

SOUTH AFRICA / JUDGMENT

Normandien Farms (Pty) Ltd v Mathimbane and Others (LCC196/2013) [2015] ZALCC 14; 2017 (5) SA 204 (LCC) (5 November 2015)

[2015] ZALCC 14

COURT
Land Claims Court

BEFORE
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CASE / FILE NUMBER
LCC 196/2013

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IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD
AT DURBAN
Case
No.: LCC 196/2013
Heard

on :	20-23 October 2015 Judgment
delivered :	5 November 2015 In
the matter between:	NORMANDIEN FARMS (PTY) LTD Applicant and MANDLA NKOSI JOSEPH MATHIMBANE First Respondent BONGINKOSI DAVID MATHIMBANE Second Respondent PHUMELELO FLORENCE MATHIMBANE Third

Respondent
MLAMULI
OBED
MATHIMBANE Fourth
Respondent
SIPHO
MATHIMBANE
Fifth
Respondent
MARIAM
JELE Sixth
Respondent
BERNARD
JELE Seventh
Respondent
MARTHA
JELE
Eighth
Respondent
ALBERT
JELE Ninth
Respondent
APOSTOL
JELE
Tenth
Respondent
SWEET
BETTER
JELE Eleventh
Respondent
JOHANNES
JELE Twelfth
Respondent
THE
MINISTER OF THE NATIONAL
DEPARTMENT
OF AGRICULTURE,
FORESTRY
AND
FISHERIES Thirteenth
Respondent
THE
MINISTER OF RURAL
DEVELOPMENT
AND LAND
REFORM
Fourteenth Respondent
THE
REGIONAL LAND CLAIMS
COMMISSIONER,
KWAZULU-NATAL

Fifteenth Respondent

JUDGMENT

MEER AJP.

Introduction

The Main Application

[1] The Applicant, as the owner of the farm Albany, situated in Normandien District, Newcastle, KwaZulu-Natal, ("the farm")

instituted an application ("the main application") in December 2013 for the removal from the farm of all the livestock

belonging to the First to Twelfth Respondents who are labour tenants residing on the farm. The removal was sought on the ground that the First to Twelfth Respondents have caused the farm to be totally overgrazed contrary to the provisions of the Conservation of Agricultural Resources Act 43 of 1983 ("CARA"), to the extent that the farm requires rehabilitation.

[2] The Applicant sought also that the Thirteenth, Fourteenth and Fifteenth Respondents, ("the State Respondents") be ordered to facilitate the removal of the livestock to alternative land to be made available by either of them. In the event of the Respondents failing to remove the livestock, the Applicant sought an order for the Sheriff to secure the removal.

[3] In a counter application the First to Twelfth Respondents sought a declaration that the main application is subversive of an order of this Court of 2 April 2014 under Case No. LCC 31/2013, and their rights emanating therefrom. They contend that they have elected in terms of that order to acquire the farm Nornandien No. 3303 and they seek an order that this Court award the land to them and determine the just and equitable compensation to be paid by the Minister of Rural Development and Land Affairs, the Fourteenth Respondent, to the Applicant in acquiring the land for them. In addition they challenge the Applicant's locus standi to invoke the provisions of CARA.

[4] The Thirteenth Respondent, the Minister mandated to administer and enforce the provisions of CARA, and the Fourteenth Respondent, the Minister mandated to assist labour tenants in acquiring land in terms of the Land Reform Labour Tenants Act 3 of 1996 ("the Labour Tenants Act") oppose the relief sought against them. Their stance is that neither of these Acts nor indeed any legislation

sanction the relief relied upon by the Applicant. The Fourteenth Respondent maintains that he does not have a policy, mandate, budget or programme to comply with the relief sought by the Applicant. He abides the decision of the court in respect of the counter

application.

- [5] The Fifteenth Respondent, the Regional Land Claims Commissioner, KwaZulu-Natal opposed the application on the basis that he has been misjoined, as his mandate is limited to processing claims for restitution of rights in land under the Restitution of Land Rights Act No. 22 of 1994, and does not extend to matters pertaining to labour tenants. The misjoinder was ultimately conceded by the Applicant, and this application accordingly does not concern the Fifteenth Respondent.

Background

Facts

- [6] In March 2013 the First to Twelfth Respondents instituted an action as Plaintiffs under case No. LCC 31/2013, in which they sought inter alia a declaration in terms of section 33(2A) of the Labour Tenants Act, that they were labour tenants. The Applicant opposed the application. Thereafter in December 2013, the Applicant instituted the present application for the removal of their livestock.

- [7] The First to Twelfth Respondents have been in occupation of the farm for many years. The Applicant purchased the farm Albany, in 2001. Since that date, it is contended in the Applicant's founding affidavit, the entire area used by the First to Twelfth Respondents

has been grazed for 365 days a year. This adversely affected the quality of the grazing and was in contravention of applicable

environmental legislation, namely the Conservation of Agricultural Resources Act 43 of 1983 (CARA), and the National Environmental Management Act 107 of 1998, (NEMA read with the relevant provisions of the Constitution of the Republic of South Africa 108 of 1996, the objects of which are to provide for the conservation of the natural agricultural resources. The situation was exacerbated by the actions of the First to Twelfth Respondents, the affidavit goes on to state, in that they failed to heed requests by the Applicant since 2001 to reduce their livestock to within normal limits. Despite requests by the Applicant the Thirteenth Respondent failed in his obligation to enforce control measures under section 6 of CARA. These allegations are not disputed by the Respondents.

