

SOUTH AFRICA / JUDGMENT

Mthethwa and Others v Bester and Others (LCC112/2011) [2018] ZALCC 39 (20 April 2018)

[2018] ZALCC 39

COURT

Land Claims Court

BEFORE

MP Canca

CASE / FILE NUMBER

LCC112/2011

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

(1)

REPORTABLE:

YES

/ NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE NO: LCC 112/2011

In

the matter between:

PHILANI OBED

MTHETHWA

FIRST APPLICANT

PAULOS ELLIOT

SITHOLE

SECOND APPLICANT

BHEKIZIZWE ADOLPHAS

NENE

THIRD APPLICANT

HLANGABAZA ALFRED

XIMBA

FOURTH APPLICANT

JABULANI MLAHLWA

XIMBA

FIFTH APPLICANT

LUCKY RICHARD DU
BAZANA
SIXTH APPLICANT
TIKI JOHANNES
SITHOLE
SEVENTH APPLICANT
and
BEN
BESTER
FIRST RESPONDENT
MINISTER OF RURAL DEVELOPMENT
AND LAND
REFORM
SECOND RESPONDENT
MINISTER
OF AGRICULTURE AND FORESTRY
THIRD RESPONDENT
Handed
Down on:20 April 2018

JUDGMENT

CANCA AJ

Introduction

- [1] There are two applications for adjudication before me. The applicants in the first application seek an interim order directing the first respondent ("Bester") to, amongst other things, restore certain grazing rights they are allegedly entitled to on a farm owned by Bester and on which they are long term occupiers in terms of the provisions of section 1 of the Extension of Security of Tenure Act, No 62 of 1997 ("ESTA"). Bester opposes the order sought and relies, inter alia, on the applicants' breach of the provisions of the Conservation of Agricultural Resources Act, No. 43 of 1993 ("CARA"). According to him, the area to which he has restricted the applicants' livestock, discussed more fully below, is sufficient for the number of livestock they are entitled to keep. The first application is hereinafter referred to as the main application.
- [2] The second application is a counter application launched by Bester in which he seeks the removal of all the applicants' livestock from the farm. The launch of the counter application follows receipt by Bester of reports by an agricultural specialist on the state of the land where the applicants' livestock are currently and have previously grazed.
- [3] The second and third respondents were joined as parties to these proceedings following a suggestion by Bester at a conference that the applicants' livestock be moved to a nearby farm owned by the State. Nothing came of this suggestion and no order is sought against the second respondent.

- [4] The third respondent, who is the Minister mandated to administer and enforce the provisions of CARA, has indicated that he intends to abide the court's decision. However, certain officials from his KwaZulu-Natal provincial office have, following a directive from this court, conducted a site inspection of the farm and compiled a report on the environmental state of the land where applicants' livestock graze. No order is sought against the third respondents as well.

Background

- [5] Bester purchased the farm, commonly known as Evershalt, situated in Winterton, KwaZulu-Natal, from its joint previous owners, a close corporation, Jordaan & Seuns Boerdery CC and Francois Nicolaas Jordaan, r'Jordaan") in 2009 but only took occupation during May 2010.
- [6] The first applicant, Philani Obed Mthethwa ("Mthethwa"}, avers in the founding affidavit that Jordaan's father allocated them a communal camp to graze their livestock with no restriction as to their number. The livestock, at the launch of the main application, consisted of 33 head of cattle, 63 goats, 20 sheep and 3 horses. Mthethwa also alleges that, after taking control of the farm, Bester subdivided the grazing area into distinct fenced off areas, thereby drastically reducing the grazing area and restricting the livestock to an area which was patently unsuitable for grazing, so the allegation continued.
- [7] In his answering affidavit, Bester concedes that there was an agreement with the previous owners regulating the applicants' keeping of livestock on the farm, which he is obliged to honour[1]. However, he disputes their averments regarding:
- (a) the extent of the grazing rights;
 - (b) the number of livestock they are entitled to keep; and
 - (c) whether they were entitled to graze their livestock on a specific area on the farm.
- [8] Bester further avers that, on taking occupation of the farm, he found that the area where the applicants grazed their livestock was overgrazed as a result of them keeping more livestock than the 24 cattle they were permitted. Bester also states that, fearing the consequences of contravening the applicable environmental legislation and, in particular, CARA, he allocated the applicants a grazing area which, in his view, was adequate for the 24 head of cattle the applicants were entitled to keep. The new grazing

area was 25 hectares in extent, which in Bester's opinion was sufficient for 24 head of cattle, given that area's carrying capacity. The area was also closer to the applicants' homesteads, so the averment continued.

