PRETORIUS v. NEFDT AND GLAS.

1908. *September* 14, 18 and 19. MASON, J.

Land. — Co-owners. — Use of common property. — Road. — License to stranger.
Costs.—Two defendants.—One successful.—Allocation.

Where G, the registered owner of an undivided half of a farm, on which there existed a private road used for transporting to market lime taken from a quarry on the farm, utilised such road for the transport of lime from an adjoining property, *Held,* that he was entitled to do so provided he did not thereby interfere with a similar use of the road by the other co-owners.

Held, further, that leave granted by G to a stranger, N, conferred no right on the latter to use the road, and that the other co-owners could restrain N from utilising it though his user caused no damage.

Where in an application for an interdict against G and N, who were represented by the same counsel and the same attorneys, P succeeded against N, but failed against G, N was ordered to pay half P's costs, and P was ordered to pay half G's costs.

Application for an interdict.

The petitioner, who was the usufructuary of an undivided half of the farm Leeuwkloof, and applied also as guardian of her minor son, who owned a one-eighth undivided share, objected to the use by the respondent Glas, who was the owner of the remaining undivided half, of a certain road on Leeuwkloof for the purpose of transporting lime from an adjoining property across the farm to market. The road in question was a private one, and had been constructed by the co-owners for the purpose of transporting lime from a quarry on the farm itself. The respondent Nefdt had a kiln on the adjoining property, and Glas transported Nefdt's lime along the road in question. Glas had also given Nefdt permission to use the road across Leeuwkloof in order to have access to his lime works. The petitioner sought to restrain Glas from using the road for the purpose of transporting Nefdt's lime and to interdict Nefdt from using the road at all.

The further facts appear from the judgment.

Roos (with him *Gregorowski*), for the applicant: The user by Nefdt of the road constitutes an infringement of the applicant's rights; it is tantamount to imposing another co-owner on the existing owners, and this he is clearly not entitled to do without the consent of the others. If that were possible a co-owner would be able to make an undue profit without accounting to the others, and he would also be able to delegate his rights. Such conduct would be an infringement of the rights of the other co-owners, for it would amount to user which does not recognise the rights of the other co-owners. See *Oosthuyzen* v. *Muller* (Buch. 1877, p. 129); *De Beers Consolidated Mines, Ltd.,* v. *McKay* (16 C.L.J. 121); *Botha, Smit and Others* v. *Kinnear* (Kotzé, 215); *Swart* v. *Taljaard* (3 Searle, 354). Any co-owner has the right to veto the use of the land in a particular way; see Voet, 10, 3, 7. Glas is, furthermore, not using the road for the purposes of the farm, for although it is open to him to convey lime quarried on Leeuwkloof across the road in question, he can be debarred from transporting lime across the road when the lime is taken from an adjoining property.

To entitle the applicant to an interdict it is not essential that damages should be proved; it is sufficient if it is shown that a legal right is disturbed. See *Colonial Government* v. *Brady* (17 S.C. 404); *Consistory of Steytlerville* v. *Bosman* (10 S.C. 67).

De Wet, for the respondents: In an application for an interdict pending action, it must be proved that irreparable damage will be sustained, and in the present case there is no proof of such damage. The respondent Glas used the road in a reasonable way and not to the exclusion of the other owners; see Maasdorp, *Institutes of Cape Law,* vol. 2, p. 129. He was entitled to make a profit out of his rights provided the other owners suffered no prejudice. The right given to Nefdt to use the road amounted at most to an alienation by Glas of a part of his rights; see *Oosthuyzen* v. *Plessis and Another* (5 S.C. 69). So also in *De*

Beers Consolidated Mines, Ltd., v. *McKay* it was contemplated that a co-owner could lease his undivided rights. The proper and appropriate course for the applicant to have adopted was to institute action for a division.

Gregorowski, in reply: Co-owners are practically partners, and as such no one has the right to use the joint property for any purpose not consented to by the others. The applicant was surely entitled to some benefit for the use of her property. In the *De Beers* case the action was for an account, and not for a prohibition as to user, for if the latter question were in issue the plaintiffs would have succeeded. Where a co-owner leases his rights, the enjoyment thereof by the lessee is based on the assumed consent of the co-owners, because it is open to the latter to completely prohibit the user of the property on a particular manner by one of their number, the doctrine being based on the maxim *Potior est conditio prohibentis;* see Voet, 10, 3, 7. With regard to the applicant's right to proceed for an interdict, see *Wilson and Hall* v. *Wessels* (8 S.C. 171).

