THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between — Appeal Case No: A356/2014

BOUDEWYN HOMBURG DE VRIES SMUTS — **APPELLANT**

And

MATHYS JOHANNES BENSON — **RESPONDENT**

And in the matter between — Case 10989/2014

BOUDEWYN HOMBURG DE VRIES SMUTS — **APPLICANT**

And

MATHYS JOHANNES BENSON — **FIRST RESPONDENT**
MARTHINUS JOACHIM VERMEULEN — **SECOND RESPONDENT**
THE SHERIFF ON THE MAGISTRATE'S COURT, RIVERSDALE — **THIRD RESPONDENT**

Coram: BAARTMAN & ROGERS JJ

Heard: **7 NOVEMBER 2014**

Delivered: **12 NOVEMBER 2014**

JUDGMENT

Rogers J:

[1] There are two cases before us. The first case is an appeal against a spoliation order granted by the Riversdale Magistrate's Court, to which is related an application by the appellant for condonation for non-compliance of certain of the rules governing the appeal. The second case is an application to suspend the execution of a writ in respect of the costs awarded in favour of the successful party in the Riversdale Magistrate's Court.

[2] I shall refer to the appellant and respondent in the appeal as Smuts and Benson. They are also the applicant and first respondent in the suspension application. The second and third respondents in the suspension application are Benson's attorney ('Vermeulen') and the Sheriff of the Riversdale Magistrate's Court. Vermeulen was joined because Smuts sought costs *de bonis propriis* against him, with an alternative for Benson to pay the costs on an attorney and client scale. The Sheriff has played no part in the proceedings.

[3] Benson, who is a farmer, launched the spoliation application in the court *a quo* on 7 April 2014 as a matter of urgency following the alleged removal by Smuts of a fence which disturbed Benson in his use of the farm Kloofnek. Answering and replying papers were filed. On 15 April 2014 the magistrate granted the application with costs, ordering Smuts to restore the removed fence.

[4] On 17 April 2014 Smuts delivered a notice of appeal. He did not simultaneously lodge the security contemplated by rule 51(4) of the Magistrates' Court Rules ('MCR'). Benson, through his attorneys, MJ Vermeulen Inc ('MJV'), adopted the stance that, because of the failure to file security within the 20 days for

the noting of an appeal allowed by rule 51(3) of the MCR, the noting of the appeal was ineffective and did not suspend the operation of the spoliation order. Smuts' attorneys, Hugo & Bruwer Prokureurs ('HBP'), disagreed. Smuts furnished the required security on 27 May 2014 but MJV contended that by then the appeal had lapsed (the 20 days having expired, by my reckoning, on 20 May 2014).

[5] On 3 June 2014 MJV wrote to HBP requiring that Smuts pay the taxed costs of the spoliation application within one week failing which a writ of execution would be served. Smuts did not pay the costs. On 17 June 2014 the Sheriff served a writ to attach Smuts' goods in satisfaction of Benson's taxed costs amounting to R7 053.

[6] On 24 June 2014 Smuts launched an urgent application in this court to suspend execution of the writ pending the determination of the appeal. As already mentioned, he sought costs personally against Vermeulen, alternatively on the attorney and client scale against Benson. On 1 July 2014 an order was made by agreement in terms whereof the suspension application was postponed to 11 September 2014 for hearing on the semi-urgent roll together with a timetable for the filing of papers. A rule *nisi* was issued calling on Benson and Vermeulen to show cause why the writ should not be suspended pending the outcome of the appeal and why the requested costs order should not be made. In regard to the writ, the rule was to operate as an interim interdict.

[7] The parties filed answering and replying affidavits in the suspension application. The parties thereafter anticipated the scheduled hearing on 11 September 2014 and obtained an order by agreement that the suspension application be further postponed for hearing together with the appeal on 7 November 2014.

