

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: LCC74/2014

Before: CANCA AJ

Heard: 09 July 2014

Judgment delivered on 28 July 2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
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In the matter between:

VELAPHI ISACK KHUMALO

APPLICANT

and

GEFFERT PRETORIUS

FIRST RESPONDENT

THE POUND KEEPER OF MONDLO POUND

SECOND RESPONDENT

JUDGMENT

[1] This is an application for the return of 18 head of cattle which the applicant alleges were unlawfully impounded by the respondents on or about 6 May 2014.

[2] The applicant, Velaphi Isack Khumalo, a farm dweller, lives with his family on Portion 6 of the farm Goed Hoop No. 431, situated in the District of Vryheid, KwaZulu-Natal. The farm is commonly known as Waterval.

[3] The first respondent, Geffert Pretorius, is a cattle farmer who conducts his farming operations on Waterval and certain farms adjacent to Waterval.

[4] The second respondent, the Pound Keeper of Mondlo Pound, does not oppose the application and has undertaken in an affidavit to abide the decision of this Court.

[5] The main point of contention between the parties is whether or not the applicant's cattle were impounded lawfully. The applicant contends that because he was not given the requisite notice that the cattle would be removed to a pound, the respondents' actions were unlawful. The first respondent, in response, avers that he had given the applicant more than adequate notice of his intended action and submits further that the applicant has failed to prove the facts necessary to justify a final order in this matter.

[6] It is necessary now to examine the facts that gave rise to the dispute amongst the parties in closer detail.

[7] The applicant avers that the first respondent, together with his herdsmen, personally removed his 18 head of cattle from their designated grazing area on 5 May 2014 and removed them to the pound the following day. The applicant contends, firstly, that he was not given the 72 hour notice prescribed by section 5 of the KwaZulu-Natal Pound Act No.3 of 2008 (the “Pound Act”) read with section 7 of the Extension of Security of Tenure Act No. 62 of 1997, consequently, in the applicant’s view, the cattle were impounded unlawfully and secondly, that he was in peaceful and undisturbed possession of the cattle at their removal. Therefore, according to the applicant, the first respondent’s removal of the cattle to the pound and the second respondent’s act of keeping the cattle, amounted to spoliation.

[8] The first respondent submits that the cattle were trespassing on one of the neighbouring farms he leases when he impounded them on 4 May 2014. According to him, the cattle were removed to the pound on 8 May 2014 following the expiry of the 72 hour notice period and not on 6 May 2014 as averred by the applicant. Therefore, the first respondent contends that the applicant was not in possession of the cattle at the relevant time and consequently, has not met an essential requirement for a spoliation order, namely that of possession. The first respondent also contends that he had given adequate notice of his intention to remove the cattle to the pound by verbally informing a member of the Stock Theft Unit of the South African Police

Service ('SAPS') and one of the applicant's sons, Njabulo, of his intended action on 5 May 2014. In addition, the first respondent submits that he had also caused his driver, Mpheni Nxumalo, to serve a written notice of his intention to remove the cattle to the pound on the applicant's youngest son, Sifiso, on the day he impounded them, namely 4 May 2014.

[9] Section 5(1) of the Pound Act reads as follows;

“The owner of land upon which any animal is found trespassing may seize such animal for impounding: Provided that such animal may not be removed to a pound before notice is given to the owner in writing no less than 72 hours prior to the removal to the pound.”

The first respondent does not own Waterval and the neighbouring farms on which he conducts his farming operations. He leases them. Section 1 of the Pound Act defines “owner” in relation to land to include a lessee of such land. The first respondent was therefore obliged, in terms of the provisions of section 5 (1) of the Pound Act, to have given the applicant at least 72 hours written notice of his intention to remove the cattle to the pound.

[10] On the first respondent's own version, he gave verbal notices of his intentions to a member of the Stock Theft Unit of the SAPS and to the first applicant's son, Njabulo. The only notice, for purposes of this judgment, which, according to the first respondent, was in writing, was the one allegedly served on the applicant's youngest son, Sifiso on the day the cattle were impounded.

Sifiso denies having been served with that notice or having encountered the first respondent or his driver on the day in question.

