



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00174

In the matter between:

CATHARINA JACOBA KOTZE
DANIEL WILLEM KOTZE

FIRST APPLICANT
SECOND APPLICANT

and

JOHANNES MARTHINUS ROSSOUW
YOLANDE ROSSOUW
ROSDRIEHOEK FARMING AND SPECULATION CC

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

Neutral citation: *Kotze v Rossouw* (HC-MD-CIV-MOT-GEN-2021/00174) [2021]
NAHCMD 284 (4 June 2021)

Coram: MASUKU, J
Heard on: 12 May 2021
Delivered: 4 June 2021

Flynote: Practice – Applications and motions – Urgent application for interdict – Urgent application struck for lack of urgency.

Summary: This is an urgent application to interdict and restrain the respondents from using a road on the farm of the applicants' farm.

Held; that should there be any urgency it is self-created.

Held; that the matter is struck from the roll and regarded finalized.

ORDER

1. The matter is struck from the roll for lack of urgency.
2. The Applicants must pay the costs of the respondents.
3. The Applicants are to proceed in terms of Rule 73(5) if so advised.

JUDGMENT

MASUKU, J:

Introduction

[1] This is an opposed urgent application to interdict and restrain the respondents against the 'unwanted and unlawful' use of a farm road passing through the second applicant's farm ('farm Danielsdam').

Parties

[2] The first applicant is Ms. Catharina Jacoba Kotze, a major Namibian female farmer, residing at farm number 115, Danielsdam, Mariental, Hardap Region, Namibia and married out of community of property with the second applicant.

[3] The second applicant is Mr. Daniel Willem Kotze, a major Namibian male, residing at erf 1442, c/o Omotako and Kuiseb Streets, Henties Bay, Erongo Region, Republic of Namibia.

[4] The first respondent is Mr. Johannes Marthinus Rossouw, a major Namibian male, residing at plot 186, Mariental, Hardap Region, Namibia.

[5] The second respondent is Ms. Yolande Rossouw, a major Namibian female, residing at plot 186, Hardap Region, Namibia.

[6] The third respondent is Rosdriehoek Farming and Speculation CC, a close corporation registered under the registration number CC 2019/01363, with its principal place of business situated at portion 1 of farm Kouewater, number 209, Hardap Region, Namibia. The third respondent is the owner of 'Farm Kouewater' and first and second respondents each hold 50% member's interest in the third respondent.

Factual background

[7] The applicants and respondents are farmers at two neighbouring farms in the south of the country. Initially, farm Danielsdam was owned by the second applicant's father and farm Kouewater by the first respondent's grandfather, both of whom are now deceased.

[8] The deceased gentlemen had an agreement in terms whereof the second respondent's grandfather could use the road on the second applicant's father's farm to access his farm, farm Kouewater. None of the parties to this application were present when that agreement was entered into. In what appears to be attempt to maintain the neighbourly relationship of the two deceased gentlemen, their descendants seemingly entered into a similar agreement. Unlike the two deceased gentlemen, tension started brewing between their descendants which, it appears was caused by the manner the first respondent allegedly used the road in question. The first applicant's legal representatives wrote to the first respondent on 4 December 2020 to complain about the first respondent

leaving the gate open as well as breaking the locks. The letter requested the first respondent to desist from this conduct.

[9] First respondent then replied to this letter on 14 December 2020. The first applicant's legal representatives then wrote again to the first respondent on 18 December 2020 and in this letter they informed the first respondent to either keep the gate closed or to use the alternative road to their farm, failing which, action will be taken. In their respective papers, the parties set out their positions and I will now proceed to briefly summarise them.

First applicant's founding affidavit

[10] During 1974, the second applicant's father gave permission to the first respondent's grandfather to use the road marked 14-11 on 'IK4' which ran through farm Danielsdam to farm Kouewater. According to the first applicant, this permission was not intended to apply to successors in title of farm Kouewater, but was to lapse upon the death of first respondent's grandfather or upon his ceasing to farm at farm Kouewater or when the second applicant's father withdraws the said permission.

