IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 29/8/14

CASE NO: 60596/2014

In the matter between:

CULVERWELL CATTLE COMPANY (PTY) LIMITED Applicant

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

28/08/14
DATE

SIGNATURE

SILKAATSNEK BEEF ESTATES (PTY) LIMITED Respondent

JUDGMENT

Tuchten J:

1 The applicant applies urgently for a mandament van spolie. The case concerns a pipeline. The respondent has started excavations with a view to removing a section of the pipeline. The applicant claims that it is in possession of the pipeline and seeks a mandament to protect its alleged possession.

2 Water is channelled from the Hartebeespoort dam through an irrigation canal. At a point on this canal, there is a pump house which, until some five years ago, was used to pump water through the pipeline to some agricultural land, in excess of 800 ha, at that stage owned or controlled by a trust through the respondent and another company called Richard Street Developments (Pty) Limited. These two companies bought water rights for a total of some 500 ha of their land, which was some five km from the nearest waterway.

3 To facilitate the bringing of the water to their lands, the respondent concluded an agreement ("the Sanral agreement") with Sanral in August 2003. Under the Sanral agreement, the applicant was given the right to lay a pipeline in the road reserve of the N4 national road to bring the water to these lands. The agreement was expressed to endure until 2030 and could be extended but Sanral also reserved to itself the right to require the respondent to remove or relocate the pipeline. There was a general prohibition against cession on the part of the respondent but clause 7.2 of the Sanral agreement reads, in relevant part:

> This agreement and its contents shall be passed on in total to either of the parties successor-in-title.

4 It is this pipeline which the applicant claims to possess. The pipeline runs from the pump house, underground along the road reserve and then onto the applicant's farm. The applicant concedes that others, including Sanral and the respondent, might be in possession of the pipeline but says, correctly, that the fact of joint possession is not a bar to the mandament. So the issue before me is whether the applicant is a possessor of the pipeline.

5 Since about 2009, the pipeline has been dysfunctional. Its purpose was to convey water to a "huge" cattle feedlot operated by the respondent. But the respondent fell on hard financial times, discontinued its feedlot operation and was compelled by commercial necessity to allow Investec Bank to sell certain of its assets. Richard Street went into liquidation but although the respondent was provisionally wound up, it was rescued from insolvency. The respondent says that given the economic climate, pumping water from the canal feeding from the Hartebeespoort dam to the property on which the erstwhile feedlot was operated is not viable. The most appropriate use of the pipes constituting the pipeline is therefore (thus the respondent) to excavate it and use the pipe sections elsewhere.

6 Among the assets of the respondent disposed of at the instance of Investec was a farm consisting of a number of portions of the farm Zilkaatsnek, in the district of Hartebeespoort. The applicant bought the land constituting the farm and certain water rights, crops and moveables from the respondent under an agreement ("the sale agreement") concluded on 13 March 2012. A representative of Investec, authorised to this end, concluded the sale agreement on behalf of the respondent. The papers do not make clear whether or not the applicant bought all the land for which the respondent had obtained water rights. I got the impression during argument that the applicant was but one of the respondent's successors in title to its erstwhile land holdings but this was not ventilated on the papers.

7 The water rights bought and sold were defined in the sale agreement as being

> ... any and all water rights accruing to the [respondent] and/or relating to the [farm].

8 It is a fair inference on the papers before me and I shall therefore accept as such that the applicant bought all the respondent's water rights and was thus the successor in title to all its water rights. Whether Richard Street Developments had any water rights that were given effect to through the pipeline is not clear on the papers.

9 The significance of this is that the Sanral agreement does not identify the content of the term successor-in-title in clause 7.2. It is not clear whether the Sanral agreement was referring to a successor to the respondent *qua* landowner or *qua* water right holder or both. The applicant does not claim in its affidavits to be the respondent's successor in title in relation to the Sanral agreement in any respect at all although its counsel submitted during argument that it was, in relation to the respondent's water rights. Given the absence in the papers even of reference to or reliance upon this provision, I do not think that I can find that the applicant was the respondent's successor as contemplated by clause 7.2 of the Sanral agreement.

