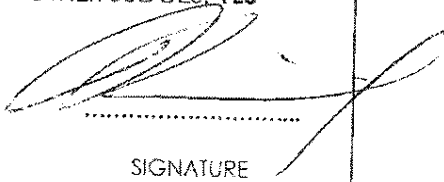


IN THE LAND CLAIMS COURT OF SOUTH AFRICA

[HELD AT RANDBURG]

CASE NUMBER: LCC 193/2013

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
29 April 2014	
DATE	SIGNATURE

In the matter between:

ALFRED MTHEMBU

Applicant

and

CORNELIUS JOHANNES VENTER

1st Respondent

CHARMAINE MARRY VENTER

2nd Respondent

JUDGMENT

EX PARTE APPLICATION OF 16 APRIL 2014

SPILG J:

29 April 2014

BACKGROUND

1. On 28 November 2013 the applicant, Mr Mthembu, brought an urgent *ex parte* application against the respondents, Mr and Mrs Venter, to interdict them from spoliating him or evicting, threatening, harassing or intimidating him "*and his associates*" from his family homestead on the farm known as Rietfontein in the Ladysmith area. I issued directives and granted interim interdictory and mandatory relief on the same day in the absence of the respondents.
2. I refer to my judgment of even date which sets out the grounds for setting aside that order by reason of a fundamental failure to make proper disclosure of relevant facts.
3. The present application was also brought *ex parte* by Mr Mthembu against Mr and Mrs Venter and sought urgent interdictory and mandatory relief. The applicant approached the court for interim orders to;
 - a. interdict the Venters from;
 - i. continuing to cut grass that is being consumed by Mthembu's cattle at their grazing camp on the farm;
 - ii. continuing with fencing of the grazing camp which is drastically reducing its size;
 - b. order the Venters to;
 - i. restore the wiring which they had removed and which forms part of the fencing of the grazing camp and the applicant's homestead;
 - ii. remove the fencing which they are in the process of erecting on the farm which is also allegedly reduces the size of the applicant's grazing camp.
4. I declined to give directions that would allow an interim order to be obtained without notice to the Venters. I however directed under rule 34 (3) that notice must be given, provided a very short period for the Venters to file any affidavits and directed that the matter be heard on 25 April 2014.
5. The Venters gave notice of intention to oppose and filed a document which was not deposed to under oath.
6. The applicant had changed attorneys to Mzila HM Incorporated and attorney M Mzila represented the applicant in court. One of the persons who had previously been in court when Mr Singh represented the applicant during the hearings in December 2013 was again present. The Venters were unrepresented.

7. The first issue was the status of the document filed by Venter. Mr Mzila was of the view that it should be allowed but that the applicant wished to consider it and file a replying affidavit in due course. In the meantime the applicant contended that he was entitled to the interim order.
8. Accordingly the issue before the court was whether or not an interim order should be granted before all the papers were filed. During the course of argument the applicant's legal representative sought to rely on the papers filed in other litigation before the court. There clearly could not be an objection provided the respondents were not prejudiced.
9. It was therefore accepted that the court was to have regard to the other litigation in which Mthembu was a party and which concerned the occupation of the farm acquired by the Venters. This meant that all the court files that were dealt with in the *ex parte* application of November 2013 and heard in December were to be considered.
10. The applicant was required to satisfy the court that *inter alia* he had a *prima facie* right although open to some doubt, that he will suffer irremediable prejudice and that the balance of convenience favours him.