[11] In 1981, the second applicant's father donated farm Danielsdam to him. It is the first applicant's position that, they (herself and second applicant) honoured the agreement of the road usage towards the grandfather of the first respondent. On 2 September 1997, the first respondent's grandfather transferred the ownership of the farm to first respondent's uncle, subject to a lifelong right of usufruct by the grandfather. The late grandfather requested the applicants that the road be rerouted in the year 2000 and this was done. In 2002, the grandfather moved from the farm to his son-in law and according to the first applicant, the permission to the grandfather lapsed in 2002.

[12] According to first applicant, the first respondent's uncle used the road marked 14-7 from 1997 without authorization. According to her, first respondent's uncle only approached the applicants in 2018 to seek permission to use the new road marked 7-10-4-11-1 and permission was granted on the same conditions as with the late grandfather.

First and second respondent rented the first respondent's uncle's farm for about a year and thereafter same was to the third respondent in 2019. The first and second respondents each hold 50% members interest in the third respondent.

[13] On or about 28 July 2018, at a meeting between the applicants and the respondents took place. At this meeting, the respondents were granted permission to use the road on condition that (a) they were to use road 7-10-11-1, (b) that the respondents should not drive with trucks on the road so marked, (c) that the respondents would keep the gate along the Mariental – Stampriet road locked as that gate gives access to the applicants' farm, (d) that the road should stay a two track farm road and respondents should use same like a reasonable road user and (e) that the applicants may withdraw their permission should these conditions not be complied with.

[14] In August 2018, the applicants provided the respondents with four sets of keys for the main gate to gain access. According to the first applicant, the road that runs through farm Danielsdam is not the only road leading to the respondents' farms, but may access same via a promulgated road, but based on their agreement the keys were given.

[15] First applicant holds that the respondents conducted themselves in the following manner after receiving the permission to use the road:

- (a) The first respondent left the main gate unlocked and open on numerous occasions, thereby giving all and sundry access to the applicants' farm and applicants' livestock was being stolen;
- (b) The first respondent requested permission from the applicants to widen the road so as to enable him to drive his trucks thereon. This request was denied. The first respondent, however proceeded to remove 'bushes and branches of trees and started to drive out of the road to widen the road'.
- (c) The first respondent drove with trucks on the road marked 3-11-10-7 and thereby damaged the road beyond repair;
- (d) The first respondent started to drive on the road marked as 1-11-4-10-7, as a result the applicants closed the gates at points 4 and 10 and fenced off those camps and they placed bushes where the gates used to be as well as signs

indicating that the road was closed. The first respondent cut the removed the bushes, cut the fence and continued driving on the road marked 1-11-4-10-7.

- (e) The applicants again closed the road and put up signs indicating that the road was closed and obtained new gates to keep the road fenced off. These too were opened by the first respondent and left open. In addition, the applicant laments that the first respondent drew cartoons on the signs indicating the road was closed.
- (f) This proceeded even after first respondent leased farm Kouewater to a third party. This third party proceeded to use the fenced off road after the first respondent removed the locks and did so with trucks. Attached to this application is a confirmatory affidavit of a certain Mr. Van der Merwe who accompanied the first respondent when he cut the fence.

[16] As regards the requirements of a final interdict, the first applicant holds that the following requirements of a final interdict were satisfied-

- (a) Clear Right¹ - The second applicant owns the farm and as owner of the farm, has the right to enjoy the farm in peace. That the applicants have the right to enjoy the property in peace. By leaving the gates open, the first respondent gives access to unauthorized person to farm Danielsdam, which also infringes on the applicants' right to privacy.
- (b) An act of interference² – The first respondent has caused damage to the applicants' property (the locks, fences and gates). And the applicants' productivity is being affected as applicant has to constantly sort out the livestock.
- (c) No other remedy³ – I understand the applicants' position to be that, they have attempted resolving the dispute out of court, but have failed and approach the court as a last resort.