10 The only moveable property of the respondent bought by the applicant under the sale agreement was some feedlot equipment in the wide sense. There had been 11 centre pivots and a number of pumps on the farm. The respondent was expressly given the right to remove them. In addition there were other farming implements used on the farm which the respondent had removed before the sale. There is no mention in the sale agreement of the pump house and its pumping equipment or the pipeline. One does not know if Investec's representative who concluded the sale agreement on behalf of the respondent was even aware that the pump house and the pipeline existed or that the respondent had rights in relation to them.

11 When the sale agreement was concluded, the respondent was in the process of preparing to apply for the subdivision of the farm properties into residential erven. The spread of urban development precludes a feedlot operation on the farm so even if the economic climate improves for feedlot operators, it is unlikely that the farm will again be used for that purpose.

12 By letter dated 16 April 2014, the respondent, through its attorney, asserted rights of ownership over and offered to sell the portion of the pipeline running under the road reserve to the applicant for R27 million, excluding VAT. The applicant was affronted by the letter to which it replied through its own attorneys in a letter dated 22 May 2014. The applicant described the respondent's allegation that it was the owner of the pipeline as ludicrous, fictitious and farfetched. The applicant asserted that it, and not the respondent, was the owner of the pipeline and warned against any attempt, among other things, to remove the pipeline. Paragraph 6 of the letter reads:

> You are hereby called upon to inform us of any such attempts by your client, as we are instructed to proceed with the necessary application in order to protect our client's rights herein.

13 The respondent's attorney replied by letter dated 12 June 2014, informing the applicant that the respondent would start removing the pipeline on 16 July 2014.

14 The threatened application to protect the applicant's alleged rights was not brought until this application was launched on 15 August 2014. One would have thought that the obvious remedy for the applicant would have been an application for a temporary interdict pending an application to have itself declared the owner of the pipeline. Not only was this relief never sought but the application was delayed because, according to the deponent to the applicant's affidavits (Mr Wentzel, the applicant's group legal adviser), he did not believe the respondent was serious. He only realised the respondent was serious, Wentzel said, when he learnt, or saw, that the respondent had actually begun with the process of excavation.

15 One of the reasons, Wentzel said, that he did not believe the respondent was serious was that 16 July 2014 came and went without any signs that the respondent was in fact actually removing the pipeline. This attempted justification is manifestly untrue. The applicant had known since it received the letter of12 June 2014 of the respondent's expressed intention. Before 16 July 2014, nothing that the respondent did, or rather did not do, could have persuaded the

applicant that the respondent was not serious. Besides, in the letter dated 22 May 2014, the applicant had threatened legal proceedings. The applicant does not say that its own threat was not made seriously.

16 The applicant gives another ground for its claim that its representatives did not believe the respondent: that the respondent had not previously asserted to the applicant rights of ownership over the pipeline. But there was no reason for the respondent to do so as against the applicant. It is not suggested that the applicant had ever previously asserted any such rights to the respondent.

17 The applicant advances a third ground why its representatives did not believe the respondent. The respondent had instituted action under case no. 51989/2012 in this court against a defendant it describes as the applicant in this application. The defendant in that action is in fact Mr AM Culverwell but little turns on that. The applicant claims that it was fortified in its belief that the respondent was not serious because "a plea was filed in January 2013 and Respondent apparently abandoned this action".

18 But, as the respondent pointed out, the matter has been enrolled for trial on 19 June 2015 and on 24 March 2014 Mr Culverwell as defendant in that action served his discovery affidavit on the attorneys

for the respondent as plaintiff in that action. So that ground does not justify the alleged belief either.

19 The grounds advanced for the decision not to respond to the warning conveyed in the letter of 12 June 2014 either, as the applicant had said it would, by litigation or at all are so implausible and the failure promptly to move to protect the applicant's alleged rights so lacking in business rationality that I reject as false the basis asserted by the applicant for the decision. Against this background, I find the applicant's evidence of the state of mind of its own representatives in relation to the seriousness of the respondent's asserted intention to remove the pipeline to be untruthful.

20 I turn to an analysis of the applicant's case in the light of the authorities. The applicant asks in the notice of motion for the restoration of its alleged possession of the portion of the pipeline within the N4 national road reserve, and for the reinstatement of that portion of the pipeline already excavated.

