IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: 158/2015

Before: The Honourable Rajab-Budlender AJ

Heard on: 02 August 2016.

Delivered on: .....

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDOES: YES/-
(3) REVISED: YES /

15/09/2016
DATE

SIGNATURE

In the matter between:

MANDLA ELPHAS NGCOBO — First Applicant

MESHACK NGCOBO — Second Applicant

and

JOHAN JOHNSON — Respondent

JUDGMENT

RAJAB-BUDLENDER AJ

Introduction

[1] This is an application in which the Applicants seek an order restoring them to peaceful, undisturbed and unrestricted access to all the grazing camps which they allege they have historically been entitled to utilise at the farm owned by the Respondent, referred to as Subdivision 2 of the Farm B. [8....], KwaZulu-Natal Province ("the farm.")

[2] The Respondent counter claims as follows:

[2.1] That the Applicants be ordered to remove their cattle from the unauthorised camps on the farm;

[2.2] That the Applicants be ordered to restrict their cattle to the camp allocated to them, being the camp in which their houses are allocated and referred to as Camp 1 and 2;

[2.3] That, in terms of section 6 and 7 of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"), an agreement was reached between the Applicants and previous owners of the farm in terms of which the Applicants would restrict their animals for grazing purposes, to the camp in which their houses are situated.

[3] The farm comprises three portions - A, B and C. Division C is owned by a Mr Flip De Jager. Division A is owned by the Respondent which he purchased from his father, Mr MJ Jansen. Division B was owned by Mr

Gert Jansen whose wife, Mrs Jo Jansen took over ownership of Division B, on his death. The Respondent subsequently bought Division B from Mrs Jansen's heirs. The Respondent therefore presently owns Divisions A and B of the farm. The Applicants allege that they are entitled to graze their livestock throughout the farm, on both Division A and B, as they consider necessary. For ease of reference, the parties provided the court with a map marked Annexure "J1" of the farm on which the various camps have been identified.

[4] The Respondent obtained an interim order in the Magistrates Court in terms of which the Applicants are required to graze their livestock in Camp 1 of the Farm, which comprises approximately 91 hectares. During the hearing of this matter, the Applicants' legal representative informed me that the Applicants have complied with this order and have done so since 4 February 2016, the date of the interim order made by the Klipriver Magistrates Court, Ladysmith. It is therefore safely assumed that it is physically possible for the Applicants to graze their existing livestock in Camp 1 – notwithstanding the fact that they may wish to have more land on which to graze their livestock.

The nature of the dispute

[5] It is common cause that the Respondent owns the farm and the Applicants have been residing on the farm since they were born. It is further common cause that the Applicants have always had an

agreement with the owners of the land. However, it is the nature of that agreement which is at issue in this case.

6] At the outset I point out that this is not an eviction application, nor have the Applicants applied to be declared labour tenants under the Land Reform Labour Tenants Act 3 of 1996 ("The Labour Tenants Act.") Instead, the question before this Court is whether the Applicants are entitled to graze their livestock on all portions of the farm, or whether they are limited to grazing their livestock in Camp 1 and in Camp 2 in exceptional circumstances, and as agreed from time to time with the Respondent.

The Relevant Facts

[7] According to the Respondent, the farm was previously owned by his father, MJ Jansen and his father's brother, Gert Jansen. Together they farmed all three portions of the land. The Applicants' father, Fanjan Ngcobo, was employed by MJ Jansen and was allowed 5 heads of cattle, 1 horse and 10 goats. During the Mid 1980's, the late Gert Jansen and the Respondent's father decided to split the farming operation. Gert Jansen continued to farm Boschfontein B with Fanjan Ngcobo (the Applicants' father) remaining in his employ. After their father's death the Applicants were employed by Gert Jansen until his death in 1994 and thereafter by his late wife, Jo until she left the farm in 2002.

[8] The Applicants are biological brothers. Both are unemployed and reside at the farm. According to the Applicants they were born on the farm and have always resided on the farm. This is not disputed. They allege that they have no other home other than *the* farm and have always been allowed to keep livestock on the farm and to graze livestock on the farm. They do not crop the land but those areas which they previously used for cropping have been turned into additional grazing areas. Although the Applicants describe themselves as both being unemployed, the Respondent alleges that the Second Applicant is employed at the neighbouring farm - an allegation which is not disputed on the papers.

[9] The Applicants allege that their parents resided on the farm and are now deceased and buried at the farm. They allege further that their parents lived at the farm under the following conditions:

[9.1] They were permitted to build their own home on a certain piece of land which was allocated to them for that purpose;

[9.2] They were also permitted to graze livestock on the farm as well as to crop on the farm in specified areas and for their domestic consumption;

[9.3] In consideration for the above, they provided labour to the previous farm owners.

