Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE NO : 14275/08

In the matter between:

ZULULAND GAS AND OUTDOOR CC Applicant

and

MORRIS CENTRE (PTY) LIMITED First Respondent

CHEVRON SOUTH AFRICA (PTY) LIMITED Second Respondent

JUDGMENT

Delivered on : 13 May 2009

SKINNER, AJ:

1

On 30 October 2008 the applicant launched an urgent application against the respondents. The matter was set down for hearing on 31 October 2008 at 3 p.m. and notice of the application was given to the first respondent's attorneys at 08.05 a.m. that morning. (I should add

that no relief was sought against the second respondent who was cited by virtue of having an interest in the matter).

2

Although the actual court order granted on 31 October 2008 was not placed before me but only a copy of the consent order prayed, it would appear to be common cause that a *rule nisi* was granted on 31 October 2008 in terms of paragraph 2 of the notice of motion returnable on 10 November 2008 "when the interim relief will be argued". Mr Acker SC on behalf of the first respondent drew my attention to the fact that a consent order was granted on 10 November 2008, a copy of which appeared in the application papers before me. There is no reference in such order to the *rule nisi* granted on 31 October 2008 being discharged but by necessary implication that must follow since the order of 10 November 2008 granted a very different *rule nisi*. In terms of the latter order the first respondent was called upon to show cause why the following order should not be granted :

> **"(a) The first respondent is interdicted from commencing with the construction of a wall/fence on the northern boarder [sic] of the applicant's property (from the approximate location of the diesel tank depicted on annexure "B" to the founding**

affidavit) to where the servitude road boarder [sic] intersects with Second Street.

(b) **The first respondent is directed to reinstate that portion of the wall location on the western boarder [sic] of the applicant's property that the first respondent demolished.**

(c) **The first respondent is to pay the costs of the application and the counter application; alternatively**

(d) **The applicant is to pay the costs of the application and the counter application."**

3

The order further contained a second paragraph reflecting various undertakings by the parties pending the return date of the *rule nisi.* The original notice of motion had sought far wider relief but Mr Snyman on behalf of the applicant correctly and properly conceded that the issues before me were limited to whether the *rule nisi* granted on 10 November 2008 should be confirmed or discharged together with the ancillary issues of the counter application brought by the first respondent as well

as an application to strike out certain passages brought by the first respondent.

4

The origins of the present dispute between the parties lay in a road servitude which the first respondent has over a portion of the adjoining property of the applicant. The servitude is 12 metres wide running along and parallel to the whole of the northern boundary of the applicant's property. In addition to the use by the first respondent, the applicant itself utilised such area to provide access to the trucks of its customers which entered the applicant's property to obtain diesel and LP gas. The dispute arose when on 30 October 2008 the first respondent through its employees or contractors commenced demolishing the western boundary of the applicant's property and allegedly "also breaking up the tar surface in front of the applicant's office which is on the applicant's property". This had been preceded by an e-mail from the first respondent to the applicant on 16 October 2008 in which it *inter alia* indicated that it intended to proceed immediately to build a wall which would be along the southern border of the road servitude area.

5

Mr Acker SC although not addressing any argument on the issue, persisted with what was set out in his heads of argument to the effect that no case had been made out to justify the applicant in moving the court when it did and on less than a day's notice to the first respondent. He relied on the well known case of **Luna Meubel Vervaardigers (Edms) Beperk v Makin and Another** 1977 (4) SA 135 (W) to the effect that a party seeking to move the court as a matter of urgency is required to make the case not only that the matter should not be heard in the ordinary course but that the degree of relaxation of the Rules of court is no greater than the exigency of the case demands. While it is clear that each case must depend on its own circumstances (**20th Century Fox Film Corporation v Anthony Black Films (Pty) Limited** 1982 (3) SA 582 (W) at 586 G), no real case was made out by the applicant in the present matter for the degree of urgency on which the application was brought. While it is of course trite as Mr Snyman for the applicant pointed out that an application for a *mandament van spoile* is to be a speedy remedy, this does not mean that a party relying on such cause of action can without further ado bring the application as a matter of urgency.

