



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

COURT A QUO CASE NO: 19/2018

APPEAL CASE NO: HCA14/2019

(1)	REPORTABLE: NO /YES
(2)	OF INTEREST TO OTHER JUDGES: NO /YES
(3)	REVISED.
	28/08/2020
	DATE
	SIGNATURE

In the matter between:

HERMAN LETSOALO & 2 OTHERS

APPELLANT

And

MASHAO JOOHN TEPANYEKGA & 11 OTHERS

RESPONDENT

JUDGMENT

NAUDÉ AJ:

- [1] This is an appeal from the Magistrate's Court Sekgosese against the judgment and order of Magistrate Raborefi-Nachabeng delivered on 21 August 2018.
- [2] The Appellants in this matter were the Respondents in the Court *a quo* and the Respondent herein was the Applicant. The parties herein are referred to as in the *court a quo* in order to maintain harmony with the record before this court.

Facts:

- [3] The Applicant is the registered owner of Portion 6 of the Farm Kalkfontein 812, Registration Division L.S, Limpopo Province. The beneficiaries of the Trust as registered with the Master of the High Court North Gauteng Division is listed as the Matoks Community Beneficiaries which list of beneficiaries was accepted by the Master of the High Court on 23 January 2017 and the Dikgale Community of the Madibeng-Letupi Community Trust was registered with the Master of the High Court North

Gauteng Division on the 3rd of July 2017. The Respondents are not beneficiaries of the Madibeng-Letupi Community Trust, nor are they trustees of the said trust.

- [4] The Respondents were initially allowed to graze their cattle on the property of the Applicant, subject to payment of certain fees. This was a verbal agreement. The Respondents failed or refused to pay any of the amounts demanded by the Applicant and the First Respondent was indebted to the Applicant in the amount of R6400.00 (Six Thousand Four Hundred Rand) on December 2017. The Second Respondent was indebted to the Applicant in the amount of R5620.00 (Five Thousand Six Hundred and Twenty Rand) and the Third Respondent was indebted to the Applicant in the amount of R8970.00 (Eight Thousand Nine Hundred and Seventy Rand). Despite various requests, the Respondents remain indebted to the Applicants in the aforesaid amounts.

- [5] The Respondents have on various instances been requested to enter into a formal written agreement with the Applicant to establish their contractual grazing rights against the property on payment of the fees as required by the Applicants, but the Respondents have refused to comply with the demand of the Applicant. The Respondents argued that they entered into a verbal agreement with the beneficiaries of the Trust to graze their cattle on the Trust's property. The Respondents have no legal right or any other right to occupy the property of the Applicants, nor any grazing rights on the property.
- [6] In the result, the Applicants brought an application in the Magistrate's Court Sekgosese wherein the Applicants applied for (a) "eviction" of the cattle (livestock) of the Respondents on the property, (b) that the Sheriff or the Pound Master be authorized to remove the cattle (livestock) from the properties and keep same in pound until the Respondents have paid the outstanding grazing fees and the costs of the Application, (c)

that the Respondents pay the costs of the application on the scale as between attorney and client.

- [7] At the hearing of the matter, the Magistrate raised two questions namely:- (1) whether the court had jurisdiction to hear the matter and (2) whether there are disputes of fact. The legal representative on behalf of the Applicants applied from the bar that a prayer be added to the notice of motion in terms whereof an interdict is issued prohibiting the Respondents from grazing their cattle on the said property. The Respondents legal representative consented to this amendment and according to the Magistrate the amendment then had the effect that the court acquired the necessary jurisdiction to hear the matter.
- [8] In respect of the second question whether there are disputes of fact, the Applicant's legal representative argued that on the documents before the court *a quo* there are no disputes of fact.. It was further argued by the Applicant's legal representative that

