



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC 15/2019

Heard on: ...19 March 2019...

Delivered on: 10 May 2019...

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
<i>10/05/2019</i> DATE	<i>[Signature]</i> SIGNATURE

In the matter between:

PHILLIP DINTSI

First Applicant

SANAH DINTSI

Second Applicant

and

DEWALD VAN BREDA

First Respondent

YOLANDI VAN BREDA

Second Respondent

JUDGMENT

NCUBE AJ

INTRODUCTION

[1] This is an opposed urgent application for an interim interdict, pending the outcome of proceedings in the Magistrate's Court, Ventersdorp under case number 204/2017. The Applicants seek relief in the following terms:

"2. *That pending the final determination of the proceedings in the Magistrate's Court for the district of Ventersdorp under case number 204/2017, the following orders are made:*

2.1 *That an order is issued declaring that the First and Second Applicants have a free and unhindered right of way, over the following farm between their homestead and the public road next to which the entrance to the farm is situated, which right of way includes free and unhindered access through the gate at the main entrance to the farm:*

The Remaining Extent of Farm Kriel 128, Registration Division IQ, North West Province ("the farm").

2.2 *That the Respondents shall provide each one of the Applicants with a key or keys to open the lock or locks on the gate at the entrance to the farm within 3 (three) days after granting of this order.*

- 2.3 *That the Respondents shall be interdicted and restrained from locking the gate at the entrance to the farm, or causing it to be locked with lock or locks of which Applicants are not each provided with a key or keys.*
- 2.4 *That the Respondents shall within 3 (three) days after the granting of this order remove the electrical fence which was installed at the gate on the route between the Applicants' homestead on the farm and the main entrance to the farm.*
- 2.5 *That the Respondents shall be interdicted and restrained from doing anything or causing anything to be done which hinders or obstructs free and unhindered movement of the Applicants, their family members, their bona fide visitors and emergency vehicles between the main entrance of the farm and the Applicants' homestead on the farm.*
3. *That the Respondents be ordered to pay the costs of this application.*
4. *That all obligations imposed on the Respondents in terms of this order shall be complied with by the Respondents jointly and severally, the one performing, the other one to be absolved.*
5. *That further and /or alternative relief is granted to the Applicants.”*

At the hearing of this application, Mr Botha, counsel for the Applicants, handed in a proposed draft order. Paragraphs 2 and 4 of the said draft order differ slightly from the terms of the relief sought. Paragraph 2 of the draft order emphasises the fact that the relief sought is not final but

temporary. Paragraph 4 of the same draft order deals with an award of costs occasioned by condonation sought by the Respondents in their heads of argument relating to late filing of their heads of argument.

[2] The Respondents raised the following points *in limine*: -

2.1 Lack of urgency

2.2 Non-joinder of the Department of Rural Development and Land Reform (“the Department”).

2.3 *Lis pendens*

2.4 Factual disputes

The Respondents also asked this Court to strike out certain averments which appear in paragraphs 49 and 51 of the Applicants’ founding affidavit. The gist of the Respondents’ opposition to the application seems to be that both Applicants no longer reside on the farm. The Respondents aver that the First Applicant left the farm and went to work at the mines and the Second Applicant also left the farm to reside somewhere else. These allegations are denied by the Applicants.

PARTIES

[3] The First Applicant is Phillip Dintsi (“Phillip”), a male person of about 41 years of age. The Second Applicant is Sanah Dintsi (“Sanah”), a female of 73 years of age, a pensioner and a biological mother of Phillip.

The First Respondent is Dewald Van Breda (“Dewald”), a business man residing at plot 83 Vryhoek, in Potchefstroom, North West Province. The Second Respondent is Yolandi van Breda (“Yolandi”) a female married in community of property to Dewald. The Respondents are owners of the farm known as Kriel 128, Muiskraal (“the farm”) in the district of Ventersdorp and which is the subject matter of this application.