[8] In the meanwhile, and on 7 August 2014, Smuts applied for an appeal date in terms of rule 50(4)(a) of the Uniform Rules of Court ('URC'). Rule 50(4)(c) provides that an application for an appeal date is the act by which an appeal is deemed to have been duly prosecuted. Smuts' application for an appeal date was late. The 40 days stipulated in rule 50(4)(a) – counted from the date of the defective noting of the appeal, 17 April 2014 – expired on 20 June 2014. In terms of rule 50(1) of the URC

an appeal lapses if not prosecuted within 60 days of the noting of the appeal. Here the 60 days – again reckoned from 17 April 2014 – expired on 18 July 2014. (Since the noting of the appeal on 17 April 2014 was defective, one could reason that the defective noting did not trigger the 40-day and 60-day period, and that – subject to condonation of the late security – those periods should be reckoned from 27 May 2014, the date on which the late security was lodged. In that event, the 40 days and 60 days expired on 23 July and 20 August 2014 respectively.)

[9] On 14 August 2014 Smuts delivered an application for condonation in respect of his failure timeously to deliver security in terms of rule 51(4) of the MCR and his further failure timeously to apply for an appeal date in accordance with rule 50(4) of the URC (the latter based on the view that the 40 days and 60 days ran from 17 April 2014). Benson did not file an affidavit in opposition to the condonation application but his counsel submitted in his heads of argument that condonation should be refused.

[10] Mr S de Beer appeared before us for Smuts (the heads having been drafted by Mr JJ Hefer) and Mr P-S Bothma for Benson and Vermeulen.

[11] The suspension application has, by virtue of the agreed orders, become academic except in relation to costs. The application was based on the contention that an appeal had effectively been noted, thus suspending the operation of the spoliation order and costs order. This contention was misconceived. On the other hand, this court has an inherent jurisdiction to suspend the execution of a writ where there is a possibility that the underlying *causa* for the writ may in due course fall away and there is a well-grounded apprehension that irreparable harm could be suffered by the applicant if execution were not stayed (*Road Accident Fund v Strydom* 2001 (1) SA 292 (C) at 304G-H; *First Mortgage Solutions Pty Ltd & Another v Absa Bank Ltd & Another* 2014 (1) SA 168 (WCC) paras 4-6).

[12] Benson was wanting to have Smuts' goods attached in satisfaction of a trifling amount of costs, in circumstances where it was obvious that Smuts, even though he had not complied precisely with the rules, was intending to appeal. At the time Benson caused the warrant to be served, Smuts' only default was that he had

furnished security on 27 May 2014 rather than by 20 May 2014.[1] Condonation, if insisted upon, had to be sought from this court, not the lower court. Realistically, such condonation would be argued at the commencement of the appeal rather than by way of an earlier interlocutory hearing.

[13] Benson should, in the circumstances and as a matter of common sense, have agreed to suspension of the writ, at least until it was determined whether Smuts would get condonation for the failure to post security timeously. If Benson was concerned that Smuts was dragging his heels, he could have put Smuts to terms to deliver his condonation application, failing which execution would proceed. Instead, costs were run up in answering and replying papers and presumably in relation to the hearing of 1 July 2014 and the scheduled hearing of 11 September 2014.

[14] I thus consider that, regardless of the outcome of the appeal, the parties should bear their own costs in relation to the suspension application.

[15] Turning to the appeal, there is the preliminary question of condonation. In regard to the failure timeously to lodge security, Smuts' attorney has explained that he simply overlooked this requirement. It is regrettable that MJV, instead of pointing out the non-compliance when the notice of appeal was filed on 17 April 2014, waited until the expiry of the 20-day period before notifying HBP that the noting of the appeal was ineffective and alleging that Smuts was in contempt of the magistrate's order. The oversight was promptly remedied when it came to light.

[16] Regarding Smuts' failure to apply for an appeal date within 40 days from the noting of the appeal, ie by 20 June 2014 (HBP only applied for a date on 7 August 2014), his attorney explained that he misinterpreted the relevant rules. He thought the registrar would only grant an appeal date after the record had been filed. The explanation is not altogether satisfactory but the delay was not gross.

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[1] The security, it has been held, need not be furnished simultaneously with the notice of appeal provided it is lodged within the period allowed for noting an appeal (see *O'Sullivan v Mantel & Another* 1981 (1) SA 664 (W) at 668C-D; *Impact Distributors (Pty) Ltd t/a Bandini Cheese v Janse van Rensburg & Another* [2008] ZAFSHC 50 para 11).

