



IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG

CASE NO: LCC282/2017B

(1)	REPORTABLE <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES <u>YES</u> / NO
(3)	REVISED.
<i>12/22/2020</i> <i>[Signature]</i>	

In the matter between:

<b>MMASANE RAMOHLOKI</b>	First Applicant
<b>NYEFOLO MOFOKENG</b>	Second Applicant
<b>TJOTJO MOFOKENG</b>	Third Applicant
<b>DIKOMO MOFOKENG</b>	Fourth Applicant
<b>and</b>	
<b>RADIEN (PTY) LTD</b>	First Respondent
<b>PHILLIP FOURIE SCHEEPERS</b>	Second Respondent
<b>NTELANE POUND MASTER</b>	Third Respondent
<b>NJH GENERAL DEALER (PTY) LTD T/A MANTSUPA ANIMAL POUND LADYBRAND</b>	Fourth Respondent

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JUDGMENT

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## COWEN AJ

1. This is an urgent application in which the applicants request this court to declare unlawful the removal of 13 cattle from the applicants' designated grazing camps and to order their restoration. It is common cause that on or about 14 October 2020, the first and second respondents caused 13 of the applicants' cattle to be removed and impounded. The question is whether they were entitled to do so.
2. The four applicants are Mmasane Ramohloki, Nyefolo Mofokeng, Tjotjo Mofokeng and Dikomo Motholo. They reside at Weltevreden 431 Farm in Fouriesburg (the property) in the Free State. They have lived on the property throughout their lives. They contend that the first and second respondents unlawfully took the law into their own hands when removing and impounding the 13 cattle and that the conduct amounts to an unlawful spoliation and violation of the rule of law.
3. The applicants instituted these proceedings on 20 October 2020 on an urgent basis. On that day Acting Judge President Meer issued directions regulating its further conduct. The matter was set down for 4 November 2020. The parties requested that it be disposed of with reference to written submissions.
4. The first and second respondents are Radies (Pty) Ltd (Radies) and Mr Phillip Scheepers. Mr Scheepers is a director and shareholder of Radies. He deposed to the answering affidavit on his own behalf and for Radies. Radies became the registered owner of the property on or about 20 December 2017. Mr Scheepers says that the applicants are occupiers of the property in terms of Extension of

Security of Tenure Act 62 of 1997 (ESTA). He contends that Radien and he were entitled to cause the 13 cattle to be removed and impounded as in doing so, they were enforcing an interim court order granted on 16 March 2018 by Ncube AJ (the interim order) and the impoundment was authorized by section 7(1) of ESTA.

5. The third respondent is the pound master of the pound where - the applicants initially believed - the 13 cattle had been impounded. This proved incorrect. In the answering affidavit, Mr Scheepers confirmed that the 13 cattle were impounded at NJH General Dealer (Pty) Ltd t/a Mantsupa Animal Pound Ladybrand (the Ladybrand pound). He understood the fourth applicant already to have been aware of this.
  
6. On 5 November 2020, I granted an order joining the Ladybrand pound as the fourth respondent and regulating its participation in the matter. I also granted an order prohibiting the sale or any other disposal of the 13 cattle pending decision in this application. In this regard, and on my request, my Registrar had – on 4 November 2020 – asked the applicants' attorneys to ascertain whether the Ladybrand pound would confirm that they would await the decision of the Court before disposing of the 13 cattle in any way. Unfortunately, on 5 November 2020, the applicant's attorney reported that the Ladybrand pound, which had confirmed receipt of the papers, would give no such undertaking and advised that the cattle would be sold at noon the following day. My Registrar immediately contacted the Ladybrand poundmaster, who advised that there was no imminent sale and that he would supply the undertaking. In view of the divergent advice and in circumstances where my Registrar had not yet received any written confirmation of the

undertaking I issued an order to provide certainty to the parties regarding the interim position. The Ladybrand pound elected not to participate in the case.

7. The following issues arise for decision:

7.1. Were Radien and Mr Scheepers entitled to enforce the interim order without approaching a Court?

7.2. Were Radien and Mr Scheepers entitled to rely on section 7(1) of ESTA to cause the removal and impoundment of the 13 cattle?