PRIMA FACIE RIGHT AND OTHER REQUIREMENTS

11. The applicant failed to set out facts from which the right he contended for was based. He only made the bald statement that he and his family were labour tenants as at 2 June 1995 and that they are occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 ("*ESTA*"). While there are some further allegations, the applicant does not disclose how and through whom the rights were derived or over what area they were entitled to be exercised. The last issue is significant because the alleged right to graze is dependent on the applicant being a labour tenant (as he is the only applicant asserting the right and its infraction against him) and as such the area is that on which his cattle, if any, were entitled to graze at the relevant date in terms of the Labour Reform (Labour Tenants) Act. The position adopted by the applicant is at the very least ambivalent for reasons that appear elsewhere in this judgment.
12. This prompted Mr Mzila to rely on the papers filed in the other proceedings which are set out in the judgment concerning the *ex parte* application launched in late November 2013. He contended that the applicant was a labour tenant through his son and that he had enjoyed grazing rights over the whole farm and not limited to a specific area. Mr Mzila confirmed to this court that this was the instruction he received from his client although the allegation is not contained in the affidavit. The papers however referred to a grazing camp.
13. I refer to my judgment in the earlier application. It is unnecessary to repeat its contents. Suffice that the applicant also failed to disclose in the present application;

- a. the allegations made by the Thulsies and Karrim that Mthembu's son, Isaac, had signed a note terminating his employment with Karrim in February 1995 and that the alleged note was attached to court papers in at least case number 16517/2008 before the KwaZulu-Natal High Court sitting in Pietermaritzburg;
 - b. that in other court proceedings he had abandoned reliance on acquiring rights as a labour tenant or as an associate through his son and contended that he personally had been a labour tenant;
 - c. that the Thulsies and Karrim sought to rely on a letter signed by him in 2000 where he had agreed to vacate the farm and that Mthembu disputed that the signature was his;
 - d. that he had in previous proceedings under oath averred that since during 1995 Karrim had sought to evict him from the farm;
 - e. the further matters which were not disclosed in the earlier application and to which reference is made in my judgment delivered in respect of that case.
14. If the senior judge had not allocated the matter to me because I had already been seized with it then another judge may have granted an interim order without notice. It is however unnecessary to dwell on that since I did not grant an *ex parte* order.
15. The relevance however of my judgment in respect of the earlier application is that it demonstrates the tenuous nature of the applicant's claim of a right which has been infringed. There are materially conflicting averments made in the previous cases which do not, on paper at least, demonstrate a strong *prima facie* right but rather one that is open to more than just some doubt unless the signature to the note by the applicant is fraudulent or there is some other explanation for the son's signature on a note relating to the termination of his employment in early 1995.
16. However the *prima facie* right asserted is not confined to the applicant's status whether as a labour tenant, associate (which by itself may not afford the protection against the alleged infringements) or as an occupier as defined in terms of ESTA. The right asserted also requires the applicant to demonstrate that there has been an infringement of his right to graze cattle in the area relied upon as his grazing camp and that such rights are to the exclusion of the landowner.
17. The applicant nowhere identifies the area which he contends is his grazing camp. When this was pointed out Mr Mzila sought to rely on certain photographs. However the photographs did not identify an area that could be defined in a court order. Once again the court expressed concern about granting an overbroad interim order. It was then stated from the bar, on instructions from the applicant, that the whole farm was open to the applicant for grazing by his livestock.
18. The difficulty facing the applicant is that such an assertion by definition excludes an exclusive right to graze cattle. Moreover the fact that grass may be cut in a particular

area therefore does not of its own indicate that the applicant will be prejudiced, since he claims an entitlement to graze over other areas.