[11] The proviso in section 5(1) of the Pound Act refers to the owner of the trespassing or straying animal that is to be removed to the pound. The definitions' section of the Pound Act defines an owner, in relation to an animal, to mean "*an owner who is known, or whose identity, with the exercise of reasonable diligence, can be ascertained, and includes the agent of the owner or other person having the lawful custody or possession of such animal.*" It is clear from the papers that the first respondent knew that the cattle belonged to the applicant and, because he was the lessee of the farm on which the applicant lived, it can be assumed that he knew where the applicant's homestead was situated on the farm. It would, in my view, have been easy for the first respondent to have driven to the applicant's homestead in order to deliver the notice to the applicant or any adult at his homestead.

[12] However, rather than do that, the first respondent elected instead to give the written notice to the applicant's youngest son, Sifiso, whom he knew, according to his own admission, works on a pig farm in the district during the week and, on the day in question, was some distance away from the cattle.

[13] Mr Snyman, for the first respondent, argued strongly that there was a serious dispute of fact about whether or not proper notice was given. He contended that the issue of notice was crucial as it was directly relevant to the second requirement for a spoliation order, namely that the applicant must

have been deprived of possession against his will and without resort to a legal process.

[14] Given the conclusion I arrive at in this judgment, it is not necessary for me to rule on whether or not the dispute regarding notice necessitates the referral of this matter for the hearing of oral evidence or to trial.

[15] Sifiso, cannot be said to have been in lawful custody or possession of the cattle as prescribed by section 5(1) of the Pound Act. The seventh edition of Black's Law Dictionary defines possession as "*The fact of having or holding property in one's power; the exercise of dominion over property*" and custody as "*The care and control of a thing for inspection, preservation, or security.*" The New Shorter Oxford English Dictionary defines possession, among others, as "*visible power or control over a thing*" and custody as "*Safe-keeping; protection; care; guardianship*". Inherent then in the definition of possession is the requirement that the possessor must exercise some control over the thing or things he or she possesses. On the first respondent own version, Sifiso worked on a pig farm in the district, was some distance from the cattle and, according to him, probably on his way to play soccer, when he was allegedly served with the notice on the day the cattle were impounded. Sifiso, therefore cannot be said to have been in control of the cattle. I find that Sifiso was not in lawful custody or possession of the cattle when the first respondent impounded them and consequently, proper notice of the intended removal of the cattle was not given to the applicant by the first respondent.

[16] In the light of the outcome I have reached, it not necessary, to deal with the first respondent's contention that the applicant has failed to prove facts to justify a final order.

[17] The applicant seeks a costs order against the respondents on a punitive scale given their conduct. It is settled law that this Court will not order costs in the absence of special circumstances. See *In Former Highlands Residents 2000* (1) SA 489 (LCC) at 498 B and *Haakdoornbult Boerdery CC and Others v Mphela & Others* 2007 (5) 596 (SCA) at 618.

[18] The applicant has not established a case that would justify me departing from the general rule in this Court not to award costs to the victorious party in the absence of special circumstances. The fact that the applicant was deprived of the possession of his cattle for approximately 3 months, whilst inconvenient to him and his family, does not amount to a special circumstance. The applicant has also not advanced any evidence, in the papers, of conduct by the respondents that would warrant a costs order against them. The first respondent was exercising his right to impound cattle he thought were trespassing on his land and the second respondent was obliged, in terms of section 11 of the Pound Act, to accept the cattle once they were brought to the pound. Section 11 of the Pound Act states that "*A pound keeper may not refuse to accept an animal for impounding.*" In the circumstances, I am not convinced that the respondents conduct attracts the punitive costs order sought.

[19] In the result I make the following order:

1. The first and second respondents, jointly and severally, are hereby directed to restore possession to the applicant, at his homestead on Portion 6 of the farm Goed Hoop No. 431(Waterval), Vryheid, KwaZulu-Natal, of his cattle currently kept at the Mondlo Pound by the second respondent within 24 hours of service of this order on them.
2. There is no order as to costs.



M.P. CANCA, AJ.

Appearances:

For the Applicant :	Advocate MM Chithi.
Instructed by:	MC Ntshalintshali Attorneys, Durban.
For the First Respondent:	Advocate C.J Snyman.
Instructed by :	Uys & Partners, Vryheid.