

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 34243/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>13/2/18</u>	
DATE	<u>[Signature]</u>
	SIGNATURE

In the matter between:-

THE TLOKWE LOCAL MUNICIPALITY

Applicant

and

NDUMISO GQWETA
THE NATIONAL COUNCIL OF SOCIETIES FOR THE
PREVENTION OF CRUELTY TO ANIMALS (NPC)
POTCHEFSTROOM ANIMAL WELTHFARE SOCIETY
(NPO)

First Respondent
Second Respondent
Third Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] The applicant claimed the removal of the first respondent's livestock, all of which was identifiable, from the applicant's immovable property described as Portion 7 of the farm Eleazer 377 I.P. ('the farm').

[2] In addition, the applicant claimed orders interdicting the first respondent from:

2.1 Conducting any farming activities on the farm;

2.2 Entering upon the farm without the applicant's prior written consent.

[3] The first respondent opposed the relief sought by the applicant. The second and third respondents did not participate in the hearing.

[4] The common cause facts were the following:

4.1 The applicant operated an economic development programme ('the programme'), that served to assist small scale farmers who were indigent and residing within the area of the applicant's municipal boundaries.

4.2 Certain requirements had to be met by farmers in order to qualify for assistance under the programme, including that the farmer was a small-

scale farmer, indigent and residing within the municipal area of the Tlokwe Municipality.

4.3 Once a farmer qualified for assistance, the future relationship between the applicant and the farmer was regulated in terms of a lease agreement, termed a 'temporary lease agreement'.

4.4 The applicant and the first respondent's concluded a temporary lease agreement dated 18 March 2012 ('the agreement'), pending finalisation of the lease documents.

4.5 In terms of the agreement, the first respondent was:

4.5.1 Granted permission to graze twenty four (24) head of cattle, reflecting a particular brand marking, on to the farm; and

4.5.2 Required, in the event of a change in the number of cattle, to submit the agreement to the applicant in order that it might give effect to the change.

4.6 On 27 September 2012, the first respondent was granted permission to remove ten (10) head of his cattle from the farm.

[5] During December 2012 or thereabouts, the applicant withdrew the first respondent's permission to graze cattle on the farm.

[6] The first respondent was unable to remove his remaining cattle from the farm immediately and, the applicant agreed to him doing so over a reasonable period of time, being:

6.1 Eight (8) head of cattle on 4 April 2014; and

6.2 Nine (9) head of cattle on 9 January 2015,

[7] Thus, the first respondent ought to have removed all of his cattle from the farm by 9 January 2015.

[8] Notwithstanding, the first respondent denied in his answering affidavit in the present application as well as the previous application (which the applicant withdrew), that the withdrawal of his permission to graze his livestock was valid, and that it amounted to a valid termination of the agreement.

[9] As at 6 November 2015, however, the first respondent's livestock on the farm numbered one hundred and thirty two (132) head of cattle and eighty (80) head of sheep, a total of two hundred and twelve (212) livestock.

[10] On 18 November 2015, the applicant addressed correspondence to the first respondent, in terms of which it informed the first respondent that it had cancelled the agreement, alternatively cancelled the agreement in terms of the correspondence, demanded that the first respondent remove his livestock within seven (7) days, and reiterated that the first respondent did not have permission to introduce further livestock on to the farm.

[11] No response was forthcoming from the first respondent and the applicant launched this application.

[12] Whether the first respondent lived within the boundaries of Tlokwe or not, or, qualified for assistance under the programme were disputed by the first respondent.

[13] The applicant argued that the agreement had been validly terminated, alternatively that the first respondent had breached the agreement by introducing vastly more livestock on to the farm than he was permitted to under the agreement.

[14] At the hearing, the applicant undertook to allow the first respondent a reasonable period in which to remove his livestock from the farm in the event that the court granted an order that he do so.

[15] The first respondent denied that the applicant was entitled in law to cancel the agreement (or, phrased differently, withdraw the permission to graze), based on the alleged material breach, and, due to the absence of procedural fairness.

[16] The first respondent did not deny that the provision of the agreement as to the number of livestock the first respondent was permitted to graze on the farm was a material term.

[17] Nor did the first respondent dispute the count of his livestock as at November 2015. Furthermore, the first respondent did not deny that there was no basis for his sheep to graze on the farm.

[18] The first respondent attempted to justify the number of his cattle on the farm on the basis that the provision in the agreement that the applicant give effect to any

change in the number of livestock, permitted him to introduce as many cattle as he wished to.

[19] The first respondent's contention, if accepted, would have resulted potentially in a situation in which a few farmers utilised all the applicant's available grazing whilst the majority of the indigent small scale farmers that the programme was intended to assist, were denied access to grazing as a result. That would have amounted to a wholly unfair and arbitrary use by the applicant of its available grazing resource, undermined the very purpose of the programme and prejudiced some of the most vulnerable people in our society.

[20] The provision relied upon by the first respondent, in my view, served to permit an increase or decrease in the livestock in the event of the birth of offspring or the death of any livestock.

[21] Thus, the first respondent's argument that he was entitled to introduce as many cattle on the farm as he wished to, was without merit. The first respondent's unilateral increase of his livestock on the farm as at November 2015, amounted to a breach of a material term of the agreement and entitled the applicant in law to cancel the contract.

