Setlogelo Appellant v Setlogelo Respondent
1914 AD 221

Appellate Division, BLOEMFONTEIN.

1914. March 16, 17.

LORD DE VILLIERS, C.J., INNES, J.A., and C.G. MAASDORP, A.J.A.

Flynote

Appeal. --- Right, of appeal. --- Order made on motion. --- Single Judge of O.F.S sitting in, vacation. --- Native. --- Prohibition to own land.-Interdict against trespass.-Interlocutory order.

Headnote

There is an appeal to the Appellate Division from a judgment on motion given by a single judge of the Orange Free State Division, exercising the full powers of that Court during vacation, although no formal consent has been given by the respondent.

The Orange Free State Division, having refused to grant an interdict to restrain the respondent from trespassing on and ploughing a portion of a farm occupied by the petitioner, on the ground that, as a native, he was prohibited by sec. 6 of chapter 34 of the Law Book from holding or obtaining transfer of immovable property.

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Held, that the interdict ought to have been granted, inasmuch as the fact of the disturbance of a *bona fide* possession was not denied, and, as no fact was adduced to show that the trespasser had or believed that he had a right equal to or better than the occupiers.

Held further, that the refusal to grant the interdict was an order which could be appealed from without the consent of the Court which made the order.

The decision of the Orange Free State Provincial Division in *Setlogelo v Setlogelo* reversed.

Case Information

Appeal from the decision of the Orange Free State Provincial Division (FAWKES, J.)

Francis Setlogelo applied by petition for an interdict restraining or interdicting Isaac Setlogelo and Ephraim Setlogelo from trespassing on certain ground and from continuing to plough on certain portion of the farm Somerset in the district of T'haba 'Nchu. He set out in his petition that all the parties were heirs under the will of Abraham Setlogelo and his surviving spouse by which the farm Somerset was left to the petitioner and Ephraim, and a portion of the adjoining farm, Moroto, was left to Isaac; that the petitioner and Ephraim were natives and could not obtain transfer of the farm Somerset, but that they took possession of the farm and exercised all the rights of ownership thereon; and that they had had the farm sub-divided by a surveyor and by agreement each had occupied a separate and defined piece of ground; that within the last thirty days Isaac and Ephraim had ploughed ground on petitioner's portion of the farm and continued to do so despite the petitioner's protest, and that as the ploughing season was fast passing he would suffer irreparable injury if the respondents were not interdicted from trespassing upon and ploughing on his portion of the farm.

The trial court (MAASDORP, C.J.) granted the following order: ---

(1) That a rule *nisi* do issue, calling upon the respondents to show cause why they should not be restrained from trespassing and ploughing on that portion of the farm Somerset, No. 55, District Thaba 'Nchu, as was duly surveyed by surveyor Johnson and allotted to the applicant.

(2) That the rule do act as an interdict in the meanwhile.

On the return day of the rule the court (FAWKES, J.) discharged the rule with costs. The learned judge delivered the following judgment: ---

Judgment

FAWKES. J.: This is an application upon the return of a rule *nisi* calling on respondents to show cause why they should not be

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restrained from trespassing and ploughing on a portion of the farm Somerset No. 55, district Thaba 'Nchu, as was duly surveyed and allotted to the applicant.

Mr. *Botha* opposed the making of the rule absolute on the ground that the applicant is a native prohibited by the provisions of section 6 of Chapter 34 of the Law Book from holding or obtaining transfer of immovable property.

The petition of the applicant, sections 6 and 7 sets out that he is a native who, in terms of the law, cannot obtain transfer, and that he nevertheless took possession of the farm and exercised all rights of ownership on the farm. Mr. *Fiehardt* while admitting that the applicant is prohibited by law from obtaining transfer, claims that he has such a possession and ownership of the land without registration of any title as would enable him to bring an action of ejectment against the trespasser.

As the applicant comes within the provisions of section 6 of chapter 34 he cannot either buy or lease immovable property or get it transferred to his name, and he can have no such possession or ownership as would, I think, give him that clear right which he must show before he can obtain the extraordinary remedy of an interdict-.

