *Client' s entrance discussed or* agreed upon. *In* such *instance, it would be included in the agreement of sale,* and */ or servitude registered over the property by the transferor in the power of attorneys to* pass *transfer. In any event ,* due *to the recent events* and *the actions of your client,* Our *Client is* concerned for *his safety and security and he can* no *longer make this concession to your client. They* are *able to obtain* access *to their property by* means *of their law full entrance.* Our *client trusts that your client will respect his property boundaries* as *he is not desirous of applying to court to enforce his rights.*

"

Secondly, Our client denies that he entered your client' s premises last night, and *he denies that he flashed lights at the restaurant at any stage. His wife* and son *accompanied him when he* was on *his property looking at* beacons on *his property,* as *he* was *entirely within his rights to* do. *He views these spurious a/legations in a serious light* and *your client is requested to refrain from this kind* of *contentions in future."*

[1 1.3] The applicant's attorneys ' response to this letter is dated 30 September 2015. They acknowledged that there exists a factual dispute regarding the negotiations that led to the conclusion of the agreement but with regard to the access route, their investigations indicate that it has been in use for more than 30 years and has been used by the previous owners of the land for a period in excess of 30 years. For that reason, they were of the view that the respondent was not entitled to refuse their client access to her property through the contested route.

Further allegations of unlawful conduct were made against the respondent, such as (a) removal of the signage to the applicant's business the previous night (29 September) and; (b) informing several members of the public that the establishment of the applicant was closed for business and no longer operated.

[1 1 .4] The respondent did not (immediately) respond to these allegations. Another letter was dispatched on 01 October 2015. It recorded all previous allegations. The respondent was placed on terms to replace the signage boards and to desist from acting in other alleged unlawful activities that prejudiced the applicant's business interest.

[1 1 .5] The respondent replied to both letters on 02 October 2015 and denied that the access route had been in existence for 30 years , that the access road was part of the sale negotiations and that it was informing the public that the applicant 's establishment is closed for business.

With regard to the removal of the signage, the respondent appeared to admit having removed it but denied that it was a direction sign. He indicated that he had already restored it but that it and any other signage with reference to the applicant 's restaurant on the respondent's property would be removed on 20 November 2015 if the applicant does not do so before that date.

With regard to the access route, the respondent reiterated the previous position that the applicant had no right to access its property through his property . The applicant was given notice that

the entrance to the respondent' s property "will be gated as and entrance controlled from 20 November 2015" because he was extremely concerned about his safety and that of his family.

[12] The applicant has attached a confirmatory affidavit of one of the members of the public who was allegedly informed that the applicant' s establishment had closed for business.

The effect of all this as well as other breaches relating to the terms of the purchase agreement will undoubtedly be ventilated in the action that the applicant intends to institute against the respondent. The applicant contends that the actions of the respondent has affected its business that in any event was purchased on the strength of the undertakings that were made and not fulfilled.

Therefore, I am not required, at this stage to make any pronouncement on their truthfulness.

The service entry dispute: Spoliation and counter- spoliation

[13] As I have indicated in the introductory paragraphs, the only issue in my view that was finally decided is the parties' respective access to what is known as the "service entry".

The court order reads as follows in this regard "

"

2.. *THAT the applicant's possession* of *the service entry to the immovable propert y, known* as *portion* 2 *(a portion* of *portion [*2..] of *the* farm *Rooibank,* 89 *registration division* JR, *Province* of Gauteng *measuring approximatel y 21, 4137 hectares (" the immovable property ") be restored* up *to* and *until 1 March 2016,*

3. *That* for *the* purpose of order 2 *the third* respondent *will* remove *the steel fencing poles that have been planted into the* ground *and that block the service entry to the immovable property:*

[14] The exact date and circumstances under which this entry came into being are also not common cause. The applicant' s version is that a fence was erected when it took possession of the property during April and has been in peaceful possession since then. Later on a gate was installed. The respondent's version is that it was created during July 2015 and was only used from September 2015. Furthermore, he objected to the gate as soon as it was installed on the basis that he did not give consent. According to him, the applicant's lawful entrance to its property is by means of registered right of way servitude over Portion [1..] (a Portion of Portion 2..) of the Farm Rooibank. The applicant disputes this and contends that this entrance was never pointed out during the sale negotiations and that in any event it is not a convenient entrance as it

meanders through several properties. The only access route that was ever shown to it is the one that comes from the tar road through the respondent's property.

The service entry is apparently used by the applicant 's contractors and suppliers and is only access to the kitchen area where deliveries are accepted.

[15] The respondent does not deny erecting steel droppers directly in front of this gate, but justifies it on the basis that he wanted to uphold the status quo.

The steel droppers were erected during October 2015. The respondent was clearly taking the law into his own hand.

IS ANY OF THE PARTIES ENTITLED TO COSTS OF THE URGENT APPLICATION?

[16] I do not intend to repeat what I have already stated above, but it is clear from the chronology of the events since the breakdown of the negotiations around the alleged breaches of the terms of sale agreement that the actions of the respondent with regard to access to the service entry left the applicants with no option but to approach the court for urgent relief.