21 The applicant need not prove ownership. The mandament protects possession. As is almost invariably pointed out in such cases, even a thief is entitled upon deprivation of possession to the benefit of the mandament. The person deprived of possession must first be restored

to possession before the merits of the case can be considered. The main purpose of the mandament is to restrain persons from taking the law into their own hands and encourage them to take their cases to court rather than to resort to self help.

22 The question, as correctly identified by counsel for the applicant, is whether the applicant factually held the section of the pipeline in the road reserve with the intention of securing some benefit for himself. Possession for the purposes of the mandament is not limited to the obvious cases, eg where the applicant for the mandament exercises physical control over a thing such as a motor vehicle, an animal or a dwelling. Possession in this sense also exists in relation to certain resources. The validity of the claim to the resource is not directly at issue in spoliation proceedings but the exercise of an alleged right or a practice even without claim of right can constitute possession for purposes of the mandament. For example, possession in this sense has been found to exist in relation to a road over which the applicant had travelled to reach a farm which he was working,[1] a source of water upon which the applicant drew for his water supply,[2] a courtyard adjacent to a restaurant used by the applicant restauranteur as an

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1 *Nienaber v Stuckey* 1946 AD 1049

2 *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 A; *Impala Water Users Association v Lourens NO and Others* 2008 2 SA 495 SCA

outside seating area for his patrons[3] and the flow of electricity to the applicant's premises.[4]

23 On the other hand, possession in the sense required for a successful resort to the mandament was not present where what was interfered with was a mere contractual right to a service, the exercise of which was not incidental to the use of the property on which the service was sought to be exercised. Thus, where an applicant had a right to draw water from a source but had chosen to exercise this access to the source through a pipeline and the right to use the pipeline was in dispute, dispossession of the flow of water through the pipeline was held not to constitute spoliation because the incident of the possession or control of the property to which the water was piped was the flow at the source, not the flow through the pipeline.[5] And where an applicant accessed the internet and other voice services through a service provider and the service provider disconnected such access, the disconnection was held not to constitute an interference with possession because there was no interference with the applicant's own hardware and the applicant was not in possession of the mechanisms by which the applicant's equipment was connected

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3 *Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others* 2013 1 SA 239 KZD

4 *Naidoo v Moodley* 1982 4 SA 82 T

5 *Firstrand Ltd t/a Rand Merchant Bank v Scholtz NO* 2008 2 SA 503 SCA.

to the internet or other users. Furthermore, the use by the applicant of its hardware by which connection might be achieved did not give the applicant possession of the connection of its corporeal property to the system of the respondent.[6]

24 The connection between the resource being used and the property in relation to which it is used must not be too diffuse or tenuous. So where an applicant operated a supermarket in a shopping centre and its representatives and customers used whatever bay in the parking area of the shopping centre which happened to be open when they wanted to park their cars, the requisite possession of the parking area needed to ground the mandament was found to be absent.[7] So too, where residents of an informal settlement drew their water from any one of six taps, none of which was on the property occupied by any of the applicants, the mandament was refused because the use of the water did not constitute an incident of the applicants' possession of their properties.[8] On the other hand, where a supermarket operator complained that access to a loading bay habitually used by it had been restricted, the unrestricted use of the loading bay was held to be

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6 *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 SCA

7 *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 1 616 W

8 *Plaatjie and Another v Olivier NO and Others* 1993 2 SA 156 O

an essential ingredient of the applicant's possession of the supermarket and the mandament issued.[9]

25 The applicant's case as made in its founding affidavit is demonstrated by the following passages:[10]

> The water for the irrigation on the farm *is obtained* from a waterway ... situated approximately 5 km from the fence of the farm. [para 11]
>
> The sole purpose of the pipeline is to transfer water from the waterway to the farm where it *is used* for irrigation and general farm consumption. [para 13]
>
> The pipeline was installed for the singular purpose to transport water to the farm. Without the pipeline the farm is simply not capable of irrigation - one of its major activities. [para 18]
>
> [T]he Applicant ... exercised factual control over the pipeline with the concomitant clear intention to derive the benefit of transporting water from the waterway onto its farm for irrigation purposes. [para 31]

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9 *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd* 2010 1 SA 506 ECG

10 The emphasis is my own.

26 I have carefully considered, in the light of the submissions of counsel for the applicant, whether the urgency with which the founding affidavit is said to have been drafted and the fact that the deponent might not be a first language English speaker could have caused confusion and whether the applicant actually intended to convey in the founding affidavit that it *might* at some time in the future elect to receive a flow of water through the pipeline which it *might* at some time in the future decide to use on the farm for irrigation and general farm consumption. I do not agree with counsel's submissions. In my view, the only fair way to read these passages is that the applicant was contending that when the founding affidavit was signed and throughout its occupation of the farm, it was in receipt through the pipeline of a flow of water which it was using mainly for irrigation but also for general farm consumption. This, if true, would constitute possession as contemplated by the authorities. But the applicant does not make that case now.