- [8] During July 2002 at the Applicant's request, the Newcastle Office of the Department of Agriculture, which the Applicant refers to as an office of the Thirteenth Respondent, investigated the area. A report by a professional agricultural scientist of that office, stated inter alia that the veld is severely overgrazed around the labourers' houses causing erosion and other adverse conditions. A further report of the Kwa-Zulu Natal Department of Agriculture and Environmental Affairs in 2012, stated inter alia that the area was so heavily overstocked, that it exceeded the carrying capacity of the total area by 73%, the overstocking had caused a very poor animal condition and the soil erosion should be addressed as a matter of urgency. These reports are also not disputed.

- [9] The answering affidavit of the Second Respondent indicated that the First to Twelfth Respondents collectively possess and graze in the region of 285 cattle, 10 horses and 133 goats on the farm. The animals are kept for personal use. The milk from the cows is used for daily living and some of the livestock are sold to raise funds to pay school fees. Most of the occupants on the farm, he states are unemployed and rely heavily on their livestock to sustain their livelihood. They have not been educated in modern farming methods and they find it strange and suspicious, he says, for the Applicant to contend that all their cattle should be removed from the farm. He emphasises the cultural importance of cattle to the labour tenant Respondents.
- [10] The Applicant's supplementary affidavit in reply of Robin Hoatson, a director of the Applicant and its General Manager, states that there are currently 360 cattle on the farm, which is way in excess of the number that can be accommodated when the veld has been rehabilitated. The situation, he states amounts to animal cruelty which will be exacerbated in the winter months.
- [11] Expert reports for the purposes of this application were compiled on behalf of the Applicant, the First to Twelfth Respondents and on behalf of the State Respondents. The report of Dr Mottram, the agricultural expert and specialist appointed by the First to Twelfth Respondents themselves, states that the livestock of the First to Twelfth Respondents should be removed from the farm Albany immediately. A joint minute of experts emanating from a meeting of all experts on 22 June 2015 records inter alia, that the following was agreed:
- (a) overgrazing is the cause of degradation of the species composition, vigour and basal cover;
 - (b) overstocking has occurred based upon the number of animals tabled;
 - (c) there is no evidence that the Respondents acted responsibly by reducing their animal numbers to adhere to acceptable grazing capacity norms; and
 - (d) there should be a total withdrawal of all domestic livestock (horses, donkeys, goats, sheep and cattle) from the area in question and the adjacent steep slopes before 31 August 2015.
- [12] The experts recommended moreover that a strict Resource Management Plan be drafted before October 2015. This plan would be carried out by suitably qualified professionals approved by the experts. The plan, it was stated must include the following:
- (a) Veld Management Plan;
 - (b) Fodder Management Plan;
 - (c) Assessment of the production potential of the area; and
 - (d) Remedial Plan for soil erosion.

[13] The experts recommended further an exclusion period of five years, during which period the plan would be put into action. All the experts accordingly agreed that there should be a total withdrawal of all animals off the area on or before 31 August 2015 and that the livestock would be removed for a period of 5 years. The Applicant submits that by virtue of the concession by all the parties that the livestock must be removed, it is entitled to the order sought as set out in the Notice of Motion against the First to the Twelfth Respondents.

[14] On 14 March 2014 by an order of this Court granted by agreement in the first action under case No. LCC 31/2013, the First to Twelfth Respondents (in this application) as Plaintiffs, were declared to be labour tenants. Paragraph 4

(a) of the order of 14 March 2014 orders the Director General of Land Affairs, the relevant official in the Fourteenth Respondent's office, to provide a comprehensive report within 6 months on:

"The election that the Plaintiffs have made insofar as their acquisition of alternative land and/or compensation."

The order was amended on 2 April 2014. Paragraph 4 (a) of the amended order, orders the Director General of Land Affairs to provide a report within 6 months on:

"The election that the Plaintiffs have made insofar as "their acquisition of the land or alternative land or compensation."

[15] I mention at this juncture that there is a dispute about which order correctly records what was agreed between the parties, the Applicant opting for the March order and the First to Twelfth Respondents for that of April. But more of that later. As aforementioned the First to Twelfth Respondents' counter- application is grounded on the order of 2 April 2014.

[16] The First to Twelfth Respondents elected pursuant to the amended order, to remain on the farm for the reason that their relocation

would cause severe prejudice and a great hardship to their livelihood as well as their livestock. They resolved to request the Fourteenth Respondent to acquire the portion of the farm occupied by them pursuant to the Court Order declaring them to be labour tenants.

[17] A valuation of the farm was obtained by the Director General and negotiations were entered into with the Applicant for the purchase thereof. These however, deadlocked. According to the First to Twelfth Respondents the valuation of the farm obtained by the Director-General was the sum of R 8 530 000,00. The Applicant disagrees that this latter amount is the correct value and contends

that if regard is had to the valuation of the farm obtained by the Director General, it is closer to R19,793,145.00 The Applicant was engaged in negotiations for the purchase of the farm for R 8 530 000,00, an offer which was rejected. The Applicant sought to be paid the sum of R400 000 000,00 on the grounds that it conducts an extensive commercial operation consisting of a few thousand hectares of land planted to timber, and if regard is had to the economies of scale, if a

portion of the farm is taken away, it will seriously impact on the entire operation, which is valued at approximately R400 million.

[18] The solution proposed by Mr Hoatson is the relocation of the livestock to a property in the vicinity which is owned by the State. The latter property is made up of four farms namely, Glendale, Langkloof, Farm Lease D11288 and the Spot 9758, totalling 890 hectares. This property is currently being underutilised, he states and thus provides a suitable temporary solution for the relocation of the livestock. His proposal, he submits would not vitiate the rights of other beneficiaries for whom the Fourteenth Respondent has stated, this property has been bought, given the underutilisation.

