



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 23702/2010

In the matter between:

LEMOENSHOEK PLASE (EDMS) BPK Applicant

and

RICHARD FAIRFAX BUTT First Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN Second Respondent

And

Case Number: 12863/2011

In the matter between:

LEMOENSHOEK PLASE (EDMS) BPK Applicant

and

RICHARD FAIRFAX BUTT First Respondent

FREEK WILLEMSE Second Respondent

RULING ON RULE 33 (4) APPLICATION DELIVERED 1 JUNE 2012

ZONDI, J:

[1] This is an application for an order allowing the separate adjudication of certain legal points in terms of Rule 33 (4) in both matters referred to in the heading above; and the admission of the filing of a further set of affidavits by the applicant (the first respondent) in the first matter above.

[2] The applicant in the present application is Richard Fairfax Butt, who is the first respondent under both the above case numbers. The applicant in both matters is the respondent in the present matter. For the sake of convenience I will continue to refer to the parties as they are cited in the two matters.

[3] On 27 October 2010, under case number 23702/2010 ("the main application"), the applicant issued an application against the first respondent and the Registrar of Deeds in terms whereof the following orders were sought:

- 3.1 for the registration of servitudes of abutment and aquaduct in favour of the applicant's property, Portion 2 of the farm Lemoenshoek 25, as the dominant property, over the first respondent's property, Portion 38 of the farm Lemoenshoek 25, as a servient property, in accordance with the terms and conditions set out in the draft notarial deed with draft diagram attached thereto and annexed to the Notice of Motion as Annexure "KM1";
- 3.2 Authorising the second respondent to register the said servitudes against the parties' title deeds

[4] The matter was opposed by the first respondent with the second respondent filing a short report while not opposing the matter. The first respondent's Notice of Opposition was filed on 15 November 2010.

[5] The first respondent's opposing papers in the main application were filed on 20 December 2010 and the applicant's replying papers on 6 April 2011.

[6] While awaiting the hearing of the main application, the applicant, on 28 June 2011, brought an urgent application for an interim relief, pending the date of the hearing of the main application, on the basis that, unless opposed, it would proceed on 21 July 2011. That application was brought under the case number 12863/2011 (interdict application).

[7] In the interdict application the applicant *inter alia* sought an order that pending the adjudication of the main application and while there is water flowing in the Lemoenshoek River the first and second respondents and/or their employees be prohibited from at any time interfering or meddling with the operation of the diversion works.

[8] Both respondents opposed the interdict application and filed their opposing affidavits to which the applicant has responded. The main application and the interdict application are still yet to be heard.

[9] The first respondent seeks an order directing that all further proceedings under both case numbers be stayed until the legal issues as set out in Annexure "A" to its founding affidavit filed in support hereof have been separately decided in accordance with the provisions of Rule 33 (4).

[10] The basis for the application is that as the papers stand there are a number of

purely legal points that have arisen which are not affected by factual disputes and which if decided in the respondents' favour, will conclusively dispose of the matter without any need for lengthy oral evidence. As I understand the first respondents' submission the position is this; it is not necessary in order to determine the legal issues to hear factual evidence and to resolve factual disputes which may arise therefrom. The dispute on legal issues can be determined independently of the hearing of factual evidence.

[11] As regards the application to condone the filing of a further set of affidavits by the first respondent in the main application, the applicant is not opposed to it on condition that it is afforded an opportunity to file a reply, if necessary. In the circumstances I will grant the first respondent leave to file a further set of affidavits and allow the applicant to file a reply, if necessary.

[12] Rule 33 (4), which deals with special cases and adjudication upon points of law, provides as follows:

"(1) ...

(4) If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[13] The Rule 33 (4) procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The term “convenience” does not only convey the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. (*Mota v Moloantoa* 1984 (4) SA 761 (O) at 786 D). In other words, the question is whether it will be appropriate and fair to hear these legal issues separately from other questions which may fall for determination.

