IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NUMBER: LCC 150/2023

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

20 September 2024

.....
SIGNATURE

In the matter between:

FREUDENTAL TRUST	Applicant
and	
BHOMU SITHOLE	First Respondent
NONHLANHLA SITHOLE	Second Respondent
NJABULA SITHOLE	Third Respondent
PHUMSILE HLONGWA SITHOLE	Fourth Respondent
BABAZILE NGUBANE	Fifth Respondent
THE FAMILY MEMBERS OF THE FIRST TO FIFTH RESPONDENTS WHO ARE ALSO RESIDING ON THE FARM COMMONLY KNOWN AS THE FARM POTSPRUIT 2894, KRANSKOP DISTRICT	Sixth Respondent
THE MINISTER OF AGRICULTURE LAND REFORM AND RURAL DEVELOPMENT	Seventh Respondent
MANDLA THOMAS DLOMO	Eighth Respondent
GAYEDE COMMUNITY TRUST, IT NO. 997/04	Ninth Respondent

JUDGMENT

re VARIATION APPLICATION

SPILG, J

INTRODUCTION

1. The present application is for the variation of a consent order granted by this court on 16 May 2024 and which was brought by persons residing on the Potspruit farm. They are identified as the 1st to 6th respondents in an urgent application brought during November 2023 by Freudential Trust ("Freudential") as the applicant relating to the grazing of livestock on its land.

   The 1st to 6th respondents are members of the Sithole and Ngubane families. They will be referred to as the respondents.

   The Minister of Agriculture, Land Reform and Rural Development ("*the Minister*") was cited as the 7th respondent. Subsequently a certain Mr. Dlomo and the Gayede Community Trust were cited as the 8th to 9th respondents respectively. They will be mentioned by name.

2. The relief sought in the urgent application was for an interim interdict to prevent the respondents from allowing their livestock, which comprises cattle, sheep, goats, pigs and chickens) from roaming or grazing outside the respondents' homestead area, or on the access public road located on the Potspruit farm, which is identified in the founding papers as Portion 3 of the farm Potspruit.

3. The applicant also sought an order requiring the respondents to herd and restrain their livestock from roaming onto, or grazing in, any of the applicant's cropping fields, or areas of the farm, or any other field and adjacent property of the applicant or cause damage to any growing crops or cultivated trees of the applicant. Certain ancillary relief was also sought should the order not be complied with.

4. I was satisfied that the matter was sufficiently urgent to direct the respondents to show cause on 14 December 2023 why the orders sought should not be made. However the court was not prepared to grant any interim relief without hearing the respondents.

5. The respondents filed an initial answering affidavit which suggested that the applicants had prevented the respondents from continuing to have their livestock access an adjoining piece of land owned by a Mr. Dlomo. It subsequently transpired that it was not the applicant, but Dlomo himself, who had terminated any

entitlement on the part of the respondents to graze their livestock on his land. Whatever rights the respondents may have had to grazing on Dlomo's land are not of relevance to the outcome of the present application. This is because it was accepted that Freudential had not inhibited the respondents' livestock from entering Dlomo's land.

6. The respondents then sought to bring a counterapplication based on rights of occupation under the Extension of Security of Tenure Act 62 of 1997. The court granted them leave to do so, but because of a possible issue arising with Dlomo and the delay that had already been occasioned, the court restricted the counterapplication to *"the applicant's farm described as Portion 3 of the farm Potspruit 2894..."*

7. The order granting the respondents leave to bring a counterapplication was broadly framed to cover any alleged grazing rights which they may contend for. This was done because in the urgent application, Freudential mentioned two matters that were pending before this court; the one under LCC 62/2014 and the other under LCC 112/2022.

8. The first of these matters contained a statement of claim by the present 1st and 5th respondents (who were amongst six plaintiffs in LCC62/2014) seeking orders against Freudential and the Director-General of the Department of Rural Development and Land Reform to declare them, together with their families, to be labour tenants in terms of section 33(2A) of the Land Reform (Labour Tenants) Act, 3 of 1996 and to award them land which they alleged had previously been used for cropping and grazing by them. They also sought a further order that the Director-General pay Freudential just and equitable compensation for the land in issue under section 25 of that Act.

   However, the land identified in that set of court papers referred to Portion 1 of the farm, Potspruit, not Portion 3.

9. At that time, which was during May 2014, the total number of livestock said to be grazing on the farm by the plaintiffs who were members of the Sithole and Ngubane families totaled six head of cattle and eighteen goats. There was however no allegation that any of the occupiers had pursued a right under section 17 (2) of the Labour Tenants Act.

