

REPUBLIC OF SOUTH AFRICA



IN THE LAND CLAIMS COURT OF SOUTH AFRICA
(HELD AT RANDBURG)

CASE NO: LCC 116/2013

(1) REPORTABLE YES/NO	YES
(2) OF INTEREST TO OTHER JUDGES YES/NO	YES
(3) REVISED YES/NO	NO
17/2/17	
DATE	SIGNATURE

In the matter between:

Mphikeleli Samson Mazibuko

Applicant

and

Pieter Martins N.O

First Respondent

Susanna Louisa Catherina Martins N.O

Second Respondent

Theodorus Francois Martins N.O

Third Respondent

Jan Hendrik Martins N.O

Fourth Respondent

Judgment

Carelse J

[1] The applicant and his family reside on the farm, the remaining extent of the farm Rusthoek, 127 H S. Perdekop, Mpumalanga which is owned by the Rustfontein Trust. Until June 2015, the applicant alleges that they were free to graze their livestock on any part of the farm and used a substantial part of the farm for ploughing. The gist of the applicant's complainant is that it was despoiled by the respondents when the respondents erected a fence that essentially divided the farm into two portions prejudicing the applicant. What the applicant seeks is an order to remove the fence in other words a restoration of the *status quo ante*.

[2] The applicant submits that his brother on behalf of the Mazibuko family lodged a Labour Tenants claim as contemplated in the Land Reform (Labour Tenants) Act, 3 of 1996 which is hotly disputed. This issue will be dealt with more fully in the main application.

[3] At the launch of the application the applicant sought the following relief :

1. That the respondents remove the fence that they erected on the farm in May and June 2015;
2. That the respondents desist from intimidating and/or harassing the applicant's family;

3. That the respondents be restricted from advancing within a 500 meter radius from where the applicant's livestock ordinarily graze
4. Alternatively that the court order that the respondents restore the status quo ante at the farm and
5. That the first, third and fourth respondents pay the costs of this application on an attorney and client scale ¹

[4] During argument two points *in limine* were raised. For the purposes of this judgment it is not necessary to deal with them because the applicant elected to abandon its relief for an interim order and persist with prayer 1 alternatively prayer 4 of the notice of motion which has no bearing on the points *in limine*. The fundamental question that I am required to determine is whether or not an owner of a farm has the right to arbitrarily alter the rights of the those who occupy the farm without a court order. In other words it is the applicant's case that the respondents have resorted to self –help.

Brief background

[5] The applicant is a descendant of Absalom and Christinah Mazibuko ("Mr and Mrs Mazibuko") who arrived on the farm with the applicant and his five siblings around November 1987. The owner or person in charge of the farm at the time was James Prinsloo ("Prinsloo") ² who entered into a labour tenant agreement with the Mazibuko family.

[6] The terms of the agreement between Mr Mazibuko, the applicant's brother and Prinsloo was that the Mazibuko family would reside on the farm,

¹ Applicant's NOM p 2-3

² Applicant's FA para 14 & 17.

graze their livestock on the farm, plough the fields of the farm, collect firewood and water, bury on the farm and perform all cultural rituals thereon. This continued with all the successors-in title and or persons in charge of the farm until June 2015³

[7] Upon the initial occupation of the farm, the applicant was allowed to keep his livestock on the farm without restrictions. In fact the applicant alleges that his livestock was allowed to mix with all previous and current owners livestock.⁴

[8] The applicant submits that that when the respondents arrived on the farm during 2011 they were advised to reduce the number of livestock. It bears mentioning that there are allegations from both sides of threats of violence.

Common cause

[9] The respondents submitted two maps, sup 1 and sup 2 which depicts the layout of the farm, in particular the homestead, water and roads on the farm. The applicant makes common cause with these maps. In so far as sup 1 is concerned it is common cause that points F, G and A depicts the old fence prior to June 2015. A gate was situated at point F giving the applicant access to his homestead marked H by way of the road depicted as a white line in sup 1. It is also further common cause that the fence depicted in sup 2 marked F, G/A depicts the position after the fence

³ Applicant's FA para 18.

⁴ Applicant's FA para 19.

was moved, without a gate. The fence was moved according to sup 2 where the old road was situated which is depicted as a red line in sup 2. This has had the effect of cutting off the applicant's access from the old road to his homestead marked H in both sup1 and sup 2 so the applicant submits. Pertinently it is common cause that the respondents have moved the fence in question and removed the gate in question.

[10] With the moving of the fence and the removal of the gate the applicant alleges that he and his family suffer the following hardship set out herein below:

35.1 The municipal water truck has been unable to enter the premises in order to refill the shared water tank for my family and our neighbours, as they have always done. We have attempted to fetch water in buckets, however I must inform this court that this farm is on steep high ground and its plateaus are close to stream and where now the fence runs and therefore attempts to carry water without wastage have been futile.

35.2 We have no entry to fetch water from the nearby spring and as a result we are fetching drinking water from a running stream nearby. It is trite that this exercise carries a potential health that is not sustainable more importantly because I have young children.

35.3 Our livestock, which comprises of cattle, goats and horses are huddled on very limited grazing ground, placing them in danger of death and even infecting one another.