7.3. If so, was there compliance with section 7(1) of ESTA?

7.4. Should the court grant any relief and costs?

8. I first deal briefly with the facts that appear from the evidence before me. The facts are to be found in the affidavits and must be determined based on the principles in *Plascon-Evans*<sup>1</sup> and *Wightman*<sup>2</sup>.

### **The facts**

9. The applicants explain in their founding affidavit that in the past they were allocated 'camps' to reside and graze cattle on the property without limitation as to the number of cattle. They say that this changed in 2017 following the arrival of Radien and Mr Scheepers, who, it is alleged, suddenly reduced the grazing area and

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<sup>1</sup> *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (A) at 634H-635C.

<sup>2</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at para 13.

ordered a reduction in the number of cattle to 2 per family. In the result, and in November 2017, the applicants and another instituted urgent proceedings under case number LCC282/2017 for relief entailing restoration to them and their families of their rights in land and declaring their entitlement to keep livestock in two camps according to their feeding requirements (the 2017 application).

10. Radies and Mr Scheepers are opposing the 2017 application. They refer the court to the content of an affidavit in that application wherein it is alleged that the applicants had hitherto occupied the property pursuant to a lease agreement but that in September 2017 these rights had been terminated and an agreement reached that the number of cattle would be reduced to 8.

11. On 16 March 2018, Ncube AJ made an order regulating the further conduct of the 2017 application and the interim position pending the finalization of the application for final relief (the interim order). The precise terms of the first paragraph (1.1) of the order are material. It reads:

*'Without prejudice to their rights the first and second respondents consent to an order in terms whereof the applicants will, pending the finalization of their application for final relief as recorded in paragraphs 2.1 to 2.3 of the amended notice of motion, be entitled to keep a maximum of 17 cattle (consisting of eight cows and nine calves) upon (the property).'*

12. In terms of paragraph 1.2 of the interim order, the cattle are to be kept in a camp of some 79.2 hectares in extent depicted in a diagram attached to the order.

13. The applicants say that they only came to learn of the interim order in December 2018. The applicants say that upon learning of the interim order they approached

the Department of Land Affairs and Rural Development for assistance to have the interim order amended. That has not occurred. Mr Scheepers disputes that the applicants only learnt of the order in December 2018 saying that it had been granted by agreement in circumstances where the applicants were represented by an attorney. The applicants reply that their attorney had consented to the order without obtaining any instructions from them. On the information before me and for purposes of these proceedings, I assume the applicants' account is correct. Importantly, however, the interim order has not to date been rescinded or varied. It stands and the applicants must comply with it or approach the court to have it rescinded or varied. There are remedies potentially available to the applicants should they be aggrieved by the interim order.

14. It is common cause that during November 2019, Radien and Mr Scheepers caused a notice in terms of section 7(1) of ESTA to be served on the applicants calling on them to remove what are referred to as "excess cattle" being cattle in excess of the number allowed under the interim order. It is also common cause that the applicants, through their attorney, contested the rights asserted in the notice and that Radien and Mr Scheepers did not take any further steps to cause the impoundment of any "excess cattle" at that stage. In correspondence before the court, Mr Niemann of Niemann Grobbelaar Attorneys, who acts for the respondents, asserts that the applicants kept some 23 cattle at that time.

15. The evidence demonstrates that on 8 October 2020, the sheriff served on the applicants a further notice in terms of section 7(1) of ESTA. The notice is in both

English and SeSotho, is issued by Radies CC<sup>3</sup> and is addressed to the first to third applicants and a Mmasane Ramohloli. It notifies the applicants that 8 (eight) mixed breed cows have been found without permission on the property and that this is in breach of the interim order which only permits a maximum amount of 17 cattle. It cautions that if the excess animals are not removed within 72 hours they will be impounded in accordance with the applicable pound ordinances or regulations. These are not identified and their material provisions are not explained. Service was effected on the first applicant personally and on the remaining applicants (by service on first applicant). The applicants say that they received the purported notice on 12 October 2020. At least insofar as the first applicant is concerned this is difficult to reconcile with the sheriff's return of service. I accept the respondents' version.