10. The matter was defended at the time by another firm of attorneys who represented the Freudential Trust.

    The defence was to deny that any of the members of the plaintiff families were labour tenants and asserted that none of the statutory provisions entitling a labour tenant to an award of land had been complied with. Nothing further has happened in the matter since April 2017, save for the withdrawal and substitution of attorneys, the last of which occurred in 2020

11. In the present case before this court, the respondents however chose to bring their counter application under ESTA.

12. On considering the papers, the court was concerned that there were material disputes of fact regarding the nature of the respondents' occupation on the farm and was also concerned about whether interim relief should be granted to Freudential, and for both purposes considered it necessary to hold an inspection on the farm with particular reference to identifying the cropping fields and the access points for livestock to water.

13. It is perhaps relevant to note now that the respondents alleged that their livestock were dying for want of access to water and although the grazing area was inadequate, they were bringing in feed.

14. At the inspection, it was contended that the respondents had not allowed their livestock to graze on the cropping fields and that there was a path from the homestead to the dam which might provide an interim solution in relation to accessing water.

15. On the 16 May 2024 the parties requested the court to grant an order by consent. The order is headed a "*Consent Order*".

16. The preamble to the order is important. It reads:

    "Having read the documents filed of record and being satisfied that the applicant and the 1st to 6th respondents have consented to an order with the provisions as set out here under, the court confirms the following provisions as an order of court"

It then proceeds:

IT IS ORDERED THAT:

1. *The Applicant's application for interim relief may be heard as a matter of urgency, in terms of Rule 34 of the Rules of the Court, the forms and services provided for in Rule 34(1) of the Rules of the Court are dispensed with and oral argument may be presented pertaining to the interim relief sought as set out hereunder.*

2. *Pending the final determination of the First to Sixth Respondents' counterapplication:*

   2.1 *The First to Sixth Respondents are, save for access to the public road, interdicted and restrained from allowing their livestock (cattle, pigs, sheep, goats and chickens) to roam and/or to graze outside of the homestead area (as described in paragraphs 6.18 and 6.19 of the Applicant's founding affidavit and the map attached thereto marked annexure "FT5") on the Applicant's farm described as PORTION 3 OF THE FARM POTSPRUIT IN THE DISTRICT OF KRANSKOP, KWAZULU-NATAL (herein further referred to as "the Farm");*

   2.2 *The First to Sixth Respondents are ordered to herd and/or to restrain their livestock described in paragraph 2.1 above from roaming onto or grazing in any of the Applicant's cropping fields or areas of the Farm or any other fixed and adjacent properties of the Applicant and to cause damage to any growing crops and/or cultivated trees of the Applicant;*

   2.3 *Subject to compliance with and exercising such rights afforded to the Applicant in section 7(1) of the Extension of Security of Tenure Act 62 of 1997, in the event of the First to Sixth Respondents failing to comply with the orders set out in paragraphs 2.1 and 2.2 above, and over and above any other lawful rights the Applicant may have at its disposal to enforce compliance with such orders, the Sheriff of the Court, with the assistance of the South African Police Services and competent pound services are ordered to immediately remove and impound the animals described in paragraph 2.1 above from the Farm;*

2.4 The First to Sixth Respondents are interdicted and restrained from returning any animals removed in terms of the order in paragraph 2.3 above to the Farm or any part thereof;

2.5 The Applicant is ordered to erect a fence that will extend the homestead area (as described in paragraphs 6.18 and 6.19 of the Applicant's founding affidavit and the map attached thereto marked annexure "FT5") on the Farm to the dam in the proximity of the said homestead area by means of a 5 (FIVE) meter wide corridor leading to the dam, and specifically to the portion of the dam where the First to Sixth Respondents claim their livestock previously had access to the dam, thereby granting the First to Sixth Respondents and their livestock access to the water in the dam and any incidental grazing that occurs in the vicinity of the allocated portion of the dam will not be construed as violating the terms of the interim interdict.

3. No order as to the payment of costs is made.

17. It became evident that it was necessary to hear evidence and at the pretrial conference held on 7 May the issues to be determined by way of oral evidence were identified as follows; whether or not the respondents had, or enjoyed, access to the areas they contend for grazing cattle and livestock; And if so, whether that right, interest or entitlement is still extant, and if so, whether that has legal consequences.

18. The court identified the witnesses it required to be called, provided dates for the delivery of witness statement summaries for those who had not yet deposed to an affidavit, discovery and the delivery of expert notices.

    It was agreed that the evidence would also be led from 15 to 20 September.

    The court also directed a follow up pretrial conference for 29 August.