Legal Context

The Conservation of Agricultural Resources Act 43 of 1983 (CARA)

[19] The objects of CARA are defined in Section 3 thereof which provides follows:

"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."

[20] In terms of section 29 of CARA the Minister of the National Department of Agriculture, Forestry and Fisheries may make regulations to promote the objects of CARA, and which, inter alia prescribe penalties for a contravention of the regulations. Regulation 9 of CARA creates obligations on land users pertaining to the utilisation and protection of the veld. The Regulation provides as follows:

"9. UTILISATION AND PROTECTION OFVELD

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 effectively against deterioration and destruction:
 - (a) The veld concerned shall be utilised in 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) utilise 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 and wind; or

- (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; or
 - (iii) a suitable grazing crop shall be established thereon in addition to the existing vegetation.
- (f) In the case of veld that is subject to erosion through the action of wind-
 - (i) a suitable wind break shall be constructed or suitable vegetation shall be established to serve as a wind break; or
 - (ii) the denuded portions shall be covered with branches, hay, straw, crop residues or any other suitable material.
- 2. If the executive officer is satisfied that the measures applied by a land user in a particular case in terms of sub regulation (I) are not sufficient to protect veld effectively against deterioration or destruction, he may direct such land user in writing to apply such additional measures as the executive office may determine."

[21] Section 6(3) (b) of CARA provides:

"an occupier may not intentionally and unlawfully cause material damage to the property of the owner or person in charge."

Section 6(5) of CARA provides:

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

[22] It is contended by the Applicant that the First to the Twelfth Respondents are continuing to commit the offences of overgrazing and degradation of the land, in respect of which, if the court does not grant the order for the removal of their cattle, would be tantamount to the condoning of unlawful conduct.

The Land Reform Labour Tenants Act 3 of 1996 ("The Labour Tenants Act")

[23] The Labour Tenants Act provides inter alia for the acquisition of land and rights in land by labour tenants. The First to Twelfth Respondents' Counter Application seeks the acquisition of and an award of land under this Act.

[24] In furtherance of its purpose "to provide for the acquisition of land by labour tenants." Chapter 3 of the Labour Tenants Act makes it possible for labour tenants to apply for an award of the land they are entitled to occupy. They may also apply for a state subsidy in order to pay the compensation which becomes payable to the current owner upon an award of such land. Sections 16 to 18 of the Act set out the procedure for an application by a labour tenant for an award in land. The relevant subsections are as follows:

24.1 Section 16(1) (a) provides that a labour tenant may apply for an award of the land which he or she is entitled to occupy or use in terms of section 3. The latter section entitles a person who was a labour tenant on 2 June 1995 to have the right to use and occupy the land which he or she was occupying on that date. Importantly, the proviso to section 16(1) states: "Provided that the right to apply to be awarded such land, rights inland and servitude shall lapse if no application is lodged with the Director General in terms of section 17 on or before 31 March 2001."

24.2 Section 17(1) provides that an application for acquisition of land by a labour tenant shall be lodged with the Director-General; and

24.3 Section 18(7)(c) provides that if after an application for an award is lodged, there is no agreement between the labour tenant and the land owner, or the Director-General is not satisfied with the agreement reached, the application for the award in land is referred to this Court to decide the matter.

24.4 Section 22(4) of the Labour Tenants Act provides inter alia that

"The Court may make an order or award on the compensation to be paid . . . to the owner of affected land. . . ."

The Applicant's locus standi in the Main Application

[25] Mr Shakoane for the First to Twelfth Respondents argued that the Applicant lacked the requisite locus standi to bring the main application. In support of this proposition, he referred to a statement in the Applicant's founding affidavit to the effect that the Thirteenth Respondent has the obligation to police the provisions of CARA, and that the only body that has the right to act in terms of that Act is the Thirteenth Respondent. Accordingly, on the Applicant's own version he argued, it had no locus standi and the application stands to be dismissed on this ground alone.

[26] In similar vein Ms Norman for the State Respondents submitted that the mechanism in CARA to deal with eroded and damaged land is an administrative one that falls under the purview of the Thirteenth Respondent, as Minister and the Executive Officer of the Department of Agriculture. Section 18 of CARA, she noted empowers the latter to determine erosion, conditions of grazing and the numbers and kind of animals on land. The Thirteenth Respondent has, she submitted stated under oath that the matter has never been reported to the Department of Agriculture, Forestry and Fisheries, hence no action could have been taken in ensuring compliance with CARA.

[27] As the Thirteenth Respondent has not dealt with the matter at all and the Executive Officer had not investigated and taken a decision as envisaged in the Act, Ms Norman argued that this application in essence is intended to usurp the powers of the Minister and that any involvement by this Court would offend the doctrine of separation of powers, and would be premature. She submitted further that as there was no determination by the Executive Officer, and the Applicant had instead relied on expert reports for the relief it sought, any reliance on the expert reports was misplaced and could not be entertained.

[28] Nor, submitted Ms Norman, could this action be grounded under the Labour Tenants Act. The removal of livestock, being a deprivation of the right of use of land was an eviction as envisaged at section I of the Labour Tenants Act. The circumstances and process as set out at sections 5 to 7 of the Labour Tenants Act for an eviction, she submitted, were not present. I note that the deprivation of use of land does constitute an eviction, as has been acknowledged by this Court in *Zulu v Van Rensburg*, 1996 (4) SA 1236 at 1259. However, the processes and circumstances at sections 5 to 7 would not, in my view have prevented the applicant from bringing the main application as an eviction under the Labour Tenants Act, had the applicant elected to do so. The main application could arguably have been brought on the basis of a material breach as contemplated at Section 7 (2) (b) of the Labour Tenants Act. Mr

Shakoane submitted that the order sought in the main application, being in truth an eviction, was hit by the court order of 2 April

2014. That order, I note, does not per se prevent an eviction. These submissions, it must be borne in mind, do not take cognisance of the fact that the main application has not been brought in terms of Section 11 of the Labour Tenants Act, as an eviction.