P.U. Fischer, for the appellant.

[LoRn DE VILLIERS, C.J.: Before you go on, have you a right of appeal? This case arose on motion, and was decided by a single judge. Must you not file a consent to the appeal direct?]

There was no appeal in similar cases before Union to the full Bench of the Orange River Colony.

The possessor of property has a right to protection. He is entitled to a *mandament van spolie* against any disturber. It is unnecessary to prove more than actual possession. It is only necessary to prove a right of possession; not that the right is in dispute. The fact that a person cannot own property does not deprive him of his right to possess it: *Lucas Trustee v Ismail and Amod* 1905 TS 239; *Khamisa v Mahomed* (31 S.A.L.J. 109). The provision excluding coloured persons from the right to own land must be strictly construed: *O.F.S. Law Book,* ch xxxiv, secs. 1, 2, 3, 6, 9; *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811; Maxwell on the *Interpretation of Statutes* (p. 427).

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C.L. Botha, for the respondent: The Court only had power to grant an interdict pending action. Such an interdict would be an interlocutory order, appealable only by leave of the judge making the order. Leave to appeal is therefore necessary.

The applicant entered into possession in order to claim ownership. This he could not claim. The bequest to the applicant being void, the property belongs, either by succession *ab intestato* or by the *jus accrescendi* to the respondent. The petition does not allege that the respondent cannot own land and it may therefore be inferred that he can own it.

An interdict may only be granted if otherwise irreparable injury would ensue to the applicant. That is not the case here. There has been no spoliation. The respondent is merely a trespasser, not a spoliator.

[LORD DE VILLIERS, C.J., referred to *Armory v Delamirie*

(1 Str. 504).]

See *Mostert v Smidt* (1 R 24); *Boyd v Olsen and Others* (12 C.T. Rep. 575); *Blomson v Boshof* 1905 TS 429; *Nelson and Meurant v Quin & Co.* (1874, Buch. 46); *Aliwal North Municipality v Oxer and Smith* (1875, Buch, 138).

Fischer, in reply: There was more than a trespass; there was an assertion by the respondent of a right.

As to the right of appeal in this case, see O.R.C. Ord. No. 4, 1902, rules 2, 3, 49 of the High Court; Ord. No. 13, 1904, sec. 5.

Cur. adv. vult.

Postea, on March 17.

LORD DE VILLIERS, C.J.: The judgment appealed from was given by a single judge of the Orange Free State Provincial Division, not sitting in chambers but exercising during vacation the full jurisdiction vested in that division. If the sitting had been in chambers there would have been an appeal to the Provincial Division under section 12 of Ordinance No. 4, 1904, but there appears to be no provision for such an appeal from a judgment such as the present. It follows that although the case came before the court by way of motion, the appeal may now be brought before the court without the formal consent of the respondent.

The application was for a confirmation of a rule *nisi* granted by the Chief Justice calling upon the respondents to show cause

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why they should not be restrained from trespassing and ploughing a portion of a farm occupied and possessed by the petitioner within certain bounds. The petition stated that within the last preceding 30 days the respondent had ploughed ground on the petitioner's defined portion of the farm, and continued to do so notwithstanding the petitioner's protest. The petition further stated that the ploughing season was fast approaching, and that the petitioner would suffer irreparable injury if the respondent was not forthwith interdicted from trespassing or ploughing on the said portion of the farm and from further interfering with the petitioner's free and undisturbed use of such portion. These statements were verified by affidavit and were not contradicted by the respondents. Counsel for one of the respondents, however, opposed the making of the rule absolute on the ground that the petitioner was a native prohibited by the provisions of section 6 of chapter 34 of the Law Book from holding or obtaining transfer of immovable property. The learned judge held that as the petitioner came within the provisions of that section he could not either buy or lease immovable property, and could have no such possession or ownership as

would give him that clear right which he must show before he could obtain the remedy of an interdict.

