

SOUTH AFRICA / JUDGMENT

Moladora Trust v Mereki and Others (189/2023) [2024] ZASCA 37; 2024 (5) SA 51 (SCA) (3 April 2024) [2024] ZASCA 37

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Matojane, Weiner

CASE / FILE NUMBER

189/2023

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 189/2023

In the matter between:

MOLADORA TRUST

APPELLANT

and

MAGALONE MEREKI

FIRST RESPONDENT

TOPIES MEREKI

SECOND RESPONDENT

DIKHOTSO MEREKI

THIRD RESPONDENT

MAGALONE MEREKI

FOURTH RESPONDENT

DEPARTMENT OF AGRICULTURE,

RURAL DEVELOPMENT

AND LAND REFORM

FIFTH RESPONDENT

Neutral citation: Moladora Trust v Mereki and Others (189/2023) [2024] ZASCA 37 (3 April 2024)

Coram: PONNAN, MATOJANE and WEINER JJA

Heard: 15 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 3 April 2024.

Summary: Land occupied in terms of s 3(4) of the Extension of Security of Tenure Act No 62 of 1997 – no express agreement or consent for occupier to graze livestock on such land – Land Claims Court finding tacit consent/agreement of owner – defence of tacit consent/agreement not advanced by respondent occupiers.

ORDER

On appeal from: Land Claims Court (Cowen J, sitting as court of first instance):

1 The appeal is upheld.

2 There is no order for costs.

3 The order of the Land Claims Court is set aside and replaced with the following:

‘(a) The first, second and third respondents are ordered to forthwith remove all their grazing animals, including but not limited to cattle, goats, horses and sheep (livestock) from the applicant’s farm, the Remainder of the property Wildebeeslaagte number 282, district Dr Kenneth Kaunda, North West Province (the farm).

(b) Should the first, second and third respondents fail to comply with paragraph 3(a) above within 30 (thirty) days from the date of the order, the Sheriff of the High Court or his deputy is ordered, with the assistance of the South African Police Services and the Pound Master for the district within which the farm is situated or his/her lawful substitute, to remove and impound the livestock.

(c) The first, second and third respondents, subject to compliance with paragraph 3(a), are interdicted and restrained from returning and keeping any livestock on the farm, without the prior consent of the applicant.’

Weiner JA (Ponnan and Matojane JJA concurring):

[1] The appellant, the Moladora Trust (the trust), is the owner of the property described as the Remainder of the farm Wildebeeslaagte

number 282, district Dr Kenneth Kaunda, North West Province (the farm). The first, second and third respondents^[1] (the Mereki children) are occupiers as defined in the Extension of Security of Tenure Act No 62 of 1997 (ESTA), by virtue of the right of their mother, the late Mrs Meraki, to occupy a portion of the farm in terms of s 3(4) of ESTA.^[2] The Mereki children are the major children of Mrs Mereki, who was employed on the farm and who died in or before 2017. They resided on the farm with Mrs Mereki and, since her death, have continued to do so.

^[2] The Department of Agriculture, Rural Development and Land Reform is the fifth respondent (the Department) but has not taken part in the proceedings to date. The South African Human Rights Commission and the Association of Rural Advancement applied to be admitted as *amici curiae* in the matter.^[3]

^[3] The trust launched an application in the Land Claims Court (the LCC), on 11 May 2022, seeking the following relief:

- ‘1. That the First to Fourth Respondents be ordered to forthwith remove all their grazing animals, including but not limited to cattle, goats, horses and sheep from the Applicant’s farm, the Remainder of the farm Wildebeeslaagte number 282, district Dr Kenneth Kaunda, North West Province (“the farm”).
2. That should the First to Fourth Respondents fail to adhere to the order prayed for in (a) within 30 (thirty) days from date of the order, the Sheriff of the High Court or his deputy be ordered to, with the assistance of the South African Police Services and the Pound Master for the district within which the farm is situated or his/her lawful substitute, remove and impound such animals to which the order in the above is applicable.
3. That the First and Fourth Respondents, subject to compliance with (a) above, be interdicted and restrained from returning and keeping any number of livestock on the farm, without prior arrangement with the

Applicant.