[17] While a failure by an attorney properly to inform himself on matters of procedure may sometimes be visited on the client, this is not a case where it would be just or proportionate to refuse condonation simply because of the failure by Smuts' attorney to comply timeously with the relevant rules. Smuts plainly wanted to pursue an appeal. A detailed notice of appeal was filed very shortly after the court *a quo* delivered judgment. He no doubt believed that his attorney was taking the necessary procedural steps. They are not matters of which he could have been expected to be knowledgeable. Benson has suffered no prejudice. This appeal is being heard less than seven months after the court *a quo* gave judgment. Strict compliance with the rules is unlikely to have resulted in a significantly earlier hearing.

[18] However, an appeal court in assessing an application for condonation must also consider the applicant's prospects of success in the appeal (see, eg, *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 533A; *Federated Employers Fire & Gen Insurance Co Ltd & Another v McKenzie* 1969 (3) SA 360 (A) at 364A). Where there has been a flagrant breach of the rules, an appellate court may refuse condonation even in the face of strong prospects of success (see, eg, *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281J-282A; *Beira Raphaely-Weiner & Others* 1997 (4) SA 332 (SCA) at 337C-F). For reasons I have stated, this is not a case where condonation should be refused without regard to prospects of success. Since the condonation application was argued simultaneously with the appeal, we have all the material and submissions to reach a conclusion on this question. I thus turn to the merits of the case.

[19] Benson alleged in his founding affidavit that at the time of the removal of the fence he was in peaceful and undisturbed possession of Kloofnek excluding, however, the dwelling that was once occupied by a Mr Dempers ('the dwelling'). He used the farm for grazing animals.

[20] The physical layout was not described as precisely as one would wish. Nevertheless, the following appears from a consideration of the papers read sensibly. Kloofnek adjoins Smuts' farm, Zeekoegat. Until the act of alleged spoliation, the dwelling and some of the surrounding Kloofnek farmland was

enclosed with fencing to create what I shall call 'the dwelling enclave'. One of the four sides of the enclave fencing was on the boundary between Kloofnek and Zeekoegat. This is the fence which Smuts removed.

[21] Until this fence was removed, Benson could place his animals in the dwelling enclave. There were two gates into the enclave as well as a drinking trough. After the removal of the fence, animals placed in the dwelling enclave would be able to wander onto Zeekoegat and animals on Zeekoegat could wander into the dwelling enclave. This is the disturbance in possession of which Benson complained. He said he could not feasibly place his animals in the dwelling enclave unless the fence were re-erected.

[22] Benson did not in his very terse founding affidavit say, nor was he required to say, by what right, if any, he occupied Kloofnek. What he said was that he was in free and undisturbed possession of Kloofnek apart from the dwelling. I am satisfied that he did not intend to exclude, and would not have been understood by Smuts as excluding, from the land which he allegedly possessed, the farmland forming part of the dwelling enclave. Only the dwelling itself was excluded.

[23] In his answering affidavit Smuts did not say that Benson did not use the land in the enclave for farming. What he did was to make allegations regarding the respective rights of the parties to that land. He alleged that his wife, Mrs Smuts, had taken transfer of a part of Kloofnek, including the dwelling enclave, during 2013. He alleged, further, that Benson occupied Kloofnek by virtue of a lease with the CV De Wet Family Trust (into whose shoes Mrs Smuts had presumably stepped upon acquiring ownership) and that Benson's rights under the lease specifically excluded the dwelling enclave (to which he referred as 'the farmyard of the Dempers House'). He attached the lease and its various addenda, and referred specifically to clause 4(b). He also claimed that the dwelling enclave was land on which Benson was prohibited from conducting any ploughing activities, in support of which assertion he annexed a specialist botanical report.

[24] As is trite, a court will not in a spoliation application enquire into the underlying rights of the parties (see *Firstrand Ltd t/a Rand Merchant Bank v Scholtz*

NO & Others 2008 (2) SA 503 (SCA) para 12 and authorities there cited). If the applicant had, and intended to have, possession of the land in question and is dispossessed, possession must be restored *ante omnia*.