the Respondents did not reply to paragraphs 8, 9, 10 and 11 of the founding affidavit, which paragraphs contain the cause of action and that their failure to deal with these paragraphs constitutes an admission of the facts contained therein. The Respondents legal representative argued that it was dealt with under background and the failure to deal with these paragraphs were an omission. The Respondent's legal representative contended that there are disputes of fact and the matter should be referred to oral evidence. The Magistrate hearing the matter opined that there can be a dispute, but the question was whether was it really a matter that needed to be determined through oral evidence. The Magistrate afforded the Respondents' legal representative an opportunity to either proceed with the matter and finalise it, alternatively to apply for an amendment. The Respondent's legal representative indicated that the answering affidavit will have to be amended and by doing so also conceded that on the papers before court there were no dispute of fact. The Respondents wanted to

apply for a postponement in order to amend their answering affidavit but was refused the postponement in that the Magistrate was of the view that even if a postponement was granted for the Respondents to amend, it will not change the situation and the Respondents still would not have a defense to the cause of action and in the result, the learned Magistrate proceeded to make a final order.

- [9] The Appellants' noted an appeal against the whole judgment of the *court a quo* on the grounds that the Magistrate in essence:-
- (a) erred in not finding that the Applicants affidavit did not meet the requirements of an interdict and erred in granting the interdict; and
 - (b) erred in granting the eviction order against the three Respondents;
 - (c) erred in authorising the Sheriff or the Pound Master to remove the cattle from the property;

- (d) erred in not finding that there is a contract which the parties did not cancel;
- (e) erred in not finding that there are disputes of fact which required oral evidence; and furthermore ;
- (f) erred in not finding that the Magistrate's Court does not have jurisdiction, but that the dispute falls within the jurisdiction of the Land Claims Court.

Case Law:

[10] Firstly, I will deal with the interdict granted. The Magistrate granted a final interdict. The well-known requirements for a final interdict as set out in **Setlogelo v Setlogelo 1914 AD 221** and **Free State Gold Areas Ltd v Merriespruit Gold Mining Co 1961 (2) SA 505 (W)** are:-

- (i) A clear right on the part of the applicant;
- (ii) An injury actually committed or reasonably apprehended;
- (iii) There is no other satisfactory remedy available to the Applicant.

I will deal with each of these requirements in turn:

[11] A 'clear right'.

Interdicts involve the enforcement and protection of rights. It follows that the first prerequisite for the granting of an interdict is the existence of a right accruing to the person who seeks to enforce the interdict. For a court to grant a final interdict, it must be satisfied that the right to be protected is a 'clear right'. To establish that the right in question is a 'clear right', as opposed to a *'prima facie right'*, involves two steps:

(a) First confirming that the right exists in law. The right to be protected or enforced needs to be identified. In this case rights are created by contract for instance the tenants' rights of occupation created under the contract of lease. Whether or not the Applicants has, a right is therefore a matter of substantive law, meaning that the right is one that is recognised by law.

(b) Secondly, proving that the right exists in fact. Merely identifying the right is not sufficient to make it a 'clear right'. A mere allegation that it exists is insufficient. Evidence must be led to prove its existence. For instance, a right of occupation enjoyed by a tenant would be proved by the existence of an agreement of lease. To establish a clear right, the applicant must prove the existence of the right on a balance of probabilities. A clear right may be either a real or a personal right, in other words, a right *in rem* or a right *in personam*.

[12] In this matter before court, it is common cause that there existed an agreement, although a verbal agreement, that the Respondents are entitled to graze their cattle on the property of the Applicants. Although the Respondents had not made any payments for the grazing rights, the Applicants only sent letters of demand and in doing so did not terminate the agreement between the parties. Nowhere in the papers filed by the parties

were allegations made that the agreements were terminated, either. The Respondent's version is however that they did not enter into an agreement with the Trustees of the Applicant, but the beneficiaries. The beneficiaries of the Applicant had no right or power to enter into an agreement with the Respondents. Although the existence of an agreement between the Appellants and Respondents was not established, it is clear that there must have been some sort of tacit or implied agreement between the parties either express or implied as the Respondents had been grazed their cattle on the property for approximately 10 (ten) years, and the Appellants had therefore demanded payment for such grazing. On the Applicant's own version, there existed a verbal agreement between the parties. It is this court's view that the grazing rights still exists in absence of the express cancellation of the agreement and therefore the Applicants had not established a "clear right". A "clear right" should not be confused with a 'real' right as in a real right of ownership (*ius in rem*). The fact that the Appellants

as a trust are the owners of the property, does not automatically mean that they have a “clear right”, but merely enjoy *ius rem* which can be protected by the *actio in rem*.