19. The suggestion that the entire farm is open to the applicant for grazing conflicts with averments made in other litigation where he had claimed that a specific area had been allocated to him and also does not appear to be in accordance with the averment in the founding papers that the respondents have infringed his use of his 'grazing camp'.
20. Furthermore the interim order granted by van Zyl J in the Pietermaritzburg High Court under case number 7228/2009 on 27 August 2009 directed that the applicant could not impede or hinder access to any area of the farm " *with the exception of the dwelling on the said property historically occupied by the First Respondent* (ie the Mthembu). One of the material allegation in that case was that the applicant had damaged and removed fencing around the farm as a result of which two boundaries of the farm were completely unfenced and the Thulsies claimed that their entire flock of sheep and a number of cattle were lost or stolen and furthermore that members of the public have free access to the farm.
21. It will also be noted from my judgment in the earlier application that the probation officer stated in a report dated 6 October 2012 that the applicant was not grazing any livestock or planting any crops on the farm.
22. In all the circumstances there is insufficient facts placed before this court in the current application to;
 - a. Identify the exact area of the grazing camp so that an effective order can be made and which also will not compete with, or infringe, the existing interim order of van Zyl J which sets out the areas which the landowner is entitled to access without hindrance;
 - b. Identify any exclusive area over which the Venters cannot put up fencing or identify precisely where the fencing is being put up and to which the applicant has been deprived of grazing rights
 - c. Satisfy the court that the applicant has enjoyed rights of grazing and that the cattle are his, bearing in mind that he claims to be a pensioner and that there were no livestock on the farm when the probation officer made his report in the latter part of 2012.
23. The applicant contends that there are no other places to graze the livestock, but he does not take the court into his confidence to explain how he, as a pensioner with no disclosed source of income and who asserts a right to occupation under ESTA, which requires a low income threshold, managed to acquire the livestock since the end of 2012 or where such cattle as he may have had might have been grazing at that time.
24. By contrast the prejudice to the respondents is clear considering that on the averments now made the applicant's cattle are free to roam over any portion of the

farm despite the fact that there existed fencing that had been removed and, in terms of van Zyl J's order, the landowner is entitled to exercise ownership rights over all but a limited dwelling area, which in turn appears to be reinforced by the probation officer's report and its consistency with fencing having been removed (which would not be the case if indeed the applicant had been grazing cattle at the relevant time when that order was made and extended with the express agreement of the applicant).

25. The application seeks to curtail the landowners' rights to fence off the land and to cut grass while failing to specify the exact area over which his alleged rights are exercised and now seeks an order that will open up the entire farm for his alleged cattle to graze on. It should also be born in mind that the applicant in early proceedings claimed that there was no limit to the number of cattle that he could bring onto the land.
26. In all the circumstances the application fails to present sufficient *prima facie* facts, albeit open to some doubt, to entitle him to interim relief bearing in mind the other requirements that must be satisfied and having regard to there being no basic let alone satisfactory *prima facie* evidence of the description or extent of the affected area or the extent of such rights as the applicant might enjoy over such area to the exclusion of the landowner.

ORDER

27. The question is whether the applicant should be entitled to supplement his papers in order to make out a case or whether he should start afresh if so minded.
28. In my view the applicant should be allowed to amplify his papers. However he should be placed on terms to do so, failing which the application cannot be proceeded with. The respondents wish to bring a counter application and provided the applicant pursues the present application by supplementing his founding papers and the order sought then they may do so. If the applicant does not proceed with the present interdictory application then they will be obliged to bring their own independent application.
29. I accordingly order that;
 1. *The application for interim relief is refused;*
 2. *The applicant is afforded until 9 May 2014 to amplify his application by way of affidavit and amendment which are to be delivered by that date;*
 3. *The respondents are to deliver an answering affidavit, if any, within 20 court days of receipt of the aforesaid affidavit and at the same time deliver any counter-*

application which must set out the relief sought in a separate notice and be duly supported by affidavits and documents in accordance with the Rules;

4. The further affidavits in the proceedings by each party in respect of the application and counter-application, if any, shall be in accordance the Rules and the times provided for therein;

5. In the event of the applicant not amplifying his papers within the time period set out in para 2 then the respondents may set the matter down for dismissal of the application based on the contents of this judgment.

DATE OF HEARING: 25 April 2014

DATE OF JUDGMENT: 29 April 2014

LEGAL REPRESENTATION;

FOR APPLICANT: ATTORNEY M MZILA of MZILA HM INCORPORATED

FOR RESPONDENTS: None