Finding on Locus Standi

[29] There is no basis for the submissions by Mr Shakoane and Ms Norman that by virtue of the fact that CARA prescribes certain

administrative functions to the Thirteenth Respondent and investigative functions to the Executive Officer, that a party like the Applicant is prevented from approaching a court for relief in the exercise of its civil remedies, or in the enforcement of rights under the Constitution, in particular the right to have the environment protected, enshrined at section 24 thereof. CARA certainly does not do so expressly nor indeed, in the light of the supremacy of the Constitution can it so do.

[30] It is accepted that, as was articulated by the Appellate Division as far back as 1907 in *Madrassa Anjuman Islamia v Johannesburg Municipality*, 1917 AD 718 :

"It is a general rule of construction that if it be clear from the language of a statute that the Legislature, in creating an obligation has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy. Exception to this general rule is found in the right of the Court to grant (unless the Legislature has expressed a contrary intention) an ancillary remedy by way of interdict"

At 725 the Court went on to say:

"To exclude the right of a Court to interfere by way of an interdict, where special remedies are provided by Statute, might in many instances result in depriving an injured person of the only really effective remedy that he has, and it would require a strong case to justify the conclusion that such was the intention of the Legislature."

See also Johannesburg City Council v Knoetze and Sons 1969

(2) SA 148 WLD.

[31] More recently in SA Maritime Safety Authority v McKenzie 2010 (3) SA601 SCA at 612 Wallis JA at paragraph 16 said:

"Where a statute creates both a right and a means for enforcing that right the position is that:

'We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded.'

[32] CARA does not expressly exclude the exercise of ordinary remedies by a litigant like the Applicant, nor, I believe, can it be contended that by prescribing specific duties to the Minister and Executive Officer, its intention was to do so.

[33] It is moreover simply not so as contended by Ms Norman that the Labour Tenants Act does not countenance the relief sought by the Applicant. Section 33 (eA) of the Labour Tenants Act empowers the court in addition to the power to make other orders in terms of the Act, to determine, prescribe or amend the terms on which a labour tenant occupies or uses land. The relief sought by the Applicant in the main application seeks to amend the terms on which the First to Twelfth Respondents occupy the land and can accordingly also be sought in terms of section 33 (eA) of the Act at the behest of a land owner in his own interests. That section provides:

"33. Additional powers of arbitrator and Court. - (1) An arbitrator or the Court may, in addition to the power to make other orders in terms of this Act-

...

...(eA) determine, prescribe or amend the terms on which a labour tenant occupies or uses land;"

[34] Most importantly, however appropo the Applicant's locus standi is the endorsement thereof in the Constitution itself, which, as the supreme law of the land, takes precedence over any other legislation. Section 38(a) of the Constitution accords the right to anyone acting in their own interest and section 38 (d) accords the right to anyone acting in the public interest, to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. The current application passes muster, given that the application in effect seeks the removal of livestock under CARA to, inter alia, promote the conservation of the soil and protect a fundamental right entrenched in section 24 of the Constitution, that to have the

environment protected in the interests of conservation.

[35] Section 24 (b) of the Constitution enshrines the right to "Everyone" to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that, inter alia, prevent ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources. In the chapter on the Environment written by Van der Linde and Basson in *Constitutional Law of South Africa*, Second Edition, Volume 3 Juta, Ed Woolman et al at page 50-11, the authors say:

"Through the use of the term 'Everyone', s 24 acknowledges that this right is to be enjoyed by all individuals. Likewise, it creates a fairly relaxed basis for locus standi. Section 24 possesses characteristics of both civil rights and socio economic rights."

The right entrenched at section 24 is echoed in CARA which, as alluded to by Mr Roberts for the Applicant, has as its object as stated in the preamble, the control of the natural agricultural resources in order to promote the conservation of the soil, the water resources and the vegetation and the combating of weeds and invader plants and for matters connected therewith. Although enacted before the Constitution, CARA should be read in conjunction therewith.

[36] It is common cause that the experts employed by all the parties have agreed that there has been wide spread overgrazing, degradation and erosion of the soil on the farm. The Applicant alleges that the First to Twelfth Respondents are the cause of the degradation and these Respondents have not contended otherwise in the pleadings. The degradation, erosion and overgrazing is in violation of the provisions of section 24 of the Constitution read with the provisions of CARA. Given that this consensus is recorded in the joint minute of experts of 22 June 2015 without a caveat by the Thirteenth and Fourteenth Respondents, Ms Norman's submission that the expert reports should not be relied on, cannot be sustained.

[37] The Applicant therefore, in my view acting in its own interest as owner of the farm and indeed in the interest of the public concerned with the protection of the environment, has, in accordance with section 38 of the Constitution read with Section 24 thereof and the objectives of CARA, the requisite locus standi in the main application. That application seeks the removal of livestock to protect a fundamental right entrenched in section 24 of the Constitution in the interests of conservation.

[38] Such standing, as submitted by Mr Roberts, is not dissimilar to that recognized in *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) SA155(N) at 1640 where it was held that a Government Authority may claim relief in the interest of the public to prevent

pollution of the atmosphere which infringed the right of the public to an environment not detrimental to health and wellbeing, or to that endorsed in *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) SA 1095 (Tks). In the latter case at 1105 B-C it was held that even at common law an association having as its main object the promotion of environmental conservation, should have locus standi to apply for an order compelling the State to comply with its obligation to enforce a conservation statute.