[13] An injury actually committed or reasonably apprehended.

The second requirement for a final interdict is an ‘injury actually committed or reasonably apprehended. An ‘injury’ in this context does not necessarily mean physical harm or harm that results in financial loss. As explained in **Erasmus (2003) Superior Court Practice, E8-6**, the authorities use the word ‘injury’ to mean an act of interference with or an invasion of the applicant’s right and resultant prejudice. If an interdict is required in order to prevent or stop the commission of a delict, facts must also be alleged and proved to show that the conduct of the Respondent is wrongful. In this court’s view, the Appellants did not allege or prove the second requirement in the papers as filed before the court *a quo*, nor in their legal representative’s argument before the court *a quo* and as a

result, the second requirement was not proved to sustain a final interdict either.

[14] Absence of any other satisfactory remedy

The last requirement for a final interdict is that the applicant must have no ordinary or satisfactory legal remedy. Because an interdict is a drastic remedy, the court will not grant an interdict when some other form of redress would be adequate or would provide similar protection. This court is satisfied that in this instance the Applicants had no other remedy than to approach the *court a quo* for an interdict as they did.

[15] The fact that the Applicants had satisfied the third requirement however is not sufficient to grant an interdict. All three requirements must together be satisfied and in the result this court is of the view that the *court a quo* was incorrect in granting the final interdict. The appeal on this aspect therefore succeeds.

[16] The second ground of appeal is that the court *a quo* erred in granting the eviction. The Applicant brought an application for the Respondent's eviction in terms of the common law. The Respondents argue that the Magistrate's Court does not have the necessary jurisdiction to hear the matter and that the Land Claims Court is the relevant court with the necessary jurisdiction in that the eviction falls within the ambit of the Labour Tenants Act, Act 3 of 1996 ("LTA").

[17] In terms of **Section 17(1) of LTA**, a labour tenant is defined as follows:-

*"labour tenant" means a person (a) who is residing or has the right to reside on a farm; (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, **and in consideration of such right provides or has provided labour to the owner or lessee**; and (c) whose parent or grandparent resided or resides*

*on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, **and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm**, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker (own emphasis).*

- [18] The Respondents do not and have not provided labour to the owners of the property and therefore the LTA is in our view not applicable to this matter. It is this court's view that the Applicant's brought the application in terms of the common law in that the common law is applicable to all kinds of evictions from commercial property utilised for commercial purposes, all other evictions from residential property not utilised for residential purposes and **agricultural land which is not utilised in any way for dwelling or residential purposes** (own emphasis). The Applicant's remedy at common law is the *rei vindicatio*.

See **Graham v Ridley 1931 TPD 476** and **Chetty v Naidoo 1974 (3) SA 13 (A)**.

- [19] In the Magistrate's Court, if there is no consent to jurisdiction, the Magistrate's Court's jurisdiction is determined in terms of Section 29(1)(b) of the Magistrate's Court Act 32 of 1944 on the basis of the value of the right of occupation to the occupier not exceeding R200 000.00 (Two Hundred Thousand Rand). In the result, the Magistrate's Court had the necessary jurisdiction to hear this matter, on eviction of the Respondents.
- [20] In **Jordan v Penmill Investments CC 1991 (2) SA 430 (E)** it was however held that a final order for common law ejectment may only be obtained by way of an action, although interim relief may however be granted on motion. The magistrate's court has no inherent jurisdiction to make a final order for eviction or ejectment upon application for common law ejectment as opposed to proceedings instituted by way of

summons. Section 29 (1) (b) of the said Act provides that the magistrate's court shall have jurisdiction in "*actions* of ejectment against the occupier of any premises or land within the district".

