

SOUTH AFRICA / JUDGMENT

Magubane and Another v Beukes and Another (LCC126B/2014) [2017] ZALCC 18 (26 October 2017) [2017] ZALCC 18

COURT

Land Claims Court

BEFORE

T M Ncube

CASE / FILE NUMBER

LCC 126B/2014

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT MADADENI

Case No: LCC 126B/2014

Before:

The
Honourable Acting Judge Ncube
Heard

On:

14
August 2017

Delivered:

26
October 2017
In

the matter between:

JULY
JOSEPH
MAGUBANE
First Applicant
GWEJE
KHUMALO
Second
Applicant
and
LODEWYK
JOHANNES BEUKES
First Respondent
TWIN
CITY DEVELOPERS (PTY) LTD
Second Respondent
WETLANDS
COUNTRY RETREAT (PTY) LTD
Third Respondent

JUDGMENT

NCUBE AJ:

Introduction

- [1] This is an application in which the Applicants seek a declaration that the Respondents are in contempt of an order of this Court (“the order”) dated 23 January 2017 and for the committal to prison of the First Respondent and Directors of the Second and Third Respondents. The application is opposed. The order states:

“Having read the papers filed on record and considered the matter in terms of Rule 54 (a) and (c) of the Land Claims Court Rules, it is hereby ordered that:

1. The interim order granted against the First, Second and Third Respondents on 5 January 2017, be and is hereby confirmed.
 2. That the orders prayed for in paragraph 3.1. to 3.6. of the Applicants’ Notice of Motion dated the 28th December 2016, be and are hereby granted.
 3. That there shall be no order as to costs.”
- [2] Since there was a material dispute of fact regarding the number of cattle removed as against the number returned, the application was referred for oral evidence on that aspect.

The Parties:

- [3] The First Applicant is July Joseph Magubane (“Mr. Magubane”) who resides at the farm known as Damascus (“the farm”)

situated in the Mpumalanga Province. The Second Applicant is Gweje Khumalo (“Mr. Khumalo”) who resides on the farm. Both applicants keep cattle on the farm.

[4] The First Respondent is Lodewyk Johannes Beukes (“Mr. Beukes”). Mr. Beukes is the managing agent of the Second Respondent, a private company which owns the farm in question. The Third Respondent is Wetlands Country

Retreat (Pty) Ltd, a private company which operates and manages the business activities of the farm.

[5] The Applicants seek an order committing Mr. Beukes and the directors of the Second and Third Respondents to prison for contempt of court, on the basis that the said Respondents failed to return to Applicants’ possession the cattle which Respondents removed from the farm on 14 December 2016.

Factual

background:

[6] The two Applicants are half- brothers and are both resident on the farm. The farm is owned by the Second Respondent and managed by Mr. Beukes. Both Applicants keep cattle on the farm. Their cattle have separate and distinct brand marks, but they graze together.

[7] Mr. Beukes keeps the farm exit gates locked in order to prevent stock theft which is rife in the area. For stock to be removed from or brought onto the farm, a written permit from the police is required.

[8] On 13 December 2016, Applicants removed from the farm two head of cattle each in order to sell it at the auction. Cattle were being conveyed in a bakkie. When attempting to take cattle out of the farm, Applicants discovered that the exit gate was locked with a padlock. Mr. Magubane broke the padlock, opened the gate and let the bakkie out of the farm.

[9] On 14 December 2016, Mr. Beukes, without permission and knowledge of the Applicants and in an endeavor to prevent any further misunderstanding

between himself and the Applicants, instructed his farm manager Abrie Landman (“Mr. Landman”) and other employees, to remove Applicants’ cattle from the farm and drive them to a camp on his other farm known as Goudhoek (“Goudhoek”).

[10] Mr. Landman and other employees did not count the number of cattle at the time of removal from the farm. However, on arrival at Goudhoek and at the instructions of Mr. Beukes, one of the employees, Sikhumbuzo Madide (“Mr. Madide”) counted the cattle. He got a total of seventy-three (73) cattle, comprising of forty-three (43) cows, nineteen (19) calves, two (2) bulls and nine (9) oxen.

[11] On 29 December 2016, the Applicants brought urgent application for the restoration of twenty-seven and forty-eight heads of cattle

respectively. On 5 January 2017, an interim order for the restoration of the above number of cattle, by close of business on 6 January 2017, was issued. On 23 January 2017, the interim order was confirmed.

