THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 15698/2008

MONDI LIMITED	Applicant
and	
MANDLAKAYISE TOBIAS DLUDLA	First Respondent
OGAGAWINI LIVESTOCK ASSOCIATION	Second Respondent

J U D G E M E N T

Msimang DJP

[1] The Applicant in this matter is a paper and packaging company and the owner of 3000 hectare piece of land in the Mtunzini area of KwaZulu-Natal (the property) upon which it primarily carries out forestry operations by growing trees which are converted into pulp paper for sale on the pulp paper market.

[2] The First Respondent is a businessman who conducts a number of business ventures in the rural Obajeni area of Mtunzini and who, together with two other persons, is a member of the Second Respondent's Association.

[3] Applicant's Asset and Policy Manager, one JAMES RYCROFT, deposed to Applicant's Founding Affidavit in this matter. He testified to Applicant's commission to the social outreach programs and to the Applicant's engagement with the neighbouring communities so as to enhance their capabilities and contribute to their social and economic development. In order to achieve these noble causes the Applicant launched a number of projects aimed at understanding the needs of these communities and finding ways in which the Applicant can assist in realizing those needs. It would appear that those projects resulted in, *inter alia,* Applicant allowing members of the local community who owned cattle and livestock in the area to bring their cattle onto the property during the daytime to graze. According to Mr. RYCROFT, each cattle owner would be given a permit which would record the number of cattle which may be brought onto the property each day and that permit would come with the following conditions:-

3.1 A cattle owner would be allowed to graze his or her cattle between sunrise and sunset and thereafter the cattle would be removed from the property and kraaled on the owner's land;

3.2 A herder would be present at all times to monitor the owner's herd of cattle;

3.3 Livestock would not be permitted to enter homestead areas;

3.4 All owners must attend monthly grazing meetings to discuss the maintenance of the herds and the condition of the Applicant's property;

3.5 No cattle would be kraaled on the Applicant's property;

3.6 Proper livestock maintenance was required, including, *inter alia*, dipping of all cattle, the supply of adequate water for the herd and de-worming;

3.7 No fires would be permitted anytime on the property;

3.8 All herders would ensure that their livestock refrained from causing any damage to the Applicant's trees.

[4] Because of the horrendous consequences attendant to overgrazing, like for instance, soil erosion, damage to surrounding crop plantations and conservation areas, a scientific measurement had to be devised to determine the number of livestock that were able to be sustainably grazed on the Applicant's property. For that reason, the grazing of cattle on the property had to be properly regulated and the number had to be carefully monitored. Mr. RYCROFT states that, as at the date when he deposed to the Founding

Affidavit, most permit holders owned between five and six cattle which, in terms of aforementioned present system, were brought onto the property in the morning and removed again in the evening.

[5] During 1997 and 1998 the Applicant outsourced all its silviculture operations, which consisted of planting and maintenance of trees, to a firm called Nyati Timber Contracting (Nyati). It was apparently during the tenancy of this firm that the First Respondent came to the picture. Mr. RYCROFT says that he was advised that during the second half of 2003, the First Respondent approached the director of Nyati, one GEORGE CATTERICK, who, at the time, lived on the Applicant's property, and requested that he be allowed to graze his herd of twenty (20) cattle with the Nyati herd. It is the understanding of Mr. RYCROFT that Mr. CATTERICK acceded to this request and First Respondent's cattle were brought onto the property, though the terms of the arrangement concluded by CATTERICK and the First Respondent are not known to Mr. RYCROFT as, at the time, CATTERICK had not disclosed this arrangement to the Applicant. No specific agreement was concluded between the Applicant and the First Respondent even when the former subsequently got wind of the arrangement. It is RYCROF's assumption that the Applicant simply accepted the presence of First Respondent's livestock upon the property

on condition that it refrained from causing any damage to the property.

[6] During 2005 the First Respondent introduced goats onto the property and RYCROFT is of the opinion that he, during 2006, again introduced more livestock onto the property. All this was done without the consent of the Applicant. RYCROFT intimates that it was during that year that, as a result of the growth in numbers of livestock and lack of sufficient control by the First Respondent's herdsmen, the First Respondent's herd began to cause damage to Applicant's plantation as it would be left unattended and allowed to roam freely all over the property. It also entered homestead areas belonging to members of Applicant's staff and to three of its neighbours and caused damage to their gardens and farming operations.