[17] On urgency, the applicant submits that the respondents forced their way onto farm Danielsdam on 28 April 2021 and again on 2 May 2021 and on both occasions damaged applicants' property. Further, that the respondents use the road in question

¹ *Setlogelo v Setlogelo* 1941 AD 221.

² *Ibid.*

³ *Ibid.*

daily and that the applicants do not know when the road would be left open. From the founding affidavit it is clear that letters were emailed between parties regarding this very issue before court. The first letter was drafted by the applicants' legal representatives on 4 December 2020 and the last one 18 December 2020. The applicant also approached the Ministry of Works Transport and Communication to apply to have the road or a portion thereof to be closed, but was informed that that application would not be considered in 2021, but perhaps in 2022 when the Board sits again. Unfortunately 'IK25' which is the application to Ministry of Works Transport and Communication is vague and no date is available to show when exactly same was made and the applicant also does not state in the founding affidavit, what date this application was made.

The first respondents answering affidavit

[18] As a point of departure, the first respondent raised a point *in limine* in his answering affidavit, to the effect that the first applicant who deposed to the founding affidavit is not the owner of the farm, but is married to the second applicant out of community of property. The first respondent took issue with the fact that the second applicant merely deposed to a confirmatory affidavit. It is his position that, in the absence of a power of attorney or consent to show that second applicant had authorized the first applicant to institute the present proceedings, the first applicant lacks standing in law. First respondent takes the view that, should this court find in his favour on this point, then the application should be dismissed.

[19] Further in rebuttal and in the event that this court takes a different view on this point *in limine*, the first respondent argued that the main and most practical road to farm Kouewater is situated at the main gate of farm Danielsdam. He also does not deny that his grandfather had obtained permission to use the said road.

[20] The first respondent asserts that there is no evidence on record to prove that the permission given by the second applicant's father to the first respondent's grandfather was not to apply to the successors in title. Further that, on the applicants' own version, the late grandfather of the first respondent had transferred ownership to the second

applicant in 1981 and the road was still used as before. Further that, the first respondent's uncle who succeeded his grandfather did not use the road without authorization from 1997 to 2018 as claimed by the first applicant. He (the uncle) was born on farm Kouerwater, grew up on the farm and started working on the farm from 1966 to 1997 when the grandfather transferred the farm to him. The first respondent thus not only denies that his uncle used the road without authorization for twenty – one years, but also the allegation that his uncle only sought and was granted permission in 2018. He goes on to state that, neither his grandfather nor his uncle are alive to confirm the terms of the agreement as alleged by the first applicant.

[21] The first respondent confirms the meeting with the applicants in 2018 where the respondents were granted permission to use the road as reasonably as possible. The first respondent does not deny that in terms of the agreement of 2018, the respondents were not to use trucks on the road. Instead, the first respondent points out that 'the alleged agreement that I may not allow trucks on the road is unreasonable'. This he alleges is because first applicant's trucks are driven on this same road.

[22] First respondent points out that the four sets of keys that were given to them at the 2018 meeting were the keys of the main gate, however first applicant began locking the gates on farm Danielsdam, including the gate giving access to farm Kouerwater. This it seems is an attempt to explain why the cutting of the fence and breaking of the locks.

[23] First respondent denies that the alternative road available to access farm Kouerwater is not 18km as the first applicant evidenced, but is 38km long and alleges that that road is in such poor condition, that one would require a 4x4 to drive thereon. He further denies drawing cartoons on the first applicant's signs and holds the view that the first applicant did not state that it was him 'or anyone claiming through him', who left the gate open.

[24] He further asserts that his grandfather purchased the farm in 1946 and his family has to date used that road and they have acquired a servitude by acquisitive prescription.

In this regard, they have the right therefore to continue using this road as they have been using it for more than thirty years, alternatively they have acquired a right of way.

[25] According the first respondent, his family is not the only one with permission to use the road. The road, he opines was used by Nampost, Nampower and other farmers until the applicant began locking the gates.