4. That the First to Fourth Respondents and/or any person associated with them be interdicted and restrained from interfering with the execution of this order in any way whatsoever.
5. That the First to Fourth Respondents be ordered to pay the costs of the application, jointly and severally the one to pay the other to be resolved, alternatively that the First to Fifth Respondents be ordered to pay the costs of the Application, jointly and severally, in the event of the Fifth Respondent opposing the relief sought.
6. That leave be granted to the Applicant to approach this Court for further relief against any other person/s and to join such person/s should it become known that other person/s, other than the First to Fourth Respondents are keeping livestock, as set in paragraph (a) above without the Applicant’s consent and to supplement the papers where necessary.’

No relief was sought for the eviction of the Mereki children and their occupation of the farm has not been threatened or terminated.

[4] The LCC held that a tacit agreement had been concluded and tacit consent had been granted by the trust to the Mereki children to keep livestock and exercise grazing rights on the farm. As the trust had not invoked the provisions of s 8 of ESTA, the termination of the grazing rights by the trust could not be upheld. This appeal is with the leave of the LCC.

[5] The application was served on 6 June 2022, on the Mereki children,[4] but they did not appear at the hearing, nor did they file any affidavits in response to the application.[5] Accordingly, the facts alleged by the trust remained uncontested. Heads of argument were filed on behalf of the Mereki children and they were represented in this Court at the hearing. It is not disputed that the Mereki children had never sought nor obtained

express consent to keep livestock on the farm and that no express agreement was concluded with the trust in this regard.

[6] After Mrs Mereki died, efforts were made by Mr Marius Nel (Mr Nel), on behalf of the trust, to inform the Mereki children that they did not have consent to keep livestock on the farm. Mr Nel contends that during these incidents, the Mereki children were abusive and aggressive towards him and informed him that they would not remove their livestock. The attempts to engage with the Mereki children proved fruitless. Thus, on 31 October 2017, a letter was addressed to each of the Mereki children, informing them that they had never obtained permission to keep livestock on the farm and they were given 30 days' notice to remove their livestock.

The letter was served personally on the first respondent on behalf of all three respondents on 9 January 2018.

[7] Mr Nel emphasises that the keeping of livestock has an immediate impact on available grazing on the farm and may cause damage to the natural vegetation on the farm. The ownership of the livestock is also unclear and there is nothing to suggest that they are healthy or have been treated for disease.

[8] During August 2020, Mr Nel was contacted by officials of the Department on behalf of the Mereki children. Allegations had been made by the children that the trust had reduced the grazing area of the Mereki children and that Mr Nel had caused a fire which had burnt their grazing area. Mr Nel denied the allegations, but was threatened with a court application by the Department. This elicited a written response from the trust in a letter dated 21 August 2020, wherein it again recorded that the Mereki children had never sought permission to keep livestock on the farm. The accusations levelled at the trust were again denied. No response was received from the Department and no application was launched.

[9] A further letter, dated 23 September 2020, was addressed to the Mereki children informing them of the previous letters and recording that a fire had occurred on the farm, which had an adverse effect on the available grazing land. It was repeated that no consent had been given for the Mereki children to keep livestock and allow them to graze on the farm. The Sheriff, who had attempted to serve the letters on the Mereki children on 5 October 2020, deposed to an affidavit stating the following:

‘With our arrival people were aggressive and extremely violent. The interpreter tried to translate the meaning of the letter and explain the contents thereof but they said they do not know who the Court is and refused to take the document. We tried to get hold of the recipient of the letter but as the people got more violent we served the letter on A Shuping.’

There was no response to this letter.

[10] It is not disputed by the Mereki children, and it was accepted by the LCC, that express consent to graze livestock was not given and the rights under the agreement with Mrs Mereki did not automatically devolve upon the Mereki children, upon her death.[6]

[11] That ought to have been the end of the matter. However, the LCC took it upon itself to consider whether there could have been a tacit agreement or tacit consent pursuant to which the Mereki children had been grazing their livestock on the farm. This, the LCC did in circumstances where no such case had been advanced by the Mereki children. This was found, despite reference to the efforts to communicate with the Mereki children, the correspondence informing the Mereki children that they had no permission to graze livestock on the farm, and the trust’s unequivocal denial that any agreement was concluded, or that any consent had been given, none of which was disputed.

