IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT DURBAN

Case No: LCC 128/2015

In the matter between:

PIET KHUMALO & OTHERS	Applicants
and	
CRAFCOR FARMING (PTY) LIMITED	First Respondent
THE TRUSTEES OF THE AFT PROPERTY TRUST	Second Respondent

Date of Hearing: 6 September 2016

Date of Judgment: 16 September 2016

JUDGMENT

BARNES AJ

1 This is an interlocutory application. It arises out of an action instituted by the Applicants (the Plaintiffs in the action) for an order declaring them to be labour tenants on the farm Cotswold No 4332, Dundee, KwaZulu-Natal ("the Farm").

2 The action was instituted against the First Respondent, Crafcor Farming (Pty) Limited ("Crafcor").

3 The action was set down for trial in the Land Claims Court sitting in Durban from 5 to 9 September 2016. However, as a result of the interlocutory application brought by the Applicants, it was necessary to postpone the trial.

4 The Applicants seek two distinct forms of relief in their application. First, they seek the substitution of Crafcor with the Second Respondent, AFT Property Trust ("AFT"). It is common cause between the parties that Crafcor sold the farm to AFT in September 2011 and that AFT is currently the registered owner of the Farm. Crafcor was therefore incorrectly cited by the Applicants. The Applicants contend that a labour tenant's claim is a claim *in rem* that attaches to the land regardless of who the owner is and that substitution is accordingly appropriate in the circumstances. Crafcor, somewhat curiously, opposes the substitution order sought.

5 The second form of relief sought by the Applicants in their application is an order interdicting Crafcor and its attorneys from interfering in the attorney and client relationship between the Applicants and their attorneys as well as an order requiring Crafcor's attorneys, Cox and Partners, to withdraw as Crafcor's attorneys of record in the action. This relief is sought on the basis of allegations

that Crafcor's attorneys contacted and consulted with the First Applicant (the First Plaintiff in the action) without his attorney's consent. It is not necessary to go into these allegations in any detail for purposes of this judgment. It suffices to state that Crafcor and its attorneys deny that they acted inappropriately or unethically in any way. It is noted, however, that the Applicants seek relief against Cox and Partners despite not having cited them as a party to the application.

6 Self-evidently, the Court's decision on the substitution question may have an impact on whether it is necessary or appropriate to decide the dispute between the Applicants and Crafcor, and if it is, what relief ought properly to be granted. It is accordingly appropriate to determine the substitution question first.

7 The difficulty that immediately arises is that there has been no service of the application on AFT.

8 At common law and in terms of the Uniform Rules of Court all trustees must be joined when a trust is sued; trustees act *nomine officii* and not in their personal capacities and must be cited as such in legal proceedings and service on a trust requires service on all trustees.[1]

9 The traditional position has been significantly altered by Land Claims Court ("LCC") Rule 10 which deals with cases by and against partnerships, trusts, organisations, associations and communities (referred to as "the entities"). LCC Rule 10(1) provides that the entities may be cited as parties in their own names

[1] See Uniform Rule 4(1)(a)(ix); *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) and *Mariola and Others v Kaye-Eddie NO and Others* 1995 (2) SA 728 (W).

without reference to the names of their members or office bearers. LCC Rule 10(3) provides that any process by which a case is initiated against an entity may be served on that entity through service (in the case of a trust) on a single trustee provided that such trustee must, within 10 days of such service, bring the process to the attention of all the other trustees.

10 In the present case, service of the interlocutory application was not effected on AFT in terms of either Uniform Rule 4(1)(a)(ix) or LCC Rule 10. All that was done was that the application was served on Cox and Partners, the attorneys of record for Crafcor. Counsel for the Applicants, Mr Crampton, argued that this was sufficient because Mr Anton Ferreira, one of the directors of Crafcor, is also one of the trustees of AFT. Mr Crampton made the following submission in his heads of argument in this regard:

> "In the present case C & P [Cox and Partners] are receiving instructions from Anton Ferreira who they regard as their 'client'. He will be their source of instructions regardless whether (sic) the Defendant is the First Respondent (the company) or Second Respondent (the Trustees of the Trust) – including Anton Ferreira."

11 This is manifestly not sufficient. The requirement that service be effected in terms of the rules is not a matter of mere form as Mr Crampton sought to contend. It is a matter of fundamental substance. As the Constitutional Court held in *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd and Others*[2]

> "Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive notice of

[2] 2015 (2) BCLR 182 (CC).

liability to legal process through oblique or informal acquaintance with it."[3]

12 Nor can the separate legal personalities of Crafcor and AFT be ignored. As the Constitutional Court held in the same case:

> "The separate legal personality of the three employers – Steinmuller, Intervalve and BHR – cannot be willed away simply because there was some overlap in their corporate operations. They had overlapping boards of directors and interconnected shareholdings, and a joint holding company. But this does not help NUMSA. NUMSA's argument depends on the proposition that knowledge held by an officer or employee of one corporation may be imputed to other corporations with which she is associated. That approach has long been alien to our law. Our law has also rightly rejected the suggestion that serving on several corporate boards makes knowledge pertaining to one company admissible against the other"[4] (footnotes omitted)

13 In the present case AFT was entitled to be served with the application. AFT cannot be presumed to have become aware of the application by virtue of the fact that one of its trustees holds office in another legal entity whose attorneys were served with the application. Apart from the obvious prejudice to AFT that this may cause, the Court itself has no certainty that all of the trustees of AFT are even aware of this application.

14 The Applicants are at liberty to serve the application on AFT either in terms of Uniform Rule 4(1)(a)(ix) or in terms of LCC Rule 10, in which case the provisions of LCC Rule 10(3)(b) would need to be drawn to the attention of the trustee upon whom service is effected. Absent proper service on AFT, the Court cannot conceivably order that it be substituted as a party to an action.

[3] At para 53.
[4] At para 54.

15 In the circumstances, the following order is made:

1. All the papers in the interlocutory application are to be served on the AFT Property Trust by no later than 23 September 2016.

2. The AFT Property Trust may file an answering affidavit in the application by no later than 7 October 2016.

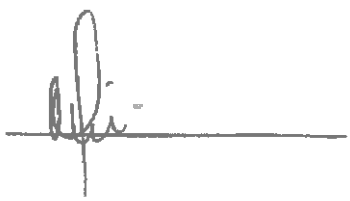
3. Thereafter, the remaining issues in the application will be determined by the Court.

4. Costs are costs in the cause.

H BARNES

Acting Judge

I agree and it is so ordered.



M SELLO

Acting Judge

Appearances:

For the Applicants: Adv Crampton instructed by Mzila H M Incorporated

For the First Respondent: Adv Van der Walt instructed by Cox and Partners