IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT DURBAN

Heard on: 28/05/2019

Delivered on: 25/06/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

25/06/2019
DATE

SIGNATURE

Before: **NCUBE AJ**

CASE NO: LCC 50/2019

In the matter between:

DUMISANI EBENEZA KUBHEKA	First Applicant
JEREMIAH ROBERT ZWANE	Second Applicant
NKOSINATHI MDLALOSE	Third Applicant
NOMVULA GLADYS KUBHEKA	Fourth Applicant
NTOMBENHLE ALLEN KHUMALO	Fourth Applicant

and

NORMANDIEN FARMS (PTY) LTD	First Respondent
ROBIN ANDREW HOATSON	Second Respondent
THE DIRECTOR GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent

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JUDGMENT

NCUBE AJ

INTRODUCTION

[1] This is an interim mandatory interdict, alternatively, a prohibitory interdict, calling upon the First Respondent to restore certain grazing land on the farm Woodburn ("the farm") which is owned by the First Respondent. Alternatively, the relief sought calls upon the First Respondent to open gates to enable the Applicants' cattle to graze on a certain area on the farm. Further relief sought is a prohibitory interdict, preventing the Second Respondent from harassing, intimidating or threatening the Applicants. The application was brought on an urgent basis and it is opposed. In fact, the relief sought is drafted in a very confusing manner and it is not easy to understand the nature of the relief sought. The relief in respect of harassment, intimidation and threats has been abandoned. That relief was not even supported by the founding affidavit. One wonders why such relief was sought if there was no evidence to substantiate the same.

The relief sought is interim in the sense that it is subject to the finalisation of an action to be launched within 30 days of the order made in this application. The affected farm is Woodburn No. 15470, Normandien, Kwa-Zulu Natal.

PARTIES

[2] All five Applicants are occupiers on the farm. The First Respondent is Normandien Farms (Pty) Ltd, a private company with limited liability, with its Head Office situated at the corner of Umlaas and Richmond Roads, Thornville. The Second Respondent is Robert Hoatson, a director of the First Respondent. The Third Respondent is the Director General in the Department of Rural Development and Land Reform ("the Department"). No relief is sought against the Third Respondent.

BACKGROUND FACTS

[3] The First Applicant was born on the farm. He is 59 years old. The Second Applicant arrived on the farm with the rest of his family in 1994 from Haycraft farm in Normandien. Both the First and Second Applicants worked for the erstwhile owner of the farm, George Conradie ("Mr. Conradie"). The Third Applicant came to settle on the farm in 1990. His father, Dumisani Mike Mdlalose, was working on the farm. The Fourth Applicant came to the farm with her husband Joseph Phinias Kubheka in 1994. Her son, Thulani Kubheka, provided labour to Mr. Conradie. The Fifth Applicant settled on the farm in 1998. Her uncle, Nkibi Mdakane, also worked for Mr. Conradie. The First to Fourth Applicants keep cattle on the farm. The First Applicant has fifty (50) cattle. The Second Applicant has forty eight (48) cattle. The Third Applicant keeps thirty five (35)

and the Fourth Applicant has six (6) head of cattle on the farm. The Fifth Applicant has no cattle. The First to Fourth Applicants' cattle graze on the farm. The total number of occupiers' cattle grazing on the farm is 139.

[4] The First Respondent bought the farm from Mr. Conradie in 2016. This farm is 1.200 hectares in extent. None of the Applicants are presently working for the First Respondent. The First Respondent also has cattle on the farm grazing separately from the Applicants' cattle. On 10 October 2018, the First Respondent convened a meeting with the First and Second Applicants. At the meeting, the First and Second Applicants, representing the rest of the Applicants, were informed that the occupiers' cattle were to be confined to the camp next to the occupiers' homesteads and not to graze on the camp adjacent to the allocated camp.

[5] The First Respondent keeps stud cattle on the farm. The First Respondent has re-fenced the farm in keeping with the Fencing Act, No 31 of 1963. A gate has been put up in order to keep the First Respondents cattle separate from those of the Applicants.

POINTS *IN LIMINE*: URGENCY

[6] The Respondents deny that this application is semi-urgent as is alleged by the Second Applicant in his founding affidavit. According to the Applicants, the infringement of their grazing rights occurred on 13 February 2019. The Applicants waited from 13 February until sometime in March 2019 when they approached the Department for assistance. It was only on 11 April 2019 that the Applicants consulted an attorney and counsel. Although the consultation was on 11 April 2019, affidavits were signed after

two weeks on 23 April 2019. There is no explanation why the Applicants had to wait until 23 April to sign their affidavits.