[10] This is denied by the Respondent who states that the Applicants and their parents were at all times paid a monthly salary of R5 with the additional benefit of being allowed to live on the farm and own 12 head of cattle. This is confirmed in the affidavit of the Respondent's father, MJ Jansen, attached to the papers who employed the Applicants' father from about 1965 until he retired, and concluded an agreement with him to this effect. The Applicants have not placed this evidence in dispute.

[11] Moreover, no allegation is made by the Applicants that they themselves provide any labour to the present owner or that they have ever done so.

[12] It is undisputed that the Applicants currently cumulatively have 126 head of Cattle, 66 Goats, 20 sheep and 11 horses and that they currently graze these animals on an area which amounts to almost 60% of the farm.

[13] The Respondent alleges that this number of livestock is in breach of the agreement which the Applicants had with the late Mrs Jo Jansen who owned the farm prior to the Respondent, which allowed each Applicant only 12 livestock each and that the agreement extended to the Respondent when he took over ownership of the farm. The terms of the Applicants' agreement with Mrs Jansen is confirmed in an affidavit by Mrs Jansen's son Frans Jansen, who assisted Mrs Jansen with the running of the farm and on occasion acted as interpreter in conversations between his mother and the Applicants.

[14] Mr Frans Jansen also confirms that the Applicants were in the employ of his mother until 2002 as cattle herders. During this time, they were allowed 12 head of cattle each and were paid a monthly salary and a bag of mielie meal. The agreement between Mrs Jansen and the Applicants was that if the numbers of livestock grew above 12, they would sell off the additional livestock so that the numbers remained at 12. The Applicants have not disputed this.

[15] In 2015, when the Respondent purchased the farm, he found that the Applicants were utilising all areas of the farm, despite the fact that he understood that they were only allowed to use Camp 1 and possibly 2. He therefore began re-erecting old fences and gates in the places where they previously stood, in order to ensure that the Applicants cattle remained on Camp 1. The Applicants allege that this constituted a breach of their agreement. I now turn to evaluate the agreement, between the parties.

The Agreement between the Parties

[16] There is clearly a dispute between the parties as to what the terms of the agreement between the Applicants and Mrs Jansen and later, the Respondent was.

[17] On the Applicants' version, they were entitled to live in the houses their father had built in Camp 1 and to graze as many livestock as they wished throughout the farm – without restriction.

[18] In contrast, the Respondent alleges that the Applicants have always had an agreement with previous owners of the farm, and with him in his capacity as the current owner, that they would be limited to Camp 1 and in exceptional circumstances to Camp 2. According to the Respondent, the agreement dates back to when the Applicants' father Mr Fanjan Ngcobo began working at the farm and was employed by the Respondent's father, Mr MJ Jansen. Mr Ngcobo has since passed away but Mr Jansen is alive and has made a confirmatory affidavit in which he confirms that the agreement with Mr Ngcobo was that he would work for Mr Jansen and would be paid a salary. In addition, he was allowed 5 head of cattle, 1 horse and 10 goats which were allowed to graze in the area in which his house was – now referred to as Camp 1. Mr Ngcobo was also entitled to harvest a small piece of land. There is nothing on the papers before me to dispute the terms of this agreement, as confirmed by Mr Jansen.

Whether this matter raises a *genuine dispute* of *fact*

[19] The Applicants chose not to file a replying affidavit. In argument, their attorney stated that they had consciously taken a decision not to file a replying affidavit, in case to do so would occasion a postponement of the matter which had been set down for hearing as soon as the date for filing a replying affidavit had passed. The Applicants' attorney told the court that he was expecting a courtesy reminder from the Applicants that the replying affidavit was due and that in the absence of such a reminder, his client had not filed a replying affidavit in time.

[20] The Applicants' attorney did, however file comprehensive heads of argument after the matter had been set down- some of which attempted to include factual evidence not previously adduced on the papers. The Applicants' attorney accepted that he was not entitled to do so in written submissions or in oral argument before the Court, and that he was constrained to arguing the matter on the papers before the Court. He also accepted that he could have filed a replying affidavit late and asked for condonation from the Court for the late filing thereof. I pause to note that the Applicants have throughout these proceedings had the benefit of legal representation.

[21] The failure to file a replying affidavit leaves this Court with undisputed evidence in the answering affidavit.

[22] Upon being questioned by the Court as to the effect of the undisputed facts, the Applicants' attorney sought a referral of the matter to oral evidence. The Respondent's attorney objected to such a referral on the grounds that it was not necessary. I am inclined to agree with the Respondent's Counsel in this regard.