16. In the answering affidavit, Mr Scheepers confirms that Radies caused the impoundment of the applicants' cattle on 14 October 2020. He says that before doing so he asked the fourth applicant to indicate which of the cattle could be removed but he says there was no co-operation. They were removed to the fourth respondent. The applicants instituted these proceedings on 20 October 2020.

**Could the first and second respondents enforce the interim order without approaching the Court?**

17. The nub of applicants' complaint is that the rule of law required Mr Scheepers and Radies first to approach the court to declare the possession of the cattle unlawful

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<sup>3</sup> This is an error by Mr Scheepers as Radies CC has been converted to a (Pty) Ltd.

in order to implement the court order. It was not open to them, the applicants say, to coerce compliance by themselves causing the removal and impoundment of the applicants' cattle.

18. In my view, to the extent that the first and second respondent were aggrieved that the applicants were not complying with the interim order, their remedy was to give notice to the applicants to cure the non-compliance and thereafter to approach the court to obtain appropriate relief by invoking the civil contempt process. It was not open to them themselves to coerce compliance by causing the removal and impoundment of the cattle.

19. This court has civil contempt jurisdiction. It is now well established that a court vested with such jurisdiction has wide powers to grant appropriate relief via the civil contempt process, one of the purposes of which is to ensure compliance with court orders. The Constitutional Court has recently pronounced on the law relating to contempt of court and has explained its source in the Constitution.<sup>4</sup> In short, the duty to observe court orders is a constitutional imperative flowing from the rule of law protected in section 1 of the Constitution and the provisions of section 165, which vouchsafe judicial authority. As the Constitutional Court has held: '*... disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery*' and the '*effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.*'<sup>5</sup> In *Pheko*, the

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<sup>4</sup> *Matjhabeng Local Municipality v Eskom Holdings Limited and Others* 2018 (1) SA (1) (CC) ('*Matjhabeng Municipality*') at para 46 to 67 and *Pheko and others v Ekurhuleni Metropolitan Municipality (No 2)* ('*Pheko*') 2015 (5) SA 600 (CC); 2015 (6) BCLR 771 (CC); [2015] ZACC 10 at paras 1-2 and 25 to 37 with reference *inter alia* to *Fakie NO v CCl Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) ('*Fakie*').

<sup>5</sup> *Pheko* at para 1.



Constitutional Court explained: "*Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: willful disobedience and resistance to lawful court orders. ... Willful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.*"<sup>6</sup>

20. Civil contempt is a criminal act but its remedies can be sourced through civil process. In the constitutional era, the standard of proof for a finding of contempt where the sanction is committal in prison is the criminal standard, in other words, proof beyond a reasonable doubt.<sup>7</sup> Should a court nevertheless find that a litigant who has breached a court order did so willfully and *mala fide* on a balance of probabilities, the court may impose civil contempt remedies other than committal such as declaratory relief, a mandamus that a contemnor behave in a particular manner, a structural interdict, a fine or another order that would have the effect of coercing compliance.<sup>8</sup>

21. The first and second respondent did not follow this course but elected themselves to cause compliance by removing and impounding the cattle. But they say that they did not thereby take the law into their own hands because they were entitled

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<sup>6</sup> *Pheko* at para 28.

<sup>7</sup> *Pheko* at paras 33 to 36 with reference to *Fakie*. Once an applicant has established the first three elements for contempt (the existence of the order, that it was known to the applicant and that it is not complied with), *mala fides* and willfulness are presumed and the contemnor is required, to avoid a finding of contempt, to lead evidence to create a reasonable doubt as to their existence. *Pheko* at para 36.

<sup>8</sup> *Pheko* at para 35 and *Matjhabeng Municipality* at paras 54 and 63 to 67 esp para 67.

to do so by virtue of section 7(1) of ESTA. The question thus arises whether section 7(1) conferred that entitlement?

### **Could the first and second respondents rely rather on section 7(1) of ESTA?**

22. Section 7(1) of ESTA provides as follows:

*'The owner or person in charge may have a trespassing animal usually or actually in the care of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given the occupier at least 72 hours' notice to remove the animal from the place where it is trespassing and the occupier has failed to do so; Provided that the owner or person in charge may take reasonable steps to prevent the animal from causing damage during those 72 hours.'*

23. It is common cause that the first and second respondent purported to issue a notice in terms of section 7(1) of ESTA prior to causing the impoundment of the 13 cattle. They contend that section 7(1) provided a lawful course to follow without approaching a court to authorize the impoundment. I deal below with whether the first and second respondent complied with the requirements of section 7(1). An anterior question is whether section 7(1) could be relied on at all in the circumstances of this case. Specifically, were the 13 cattle "trespassing" animals as contemplated by section 7(1).

