



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 642/2022

In the matter between:

SNOWY OWL PROPERTIES 284 (PTY) LTD	FIRST APPELLANT
ANTON LOUW	SECOND APPELLANT
MICHAEL KIRKINNIS	THIRD APPELLANT
DEREK WOODHOUSE	FOURTH APPELLANT
TARA GETTY	FIFTH APPELLANT
ZUKA PROPERTIES (PTY) LTD	SIXTH APPELLANT
MUN-YA WANA CONSERVANCY	SEVENTH APPELLANT
SIMON NAYLOR	EIGHTH APPELLANT
and	
MZIKI SHARE BLOCK LIMITED	RESPONDENT

Neutral citation: *Snowy Owl Properties 284 (Pty) Ltd and Others v Mziki Share Block Limited* (642/2022) [2024] ZASCA 79 (27 May 2024)

Coram: PONNAN, MOTHLE, WEINER AND GOOSEN JJA AND COPPIN AJA

Heard: 2 May 2024

Delivered: 27 May 2024

Summary: Interdict – infringement of rights conferred by servitude - appeal against a final order – defences raised against grant of the interdict determined in separate proceedings concerning enforceability of arbitration award – finalisation of appeal process in those proceedings dispositive of defences to interdict – persistence in meritless appeal warranting punitive costs order.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Chili J, sitting as court of first instance):

The appeal is dismissed with costs on the scale as between attorney and client.

JUDGMENT

Goosen JA (Ponnan and Mothle and Weiner JJA and Coppin AJA concurring):

[1] Snowy Owl Properties 284 (Pty) Ltd (Snowy Owl) is the owner of two large farms situated in northern KwaZulu-Natal (the Snowy Owl properties). Mziki Share Block Limited (Mziki) is a share block company which owns land (the Mziki properties) adjacent to the Snowy Owl properties. Snowy Owl and Mziki entered into an agreement to establish a functionally integrated private game reserve on their properties. The operation of the private game reserve was approved, subject to the registration of a servitude over the Snowy Owl properties in favour of the Mziki properties. During 1990, a notarial agreement of servitude was registered over the properties, permitting the parties access to a network of roads on the properties, for the purpose of game viewing.

Background

[2] The relationship between Snowy Owl and Mziki has, despite their common interest in the operation of a private game reserve, been bedevilled by conflict. The terms of the agreement of servitude have been the subject of disputes which have been referred to arbitration.¹

2016 and 2019 arbitration awards

[3] Trouble first arose when Snowy Owl proposed the development of tourist guest lodges on its property. Mziki objected on the basis that the development of the lodges would interfere with its servitudinal rights of traverse. An arbitrator found that the property could only be used for game viewing, but that Snowy Owl was entitled to develop game lodges on its property. An arbitration appeal panel overturned the award in respect of the development of game lodges on the property.² A further dispute concerning the conduct of Mziki guests and their use of game hides on the Snowy Owl properties was also referred to private arbitration. It was resolved in July 2019.

The 2020 arbitration award

[4] In July 2017, Snowy Owl commenced digging up roads in the plains area of its properties using a bulldozer. Branches and piles of gravel were dumped on the road surfaces to prevent vehicle access. Notices were issued to Mziki and other parties who exercise rights of traverse, advising that certain roads would be closed for maintenance purposes and others permanently closed for ecological reasons. The dispute went to arbitration. Mziki filed its statement of claim in February 2018. It claimed that the destruction and closure of the roads infringed its servitudinal rights and called for the rehabilitation and re-opening of roads that

¹ A history of the disputes is set out in the arbitration award of Advocate Dodson SC, handed down on 2 April 2020. See also the judgment of this Court in *Snowy Owl Properties 284 (Pty) Ltd v Mziki Share Block Limited* [2023] ZASCA 2 paras 1 and 4.

² The appeal panel delivered its award in August 2016.

had been closed. Snowy Owl pleaded that it was obliged to close certain roads to prevent ecological damage, and to give effect to an environmental management plan prepared to secure declaration of the reserve as a protected area.³ In respect of other roads, it stated that temporary closure was necessary for maintenance work. The arbitration commenced before Advocate Dodson SC in October 2019 and was concluded in March 2020.