Cur. adv. vult.

Postea (September 18):—

Mason, J.: The petitioner is the usufructuary of an undivided half of the farm Leeuwkloof, and also acts as the guardian of a minor son who owns a one-eighth undivided share in the farm, subject to her usufruct.

The respondent Glas is the registered owner of the other undivided half of the farm. With the consent apparently of the others interested, certain children of the petitioner and the respondent Glas quarried and burned lime in kilns which they had erected upon the farm, not far from the boundary of an adjoining property, Kalkheuvel. To this spot they had made a road or, at any rate, improved an existing track, so as to make it suitable for transport.

The respondent Nefdt, a son-in-law of Glas, having acquired rights to lime on the adjoining farm of Kalkheuvel, began transporting his lime, with the consent of Glas, through the farm Leeuwkloof along the road used by those quarrying lime upon

that farm. To this objection was taken on behalf of the petitioner. Negotiations took place for giving him a right of passage, but they fell through. Thereupon a contract was made, it is alleged, between Glas and Nefdt by which the former undertook to transport the lime to the market, and for that purpose used the road across Leeuwkloof. The petitioner claims an interdict against Glas using the road across Leeuwkloof for this purpose. The respondent Nefdt, with the leave of Glas, crosses the farm Leeuwkloof in order to reach his own lime works on Kalkheuvel. The petitioner claims that his passage across her farm should also be interdicted. She also contends that the alleged contract between Glas and Nefdt for transport is a mere fiction, and that Nefdt as a matter of fact is doing his own transport; but I intimated during the argument that it would be impossible for me to decide that matter in an interlocutory application of this nature.

It is, I think, apparent from the affidavits which have been filed that no damage is being done to the property by the use which is complained of, but it appeared to me that the petitioner would be entitled to an interdict if she could clearly show, on admitted facts, that a right of hers was being infringed and a right which she was entitled to enforce by interdict.

The actual facts, apart from the question of the alleged fictitious contract and the use of water, which really was not pressed in argument, are not in dispute. The issue is one whether in law the respondent Glas can use the road now existing on the joint farm for the purpose of riding lime from Kalkheuvel, and whether the respondent Nefdt can, with the consent of Glas, use the same road for the passage of himself and his servants to his lime works on the other farm.

The authorities with reference to the common rights of use by co-proprietors in undivided shares are not very numerous, because, so it is laid down, the proper remedy in case of dispute is to have a division. Pothier discusses the question somewhat briefly in his first appendix to his treatise on partnership, stating (sec. 185) that the rights of co-proprietors are the same as those of partners in partnership property. Partners' rights he defines in chap. 5, where, in sec. 84, he states that each partner may

use partnership property for the purposes for which it is intended, and provided that he does not hinder his co-partners from a like use in their turn. Sir HENRY DE VILLIERS in *Oosthuyzen* v. *Plessis and Another* (5 S.C. 69) lays down that the owner of an undivided share is entitled to make a reasonable use of the farm, proportionate to his interests therein, having the same rights of ingress and egress as to any house not in the actual occupation of co-proprietors, the right to depasture any number of cattle to an extent that would not be disproportionate to his share, and to the use of a reasonable quantity of wood and water for domestic purposes.

The petitioner's counsel contended very strongly that a co-owner had an absolute right of veto on any use of the farm at all, citing Voet (10, 3, 7); but this passage refers, I think, to the right which a co-owner has to prevent any innovation or change in the nature of the occupation of the land. The case in which the rights of co-owners *inter se* has been most fully discussed seems to be that of *De Beers Consolidated Mines, Ltd.,* v. *McKay* (16 C.L.J. 121), where the court of the late Republic laid down the general law with reference to this subject. There was no difference as to principles, though one of the judges dissented as to their application. Each co-owner, it was said, could use the common property in accordance with the use to which it was intended to be put, but must refrain from any acts by which the like right of user of the others might be infringed.