24. In *Sibanyoni v Holtzhausen and others*,<sup>9</sup> Ngcukaitobi AJ considered and affirmed this Court's duties when interpreting and applying section 7(1) of ESTA being a law which permits and regulates the dispossession of cattle on farms. With reference to principles of statutory interpretation articulated by the Constitutional Court<sup>10</sup> the

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<sup>9</sup> [2019] ZALCC 11.

<sup>10</sup> At paragraph 51 with reference, at paragraphs 29 to 31, to the Constitutional Court's decisions in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re*

court emphasized its duty to interpret ESTA in a way that gives the fullest possible protection to holders of constitutional rights. The Court had regard to the right to dignity<sup>11</sup> and section 25 of the Constitution. It held that the purpose of section 25 includes the transformation of *'property ownership patterns from the colonial and apartheid past to a future based on equality, dignity and freedom'*.<sup>12</sup> As regards the transformation of property relations, particularly land, it held: "*security of tenure sits alongside land ownership*".<sup>13</sup>

25. In *Sibanyoni* and with reference to section 7(1), this Court held further that any law that sanctions the compulsory taking of cattle by impoundment implicates both the negative and positive features of section 25. No taking of property may be arbitrary. This includes the property rights of African people, including ownership of cattle and land, which were severely curtailed by arbitrary laws under colonial and apartheid rule. These rights, this Court held, must now be affirmed.<sup>14</sup> The importance of cattle should not be under-emphasised. This concerns not only their value as wealth or sustenance to people but their place in the story of land dispossession, vividly recounted in *Sibanyoni*.<sup>15</sup> Importantly, the history of impoundment itself has a draconian history that is intimately linked with the history of land dispossession.<sup>16</sup> In the result, this Court held that ESTA must be

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*Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 22 to 23 and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009 (1) SA 337 (CC).

<sup>11</sup> At paragraph 55.

<sup>12</sup> At para 33 to 39 in which reference is made to the Constitutional Court's decisions of *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and others* 2015 (6) SA 125 (CC) at para 34; *Daniels v Scribante and another* 2017 (4) SA 341 (CC) at para 13 and *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 61.

<sup>13</sup> At para 33.

<sup>14</sup> At para 42.

<sup>15</sup> At para 43 to 50.

<sup>16</sup> Para 50. See too the Constitutional Court decisions in *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 38 to 42.

interpreted and applied to redress this history, not to entrench it, which – in order to give effect to the transformative purposes of the Constitution – requires an appropriate balance to be struck between the interests of land-owners and occupiers.<sup>17</sup>

26. This approach must inform this Court's interpretation and application of section 7(1) of ESTA including the meaning to be given to the word "*trespassing*" animals. The respondents contend that the word should be given the meaning the Oxford Dictionary of Law gives it, quoted as "*a wrongful direct interference with another person or with his possession of land or goods ...*"<sup>18</sup> In my view this definition cannot be adopted. First, the dictionary is not a South African legal dictionary yet the definition is framed with reference to legal concepts (wrongfulness and possession) which have meaning in a specific legal system. To introduce such a definition without carefully interrogating the resultant consequences is a recipe for confusion and error. Second, the definition is unduly broad: it would confer rights on landowners to impound others' cattle where there is any interference with possession of their land which they regard to be wrongful. A narrower interpretation is warranted.

27. Difficult and important questions arise as to the meaning of the term "*trespassing*" under section 7(1). For example, can it ever include the case, such as this one, where the alleged "*trespass*" does not entail any animal moving outside the boundaries of a physical area in which cattle may be kept pursuant to an

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<sup>17</sup> At para 50 and 51.