The issue is not whether or not the applicant had consent or a right to erect the service entry . Even on the version of the respondent, it is clear that the gate was in existence for some time and he {respondent) was aware of it.

The gate could have been created without the respondent's consent , but he is not entitled to take the law into his own hands by planting steel droppers to prevent use of the gate.

(17] In the matter of **Ivanov v North West Gambling Board**[1], the issue was, amongst others whether possession that was prohibited by statute, notably, the National Gambling Act should be restored by spoliation order.

The appeal court, per Mhlanta JA, held[2] that:

> *" the aim* of *spoliation is to prevent self-help. An applicant upon* proof *of two requirements is entitled to* a *mandament van spolie restoring the status* quo *ante. The first proof that the applicant* was *in possession of the spoliated thing. The* cause *for possession is irrelevant- that is why possession by* a *thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful* or *illegal is irrelevant,* as *that would* go *to the merits* of *the dispute"*

[1] 2012 (6) SA 67
[2] Paragraph 19

The court referred to various old authorities, amongst others Bon Quelle (edms) BPK v Munisipaliteit van Otavi[3] wherein the following was stated:

> *" Die mandament van spolie is n' besitsremedie waarvan die beperkte en uitsluitlike funksie is* om *die herstel van status quo ante te bewerk-stellig (Oglodzinski* v *Oglodziski 1 976 (4) SA 273 (DJ* op *274F-G) en daarom kom dit nie* daarop *aan dot die spoliator n ' sterkter aanspraak* op *besit as die gespolieerde* mag *he nie of dot laasgenoemde inderdaad* geen *reg* op *besit het nie. Die beginsel is eenvoudig: spoliatus ante onmia restituendes est* ongeag *die partye se daadwerklike regte* op *besit"*

[18] I have already mentioned the fact that both parties obtained relief with regard to the service entrance dispute. The applicant ' s relief is that its possession should be restored until 01 March 201 6 and that in this regard, the respondent should remove the steel droppers.

[18.1] The respondent did not file a notice of counter-application, but in his answering affidavit he asked the court to restore his possession of this service entry. This is understandable because the matter was brought to court on an urgent basis . The matter was settled without argument, so I do not know what informed the settlement in paragraphs 2 and 3 of the order. What is clear though

[3] 1989 (1) SA 508 (A)

is that both parties cannot be said not to have obtained some relief.

[18.2] However, in as far as the issue of costs is concerned, the overriding principle is that the respondent took the law into his own hands by erecting steel droppers in front of the service entry, refusing to remove them. The applicant was forced to approach court.

For that reason, costs of the urgent application must be awarded in favour of the applicant.

[19] The next question is the scale on which such costs should be paid.

[20] As I have stated above already, counsel for the applicant, Mr. Woodrow, contends that the actions of the respondent since the onset of the dispute with regard to the alleged breaches of the terms of the sale agreement were vexatious, unscrupulous, unlawful, dishonest and dilatory.

He referred me to the case of **Ward v Sulzer**[4] at paragraph 516 in this regard where the following was stated " *for example vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive)*

[4] 1973 (3) SA 701 (ADJ at 706H

''

on the part of *an* unsuccessful *litigant may render it unf air* for *his harassed opponent to be out of pocket in the matter* of *his own attorney and client* costs".

He also referred to the matter of **Nel v LandBouwers Ko-Operative Vereenegi ng 1946 AD 597** , where the purpose of an attorney and client cost order was explained as follows :

> *"The true explanation* of awards of *attorney and client costs not expressly authorised by Statute* seems *to be that, by reason* of *special considerations arising either* from *the circumstances which give rise to the action* or *from the conduct of the losing part y, the court in* a *particular* case *considers it just, by means* of *such an* order, *to ensure* more *ef fectually than it can* do *by means* of a *judg ment* for *party and part y costs that the successf ul part y will not be out of pocket in respect of the expense* caused *to him by the litigation. Theoretically* a *party and party bill taxed in accordance with the tarif f will be reasonabl y sufficient* for *that* purpose. But *in fact* a *party may have incurred expense which is reasonabl y necessary but is not chargeable in* a *part y* and *part y bill."*

viability of the business, informing members of the public that the applicant 's business is closed for business , taking down signage to the applicant ' s business, diverting internet access, and many other issues.

[22] Therefore, I am not inclined to grant the request for a punitive cost order on a scale of attorney and client at this stage.

ORDER

[23] I make the following order;

[23.1] The respondents are directed to pay the costs of the urgent application, including the reserved costs of 28 October 2015, jointly and severally, the one paying the others to be absolved.

TAN MAKHUBELE

ACTING JUDGE OF THE HIGH COURT.

APPEAR ANCES:

Applicant:	**Advocate C Woodrow**
Instructed by:	Van Der Merwe & Bester Inc
	Pretoria

Respondents:	**Advocate J J W Hayes**
Instructed by:	Hayes Smit Attorneys
	Pretoria.
Date Heard:	18 May 2016.