[25] In order to possess the whole of a farming area it is not necessary that the farmer use all the land all the time. In the context of possession for purposes of acquisitive prescription it has been said that the test is whether there was such use of part or parts of the ground as amounts for practical purposes to possession of the whole, that absolute continuity of possession is not required, and that much depends on the nature of the property and the type of use to which it is put (*Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & Another* 1972 (2) SA 464 (W) at 467H-468B; *Morgenster 1711 (Pty) Ltd v De Kock NO & Others* 2012 (3) SA 59 (WCC) para 17).

[26] I do not think there was any *bona fide* dispute in the court *a quo* that Benson had for some years used the land forming part of the dwelling enclave (together with the rest of the farm) for agricultural purposes. I would simply add that clause 4(b) did not expressly say that the dwelling enclave was excluded from his lease. What was excluded from the lease was '*die woning wat tans deur Mnr Dempers bewoon word op die plaas Kloofnek'*. On the face of it, this refers to the dwelling itself, not any surrounding land. It is not necessary or appropriate in this case to express any final view on the interpretation of the lease but it certainly does not provide clear support for a contention that Benson knew that he had no right to use the dwelling enclave and therefore as a fact did not use it. I may also add that the botanical report does not support Smuts' assertion that the use of the enclave was unlawful.

[27] The removal of the fence did not prevent Benson from gaining physical access to the dwelling enclave. He could still drive his cattle into the enclave through one of the gates. However, the enclave was no longer enclosed on its border with Zeekoegat. It is a matter of common sense that a farmer cannot keep cattle on his land if the land is not fenced, since then his animals could wander onto the neighbouring land. They might become lost or mingled with other cattle or be difficult to round up.

[28] Dispossession does not have to be absolute (complete) in order to constitute spoliation (*LAWSA* 2nd Ed Vol 27 paras 95 and 108). For example, the use of water and electricity would typically be an incident of possession of property, so that disconnecting the water or electricity supply could amount to an act of spoliation (*Naidoo v Moodley* 1982 (4) SA 82 (T) at 84B-E; *Impala Water Users Association v Lourens NO & Others* 2008 (2) SA 495 (SCA) para 19; *LAWSA ibid* paras 97-103). We are concerned here with a boundary fence. The primary function, or at least one of the primary functions, of a boundary fence on farming property is to keep animals in and out. The removal of a fence hitherto used to contain animals on land physically possessed by a farmer is, in my view, an act which materially interferes with the farmer's possession of the land.

[29] A different way of viewing the matter, which leads to the same conclusion, is that, by using land as a camp for animals, the farmer is also using the fences which create the encampment.

[30] The removal of a containing fence has the character of self-help which lies at the heart of the *mandament van spolie*. It is quite different from the sort of interference which is caused where an owner does an activity on his own land which causes a nuisance to his neighbour (eg by making noise or dust) and thus indirectly disturbs the neighbour's use of adjoining land. In the latter class of case the neighbour would need to establish that the owner's use of the adjoining land is unlawful.

[31] The fact that Benson did not own the fence is naturally irrelevant in the spoliation application. It is likewise irrelevant that the fence might hitherto have been used not only by Benson as an incident of his possession of the dwelling enclave but also by those in possession of the neighbouring farm. Possession need not be exclusive in order to be the subject of spoliation (*Willowvale Estates CC & Another v Bryanmore Estates Ltd* 1990 (3) SA 954 (W) at 956J-957C; *Gowrie Mews Investments CC v Calicom Trading 54 Pty Ltd & Others* 2013 (1) SA 239 (KZD) para 10; *LAWSA ibid* para 96).

[32] Given my conclusion on the merits of the case, the application for condonation should be dismissed, such costs to include those relating to the appeal (see the orders made in *Federated Employers*, *Ferreira* and *Beira supra*).

Baartman J

[33] I concur. The following order is made:

In Case A356/2014:

The condonation application is dismissed with costs, such costs to include the costs of the appeal.

In Case 10989/2014

(i) No order is made on the merits of the application.

(ii) The parties shall bear their own costs of the application.

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BAARTMAN J

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ROGERS J

APPEARANCES

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