<sup>18</sup> The Oxford Dictionary of Law definition quoted in the heads of argument goes on to explain that there are three kinds of trespass: to the person, to goods and to land and then comment is provided on each.

agreement or court order, and the only dispute is the number of cattle that may be kept in that area? (Though unsatisfactory terminology – this might be termed an “excess animal complaint”). While I am doubtful that it does, I have received limited argument on the matter, which has important consequences for landowners and occupiers alike, and it is accordingly undesirable for me to attempt to decide the issue if I can decide the dispute before me without doing so. In my view, I can. This is because whatever the meaning of a “trespassing” animal, it cannot include a case where there is an excess animal complaint but the parties are in dispute with each other and involved in ongoing litigation in respect of that very issue. Such an interpretation would undermine the rule of law and the judicial process. It would also create the conditions for arbitrary deprivation of cattle in a manner that serves to entrench historical patterns of dispossession that the Constitution requires be redressed. It would also result in undue hardship for people whose wealth relative to a landowner is likely to be minimal and who will often not be able to afford to pay any fees invariably associated with the release of animals from a pound.

28. There is a further potential difficulty for the respondents in this case which concerns the actual import of the interim order. Mr Scheepers strongly asserts that it imposes a maximum number of cattle allowed on the property. But that is not what the order expressly says. Its effect, in the result, is not as clear as Mr Scheepers asserts. The existence of an ambiguity in the interim order, the very instrument that the applicants rely on to claim the “trespass”, reinforces the need for the applicants to approach the court in the circumstances of this case for relief, whether via the civil contempt process or to authorize an impoundment.

29. In the result, I conclude that the first and second respondents were not entitled to rely on section 7(1) of ESTA to cause the impoundment of the 13 cattle.

**Was there compliance with the requirements of section 7(1) of ESTA?**

30. There is a further reason why the conduct causing the impoundment was unlawful, being that at least two further requirements of section 7(1) were not complied with.

31. First, the notice that was given was ineffective. Notice was given to impound only 8 mixed breed cattle. Aside from any concerns about which specific cattle were regarded as “excess” and whether these were adequately described, it is common cause that 13 cattle were impounded. For this reason alone, there was non-compliance with section 7(1).

32. Secondly, section 7(1) does not stand alone. It requires that any impoundment and removal be *in accordance with the provisions of any applicable law*. Such compliance should be pleaded in any case in which a party relies on section 7(1) with reference to the requirements of the law concerned. This is not a matter of form. The failure to plead compliance with an applicable law will result in this Court being unable to perform its own duties to ensure that section 7(1) of ESTA is only applied in a manner that is consistent with the Constitution. Laws governing impoundment are far-reaching and can validly, albeit in circumscribed circumstances, sanction impoundment of cattle without recourse to courts.<sup>19</sup> Courts have struck down as invalid at least two laws governing impoundment and

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<sup>19</sup> See *Zondi supra* and *Mdodana v Premier of the Eastern Cape and Others* [2013] ZAECGHC 66.

required law-makers to prepare new laws that comply with the Constitution.<sup>20</sup> A party relying on section 7(1) should not only identify the applicable law but plead compliance with any material provisions so that the other party and in turn the Court can, where appropriate and within the Court's jurisdiction, raise and determine disputes concerning these matters.

### **Relief and costs**

33. In the result, the substantive relief the applicants seek against Radien and Mr Scheepers should be granted. The duty to restore the applicants to possession of their cattle contemplated by the notice of motion, and in turn subparagraph 35.2, naturally includes a duty to cover all costs associated therewith including any monies owed to the fourth respondent.

34. As regards costs of the application, in the special circumstances of this case as set out above, justice requires that the applicants are awarded their costs. Mr Scheepers has at all times been acting as a director of the first respondent and it is appropriate that the first respondent pay the costs.

35. The following order is made:

35.1. The first and second respondents' conduct removing and impounding the applicants' 13 cattle from the property is declared unlawful;

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<sup>20</sup> See *Zondi and Mdozana supra*.

- 35.2. The first and second respondents are directed to restore the applicants to possession of their cattle within 2 days of the court order;
- 35.3. The first respondent is ordered to pay the applicants' costs.



**COWEN AJ**

Judgment delivered: 12 November 2020

*Representation:*

Applicants represented by PT Sidondi Attorneys

1<sup>st</sup> and 2<sup>nd</sup> Respondents represented by JP Niemann, Niemann Grobbelaar Attorneys