27 It emerged in the answering affidavit that the applicant has *never* drawn water through the pipeline. Whether the applicant in fact irrigates any lands on the farm is unclear because although the respondent in its answering affidavit invited the applicant to explain what farming activities were actually presently being conducted on the farm, the applicant elected not to do so. As the applicant itself says

that irrigation is impossible without water delivered through the pipeline, the probability is that the applicant is not irrigating any of its lands on the farm.

28 The case as argued to me on behalf of the applicant was that because the pipeline had, before the applicant came onto the farm, been used for bringing water for irrigation and the applicant had bought the pipeline, the pipeline itself is a "natural incident of the Applicant's possession of the irrigation system on the farm". The respondent of course claims that those parts of the pipeline not running on or under the land sold under the sale agreement were not part of the merx and that the respondent remained their owner. The issue of ownership cannot be decided on these papers.

29 It is trite that a case must be made in the founding affidavit. I do not think that the case for possession argued to me was made in the founding affidavit. On this ground alone, the application must fail. It was submitted that it would have been foolhardy for the applicant to put up a case that could so easily be demonstrated as false. No doubt this is true if the deponent had the direct intention of perverting the truth when he signed the founding affidavit. The applicant's founding and replying affidavits were deposed to by Wentzel. I think it may be that in this regard Wentzel was just supremely careless and did not

bother to check the facts. I shall thus for present purposes hold no more than that Wentzel carelessly advanced a version which was not true and when the untruthfulness of the version was demonstrated, sought to escape its consequences by putting up a new case.

30 But this lack of candour has consequences, especially when taken with the untruthfulness about why the applicant did not respond to the letter dated 12 June 2014 telling the applicant of the date when the respondent intended starting with excavations. One consequence is that the assertion of state of mind by the applicant's representative, ie that the applicant subjectively asserted control over the pipeline and thus possessed it, is cast in doubt. One accordingly must look for outward manifestations of that alleged state of mind on the part of the applicant's representatives.

31 Counsel for the applicant pointed to two such alleged manifestations, both of which emerge from allegations made in reply. It is true that the respondent delivered what in this Division is known as a duplicating affidavit, ie an affidavit delivered in response to allegations made in the replying affidavit, and did not put either of these manifestations directly in issue. But the duplicating affidavit was prepared and delivered in great haste and only dealt with matters manifestly within the knowledge of the deponent to the respondent's answering affidavit

and the respondent's lawyers. So one must scrutinise the alleged manifestations carefully.

32 The first such alleged manifestation of a subjective intention by the applicant to exert control over the pipeline is set out in paragraph 8.3 of the replying affidavit:

> The applicant secured its control over, and therefore possession of, the pump house in 2012, soon after it purchased the farm from the Respondent by welding shut the door to the pump house and placing chains and locks around the fence to the pump house. ... The Respondent does not have keys to these locks and therefore does not have possession of the pump house.

33 But the respondent has demonstrated by photographs attached to its duplicating affidavit that it does indeed have keys to the locks securing the chains around the gates to the pump house area and to the pump house itself. There are however clear signs of welding to the two sides of the metal doors to the pump house. The respondent has put up no evidence to contradict that of the applicant that the applicant welded the doors shut in a demonstration of its asserted rights over the pump house and, so the applicant says, over the pipeline as a whole as well. That might have been relevant to a consideration of whether the applicant should obtain interim relief pending an action declaring it the

owner of the pipeline. But no such application is before me. For present purposes, I think that this is yet another instance where the applicant's allegations cannot stand scrutiny. Even if it is true that the doors to the pump house were welded at the applicant's behest, that alone does not demonstrate possession of the pipeline. It demonstrates possession of the pump house, perhaps with a view to obtaining possession of the pipeline, but not possession of the pipeline itself.