[7] The Rules of this Court require the applicant to state in his affidavit the circumstances which render the matter urgent and why he cannot obtain substantial redress at a hearing in due course[1]. No such circumstances have been given by the Applicants in this case. The only reason given for urgency is that winter is approaching. This is not sufficient as it does not give the reasons why the Applicants will not obtain substantial redress at a hearing in due course. It is not sufficient to try and justify urgency in the replying affidavit. In motion proceedings, the applicant must make out his case in the founding affidavit, not in the replying affidavit. The Applicants have failed to make out a case for urgency. The point *in limine* is upheld. However, for the sake of finality, I intend dealing with the merits as well.

UNENFORCEABILITY OF THE ORDER SOUGHT

[8] The First and Second Respondents contend that the relief sought in paragraphs 2.1, 2.2 and 2.4 of the Notice of Motion, if granted, will not be enforceable. Paragraphs 2.1, 2.2 and 2.4 of the Notice of Motion state:

> "2.1. *The First and Second Respondents are ordered and directed to remove the wire fencing erected by the Second Respondent on or before 13 February 2019 on the first respondent's farm known as Woodburn, No. 15470 enclosing the Applicants' grazing crops. The*

[1] Rule 34(2) of the Rules of the Land Claims Court.

said fence is marked with a black marker on Annexure "A" to the Founding Affidavit.

2.2. *Alternatively the First and Second Respondents are ordered and directed to open the gate the Second Respondent installed on the said 13 February 2019 far (sic) during 13 February 2019 on the farm and allow the applicants' cattle to have access to the grazing beyond the said gate which they enjoyed prior to it being installed.*

2.4 *The First Respondent is interdicted and restrained from preventing the Applicants' cattle from grazing in the area which they used to graze in prior to 13 February 2019, beyond the recently installed gate and fencing referred to above."*

[9] In my view, there can be no problem enforcing orders sought in terms of paragraphs 2.1 and 2.2. The fence referred to in paragraph 2.1 is clearly marked on the map annexure "A" which is attached to the founding affidavit. The Second Applicant, the deponent to the founding affidavit, knows this particular fence. In case of uncertainty, the Second Applicant will show the fence to the Sheriff. The same applies for the fence marked "X". The Second Applicant knows the gate. The Second Respondent himself concedes in his answering affidavit that he erected the gate to prevent the Applicants' cattle from grazing outside or beyond the allocated camp. Therefore, this particular gate is well known to both the Second Respondent and the Second Applicant. There can be no enforceability problem.

[10] There is a problem with paragraph 2.4 of the Notice of Motion. The Applicants seek an interdict restraining the First Respondent from preventing the Applicants' cattle from grazing in the area which they used to graze in from 13 February 2019, beyond the recently installed gate and fencing. The problem is the extent of the said grazing area *"beyond the recently installed gate and fencing"*. This can mean the whole farm. The other problem is that the First and Second Respondents do not know the said grazing area which is "*beyond the recently installed gate and fencing"*. The Second Respondent only knows the grazing camp which he allocated to the Applicants. The Applicants deny that the Second Respondent ever showed them such grazing camp. The Applicants aver that the cattle are not confined to the camp identified by the Second Respondent. This is a material dispute of fact which should have been foreseen by the Applicants. As a result of vagueness and lack of particularity with regard to the extent of the grazing area "*beyond the recently installed gate and fencing"*, the relief sought in paragraph 2.4 is unenforceable. This point *in limine,* is likewise, upheld.

MERITS: DISCUSSION

[11] It is common cause that the First Respondent is the owner of the farm in question. It is common cause that at least for now the Applicants are occupiers on the said farm. It is equally common cause that the First to Fourth Applicants own cattle. The cattle graze on a certain area of the farm. The Fifth Applicant does not have cattle but has decided nonetheless to participate in these proceedings.

The pertinent question is whether the Applicants are entitled to graze their cattle on any other area except the area identified by the Second Respondent as the area where they can graze their cattle.

[12] The Applicants contend that Mr. Conradie granted them consent to graze their cattle on an area which is beyond the recently installed gate and fence. There is no proof of that consent having been granted. There is no confirmatory affidavit from Mr. Conradie. No reason is given for non-availability of a confirmatory affidavit from Mr. Conradie. Even if there was such consent given to the Applicants to graze cattle on the larger portion of the farm, the question is whether or not the consent given by Mr. Conradie as the previous owner, is binding on the new owner of the farm. In other words, the question is whether consent given by the previous owner is transferable to successors in title.

