

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

Case No: 3152/2019

In the matter between:

KHOLEKILE MANGA

First Applicant

VUSUMZI MANGA

Second Applicant

THEMBELANI XHOTYENI

Third Applicant

And

MINISTER OF POLICE

First Respondent

**MR HLWEMPU: THE STATION COMMANDER
(COMMEETTES DRIFT POLICE STATION)**

Second Respondent

JOHN DU PLESSIS

Third Respondent

MR NCANDANA: NDLAMBE MUNICIPALITY POUND

Fourth Respondent

JUDGMENT

BESHE J:

[1] This application was launched on an urgency basis for an order in the following terms:

“1. The application be heard as a matter of urgency in terms of Rule 6(12) with the abridgement of the time periods provided in the Uniform Rules of Court as contained herein;

2. The respondents are directed to return the 23 cattle which were taken from the applicants possession and control on or about 15 October 2019;

3. The first, second and third respondents be directed to do all that is necessary to ensure that the cattle are returned to the applicants in Peddie with immediate effect, including but not limited to:

3.1 Authorising the fourth respondent to release all cattle removed from the possession of the applicants on or about 15 October 2019 back into the care of the applicants with immediate effect;

3.2 Paying the fourth respondent for all travel and accommodation expenses which are due, owing, and payable to him in regard to the aforementioned cattle; and

3.3 Paying for the travel and any other necessary ancillary expenses related to returning the cattle to the area from which they were removed.

4. The first, second, and third respondents be liable for the costs associated with the fulfilment of prayer 3 above on a joint and several basis, the one paying the other to be absolved;

5. The detention of the applicants livestock be declared wrongful, and unlawful;

6. The first, second, and third respondents be ordered to pay the costs of this application on the attorney and client scale; and

7. Further and/or alternative relief.”

[2] At applicants’ request, prayer two was amended to read: 16 cattle instead of 23.

[3] The papers reveal that this matter concerns applicants' cattle that are currently impounded at the Ndlambe Municipal Pound since 15 October 2019.

[4] According to the applicants, the cattle were removed by the third respondent, assisted by second respondent and or members of the first respondent.

[5] The three applicants are described as adult male persons of Ndwayana Location, Peddie in the Eastern Cape Province and owners of the impounded cattle.

[6] As the heading suggests, first respondent is the Minister of Police who is the Cabinet Minister in charge of the Police and therefore vicariously liable for their actions and negligent omissions.

[7] The second respondent is the Station Commander in charge of the Committees Drift Police Station, Grahamstown.

[8] Third respondent is an adult male residing at Outspan Farm, Committees Drift. According to third respondent, Committees Drift Outspan Farm is owned by the Department of Rural Development and Land Reform. He was a lessee of the farm for many years. Approximately two years ago he was allocated one hector of land together with five other households on the said farm.

[9] The fourth respondent is the pound master of the Ndlambe Municipal Pound where the cattle in question are currently kept (impounded).

[10] There is no unanimity between the parties as to the circumstances under which the cattle got to be handed over to the fourth respondent.

[11] As indicated earlier in the judgment, applicants' case is that the cattle were removed by the second respondent, and or members of first respondent and transported to the fourth respondent.¹ And that the removal was seen by the applicants' shepherd, **Mr Mbonisi Madiba**. **Mr Madiba** is alleged to have reported that the livestock in question was removed from the open field and taken to Nonzwakazi Farm.

¹ Paragraph 10 of the founding affidavit.

[12] A confirmatory affidavit by **Mr Madiba** was filed. In the said affidavit he states that he is the third applicant in the matter.² He confirms that he is the shepherd looking after applicants' cattle. That he confirms the contents of the founding affidavit in so far as it relates to him and the entire conduct of the respondents.

[13] It is not clear from the founding affidavit and or confirmatory affidavit what constituted the "entire conduct of the respondents". What second respondent did, if he was there and what the other members of the first respondent did, whether in fact they were at the scene. Where this "open field" was.

[14] According to the applicants, the removal of their cattle occurred without warning, lawful justification, or consent without there being any reason provided to the shepherd or to the applicants to justify the removal of the cattle.