[7] The Founding Affidavit catalogues a number of overtures directed at the First Respondent with a view to resolving the problem. It would appear that the First Respondent persistently failed and/or refused to co-operate in these interventions.

[8] One such intervention consisted of a letter dated 17 January 2007 addressed by the Area Manager of the

Umfolozi area of Applicant's operations to the First Respondent, the relevant portions of which read as follows:-

> "In terms of company policy the kraaling of cattle on Mondi property is not permitted. We therefore would like to inform you that you are no longer allowed to kraal your livestock on Mtunzini Estate. We will however permit you to obtain a grazing permit which will allow you to graze the livestock during the day (from sun rise to sun set). There after you must remove your livestock from the estate. We will give you 30 days from Friday 19 January2007 to find alternative kraaling site off the property. From Monday 19 February your livestock may no longer be kraaled on the estate. The infrastructure and equipment for the kraal/enclosures may not be dismantled and removed as this belongs to Mondi Business Paper.
>
> For grazing, you have to abide by the rules stipulated on the grazing permits. These permits will be issued monthly from February 2007 there will be a monthly livestock meeting held to discuss grazing issues and renew permits. The same rules apply to all permit holders.
>
> Please take note of the following rules:
>
> A herd boy must be present at all times with your livestock to control them
> Livestock not to enter compartments that are under the age of three years old
> Livestock must stay away from homestead areas
> You are expected to attended the planned monthly grazing meeting
> Paddock and kraal areas are not to be use at all
> Proper livestock maintenance is required (examples: dipping, adequate water supply, de-worming)"

[9] When the First Respondent did not respond to the said letter, a second one was addressed to him on 28 January 2007 stating as follows:-

> "Referring the letter dated 17 January 2007, we would like to be informed in writing by Friday 27 July 2007, what your action plant is regarding the kraaling of your livestock on the Mtunzini Estate."

[10] On 26 February 2007 he responded to the two letters by means of a Minute written in IsiZulu, the English translation of which reads as follows:-

> "Responding to the letter you wrote to me about my cattle, I heard what you say but at the moment I'm still looking for the alternative place where I can keep my cattle. I don't have land because of sugar d if I don't get the place I will sell my cattle.
>
> I would like to request Mondi to give me more time to look for the place. Lastly I would also like to inform you that the cattle kraal doesn't belong to Mondi, it is my kraal."

[11] Notwithstanding the undertaking made in the aforesaid letter, First Respondent's livestock was not removed from the property. Instead, during August of 2007, he is said to have requested a meeting with Applicant's members to discuss a possible extension of time within which to find alternative land for his herd. What purports to be the Minutes of that meeting is annexed to the Founding Affidavit and reads as follows:-

> "Tobias requested the meeting. He is liaising with the Department of Agriculture to lease a farm in the Mkuzi area. He requested to be given more time to find a farm for his cattle.

> The number of live stock that he is keeping on the estate is increasing. He said that he has 70 head of cattle & 40 goats that he is kraaling at the farm (at Bridge 5).
> He has been informed the half the head of cattle to only 35 cattle (may not be more) & NO goats are permitted. Herd boys must be visible with all this animals. No more goats form Dec 2007 due to better prices at the end of the year.
>
> He has to discuss with Nyati regarding this herb boys occupying the house in the Nyati village.
>
> Tobias requires a monthly grazing permit. He also requires a register for t his cattle & a plan to reduce the head of cattle.
>
> By 23 November he has to inform Mondi by when he will move all this cattle off the property completely."

[12] However, according to RYCROFT, the First Respondent failed to do what, in terms of these minutes, he had been required to do.

[13] It was at this stage that the Applicant decided to involve members of the local community as well as its specialist in community liaison matters, one Mr. WALTER SHANDU. A meeting was then arranged for 23 April 2008 at which the First Respondent arrived, allegedly in the company of young men who were carrying firearms. The meeting was also attended by a member of Applicant's Asset Protection Unit, one MARTIN REICH, PHILIP MARX from Maxim Security, a representative of Nyati, HARRISON, Applicant's Mtunzini Manager, SHELAGH-ROSE PIENAAR and one NHLANHLA MHLONGO, Applicant's Community Engagement Facilitator. However, at this meeting little, if any, headway was made in

resolving the dispute between the Applicant and the First Respondent.