[26] On urgency, the first respondent is fortified in his view that according to the first applicant, the dispute already arose in 2019 and 2020. The applicant even wrote a letter to the Ministry of Works Transport and Communication in June 2020.

[27] The first respondent does not deny breaking the locks on the gates of farm Danielsdam in April 2021 and May 2021. He also does not deny that in the incident of April 2021, he was accompanied by a certain Mr. Van der Merwe as alleged by the first applicant.

[28] In conclusion, according to him, the damage to the road is normal wear and tear.

Replying affidavit

[29] In reply to the point in limine, the applicant asserts that while she is married out of community of property to her husband who is the registered owner of farm Danielsdam. She has been living on the farm and farming there for more or less ten years, that she is in physical control of the farm and is the bona fide possessor thereof. Further, that she has the right of use and enjoyment and for these reasons she has substantial interest in the outcome of this matter and therefore has standing. She also states that her husband gave her oral permission to institute these proceedings and has deposed to a confirmatory affidavit. It is further the first applicant's rebuttal that, this application is not brought on behalf of the second applicant, but is brought by both herself and the second applicant joint and that she merely deposed to the founding affidavit because she is actively involved in the affairs of the farm.

[30] On urgency, the first applicant does not deny the first respondent's assertion that the issues forming the subject matter of this case emanated in 2019 and does not even attempt to correct this averment with an alternative date. Instead, the first applicant states that, the reason why the matter was only brought to court in 2021 is because they hoped that the issues would be resolved through other remedies outside of court. However, that the first respondent's conduct in April and May 2021 demonstrated that the respondents intended to continue 'with their unlawful usage of the road'.

[31] On the merits in a nutshell, the applicant rebuts that cutting fences, bushes and branches of trees does not constitute reasonable wear and tear. Further that, prescription was interrupted in 2002, when the grandfather left farm Kouerwaters; when the road was rerouted and when the respondents were given permission to use the road in 2018. It is the applicant's case therefore that the question of servitude by acquisitive prescription does not even arise.

Applicable law and analysis

Locus standi iudicio

[32] It is common cause that the first applicant is married to the second applicant out of community of property and that she is the one living on farm Danielsdam and farming there. She is the one in physical control of the farm and is the one affected by whether or not livestock is stolen as a result of an open gate as alleged by her. She is the one whose privacy and safety is jeopardized when the farm's gate is left open making entry by unauthorized persons possible. I am fortified in my view that, she is directly affected by success or failure of the farming activities on farm Danielsdam.

[33] Damaseb, P.T states that –

'Motion proceedings implicate both the procedural and substantive meanings in *locus*, for a person who seeks to bring proceedings or to oppose them must, on the one hand, have the authority to bring the proceedings because either . . . he has the legal right to do so or is acting on behalf of a person who does In motion proceedings the applicant must make out the case for locus standi in the founding papers and will ordinarily not be allowed to raise *locus* for

the first time in the replying papers. . . . (where what is challenged is the authority to bring the application) In that regard, it is settled that a person who seeks redress in civil proceedings against another must have a direct legal interest in the matter and not a derivative interest⁴

[34] In determining what constitutes direct interest Prest SC explains that ‘The general rule is that in order to justify its participation in a suit or to bring proceedings for relief, a party must show that it has a direct and substantial interest in the right which is the subject matter of the litigation. . . .To determine whether the interest of a litigant qualifies as a direct interest depends upon the facts of each case, and no fixed or generally applicable rules can be laid down for all cases. Where, therefore, the offensive conduct of the respondent bore upon the prosperity of certain businesses, anyone who was a director and in full control of the company which was trading and anyone who was a manager of a business had a real interest that the business should survive and that its profitability should not be harmed.’⁵

[35] The first applicant, although not the title deed holder of farm Danielsdam, is the wife of the owner. Further as is clear from both the applicants as well as the respondents’ papers, it is the first applicant who is in physical control of the farm and who runs the farming activities there. This she has done for more or less ten years. There is no doubt in my mind, based on the authorities cited above, that these circumstances vest the first applicant with direct and substantial interest in the outcome of this matter as same invariably will have an effect on the smooth running of her farming activities. She also has direct interest in having her right to privacy protected. She therefore has locus standi. I now proceed to deal with the issue of urgency.