[15] Upon learning that the livestock was taken to the pound, the applicants made enquiries with the fourth respondent and whereupon they were advised that the cattle were impounded by the third respondent.

[16] Applicants disavow knowledge of any complaints that their cattle were unlawfully in property belonging to the third respondent.

[17] Fourth respondent has not entered the fray. According to the applicants, the pound master informed them that he could only release their cattle against the payment of certain prescribed fees which they say they cannot afford.

[18] The granting of the relief sought by the applicants is resisted by the first, second and third respondents.

[19] A member of first respondent who is also the second respondent deposed to the answering affidavit apparently in respect of both first and second respondent. The basis for opposing the application as would appear from **Captain Mandisi Hlwempu** is the following:

² Page 74 of the papers, paragraph 1.

They have over the years received complaints from third respondent about fencing at his farm being damaged and cattle including those belonging to the applicants straying or being driven onto his land which in turn damaged his crop of cabbages.

[20] On the 11 October 2019 one of his colleagues **Warrant Officer Lelengwana** attended to Outspan Farm where he observed a number of cattle feeding on third respondent's cabbages. It was as a result of this incident that he (**Captain Hlwempu**) advised third respondent that he should consider impounding the cattle in question.

[21] As a result of the latest complaint (11 October 2019) and at the request of the third respondent, **Warrant Officer Lelengwana** spoke to a member of the **Vele** family, the **Ndakuse** family, first applicant's wife in relation to third respondent's complaint and his intention to impound their cattle should they stray into his land again. He also spoke to the second applicant telephonically.

[22] According to **Hlwempu**, none of the police from his police station were in attendance where and when the cattle were impounded as alleged by the applicants on the 15 October 2019. He denied that he or any other police official assisted in removing applicants' cattle.

[23] **Warrant Officer Lelengwana** deposed to an affidavit confirming what was stated by the second respondent in so far as it related to him.

[24] Third respondent (**Du Plessis**) sketches the history that ended with him together with other local families planting crops on the part of the land that was allocated to them. According to him they entered into an agreement to clear and fence the piece of land where they would then plant crops which they have been

doing. Even though second applicant belonged to one of the five families that were allocated land, he was not part of the co-operative that entered into the commercial agreement referred to above. He however retained the right to use the remainder of the farm for purposes of grazing his cattle / livestock. The farm is approximately 500 hectares of that 100 hectares is fenced and used for growing crops and 400 hectares is used for grazing cattle.

[25] The fence around the cultivated part of the farm is regularly cut and cattle pushed into the cultivated area causing damages to the crops according to the third respondent. He further states that those cattle are seldom branded making it difficult to determine who they belong to. That as a measure of last resort he caused the livestock to be impounded on the advice of the second respondent. When he arranged for the cattle to be removed, he did not know that they belonged to the applicants.

[26] Annexed to third respondent's answering affidavit are a number of photographs he alleges were taken between 13 September and 24 October 2019. Depicted on these photographs are: damaged fences, damaged crops, cattle inside the "fenced" area. In one of the photographs a number of cattle can be observed with a male person balancing on a stick, who is seemingly looking on. Third respondent believes this male person to be an employee of the applicants who is employed to herd their livestock.

[27] As regards what happened on the 15 October 2019 **Du Plessis** asserts that he observed a large number of cattle eating the crops. He removed some from the

cultivated land and arranged for them to be transported to the Alexandria municipal pound which is closest to the farm concerned.

[28] One cow belonging to **Ms Mbilane** was released to her because she pleaded with him and undertook to make sure that her cow does not graze in the irrigated part of the land.

[29] On an earlier occasion he raised his concern with first applicant's shepherd. As a result of which he received a call from the first applicant who pleaded with him not to have his cattle impounded and advised that he will take steps to ensure that they did not come to the irrigated part of the farm.

[30] **Du Plessis** denies that the applicants were not aware of the reason for the removal of their cattle. Adding that in 2017 second applicant was convicted of malicious damage to property as a result of him having laid a charge against him because of the damage caused by his cattle to third respondent's crops.