Now in this case I cannot see *anything on the record which* would justify me in believing that Glas used this road for the transport of lime for Kalkheuvel in such a way as to interfere with a similar use of the road by the petitioner or those on whose behalf she is acting. But it is said that he cannot use the road, because he is transporting things from another farm and not for the purposes of this farm. I do not find anything in the authorities which would justify me in holding that a co-owner is limited, so far as the right of passage is concerned, to use of the surface of a joint farm only for the purposes of the farm. He might, for instance, be a transport rider or carter. Could it be said that he could not bring his cattle or transport

equipment on to the joint farm, because the persons for whom he was carrying goods lived somewhere else? Suppose the respondent Glas himself owned the farm Kalkheuvel: could it be said that he could not cross Leeuwkloof with a load of goods intended for that farm? To make such a distinction would lead to endless difficulties, and it is not, so far as I can judge, a distinction recognised by any authorities. The petitioner, I think, must therefore fail upon this portion of her claim.

With respect to the second branch of the case, the whole point is whether a co-owner can give strangers leave to use a road across a joint farm. In the case of *Oosthuyzen* v. *Plessis and Another* one co-owner sold her share on condition that she should retain for life the possession of certain premises occupied by her with the full consent of the other co-owners, the right of the pasturing a certain number of cattle, and using wood and water on the farm for domestic purposes, and this was an alienation of a portion of her rights with the reservation of another portion which was held to be valid It was contended that the respondent Glas had done no more in giving license to Nefdt to cross the farm. The whole point is whether he has alienated only a portion of his rights or whether he has substantially, so far as his right of passage is concerned, with reference to the road in question, imposed another co-owner on the other joint owners. If the sole test be whether a license of this kind injures the other proprietors or impedes in any way their use of the property, then it would follow that one co-owner could allow the whole world to use any of his rights and the other co-owners would have no redress unless they could show some actual prejudice. This would, I think, impose an intolerable burden upon persons who wish to have the farm reserved for really joint use. It seems to me that the position which actually results from a license to use the road is analogous to that arising when another co-owner is imposed on the joint owners. The respondent is claiming for himself, and the Court is giving to him the full right of user of this road as a co-owner. I do not think he can also confer these rights upon another, whilst he is at the same time exercising them for himself. It appears to me upon the admitted facts that this is a clear infringement of the rights of

the petitioner, and that she is therefore entitled to an interdict in respect of the respondent Nefdt.

Some question is raised by the affidavits as to a way of necessity. This was not pressed during argument, because it was clear that a way of necessity could not be claimed by the respondent Nefdt in this manner.

The petition prays for an interdict pending action, but no action will be necessary if the sole question is whether Glas may give the respondent Nefdt a right of passage across the farm Leeuwkloof, and it would be putting the parties to a useless expense to compel an action to be brought if that is to be the sole question at issue; but of course the petitioner may desire to bring an action so as to show that the alleged transport contract is fictitious, and that she might then have a right to interdict Glas in accordance with her prayer. As to that I express no opinion, but I think the most convenient form of order will be to give an interdict against the respondent Nefdt until further order of the Court, leaving it for the petitioner to determine whether she will proceed by action against Glas.

Postea (September 19):—

On the question of costs.

Gregorowski, for the applicant: The applicant has succeeded as against Nefdt, and is therefore entitled to all the costs; she was compelled to proceed against both Nefdt and Glas, because it was through the latter that the trouble originated. No extra costs have been caused by joining Glas, both respondents being represented by the same counsel and attorney. In a case of this nature all the registered owners must be before the Court.

[MASON, J.. Is it a correct proposition that if one person gives another a right which the latter is not entitled to exercise, the person to whose prejudice the right is exercised is entitled to proceed against both?]

Yes; this is not the case of a trespasser raising the case that another was really the trespasser. A difficult question of law is raised, and the trespasser claims that he acted under rights conferred by the co-owner.

De Wet, contra: The *gravamen* of the application was the conveyance of lime, and although I admit that the applicant is entitled to costs against Nefdt, she has failed in her claim against Glas, and should therefore pay the latter's costs. The proper order against Nefdt is that he should pay half the costs, half of the respondent's and half of the applicant's costs, the applicant to pay half the costs of Glas. See Van Zyl, *Judicial Practice*, 2nd ed. p. 775; *Beaumont* v. *Senior and Bull* ([1903] I K.B. 282).

