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

CASE NO. 259/2018

In the matter between:

SANGO MAVUSO **Applicant**

and

MRS MDAYI/CHAIRPERSON **First Respondent**

PICARDY COMMUNAL FARM COMMITTEE **Second Respondent**

RESIDENTS OF PICARDY FARM, BALFOUR **Third and Further Respondents**

JUDGMENT

Bloem J.

[1] The issue in this application is whether or not the applicant reasonably apprehended a fear that his possession of a farm was threatened with unlawful conduct. The first and second respondents contended that the applicant failed to specify any unlawful conduct that may have caused him to apprehend fear. The applicant contended that unlawful acts were specified.

[2] The applicant is a practising attorney who is also a businessman and a farmer. The first respondent is an adult female residing on a farm commonly known as Picardy in the district of Balfour. She is also the secretary of the Picardy Communal Property Association (the CPA) which was registered in terms of the Communal Property Association Act.[1] The third and further respondents were described by the applicant as "*the residents of Picardy Farm, Balfour, Eastern Cape Province whose full and further particulars are not known to me but are the*

[1] Communal Property Association Act, 1996 (Act No. 28 of 1996).

people who reside on Picardy Farm and who are currently threatening to evict and dispossess me." Mr Duminy, counsel for the applicant, conceded at the hearing that no relief could possibly be granted against the third and further respondents, primarily because they were not properly identified. That concession was properly made. Our courts do not grant orders against unidentified respondents.[2]

[3] On 3 February 2018 this court issued a *rule nisi* calling upon the respondents to show cause on 13 February 2018 why the following final order should not be issued:

"*1.1 that the Respondents not to interfere with and/or disturb the Applicant's possession of that portion of Picardy Farm, Balfour, Eastern Cape Province that he currently occupies;*

1.2 that the Respondents be and are hereby interdicted and restrained from:

1.2.1 entering onto the portion of Picardy Farm, Balfour, Eastern Cape Province that is currently occupied by the Applicant and/or his staff and/or his livestock and/or farming operation;

1.2.2 being within 50 metres of that portion of Picardy Farm, Balfour, Eastern Cape that is currently occupied by the Applicant and/or his staff and/or his livestock and/or farming operation;

1.2.3 threatening, intimidating, harassing, harming and/or causing any other person to threaten, intimidate, harm and/or harass the Applicant or his property and possessions in any way;

1.2.4 interfering with the Applicant's access to Picardy Farm, Balfour, Eastern Cape Province;

1.2.5 destroying, damaging or defacing the Applicant's premises and property at Picardy Farm, Balfour, Eastern Cape Province;

1.2.6 inciting violence against the Applicant, his staff and/or his property at Picardy Farm, Balfour, Eastern Cape Province;

1.2.7 removing, unlawfully impounding or otherwise interfering with the

[2] *Rhodes University v Student Representative Council of Rhodes University and others* [2017] 1 All SA 617 (ECG) at 647e.

Applicant's livestock including the Applicant's cattle and goats at or near Picardy Farm, Balfour, Eastern Cape Province;

1.2.8 preventing the Applicant's livestock from grazing at Picardy Farm, Balfour, Eastern Cape Province;

1.2.9 evicting the Applicant, his possession and/or the Applicant's livestock from Picardy Farm, Balfour, Eastern Cape Province.

1.3 that the sheriff of this Honourable court, assisted by the South African Police if necessary, be and is hereby authorised and directed to serve this order on the Respondents immediately and to take all steps necessary to prevent the Respondents from breaching this order in any way and are further duly authorised to arrest and detain any of the Respondents should they breach the provisions of this interdict and order and to bring them before this Honourable Court forthwith.

1.4 that the Respondents are to pay the costs of this application on an attorney and client scale.

2. that paragraphs 1.1, 1.2 and 1.3 above will have immediate operation pending the return date … " which was extended from time to time.

[4] It is common cause that the applicant was born on the farm. His mother was the headmistress of the farm school where the applicant was schooling until he had to leave to further his primary, secondary and tertiary education. He returned to the farm during school holidays. He alleged that in 2012 he purchased the "*rights in and to the portion of the land at Picardy Farm*". After securing gainful employment he purchased some cattle and goats during 2012. They are being looked after on the farm. He invested in the land by purchasing stock handling equipment and erecting fences around the portion of the land in respect of which he purchased rights. According to the applicant the farm belonged to the government of the Republic of South Africa. Since his employment he does not live on the farm on a permanent basis. He would attend to the farm over some weekends and when he is on vacation. I shall hereinafter refer to the land on which the Picardy Farm is

situated as “the land” and the portion of Picardy Farm which the applicant occupies as “the farm”.

