IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

(1) Not reportable.
(2) Not of interest to other judges.

02/12/2020 .....
DATE SIGNATURE

Case No: LCC174/2018

In the matter between:

PETRUS MOELESO	First Applicant
DAVID M MOFOKENG	Second Applicant
MAKI MOELESO	Third Applicant
NINI MABE	Fourth Applicant
and	
LOSKOP LANDGOED BOERDERY	First Respondent
Registration Number: 2016/456707/07	
W.A. PIETERS	Second Respondent
RIAAN PIETERS	Third Respondent

JUDGMENT

Yacoob J:

1. The applicants are occupiers in terms of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA"), on land owned by the second respondent. The first

respondent is, according to the third respondent's answering affidavit, in control of the farm and its operations, and the third respondent is the director of the first respondent, and appears to be the person in charge of the land. The second respondent is the third respondent's father.

2. Although the applicants make certain allegations in the papers which appear to imply that they are labour tenants, they rely explicitly on ESTA and it is common cause that they are occupiers in terms of ESTA. For the purposes of this application I accept that they are occupiers in terms of ESTA.

3. The first applicant was born on the farm in 1974, and has worked on the farm since 1999. His mother is the third applicant. Further details of the remaining applicants have not been provided, save for their ages and that they live on the farm.

4. The applicants keep cattle on the farm. It is common cause that they have been permitted to do so, although it is at least notionally in dispute how many they are permitted to keep, and on what terms.

5. The applicants contend that they initially had access to three grazing camps for the cattle. They allege that the previous owner of the farm, the second respondent, withdrew their access to use one of these camps, and in return provided them with fodder in the winter months. They allege further that the third respondent has now withdrawn their access to a second camp, and they are now forced to keep all their cattle in one camp which is also where they live.

According to them, at the time the founding affidavit was signed, there was no clean water supply to that camp, and the cattle had to drink from a muddy dam.

6. According to the applicants, the third respondent took away their access to the second camp and sometime between his taking over the management of the farm in 2017 and them approaching the Department of Rural Development and Land Reform in April 2018. The result of their approach to the Department was the appointment of the applicants' attorneys of record. They contend that they received notices of eviction on 18 April 2018, the day after they approached the department. The applicants do not annex the notices they received nor any documents showing their approach to the Department.

7. This application was issued on 30 October 2018 and was served on the respondents on 06 November 2018.

8. The applicants seek in the notice of motion the restoration of their grazing rights, access to water for the cattle and fodder during the winter months. As will become evident, the relief related to water has fallen away and the remaining issues are the reduction of the land available for grazing and the provision of winter fodder. It also appears that the "eviction" referred to by the applicants is the reduction of their grazing rights.

9. They contend that the respondents have acted unlawfully by reducing their rights without a court order, and have taken the law into their own hands, and that the reduction of their rights amounts to eviction.

10. The respondents contend that the applicants have a water supply at the remaining camp, that it was necessary to move the cattle from the additional camp because the camp was overgrazed, and that the provision of winter fodder was only in times of extreme drought. The respondents do not disclose when exactly winter fodder was provided, in which years, and how this may have corresponded with any reduction in the grazing that may have been available to the applicants. According to the third applicant he took over the management of the farm in March 2018.

11. He asked obtained a report which states that the camp is overgrazed. He states that he requested the report and only after receiving it did he send it to the applicants and request them to “remove their cattle from the farm”, which they did not do. That is when he moved the cattle from the overgrazed camp. The third applicant does not disclose when he requested the report, when he requested the applicants to move the cattle, when he removed the cattle from the overgrazed camp, and where he wished the applicants to move their cattle to. The report is dated May 2018.

12. The respondents rely on the Conservation of Agricultural Resources Act, 43 of 1983 (“CARA”) to found their right to move the cattle. They contend that they had to do so or else they would be guilty of an offence.

13. The respondents have also approached the relevant Magistrates’ Court for an order that the applicants remove their cattle, failing which that the sheriff remove the applicants’ cattle to a place provided by the applicants or to a pound.

14. Coincidentally the Magistrates' Court application was instituted on the same day as this application, although it was served later. It is opposed.

15. It is not clear what exactly the respondents admit or deny as the third respondent's answering affidavit does not cite each subparagraph of the founding affidavit individually. For example, there is a long section of approximately 5 pages dealing with "AD paragraph 7". Many of the paragraphs of that section state that the deponent denies the contents of the paragraph and then goes on to admit certain things. The denials are general and amount to bare denials, save for those few which specifically deny particular allegations.

16. The third respondent further denies the applicants' allegations and "puts them to the proof thereof" without providing any such proof himself of his own allegations.

17. For example, he denies that a camp was taken away by his father and that the agreement between the owner and the occupiers was that fodder would be provided instead. He contends that fodder was provided because of a drought. He puts the applicants to the proof of their allegation. However he does not provide any proof of fodder having been provided because there was severe drought and only in times of severe drought.