19. On 19 August the applicant's attorneys requested an urgent pretrial conference because the applicant had received a section 17 (2)(a) notice under the Labour Tenants Act in which the 5th respondent, Ms Azolina Sithole (who was born in

1936) and Ms Johanna Sithole (who was born in 1940) all identified themselves as persons who had applied to the Director-General for the acquisition of a right in land in respect of the remaining extent of Portion 3 Potspruit.

The notice further advised that the application had been submitted by no later than 31 March 2001, which was the cut-off date for applications to acquire a right in land by persons who alleged that they were labour tenants.

20. In terms of the notice, if the owner denied that the applicants were labour tenants then it must inform the Director-General within one calendar month of the grounds on which it denies. Although the notice was only served at the beginning of August, it was purportedly signed on behalf of the Director General almost a year earlier on 29 September 2023.

21. The notice requesting the pretrial had attached to it the section 17(2) (a) and (b) notices issued by the Director-General. Also attached was Freudential' s response denying that those applying for the land acquisition were labour tenants and a request was made to refer the dispute for adjudication to the Land Court.

    The last document attached to the notice was a request for access to the Director-General's records in relation to the original application made, certain other documents and a request for any written reasons or resolutions relating to why the notification of the claim did not occur promptly after its receipt. This was requested in terms of section 18(1) of the Promotion of Access to Information Act 2 of 2000.

22. The purpose of the request for case management was to consider the impact of the section 17(2) notice on the imminent hearing, bearing in mind that the court at an earlier pretrial conference had expressed the view that the issue of the respondents' alleged status as labour tenants should form part of the considerations in the main application and in the final relief sought.

23. The concern was that the delivery of this notice may result in the matter not being ready for hearing on the selected dates and asked;

    "... for a further pretrial conference for the determination of the incorporation of the new matter into the pending proceedings and to agree to a new timeline and towards a new and alternative trial date so that both matters can be determined simultaneously"

24. At a pretrial held on 28 August it was apparent that the process of the referral of the section 17 (2) would have to be dealt with by way of the relevant pleadings before the court could determine the issues identified for the leading of oral evidence.

Ms Sikosana on behalf of the respondents indicated that livestock were dying and that the delay in hearing evidence on the occupation rights which the respondents enjoyed (resulting from the delivery of the section 17(2) notice) necessitated the respondents seeking an order varying the interim order which had been granted.

25. When the pretrial resumed on the following day, the parties agreed to the times by when a variation application was to be filed and answering and replying affidavits were to be delivered. This was without prejudice to the applicant's right to argue that the variation application was not competent, It was also agreed that the variation application would be heard on 19 September.

ORDER SOUGHT TO BE VARIED AND THE GROUNDS

26. In terms of the variation application, the respondents seek to delete the preamble to para 2, and the contents of paras 2.1 and 2.2 of the May order and to replace them with the following:

2. Pending the final determination of the respondents s 16 application in terms of the land reform (labor tenants) act 3 of 1996("LTA"):

2.1 the 1st to 6th respondents are interdicted and restrained from allowing their livestock(cattle, pigs, sheep, goats and chickens to roam and to graze on the cropping portions of the applicants farm described as Portion 3 of the farm Potspruit .....(herein further referred to as "the farm, save for access to the public road and all other portions of the farm which the applicant has not used for cropping and/or cultivated trees of the applicant in accordance to the areas marked in blue (label "E") , as per annexure BMS2

2.2 the 1st to 6th respondents are ordered to herd and/or to restrain their livestock described in paragraph 2.1 above from roaming onto or grazing in any of the applicant's cropping fields or areas of the farm or any other field and adjacent properties of the applicant or to cause damage to any growing crops and all cultivated trees of the applicant"

27. The area marked in blue is only partly within Portion 3 of the farm Potspruit. The remainder is on the farm Ousig which is owned by a different trust whose beneficiaries are alleged not to be the same as those under the Freudential Trust. If the respondents are entitled to the variation order, no difficulty arises in limiting the blue area to within the boundaries of Portion 3.

28. The reason for seeking a variation of the May order appear in paras 18, 20, 21 and 55 of the respondents' founding affidavit to their variation application and are set out in Ms Sikosana' s heads of argument. It is said to be the sudden change of factual circumstances which means that the question of the respondents' rights to graze can no longer be heard in September 2024. This would be prejudicial to them because if they do not get access to a grazing area urgently, they "will *not have any livestock at all and that would be disastrous for my family because we depend on them for our livelihood. I am unable to afford to supplement their food with fodder adequately.*"[1]

THE MAIN ISSUES RAISED BY THE VARIATION APPLICATION

29. *Mr. Kruger* on behalf of the applicants took a number of points *in limine* in addition to challenging the factual and legal basis for bringing the variation application.