6

Events have however overtaken the matter. As I have indicated a consent order was granted which had the effect of restricting the ambit

of the relief sought and the first respondent has had opportunity to file an opposing affidavit. In those circumstances it does not appear to me to be in the interests of justice to dispose of this matter on the grounds of lack of urgency when the merits of the respective claims are ripe for hearing.

7

The existence of the road servitude formed in my view merely the background to the dispute between the parties. The first respondent does not purport to justify its actions as flowing from its rights under the servitude. It does however contend that it was entitled to act as it did and as it intends to do in terms of an agreement between the parties. Accordingly the existence or otherwise of such agreement is fundamental to a resolution of the present dispute – if there is an agreement in the terms contended for by the first respondent then its actions could neither constitute spoliation (since any deprivation was not unlawful) or give rise to an interdict for similar reasons.

8

Mr Snyman laid great store on two annexures to the founding affidavit. The one was the e-mail to which I have already referred. In addition to

indicating the intention to proceed to construct the wall the e-mail stated "the conditional proposals we extended to your clients at the meeting on the 30 September 2008 (as set out below) are hereby retracted". I should point out that no proposals at all were set out "below" in the e-mail. Mr Snyman argued for a very broad interpretation of the word "retracted" as meaning "withdrawal" and "cancellation" and in so doing he referred to the meaning appearing in a recognised English/Afrikaans dictionary. In the Shorter Oxford English Dictionary (3rd Edition) "retract" is defined as "to withdraw, recall, revoke, rescind (a decree, declaration, promise etc.) and "to withdraw" (a statement, etc.) as being erroneous or unjustified". There is no reference to the word meaning "cancellation". In any event, even if "retract" could mean "cancel" the wording of the e-mail in question clearly refers to retracting only the conditional proposals extended at the meeting on 30 September 2008. Annexure "G" to the founding affidavit was an e-mail from the first respondent to the applicant's attorney dated 30 September 2008 and purporting to set out a summary of the meeting held between the parties on the same date. It commences with the words "I refer to our meeting with your client (Zululand Gas) and confirm that (sic) following". On my reading of this document the only conditional proposal that I can ascertain from it is that the first respondent would consider erecting a temporary fence "abutting the proposed curb stones of the road (as indicated in pencil during the meeting) in order to give your clients an

opportunity to move the bowser and/or tank to a more suitable location on the site". This was conditional on the applicant giving "a timing that is acceptable" in relation to the moving of the bowser and/or tank. It was common cause that the bowser encroached approximately 1 metre onto the road servitude area while the northern end of the applicant's diesel tank was situate "right on" the road servitude line.

9

In my view these documents read together cannot be taken as meaning that the first respondent withdrew or cancelled all and any agreements reached previously between the parties. Accordingly any agreement reached would still be of full force and effect.

10

It is perhaps opportune at this stage to deal with the application to strike out brought by the first respondent. In an application brought during February 2009 the first respondent contended that certain paragraphs/sentences in the replying affidavit of the applicant should be struck out as constituting an endeavour by the applicant to make out a case in reply which in any event was inconsistent with the case made out in the founding affidavit and introducing evidence in the replying affidavit which should have been disclosed in the founding affidavit.

During his submissions Mr Acker SC limited various of the passages which the first respondent sought to strike out. I do not propose to deal with all of these passages. To my mind the only valid complaint related to sub-paragraph 2.1 and paragraph 29 of the replying affidavit. The first of these is an averment by the applicant that the construction of a wall along the 12 metre servitude line was not necessary to enable the first respondent to use the road. I agree with the submission on behalf of the first respondent that need or necessity had not formed part of the applicant's case in the founding affidavits and should accordingly be struck out. The second offending paragraph implies that an agreement may have been reached but if so it was under a mistaken belief affecting the consent of the applicant. This too is a change of stance. The other passages which are alleged to be offending in my view relate to the existence or otherwise of an agreement between the parties and in particular to whether the e-mail of 16 October 2008 (annexure "H") to the founding affidavit "retracted" all and any agreements. This was canvassed in the founding affidavit as I have indicated and accordingly did not constitute either new material or a change in stance by the applicant. I accordingly do not believe that such passages need be struck out. In the light of this, the first respondent has been successful on certain aspects of the application to strike out but not on others and cannot be said to have been largely successful in such application. In my view therefore it would be appropriate to make no order as to costs

in respect of the applicantion to strike out.