Urgency

[36] In *Beukus v Kubitzausboerdery (Pty) Ltd*⁶, Parker, AJ was called upon to make a determination based on similar relief as claimed in this matter before me. In the *Beukus* matter, the applicant was using a road on the respondent’s farm, but was subsequently denied such access by the respondent. The applicant approached the court on an urgent

⁴ Damaseb P T. 2020. *Court – Managed Civil Procedure of the High Court of Namibia*. Juta, 150-151.

⁵ Prest C B. 1993. *The Law & practice in Interdicts*. Juta.

⁶ *Beukus v Kubitzausboerdery (Pty) Ltd* (HC-MD-CIV-MOT-EXP-2018/00461) [2019] NAHCMD 110 (17 April 2019) para. [1].

ex parte basis for similar relief as sought in the present matter. In that case too, urgency was challenged and there the court found that, the urgency was self-created.

[37] The court accepted that spoliation applications are by their very nature urgent because the spoliation relief exists to preserve law and order and to stop and reverse self-help in the resolution of disputes between parties. The court however cautioned that this general principle ‘. . . does not prevent court from determining whether the urgency was self-created’.⁷ The court took into consideration that the first time the respondent locked the gate was in May 2018 and subsequently in August 2018 and September 2018, but the applicant only filed the urgent on December 2018. The court was satisfied that the matter did not become suddenly urgent in December 2018 in the circumstances and that the applicant could have approached the court much earlier in the year.

[38] In the present matter, as far back as 4 December 2020, the applicants’ legal representatives wrote a letter to the first respondent raising the issue of the gates being left open and the breaking of the locks on the gates by the first respondent and requested the first respondent to desist from this conduct, failing which the High Court would be approached. The first respondent responded to that letter on 14 December 2020 and the applicants again wrote to the first respondent in reply to his response on 18 December 2020. Clearly, the issue before me was already present therefore necessitating the initial letter of 4 December 2020. Another letter was again sent to the first respondent dated 13 April 2021 setting out the same issue as before. Why is this matter urgent?

[39] The applicants only filed the founding papers on the E-Justice system on 7 May 2021 and the matter was set down for 12 May 2021. What happened between 19 December 2020 and 12 April 2021? This matter did not suddenly become urgent on 7 May 2021. The alleged conduct of the first respondent dates back to December 2020 and the first letter of complaint by the applicants’ legal representatives is dated 4 December 2020. The first applicant’s explanation that they were exploring the possibility of having the dispute resolved out of court by way of an amicable resolution does not aid their case

⁷ Ibid, para. [4].

as the founding affidavit does not accurately and in detail set out what actions were taken to resolve the dispute which caused the delay, other than the letters, a criminal case that is or is not currently pending and the application to have the road or portion thereof closed. It is a matter of note that, no date is given when the application to the Ministry was made to have the road or a portion thereof closed.

[40] The founding affidavit does not set out an explanation for the period 19 December 2020 to 12 April 2021 nor the period 14 April 2021 to 6 May 2021.

[41] The urgency, if any exists, is self-created and I associate myself fully with the reasoning of Parker, AJ in the *Beukus* matter insofar as it relates to the question of urgency.

Conclusion

[42] In the result, the application is struck from the roll for lack of urgency and the applicants are to pay the costs of the respondents.

Order

[43] In the premises, the following order commends itself as being appropriate to issue, namely:

1. The matter is struck from the roll for lack of urgency.
2. The Applicants must pay the costs of the respondents.
3. The Applicants are to proceed in terms of Rule 73(5) if so advised.

TS Masuku
Judge

APPEARANCES

FOR THE APPLICANT

J. Vermeulen
Of Ellis Shilengudwa Inc, Windhoek

FOR THE RESPONDENTS

M. Schurz
Of Delport Legal Practitioners, Windhoek