[5] In 2014 some residents informed him that the community had taken a decision that he should vacate the farm. He objected to the decision on the basis that he “*was one of the original communal dwellers of the farm*”. Nothing happened for approximately four years until 23 January 2018 when he received a call from a man who identified himself as a member of the “Picardy Farm” who instructed him to attend a meeting with members of the CPA on 25 January 2018. When he enquired about the purpose of the meeting he was told that everything would be explained to him at the meeting. He explained that he was unable to attend a meeting on such short notice as he had to travel approximately five hours from Mthatha to the farm. The applicant thereafter telephoned his farm labourer to enquire what was happening on the farm. The farm labourer was unaware of any problems on the farm.

[6] On 24 January 2018 the applicant received another call, again from someone who identified himself as a community representative. He told the applicant to avail himself at a meeting on the land on the following day as a decision would be taken that he, his livestock and other possessions should leave the farm. The applicant addressed a letter to the chairperson of the CPA wherein he advised that he could not attend the meeting. He requested that the meeting be rescheduled and that he be provided with a copy of the agenda for the meeting. He forwarded a copy of the letter to one of his farm labourers, Monwabisi Makhaluza, with the request that he attend the meeting. After the meeting Mr Makhaluza telephoned the applicant and reported to him that he “*had been instructed to vacate the land with [his]*

livestock and possessions".

[7] Mr Makhaluza contacted the applicant on 1 February 2018 and informed him that he (the applicant) was required to attend a meeting on Saturday, 3 February 2018 with a committee of residents of the land. When the applicant made enquiries, through Mr Makhaluza, about the time of the meeting, he was informed that the first respondent had stated that members of the community were tired of his attitude and had decided that he must vacate the farm by no later than that Saturday "*or else they will eject me and my possessions and impound my livestock*". Mr Makhaluza has deposed to a confirmatory affidavit, the allegations of which I shall deal with later. Based on the above the applicant alleged that the respondents "*unlawfully and illegally threatened to dispossess me of my undisturbed possession of that portion of Picardy Farm that I occupy and utilise*".

[8] The chairperson of the CPA, Venus Ngcuka,[3] deposed to the main answering affidavit. She alleged that during or about 1982 the farm was expropriated from its white owners by the then Ciskei Government. Prior to the expropriation the owners allocated one farmhouse to one Philemon Yeko. During or about 1984 and after the death of Mr Yeko, the farm manager allocated the aforesaid farmhouse to the applicant's mother, amidst protest from the Yeko family. The applicant's mother retired and left the farm during or about 2011. It was only during 2012 that the applicant was seen on the farm after he "*had left the farm whilst an infant*". In 2014 the applicant was seen on the farm more often. Later that year he took his own livestock and cattle herder, Mr Makhaluza, to the farm. Members of the CPA enquired from the applicant how he, as a non-member of the

[3] Noluthando Mdayi is not the chairperson of the CPA, as alleged by the applicant. Mrs Mdayi alleged that she is the secretary of the CPA.

CPA, came to be farming on the land belonging to the CPA. He refused to speak to them other than to state that he was born on the land. Members of the CPA approached the Magistrate at Seymour, Legal Aid South Africa, the South African Police Service and the Department of Land Affairs to assist them with the applicant's unwanted presence on the farm. The CPA lacked financial resources to instruct attorneys to arrange for the applicant's eviction from the farm.

[9] In the meantime the applicant continued taking livestock to the farm "*without enquiring from [the CPA] or [requesting its] consent as the owner of the land*". On or about 22 December 2017 the applicant was seen taking a tractor onto the farm to plough the land. That conduct infuriated members of the CPA. The local councillor advised them to address a letter to the applicant inviting him to a meeting. The applicant requested that a meeting, scheduled to be held on 25 January 2018, be held on 27 January 2018. He nevertheless failed to attend that meeting. Mr Makhaluza attended the meeting on 27 January 2018. He handed a letter, written by the applicant, to members of the CPA wherein the applicant apologised for not being able to attend the meeting on 25 January 2018 but said nothing about the meeting of 27 January 2018. It was resolved to call another meeting on 3 February 2018 to enable the applicant to attend. Mr Makhaluza was told to inform the applicant about the meeting on 3 February 2018. The applicant did not attend that meeting. Instead he instituted this application. After the issue of the *rule nisi* the application papers were served on Mrs Mdayi in her capacity as the "*chairperson*" of the CPA.