[39] As to the relief that might be granted for the violation of a right enshrined in the Constitution, In *Fose v Minister of Safety and Security* 1997 (3) SA786 CC at page 799 paragraph 19, the following was stated:

"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights".

[40] I pause to mention that the Applicant's locus standi and section 24 right under the Constitution cannot be ousted by rights which Ms Norman submitted labour tenants have, not to be separated from their cattle in terms of sections 10, 30 and 31 of the Constitution which respectively deal with the rights to dignity, the right to language and cultural life, and the right to enjoy one's culture, practice one's religion and use one's language. This submission by her, unsubstantiated in the affidavit on behalf of the First to Twelfth respondents, in effect amounted to evidence on her part, of which I cannot take cognisance. There was simply no evidence that any of these rights would be infringed by the relief sought by the Applicant.

[41] Finally, it must be noted as is stated in the Applicant's founding affidavit that the Applicant also has standing to enforce

environmental laws by virtue of the provisions of section 32 of the National Environmental Management Act 107 of 1998 ("NEMA"),

which provides legal standing to any person to seek appropriate relief in respect of a breach of any provision of NEMA or the provisions of any other statutory provisions concerned with the protection of the environment and natural resources.

[42] From all of the above it is clear that, in short, the Applicant has standing to bring the main application under the Constitution, CARA, the Labour Tenants Act, and NEMA. The applicant, it can be said, is indeed very well suited.

The First to Twelfth Respondents' Counter Claim

[43] The counterclaim as aforementioned flows from the disputed order of this Court of 2 April 2014 under Case Number LCC3 1/2013 , an application in which the First to Twelfth Respondents applied to be declared labour tenants. The Order states:

"IT IS ORDERED AS FOLLOWS:-

1. That the order in terms of paragraph one is granted, declaring in terms of Section 33(2A) of the Act that the Plaintiffs are Labour Tenants.
2. That the Second Defendant will commence forthwith with negotiations between the community and property owners , and canvas the possibility of acquisition of properties for accommodation.
3. The process shall commence forthwith and be completed within 12 months from the date of this order.
4. That the Second Defendant shall provide a comprehensive report on the following aspect within 6 months of the date of this order:-
 - (a) The election that the Plaintiffs' have made in so far as their acquisition of the land or alternative land or compensation.
 - (b) The progress in acquiring such land and the status of such acquisition.
 - (c) The anticipated time frames for the completion of the process of allocation of land and/or resettlement of the Plaintiffs'.
4. The costs of this application are reserved.
5. The matter is adjourned sine die."

[44] The First to Twelfth Respondents seek in the counterclaim, an order declaring that they have elected in terms of paragraphs 2 and 4 (a) of the order of 2 April 2014, to acquire the farm Normadien No 3303, and an order that such land be awarded to them. They seek moreover an order that the Applicant be paid just and equitable compensation for the land as determined by this Court, such compensation to be paid by the Fourteenth Respondent and

the Director-General, Department of Rural Development and Land Reform (being the Fourth Respondent in the counter-application) . In addition as aforementioned, the First to Twelfth Respondents seek a declaration that the current application by the Applicant for the removal of their livestock, is subversive of the order of 2 April 2014 and their rights or entitlements emanating from such order.

- [45] The order of 2 April 2014 was the subject of considerable dispute and was keenly contested by the Applicant. The stance of the Applicant was that this order did not record what was agreed between the parties. The order of 14 March 2014 according to the Applicant, correctly recorded their agreement. That order referred to the acquisition of alternative land as opposed to the amended order of 2 April 2014, which referred to the acquisition of the land occupied by the First to Twelfth Respondents. In this regard Mr Roberts referred me to the record of the proceedings of 13 March 2014, where at page 1 line 5 Sardiwalla AJ stated on this aspect:

"I further order that the second defendant will commence forthwith with negotiations between the community and property owners and canvass the possibility of alternate properties for accommodation."

- [46] This extract certainly appears to support Mr Robert's contention that the order of 14 March 2014 correctly recorded what had been agreed. The Applicant contended that the amended order of 2 April 2014, was improperly and disingenuously obtained by the First to Twelfth Respondents' Attorney in circumstances which amounted to fraud. These allegations gave rise to an application to strike out those paragraphs in the Applicant's answering affidavit in the counterclaim, which the First to Twelfth Respondents considered to be scurrilous.

- [47] The founding affidavit in the counter application contends that on a proper reading, the amended court order of 2 April 2014, not only bestowed the first to twelfth respondents with all the concomitant rights of labour tenants, but also with a right in land as defined in section 1 of the Labour Tenants Act, which the Director-General of the Department of Rural Development and Land Reform is, in terms of the court order, required and obliged to give effect to for their benefit.

- [48] Mr Shakoane submitted that the First to Twelfth Respondents had taken advantage of the court order of 2 April and had exercised their right derived therefrom to elect to acquire the land they had used and resided on. The Fourteenth Respondent, he said, had complied with the order by obtaining a valuation of the land and making the offer to purchase which the Applicant rejected. The order, he submitted, remains binding and is required to be obeyed unless reversed or set aside on appeal. In the circumstances, he submitted it would be subversive of the court order and the rights or gains derived by the First to Twelfth Respondents therefrom, if the order sought by the Applicant in the main application were to be granted in the absence of a setting aside of such order or a successful rescission or variation application by the Applicant. Given the deadlock reached on the purchase price or amount of compensation, his argument continued, the only matter which remained for

adjudication by this Court was what would be just and equitable compensation for the acquisition of the land, whereafter an award of the land would be ordered by this Court.