11

In relation to the “northern wall” (being the wall which was to be built along the southern most border of the road servitude area), Mr Acker SC submitted that there could be no doubt that such an agreement had been concluded and was still in existence. In support of this submission he brought my attention to the following passages in the papers :

(a) Paragraph 16 of the founding affidavit where the applicant set out that the difficulty with constructing the northern wall was the location of the diesel tank and bowser (pump). The passage referred to the fact that the first respondent and applicant “have been talking for quite a number of years about the construction of a wall on the 12 metre servitude line”. The submission was that although the passage did not state that an agreement had been concluded it equally did not state that there was no agreement in existence.

(b) Annexure “F” to the founding affidavit was a letter from the applicant’s attorneys to the second respondent dated 30 October 2008 explaining why the second respondent had been cited. It was pointed out that approximately 10 months

previously an issue had arisen between the applicant and first respondent with regard to the right of way servitude and that the first respondent had informed the applicant it intended to exercise its rights in terms of the servitude. The document then stated "due to the health and safety concerns it would be necessary for a new boundary wall to be constructed on the 12 metre servitude line which would, as the tank and pump stands now, effectively reduce our client's business capacity with at least 50% as the tank and pump is situated on the 12 metre servitude line. In view of the aforementioned it is necessary for our client to move the pump and to install an underground storage tank". The applicant accordingly sought the approval of the second respondent to remove the pump and to place the tank underground. I agree with the submission of Mr Acker SC that this letter proceeds from an assumption that there was an agreement to build the northern wall. If no such agreement had been reached there would be no point in the applicant contending that it is necessary for a new wall to be constructed and for the tank and pump to be relocated.

(c) Paragraph 19 of the founding affidavit where the applicant averred that the first respondent was insisting that the

concrete wall be constructed as soon as possible and the applicant was requesting "extra time". "The parties however attempted to settle their differences and the first respondent agreed to give the applicant time to move the tank and the pump". Again, such agreement is only consistent with there being an underlying or preceding agreement that the northern wall would be constructed which would necessitate moving the tank and pump.

(d) In the e-mail of 30 September 2008 (annexure "G" to the founding affidavit) the first respondent indicated that it was at the request of the applicant together with recommendations of the architect involved that the northern wall be constructed.

(e) Finally, my attention was drawn to the answering affidavit in the application to strike out where the applicant in relation to the e-mail of 16 October 2008 (annexure "H" to the founding affidavit) which indicated that the first respondent intended to proceed to build the northern wall stated :

(i) "the first respondent attempted to rely on an agreement which was cancelled by its director

Mark Hathorn on 16 October 2008 (annexure "H") to the founding affidavit";

(ii) "by replying as I did in the replying affidavit, I placed further facts on record to show that the first respondent's allegations are false and incomplete because the agreement was cancelled by the first respondent as mentioned above".

12

There are further indications of such an agreement. Annexure "MH9" to the answering affidavit in the main application was the handwritten minutes of the deponent to the first respondent's affidavit regarding a meeting held on 10 July 2008. The document records that the party attending the meeting on behalf of the applicant "had no objection to a 1,8m prefab concrete wall to be constructed along boundary and servitude (12m)". In reply to this the applicant in paragraph 2 of its replying affidavit stated "at the time when I had these discussions with the first respondent, we were unaware of the fact that the applicant needed the second respondent's permission to move the fuel bouzer (sic). That was later brought to our attention, and therefore nullified the

applicant's initial consent that the first respondent could construct a wall along the 12 metre servitude line. At that stage I was under the *bona fide* and wrong impression that a servitude was like "ownership", and that is why I conceded that the first respondent was entitled to construct a wall along that boundary".