[10] In the answering affidavit the first and second respondents raised three points *in limine*. The first was that the CPA was not joined as a party. The second, which is

related to the first, was that the second respondent, which was cited as the Picardy Communal Farm Committee, is a non-existent entity and accordingly has no *locus standi*. The third was that this court did not have jurisdiction to entertain the application by virtue of the provisions of the Extension of Security of Tenure Act[4]. At the hearing Mr Mpahlwa, counsel for the respondents, did not pursue any of those points *in limine*. I will accordingly not deal with them, save to point out that Mr Mpahlwa correctly accepted that, although the applicant cited the Picardy Communal Farm Committee as the second respondent, the applicant intended to cite the CPA which was before the court.

[11] The applicant seeks a final interdict. An applicant seeking an order for a final interdict must show a clear right (in the sense of a right clearly established);[5] an injury actually committed or reasonably apprehended; and the absence of any other satisfactory remedy available to the applicant. For the grant of a final order all three requisites must be present. Once the applicant has established the three requisites, the scope for refusing relief is limited.[6]

[12] Mr Mpahlwa submitted that the applicant failed to establish each of the three requisites, particularly the first two. I shall, for the sake of convenience, deal with the second requisite first, namely whether or not an injury has actually been committed or that there is a reasonable apprehension of such an injury or harm. There is no evidence that the applicant or any of his farm labourers or property has been injured or harmed by the respondents. The test whether there exists a

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[4] Extension of Security of Tenure Act, 1997 (Act No 62 of 1997).
[5] *Edrei Investments 9 Ltd (In liquidation) v Dis-Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) at 556C-D.
[6] *Hotz and others v University of Cape Town* 2017 (2) SA 485 (SCA) at 496H-497B.

reasonable apprehension of harm is objective.[7] An applicant must set out facts to enable the court to determine whether his or her fears are well-grounded. The applicant alleged that Mr Makhaluza expressed "*fear of being injured and harmed by the Respondents should he attempt to protect [the applicant's] premises, livestock, crops and property at the farm*". The applicant expressed the fear that "*should I attend at the farm I will face harassment, intimidation, threats and violence to my person and property at the hands of the respondents. The Respondents have the intention, means and ability to forcibly evict me and livestock from the farm and to do physical harm to me and my property".* I will now examine the allegations contained in the applicant's affidavits to determine whether his fears as well as Mr Makhaluza's fears were well-grounded.

[13] Reference is made to the telephone calls that the applicant received from community representatives and Mr Makhaluza between 23 January 2018 and 1 February 2018. Mr Makhaluza alleged that it was on 2 February 2018[8] that he was told by the secretary of the CPA to tell the applicant that a decision had been taken that he must vacate the farm with his livestock and other possessions by no later than 3 February 2018 failing which he and his possessions would be ejected and his livestock impounded. Mr Makhaluza concluded his affidavit by alleging that:

> *"The atmosphere of the meeting on 25 January 2018 and my interaction with the first respondent on 2 February 2018 was aggressive, hostile, threatening and intimidating to me and my employer. I truly fear for my life and my employer's property, possessions, livestock and his own life should he attend at the farm with the other residents currently. I believe that the residents*

[7] *Pickles v Pickles* 1947 (3) SA 175 (W) at 179-180.
[8] Not 1 February 2018, as alleged by the applicant.

will become violent unless stopped".

[14] The respondents' case is that they sought a meeting with the applicant to understand his presence on the farm. Their attempt to understand his presence on the farm was frustrated by the applicant's excuses for his failure to meet them. His refusal to co-operate with them and his failure to attend the meeting that was rescheduled for 27 January 2018, at his request, caused them to decide to request him to vacate the farm. The respondents deny that Mrs Mdayi was at any stage hostile or aggressive in a meeting where the applicant's presence on the farm was discussed.

[15] Since the applicant seeks a final interdict, the factual disputes must be resolved by the application of the rule enunciated in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd.*[9] The interdict can accordingly be granted only if the facts as stated by the respondents, together with the facts contained in the applicant's affidavits which are not or cannot be disputed, justify the granting thereof. The respondents' denial of a hostile attitude by the first respondent is not far-fetched or untenable. More importantly, Mr Makhaluza did not set out facts in his affidavit as to what Mrs Mdayi or any member of the CPA said in the meeting to cause him to feel intimidated and fear being beaten or injured. It was insufficient for Mr Makhaluza to allege that the atmosphere of the meeting on 25 January 2018 and his interaction with Mrs Mdayi were aggressive, hostile, threatening and intimidating. He was required to state the facts upon which he based the description of the atmosphere and his interaction with the first respondent. Absent those facts this court is unable to determine whether the applicant's expressed fears, or even Mr Makhaluza's expressed fears, were well-grounded. The

[9] *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

applicant has failed to prove that, based on what the respondents had said or done, he had a well-grounded apprehension that the respondents would interfere with any of the rights that he might have. Since one of the three requisites for the grant of a final interdict is absent, the application must fail.