[14] Thereafter a number of attempts were made to hold meetings with a view to resolving the impasse, all in vain. This was apparently due to lack of co-operation from the First Respondent. Not even Applicant's involvement of the Inkosi of the area would coax the First Respondent into co-operating in the mediation efforts. Instead, he, on one occasion, reportedly approached the Inkosi and informed him that he would not meet with the Applicant's representatives and requested the Inkosi not to intervene in the matter.

[15] As a last resort and on the advice of Inkosi and the traditional Councilors, the Applicant addressed a letter to the First Respondent requesting him to remove all his livestock from Applicant's property within twenty four (24) hours. The original arrangement was that the Inkosi would personally hand the Applicant's letter to the First Respondent and that the Inkosi would also personally inform the First Respondent to remove the cattle. However, when the Inkosi's Induna called upon the First Respondent in order to deliver the letter, he refused to take delivery of the same.

[16] It was for that reason that a decision was taken that the letter be delivered to the First Respondent by the Sheriff of the Esikhawini Magistrate's Court. Indeed, on 21 October 2008 the letter was duly delivered upon the First Respondent by the said Sheriff. The deadline appointed in the letter came and went past, but First Respondent's livestock remained on the property. Thereafter, during November of 2008, the First Respondent addressed a letter to the Applicant, alleging that he was writing it in his capacity as Chairperson of the Second Respondent and stating that:-

> "I write this letter as a Chairperson for the cattles for the Gagwini Livestock Association.
> The cattles does not only belong to me but also to the community of Gagwini.
>
> I Mandlakayise Tobias Dludla, Chairperson of the Committee for cattles, am the one responsible for the cows.
>
> I would like to inform you that if you write such a letter again write to the farmers (owners of cattles) for the cattles not only me. We have had several meetings and we are done with Mondi. We were the following:
>
> Mr Mbatha
> Mr Mhlongo
>
> We agreed with them that we will write a letter and give recommendations of which we did. We are still waiting for Mondi's response (copy of letter attached). We have ten (10) years using Mondi's land."

[17] By 26 November 2008 the impasse between the parties remained unresolved triggering the launching of the present application on the said date for the following relief:-

"1.

> That the First and Second Respondents are directed to remove all of their livestock from the Applicant's immovable property situated in the Mtunzini area and depicted on the plan annexed to the Notice of Motion marked "X", within 48 hours of the service of this order.

2.

> That in the event of the Respondents failing to comply with paragraph 1 above, the Applicant, assisted by the Sheriff of Mtunzini, is authorized and directed to remove all of the First and /or Second Respondents' livestock from the Applicant's immovable property and transport it to the South African Police Services Pound in Vryheid."

[18] It would appear that on 24 December 2008 the matter came before my brother GYANDA J and that, on that occasion, the Application was not opposed and the Applicant was granted final relief. By 4 March 2009 the Respondents had given notice of their intention to oppose the Application. On the said date the matter was brought before Court and the order granted on 24 December 2008 was rescinded, the Respondents being given leave to deliver their Answering Affidavit within fifteen (15) days and the issue of costs being reserved for determination by the Court hearing the Application. Indeed, the Respondents subsequently filed their Answering Affidavit which was followed by Applicant's Replying Affidavit.

[19] When the matter was argued before me on 12 February 2010, I requested Ms Nicholson, who appeared for the Applicant, to distil, from the maze of facts which had been placed before me, the concise grounds upon which the Application was based and, in response, she submitted, as I understood her, that the Application is based on Respondents' breach of contract. To substantiate her submission, she referred to the conditions set out in paragraph 3 hereof upon which members of the local community were permitted to graze their livestock upon Applicant's property and argued that, like all other members of the local community, the Respondents were bound by those conditions. The Respondents committed breach of these conditions in that, as she further argued, they failed to ensure that their livestock refrained from causing damage to Applicant's property, they did not ensure that a herder was, at all times, present to control their livestock, they allowed their livestock to enter homestead areas, they failed, neglected and/or refused to attend monthly grazing meetings to discuss the maintenance of the herds and condition of Applicant's property and in that their livestock was kraaled on Applicant's property in violation of a stipulation contained in these conditions prohibiting such conduct.