Finding on the Counterclaim

[49] The power of this Court to award land or a right in land, is derived in terms of section 22 of the Labour Tenants Act, following upon an application by a labour tenant for an award in land in terms of the provisions of sections 16 to 18 of that Act, which are discussed above under "Legal Context". An application for an award in land has to be referred to the court by the Director General in terms of section 18 (7) of the Act, where no agreement is reached. In terms of section 22(4) of the Act the Court then decides the matter and determines just and equitable compensation to be paid to the owner. Absent an application in terms of sections 16 and 17 of the Act, this Court cannot make an award of land to a labour tenant under section 22.

[50] The State Attorney, on behalf of the Fourteenth Respondent, was directed to file documentary proof that the First to Twelfth

Respondents had applied for an award in land in terms of section 16 before the cut-off date. This was not filed. Absent such proof, this Court is not authorised to determine just and equitable compensation or make an award in land.

[51] This being so, neither the original nor the amended court order, notwithstanding the contents thereof, nor the order to the

Director-General and the election by the First to Twelfth Respondents to acquire the land or alternative land, clothe this Court with the requisite authority to determine compensation and make the award sought in the counter application. Nor do either of the court orders award the First to Twelfth Respondents the right to acquire the farm as contended by Mr Shakoane.

[52] Mr Shakoane argued also that the additional powers bestowed on the court in terms of section 33(1) and 33(2A) of the Labour Tenants Act are not subject to nor limited in terms of the proviso to section 16(1), namely that the right to apply to be awarded land shall lapse if no application is lodged with the Director-General in terms of Section 17 on or before 31 March 2001. Section 33(2A) merely provides that the court may determine whether a person is a labour tenant irrespective as to whether or not such person has lodged an application in terms of section 17. That section cannot be relied on as authority for the proposition that persons who did not apply to be awarded land on or before 31 March 2001 is entitled to an order of this Court awarding them land.

[53] Finally, it must be noted that even had the First to Twelfth Respondents acquired the farm and been both the users and the owners thereof, or were they still to acquire the farm, this would not be a bar to the removal of their livestock. For, as Mr Roberts for the Applicant submitted, their rights to the land, would not be unfettered rights in property and the exercise thereof would be subject to the applicable legislative restrictions. The flaunting of such restrictions is apparent on the farm from the uncontested

evidence about the overgrazing and resultant damage which, has prevailed since 2002. The prevailing situation is in contravention of Regulation 9 of CARA and the non-compliance with control measures constitutes an offence in terms of section 6(5) of CARA.

[54] As was said in *Adendorjfs Boerderye (Pty) Ltd v S. Shabalala and Others* LCC 4/2014 at paragraph 19,

"...a land user bears the obligation to effectively protect the veld against deterioration and destruction."

[55] I am inclined to agree with the Applicant that the First to Twelfth Respondents are continuing to commit the offences specified in CARA and referred to above, in respect of which if an order is not granted as sought, it would be tantamount to this Court condoning unlawful conduct. See *Victoria Park Ratepayers Association v Greyvenouw CC and Others* (2004) 2 All SA 623 (SE), *Lester v Ndlambe Municipality and Another* (2014)1 All SA 402 (SCA) at paragraph 23, *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (CPD) at page 463 paragraph G, *Durban City Council v Premlall and Another* (2) 1972(1) SA 547 (D&CLD) at 550G-551A and *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*, 2015(5) SA 1 (GP) at paragraph 28.13.

[56] I accordingly find in view of all of the above, that the counterclaim cannot succeed. Given my finding that neither the order of 14 March 2014 nor the amended order of 2 April 2014 clothe this Court with the requisite authority to make the award sought in the counter application, or are a bar to the relief sought in the main application, it is not necessary for me to consider the dispute pertaining to which is the correct order nor the application to strike out flowing from this dispute.

The relief sought against the Thirteenth and Fourteenth Respondents in the Main Application

[57] I now turn to consider whether the Thirteenth and Fourteenth Respondents can be ordered to facilitate the removal of the livestock. Ms Mhlongo who appeared as Junior Counsel for the State Respondents, submitted in heads of argument, that the Thirteenth Respondent has no mandate to relocate the First to Twelfth Respondents livestock to another farm as sought by the Applicant in paragraph 2 of the Notice of Motion. The Thirteenth Respondent's mandate she submitted, is limited to the administration and enforcement of CARA. Mr Roberts conceded this was so.

[58] In my view it was however the failure of the Thirteenth Respondent to exercise such mandate and to administer and enforce CARA that was evident in this matter. In terms of section 6, as alluded to by Mr Roberts, the Thirteenth Respondent may inter alia prescribe control measures relating to the grazing capacity of veld and the maximum number of livestock that may be kept. The Executive Officer has investigative powers and may enter upon properties, determine erosion, grazing conditions and is entitled in terms of Regulation 17 to serve directions on land users to take control measures to achieve the objects of the Act. I note that notwithstanding the Thirteenth Respondent being aware of the situation on the farm since at least December 2013 when this application was instituted, and notwithstanding the recommendation of his own experts, and a report by the Kwa-Zulu Natal Agriculture Department, the Thirteenth

Respondent took no steps to comply with his obligations under CARA. Steps were taken neither to investigate nor to issue directives. The Thirteenth Respondent simply failed to act in terms of his duties under CARA.

