

SOUTH AFRICA / JUDGMENT

Kubheka v Tonkin and Another (LCC148/2018) [2019] ZALCC 28 (4 January 2019)

[2019] ZALCC 28

COURT

Land Claims Court

BEFORE

T M Ncube

CASE / FILE NUMBER

LCC148/2018

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT RANDBURG

CASE

NUMBER LCC 148/2018

04/01/2019

Before:

Ncube AJ

Date

heard: 22 October 2018

Date

delivered: 04 January 2019

In

the matter between:

KHESAYA

SONAKELE

KUBHEKA

APPLICANT

and

DELARAY

PETRUS

TONKIN

1st RESPONDENT

BRAKULEI

EIENDOMS

TRUST

2nd RESPONDENT

JUDGEMENT

INTRODUCTION

[1] This is opposed urgent application. The applicant seeks relief in the following terms;-

1.1 Declaring the respondent's conduct of reducing the applicant's grazing land on Reebokfontein farm 514 IS, Standerton, Mpumalanga Province, unlawful and set aside.

1.2 Ordering the respondent to remove the fences he erected on the camp demarcated for use by the applicant, Which fence reduced the grazing land of the applicant.

1.3 Declaring the respondent's conduct of removing the fence protecting the applicants animals from falling into the river at Reebokfontein farm 514 iS Standerton Mpumalanga Province, unlawful and set aside.

1.4 Compelling the respondent to put back the fence which he removed, which fence protects the applicant's animals from falling into the river.

1.5 Ordering the respondent to allow the applicant to buy electricity from the respondent or to give the applicant the code or numb.er to use to buy electricity.

1.6 Costs of the application.

Relief sought in respect of electricity was abandoned on the date of the hearing of this application.

[2] The respondents, upon receipt of application papers filed a Counter Application, where in they sought the following relief:

"1. That the Applicant be ordered and directed to remove all the livestock, including cattle, goats, horses and any other livestock in her possession or under her control from the farm Reebokfontein no 514 held under deed of transfer no T3374/2016, Mpumalanga Province of which the Second Respondent is the owner ("the farm") within fourteen (14) days of the granting of this order.

2. That the Applicant is interdicted and restrained from returning any of her livestock as contemplated in paragraph 1 above or any other livestock onto the farm for a period of three years from elate of the removal of the livestock from the farm.

3. In the event of the Applicant failing to comply with the orders in paragraph 1 and 2 above. an order is hereby issued that the appointed Sheriff for the district wherein the farm is situated, with the assistance of the South African Police Services and/or any other registered private security company , at the Respondents' expense, shall remove all livestock to the pound in Standerton; Mpumalanga Province or such other pound in the Mpumalanga Province, who will be able to accommodate the livestock in terms of the applicable legislation.

4. That the Applicant be ordered to pay the costs of the Counter Application.
 5. That further or alternative relief be granted to the Respondents"
- [3] Respondents raised two preliminary points, relating to lack of urgency and non- joinder of the Minister of Rural Development and land Reform ("the Minister") to the main application. Both these points were abandoned on the hearing date. The applicant also raised a preliminary point relating to non- joinder of the Minister to the Respondents' Counter Application. On the hearing date, applicant raised a preliminary point of lack of locus standi in respect of the first respondent to bring the Counter Application without the authority from the Trust. As that point was not pleaded on the papers, it was subsequently withdrawn. It will be convenient to decide the Counter Application first Should the Counter Application succeed, there will be no point in deciding the main application, since livestock will have to be removed in any event.

PARTIES

- [4] The applicant is Khesaya Bonakete Kubheka. She is a widow of the late Msongelwa Nkosi ("Mr Nkosi"). I shall refer to the applicant as ("Mrs Nkosi"). Mrs Nkosi resides on Reebokfontein farm 51' 4 IS, Mpumalanga Province. The first

respondent is Delarey Petrus Tonkin ("Mr Tonkin") who is one of the trustees of the second respondent, Brankvlei Eiendoms

Trust. The second respondent is the Trust as afore mentioned.