[14] Ordinarily, it is desirable in the interests of expedition and finality of litigation to have one hearing only at which all the issues are canvassed so that the Court, after conclusion of the trial, might dispose of the whole of the case. The function of the Court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages and disadvantages which would flow from the grant of the order sought. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that such advantages would outweigh the disadvantages, it would normally grant the application (*Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364). At the same time, it may not be desirable to separate the issues in circumstances where the issues are inextricably linked (*Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485).

[15] The issues in respect of which the first respondent seeks a separate preliminary hearing are the following:

1. that the application be dismissed in that the servitude sought to be registered is not legally registrable;
2. that the servitude constitutes an attempt to achieve an apportionment of the water of the Lemoenshoek River under the guise of an application for a

servitude in terms of section 127 of the National Water Act, 36 of 1998 (“the Act”) which is legally inadmissible;

3. Alternatively, that the applicant has failed to make out a case, as is required by section 127 read with Schedule 2 of the Act, that it is authorised under the Act, to use the water, alternatively, all the water, which forms the subject of the servitude sought in the Notice of Motion. The respects in which it is alleged that the applicant has failed to make out a case under section 127 read with Schedule 2 of the Act, are set out by the first respondent.
4. As regard the interdict application the suggestion is that it should be dismissed on the basis that it lacks urgency.

[16] The question whether or not these legal issues can be determined separately from others must be considered by reference to the averments made by the parties in their respective affidavits. If one has regard to the applicant’s founding, and replying affidavits it is apparent that the applicant in seeking relief relies to a large extent not only on its own evidence regarding the use of water by the riparian land owners along the Lemoenshoek River but also on the information given to it by the third parties. The same applies to the first and second respondents in relation to their defences.

[17] That this is the case is borne out by the allegations which the applicant makes in para 2.1 of its Replying Affidavit. It says:

“Dit blyk ooglopend dat die eerste respondent se kennis van die feite en die geskiedenis van die situasie wat heer en geheers het in en ten opsigte van die Lemoenshoekrivier, grootliks gebaseer is op inligting wat hy van derdes verkry het.”

He goes on to say:

“Ek is voorts geadviseer dat verskeie van sy regs-submissies nie korrek is nie, alternatiewelik, op ‘n verkeerde feite basis gegrond is...”

[18] He says: *“Ek glo waarlik dat insoverre daardie inligting verskil van die feite soos weergegee deur die eerste respondent en veral MNR ADS FULLARD se verklaring, eergenoemde die korrekte feit weergawe uiteengesit”* .

[19] As regards the first legal point, the grounds upon it is contended by the first respondent that the servitude is not legally registrable relate to the manner in which servitude conditions are formulated and the form in which a plan depicting the location of the proposed water works is presented. It was argued by Mr **Le Roux** that the lack of specificity in the conditions renders the servitude not legally registrable.

[20] In my view there is no need to address this issue as a preliminary point. Its consideration only becomes relevant once the Court has in terms of section 130 of the Act awarded a claim for a servitude. In terms of this section the Court may award a claim with or without modifications. It is therefore clear that the determination of the registrability of a servitude may or may not arise depending on the outcome of a claim for a servitude.

[21] As regards the second and third legal points raised by the first respondent, in my view these may not be determined separately as their determination essentially entails the consideration of the factual evidence on which a claim for a servitude is based.

[22] From the foregoing it is clear in my view that the issues relating to the legal

points and factual issues cannot be separated. They are inextricably linked. The determination of the legal points requires the consideration and resolution of factual disputes. In these circumstances it will be desirable in the interests of expedition and finality of litigation to have one hearing only at which all the issues are canvassed so that the Court, after conclusion of the trial, might dispose of the whole of the case.

[23] In the result the application for separation is refused. The first respondent is given leave to file a further set of affidavits in the main application to which the applicant may reply, if necessary. Costs are reserved for later determination.

A handwritten signature in black ink, appearing to read 'D H Zondi', is written over a horizontal line.

D H ZONDI