[16] Even if I am wrong in finding that the applicant failed to prove that he has a reasonable apprehension of harm, the application must fail for another reason. In my view the applicant failed to show on a balance of probability that his entitlement flowing from his *de facto* possession of the farm (*ius possessionis*) had been or is being threatened and that he therefore requires protection. It is common cause that the CPA is the owner of the land upon which the farm is situated. In his founding affidavit the applicant alleged that during 2012 he purchased from an acquaintance "*his rights in and to the portion of the land at Picardy farm which I currently occupy.*" The applicant did not state the nature of the rights that he bought from his acquaintance. The CPA, being the owner of the land in question, can do with it whatever it wants as long as it is utilised for the benefit of its members, but more importantly as long as the CPA acts within the law. According to the constitution of the CPA the will of its members is determined at general meetings which are held from time to time. The respondents alleged that the members of the CPA decided in general meetings that the applicant should vacate the farm.

[17] Mr Duminy submitted that ownership of the land by the CPA is irrelevant because "*the applicant has possessory rights and a right not to be disturbed in his possession*" without recourse to the law. I agree with that submission to the extent that the applicant's *de facto* possession of the farm may not be disturbed

without recourse to the law. The applicant is in *de facto* possession of the farm. If he is unlawfully deprived of the possession of the farm he would be entitled to the protection afforded by the mandament van spolie to restore the unlawfully deprived possession. The mandament van spolie is presently not available to the applicant because he has not been deprived, lawfully or unlawfully, of possession of the farm. It is for this reason that the applicant seeks a prohibitory interdict.

[18] The applicant seeks an order that the respondents be prohibited from evicting him from the farm and interfering with his possession thereof. He would be entitled to such an order if it is shown on a balance of probability that he reasonably apprehends that he would be unlawfully deprived of possession of the farm. Although the applicant is not the owner of the farm, he has a right not to be unlawfully deprived of possession thereof. He would therefore be entitled to a prohibitory interdict if he established on a balance of probability that the respondents were about to unlawfully deprive him of the possession of the farm.

[19] The applicant alleged that he was informed on 24 January 2018 that a decision would be taken in a meeting on 25 January 2018 that he should vacate the farm with his livestock and other possessions, that he was telephoned on 25 January 2018 by Mr Makhaluza who informed him that a decision had been taken at the meeting that the applicant should be instructed to vacate the land with his livestock and other possessions and that on 1 February 2018 he was informed that it was decided in the meeting that he should vacate the farm with his livestock and other possession by no later than 3 February 2018 failing which "*they will eject me and my possessions and impound my livestock*". That is the sum total of the allegations upon which the applicant relied for the contention that he feared being

unlawfully deprived of the possession of the farm. The respondents' case is that members of the CPA resolved to call the applicant to a meeting to be held on 3 February 2018 and if he was not prepared to attend that meeting, that he and his livestock should "*be banned from the farm*".

[20] In my view the applicant has failed to show that he faced an unlawful deprivation of possession of the farm. Mr Duminy relied on the threat that the applicant faced ejectment and his livestock faced being impounded if he did not attend the meeting on 3 February 2018 for the submission that the respondents intended to unlawfully deprive the applicant of his possession of the farm. There is nothing wrong with the applicant's intended eviction or the impoundment of his livestock provided that such eviction and impoundment were lawful. Such acts would be unlawful if not done in terms of the law. It is not the applicant's case that the respondents intended to evict him without an order of court or to have his livestock impounded without following due process of law. That being the case, the applicant failed to show that the entitlement flowing from his continued possession of the farm was or will be threatened. He accordingly failed to show a clear right which requires protection.

[21] There is no reason why costs should not follow the result. However, I need to deal with one aspect relevant to costs. The main answering affidavit was delivered on 6 March 2018 under cover of a filing sheet consisting of two pages. On that same day the respondents' attorneys delivered six further confirmatory affidavits each under cover of a filing sheet also consisting of two pages. I can think of no reason why the main and confirmatory affidavits could not have been delivered under cover of one filing sheet, except for the undue generation of fees. That practice

cannot be countenanced. This court expresses its displeasure by requesting the taxing master or mistress not to allow the costs relevant to the drafting and delivery of seven separate filing sheets in respect of the affidavits delivered by the respondents' attorneys on 6 March 2018 and allowing the costs of only one filing sheet.

[22] In the result, the extended rule nisi is discharged with the effect that the application be and is hereby dismissed with costs.

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G H BLOEM
Judge of the High Court

For the applicant:	Adv A R Duminy, instructed by Yokwana Attorneys, Grahamstown
For the first and second respondents:	Adv M Mpahlwa, instructed by N T Vuba Incorporated, Grahamstown
Date of hearing:	21 June 2018
Date of delivery of the judgment:	3 July 2018