[5] On 2 April 2020, Dodson SC issued an award (the 2020 award). He found that the closure of the roads was in breach of Mziki's servitudinal rights and directed that Snowy Owl rehabilitate the roads, including what were described as 'the River roads', and restore access to Mziki within specified time periods. These were subject to termination of the 'national lockdown', proclaimed under the National Disaster Management Act 57 of 2002 to combat the COVID-19 pandemic, which imposed restrictions on specified activities, including game farming activities.

The award application

[6] Snowy Owl did not re-open the roads as required by the 2020 award. On 15 July 2020, Mziki launched an application before the KwaZulu-Natal Division of the High Court (the high court), in terms of s 31(1) of the Arbitration Act 42 of 1965, to make the 2020 award an order of court (the award application). Snowy Owl opposed the application on the basis that the 2020 award was vague, could not be made an order of court, and that it required Snowy Owl to undertake actions which are unlawful in terms of prevailing environmental legislation. The application was enrolled for hearing on 4 December 2020.

³ The Snowy Owl properties form part of a larger conservancy, the Mun-Ya-Wana Conservancy. Snowy Owl and the Conservancy were seeking to have the area declared as a 'protected area' in terms of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA) It was declared a protected area in September 2019.

[7] On 18 February 2021, Radebe J granted the application, making the 2020 award an order of court. Snowy Owl was granted leave to appeal to this Court by Radebe J on 27 July 2021.

[8] On 19 January 2023, this Court dismissed the appeal against Radebe J's order.⁴ On 23 February 2023, Snowy Owl applied to the Constitutional Court for leave to appeal against the order of this Court. The Constitutional Court refused the application for leave to appeal on 28 September 2023, thereby bringing to finality the challenge to the enforceability of the 2020 award.

The interdict application

[9] During October 2020, after Mziki had commenced the award application, Snowy Owl started digging up sections of River Road and placed rubble and other material across the road surface to block access to the roads. On 15 October 2020, Mziki launched an application to interdict Snowy Owl from destroying the roads and to compel the restoration of access (the interdict application). It based its application on the binding effect of the 2020 award and its praedial servitudinal rights. Snowy Owl was cited as the first respondent. The second to fourth respondents were directors of Snowy Owl who, together with the fifth respondent, a businessman with a financial interest in Snowy Owl, were alleged to have been responsible for directing the activities of Snowy Owl. They opposed the interdict application. I shall refer to them collectively as Snowy Owl. The other parties were cited because of a possible interest in the matter.⁵

⁴ *Snowy Owl Properties 284 (Pty) Ltd v Mziki Share Block Limited* [2023] ZASCA 2 (*Snowy Owl*).

⁵ The sixth respondent was Zuka Properties (Pty) Ltd, an owner of adjacent property. The seventh respondent was the Mun-Ya-Wana Conservancy, an entity established as a nature reserve in terms NEMPAA. The eighth respondent was a person employed as the Conservancy Warden by the Mun-Ya-Wana Conservancy. No relief was sought against these respondents.

[10] Seegobin J heard the application for interim relief on 20 October 2020. The parties agreed to an order in the form of a rule *nisi* operating as an interim interdict pending the return date of the interdict application. The return date was set for 4 December 2020, which was the date that the award application was to be heard. Both applications came before Radebe J. Counsel, who then appeared for Snowy Owl, informed Radebe J that the award application should be adjudicated first since the outcome might have a bearing on the outcome of the interdict application.⁶ The interdict application was therefore held in abeyance and the return date of the rule *nisi* was extended.

[11] Chili J heard the interdict application on 26 February 2021. He was provided with a copy of the judgment of Radebe J, which had been delivered on 18 February 2021. On 19 October 2021, Chili J confirmed the rule *nisi* issued by Seegobin J. He refused leave to appeal against his judgment. This Court granted leave to appeal to it on 27 June 2022. The appeal against Radebe J's order had not yet been heard.⁷

The confirmation of the rule nisi

[12] Snowy Owl admitted that it had destroyed sections of River Road and that it had blocked access to other roads in conflict with the terms of the 2020 award. It did not deny that its conduct was in breach of the agreement of servitude. Its defence was that it was not obliged to comply with the 2020 award because it required performance of acts which were contrary to environmental legislation. It also relied on an environmental management plan which had been approved for the Mun-Ya-Wana Conservancy, which incorporated the Snowy Owl properties

⁶ Before this Court counsel for Snowy Owl took issue with the characterisation of the former counsel's submissions as constituting a concession that the outcome of the award application was dispositive of the defence in the interdict application.