BACKGROUND FACTS

[4] The farm was previously owned by Mr John Oscar Olen (“John”). Phillip’s parents, Mr Frans Dintsi (“Frans”) and Sanah, were employed on the farm by John as general workers. Frans was, together with members of his family, allocated a site where he built a house for his family. Phillip was born on the farm in 1978. He stayed on the farm with his parents and other siblings, including Benjamin Dintsi (“Benjamin”), Isaac Dintsi (“Isaac”) and Agnes Dintsi (“Agnes”). Phillip also provided labour on the farm. John’s son, Gideon Brits Olen (“Gideon”), purchased the farm from John in about 1994. John later passed on. Frans also passed on in 1998. Frans and many other members of the Dintsi family who had passed on, were buried on the farm with the consent of both John and Gideon.

[5] Gideon later sold the farm to Dewald and Yolandi and it was registered in their names in January 2014. The Dintsi family house was still on the farm. Benjamin was always present at that house. Phillip occasionally visited Benjamin. Phillip was at that particular moment working at the mines. Dewald did not require the services of Benjamin. Therefore, with the assistance of the Department, Dewald relocated Benjamin to another farm at Rysmierbult.

- [6] Dewald and Yolandi do not reside on the farm. Dewald occasionally visits the farm to check if everything is still in order. There is one main gate at the entrance to the farm. After Benjamin had left, Dewald locked the gate with padlock and chain. He put up a notice on the gate with his cell phone number should anyone wish to talk to him concerning the locked gate.
- [7] When one of Phillip's siblings, Isaac, passed on, Phillip and Sanah asked Dewald for consent to open the locked gate and let Isaac be buried on the farm. Dewald refused to open the gate and withheld consent for the burial to take place on the farm. Isaac's body was consequently buried at another place. Later, and in January 2017, Dewald noticed that there were people occupying the Dintsi homestead which had been vacated by Benjamin.
- [8] On 01 February 2017, Matshitse Attorneys, representing Phillip and Sanah, wrote a letter to Dewald's Attorneys Moolmaan and Pienaar alluding to the fact that Sanah was returning to the Dintsi homestead on the farm after she had been away for health reasons, also asking Dewald to provide the copy of the key to open the gate so that Sanah could have easy access to her homestead. It was also alleged in the said letter that Phillip was permanently resident at the Dintsi homestead and that he could also be trusted with the key to the main gate. Dewald refused to have the gate opened and give a key to Phillip, hence the present application.
- [9] On 25 October 2017, Dewald and Yolandi filed an application in Ventersdorp Magistrate's Court (main application) seeking an ejectment

of the Applicants in the present application from the farm. The application was brought under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act¹ (“PIE”). The main application was premised on the assertion that Phillip and Sanah had left the farm for a long time, but had returned to stay on the farm without permission from the owners, thus it was alleged that they were then occupying the farm unlawfully. Phillip and Sanah opposed the main application. In addition, they filed a counter-application in which they alleged they were occupiers in terms of the Extension of Security of Tenure Act² (“ESTA”), and they sought a declaratory order to that effect. The main application was subsequently referred to trial as an action and it is still pending in the Ventersdorp Magistrate’s Court.

POINTS IN LIMINE

[10] I turn now deal with points *in limine* as raised by the Respondents.

10.1 LACK OF URGENCY

Mr Ackerman, Counsel for the Respondents, argued that the matter was not urgent and the application should be dismissed. He averred that the main gate has been permanently closed since January 2014.

Mr Botha, Counsel for the Applicants, contended, correctly in my view, that there is now an issue of electric fence which has recently been erected, denying Applicants access to their homestead and that is urgent. This point *in limine* has no merit. The issue of the electric fence creates urgency. The point is accordingly dismissed.

¹ Act 19 of 1998.

² Act 62 of 1997.

