

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

CASE NO. : 1723/2017

Reserved on : 09 May 2017

Date delivered : 23 May 2017

In the matter between:

ABRAHAM MANDLENKOSI MHLEBI

First Applicant

TEMBA BETHWELL SIYOTHULA

Second Applicant

And

CROSBY BUNGANE MBANGI

First Respondent

NOMAGCINA MBANGI

Second Respondent

JUDGMENT

MAJIKI J:

[1] On 19 April the applicants approached this court by way of urgency, essentially for an order that the respondents be ordered to return 205 mixed cattle to applicants' farms forthwith. The nature of the order sought is that of *mandament van spolie*. The application is opposed by the respondents. The first applicant has filed an answering affidavit on his behalf and that of the second respondent to whom he is married in community of property.

[2] It is common cause that the first respondent has been ploughing on the portion of portion 2 Emthonjeni Farm Middleridge No [...], Mhlontlo

Municipality in the district of Tsolo (the farm) since 2012 to date. This was at the instance of first applicant through an attempt by the first applicant to sell portion 2 of the farm, belonging to his late father Amos Ntlanganiso Mhlebi who died in 2010 to the respondents. Two consecutive deeds of sale in that regard were entered into with a provision for a lease option, however both deeds lapsed. The applicant is the executor of his late father's estate. The second applicant is the owner of portion 1 (Hlubi) of the farm, which is adjacent to portion 2 of the farm. It is also common cause that the cattle in the farm destroyed the crops of the respondents.

[3] It is in dispute that this court has jurisdiction to hear the matter. The number of the cattle that form the subject matter herein is also in dispute. According to the respondent the number of the cattle are 187 and not 205. It is also in dispute that the first applicant is responsible for the farm and that the applicants have cattle of their own in the respective farms. According to the respondents most cattle do not belong to them if they own any cattle the number of those is very minimal. The cause of destruction of crops is in dispute, according to the applicants it is the respondents' failure to fence the cultivating area and the ploughing of mealies far-beyond the agreed area that caused the cattle to destroy the crops.

[4] The issue for this application is whether the applicants have satisfied the legal requirements for *mandament van spolie* and whether this court has jurisdiction to entertain the matter.

[5] **JURISDICTION AND NON-JOINDER**

According to the respondents on 16 April 2017 187 cattle were taken by the first respondent to Mr Dikiso's farm who had handling fence lines. The cattle had trespassed and invaded his crops of mealies space. After informing the farm owners of such invasion he arranged for removal of the cattle to the

municipal pound. The truck managed to load 60 on that day and delivered to Elliot Municipal pound. 127 cattle were subsequently delivered to the Ugie Municipal pound on 20 April 2017. Both pounds are outside the jurisdiction of this court. Furthermore those municipalities as parties who now have possession of the cattle may be affected by the restoration order this court may make. They have a substantial interest herein and they ought to have been cited. According to the applicants, they deny that the cattle are with the municipalities. From the respondents' version 127 cattle were only moved to Ugie Municipality on the 20th the same day as to the service and issue of the papers herein. At the time the applicants approached court, the 127 cattle were still in Tsolo. In respect of the 127 cattle the issue of jurisdiction therefore cannot arise under the said circumstances. The other 60 cattle that the respondents say were moved to Elliot on 16 April 2017, at the time their alleged dispossession took place, they were in the farm, in Tsolo. Subsequently, they were also first kept in another farm in Tsolo before allegedly being moved to Elliot. Furthermore, the respondents are residents within the area of jurisdiction of this court.

[6] In the light of the fact that dispossession of all the cattle took place in Tsolo, within the jurisdiction of this court, and the fact that the respondents also reside within the jurisdiction of this court, I have to agree with the applicants' submissions that this court has jurisdiction.

[7] With regard to joinder of Ugie Municipality that issue is linked to the finding that I will make in respect of other issues herein. I will therefore address it in due course.

[8] One issue that I have to deal with earlier on is the issue of ownership of cattle. This the respondents raised in the context of the applicants' having failed to make a full disclosure and not acting in good faith. Otherwise the parties are of the same mind that it is not relevant for purposes of making a

determination of a relief under *mandament van spolie*. I agree with Mr Mantyi that good faith is a *sine qua non* in *ex parte* applications. I do not regard the issue of ownership as material, for any reason, for purposes of these proceedings. The first applicant averred that the cattle were kept in the portion of the farm he controls and the one owned by second applicant.

[9] The requirements for the applicants to succeed in spoliation proceedings they must allege and prove that:

- (a) They were in possession of the property;
- (b) That they were dispossessed wrongfully without consent.

The applicants' case with regard to possession is that the first applicant is responsible for portion of the farm. The second respondent is the owner of portion 2. The first applicant has 85 mixed cattle kept at portion 1 of the farm and second applicant has about 120 mixed cattle.