18. The deponent further challenges the applicants to provide proof of the agreements that the applicants contend existed between themselves and the previous owner, but does not provide proof of the agreements he contends exist between the owner and the occupiers.

19. The deponent contends that occupiers were limited to a maximum of 3 cows and 2 calves each, and that they had to pay “rent” of R25 per calf and R35 per adult animal. In support of this he annexes three contracts. Two of these are of people not related to this application. A third appears to relate to the second applicant, but neither the respondent nor the applicants in reply say that this is the case.

20. The respondents appear to have simply taken random contracts as examples. They provides no explanation why the contracts of the applicants have not been provided. Nor is there any basis on which the court can assume that the contracts of all employees were identical.

21. For example, each of the contracts annexed provides for a different number of cattle, both adult and calves.

22. There is a further problem with the respondent’s reliance on the contracts: they do not say what the deponent alleges they do. Examining the contracts, it is clear that they have a cash component in return for labour provided, and then additional other benefits, under the section “Byvoordele” (Benefits). It states that “the employee is entitled to the following benefits”, with the words “in natura betaling” in brackets, indicating payment in kind. This section lists cattle, shoes, overalls, maize meal and accommodation. Next to each of these is listed the “Randwaarde per Maand” or rand value per month of the benefit. The rand value of cattle is listed as R35 per month for adult animals and R25 per month for calves. This appears to indicate that the benefit to the employee was valued in that way, not that any payment was taken from the employee.

23. In my view the affidavit of the respondents is less than candid and does not add much of value to the court's understanding of the issues regarding what the applicants may have been entitled to, and what grazing had been made available, and what was withdrawn. The bulk of it consists of bare denial. There is also some inconsistency with the report, as I mention below.

24. The respondents also, despite the fact that they are in possession of this knowledge rather than the applicants, criticize the applicants for not stating where on else on the farm they may be able to graze their cattle. It is telling that the respondents fall short of alleging that there is no alternative land on the farm that may be used for grazing if the grazing camp is overgrazed. In fact the respondents do not even take the court into their confidence regarding what kind of farm it is and what the use of the land is.

25. Interestingly, although the answering affidavit denies that the previous owner removed the applicants from a grazing camp, and contends that the applicants were only removed from the second camp after the report was produced, the report evaluates two grazing camps on the farm, one that is currently being grazed by "an established local community" and one that was formerly grazed by the same community. This begs the question when the community, which appears to include the applicants, were removed from the second site that was evaluated by the report.

26. In addition, the report does not evaluate the entire farm, only the designated areas the expert was asked to examine.

27. The applicants in reply contend that water was provided only after proceedings were instituted. They also allege that the report was produced only after their cattle were moved, and that, in fact, the report applies to other areas of the farm and not the grazing camp that is at present a bone of contention. They deny that they ever paid rent for grazing. They deny also that they were allowed only 3 cows and 2 calves for each occupier.

28. Although neither the applicants nor the respondents have provided satisfactory evidence of their cases, there is enough that is common cause to allow the court to decide the narrow issue, whether the respondents were entitled to move the applicants' cattle without a court order.

29. The respondents contend that they were entitled to do so to prevent non-compliance with CARA.

30. CARA provides, amongst others, for the promulgation of control measures dealing with the use of veld, and that a land user who failed or refuse to comply with control measures which are "binding on him" shall be guilty of an offence.[1] It also provides that an employer is liable for an action of an employee which constitutes an offence unless the employer shows that he took all reasonable steps to prevent it.[2]

[1] Section 8
[2] Section 25(1)

31. The respondents contend that the court cannot grant an order restoring the rights of the applicants because that would be tantamount to the court granting an order which entitles the applicants to act unlawfully.

32. ESTA defines "evict" as

> "to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and "eviction" has a corresponding meaning" (my underlining).

33. The applicants' right to use the grazing camps is clearly use of land linked to their rights of residence in terms of ESTA. This much is common cause. The deprivation of that right would therefore ordinarily be eviction, in terms of the definition, and the termination of the right must therefore be in terms of section 8 of ESTA. Notice must be given, and if the occupier does not comply with the notice, the owner or person in charge must obtain a court order, in terms of section 9 of ESTA.

34. It was submitted on behalf of the applicants that they were nonetheless entitled to act as they did because of the overgrazing disclosed in the report, and because of the requirements of CARA. They rely on the judgment of the Supreme Court of Appeal in *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, and Another Appeal*,[3] in which the SCA found that removal (or curtailment of a right) to attain compliance with the law is not eviction because there is no intention to terminate the relationship between the land owner or person in charge and the occupiers. The grazing rights were not being denied or terminated.