[31] According to third respondent he cannot return the cattle to the applicants because they are not in his possession / control.

[32] Issues for determination are accurately identified by the applicants as being:³

Whether the third respondent acted in conjunction with the employees of the first respondent who in turn were acting within the course and scope of their duties;

the lawfulness or otherwise of the removal of applicants' cattle; and

liability for the return of cattle.

³³ See Applicants' heads of argument, paragraph 2.

[33] Applicants have not put forward any direct evidence that the third respondent acted in conjunction with the employees of first respondent. They invite the court to draw inference from the evidence they placed before court and from probabilities.

[34] Third respondent asserts that he reported incidents involving cattle damaging their crops to the police on numerous occasions as this has been a long-standing problem. This culminated in second respondent advising him to consider impounding the cattle. That in fact applicants or members of the community had been warned that this would happen if they did not ensure that their livestock does not stray into the land in question.

[35] Realising their difficulty in this regard, applicants argue in the alternative that they had no option but to proceed against the first respondent in light of the contents of a letter received from third respondent's attorney of record, namely:

That the cattle were not removed by the third respondent.

The police had made it clear to the community at a meeting that in the event that their cattle strayed or being led into the cultivated area of the farm the police would have no alternative but to impound the livestock concerned.

That when a report was made to the police once more they arranged for the impounding of the cattle which were delivered to the Alexandria Municipal Pound.

[36] This may have justified them proceeding against the first respondent. But in light of the evidence and in particular respondents' version in this regard do the contents of the letter provide evidence of complicity on the part of first respondent's employees?

[37] Unfortunately **Mr Madiba** who would have been best placed to shed light as to who did what chose not to provide details of what he observed concerning the removal of the cattle. In my view therefore this issue must be decided on the version of the respondents.⁴ The fact that an employee of the first respondent, namely second respondent advised third respondent to consider impounding the cattle, does not in my view make them complicit in the impounding of the cattle.

[38] From what I have stated above, it is clear that the employees of the first respondent did not remove or arrange for the removal of the cattle. The third respondent on the other hand admits that he arranged for the removal and impoundment of the cattle concerned. He denied that such removal was not justified. He asserts that he had run out of options having reported the matter to the police on numerous occasions. Having spoken to some of the members of the community, including the applicants stating that “The reason for having the livestock impounded is that they had been abandoned to graze on the irrigated land and were damaging our crops”.⁵

[39] There was no specific reliance by third respondent on Municipal by-laws. However, in argument before me it was argued that legal basis for arranging for the impoundment of the cattle was the Municipal by-law relating to the impoundment of animals. The said by-law is enacted in terms of the provisions of the Constitution, in particular *Section 156 (2)*.⁶

⁴ Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623.

⁵ Page 101 of record.

⁶ This By-law was published in the Provincial Gazette Extraordinary 12/1/2007.

[40] **Section 3 of the by-law provides that any person may impound an animal found abandoned upon his property or any street, road, reserve or other public place.**

[41] Third respondent submits that his action is permitted by the said by-law. And that the applicants do not impugn the validity of the by-law. It was argued on behalf of the applicants that the conduct of the third respondent amounted to taking the law into his hands – to self-help. My attention was drawn to two decided cases where the courts grappled with some of the issue under consideration in this matter. Namely the impoundment of livestock. In the two matters the attack was directed at certain provisions of the Pound Ordinance and the effect thereof. Whereas in this matter the complaint concerns what is considered as unlawful or arbitrary removal / impoundment of applicants' livestock by the respondents.

[42] In ***Zondi v MEC for Traditional and Local Government Affairs***⁷ the court was grappling with the validity of the provisions of the *Pound Ordinance 32 of 1947* (KZN). One such provision was *Section 16 (1)* which provides that: **"16 Trespassing or straying animals may be impounded**

(1) The owner of any land upon which any animal is found trespassing may impound such animal: Provided that before any person may impound any animal which belongs to the owner of land of land immediately adjacent and which bears the registered brand of that owner, he shall give at least 12 hours written or verbal notice of the trespass to such owner."

⁷ 2005 (3) SA 24.