[10] The first applicant gave the first respondent the portion to cultivate on, far from the camps in which cattle graze. The second applicant's farm is separated with a fence from portion 2 with gates leading to 2nd applicant's farm. One has to cross portion 1 to gain access to portion 2 of the farm. The respondents failed to fence the arable portion as previously agreed that he would do so, the fence there was not a proper one. In 2016/2017 the respondents ploughed more mealies and not vegetables as was agreed, they ploughed in more hectares than the three hectares that were agreed on. This resulted in the buffer zone between grazing land and cultivated land being removed and the cattle seeing the mealies, which made it easy for them to cross. The first respondent removed the cattle and hid them in neighbouring farms. Before that removal they had kept the cattle there peacefully, for years.

[11] With regard to wrongful dispossession the applicants aver that the cattle were removed without a court order, they never gave permission to such removal.

[12] According to the respondents the cattle on the grazing part of the farm collapsed his fence and destroyed his crops. He held meetings with cattle owners who rented their cattle in the farm but the problem persisted. The first applicant even promised to emigrate the cattle from portion 2 to portion 1 and also promised that the damage would be quantified and made good. He at some stage removed the cattle to Mr Mfoxo's farm but cattle owners were infuriated. It was after the trespass of 16 April 2017 that he decided to remove them to municipal pounds and only managed to do so with 60 cattle at first. Further engagements with cattle owners to make good of the damage came to a naught. On 17 April, the cattle owners demanded return of their cattle which were already in the municipal pound. They said they would not take their cattle themselves and would not pay anything, they were not responsible for the collapse of the fence. He told them that he would take the remaining 127 cattle to the municipal pound too, which he did on the 20th. He told the second respondent and one Mr Nolushu, in particular being those that he could get hold of, he sent short message services (SMS) to the rest. He is not in possession of the cattle in question, the release of the cattle from the pounds would require proof of ownership by the person seeking to release same, which proof he would not have. He therefore would not be able to have the cattle released to him.

[13] According to the first respondent he has a defence of impossibility of restoration of the cattle. They are kept by the two municipalities in terms of their by-laws. Secondly, the applicants are not owners of the cattle in question and have no *locus standi* to bring these proceedings. They possessed cattle on behalf of real owners, it is the cattle owners who employed shepherds to look after the cattle and not the farm owner. The possessor has to control the article

with body and mind. Physical element consists factual control, mental element concerns the state of mind of the possessor. It is the shepherds who in actual fact possessed the cattle. Thirdly, the applicants recklessly cited the second respondent without even trying to sort out the dispute with the first respondent first.

[14] The applicants deny any agreement, or being advised of the cattle being impounded. They deny that the cattle are in the municipality pound but aver that they are in a neighbouring farm belonging to a friend of the respondent. The first applicant state that his personal discussions with the first respondent yielded no results.

[15] I propose to deal with the dispute about the whereabouts of the cattle before I comment about the issue of non-joinder. The applicants' dispute that the cattle are at the municipal pounds, they say they are at the neighbouring farms. This is borne out by the fact that the respondent himself refers to those farms as the places he moved the cattle to. According to the respondents indeed the cattle were first moved to the neighbouring farms but by the 20th April 2017, all 187 cattle had been moved to the municipal pounds. The cattle and farm owners were informed of the whereabouts of the cattle again, as they were informed previously on the 16th and 17th April. In the circumstances, he parted with possession of the cattle and they would not be released to him as he is not their owner. He did not remove 205 cattle but 187 cattle.

[16] In *Renene v Minister of Safety and Security and Another* it was restated that where restoration is objectively impossible there is no room for *mandament van spolie*, the court has to refuse a spoliation order since restoration of the *status quo* is no longer possible.

[17] In the light of the dispute as to the whereabouts of the cattle, and these being application proceedings, the principle restated in *Plascon Evans Paints*

Limited v Van Riebeeck Paints Limited 1984 (3) SA at 634 (H) is resorted to resolve the issue, namely:

“... where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”

In the circumstances of this case, I have to accept the version of the respondents that all the cattle were moved to the municipal pounds by 20 April 2017. At the time this matter was heard, the spoliator gave reasons why it cannot be possible for him to restore the cattle.

[19] In the light of this, I do not regard it necessary to address the issue of non-joinder and the rest of other issues raised by the respondents. As regards to when the 127 cattle, that remained were moved, that could have had an impact on the order of costs. The respondent could have been held liable for some costs from the time he was served with the papers up to the time of the removal of the cattle. However, the record reveals that he was served at 17h05. In all probabilities, considering the normal office operating times, the cattle would have been removed by then. Nevertheless, none of the parties raised the issue of the time of the removal of the cattle.

Consequently, the order of spoliation has to be refused.

In the result,

The application is dismissed with costs.

B Majiki
Judge of the High Court

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