13

On a conspectus of all the affidavits, I am in agreement with Mr Acker SC that there was an agreement between the parties for the first respondent to be allowed to construct a wall along the southernmost servitude line. There was a condition attached to such agreement which related to the applicant being given time to move the tank and pump. It is common cause that these have been moved. Accordingly such condition has been fulfilled and the first respondent is entitled to construct the northern wall in terms of the agreement. For that reason the application in respect of the northern wall (paragraph 1(a) of the *rule nisi* granted on 10 November 2008) must fail.

14

As regards the western wall being the wall on the boundary of the applicant's property facing Second Street and in the vicinity of the road servitude area, Mr Acker SC very fairly and properly conceded that there were insufficient indications for me to be able to conclude that an

agreement had been reached between the parties which will allow the first respondent to act as it had. He further submitted that in any event the applicant was in law not entitled to an order for reinstatement of the portion of the wall demolished by the first respondent. In this regard he relied upon **Rikhotso v Northcliff Ceramics (Pty) Limited and Others** 1997 (1) SA 526 (WLD) at 535 A-B where the court held :

> **"The weight of authority supports the proposition that a spoliation order cannot be granted if the property in issue has ceased to exist. It is a remedy for the restoration of possession, not for the making of reparation".**

15

The court declined to follow the approach in **Fredericks and Another v Stellenbosch Divisional Council** 1977 (3) SA 113 (C) at 117 H where such court ordered the re-erection of informal housing that had been demolished and said that if the original sheets of corrugated iron could not be found or had been so damaged as to be unusable there was no reason why other sheets of similar size and quality should not be used. The court in **Rikhotso** supra at 534 D correctly with respect found that this was an obiter remark which in its context "was an observation made by the learned Judge in reply to an argument as to the practicality of restoring the dwellings. I do not think that the learned

Judge intended by this remark to hold that it was competent to order that possession be restored by substitution". The Supreme Court of Appeal in **Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others** 2007 (6) SA 511 (SCA) criticized the approach in **Fredericks** supra and at 521 paragraph [24] held :

> **"The doctrinal analysis in Rikhotso is in my view undoubtedly correct. While the mandament clearly enjoins breaches of the law and serves as a disincentive to self-help, its object is interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent. To insist that the mandament be extended to a mandatory substitution of the property in dispute would be to create a different and wider remedy than that received in South African law, one that would lose its possessory focus in favour of different objectives".**

16

I should add that I also have considerably difficulty with the claim by the applicant for a final interdict. The requirements for such interdict are trite and in my view it has not been established that there is no other suitable alternative remedy. The applicant contends that it will suffer a substantial reduction in trade and

accordingly a considerable loss of income if the northern wall is constructed. If however it is ever shown by the applicant that no such agreement as I have found existed did in fact exist, the actions of the first respondent would naturally be unlawful and give rise to a claim for damages. On this aspect too I therefore do not find that the applicant has made out a case.

17

In the event however that my view of the law may be incorrect, I nevertheless find that the applicant is not entitled to the relief which it seeks. During argument Mr Snyman *albeit* rather faintly and in response to a question from me submitted that if I were to find that the e-mail of 16 October 2008 did not constitute a retraction/cancellation of all and any agreements, it would be necessary to hear oral evidence as to whether any agreement did in fact exist in relation to the western wall. Mr Acker SC submitted that this was not an application that the matter should be referred for the hearing of oral evidence but that in any event even if it were to be regarded as such, I should refuse to do so.

18

In **Kalil v Decotex (Pty) Limited and Another** 1988 (1) SA 943 at 979 H-I, the court found that it had a discretion, in an application for

a provisional order of winding up, to allow the hearing of oral evidence in an appropriate case. It held :

> **"Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favour the respondents".**

19

In **Bocimar NV v Kotor Overseas Shipping Limited** 1994 (2) SA 563 (AD) at 587 A-G the court stated :

> **"It would seem that in the Court *a quo* Bocimar's counsel simply applied informally and non-specifically for the hearing of oral evidence, at the end of his argument on the merits, in the event of the Court holding that Bocimar had failed on the papers to establish a genuine and reasonable need for security. No indication was apparently given of who should be**