[13] Mr. Myeni, Counsel for the Applicants, relied on section 24(1) of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA") for the assertion that the consent given by the previous owner is binding on successors in title. Section 24(1) of ESTA provides:

> *"24 (1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.*
>
> *(2) Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she or it had given it.*

[14] However, the Supreme Court of Appeal ("SCA") has held that the right of an occupier to keep or graze cattle on another person's farm or land is not a right which derives from ESTA, but a personal right which derives from consent between the occupier and the land owner or person in charge.[2] Therefore, the law at present is that consent to graze livestock given by the previous owner or person in charge is not binding on the successor in title and such right is not an ESTA right. This presupposes that each subsequent owner or purchaser of a farm will have to consent to the occupier keeping livestock on the farm despite the fact that there was consent to do so given by the previous owner or person in charge.

[15] Therefore, any agreement given by Mr. Conradie to keep livestock is not binding on the First Respondent. The First Respondent has given consent to the occupiers to confine their livestock within the identified camp which is shown as camp "E" on RH2. In other words, the First Respondent did not consent to the occupiers grazing their cattle on any other land which is outside of camp "E". That is the effect of a personal right. A personal right differs from a real right. A real right is enforceable against the whole world. A personal right is enforceable against the individuals who are a party to a certain agreement. A personal right creates a reciprocal obligation to perform in terms of the right given to a certain individual. In *ABSA Bank v Keet,*[3] Zondi JA explained the difference in the following terms:

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[2] *Adendorffs Boerdery (Pty) Ltd v Shabalala & Another* [2017] ZASCA 37 at para 28, *Margre Property Holdings CC v Jewula* (2005) 2 All SA 119 (E) at 122 and 124.
[3] 2015 (4) SA 474 (SCA) at para 20.

> *"In my view, there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The high court in Staegemann (para 16) was correct to say that the solution to the problem of the prescription is to be found in the basic distinction in our law between a real right (**jus in re**) and a personal right (**jus in personam**). Real rights are primarily concerned with the relationship between a person and a thing, and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not an absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right."*

[16] The authorities make it clear that the Applicants cannot claim any right to graze cattle anywhere on the farm except in the camp allocated to them by the First Respondent. Any consent which might have been given by Mr. Conradie is not binding on the First Respondent. In terms of consent given by the First Respondent, the Applicants' cattle are confined to the allocated camp which is camp "E". In my view, the application should fail on this basis alone and it is not necessary to deal with the rest of the argument raised by Ms. Roberts, Counsel for the First and Second respondents.

COSTS

[17] The general practice in this Court is not to make costs orders. The Court may depart from this general rule if there are good reasons to do so. In the present case Ms. Roberts argued that the Court should depart from the general rule and award costs. The reason advanced by Ms. Roberts to justify a punitive costs order is that the entire application was just an abuse of court process since the attorneys for the Applicants did not first meet the Respondents' attorneys before instituting this application, as requested. Mr. Myeni gave a satisfactory explanation as to why the Applicants' Attorney could not meet the Respondents' Attorney before the institution of these proceedings.

[18] The Applicants joined the Second Respondent and sought an interdict against him for harassment and intimidation. That relief was later abandoned. The Fifth Applicant is cited as a party but has no cattle grazing on the farm. The question is whether for those reasons it can be said that the entire application was an abuse of the court process. The question is whether the entire application was instituted for ulterior purposes[4]. In *Beinash v Wixley*[5] Mahomed CJ held:

> *"What does constitute an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the*

[4] See *Hudson v Hudson and Another* 1927 (AD) 259 at 268.
[5] 1997 (3) SA 721 (SCA) at 734 F-G.

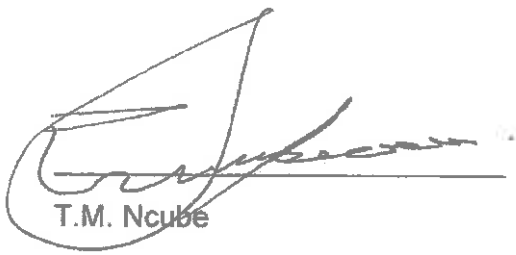
Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."

[19] I am not persuaded to believe that the entire application procedure was used for ulterior purposes. In my view, there is nothing to suggest this urgent application was used for some other purpose different from purposes of facilitating the pursuit of the truth. I find therefore that there is nothing to justify departure from the general rule.

ORDER

[20] In the result, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.



T.M. Ncube
Acting Judge, Land Claims Court

Appearances:

For the Applicants	Adv. N Myeni
Instructed by:	Phumlani Ngubane & Associates Inc. Attorneys DURBAN
For the 1st & 2nd Respondents:	Adv. E Roberts
Instructed by:	Vinnicombe & Associates Attorneys THORNVILLE