36. The area that is normally used to inoculate the livestock has also been blocked off. If a cow, a goat or one of the horses were to fall sick, besides the rather close proximity that the livestock are in, I would be forced to inoculate the possibly diseased animal very near to my household, creating an otherwise avoidable health hazard.

37 If ever there is a medical emergency on the farm, an ambulance will be unable to reach our homestead as there is no pathway for any vehicle to manouver its way in ⁴⁵

[11] The respondents deny that the moving of the fence and the removal of the gate caused the applicant and his family any hardship.

[12] It is common cause that the gate was removed and replaced with a solid fence which I understand to be the fundamental complainant. The consequence of this curtailed the applicant's access by road to his homestead and equally curtailed their grazing area to the extent that the applicant does not have access to the remainder of the farm that they previously had before and during the current ownership.

The law

[13] A mandament van spolie is aimed at the recovery of lost possession. It is founded on the principle that no one is allowed to take the law into his or own hands by dispossessing another forcibly or wrongfully. In the well known decision of *Nino Bonino v De Lange* 1906 TS 12 the principle is:

“ It is a fundamental principle that no man is allowed to take the law into his own hands ; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so the Court will summarily

⁴⁵ Applicants FA para 35, 36, 37

restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute”⁶

[14] The underlying principle is that people are required to follow all legal processes and not to simply help themselves. In order for a victim to succeed, a victim of spoliation must prove two things: that he or she was in peaceful and undisturbed possession of the thing concerned and secondly the spoliator wrongfully that is without due legal process or consent, deprived him or her of the thing. If these two requirements are met then the court has no discretion and must grant the mandament van spolie.

The first requirement

[15] Has the applicant demonstrated that he was in peaceful and undisturbed possession of the respondents entire farm prior to the new fence being erected as depicted in sup 2? Pertinently it is the applicant's case that prior to the moving of the fence and the removal of the gate, the applicant's grazing rights on the farm were not limited. With the moving of the fence and the removal of the gate the applicant's grazing rights has been reduced. To that extent their peaceful undisturbed use of the farm prior to June 2015 has been unlawfully spoliated, so the applicant submits.

[16] At the outset of argument the respondents made a tender which the applicant rejected. The respondents complain about the number of livestock

⁶ Nino Bonino v De Lange 1906 TS 120 at p 122

on the farm. In my view the respondent could have brought a counterclaim to reduce the livestock. The respondents have not done so.

[17] I understand the respondents case to be that the applicant has not made out a case for spoliation on the basis that the applicant has not shown that it was in peaceful and undisturbed possession of the entire farm. In fact the respondents submit that the applicant's use of the farm has not been spoliated. Since the erection of the new fence the applicant's livestock has a larger area for grazing, has access to his homestead via an alternative road and access to water so the respondents submits. This is disputed by the applicant for the following reasons set out in paragraph [10] above.⁷ In response the respondents submit in their answering affidavit⁸

* 19.4 The fence has however had the effect that the applicant is not able to leave the gates open for his illegal livestock to roam freely.

In reply the applicant submits:⁹

* 31.1 The erection of the fence substantially reduces the land that I used to use for grazing...

[18] The respondents submit that the foregoing are clearly material disputes of fact that cannot be resolved on the papers. Because the applicant has failed to seek a referral to trial, this application should be dismissed, so the respondents submit. In my view in so far as the determination of the spoliation application is concerned there are no material disputes of fact.¹⁰

⁷ Page 15-16 of founding affidavit paragraph 35

⁸ Page 46 paragraph 19.4

⁹ page 92 paragraph 31

¹⁰ FA pg 15-16 par 35 AA par 19.4 and p 92 par 31

[19] On the respondents own version they erected the fence without a gate to prevent the applicant's illegal cattle from roaming free. The respondents do not allege that the applicant's livestock were roaming illegally on their entire farm. It is the livestock that is illegal. In my view there is therefore no dispute of fact on the issue of whether the applicant was in peaceful and undisturbed possession of the respondents farm prior to the moving of the fence. That the applicant's livestock can no longer use the entire farm for grazing purposes and no longer have access to the drinking water which it previously had, in my view amounts to spoliation. I am satisfied that the applicant has made out a case for spoliation. In my view the *status quo ante* should be restored.

Costs

[20] The applicant seeks costs on an attorney client scale because of the conduct of the respondents who resorted to self-help. The respondents submit that the costs should follow the result but not on an attorney client scale because the Department is funding the litigation. Given the conduct of the respondents in this matter the court marks its displeasure with an order for costs on an attorney and client scale.

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

1. The respondents are ordered to remove the fence that they have erected on the farm as depicted in sup 2 to its original state as depicted in sup 1 including the gate as indicated in sup

1 marked "X" (The respondents are to restore the *status quo ante* at the farm)

2. The respondents are to pay the costs of this application on an attorney client scale.

A handwritten signature in black ink, appearing to be 'Carelse J', written over a horizontal line.

Carelse J

Judge of the Land Claims Court

Appearances :

Counsel for Applicant : Adv M. Majozi

Instructed by: Lingenfelder & Baloyi Attorneys

Counsel for Respondents : Adv S Guldenpfennig SC

Instructed by: Jarvis Jacobs Raubenheimer Incorporated Attorneys