BACKGROUND FACTS

- [5] Mrs Nkosi's family arrived on the farm in 1998. The family comprised of Mr and Mrs Nkosi and their eight (8) children. On 01 March 1998, the Hannes Lombard Trust, the previous owner of the farm, employed Mr Nkosi to work on the farm. The family initially occupied a farm house. Later, they established their own homestead.
- [6] Mr Nkosi was given consent to keep cattle and goats. He had to pay a grazing rental of R10.00 per cow on the farm. He was allocated a demarcated and fenced off grazing site. Apart from Mr Nkosi, one of the children Josia ("Josia") Vilakazi was also working on the farm under the supervision of Mr JJ Lombard. Both Mr Nkosi and Josia were looking after livestock.
- [7] In February 2014, Mr Nkosi passed on. He is survived by his wife Mrs Nkosi and children. At the demise of Mr Nkosi, the family had 30 head of cattle. After the death of Mr Nkosi, Mr JJ Lombard approached Mrs Nkosi and requested her to reduce the number of cattle to 25, which she did.
- [8] In 2016, Lombard Trust sold the farm to the second respondent. The second respondent did not give consent to Mrs Nkosi to keep cattle on the farm. On 14 November 2017, the second respondent's Attorneys wrote to the Department of Rural Development and Land Reforms

("the Department") advising the Department that the Nkosi family was keeping more livestock than what they were allowed by the Lombard Trust to keep and as a result; the allocated camp was seriously overgrazed and that live stock had to be removed in order to rehabilitate the camp. In response to the Attorney's letter of 4 November, the Department appointed a firm of Attorneys to assist Mrs Nkosi.

REMOVAL APPLICATION

- [9] The basis of the Counter Application for the removal of livestock from the farm, is that the demarcated camp is seriously overgrazed.

The camp is 10.1 hectares in size. Mr Nkosi was allowed to keep 10 head of cattle and 3 goats. That number of livestock was suitable for the size of Mr Nkosi's allocated camp. However, contrary to what Mr Nkosi was allowed to keep, the family keeps more livestock, hence the over grazing of the camp.

- [10] Mrs Nkosi concedes that the allocated grazing camp is overgrazed. However, Mrs Nkosi blames the second respondent which, she says, has reduced the size of her grazing camp. The second respondent denies having reduced the size of the grazing camp. The first respondent contends that the second respondent only repaired the existing fence but did not reduce the size of Mrs Nkosi's grazing camp. In my view, it does not matter whether the size of the grazing camp was reduced or not. What is important is that both parties agree that there is over-grazing on the farm.
- [11] The second respondent contends that the number of livestock grazing on the demarcated camp is in contravention of the provisions of the Conservation Of Agricultural Resources Act (CARA), Act 43 of 1983. CARA places a responsibility on the Trust as owner of the farm and Mrs Nkosi as the land user to prevent overgrazing on the agricultural land.
- [12] Regulation 9(1) (a) to (c), made in terms of Section 29 of CARA, provides:
- "9 (1) Every land user shall by means of as many of the following measures as are necessary in his situation protect the veld on his farm unit affectively against deterioration and destruction:
- (a) The veld concerned shall be utilized on alternating grazing and rest periods with due regard to the physiological requirements of the vegetation thereon.
 - (b) Animals of different kinds shall be kept on the veld concerned.
 - (c) The number of animals kept on the veld concerned shall be restricted to not more than the number of large stock units that may be kept thereon in terms of regulation 11.
 - (d) A suitable soil conservation work. Shall be constructed and thereafter be maintained in order to
 - (i) utilize the veld concerned in alternating grazing and rest periods,

(ii) protect the veld concerned against excessive soil loss as a result of erosion through the action of water or wind,

(iii) collect sediment from run-off water.

(e) If the veld concerned shows signs of deterioration-

(i) The number of animals kept thereon shall be suitably reduced.

(ii) The portion showing signs of deterioration shall be withdrawn from grazing until they have recovered sufficiently."

[13] CARA defines a land user as follows:

'Land user' "means the owner of land and includes-

(a) any person who has a personal or real right in respect of any land in his capacity as fiduciary, fidei commissary, servitude holder, possessor, lessee or occupier, irrespective of whether he resides thereon;

(b) Any person who has the right to cut trees or wood on land or to remove trees, wood or other organic material from land,

(c)"

[14] It is evident that CARA places a duty on both the land owner and the occupier or land user to see to it that overgrazing on the farm does not occur. Regulation 9(1) (a) provides that the veld should be given rest period. The number of animals must be restricted. (Reg 9(1) {c} and 9(1)(e)). The portion showing signs of deterioration must be withdrawn from grazing until the grazing has recovered. (Reg 9 (1) (e)(ii).)

[15] It is common cause that Mrs Nkolsi has more than 10 head of cattle grazing on the demarcated portion of the veld. However the demarcated portion cannot carry ten cattle. I November 2017, Mrs Nkosi had 23 cattle, 16 goats; 5 horses and 1 pig on the demarcated portion of the grazing veld.

[16] The second respondent sanctioned David Sanders Lotter ("Mr Lotter"), an agricultural expert, to evaluate the condition of the veld on the demarcated area and provide a report and give his opinion thereon. On 11 April 2018 Mr Lotter evaluated the veld condition and compiled a report. According to the report, the demarcated veld is 10.1 hectares but Mr Lotter found 21 cattle, 17 goats and 3 horses grazing on that particular area.