- [12] Cattle were finally returned to the Applicants on 10 January 2017 at the instruction of the Respondents' attorney. Mr. Beukes was not present when cattle were returned as he was in the USA. He was however communicating with Mr. Landman on WhatsApp social network. He was told that seventy-five cattle were returned. Seventy-three cattle were removed to Goudhoek. One cow belonging to Mr. Khumalo, died at Goudhoek and three calves were born and the total number returned was seventy-five.
- [13] On 15 December 2016, Applicants counted their cattle in the presence of Mr. Landman, Sergeant Segobo and Constable Dlamini at Goudhoek and they got a total of seventy-three cattle.
- [14] On 10 January 2017, whilst the cattle were being returned to the farm, Mr. Khumalo who was present, asked that twenty-two cattle be separated from the rest. He asked his son, Hendrik Khumalo ("Hendrik") to take those cattle to Zaihoek informal

settlement where Hendrik stays. Mr. Khumalo had previously sold eight of those cattle to Hendrik and the remaining fourteen to other people. Therefore, the number of cattle remaining and taken back to the farm was fifty-three.

- [15] On 1 March 2017, the Respondents' legal representatives requested the Sheriff, Mr. Le Roux, to count the cattle in the presence of the police and Mr. Beukes. The Sheriff counted fifty-five cattle. Applicants were not present on that day. On 2 March 2017, the Sheriff recounted the cattle in the presence of the Applicants. He again recorded fifty-five cattle.
- [16] Applicants contend that not all cattle were returned as per the court order. Mr. Magubane contends that out of his twenty-seven cattle removed, only fourteen were returned. Thirteen cattle were missing. Mr. Khumalo contends that out of his fifty-seven cattle removed, only fifty-one were returned. Six cattle were missing. Respondents maintain that all cattle, including a dead cow and three calves born at Goudhoek, were returned to Applicants.

Contempt of court

- [17] Contempt of court is the commission of any act or making of any statement that displays disrespect for the court, or its officers, acting in an official capacity, including willful disobedience or resistance to lawful court orders. In this regard, in *Pheko and Others v Ekurhuleni City*[1], Nkabinde J expressed herself in the following terms:

"The rule of law, the foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions, issued by a court bind all persons to whom and organs of state to which they apply and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The

effectiveness of court orders or decisions is substantially

determined by the assurance that they will be enforced.”

[18] For Respondents to be held in contempt of court, Applicants must prove the following requirements[2]:

- (a) The order must exist;
- (b) The order must have been duly served on or brought to the notice of the alleged contemnor;
- (c) There must have been non-compliance with the order; and
- (d) The non-compliance must have been willful or mala fide.

[19] To succeed in their application, Applicants must prove at least the first three requirements of contempt. Once the Applicants have proved the existence of the order, the service thereof and non-compliance, the onus shifts to the Respondents to show, on a balance of probabilities, that non-compliance was not willful or mala fide[3].

Discussion

[20] As Miss Oschman, Counsel for the Respondents, correctly stated in her argument, the existence of the order of 23 January 2017 and the notice thereof to Respondents is not in dispute. The issue for determination is whether the Applicants succeeded to prove that

Respondents did not comply with the order; in the sense that not all cattle were returned as per the court order, in the sense that not all cattle were returned as ordered. In that regard, the founding affidavit as well as the testimony of the Applicants is important.

[21] Mr. Magubane deposed to a founding affidavit which was confirmed by Mr. Khumalo. In the founding affidavit, Mr. Magubane claims that seventy-five cattle were removed from the farm on 14 December 2016, twenty-seven cattle belonged to him and forty-eight belonged to Mr. Khumalo. In court, Mr. Magubane testified that whilst his cattle were twenty-seven, cattle belonging to Mr. Khumalo were fifty-seven and not forty-eight as stated in the founding affidavit. This means that Applicants had eighty-four cattle that were removed from the farm, and not seventy-five indicated in the founding affidavit.