MASON, J.: With reference to the costs, I confess that I feel considerable difficulty. I feel that, though the petitioner has succeeded in regard to part of her application, she has failed in a very substantial portion; and as regards the respondent Glas directly and personally she has entirely failed. Both respondents are represented by the same counsel and attorneys, and it is therefore extremely difficult to deal with the matter of costs. I think I must try to deal with it, as far as possible, as if there had been two entirely separate applications; and as if as against Glas the petitioner had entirely failed, and as against Nefdt had entirely succeeded. If that had been the result, Nefdt would have had to pay the petitioner's costs, and the petitioner would have to pay all Glas's costs. The question is how to work those principles into a case where, quite rightly, the respondents are represented by the same attorneys and counsel. I think the case quoted by Mr. *De Wet* and the principles referred to by him really indicate the right way of dealing with the matter. I shall, therefore, with reference to the costs generally, direct that Nefdt pay half the petitioner's costs, and the petitioner shall pay half the costs of the respondent Glas. But this will be prefaced by an order that the respondents shall pay the costs of the petitioner in connection with the affidavits as to the way of necessity, because that question ought not to have been brought in at all. All that need have been said was: "I may hereafter claim a way of necessity in proper proceedings." A way of necessity can only be claimed in an action brought for that specific purpose, and no one is entitled to use a road as a way of necessity, or to

make any claim for such a way, as a matter of fact, until he has obtained an order from the Court.

Applicant's Attorneys: *Stegmann & Roos*; Respondents' Attorneys: *Sim & Van Velden.*

1910 W.L.D. 90, 98, 99
1914 E.D.L. 573.
1932 W.L.D. 137.
1938 W.L.D. 182, 184

GRABIE v. PRETORIA MUNICIPAL COUNCIL.

1908. *September* 18, 21. INNES, C.J.

Practice. — Pleading. — Denial of liability.—Tender. — Payment into court.

In an action for debt or damages on the ground of negligence, it is permissible to plead simultaneously a denial of liability and a tender or payment into court.

Action for damages.

The declaration alleged that the plaintiff was employed by the defendant in the excavation of certain soil for drainage works in one of the streets of the town of Pretoria, and that it was the duty of the defendant to see that the sides and overhanging walls of the excavations were safe and properly pinned up and supported; that the defendant failed to have the walls and sides so pinned up and supported and was aware of their unsafe condition; that the plaintiff, whilst unaware of these facts and without having reasonable means of ascertaining the same, was working in the said excavations on the 14th April, 1908, when the walls gave way and the soil fell upon the plaintiff, whereby he was seriously and permanently injured and rendered unfit for work. On these grounds the plaintiff claimed £1000 damages, less £25 paid on account, with costs.

The defendant in pars. 2 and 3 of its plea admitted that it

was its duty to see that the sides and walls of the excavations were safe and properly supported, but stated that the excavations in question were shallow, and that all reasonable precautions had been taken; that the fall of the sides of the excavations could not reasonably have been anticipated, and that the defendant was unaware of the unsafe condition of the excavations. It was admitted that the plaintiff had been injured by the fall of the ground, but it was denied that he had been permanently injured and rendered unfit for work.

The plea further set out that the defendant had always been willing to compensate the plaintiff, and had requested the latter to submit to medical examination in order to ascertain the extent of his injuries, but that the plaintiff had refused to submit to such examination, and that the defendant had already paid the plaintiff the sum of £25 as compensation for the injuries sustained. The defendant tendered a further sum of £75, with costs to date of the plea, on the magistrate's court scale.

De Korte, for the plaintiff: On the plea as it stands the only question to be determined is that of damages, and the Court will not hear evidence on the question of negligence. The plea admits negligence, because the duty of pinning up the sides is alleged, and the defendant, whilst admitting this duty, does not deny that it has failed therein. It is, moreover, not competent for the defendant to deny liability and at the same time plead a tender, the one being inconsistent with the other. It is analogous to payment into court, and that, according to the English practice, would amount to a tender of amends. See *Spurr* v. *Hall and Another* (2 Q.B.D. 615).

[INNES, C.J.: Those were cases prior to the Judicature Acts.]

The tender is conditional, and the defendant, having tendered costs, cannot now deny liability.

Gregorowski, for the defendant: Pars. 2 and 3 of the plea amount to a denial of the alleged breach of duty on the defendant's part, and it is competent for the defendant to so deny liability and at the same time to plead a tender, provided it is unconditional: See *Van der Spuy* v. *Colonial Government* (14 S.C. 410). The rule is fair and reasonable, for it is easy to con-