



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO.: 1431/2016
Date heard: 12-11-2020
Date delivered: 19-11-2021

In the matter between:

Mariana Van Wyk

Respondent/Applicant

And

Daberas Adventures CC

Applicant/Respondent

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This is an application for leave to appeal against the judgment I handed down in this matter on 13 December 2019. The orders I made in this matter are in effect:
 - 1.1 The ejectment of the respondent from the Remainder of Portion 4 of the farm Daberas No8 (The applicants' property);

- 1.2 That the respondent be ordered to remove any structures it had erected upon the property without doing any damage to the property;
 - 1.3 That the respondent be ordered to remove the fencing it erected on the property and to replace the fencing as it was before the respondent interfered with it;
 - 1.4 That the respondent comply with the above orders within 7 days, and
 - 1.5 That the respondent pays the costs of the application.
2. For the sake of convenience I refer to the parties as in the main application. In its notice of application for leave to appeal, the respondent raised some 38 grounds of appeal. The majority of these grounds are interlinked and it will serve no useful purpose to deal with each individually. I will therefore confine this judgment to those grounds argued by Mr Da Silva for the respondent.
3. I may commence by stating that those grounds relating to my findings on the issue of acquisitive prescription have been abandoned by the respondent.
4. The relevant grounds of appeal are as follows:
 - 4.1 The applicant approached the court prematurely.

4.1.2 In this regard for Da Silva has referred to the matter of *Maledu and Others v Itereleng Bakgatla Mineral Resources (PTY) LTD and another* 2019 (1) BCLR 53 (CC), where the Constitutional Court held that the respondents were under a duty to exhaust the internal processes under s54 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) before approaching the High Court for an order of eviction and an interdict.

4.1.3 The respondent sought to draw a parallel between the *Maledu* case and the matter *in casu* in arguing that s16 and S 29(d) of the Fencing Act, 31 of 1963 provides an alternative remedy which the applicant should have exhausted before approaching this Court for an order of ejection and an interdict and that a court of appeal could thus reasonably find that the application was premature and that this court had no jurisdiction to adjudicate this matter.

4.1.4 The first problem with this argument is that s54 of the MPRDA constitutes a mandatory process which mining right holders and landowners/lawful occupiers must comply with in the event of a dispute over access to the land to which the mining right relates.

4.1.5 S 16 of the Fencing Act which relates to give and take lines does not provide for the mandatory referral of disputes for determination in terms of the second schedule to the Fencing Act. In fact it states that “*any such owner may claim that the matter shall be determined as a dispute in accordance with the provisions of the second schedule.*”

(Own underlining)

4.1.6 I have in the main judgment also dealt with the applicability of s29 (d) of the Fencing Act in paragraphs 22 to 27 thereof. Mr Da Silva contends that my reliance on the authorities cited therein is unfounded. He again places reliance on *Halgreen v Theron* 1927 EDL 417. In the *Halgreen* matter however it appears that a give and take line had already been fixed between the previous owner of the applicant's property and that of the respondent. The issues in that matter, which concerned a review of an award of arbitration in terms of the Fencing Act, do not apply *in casu*.

4.1.7 The ground that the court has no jurisdiction to entertain the dispute between the parties by virtue of a mandatory referral is unmeritorious for the further reason that s30 of the Fencing Act specifically states that Magistrates Courts have jurisdiction to entertain any civil proceedings under

the Act. Sections 16 and 29(d) of the Act do therefore not oust the Court's jurisdiction to deal with matters relating to fences under the Act.

4.1.8 For the sake of completeness I deal briefly with the argument that the dispute resolution process in Schedule 2 of the Fencing Act is an alternative remedy available to the applicant. The requirement that there be no other suitable or effective remedy applies to interdicts. In this regard the alternative remedy should offer similar protection of the applicant's interests to that in the relief sought. It cannot in my view be said that a referral to the Board for determination of a give and take line would offer similar relief.

4.2 That the court erred in not referring the disputes of fact for oral evidence.

4.2.1 The disputes of fact which in essence relate to whether or not the erstwhile owners of the respondent's property assisted in erecting and maintaining the fence and when the fence was erected. Those disputes are not material to the real issue in this matter i.e. the defence raised by the respondent that the fence in dispute constitutes a give and take line in terms of the Fencing Act. I have dealt with these aspects in paragraphs 33 and

34 of the main judgment which also relate to the further ground of appeal that I erred in not finding that a tacit agreement had come into existence between the erstwhile owners of the property. There is no merit in these grounds.

- 4.3 That the court erred in allowing the affidavit of BC Van Wyk and PS Van Wyk's letter attached to the replying affidavit and not allowing the respondent to file a further affidavit.

4.3.1 In the first place, the respondent's Mr Da Silva was given the opportunity to apply for the admission of a further affidavit, which he declined. This failure of his cannot be laid at the court's door. In the second place, my refusal to strike out those portions of the replying affidavit objected to by the respondent is fully explained in paragraphs 12 to 21 of the main judgment. There is no merit in this ground of appeal.

5. I am in the circumstances of the view that there would not be any reasonable prospect of success on appeal in this matter. I may in conclusion add that nothing prevents the respondent to take the initiative to have a determination made in terms of the Fencing Act in relation to a give and take line, should it consider it necessary.

In the premises, the following order is made:

The application for leave to appeal is dismissed with costs.



CC WILLIAMS

JUDGE

For Applicant/Respondent:	Mr. A Da Silva Louw & Da Silva Inc
For Respondent/Applicant:	Adv. H Rust Elliot Maris Wilmans & Hay