> **required to give evidence or submit themselves to cross-examination nor was any indication given of what evidence new witnesses would be able to give".**

20

After referring to the passage which I have quoted from **Kalil** supra, the court indicated that :

> **"these observations are, in my view, pertinent to applications generally. In the present case, the probabilities on the affidavits ..... tend to favour Kotor rather than Bocimar. Moreover, the lack of any specific indication as to what oral evidence Bocimar had in mind increases the difficulty of making a favourable assessment of the prospects of *viva voca* evidence tipping the balance in favour of Bocimar".**

21

I am in agreement with the submission on behalf of the first respondent that such indications as there are in the papers point to an agreement in respect of the western wall having been reached. In this context I have regard to the following passages :

(a) Annexure "G" to the founding affidavit where in relation to the front gate (which is the area where the gate was to be moved and a wall constructed in its place), it is noted that "the front gate access was

discussed at length. It was agreed that this work should take place first. I would consult with Garth before work commences".

(b) The handwritten notation by Mr Hathorn of a meeting held on 22 September 2008 (annexure "MH 10 B") where it is indicated that a meeting was held with Garth Holgate on behalf of the applicant and it was "agreed on .....taking out fence at corner (NW) and removing part of fence".

(c) The allegation in the answering affidavit that there was an agreement as set out in the previous sub-paragraph to which the response on behalf of the first respondent is "what was agreed on at previous meetings between the parties is of no force and effect because the first respondent decided on 16 October 2008 not to co-operate with the applicant and to take the law into its own hands".

22

Taking all the aforegoing into account I find that the applicant has not made out a case for the relief which it seeks in respect of the western wall.

23

What remains to be considered is the counter application by the first respondent. Such application was launched on 4 November 2008 and various relief sought the only portion of which is still relevant and in terms of which an order is being sought is an order interdicting the applicant from in any way obstructing or hindering the first respondent's access, use and construction on the road servitude area. The counter application is not referred to in the order of court dated 10 November 2008. This would appear to be inadvertent. It was not contended on behalf of the applicant that the counter application had fallen away. Since, unlike the situation relating to the applicant's notice of motion where by necessary implication this has been altered through the grant of the order on 10 November 2008, there is no reference express or by necessary implication to the counter application, I can only conclude that such counter application is still an issue before me.

24

The applicant had acknowledged that there were certain vehicles or trucks parked on the road servitude area but submitted that these had been removed on 31 October 2008 and accordingly there was no need for the counter application to have been brought. In response to a query from me relating to photographs taken subsequent to that date which still showed vehicles parked in the road servitude area, Mr Snyman submitted that these had no impact on the situation because

there was more than ample space for the first respondent and its vehicles to utilise the road servitude area. In my mind this is no answer – the first respondent is entitled to unencumbered and unrestricted use of the entire area covered by the servitude. Further, as Mr Acker SC pointed out, the first respondent was not only concerned with whether it and its vehicles could pass any vehicles parked on the road servitude area, but whether it would be able to continue with its construction of the road itself on the servitude area. He submitted that this would be impossible if there were vehicles parked because such would interfere with the construction. In my view there is much to be said for this.

25

I accordingly make the following order :

(a) The *rule nisi* granted on 10 November 2008 is discharged.

(b) The applicant is directed to pay the costs of the first respondent occasioned by its opposition to the application.

(c) An order is granted interdicting the applicant from in any way obstructing or hindering the first respondent's :

(i) access to the road servitude;

(ii) use of the road servitude;

(iii) construction on the road servitude.

(d) The applicant is directed to pay the costs of the first respondent of the counter application.

(e) No order as to costs is made in respect of the application to strike out.

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SKINNER, AJ

Acting Judge of the High Court

KWAZULU-NATAL, PIETERMARITZBURG

Date of hearing	:	8 May 2009
Date of Judgment	:	13 May 2009
Counsel for Applicant	:	Mr. C. Snyman
		Instructed by :
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Counsel for First Respondent	:	Mr. B. Acker SC
		Schreiber Smith Attorneys