- [9] In an affidavit confirming Bester's averments relating to the applicants' rights on the farm prior to its sale, Jordaan avers that he was in charge of the farming operations long before the applicants took up residency on the farm. He further states that he was the one who concluded the various agreements with the applicants in respect of, inter alia, their residency, the number of livestock they were permitted to keep and where same were allowed to graze on the farm.
- [10] Jordaan confirmed Bester's averments that the applicants were only allowed to keep cattle and that these were limited to a total of 24. According to him, goats were only allowed on the farm for traditional and religious purposes and even then, only with permission and for a limited period.
- [11] The versions presented by Bester and Jordaan of the applicants' rights in respect of the keeping and grazing of livestock on the farm are vehemently denied in the applicants' replying affidavits. Mthethwa avers that he and a number of the applicants not only had cattle but also goats, sheep and, in the case of the fourth applicant, a horse as well, when they moved onto the farm. With regard to Bester's averment that he reduced their grazing rights out of fear for the consequences of breaching CARA, Mthethwa denies, in the absence of confirmatory evidence or evidence, that there was overgrazing.
- [12] There are several factual disputes regarding the applicants' right to the disputed grazing area as well as to the number of livestock they were allowed to keep, as is evident from the above. The approach to be adopted regarding the degree of proof required to prove a clear right when seeking a temporary interdict is set out as follows in the head-note to Webster v Mitchell 1948 (1) SA 1186 (W):
- "The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he could not succeed."*
- [13] Ogilvie Thompson J, as he then was, in Gool v Minister of Justice and Another 1955 (2) SA 682 (CPD) at 688, agreed with the approach set out in Webster, save that he substituted the word "should" for the words "not could" in the penultimate paragraph of the head-note referred to above.
- [14] In my view, it is improbable that Jordaan's father, or any farmer for that matter, would allow his or her workers or occupiers, such as the applicants, an unrestricted number of livestock. Also, given that the applicants did not dispute Jordaan's averment that he was in charge of the farming operations on the farm, it is also improbable that he would have permitted the applicants to, knowingly, breach the applicable environmental legislation, including CARA. And, given the evidence that the fencing on the grazing area appears to be the type meant for large animal units, and not sheep or goats, also casts serious doubt on whether the applicants had a right, let alone a clear one, to keep livestock, other than the 24 head of

cattle on the farm.

- [15] However, even if I am wrong in finding the applicants' assertions regarding their grazing rights and the number of livestock they were allowed to keep, the main application still falls to be dismissed on the ground that the applicants were in breach of the provisions of CARA, in that the impugned grazing area is woefully over-grazed. It bears noting that contravention of regulations made in terms of CARA attracts certain penalties. That the area is over-grazed is confirmed by both the third respondent's officials and the agricultural specialist commissioned by Bester. Their reports are discussed later when I consider the merits of the counter application.
- [16] In the light of the above, I find that Bester was well within his rights to move the applicants' livestock's grazing area to land which is sufficient to carry 24 cattle. Failure to do so would have been tantamount to him condoning unlawful conduct, as was contended for on behalf of Bester. The main application must therefore fail on this ground as well. I now turn to consider the counter application.

The counter application

- [17] The counter application for the removal of all the livestock belonging to the applicants relies on the recommendations of Lester 5 Miller ("Miller"), an agricultural specialist, whom Bester instructed, inter alia,

"(a) To ascertain the status of the veld in terms of conservation and agricultural services of the impugned land, (b) To determine the veld management and (c) To make recommendations on the effective management of the land use, environmental conservation and natural agricultural resources (sic)."

- [18] In support of the counter application, Bester alleges that the applicants, contrary to the provisions of CARA, caused the vegetation in the area where their livestock graze to deteriorate and the soil to degrade to such an extent, due to overgrazing, that the farm requires rehabilitation. The counter application is opposed by the applicants.

- [19] The following provisions of CARA are applicable, namely:

19.1 In terms of section 1 of CARA, grazing in relation to veld, means the production capacity over the long of that veld to meet the feed requirements of animals in such a manner that the natural vegetation thereon does not deteriorate or is not destroyed.

19.2 Section 3 of CARA which provides that

"The objects of this Act are to provide for the conservation of the natural agricultural resources of the Republic by the maintenance of the production potential of land, by the combating and prevention of erosion and weakening or destruction of the water sources and by the protection of the vegetation and the combating of weeds and invader plants";

19.3 Section 6(5) of CARA which provides that

“any land user who refuses or fails to comply with any control measures which is binding on him shall be guilty of an offence.”

19.4 Section 29 of CARA which empowers the third respondent to make regulations to promote the objects of CARA and which, amongst other things, prescribes penalties for a contravention of the regulations.

[20] Section 24 of the Constitution provides that everyone has the right to have the environment protected for the benefit of present and future generations which includes the use of natural resources through responsible legislative measures. It was argued on behalf of Bester that CARA, which has as one of its objects, the conservation of grazing land, is one of the legislative measures envisioned by the Constitution. See *Director: Mineral Development Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) at 719 C-O.

[21] Regulation 9(1)(a) - (e) made in terms of section 29 of CARA provides that:

"9

- (1) Every land user^[2] shall by means of as many of the following measures as are necessary in his situation protect the veld on his farm unit effectively against deterioration and destruction:
 - (a) The veld concerned shall be utilized in alternating grazing and rest periods with due regard to the physiological requirements of the vegetation thereon.
 - (b) Animals of a different kind 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 portions showing signs of deterioration shall be withdrawn from grazing until they have recovered sufficiently."