I am of opinion that upon the uncontradicted facts before the Court, the petitioner has a clear right to an interdict. He does not by his petition claim that he is the registered owner or lessee of the land, but he states that he is in *bona, fide* occupation and possession of the land. As such occupier he is entitled to retain undisturbed occupation until ousted by someone who can establish a better title than his to own or occupy the land. This is an elementary principle of law which Mr. *Botha* on behalf of the respondents has not attempted to deny, but he has contended that there is no proof of such irreparable injury as would justify the granting of an interdict. *Prima facie,* the disturbance of a man's *bona fide* possession is such an injury to him as to justify the granting of an interdict. If such a disturbance takes place in circumstances which show that the trespasser honestly believes that he has a better right to possession than the occupier, or at all events, has an equal right, the Court would be justified in withholding the interdict until the relative rights of the parties have been decided by action. But where, as in the present case, the fact of the,

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disturbance of a *bona fide* possession is not denied, and no single fact is adduced to show that the trespasser had or honestly believed that he had, an equal right as, or a better right than, the occupier, the disturbance should be treated as an act of spoliation, and the parties should be replaced in the position in which they were before the act was committed. The interdict ought, in my opinion, to have been granted in order to place the parties in that position. It has been contended that the judgment was only interlocutory, and cannot therefore be appealed against without leave of the court below, but this proposition appears to me to be untenable. After refusing the interdict, the court below had no longer any power to grant the interdict in the same application. The final word as to the granting of the interdict had been spoken and on the principles laid down by this Court in *Steytler v Fitzgerald* (1911 AD 292), the order refusing the interdict had the effect of a definite sentence which is subject to appeal. The Court will allow the appeal with costs in this court and in the court below, and will grant the interdict as prayed, with leave to the respondents to institute an action against the petitioner for a discharge of such interdict

INNES, J.A: I agree that an appeal in this matter lies of right to this court and that the written consent referred to in section 5, Act No. 1, 1911, is not required.

It was urged, however, though not very strenuously, that the order appealed from was interlocutory, and could not be brought here without the leave of the court below. That contention seems to me unsound. The application for an absolute interdict, and the refusal to grant it finally disposed of the applicant's right to the only relief which he sought. And the fact that this court is affording the respondents an opportunity of reopening the matter by way of entirely fresh proceedings, which they may or may not institute, does not seem to me to alter in any way the nature of the original order. There are many cases in which the refusal to grant an interdict even pending an action has been held to be final and not interlocutory (*Donoghue v Van der Merwe, 1889-1890 (4) OR 1; Ex parte Lewis and Marks, 1904 TS 281; Carlis v Hertz Trustee, 1904 TS 584.* And the refusal of an interdict absolute seems a stronger case.

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So far as the merits are concerned the matter is very clear. The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. Now the right of the applicant is perfectly clear. He is a possessor; he is in actual occupation of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possesion. True, the law does not allow him to buy land, or to lease it, or to take transfer of it. But it does not forbid him from occupying it, more especially as it would seem to have devolved upon him by way of inheritance. It would indeed be a remarkable state of things if a native could be deprived of his right of occupation of land which he had honestly come by at the instance of any person who took a fancy to it, merely because he was not and could not become the registered owner. And yet that would be the result of the order appealed from if it were allowed to stand.

But it was urged that in any event no irreparable injury had been sustained. That was not the ground upon which the learned judge based his refusal; but in any event it is not a ground which can avail the respondent in this case. The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's *Institutes* where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though *prima facie* established, is open to some doubt.

In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better cairse, is to grant the relief if the discontinuance of the act complained of would not irreparable injury to the other party: Van der Linden, *Inst.* (3, 1, 4, 7). But he certainly does not lay down the doctrine that where there is a clear right the injury complained of must be irreparable in order to justify an application an interdict.

I was not suggested during the argument that the other requisites for an interdict were not present, and I agree that the

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appeal should succeed and the order be made in the terms stated by the Chief Justice.

C.G. MAASDORP, A.J.A., concurred.

Appeal allowed accordingly with costs in this Court and in the court below and interdict granted as prayed with leave to the respondents to institute an action against the applicant for a discharge of such interdict.

Appellant's Attorneys: *Gordon Fraser & Machardy,* Bloemfontein; Respondent's Attorneys: *Fraser & Scott,* Bloemfontein.