30. It is unnecessary to deal with all the points raised or to deal with the way in which the applicants have characterised the issues. Suffice that the court is of the view that there are two issues which are determinative of this application.

31. The first concerns the legal consequences of a party who is properly represented by an attorney or advocate agreeing to terms which are made an order of court. The other is whether there are in fact new circumstances that have arisen which, assuming a court can vary such an order in the interests of justice, might entitle a party to vary an agreement which was concluded by him or her and made an order of court. To some extent the issues may overlap.

ABILITY TO VARY OR RESCIND A COURT ORDER MADE BY CONSENT

32. The order sought to be altered was one made by agreement between the parties

[1] Respondents' HOA para 9

through their duly appointed legal representatives.

Mr. Kruger referred the court to cases such as *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) at para 31 where Madlanga J said the following:

> *The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus.*

Other cases referred to included *Georghiades v Janse Van Rensburg* [2006] ZAWCHC 29; 2007 (3) SA 18 (C) and *Standard Bank of South Africa Ltd v Swartz and Others* [2024] ZASCA 28

33. These cases either dealt with agreements which put a final end to litigation or involved matrimonial matters, including maintenance orders made by consent to which there is specific legislation allowing for a variation.

34. Nonetheless there are a large number of cases where parties are bound by consent orders made on their behalf by their legal representatives. These cases start off on the fundamental basis that agreements seriously and deliberately entered into are binding- *pacta sunt servanda.*

35. As with any agreement, there may instances where they can be rescinded through misrepresentation or end by reason of *vis major* or supervening impossibility. Where the agreement is made an order of court the additional need to preserve the integrity of court orders comes into reckoning. Nonetheless, I can comprehend a situation where in the interests of justice due to changed circumstances a variation can be made.

Such a situation is where the effect of the agreement in pending litigation turns out to destroy the very right which is sought to be preserved or transferred. If there is a

right which is the subject matter of the main litigation, then any interim arrangement which turns out, through intervening circumstances, to result in that right being incapable of exercise or implementation (because it's subject matter is no longer in existence at the time of determination) ought to be capable of variation, not only because a person is constitutionally entitled to have his or her dispute resolved by the application of law before a court (s 34 of the Constitution)) but also because such order must be rendered effective.

36. It is however unnecessary to decide this point and I decline to do so because I do not believe I have been given sufficient material. Also due to the desirability of giving a decision promptly in an urgent application, there is insufficient time to conduct the type of thorough research that would otherwise be required.

37. For present purposes I will therefore assume that a Superior Court, such as the Land Court, has the inherent jurisdiction to vary an interim order where an intervening changed circumstance would result in the final order ultimately sought, being rendered a *brutum fulmen*.

    The fundamental nature of any interim order is to preserve a situation, taking into account the prejudice at the time the order is made. Where the nature of the prejudice dramatically changes after the interim order is granted but before a court is in a position to finally determine rights *inter se*, then it appears to be in the interests of justice that the court can exercise such a power provided at the very least there has been an unforeseen change of circumstance to the degree which has arisen and that such a change alters the balance of prejudice to a sufficient degree that it will not adequately preserve the *status quo ante* of the party in whose favour the court ultimately decides.

38. The difficulty facing the respondents is that their case at all times has been a reduction in their grazing area because the neighbouring farmer, Dlomo, stopped them accessing his farm as had been agreed upon when the respondents, according to their version, were no longer permitted to graze their livestock on certain areas of the applicant's farm. This occurred when the applicant extended the area on which it cultivated crops or planted trees.

39. In presenting that case, the respondents also contended that their livestock were dying, the focus being on the lack of water. This was resolved when they and the applicant agreed on the terms pursuant to which they could lead their livestock to

the dam (as set out in the consent order).

Insofar as the provision of fodder is concerned, the respondents were themselves going to procure any additional fodder which may have been required.

40. It therefore is surprising that the respondents claim in their founding affidavit to the variation application that further livestock were dying. It is surprising because the variation application was brought on 3 September which was two weeks before the hearing of evidence would be completed, yet according to the respondents they had concluded the agreement which was made an order of court on the basis that they would supplement the fodder themselves.

Accordingly the alleged death of the livestock is not attributable even at this stage (being 20 September) to the need to postpone the hearing of evidence which was set down for this week.

41. It may however have sufficed if the respondents were able to set out the necessary facts to demonstrate that they do not have the financial resources to procure the fodder; which facts would have to include why livestock were already dying even before the oral hearing was to take place but for the delivery of the section 17(2) notice.