⁷ The appeal against Radebe J's order was heard on 22 September 2022.

(the MMP)⁸. The MMP allowed the Conservancy Warden (the eighth appellant) in conjunction with the owner of the land (Snowy Owl) to close roads for ecological reasons. Snowy Owl therefore opposed the interdict application on the same basis advanced in the arbitration proceedings and before Radebe J.

[13] Before Chili J, counsel for Snowy Owl submitted that the interdict application should be adjourned pending an appeal against the order of Radebe J. Chili J rejected the submission. He held as follows:

‘In its defence, the first respondent sought to suggest that there was no obligation on it to comply with the terms of the arbitration award given the fact that doing so would amount to performing acts sanctioned by law. ... That is not what I am seized with in the present application. As already pointed out, the question whether an award should be made an order of court has already been decided and is the subject of an appeal. [Counsel] submitted that the appropriate order would be to adjourn the matter, reserve costs and extend the rule pending the decision on appeal. I do not agree. The issue before me is very simple. All that the first respondent (in conjunction with the second to fifth respondents) is required to do, is to undo the damage done to the roads after the grant of the award.

It was sufficiently established that the applicant has a clear right, *ex facie* the award and the servitude itself, for the reinstatement and re-opening of the roads which are the subject of the servitude.’

[14] Regarding Snowy Owl’s reliance upon the approved MMP, Chili J found that it had already been approved when the arbitration occurred. He found that Snowy Owl could not rely on the alleged approval of the MMP to justify the closure of the roads because a mandatory requirement of consultation with all interested parties, provided in s 39(3) of NEMPAA, had not been met. Mziki had not been consulted on the MMP. Chili J concluded that no justification existed

⁸ The environmental management plan was styled the Mun-Ya-Wana Management Plan, hence MMP.

for the infringement of Mziki's servitudinal rights and that it was therefore entitled to confirmation of the rule *nisi*.⁹

The appeal

[15] Prior to the hearing in this Court, a directive was issued requiring Snowy Owl to indicate whether it was persisting in this appeal, considering the final determination of the challenge to the enforceability of the arbitration award. Supplementary heads of argument were filed in which Snowy Owl confirmed its persistence with the appeal.

[16] It is apposite to highlight the findings of this Court when it dismissed the appeal against Radebe J's order. In dealing with the argument that the award required the performance of illegal or unlawful acts, this Court said:

'Firstly, to debate what an [Environmental Assessment Practitioner] may or may not recommend *if* the appellant applies for authorisation is both irrelevant and unhelpful. But more importantly, the appellant's contentions must be rejected for the simple reason that the justification for the closure of the roads concerned was raised before the arbitrator and he rejected it after considering the factual and expert evidence presented to him. The arbitrator found that there were no legislative reasons for the closure nor was there provision in the servitude agreement that mandated the closure of any of the existing roads. The evidence in the affidavit of the [Environmental Assessment Practitioner] seems to be another version of the

⁹ The rule *nisi* granted by Seegobin J called upon the first to fifth appellants (then cited as respondents) to show cause why the following order should not be granted:

'1.1 The first to fifth respondents are interdicted from doing anything or instructing anyone to prevent the applicant and its members from gaining access to any of the roads, including the roads known as River Road, River Loop and River Link, situated on the properties [to] exercise their rights in terms of the servitude over the said properties.

1.2 The first to fifth respondents are interdicted from closing or instructing anyone to close, any of the roads referred to in paragraph 1.1 above, in addition to said River Road and River Link.

1.3 The first to fifth respondents are interdicted from damaging or instructing anyone to damage, the surfaces of any of the roads referred to in paragraph 1.1 above.

1.4 The first to fifth respondents are interdicted from taking any further steps or instructing anyone to take any further steps to make the said River Road and River Link less passable for vehicles.'