- [21] The situation differs however in the instance where an application for ejectment was made in terms of **Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, Act 19 of 1998 (PIE)**. Erasmus & Van Loggerenberg ("**The Civil Practice of the Magistrate's Courts**" Service 11, 2003) the writers contend that the word "*action*" in section 29 (1) has the narrower meaning of proceedings initiated by summons. Thus an application for the delivery of property or for permanent final ejectment may not be brought in the magistrate's court. However, the latter limitation does not apply to proceedings for eviction in terms of the PIE and the Extension of Security of Tenure Act 62 of 1997 ["ESTA"]. Section 4 (1) of the PIE stipulates that "*notwithstanding anything to the contrary contained in any law or the common law, the provisions of this*

section apply to proceedings by any owner or person in charge of land for the eviction of an unlawful occupier". The word "proceedings," it was stated, can be interpreted to include applications. The court *a quo* therefore could not have been competent to grant the final order on the application before it. The court below could only have granted an interim order. In the result, the appeal must on this ground succeed.

- [22] Furthermore, in terms of the common law, eviction proceedings cannot commence, unless the lease had been cancelled. In **Morkel v Thornhill (A105/2009) [2010] ZAFSHC 29 (4 March 2010)** it was held that a notice of cancellation must be clear and unequivocal and only takes effect from the time it is communicated to the relevant party. As stated above, there is no such cancellation on the papers filed before the court *a quo*, and it can therefore be accepted that although there was a demand for payment, the agreement was never cancelled. In the result, the court *a quo* should not have entertained the

eviction proceedings. The court *a quo* erred in granting the final eviction and as a result, the appeal must succeed on this ground as well.

[23] The last issue remaining in respect of the grounds of appeal as raised by the Respondents is whether the court below, could grant an order authorising the Sheriff or the Pound Master to remove the cattle from the property and impound the cattle until payment of the arrear amounts have been made by the Respondents.

[24] **Section 46(2)(c) of the Magistrate's Court Act** stipulates, as follows:

"46 Matters beyond the jurisdiction:

(1)

(2) A court shall have no jurisdiction in matters -

(a)

(b)

(c) in which is sought specific performance without an alternative of payment of damages except in

(i) the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette.....”

It is essential to realise that section 46 is prohibitive in nature, prohibiting Magistrates’ Courts from hearing claims and granting orders in those matters set out in the said section. See **BADENHORST v THEOPHANOUS 1988 (1) SA 793 (C)** at 796 E. It is not an enabling or empowering section.

[25] In **Tuckers Land & Development Corporation (Edms) Bpk v Van Zyl 1977 (3) SA 1041 (T)** at 1045D, followed in **Otto v Basson 1994 (2) SA 744 (C)**, Van Reenen J finds the distinction between claims *ad pecuniam solvendam* and claims *ad factum praestandum* useful and he expressly dissents from the decision in **Carpet Contracts (Pty) Ltd v Grobler 1975 (2)**

SA 436 (T). After a review of the history of **Section 46(2)(c)** he concluded that orders sounding in money, regardless of the cause of action, are not,, for the purposes of the section, orders for specific performance. He points out that from the history of the section the interesting fact emerges that:-

“dat alhoewel daar heelwat regterlike verskil was oor die landdroshof se bevoegdheid om daadwerklike vervulling te gelas, daar nooit enige twyfel bestaan het oor die bevoegdheid om eise wat in munt geklink het, hetsy as skuld, skadevergoeding of andersins, af te dwing nie. En ons het die historiese feit dat die howe reeds duisende der duisende sodanige bevele gemaak het.” See **Jones & Buckle, The Civil Practice of the Magistrate’s Courts in South Africa, Tenth Edition, Volume 1 (The Act page 188)**

[26] In **Van Rensburg Pathologists Incorporated v Rampana (A70/2013) [2013] ZAFSHC 191 (19 December 2013)** Van Zyl

J held as follows:-

*“As already indicated, section 46 is not the empowering section. Although I agree with the interpretation of the word “matters”, that only means that the **prohibitions** contained in section 46 pertains to both applications and actions. The operative word that was used by the Legislature in the **empowering** section 29 is “actions”, which has previously already been construed as to have the restrictive meaning of action proceedings as such, not including application proceedings. In IN RE: PENNINGTON HEALTH COMMITTEE 1980 (4) SA 243 (NPD) at 247 H and further, the following dicta appear:*

