IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

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

18-09-2018 .....

Before: **Canca AJ**

CASE NO.: LCC 112/2011

In the matter between:

PHILANI OBED MTHETHWA	First Applicant
PAULOS ELLIOT SITHOLE	Second Applicant
BHEKIZIZWE ADOLPHAS NENE	Third Applicant
HLANGABAZA ALFRED XIMBA	Fourth Applicant
JABULANI MLAHLWA SIGAZI	Fifth Applicant
LUCKY RICHARD DUBAZA	Sixth Applicant
TIKI JOHANNES SITHOLE	Seventh Applicant

and

BEN BESTER	Respondent

Delivered: 18 September 2018

JUDGMENT

CANCA AJ

[1] This is an opposed application for leave to appeal to the Supreme Court of Appeal, alternatively to this Court, against the whole of the judgment and order granted by this Court on 20 April 2018. There were two applications for adjudication in this matter. The first was brought by the applicants and is referred to as the "main application" in the judgment and the other was a counter application brought by the first respondent.

[2] In the main application, the applicants sought an interim order directing the first respondent to, *inter alia*, restore certain grazing rights which the applicants were allegedly entitled to on a farm owned by the first respondent. In the counter application, the first respondent sought the removal of all the applicants' livestock from the farm.

[3] The applicants have launched a four-pronged attack on the judgment. The grounds on which the appeal is based are set out in detail in the Notice of Application for Leave to Appeal and need not be repeated in that detail here.

[4] In brief summary, the attack is that the Court failed to (a) consider that the main application was premised on a spoliation, (b) consider the issue of spoliation at all, (c)

recognize that the overgrazing was a result of the first respondent's act of spoliation (in reducing the grazing area from 35 hectares to 25 hectares) and (d) recognize that the provisions of the Conservation of Agricultural Resources Act, No 43 of 1993 ("CARA") was only violated after the first respondent's act of spoliation.

[5] With regard to the grant of the counter application, the applicants aver that the Court erred by failing to take into account that (1) overgrazing would arise with reduced grazing space, (2) the act of spoliation had been committed approximately six years before, (3) even with spoliation , there was still noted degradation in the soil and land and (4) the report of the experts did not take into account the length and duration in respect of which the applicants had been grazing the land.

[6] Having set out the essence of the applicants' case for leave to appeal, the question that must now be addressed is whether leave should be granted and if so, on what basis.

[7] The principle to be adopted in applications for leave to appeal has been codified in section 17(1) of the Superior Courts Act, No 10 of 2013 ("the Act"). This sub-section provides that leave to appeal should only be granted where "*the appeal would have a reasonable prospect of success.*" Also see *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others* (LCC 14R/2014) at paragraph 6. I now turn to deal with the merits of the application.

[8] This matter is not a spoliation. A spoliation is a possessory remedy. What the applicants sought was specific performance of a contractual right. This is so because

the relief sought and the case made out by the applicants is that they relied on an alleged breach of a right.

[9] The orders sought in the notice of motion refer to the restoration of "*grazing rights*". The first applicant refers to the breaching of grazing *"rights"* in his founding affidavit and to the "*right*" to graze in his replying affidavit. The confirmatory affidavits of the other applicants also refer to *"grazing rights"*.

[10] It is trite that a spoliation does not concern itself with the restoration of rights nor can a person achieve specific performance of a contractual obligation in spoliation proceedings. See *Zulu v Minister of Works, KwaZulu-Natal* 1992 (1) SA 181 (D & CLD) at 187 G where Thirion J held "*In truth the mandament van spolie is not concerned with the protection or restoration of rights at all."* See also the dictum of Koen J, in *Microsure v Net 1 Applied Technologies SA* 2016 (2) SA 59 (NPD) at 67, where the learned Judge held at paragraph 30 that,

> *"What the Applicants' seek to achieve is specific performance of contractual obligations, they were allegedly entitled to. This they cannot achieve in spoliation proceedings.*

[11] The real dispute between the parties, as was correctly contended by Mr. Roberts, for the first respondent, is whether grazing rights exist and if so, the extent thereof. This aspect of the matter has been dealt with in some detail in the judgment and it is therefore not necessary to repeat same in this judgment.

[12] The reason that no reference is made to spoliation in judgment complained of by the applicants is because the argument presented by Mr. Naidoo, for the applicants, was palpable misplaced in the light of the authorities on spoliation. I was therefore entitled to ignore the applicants' stance on that aspect of their case. In any event, I was persuaded by Mr. Roberts' contention that, if the order had been granted on the basis of spoliation, the first respondent would have been precluded from adducing evidence to disprove the alleged existence of the right.

[13] The complaint against the grant of the counter application also has no merit. The first respondent was obliged to act in terms of the provisions of Regulation 9(1) of CARA. These, *inter alia*, provide that the veld should be given rest periods and that the number of animals should be restricted. The regulation also provides that the portion showing signs of deterioration should be withdrawn from grazing until the grazing has recovered.

[14] According to the papers, the fact that the grazing area was overgrazed and had become eroded was evident during an inspection *in loco* held on 7 September 2015 and is recorded in the minutes of that inspection. Reasoned findings in respect of the issues pertaining to CARA are set out in the judgment and it is accordingly not necessary to traverse these here.

[15] It was also argued on behalf of the applicants that grazing was a customary right and that it had been extinguished. The issue of cultural rights is not raised in the papers but even if it was raised, cultural rights to grazing cannot, cannot, in my view, trump the provisions of CARA.

[16] I have carefully considered the submissions of both counsel and am of the view that another Court would not come to a finding different from mine. This being so, there is no reasonable prospect of success on appeal. Leave to appeal is accordingly refused.

[17] In the result, the following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

MP Canca

Acting Judge, Land Claims Court

Appearances:

For the applicants:	Adv. VM Naidoo SC
Instructed by:	Kwela Attorneys, Pietermaritzburg
For the respondent:	Adv. MG Roberts SC
Instructed by:	Tatham Wilkes Incorporated, Pietermaritzburg