The court found that the provision was inconsistent with the Constitution as it permits arbitrary and irrational deprivation of property. The section was criticized for not having provision for the stock owner to receive any or adequate notice of the alleged trespass and does not afford the owner reasonable opportunity to make representations. The court then went on to say:⁸

“There is no reason, let alone sufficient reason, for the deprivation. Section 16(1) of the ordinance also denies stockowners equal protection and benefit of the law, contrary to the provisions of ss 1 (c) and 9(1) of the Constitution. It differentiates between landowners and stockowners in a manner that is irrational and arbitrary. It serves to legitimate governmental purpose. Applicant’s assertion is that the ordinance serves the private exploitative interest of landowners and poundkeepers at the expense of poor, landless, rural people who are unable or do not know how to access legal help. It follows that because s 16(1) of the ordinance permits arbitrary and irrational deprivation of property it is inconsistent with s 25(1) of the Constitution.”

The invalidity of *Section 16 (1) of the Ordinance* amongst other provisions was confirmed by the Constitutional Court.⁹

[43] A similar issue was dealt with in this division in the matter between ***Benson Mdodana v Premier of the Eastern Cape & Others***.

[44] In this matter the court was also considering the validity of the provisions of a *Pound Ordinance no. 18 of 1938* (Applicable in the Eastern Cape) which was also concerned with the impoundment and sale of livestock without judicial supervision

⁸ Page 34 H – I.

⁹ *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 CC at630 [134].

and the effect of the provisions on the landless. Certain provisions of the *Pound Ordinance* in question were declared to be inconsistent with the Constitution and therefore invalid.

[45] In this matter however, as stated earlier, the attack is on the conduct of the respondent/s and not so much on the legislation that currently permits impoundment of livestock and stipulate what should happen with the impounded animals. Third respondent places reliance on the Ndlambe Municipal Impoundment of Animals by-law as stated earlier. I have already stated what the relevant section of the by-law provides.

[46] Whenever the court is confronted with competing interests, it is incumbent upon such court to endeavour to strike a balance between the contending interests. Applicants mainly complain about the infringement of their right to property. Third respondent on the other hand complains that there has been a repeated damage to fencing around land in which commercial crop farming is carried out by an Agricultural Co-op of which third respondent is part. That impoundment was resorted to because requests to cattle farmers around the farm appeared to be falling on deaf ears.

[47] The applicants do not suggest an alternative route that the third respondent or anyone in his position could have followed in the circumstances – To safeguard the Co-op's crops. Although applicants suggest that the fence around the farm / land in question was in a state of despair, they assert that their cattle were rounded up and

removed from the open field.¹⁰ The photographs that are said to have been taken on different dates depict livestock inside the cultivated area of the farm.

[48] It is trite that no-one may be deprived of their rights, including right to property, without the due process of the law. Individuals are therefore not allowed to resort to self-help to take law into their hands. The **Zondi** matter referred to earlier later served before the Constitutional Court for purposes of confirmation of invalidity of certain provisions of the *Natal Pound Ordinance* which the Constitutional Court did. Regarding *Section 16 (1) of the Ordinance* which provides for impoundment of livestock the court had this to say:¹¹

“[66] Section 16(1) of the ordinance permits a landowner to decide whether trespass has occurred and to act upon such decision by seizing and impounding the livestock. A reading that would require the landowner to first obtain a court order prior to impounding the trespassing animals would indeed be inconsistent with the scheme of the ordinance, whose very purpose is the immediate seizure and impoundment of trespassing animals without a court order. It is arguable therefore that it may limit the right to access to courts. This question however need not be decided. Even if it did, it would certainly be justifiable.

“[67] As will appear more fully below, powers of the kind authorised by s 16(1) are necessary to deal with trespassing and straying animals. Such animals are a danger to property and human beings. It is therefore necessary to take immediate action against such animals. To require the landowner to first obtain a court order before

¹⁰ Page 4 of the record paragraph 11 of the founding affidavit.

¹¹ Page 614 [66] – 615 [67].

impounding the trespassing or straying animals may well result in more damage to property or expose human beings and other animals to danger.”