[3] 2019 (1) SA 154 (SCA)

35. In that case the land owner had brought an application for orders that the occupiers' livestock be removed and that arrangements be made by the relevant government entities to facilitate their removal to alternate land. The basis of this application was overgrazing, and the resulting contravention of CARA. The occupiers in the meantime had been declared labour tenants and made a counter application for the award of the same land from which the owners wished to remove them.

36. This court granted the order of removal, ordered the Minister to provide alternative land for the livestock, and dismissed the counter application. The matter was then heard by the SCA by leave of the SCA. The SCA found that the right that the labour tenants might have the right to acquire the land did not mean they were exempt from the provisions of CARA.

37. The order granted by this court and confirmed by the SCA was that the livestock was to be removed and that the labour tenants may not bring the livestock back to the land or bring new livestock on to the land for five years until the date of removal. This was to allow the rehabilitation of the land.

38. In my view the conduct of the respondents in this case differs in two ways from the conduct of the land owner in *Normandien*, which make this case distinguishable from that.

39. First, the *Normandien* owner did not act without a court order. An order was obtained and due process was followed. Despite the fact that the curtailment of

rights was justified by the requirements of CARA, the owner correctly implemented it with judicial oversight. In my view an owner or person in charge cannot unilaterally decide what is and is not a justifiable curtailment of an occupier's rights. This view is bolstered by the respondents' action firstly in saying in their letter to the Department on 31 May 2018 that they intended to seek a court order compelling the occupiers to remove the livestock from the farm, and that they actually did bring an application for the removal of their livestock.

40. The second point of distinction from *Normandien* strengthens my view that an owner or person in charge ought not to unilaterally decide what is or is not a justifiable curtailment of an occupier's rights.

41. This is that, although the respondents have produced a report which may justify moving the cattle from the disputed camp (which is denied by the applicants as they say it is a different camp), it does not on its own justify the reduction of the grazing area made available to the occupiers. There is nothing on the papers which justifies this. There is no assertion that there is nowhere else on the farm on which grazing can be provided, yet the respondents have reduced the grazing provided and have the ultimate aim of removing the livestock completely.

42. There are two additional points of distinction which are relevant to the inference the court may make about the respondents' intention, taking into account that the answering affidavit is wanting in so many respects. First, the respondents have not indicated in any way that the removal of the livestock is intended to be

temporary, and second, it is clear that what they ultimately seek is the permanent removal of the livestock from the farm.

43. On the facts of this case, then, I find that the actions of the respondents in reducing the grazing area available to the applicants do amount to an attempt to evict in terms of the definition in ESTA, and therefore that their doing so without judicial oversight is inconsistent with ESTA and unlawful.

44. The order I propose to make would not amount to an order requiring anyone to commit an offence, since I simply order the respondents to ensure that grazing of similar capacity and quality is made available. It does not have to be the same camp that has been overgrazed.

45. If in fact the applicants are keeping more livestock than they are entitled to, the respondents have remedies at their disposal which they do not appear to have attempted to use.

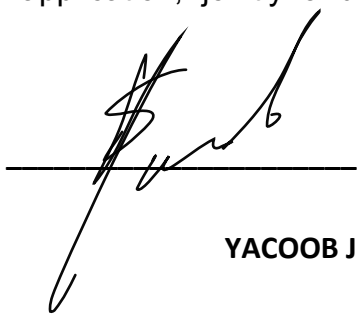
46. As far as the provision of fodder is concerned, I find that there is a dispute of fact which cannot be resolved on the papers as they currently stand. I make no order on that question and if the applicants still require relief grant leave to them to institute action proceedings to that end.

47. Counsel for the respondents submitted that, since the applicants did not ask for a costs order in their notice of motion, and it was asked for for the first time in the heads of argument, no costs order should be made in the applicants favour.

48. However there are no factors that militate against making a costs order in this case. Costs are always in the discretion of the court, and the respondents have been aware that the notice of motion does ask for further or alternative relief. If there were any facts that needed to be brought to the court's attention regarding costs, the respondents had sufficient time to request condonation and file an additional affidavit dealing with the issue. I see no reason why costs should not follow the result.

49. For these reasons, I make the following order:

1. The respondents' conduct in reducing the grazing available to the applicants in the absence of a court order is unlawful.
2. The respondents are ordered to restore to the applicants the right to graze on a camp of at least similar capacity to the camp from which the applicants' livestock has been removed, on the farm known as Barnea 231 in the District of Bethlehem, Free State Province.
3. The applicants are granted leave to institute action proceedings to determine their entitlement to winter fodder.
4. The respondents are to pay the costs of this application, jointly and severally.



YACOOB J

LAND CLAIMS COURT OF SOUTH AFRICA

Appearances

For the applicants	: Mr NV Finger, of Finger Attorneys
Counsel for the respondents	: Mr JS Stone
Instructed by	: Niemann Grobbelar Attorneys
Date of hearing	: 10 March 2020
Date of judgment	: 02 December 2020