[20] In their Answering Affidavit the Respondents placed in dispute a number of allegations made on Applicant's behalf in the Founding Affidavit. For the purpose of determining the issue before it, it would, however, not be necessary for this Court to attempt to resolve all those disputes. It would be sufficient for that purpose to deal only with those that are relevant to the determination of that issue.

[21] Applicant's allegation that the First Respondent only started grazing his livestock on the Applicant's property during the second half of 2003 has been denied. The First Respondent avers that he started grazing his livestock on Applicant's property as far back as in 1999 when, initially, he had obtained the consent of the then Applicant's Manager, one GAVIN EICHLER and later of Applicant's representative GEORGE CATTERICK which consent had not only entailed grazing rights but extended to a permission given to the First Respondent to use a dwelling on the property as his residence for himself and his herder employees and to a permission for him to construct a kraal where his cattle would, during the night, be housed.

[22] Regarding the permit system referred to in Applicant's Founding Affidavit, the First Respondent avers that he only heard about it for the first time during 2007 when the Applicant tried to unilaterally impose the same upon the

members of the local community, alleging that their livestock had caused damage to its property. According to the First Respondent, though the system was discussed, it was, however, never instituted.

[23] The damage allegedly caused to Applicant's property, the First Respondent further submits, had not been caused by Respondents' livestock but it had been caused by the cattle and horses that had strayed on and occupied Applicant's property.

[24] On the face of it, there is accordingly a dispute of facts between the parties regarding the facts which are crucial in the determination of the issue before Court. It is essential that the dispute be resolved as such resolution is indispensable in the determination of that issue.

[25] The first issue upon which there is an apparent dispute is whether an agreement regulating the Respondents' grazing rights upon the property was ever concluded between the Applicant and the Respondents and, if so, what were the terms of that agreement. As already alluded to, while the Applicant's Asset and Policy Manager insinuates that such an agreement was concluded during the second part of 2003, this is denied by the First Respondent who avers that he began grazing his livestock upon Applicant's

property in 1999 and that the first time he heard of the permit system was during 2007 when the Applicant tried to unilaterally impose it upon the members of the community. Though the subject of a permit system was discussed, the First Respondent further recalls, it was never instituted.

[26] There is also a dispute as to whether damage to Applicant's property had been caused by Respondents' livestock, the First Respondent's position being that the damage had been caused by the cattle and horses that had strayed onto the property.

[27] It is trite law that, save in exceptional circumstances, in motion proceedings the Applicant must make out his/her case for the required relief in his/her Founding Affidavit with the understanding that in motion proceedings:-

> "the Affidavits constitute both the pleadings and the evidence"[1]

[28] Perusing the paragraphs in Applicant's Asset and Policy Manager's Affidavit dealing with the Respondent's involvement in the permit system, it would appear, from the context, that the Manager bears no personal knowledge of such involvement. For instance in paragraph 23 he deposes as follows:-

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[1] Saunders Valve Co. Ltd v Insamcor (Pty) Ltd 1985 (1) SA 144 (T) at 149B-C;
See also Bayat and Others v Hansa and Another 1955 (3) SA 547 (N) at 553D

> "I am advised that during the second half of 2003 the First Respondent approached Mr. George Catterick, a Director of Nyati … to request that the First Respondent be allowed to graze his herd of 20 cattle with the Nyati herd. I understand that Catterick agreed to allow the First Respondent to bring his herd onto the Applicant's property."

and in paragraph 24 he continues to state as follows:-

> "I do not know the terms of arrangement between Catterick and the First Respondent. I can only assume that the same conditions which applied to the Nyati herd would apply to the First Respondent's cattle."

and in paragraph 26 he opines as follows:-

> "As I understand it, the Applicant tacitly accepted the presence of the First Respondent's herd of 20 cattle on condition that it refrain from causing any damage to the Applicant's property."

[29] In the succeeding paragraphs he alludes to a number of efforts which were made by or on behalf of the Applicant to bring the Respondents within the ambit of the permit system. It is history that none of those efforts succeeded.