42. It is trite that it is insufficient for a party to set out a conclusion without laying the factual basis for it in motion proceedings. See Joffe J in *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T). In the present case the respondents merely make the bold statement that should their livestock not get access to a grazing area urgently" *I will not have any livestock at all and that would be disastrous ... because we depend on them for our livelihood. I am unable to afford to supplement their food with fodder adequately."*

43. There is however nothing set out which deals with why livestock have allegedly died already or with the cost of obtaining fodder over an extended period. While it is accepted that the respondents have little income, they have not set out the basis on which they derive their *"livelihood"* from the livestock, it being clear that the livestock are not reared for domestic consumption only.

44. The court is therefore not able to come to the respondents' assistance because they have failed to set out sufficient facts, as opposed to conclusions, to support a variation of the interim order.

45. The variation order relied on allegations relevant to the rights of a labour tenant, whereas the counterapplication is formulated on the basis that the respondents are ESTA occupiers. Presumably, once there is a referral of the application to this court, the respondents will set out a case based on labour tenancy to which the applicants will respond.

46. It is necessary to explain to the parties that my decision in respect of the variation application leaves open the question of whether or not the respondents can competently bring an order seeking interim relief in any section 17(2) referral matter under the Labour Tenancy Act if the factual requirements for changed circumstances (if legally competent) are satisfied,

OFFICE OF THE DIRECTOR-GENERAL

47. The situation in which both the respondents and the applicant find themselves is due to the failure by the Office of the Director-General to have dealt with the application for the allocation of land with the sufficient degree of expedition that it is required to perform its functions in order to ensure that the constitutional protections under section 25 (6) are given content and are implemented in appropriate cases.

48. Not only is the delay of almost a quarter of a century inexcusable in processing applications under the Labour Tenancy Act, but it is difficult to comprehend how it can take almost a year from the signing by the Deputy-Director General of the section 17(2) notice to its actual delivery.

49. In *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11); 2019 (6) SA 597 (CC) at para 69 the Constitutional Court found it necessary to appoint a Special Master because there was a failing institutional functionality at the Office of the Director-General *"... of an extensive and sustained degree. That cried out for remedy. ..... The Land Claims Court's order was directed at remedying institutional dysfunction and other blockages that imperil rights at a systemic level".*

50. In reaching this conclusion Cameron J set out the significance of securing the implementation of the land reform project. At paras 1 and 2 the following was said:

> *"[1] ... Land reform could be "a catalyst for structural change in our society", the judgment noted. But delays in processing land claims have debilitated land reform. Expeditious land restitution could, the Court said, "contribute to a wider, more striking consciousness that centres on the constitutional values of equality and dignity, and gives rise to ideals of social justice, identity, the stimulation of economic activity, the promotion of gender equality and a contribution towards the development of rural livelihoods."*
>
> *[2] Each of these urgent words are apposite to this case – not, this time, for lawmakers, but for our country's administrators – the bureaucrats and officials who are responsible for putting into effect the land reform programme. At issue are not only the lives and wellbeing of those claiming the betterment of their lives as labour tenants. At issue is the entire project of land reform and restitution that our country promised to fulfil when first the interim Constitution came into effect, in 1994, and after it the Constitution, in 1997."*

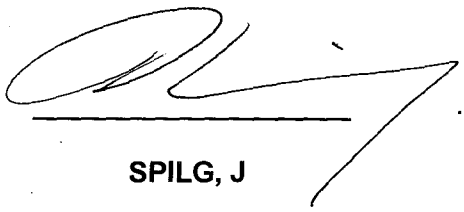
51. There appears to be no reason why the Office of the Director-General cannot ensure the expeditious referral of the application to the Land Court. It appears appropriate that the delay of over 20 years in processing this application and the lengthy time it took to deliver the notice is brought to the attention of both the Director-General and the Special Master.

52. Ms Sikosana on behalf of the respondents has provided details of the basis on which they allege that they, or their parents or grandparents, came to be labour tenants. This means that most of the essential groundwork has now been done. There should be no reason why the referral to evidence cannot be heard during the first term of next year provided the Office of the Director-General does not delay the process any further.

ORDER

53. In the circumstances the variation application is dismissed. There are no

circumstance justifying a change to the normal position this Court takes in relation to costs. There will therefore be no order as to costs.



SPILG, J

DATE OF HEARING	29 August, and 19 September 2024
DATE OF JUDGMENT	20 September 2024
FOR APPLICANT	Adv JE Kruger
	Moolman & Pienaar Inc
FOR 1st to 6th RESPONDENTS	Ms M Sikosana
	Legal Aid: Pietermaritzburg