[59] In respect of the Fourteenth Respondent, Ms Mhlongo submitted that he does not have a policy, mandate, budget or programme to comply with the relief sought by the Applicant. She did however concede that The Fourteenth Respondent has a duty to assist labour tenants and submitted he had done so in complying with the amended court order. The duty of the Fourteenth Respondent to assist labour tenants, would, in my view include an obligation to make land available for the First to Twelfth Respondents to relocate their livestock to. To that end, the Fourteenth Respondent would do well to look to the Land Reform Provision of Land and Assistance Act 126 of 1993. Section 10

(1) of that Act provides as follows in respect of the Minister of Rural Development and Land Reform, the Fourteenth Respondent :

"10. Provision of Property for land reform purposes.-

"1. The Minister may, from money appropriated by Parliament for the purpose of this Act-

(a) acquire property; and

(b) on such conditions as he or she, may determine:-

(i) make available state land administered or controlled by him or her or made available to him or her;

(ii) ...

(iii) ...

(iv) ...

which he or she considers suitable for the achievement of the objects of this Act, whether in general or in cases of a particular nature or in specific cases."

- [60] The object of the above Act provides, inter alia, for the acquisition of property and the provision of financial assistance for land reform purposes. I can see no reason why, given these provisions and those of the labour Tenants Act, the obligations of the Fourteenth Respondent to assist labour tenants should not extend in a case like this, to removing their livestock temporarily to alternative land. Such land should ideally be as close as possible to the farm the first to twelfth respondents occupy to minimise inconvenience to them and in deference to their sentiments about their cattle being removed. A removal to land in the close vicinity, it is hoped will to some extent, mitigate difficulties.
- [61] The removal of the livestock is in my view necessary and in the interests of all concerned, the land users, the environment, the public and ultimately whilst they might not currently appreciate it, the First to Twelfth Respondent labour tenants themselves. The short term inconvenience to them of being separated from their livestock will in the long term be beneficial to their use and occupation of the farm, once it is rehabilitated in accordance with the recommendations of the experts.

Costs

- [62] The Applicant sought an award of costs on an attorney and client scale against all of the Respondents, jointly and severally, the one paying the other to be absolved. Such costs, it was contended, should include the costs of two Counsel in the main application, the counter application and the recusal application of Sardiwalla AJ, who initially presided over this matter.
- [63] The Applicant submitted that in view of the concession by the First to Twelfth Respondents' expert, that there was overgrazing and there should be a removal of livestock for a period of 5 years, the counter application was frivolous and vexatious and warranted a costs order against the First to Twelfth Respondents, notwithstanding the practice of this Court not to award costs. I am of the view that this is an apt characterisation of the counter application, its clearly unsustainable challenges to the Applicant's locus standi and equally unsustainable defences contrary to the provisions of, yet based on the Labour Tenants Act.
- [64] Then too, there is the conduct of the First to Twelfth Respondents at various stages since the inception of the matter in December 2013, their unacceptable dilatoriness in the filing of their answering affidavit only on 26 February 2015 in response to the founding affidavit of 6 December 2013. There were also other delays occasioned by them. I note that the hearing that was scheduled for a week commencing on 4 August 2015 could not continue as accommodation had not been arranged by their legal team. I am of the view, in all the circumstances, that the Applicant is entitled to the cost order it seeks against the First to Twelfth Respondents.
- [65] In relation to the State Respondents, it must be borne in mind that the Applicant sought to enforce a constitutional right. It has been accepted that in litigation between the state and private parties, seeking to assert a constitutional right, the state should be ordered to pay

the cost if it loses. See *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009(6) SA 232 (CC); *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 (LCC); *Democratic Alliance v Ethekweni Municipality* 2012 (2) SA 151 (SCA); *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC); *Midlands North Research Group and Others v Kusile Land Claims Committee and Another* 2010 5 SA 57 (LCC) paras [18] - [21] and *Baphalane Ba Ramakoka Community v Minister of Agriculture and Land Affairs* 2011 (9) BCLR 891 (cc) par [38].

[66] It is in my view fitting that a cost order, on the scale sought, be awarded against the State Respondents. Their conduct too was dilatory. Notwithstanding the court order issued by Sardiwalla AJ, the Director General in the office of the Fourteenth Respondent

failed to deliver the required report. In respect of the Thirteenth Respondent he has, for the past two years, since the inception of this matter, when one assumes he was made aware of the situation on the farm, done nothing pro-actively to preserve the natural resource, in terms of his admitted obligations under CARA.

[67] The persistent opposition to the application by all the Respondents notwithstanding the agreement and recommendation of their respective experts that the livestock be removed, is another reason for the award of costs on the scale sought against them. This matter ought clearly to have been settled as was suggested to the parties by the Court. Instead it was vigorously opposed with resultant costs to the State and ultimately the tax payer who has funded the litigation of all the Respondents.

[68] I am not inclined to award the Applicant the costs it seeks in the recusal application. Notwithstanding the circumstances of that application, the First to Twelfth Respondents were successful therein. In keeping with this Court's practice not to award costs in general, no order as to costs is granted respect of the recusal application.

[69] The Fourteenth Respondent brought an application to postpone the proceedings on the second day of the hearing in order for senior counsel to be briefed at that late stage. That was when Ms Norman entered the fray belatedly on behalf of the Fourteenth Respondent. I expressed my grave disapproval during the postponement application and do so again here, that the Fourteenth Respondent who was a party to these proceedings for the past two years was so ill prepared, that a decision to brief senior counsel was only taken half way through these proceedings. The postponement application was refused primarily because a date could not be found when all counsel were available in the next month and a half before the end of the court term. Given the semi urgent nature of the matter (the experts recommended that the livestock be removed in August 2015, a date that has come and gone), and the prejudice to the Applicant and the First to Twelfth Respondents if the already delayed matter were to be dragged out even further, the postponement was refused, as no date was available this year.