10.2 *NON-JOINDER OF THE DEPARTMENT*

Mr Ackerman argued that the Department should have been joined as a party in this application. He seems to suggest that since the Department is funding the attorneys representing the Applicants, the Department is therefore an interested party and it plays a pivotal role in these proceedings. The test for joinder is that any party who has or may have a direct and substantial interest in any order which the court might make in the proceedings is a necessary party and should be joined.³ What is before me, is an application for an *interim* interdict. In the circumstances of this case, no order can be made against the Department. Consequently, the Department has no direct and substantial interest in this application. This point is also dismissed.

LIS PENDENS

10.3 It is true that there is an action pending at the Ventersdorp Magistrate's Court involving the same parties. However, it is not clear if it can be said with certainty that the issues are the same as in the present application. The original action is for the ejectment of the Defendants on the premise that they are unlawful occupiers. The Defendants filed a counter action to be declared occupiers in terms of ESTA. The application before this Court is somewhat different from the issue which the Magistrate must determine. The present application is for an interim interdict which is not what the Magistrate will be called upon to decide. The interim interdict has its own requirements which are different from the requirements

³ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

which parties will be required to prove in their respective claims at the Magistrate's Court.

10.4 The defence of *lis alibi pendens* arises when the following four requirements are proved: –

- (i) there must be litigation pending;
- (ii) between the same parties;
- (iii) based on the same cause of action; and
- (iv) in respect of the same subject matter.⁴

Even if the requirements of *lis alibi pendens* are established, the Court has a discretion to stay the present proceeding or to hear the matter.⁵ In *Loader v Dursot Bros (Pty) Ltd*,⁶ it was held:

“It is clear on the authorities that a plea of lis alibi pendens does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings, because it is prima facie vexatious to bring two actions in respect of the same subject-matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a lis alibi pendens is proved to exist ...”

10.5 In *Ferreira*⁷ it was held:

“The discretion to stay the proceedings or to hear the matter is determined with reference to what is just and equitable as well as the balance of convenience. In view of the fact that the later proceedings are presumed to be vexatious, the party who instituted those proceedings bears the onus of

⁴ *Keyter NO v Van Der Meulen and Another* NNO 2014 (5) SA 215 ECG at para 10.

⁵ *Ferreira v Minister of Safety and Security and Another* [2015] ZANCHC 14 at para 8.

⁶ 1948 (3) SA 136 (T) at 138.

⁷ *Ferreira* n5 above at para 9.

establishing that they are not vexatious. He or she does so by satisfying the court that despite all of the elements of lis alibi pendens being present, justice and equity and the balance of convenience are in favour of the subsequent proceedings being adjudicated upon.”

In my view, the Applicants in this matter have succeeded to prove that it is just and equitable to proceed with this application. In my view, justice, equity and balance of convenience favour the adjudication of this application. This point is likewise dismissed.

FACTUAL DISPUTES

10.6 The Respondents have also raised dispute of facts as a point *in limine*. Not every dispute of facts is material. There must be a genuine dispute of fact. The case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions*⁸ is instructive in this regard. The Court is required to make a determination whether on the papers there is a genuine and a *bona fide* dispute of fact which cannot be adjudicated without hearing oral evidence. I am of the view that there are no *bona fide* disputes of fact in this matter. Most of the facts are common cause. It is common cause that Applicants are resident on the farm. It is common cause that the main gate to the entrance of the farm is permanently locked. It is equally common cause that an electrical fence has been erected in front of the Applicants' homestead. That being the case, there is no genuine dispute of fact which requires oral evidence to be heard. Therefore, the point of factual disputes also stands to be dismissed.

DISCUSSION

⁸ 1949 (3) SA 1155 (T) at 1163-5.

- [11] The first requirement in an application for an interim relief is a *prima facie* right. The Applicant must show that he has a *prima facie* right to the final relief pending, in respect of which the interim relief is being sought. In *Simon NO v Air Operations of Europe AB and Others*,⁹ Smallberger JA expressed himself in the following terms: -

“Insofar as the appellant also sought an interim interdict pendente lite it was incumbent upon him to establish, as one of the requirements for the relief sought, a prima facie right, even though open to some doubt (Webster v Mitchell 1948 (1) SA 1186 (W) at 1189). The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicants, he cannot succeed.”