“A perusal of all the sections shows that the Legislature drew a clear distinction between actions and applications. Procedure by way of application is recognised, but the intention appears to have been to confer jurisdiction generally in actions (in a narrow sense) while authorising application proceedings only in specific cases. My conclusion that the word ‘actions in s 29(1) means proceedings initiated by summons is supported by the case of WOLMAN v BLOCK (2) 1928 OPD 119.It follows that the decision in WOLMAN v BLOCK (supra) is still

applicable notwithstanding that it dealt with legislation which has since been repealed.”

That the use of application procedure to initiate proceedings in Magistrates' Courts finds very limited application and that it may not be used if not specifically sanctioned, is very clear from the following respective extracts:

“The Magistrates' Courts Act and Rules provide only for applications in certain limited circumstances. Other legislation may also expressly or implicitly empower applications in the Magistrates' Courts.Although, in the Magistrates' Courts, the only applications that are strictly speaking capable of being independent proceedings are interdicts and spoliation orders..... If application proceedings are not sanctioned by the Act or rules or other legislation it is not competent to launch proceedings by way of application. When proceedings are launched by application not sanctioned in the rules or Act, they are a nullity in terms of the Act and Rules. (Own emphasis)

See CIVIL PROCEDURE IN MAGISTRATES' COURTS, LTC Harms, at B 485 - B 486.

“Die aansoek of mosie kan slegs in gevalle waarvoor uitdruklik voorsiening gemaak is, gebruik word om gedinge in te stel. Word dit gebruik in gevalle waarvoor daar nie voorsiening gemaak is nie, kom geen geding binne die raamwerk van die Wet op Landdroshowe 32 van 1944 tot stand nie. Dit word aan die hand gedoen dat die enigste gevalle waar van die aansoek as middel tot die instel van ‘n selfstandige geding ingevolge die Wet op Landdroshowe 32 van 1944 gebruik gemaak kan word, is wanneer ‘n finale interdik en die mandament van spolie aangevra word.”

- [27] It is this court’s view that although the Magistrate’s court does have jurisdiction to entertain an action for specific performance, it follows that if the agreement between the parties was not unequivocally cancelled, neither were the terms and conditions of the agreement fully pleaded, the Magistrate could not have granted an order for specific performance in that the cattle be impounded by the Pound Master until payment of the arrear amounts have been made by the Respondents. In addition, the Magistrate erred in granting the relief of specific performance

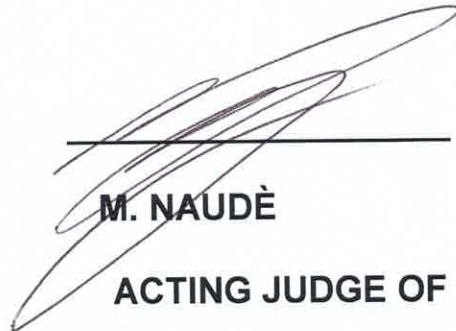
on motion proceedings. The Applicant should have instituted action proceedings. In the result, the appeal on this ground must also succeed.

[27] The only issue remaining is costs. The general rule is that the successful party should be awarded costs. There is in this court's view no reason why the general rule should not be applicable and in the result the appeal succeeds with costs.

Order:

[28] The following order is made:-

1. The appeal is upheld with costs.
2. The order of the court *a quo* handed down on 21 August 2018 is set aside.
3. The Respondent in the Appeal/Applicant in the court *a quo* to pay the costs of this appeal.

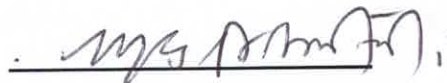
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M. NAUDÉ

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I AGREE, and it is so ordered.

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M.G PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON:	21 AUGUST 2020
JUDGMENT DELIVERED ON	28 AUGUST 2020
For the Appellants:	Mr. Phooko
Instructed by:	Moloko Phooko Attorneys
For the Respondent:	Adv. M. Bresler
Instructed by:	Charl Naudè Attorneys.
	POLOKWANE