[70] It is not so as contended by Ms Norman that the basis for the refusal of the postponement was, in addition that the main application was urgent, a contention which she disputes. The degree of urgency was characterised as semi urgent and not urgent. Ms Norman very properly tendered to pay the wasted costs occasioned by the entertaining of the two hour postponement application. I am of the view that the circumstances warrant these too being paid on an attorney and client scale. In heads of argument, she contends that the Court penalised the Fourteenth Respondent twice, in that although ordered to pay costs for the two hour period, the Court ordered that the hearing should commence at 08h30 the following morning. With regard to this submission, suffice it to say that this Court, especially when on circuit, regularly commences proceedings at 08h30. As opposed to punishing litigants, an early start ensures that matters are expeditiously and efficiently concluded in the interests of the administration of justice and the tax payer who ultimately funds the court on circuit.

I grant the following order:

1. The First to the Twelfth Respondents are ordered to remove all their livestock (including, inter alia, all their cattle, goats, horses and donkeys) presently in their possession or under their control from the farm Albany, more fully

described as:

ALBANY FARM NO. 8944, REGISTRATION DIVISION HS, IN EXTENT 938,5249 HECTARES and held under DEED OF TRANSFER NO. T 25791/95(3), situated in Normandien District, Newcastle, Kwa- Zulu-Natal; (hereinafter referred to only as "the farm") by 15 January 2016.

2. The First to Twelfth Respondents are interdicted and restrained from returning any of their livestock as contemplated in paragraph 1 above or any other livestock onto the farm for a period of 5 years from the date of removal contemplated in paragraph 1 above.
3. The Fourteenth Respondent is ordered and directed to make alternative land in close proximity to the farm and preferably on the neighbouring farms Glendale N011290, Langkloof4590, Farm Lease 011288 and The Spot 9758, available to the First to Twelfth Respondents for their livestock to be relocated to, by 15 January 2016. The Fourteenth Respondent shall further take all steps necessary to comply with this order and to make available all resources to do so.
4. In the event of the Respondents failing to comply with the orders contemplated in paragraphs 1, 2 and 3 above, and in the event of the Fourteenth Respondent failing to make available such alternative land for the grazing of the livestock aforementioned by 15 January 2016, then, in that event an order is hereby issued that the Sheriff of Newcastle 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 Applicant's expense, shall remove all such livestock contemplated in prayer 1 above, which the

First to the Twelfth Respondents have failed to remove from the farm, and to take such livestock to such other place indicated or made available by the Fourteenth Respondent. In the absence of the aforesaid Respondents indicating such other place or location, the Sheriff is ordered to remove such livestock to the pound in Dundee, Utrecht, Ladysmith, or Newcastle or such other pound in Northern Natal able to accommodate the livestock, for the pound master to deal with in terms of the applicable legislation dealing with pounds.

5. The First to the Fourteenth Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the Applicant's costs of this application taxed on the scale as between attorney and client, such costs to include, inter alia, the amounts referred to in subparagraphs 5.1 to 5.9 below. These amounts will be paid within a period of 30 days from taxation thereof:-

5.1 the employment of two counsel and an attorney in respect of all trial dates allocated, the quantum of which is to be determined by the taxing master;

5.2 the necessary and reasonable costs of two counsel and an attorney for attending all pre-trial conferences, the necessary and reasonable costs incurred in respect of consultations with the Applicant's witnesses, and the costs in respect of consultations with the experts listed below, including all reasonable travelling expenses and the costs in respect of travelling time, the quantum of which is to be determined by the taxing master;

5.3 the necessary and reasonable costs of attending inspections in loco by two Counsel, the Attorney and the Experts listed below, the quantum of which is to be determined by the taxing master, including costs in respect of travelling time and travelling expenses;

5.4 all necessary and reasonable costs incurred by the Attorney acting for the Applicant for the purposes of attending consultations, inspections in loco and the trial itself;

5.6 the necessary and reasonable travelling and accommodation expenses of the witnesses of the Applicant to attend the trial of the matter;

5.7 the necessary and reasonable qualifying fees and the expenses of the expert witnesses listed in paragraph 6 below, such to include the costs of the inspection in loco conducted by Mr C Henderson, Prof. Tainton, Dr Kinvig and Mr Burton, the consultations by them with the Applicant's witnesses to obtain relevant information to compile their reports and the consultation time with the Applicant's two Counsel and Attorney;

5.8 all necessary and reasonable costs of obtaining aerial photograph;

5.9 the necessary and reasonable costs incurred by the Applicant's Attorney in compilation, preparation, indexing and paginating of bundles of documents, maps and photographs and making copies thereof as well as indexing and paginating of the Court bundles and file; and

5.10 all reserved costs save for the reserved costs of the recusal application.

6. The experts referred to above in paragraph 5.6 are as follows:

Clive Henderson, an agricultural expert;

Prof Neil Tainton, a grass science expert;

Dr Richard Kinvig, an environmental expert; and

Mr Stephen Burton, an aerial photograph analyst.

7. The Fourteenth Respondent shall pay the wasted costs occasioned by the postponement application on an attorney and client scale.

Y SMEER

Acting Judge President

Land Claims Court

Appearances:

Counsel for the Applicant:

Adv G Roberts

SC Adv C Hattingh

Attorneys for the Applicant:

Peter Vinnicombe & Associates, Durban.

Counsel for the 1st to 12th Respondent:

Adv G Shakoane SC

Adv M Kgariya

Attorneys for the 1st to 12th Respondent:

MC Ntshalintshali & Associates, Durban.

Counsel for the 1st to 12th Respondent:

Adv T Norman SC Adv Z P Mhlongo

Attorneys for the 13th Respondent:

State Attorney, Durban

Date of Hearing:

20-23 October 2015

Date of Judgment:

5 November 2015

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