- [12] In his founding affidavit, the First Applicant avers that he was born on the farm and has been residing on the farm at the family dwelling for his whole life. He avers further that he, together with the Second Applicant, have been residing on the farm “continuously, openly and uninterruptedly for a period of time which commenced prior to 04 February 1997”. The Respondents seem to have taken issue with the fact that at some stage the First Applicant left the farm to seek employment in the mines. Mr Ackerman argued that had the Applicants been present at the farm in January 2014, when the main gate was permanently locked, they would have complained at that time.

⁹ 1999 (1) SA 217 (SCA) at 228 F - H.

- [13] Mr Olen, the previous owner of the farm, deposed to an affidavit on behalf of the Respondents. In his affidavit, Mr Olen states that he still remembers that he employed a person by the name of Phillemon Dintsi, who was working and residing at the Dintsi homestead on the farm. He further states that the said Phillemon left the farm in 2006 in order to seek employment in the mines. However, Mr Olen states that although the said Phillemon had left the farm, he saw him from time to time coming to visit Benjamin on the farm. In his replying affidavit, Phillip agrees that he left the farm in order to find employment at the mines. In all probability, Mr Olen is mistaking the name "Phillip" for "Phillemon".
- [14] It is not uncommon for people, at least amongst Africans, to leave their homestead and family in order to seek employment in the mines or urban areas. That does not amount to abandonment of residence in their rural areas. They may be away for months or years but they do return to their homes at the termination of their contract of employment or during holidays. In all probability this is what happened to Phillip, as Mr Olen says he saw him visiting Benjamin on the farm on certain occasions. Likewise there is undisputed evidence that Sanah is old and sickly. Sanah is diabetic, short sighted and suffers from back pains as she was involved in a vehicle collision in 2010. For these reasons, Sanah sometimes must go to her daughter's house in Fochville so as to be nearer to clinics and other health facilities where she can get medication.
- [15] Sanah's daughter, Agnes, has deposed to a confirmatory affidavit confirming that Sanah has never abandoned her home on the farm, but was away in order to have access to health facilities. According to Agnes, in December 2018, Sanah was at her homestead on the farm, but now she is at Agnes's place because the Respondents have erected an electric

fence and it is impossible for Sanah to walk through that fence, but she has not abandoned her residence on the farm. Health, employment and economic reasons will at times require a person to be away from his or her home on certain occasions without abandoning his residence.

[16] In *Mathebula and Another v Harry*,¹⁰ it was held:

“The meaning of ‘reside’ as in s 6(2)(dA) should not depend on mathematical formulas, such as how many days in a week a person spends on a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a degree of actual physical presence. But this need not necessarily be continuous. Importantly, the Court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention - exhibited by conduct - to return on a permanent basis to one’s residence. It is wrong to assume in all instances that simply because one lives elsewhere out of economic necessity, that fact should ipso facto exclude one’s residence on a particular farm.”

[17] From photographs of the Dintsi homestead submitted with the Applicants’ papers, it is clear that there are people residing at that house. Even if it can be accepted that the Applicants have been away from this homestead for a long period, the fact remains that they have now returned to their residence, and their right to residence which they derived from consent of the previous owner of the farm must be respected. In fact, Mr Lawrence Siziba, who deposed to an affidavit on behalf of the Respondents, confirms that Phillip presently resides on the farm. He states:

¹⁰ 2016 (5) SA 534 (LCC) at para 21.

"I have frequently seen Phillip climbing over the gate at the main entrance of the farm, from time to time. In doing so, Phillip was coming from the area and road outside the main farm entrance gate, and then he entered the farm by climbing over the entrance gate to the farm. At no point in time did I ever see Phillip crawling underneath a fence to gain access to the farm at the main gate and I have always seen him climbing over the gate."