[21] Neither the third respondents' officials nor Miller testified. According to the report compiled on behalf of the third respondent, the impugned land is "overstocked and [that] the livestock numbers need to be reduced...". Miller, on the other hand, states that the applicants failed, prior to Bester's intervention, to implement nearly all the control measures prescribed by CARA and its regulations designed to maintain the productive potential of the land.

[22] In the summary of his report, Miller, in relevant parts, states that:

"The Conservation of Agricultural Resources Act 43 of 1983 places a responsibility on land owners and land users such as the dwellers to protect the veld on the land. A number of the regulations are important here:

- a. The veld concerned shall be utilized in alternating grazing and rest periods with due regard to the physiological requirements of the vegetations thereon. This was never done by the farm dwellers and they continued with only one camp.
- b. The number of animals kept on the veld concerned shall be restricted to no more than the number of large stock units that may be kept thereon in terms of regulation 11. This was also never done, in fact the number of cattle was more than the allowed amount and there was no indication that this was going to stop. The fact that the cattle are still grazing on the Subject property, perhaps indicated they never intend to comply.
- c. A suitable soil conservation work shall be constructed and thereafter managed 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; or
 - (iii) Collect sediment from run-off water. None of the above was done. There needs to be some intervention to protect the land.
- d. If the veld concerned shows signs of deterioration-
 - (i) The number of animals kept thereon shall be suitably reduced
 - (ii) The portions showing signs of deterioration shall be withdrawn from grazing until they have recovered sufficiently; or;
 - (iii) A suitable grazing crop shall be established thereon in addition to the existing vegetation. These interventions have not been done on the Subject Property."

[23] Miller then concludes his report by recommending that, as a start to that land's rehabilitation, all the applicants' livestock be removed from the farm for a period of at least 5 years and that a reassessment be done in conjunction with the third respondent after that period to determine when the livestock could be re- introduced.

- [24] A report on the alleged overgrazing on that land compiled on behalf of the third respondent, although not as comprehensive as the one by Miller, concludes that the applicants' grazing area is "overstocked and [that] livestock numbers needs to be reduced...".
- [25] It is also not disputed that the soil has eroded and that measures to slow down or stop the erosion need to be implemented. The difference between the two reports is that Miller recommends the removal of all the applicants' livestock as opposed to their reduction.
- [26] Although the applicants and Bester were granted leave to amplify their original papers, following my directive that the third respondent compile a report on the condition of the land, the applicants elected not to do so. The applicants also failed to challenge, either by way of affidavit or during argument, the contents of the report compiled by Miller. Therefore, in having to choose between the recommendations in the two reports, I must, in view of its comprehensive nature, and based on Miller's curriculum vitae, accept his recommendation that the applicants' livestock be removed from the farm. Failure to do so would, as was correctly contended by Mr Roberts, amount to condoning, not only a breach of the Constitution but also the provisions of CARA. Therefore, the counter application must, in the light of all of the above, succeed.

[27] I accordingly make the following order:

1. The main application is dismissed.
2. The First to Seventh Applicants are ordered to remove all their livestock (including, inter alia, all their cattle, goats, sheep and horses) presently in their possession or under their control from the farm Evershalt, more fully described as:

Portion 6 (of 2) of the Farm Rietvallei No. 1195 and Portion 5 (of 2) of the Farm Rietvallei No. 1195, held under Deed of Transfer T19933/2010, situated in Winterton, KwaZulu-Natal; (hereinafter referred to as only as "the farm") by 29 June 2018.

3. The First to Seventh applicants are interdicted and restrained from returning any of their livestock as contemplated in paragraph 2 above or any other livestock onto the farm until the First Respondent, in conjunction with the Third Respondent, have determined that livestock can be re- introduced.
4. In the event of the Applicants failing to comply with the orders contemplated in paragraphs 1 and 2 above, then, in that event, an order is hereby issued that the Sheriff for the district, with the assistance of the South African Police Service, alternatively any other registered private security company that the Sheriff is granted leave to appoint at the First Respondent's expense, shall remove all such livestock contemplated in prayer 1 above, which the First to Seventh Applicants have failed to remove from the farm, and to take such livestock to the pound in Winterton or such other pound in the vicinity able to accommodate the livestock, for the pound master to deal with in terms of the applicable legislation dealing with pounds.

5. No order as to costs.

MP Canca

Acting Judge, Land Claims Court

Appearances:

For the Applicant

Advocate VM Naidoo SC

Instructed by

Kwela Attorneys, Pietermaritzburg

C/O Phungo Incorporated, Randburg.

For the First Respondent Advocate MG Roberts SC

Instructed by:

Tatham Wilkes Incorporated, Pietermaritzburg

C/O Pieter Moolman Attorneys, Randburg.

[1] Section 24(2) of ESTA provides that "Consent contemplated in this Act given by the owner or person in charge of the land

concerned shall be binding on his or her successor in title as he or she or it has given it."

[2] A land user is defined, in relevant parts, by CARA as (a) any person who has a personal or real right in respect of any land in his capacity as fiduciary, fideicommissary, 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 the land or to remove trees, wood or other organic material from land."

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