[17] Mr Lotter recorded that the carrying capacity of the demarcated veld is 2.9 LSU (Large Stock Unit) per hecter but at the time of the evaluation; the veld carried 26 Large Stock Units which means the veld is overstocked by 23.1 Large Stock Units. In the final analysis, Mr Lotter opined that all livestock should be removed from the demarcated area for at least 2 to 3 years in order to help the veld to recover. There is no other expert evidence to gainsay the opinion of Mr Lotter.

NON- JOINDER

[18] Mrs Nkosj contends that the Counter Application should be dismissed because the Trust failed to join the Department of Rural and Land Reform. The assertion is that the Department should provide alternative grazing land should the court order the removal of livestock from the overgrazed veld. As in general rule, any person who had a direct and substantial interest in any order which the court might make is a necessary party and should be joined in the proceedings. The Department has no interest in an order for the removal of livestock. The Department has no obligation to make grazing land available to the occupiers.

[19] In *The Minister of Rural Development and Land Reform v Normandien Farm (Pty) Ltd and others* -2018 (1) ALL SA 390 at para 71 Rogers AJA expressed himself in the following terms:

"It follows that it would not be within the power of the land Minister to make land available to the occupants unless the designation of land for that purpose would be a designation 'for the purposes of settlement'. Since 'settlement' means the 'settlement of persons', a conclusion adverse to the Land Minister would require us to find that people may be settled on land even though their occupation of the land in question does not include residence and is confined to being on the land for purposes of looking after their livestock..."

SEPARATION OF POWERS

[20] Mr Sikhosana, Counsel for Mrs Nkosi, argued that in terms of CARA it is the Executive Officer who may issue directives to the land user to comply with particular control measures in order to achieve the objectives of CARA. Therefore, Mr Sikhosana argued, should the court order the removal of livestock, the court will be breaching the principle of separation of powers. That argument was, in my view, correctly refuted by Ms Roberts, Counsel for the respondents. In the Counter Application, respondents seek an interdict in the form of mandamus, which the court is competent to grant. The Executive Officer can issue directions to the land user, but is not competent to grant interdicts, Therefore, Mr Sikhosana's argument cannot stand.

DISPUTE OF FACT

[21] Mr Sikhosana argued further for the dismissal of the Counter Application on the basis that there is a dispute of fact as to who contravened CARA between the second respondent and Mrs Nkosi. Mr Sikhosana contends that overgrazing occurred because the second

respondent reduced Mrs Nkosi's grazing land. In my view, there is no genuine dispute of fact. It is common cause that the demarcated

grazing land is overgrazed and it should be allowed to recover.

COSTS

[22] Miss Roberts asked for an order of costs against Mrs Nkosi for withdrawing her electricity relief in the main application only on the morning of the hearing of the application. In response, Mr Sikhosana also asked for a costs order against the second respondent

in respect of two points in limine which they withdrew in the morning of the hearing of the application. Other points related to lack of urgency and failure by Mrs Nkosi to join the Department as a party to the proceedings. The general practice in this court, is not to make cost orders unless there are good reasons to do so. In this case, there are no good reasons for a costs order.

ORDER

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

1. The main application is dismissed.
2. The Counter-Application is granted.
3. The Respondent in the Counter Application (Mrs Nkosi) is ordered to remove all livestock, including cattle, goats, horses and any other livestock, excluding chickens, in her possession or under her control from the farm Rel9bokfontein No514, held under Deed of Transfer No T 3374/2016, Mpumalanga Province on or before 28 February 2019.
4. The Respondent (Mrs Nkosi) is interdicted and restrained from returning any of her livestock mentioned in paragraph 3 above or any other livestock onto the farm for a period of three (3) years from the date of removal of such livestock from the farm.
5. In the event of the Respondent failing to comply with the order in paragraph 3 above, the Sheriff, for the district of Standerton, is hereby authorized, with the assistance of the South African Police Services and or any other registered private security company, if necessary, at the Respondent's expense, to remove an livestock on the 8th of March 2019, to the pound in Standerton or such other pound in the Mpumalanga Province, nominated by the second respondent and which will be able to accommodate the livestock, for the Pound Master to deal with the livestock in accordance with applicable legislation.
6. There is no order as to costs.

T. M. NCUBE

Acting Judge of the

Land Claims Court

APPEARANCES.

For Applicant: Adv M.G Shosana

Instructed by: Semenya Gwangwa

Incorporated.

PRETORIA

For Respondents: Adv E Roberts

Instructed by Mooimant Pienaar INC

POTCHEFSTROM

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