Paragraph 1.5 required Snowy Owl and the cited respondents to restore and repair River Road and River Link and to remove any obstacles placed on the said roads. Paragraph 1.1 to 1.4 operated as an interim interdict pending finalisation of the application.

evidence already presented by the witnesses for the appellant, including, an environmental expert, Mr Neary, before the arbitrator. This is not an appeal against the factual finding of the arbitrator. It is therefore not permissible, nor appropriate for the appellant to engage in a factual debate on matters already considered in the arbitration proceedings and decided by the arbitrator.’¹⁰

[17] Turning to Snowy Owl’s reliance upon the MMP to justify the closure of the River roads, this Court held:

This argument is once more raised before us but in a reformulated manner. As an example, and to lay this argument to rest, the Mun-Ya-Wana Conservancy was declared a Protected Area on 5 September 2019 in terms of s 23 of NEMPAA. The arbitration hearing took place on 15 March 2020 and the MMP was approved on 5 March 2020. The latter date pre-dates the hearing of the arbitration and the resultant award which was made on 2 April 2020. Therefore, the conclusion I reached regarding the MMP in the previous paragraphs equally applies here. Much reliance was also placed on the Mun-Ya-Wana Conservancy or its Warden, but we are also not told what its/his attitude is to the debates raised by the appellant including the authorisations bemoaned about. Another important consideration to make in this regard is that the respondent is not a member of the Mun-Ya-Wana Conservancy. The respondent was never consulted before the MMP, heavily relied upon by the appellant, was prepared and allegedly approved as required by s 39(1) of NEMPAA. This section is peremptory and provides that when a management plan for a protected area is being prepared, all the affected parties who have an interest must be consulted.’¹¹

[18] This finding accords with that of Chili J on the same issue. The only legal justification which would permit Snowy Owl to close roads in breach of the servitude rights, has therefore been decisively dismissed by this Court.

[19] Snowy Owl persisted with the appeal as it took the view that a live controversy remained. Counsel submitted that:

¹⁰ *Snowy Owl* fn 4 above, para 19.

¹¹ *Ibid* para 29.

- (a) Since Chili J had impermissibly decided an issue which had already been decided (by Radebe J) contrary to the doctrine of *res judicata*, his order could not stand.
- (b) Chili J granted final relief whereas only interim relief was warranted, given the appeal against Radebe J's order.
- (c) There is no need for the order granted by Chili J seeing that Radebe J's order, which is now final, provides adequate protection for the rights of Mziki.
- (d) Radebe J's order can be enforced by contempt of court proceedings in the event of a breach.

[20] No sensible basis for persistence with this appeal is discernible from the argument. Reliance upon the doctrine of *res judicata* is entirely misplaced. Mziki based its claim for an interdict on the further breach of the servitude and the binding effect of the arbitration award. The breach was admitted. Mziki wanted to restrain further breaches and to secure re-opening of the closed roads. Its cause of action was not the same as the cause of action advanced to have the arbitration award made an order of court. There, Mziki relied on the Arbitration Act. Snowy Owl, however, defended the interdict application on the same basis it resisted the application before Radebe J. That defence did not meet the assertion of Mziki's servitude rights.

[21] Mziki did not ask Chili J to decide issues that had already been decided. It required Chili J to determine whether there was a fresh or ongoing breach of its servitude rights by the closure of roads which occurred after the 2020 award was delivered. The argument that Chili J ought not to have granted final relief because of the pending appeal in which Snowy Owl's defences remained live, loses sight of the basis of the claim for an interdict. Snowy Owl's defences did not engage that claim. There was therefore no reason not to confirm the rule *nisi* and grant final relief.

[22] Snowy Owl did not challenge the terms of the order granted by Seegobin J. This is hardly surprising since it was an agreed order. Yet, as the argument progressed, counsel suggested that Seegobin J's order was overbroad because of its prohibition against closure of 'any roads'. It was submitted that Mziki had not made out a case for such relief. The argument was without substance. The agreement of servitude confers upon Mziki a right of traverse using all existing roads on the Snowy Owl properties. Snowy Owl consented to the interim order. It admitted that its conduct breached the servitude. Counsel nevertheless argued that this Court should set aside Chili J's order and replace it with an order dismissing the application. When asked to point out a legal or factual basis upon which this Court could do so, none was suggested. The only basis suggested was that the order was now no longer required because Radebe J's order secured adequate protection for Mziki. Yet, on this argument, since Mziki would be entitled to obtain the relief provided by Chili J's order, there is no basis to set it aside.