[30] Regarding the allegation of damage to Applicant's plantations, the allegation is made for the first time as follows in paragraph 31 of the Founding Affidavit:-

> "By the end of 2006 as a result of the growth in numbers and lack of sufficient control by the First Respondent's herdsmen, the

> First Respondent's herd began to cause damage to the Applicant's plantations…"

The allegation is repeated as follows in following paragraph:-

> "The First Respondent's herd also destroyed a number of the Applicant's compartments that had been occupied… In the absence of any proper control, the First Respondent's herd entered the coppiced compartments and damaged the coppiced plants destroying a number of new shoots."

and in paragraph 33 the Applicant's Asset and Policy Manager deposed as follows:-

> "The First Respondent's herd also entered homestead areas belonging to members of the Applicant's staff and of those of its neighbours and caused damage to their gardens and farming operations."

[31] Apart from lack of specificity and particularity in the allegations made in the Founding Affidavit regarding the said damage, it does not appear as though the deponent has personal knowledge of the circumstances surrounding the said damage.

[32] In paragraphs 58, 59 and 61 of the Founding Affidavit, the deponent refers to incidents involving the cause of damage to Applicant's property by the First Respondent's livestock allegedly witnessed by the owner of a neighbouring

farm, one BRIGADIER JAMES WILLIAM PARKER. However, no confirmatory affidavit by the said BRIGADIER was annexed to the Founding Affidavit. The allegations of this damage accordingly remain hearsay.

[33] The allegations of threats made to Applicant's staff members by the First Respondent are made in paragraph 47 of the Founding Affidavit. They also, appear to have been reported to the deponent and it would therefore appear that he bears no personal knowledge thereof. On this issue again no confirmatory affidavits by the employees directly involved in the alleged incident accompanied the Founding Affidavit.

[34] Upon close scrutiny of the allegations made in the Founding Affidavit it is therefore evident that the allegations that are crucial in the determination of the issue before Court are based on hearsay evidence which is inadmissible. The Applicant must stand and fall by the allegations and the evidence made in its Founding Affidavit and since the evidence upon which its case is based is hearsay evidence, it must follow that in its Founding Affidavit it has not made out a case for relief based on the alleged breach of contract by the Respondents.

[35] Neither, in my considered view, can a number of Confirmatory Affidavits filed contemporaneously with

Applicant's Replying Affidavit help rescue Applicant's case. As a general rule, the Applicant must stand and fall by its Founding Affidavit and the allegations and evidence contained therein and that, save in exceptional circumstances, a defect in the allegations made in the Founding Affidavit cannot be cured by attaching Confirmatory Affidavits in the Replying Affidavit which ought to have formed part of the Founding Affidavit. Having considered the facts of the present case, these facts do not fall within the recognized exceptions to this general rule.[2]

[36] In his Answering Affidavit the First Respondent raised a special defence based on the provisions of the Extension of Security of Tenure Act (ESTA)[3], submitting that, in respect of the Applicant's property, he fell within the definition of *"Occupier"* as set out in section 1 of ESTA, that the said legislation applied to such occupation and therefore that any proceedings brought against him ought, in terms of the same, to have been instituted in the Magistrate's Court in whose area of jurisdiction the land concerned is situated or in the Land Claims Court and that the utilization of this Court for that purpose could only have occurred with the consent of all the parties. As no such consent had been sought from or given by the Respondents in this matter, he further submitted, this Court lacks jurisdiction to entertain the

[2] The Master v Slomowitz 1961(1) SA669(T)
[3] Act No.62 of 1977;

Application and to grant relief sought by the Applicant herein.

[37] Having perused Applicant's response to First Respondent's special defence, I have been driven to the conclusion that the disputes of fact between the parties on the issue are such that the issue cannot be resolved on the papers and that it would appear that, for the proper resolution thereof, the matter would have to be referred for the hearing of oral evidence. However, in the view I take on the allegations which are crucial for the determination of the main issue herein, I have found it unnecessary to deal with issues pertaining to the special defence.

The Application is accordingly dismissed with costs.

Date of Hearing : 12 February 2010

Date of Judgment	:	15 March 2010
Counsel for Applicant	:	Adv. JF Nicholson
Instructed by	:	Shepstone & Wylie
Counsel for Respondents	:	Adv. MB Pitman
Instructed by	:	Livingston Leandy Incorporated