[23] These proceedings are motion proceedings and the Applicants chose to bring them as such. The Applicants moreover, consciously decided not to file a replying affidavit placing the facts in the answering affidavit in dispute. It is trite that where material disputes of fact arise in proceedings on notice of motion and relief that is final of nature is claimed, it may be granted only if the factual allegations in the

Applicant's affidavits that have been admitted by the Respondent together with the facts alleged by the respondent, justify the granting thereof, unless there are doubts whether the disputes raised are real, genuine or bona fide or are so far-fetched or untenable that they stand to be rejected merely on the papers (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – I. See also: *National Director of Public Prosecutions v Zuma 2009 (2) SA 17 277 (SCA) at para 26.)*

[24] In this case, the Applicants' version of the agreement between themselves and Mrs Jansen (and subsequently the Respondent) is that they are entitled to own as many livestock as they wish, and that they may graze their livestock throughout the farm- in an area amounting to approximately 57% of the farm, notwithstanding the fact that this would preclude the owner from grazing his own cattle on the farm.

[25] In contrast, the Respondent's version, confirmed on oath by his father, is that the agreement has always been that the Applicants {and their father before them} were entitled to reside on the land and to crop and graze a limited number of livestock in Camp 1 with access in exceptional circumstances, and by agreement with the owner, to Camp 2. The Respondent's version is not *so far-fetched or untenable* so as to justify a departure from the established principle in motion proceedings as set out in *Plascon-Evans* referred to above. If anything, it is the Applicants' version which is unlikely to be correct. It is difficult to believe that Mrs Jansen, the previous owner, would have agreed to give the Applicants

free access to all parts of the farm for grazing of an indeterminate number of livestock, in perpetuity and without any written recording of such an agreement.

ESTA

[26] The Respondent appears, by his counter claim, to accept that the Applicants are occupiers under ESTA This is, in my view, correct. In argument, the Applicants' legal representative argued that ESTA does not apply to these facts and that the Applicants are labour tenants. However, no evidence has been placed before me which would support a finding that the Applicants are labour tenants as contemplated by the Labour Tenants Act, nor has the Applicant sought such a declaration from this Court in its notice of motion. The Applicants' legal representative indicated during argument that the Applicants intended to bring another application in which they will seek to be declared labour tenants. That application is not before me and I therefore do not pronounce on the status of the Applicants as labour tenants.

[27] However, I am required by the counterclaim, to make a finding as to whether the Applicants are occupiers under ESTA To my mind, it is clear that the Applicants are indeed occupiers as contemplated by ESTA An 'occupier' is defined in ESTA as meaning:

> "a *person residing on land which belongs* to *another person, and who has* or *[sic]* on *4 February 1997 or thereafter had consent or another right in law to* do *so, but excluding-*
>
> *(a)*
>
> *(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including* a *person who works the land himself or herself and does not employ any person who is not* a *member of his or her family; and*
>
> *(c)* a *person who has an income in excess of the prescribed amount."*

[28] It is undisputed that the Applicants reside on the farm in question, with the consent of the Respondent. The Applicants state that they are unemployed and the Respondent alleges that the Second Applicant is employed at a neighbouring farm. No evidence has been placed before me that the Second Applicant earns more than the prescribed maximum salary of R5000 as contemplated in (c) of the definition of occupier.

[29] I am of therefore of the view that the Applicants are occupiers under ESTA and as such, they are subject to the rights and obligations set out in sections 6 and 7 of ESTA.

[30] In this regard, section 6(1) of ESTA provides *inter alia* that an occupier:

> *"(1) shall have the right to reside on and use the land* on *which he or she resided and which he or she used after 4 February 1997, and to have access to such services as had been agreed upon with the owner of person in charge, whether expressly or tacitly.*

[31] I am of the view that an agreement was reached between the Applicants and the previous owner of the farm, Mrs Jo Jansen in terms of which the Applicants were entitled to graze their livestock on Camp 1 and in

exceptional circumstances, on Camp 2 by agreement with the farm owner. When the Respondent assumed ownership of the farm in 2015, he stepped into the shoes of Mrs Jansen and the agreement continued inforce.

Costs

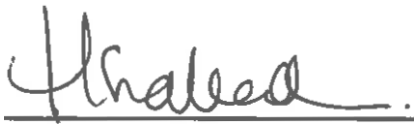
[32] In keeping with the practice in this Court not to award costs in matters such as these, which are brought in the exercise of a constitutional right and in the genre of social litigation, I make no order as to costs. *(Department of Land Affairs v Witz: In re various portions of* Grassy *Park 2006 (1) SA 86 (LCC) at para 31; Hlatswayo and Others v Hein 1999 (2) SA540 (LCC) at paras 15-26.)*

[33] The following order is therefore made:

[33.1] The application is dismissed.

[33.2] The Applicants are required to restrict their animals for grazing purposes to the camp on which their houses are situated, being Camp 1. In exceptional circumstances and by agreement with the farm owner, the Applicants may also graze their animals on Camp 2.

[33.3] No order as to costs.



Rajab-Budlender N

Acting Judge of the Land Claims Court

Appearances:

For First and Second Applicants	: Mr Ian Blose
Instructed by	: Blose Phindela Incorporated
For Respondents	: Mr Jonathan Lievaart
Instructed by	: D & K Attorneys