34 The second alleged manifestation of an intention to exercise control over the pipeline is based on the allegations in paragraph 17.3 of the replying affidavit:

> During February and March 2014 the Applicant had discussions with SANRAL in order to commence using the pipeline. SANRAL advised the Applicant however against the use of the pipeline due to suspected damage to the pipe which occurred during the installation of the optic fibre cable. The damage would have to be repaired first. Applicant has already commenced the process of obtaining quotes to repair this damage.

35 These are rather vague allegations. There is no indication of the identity of the representative of the applicant who is said to have conducted these discussions or the officials of Sanral with whom the discussions allegedly took place. No documents arising from the

discussions have been put up. The reference to a fibre optic cable needs to be explained. The respondent discovered, *when it began excavating*, that a fibre optic cable crossed the pipeline. The applicant was not warned by Sanral of the existence of the cable as it probably would have been if Sanral were aware of its proximity to the pipeline. I therefore think it unlikely any disclosure was made to the applicant by Sanral in relation to the fibre optic cable.

36 If the applicant had been aware of the Sanral agreement when it allegedly negotiated with Sanral, the applicant would probably have known that it could exercise no rights against Sanral in relation to the pipeline under the Sanral agreement unless it did so by agreement with Sanral or presented itself to Sanral as the respondent's successor in title as contemplated in clause 7.2 of that agreement. And if it had been aware of the Sanral agreement, the applicant would probably have mentioned it in the correspondence to which I have referred. The fact that the applicant made no reference either in the correspondence or the founding affidavit to any discussions or understandings with Sanral demonstrates, as I see it, a probability that the applicant was unaware of the Sanral agreement until its existence was disclosed in the answering affidavit.

37 And finally, in paragraph 17.4 of the replying affidavit, the applicant asserts that the Hartebeespoort Irrigation Board has authorised the use of water extracted from the waterway in relation to the residential development to take place on two portions of the farm Zilkaatsnek. One of those portions is part of the farm. The likelihood therefore is that the applicant does not want water for agricultural purposes but for residential purposes.

38 The result is that the applicant has not established on a balance of probabilities on the admitted or undisputed facts[11] that it was ever in possession of the section of the pipeline which the respondent is in the process of excavating. I do not think that on the case made in reply, the applicant established that the use of the pipeline running under the road reserve was incidental to its use of the farm. The applicant asserts on that case no more than that it might in the future want to use the pipeline to bring water to the farm. It is quite true that an applicant contending for possession in the extended sense does not have to prove constant use of the thing spoliated. Thus, an applicant claiming spoliation of a resource such as a road, dedicated parking bay or electricity or water supply need not prove that he uses the resource every day, or even regularly. But no case was quoted to me in which a successful resort to the mandament was made where

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[11] *Nienaber v Stuckey* at 1054

the applicant had never used the resource at all but merely asserted that he might in the future decide to do so. Even in its extended application, what the mandament protects is possession, not the desire to obtain possession. Furthermore, this being an application for final relief, the procedural rule in *Plascon-Evans* is of application. The version of the respondent, that the applicant is not and has never been in possession of the pipeline, cannot be rejected on the papers.

39 Counsel for the applicant asked me, if I was against the applicant on its spoliation application, to consider granting the applicant an interim interdict pending an action for a declaration of its rights in relation to the section of the pipeline in question. This was done, apparently without any formal application for such relief, in *Hillkloof Builders (Pty) Ltd v Jacomelli* 1972 4 SA 228 D. I do not intend to exercise my discretion in favour of the applicant for the reasons which follow. The applicant deliberately refrained, probably on legal advice, from bringing such an application and then tried to avoid the procedural consequences of that decision. The applicant has not come to court with clean hands. Its representative has at least in one respect shown himself to be consciously untruthful. In other respects the truthfulness of his evidence is subject to considerable doubt. The respondent has not had an opportunity to deal with matters relevant to an application for an interim interdict; particularly in relation to the balance of

convenience which has not been addressed by the parties at all. This does not preclude the applicant from applying in the future for such relief, if so advised.

40 I make the following order: the application is dismissed with costs, including the costs consequent upon the employment of senior counsel.

NB Tuchten
Judge of the High Court
28 August 2014

For the applicant:
Adv C Acker
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For the respondent:
Adv JL van der Merwe SC
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