- [18] For a person to either climb over or crawl under the fence in order to gain access to his home is not concomitant with that person's right to dignity which is entrenched in the Constitution. There is no evidence that Phillip will not be able to keep the main gate locked if he is provided with a duplicate key to open the gate.
- [19] Insofar as the electric fence is concerned, the Respondents aver that the electric fence was erected in order to separate the Respondents' herd of cattle. Some of the cattle had contracted brucellosis. The farm manager was instructed to erect a temporary electric fence in order to create a corridor between the wire fences, separating the camps where infected cattle are kept separately from those cattle which are not infected. Whilst the farmer is perfectly entitled to take measures to prevent the spreading of a disease on the farm, such measures should not infringe the occupier's right to dignity. The Respondents can still erect the electric fence but leave space allowing the Applicants and their visitors to walk and drive through in order to gain access to their home. The other alternative will be for the other group of cattle to be moved onto a different part of the farm, where the Applicants will not be prevented from gaining access to their home.
- [20] In my view, the Applicants are likely to succeed in their counter action at the Magistrate's Court and they have established a *prima facie* right

which might be open to some doubt. It is disturbing to note that the Respondents did not even find it necessary to consult the Applicant before they erected the electric fence; they ignored the presence of Phillip on the farm as if he did not exist.

COSTS

[21] Mr Ackerman asked for an award of costs on attorney and client scale should the application be dismissed. It is not dismissed. Equally, costs sought by Mr Botha in his draft order, are not justified in the circumstances of this case. The normal practice in this Court is not to make costs orders unless there are exceptional reasons warranting an award of costs. In this case there are no exceptional reasons to justify a costs order.

ORDER

[22] In the result, I make the following order: -

1. All points *in limine* are dismissed.
2. The Rule Nisi is confirmed.
3. Pending the final determination of the proceedings in the Magistrate's Court for the district of Ventersdorp under case number 204/2017, it is declared:
 - 3.1 that the First and Second Applicants have a free and unhindered right of way over the following farm between

their homestead and the public road next to which the entrance to the farm is situated, which right of way includes free and unhindered access through the gate at the main entrance to the farm (the Remaining Extent of the Farm Kriel 128, Registration Division IQ, North West Province (“the farm”)).

- 3.2 The Respondents shall provide each one of the Applicants with a key or keys to open the lock or locks on the gate at the entrance to the farm within three (3) days after granting of this order.
- 3.3 The Respondents are interdicted and restrained from locking the gate at the entrance to the farm or causing it to be locked, with a lock or locks of which the Applicants are not each provided with a key or keys.
- 3.4 The Respondents shall within three (3) days after the granting of this order remove the electrical fence which was installed at the gate on the route between the Applicants’ homestead on the farm and the main entrance to the farm.
- 3.5 The Respondents are interdicted and restrained from doing anything or causing anything to be done which hinders or obstructs free and unhindered movement of the Applicants, their family members, their *bona fide* visitors and emergency vehicles between the farm and the Applicants’ homestead on the farm.

4. None of the orders contained in paragraphs 3.1, 3.2, 3.3, 3.4 and 3.5 above, including the declaratory order contained in paragraph 3.1, are made final relief and all these orders shall lapse upon final determination of the proceedings in the Magistrate's Court for the district of Ventersdorp under case number 204/2017.
5. There is no order as to costs.

A handwritten signature in black ink, appearing to read 'T M NCUBE', is written over a horizontal line. The signature is stylized and cursive.

T M NCUBE
Acting Judge
Land Claims Court

APPEARANCES

For Applicants: Adv J. J. Botha

Instructed by: Matshitse Attorneys

POTCHEFSTROOM

For Respondents: Adv G Ackerman

Instructed by: Moolman And Pienaar Inc

POTCHEFSTROOM