[23] The suggestion that Mziki ought rather to have enforced its rights through contempt proceedings is also entirely misplaced. The fact that a party may pursue contempt proceedings to enforce an order against a recalcitrant party, does not preclude an interdict to restrain an ongoing infringement of a right. Counsel could not point to authority to the contrary, and I know of none. In any event, when the interim interdict was granted by Seegobin J on 20 October 2020, there was no court order which could be enforced by contempt proceedings. The award application was argued on 4 December 2020 and the order was issued on 18 February 2021. Thereafter, Radebe J's order was the subject of an appeal. It was not enforceable until the matter was put to rest by the Constitutional Court.

[24] A final aspect concerns the alleged misjoinder of the directors or employees of Snowy Owl (i.e. the second to fifth appellants). Misjoinder was not raised as a plea on the papers and did not feature as an issue before Chili J. It was raised for the first time on appeal. It was submitted that since it was a purely legal question, it was permissible to do so.

[25] Joinder as a matter of necessity and as a matter of convenience are distinct.¹² In the case of the former, a failure to join precludes determination of the suit until joinder has occurred. A court may act *mero motu* to protect the interests of a necessary party.¹³ In the case of the latter, the party joined is not a necessary party but may be joined on the basis that the relief may prejudicially affect its rights. A party may also be joined based on convenience, as in this instance, as a co-respondent against whom relief is sought. This does not give rise to misjoinder.¹⁴ The second to fifth appellants were joined on the basis that they, as the controlling minds of Snowy Owl or as its agents, were responsible for the infringing conduct. Relief was sought against them upon that basis. An appeal is ordinarily not the time to raise an argument of misjoinder for the first time.¹⁵ The second to fifth appellants did not object to their joinder. They consented to the order granted by Seegobin J, and they opposed the confirmation of the rule *nisi* before Chili J.

[26] It follows that the appeal must be dismissed. What remains is the costs. The ordinary rule is that the costs follow the result. The question, however, is whether a punitive costs order is warranted. In my view it is, for the following reasons.

¹² *Judicial Services Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) para 12.

¹³ *Mtjhabeng Local Municipality v Eskom Holdings Ltd* [2017] ZACC 35; 2018 (1) SA 9 (CC) para 91.

¹⁴ *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) para 11.

¹⁵ *City of Johannesburg v Changing Tides (Pty) Ltd and 97 Others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae)* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) para 36.

[27] Chili J's judgment makes it plain that he was dealing with an admitted breach of the terms of the 2020 award and the servitude, for which no justification was offered other than a legal contention which had already been decided. He decided the matter upon the basis that Mziki was entitled to protection of its rights of servitude which had been further breached and that it required the re-opening of roads which had been closed after the 2020 award was delivered.

[28] Persistence in a meritless appeal despite being alerted to the insurmountable difficulties it faced, was plainly ill-advised. Courts do not decide academic issues nor resolve questions which can have no practical legal effect. This Court's personnel and resources are limited. Enrolment of an appeal necessarily precludes the hearing of another appeal by the allocated judges on the same day. Other litigants must therefore wait until their appeal can be heard. Thus, the enrolment of an appeal in which the substantive legal issues have already been resolved between the parties, causes prejudice not just to the other party in the appeal but also to the efficient administration of justice. In the circumstances and particularly in view of the query by this court, a punitive costs order is justified and indeed warranted.

[29] Accordingly, the appeal is dismissed with costs on the scale as between attorney and client.

G GOOSEN
JUDGE OF APPEAL

Appearances

For the appellants: R S Shepstone

Instructed by: Errol Goss Attorneys, Johannesburg
Eugene Attorneys, Bloemfontein

For the respondent: G Cooper

Instructed by: Cliffe Dekker Hofmeyr Incorporated, Cape Town
Claude Reid Attorneys, Bloemfontein.