[22] In the founding affidavit, Applicants allege that seventeen (17) and six

(6) cattle, respectively, were not returned. The six cattle include Mr. Khumalo's cow which was dead when cattle were returned. This gives a total of twenty-three cattle that were not returned in terms of the order. In his testimony in court, Mr. Magubane said he was short of thirteen cattle, not seventeen mentioned in the founding affidavit. If this is true, it means the Applicants are short of nineteen cattle and not twenty-three.

[23] Mr. Khumalo testified that out of his fifty-seven cattle which were removed from the farm, he got back only fifty-one. In an attempt to explain the discrepancy between forty-eight mentioned in the founding affidavit and fifty-seven mentioned in his testimony, Mr.

Khumalo said that the number forty-eight mentioned in the founding affidavit excludes the calves since his previous employer and farm owner, Mr. Devenish, taught him not to count the calves when counting cattle. Mr. Devenish testified that he never taught Mr. Khumalo to count cattle.

- [24] Mr. Khumalo further testified that out of fifty-one cattle he got back, he separated twenty-two which he had sold but had not delivered to different purchasers. He took home twenty-nine cattle. Three calves were subsequently born when cattle had been brought back to the farm, giving Mr Khumalo, a total of thirty-two cattle on the farm. According to the replying affidavit deposed to by Mr. Magubane and confirmed by Mr. Khumalo, the number of cattle separated on their way to the farm, was eleven and not twenty-two mentioned by Mr Khumalo in his testimony. This means Mr. Khumalo took home forty cattle and not twenty-nine.
- [25] Parties' legal representatives asked the Sheriff to count the cattle. On 1 March 2017, the Sheriff counted the cattle and recorded a combined total of fifty-five. Since the Applicants were not present during the first counting, the Sheriff recounted in the presence of both Applicants on 2 March 2017 and again recorded a combined total of fifty-five cattle on the farm. The applicants did not tell the Sheriff that the cattle were short.
- [26] Mr. Whittington, Counsel for the Applicants submits that since one cow was dead on return, that also constitutes non-compliance with the order on the part of the Respondents. I do not agree. The Applicants accepted the dead cow in the state in which it was returned. Mr. Khumalo testified that he examined the dead cow and discovered that it died as a result of complications associated with it giving birth.
- [27] The other point raised by Ms. Oschman, is that on 10 January 2017, when the cattle were returned, Mr. Beukes was not even in the country, he was in the USA and he may not be held in contempt of court for not returning all the cattle. Mr. Whittington pointed out, correctly in my view, that this point was never raised on the papers but raised for the first time in Mr. Beukes' testimony in court. The Applicants had no opportunity to comment on that point in their papers.
- [28] There is a material discrepancy in the number of cattle which were returned by the Respondents. The effect of this discrepancy in the testimony of the applicants is that it cannot be said that there are cattle which Respondents did not return. In the circumstances, Applicants have not proved non-compliance with the order. It is therefore, not even necessary to deal with the element of willfulness or mala fides.

Costs

- [29] Ms. Oschman argued for payment of costs de bonis propriis by the Applicants' legal representatives. The basis of her argument is that the Applicants testified that the number of cattle

mentioned on papers is not correct. Ms. Oschman argued therefore that the attorney was negligent in drafting the papers and he is therefore liable to pay the costs. In my view, the discrepancy between the Applicants' papers and their evidence in court does not suggest negligence on the part of the attorney who drafted the papers. In fact, Mr. Khumalo testified that he mentioned forty-eight cattle in the founding affidavit because he did not count the calves. The number of cattle mentioned on the papers is the number given by the Applicants to their attorney.

[30] Ms. Oschman further argued for the payment of costs by the Applicants themselves if not paid by the attorney. It is the practice of this court not to make cost orders unless there are good reasons to do so. In *Haak Douthmbly Boerdery CC v Mpela*[4], the Supreme Court of Appeal confirmed this court's practice. In my view, there is no good reason in this case to deviate from the court's practice of not making cost orders against the parties.

Order

[31] 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 of the Land Claims Court

Appearances

For the Applicants:

D Whittington instructed by Bhayat Attorneys Inc.

For the Respondents:

I Oschman, instructed by Cox and Partners

[1] 2015 (5) SA 600 (CC) at para 1

[2] *Pheko* – supra at para 32

[3] *Fakie NO V CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 17

[4] 2007 (5) SA 567 (SCA) at page 618

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Prepared on 23 October 2026 · Esheria