However the court found that even though it may appear that there is nothing wrong with *Section 16 (1)* – (the impounding provision) but when read with the rest of the scheme which *inter alia* provides for the sale of the livestock that was impounded, it limits the rights to access to courts. And further that there is no reason why once the animals have been impounded the judicial process should not be allowed to supervise the process of execution through its rules.¹² In my view third respondent has succeeded in showing that he was acting within the law by having the cattle impounded after all attempts to persuade the owners of the livestock to ensure that they do not graze in the cultivated area of the farm.

[49] It was argued on behalf of the applicants that the By-law allows the impoundment of abandoned as opposed to stray animals. I do not think this submission advances applicants’ case. At paragraph [40] of the answering affidavit, third respondent denies that the cattle were unlawfully removed. He goes on to point out that:

“They were lawfully removed because they had no right to graze on the irrigated land. The cattle had strayed on to (or been herded into the irrigated land after fences had been cut) and left there to graze the crops planted for commercial production.”

[50] In my view “left there to graze” suggests abandonment of the cattle in question. In my view to abandon includes leaving something unattended or unrestricted. This is what third respondent suggests applicants did with regard to

¹² Paragraph [83].

their livestock. Which in turn resulted in the livestock causing damage to the crops. And that as a result thereof third respondent had no option but to impound the cattle as attempts to get its owners to keep the cattle away from the crops (fenced off area of the farm) had failed. See also *Section 4* of the By-law which refers to “abandoned, lost or stray animals”.

[51] As I stated earlier there is no suggestion by the applicants as to what third respondent should have done in these circumstances. The Constitutional Court noted in the **Zondi** matter *supra*¹³ that:

“[80] The need to take immediate action against trespassing animals cannot be gainsaid. Unattended animals may cause damage to crops and property. They could also cause pose safety or health hazards to other animals and members of the public. It is therefore necessary to have a mechanism for dealing quickly and effectively with animals found trespassing on land or straying in public places or on public roads. The need for such mechanisms must be viewed against the responsibility of livestock owners to ensure that their animals do not trespass onto other people’s land. If they should neglect their livestock, they must be prepared to pay the price for such neglect. Pound legislation is therefore necessary to deal with those livestock owners who neglect their responsibilities.”

It is my considered view that third respondent was justified in arranging for the impoundment of the animals in question.

[52] A reading of the papers does not reveal that we are dealing with land owners on the one hand and the landless on the other. It appears to be common cause that

¹³ At page 617 [80].

the Committees Drift Outspan Farm is owned by the Department of Rural Development and Land Reform. A Co-operative comprising of third respondent and other families were allowed to use the land at Committees Drift for commercial purposes. Of the ± 500 hectares farm only 100 hectares is fenced and irrigated. 400 hectares is used for grazing. I say this is seemingly common cause because the applicants chose not to respond to those allegations, labelling them irrelevant.

[53] I am not satisfied that the applicants have made out a case that their cattle were unlawfully impounded or removed by the respondents. There is no evidence that the employees of the first respondent had a hand in the removal / impoundment of applicants' livestock.

[54] I have been invited in the event I find that first respondent's employees were not complicit in the removal of the cattle, to order third respondent to pay their costs. It being argued that had it not been for the contents of third respondent's attorney of record letter, the first and second respondents would not have been cited as respondents by the applicants. However, on the same day the cattle were impounded applicants' attorney of record addressed a letter to the third respondent and stated *inter alia* that:

"On the 15 October 2019, you unlawfully took and removed 23 cattle belonging to our clients without informing them and without a court order.

We are informed by client that you loaded the said cattle to a truck and took them to a place which is unknown to our clients.

It also came to our attention that you were assisted by the station commander (Mr Hlwempu) when the cattle were removed."

So, it cannot be that it was only upon receipt of third respondent's attorney's response that applicants got wind that first respondent's employees were involved. Accordingly, the costs should follow the result.

[55] The application is dismissed with costs.

NG BESHE
JUDGE OF THE HIGH COURT

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Date Heard : 14 November 2019

Date Reserved : 14 November 2019

Date Delivered : 4 December 2019