[12] The finding of the LCC that tacit consent to graze livestock had been granted and that there was a tacit agreement with the trust to that effect was thus not based on any proper factual foundation.[7] The test to be applied in dealing with whether there was tacit consent or a tacit agreement is whether the party alleging the existence of the tacit contract has shown on a balance of probabilities unequivocal conduct on the part of the other party that

proves that it intended to enter into a contract with it.[8] This issue did not arise in this case, as the version of the trust, which was that there was no agreement, either express or tacit

between the parties, was not contested.

[13] Instead, the conclusion reached by the LCC rested on a foundation that was purely conjectural, not foreshadowed in the papers and of which the trust had not been forewarned. It follows that neither the approach, nor the conclusion reached by the LCC can be supported on appeal. Consequently, the appeal must succeed.

[14] The trust has not sought costs against the Mereki children. To the extent that the relief sought by the trust before the LCC conduces to confusion, the order that issues, although in substance no different to the relief sought by the trust before the LCC, has been modified somewhat.

[15] In the result, the following order is made:

1 The appeal is upheld.

2 There is no order as to costs.

3 The order of the Land Claims Court is set aside and replaced with the following:

S E WEINER

JUDGE OF APPEAL

Appearances

For the appellants:

M G Roberts SC with E Roberts

Instructed by:

Moolman & Pienaar Inc, Potchefstroom

Pieter Skein Attorneys, Bloemfontein

For the first to second respondents: V A Mnyameni with M S Sebotha and D Somo

Instructed by:

Legal Aid South Africa, Vryburg

Legal Aid South Africa, Bloemfontein.

[1] The citation of the fourth respondent is an error, being a duplication of the first respondent. Further reference to the Mereki children will be a reference to the first to third respondents.

[2] Section 3(4) of ESTA provides as follows: ‘3. Consent to reside on land . . . (4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.’

[2] Section 3(4) of ESTA provides as follows:

‘3. Consent to reside on land

. . .

- (4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.'
- [3] The application was granted, but in view of the decision on the facts of this matter, this Court does not have to deal with the legal issues raised by the amici.
- [4] By service on Ms Kediemetse Lephadi (Tenant), in control at the defendants' chosen domicilium citandi et executandi residence, who accepted service on behalf of the defendants. The notice of set down was served on 13 July 2022, by affixing it at the main gate as the Sheriff noted on the return of service that '[t]he Respondents was very aggressive towards us, refuse to communicate by taking this Notice he called the police for us, and they did arrive at given address. Notice on the respondents, but still they refuse to take this Notice, that's why it was served by affixing at the main gate.'
- [4] By service on Ms Kediemetse Lephadi (Tenant), in control at the defendants' chosen domicilium citandi et executandi residence, who accepted service on behalf of the defendants.

The notice of set down was served on 13 July 2022, by affixing it at the main gate as the Sheriff noted on the return of service that '[t]he Respondents was very aggressive towards us, refuse to communicate by taking this Notice he called the police for us, and they did arrive at given address. Notice on the respondents, but still they refuse to take this Notice, that's why it was served by affixing at the main gate.'

- [5] The Mereki children also did not deny receipt of the letters, the application and the notice of set down.

6 Adendorff's Boerdery v Shabalala and Others [2017] ZASCA 37 para 28; Loskop Landgoed Boerdery (Pty) Ltd and Others v Petrus Moeleso and Others

- [2022] ZASCA 53 para 14, where this Court held that the right of an occupier to keep or graze livestock 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.

- [7] Moladora Trust v Mereki and Others

- [2022] ZALCC 32; 2023 (3) SA 209 (LCC).

- [8] Buffalo City v Nurcha Development Finance (Pty) Ltd and Others [2018] ZASCA 122; 2019 (3) SA 379 (SCA) paras 20 and 22; Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited [2019] ZACC 9 paras 16-22

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Prepared on 11 October 2026 · Esheria