[22] As to the fairness of the cancellation procedure, the first respondent's primary ground of opposition was that the applicant's termination of the agreement qualified as administrative action, and, that the applicant had not afforded the first respondent a right to a fair hearing in respect of the decision to terminate the agreement. That, according to the first respondent, served to render the cancellation irregular, unfair and invalid. The first respondent relied on the minority judgment in *Cape Metropolitan*

*Council v Metro Inspection Services (Western Cape) CC*¹ and *Sokhela & Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) & Others*.²

[23] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*³ did not assist the first respondent as it dealt with the granting of a lease, (which was found to constitute administrative action), not the termination thereof. Thus, *Grey's* was not applicable to the facts at hand.

[24] In the light of the significant increase in the first respondent's livestock on the farm, the applicant argued that the court could ignore the disputes as to the first respondent's place of residence and his indigence or otherwise, and find that the agreement had been validly cancelled pursuant to the first respondent's material breach thereof.

[25] The applicant denied that the cancellation of the agreement constituted administrative action. The applicant argued that it invoked the common law principles of contract law pursuant to which the first respondent was not entitled to procedural fairness in respect of the cancellation.

[26] The applicant conceded that it was an organ of state and exercised a public power in concluding the agreement with the first respondent under the programme.

¹ *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA) ('Cape Metropol').

² *Sokhela & Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) & Others* 2010 (5) SA 574 (KZP) ('Sokhela').

³ *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) ('Grey's').

[27] The applicant relied upon the line of authority commencing with *Cape Metropol* to the effect that the cancellation of a contract between a public body and a private firm was not administrative action.

[28] The applicant argued that once the parties concluded the agreement their relationship was regulated thereafter by the agreement and the principles of contract law, and that the applicant's contractual rights could be exercised without regard for the principles of administrative justice.

[29] In *Logbro*⁴ the court stated that *Cape Metropol*:

'[9] ... did not purport to provide a general answer to the question whether a public authority in exercising powers derived from the contract is in all circumstances subject to a public duty to act fairly. That question was left open. Instead, the Court's judgment makes it plain that the outset depends on all the circumstances. ...

[10] (Cape Metropol) is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual powers without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.'

[30] The applicant referred to *Government of the Republic of South Africa v Thabiso Chemicals (PTY) LTD*⁵ in which the SCA, relying inter alia on *Cape Metropol*⁶ and *Steenkamp*,⁷ dealt with the role of the principles of administrative law upon a contractual relationship between the parties.

⁴ *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) ('*Logbro*') paras 9 and 10.
⁵ 2009 (1) SA 163 (SCA) ('*Thabiso*').

⁶ *Cape Metropol* above n 1 para 18.

⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) paras 11 and 12.

[31] *Steenkamp*⁸ referred to *Logbro* in stating that 'Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship.'

[32] The issue in *Thabiso* was whether the cancellation process was procedurally fair and whether an opportunity to address the relevant authority in accordance with the *audi alteram partem* rule prior to cancellation of the tender, ought to have been allowed. The SCA determined unequivocally that the principles of administrative law did not play any part in the cancellation of the tender.

[33] The court in *Thabiso*, however, did not refer to *Logbro* or to the parties' respective bargaining power.

[34] In *Cape Metropol*, the SCA relied inter alia upon the absence of any disparity in the parties' respective bargaining positions. Not only was the first respondent 'a very substantial commercial undertaking' but the public body '... did not, by virtue of it being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution.'⁹

[35] Furthermore, other than *Steenkamp*, the cases abovementioned dealt in the main with public authorities on the one hand and corporate entities of some description on the other, not with an agreement between a public authority and a natural person.

⁸ Id.

⁹ *Cape Metro* above n 1 para 18.

[36] It follows from *Logbro* that whether or not the applicant was entitled to exercise its contractual power without regard for public duties of fairness depends on all the circumstances¹⁰.

[37] Whether or not the applicant's act of cancellation constituted administrative action turns on 'the nature of the power exercised'.¹¹

[38] Additional factors that might be relevant in determining the nature of the function included the source of the power exercised by the applicant, the subject-matter, whether or not it involved the exercise of a public duty and how closely related it was to the implementation of legislation.¹²

[39] The agreement was silent in respect of grounds justifying its cancellation and the method of its termination. Hence, the applicant sourced its alleged entitlement to cancel in the common law of contract, cancelling the agreement unilaterally pursuant to the first respondent's material breach thereof.

[40] Accordingly, the nature of the power exercised by the applicant was a common law contractual power and not one that was sourced in legislation.

[41] Given that the applicant derived its entitlement to cancel the agreement from the common law, the cancellation process was not imposed by the applicant upon the first respondent pursuant to the applicant being a public authority.

¹⁰ *Logbro* above n 4 paras 9 and 10.

¹¹ *Cape Metropol* above note 1 para 17; *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) para 141 ('SARFU').

¹² *Cape Metropol* above note 1 para 17.

[42] The common law power of cancellation upon a material breach of a contract was equally available to a natural person leasing a farm to the first respondent on the same terms as applied in this matter, as it was to the applicant.

[43] As a result, the applicant was not acting from a stronger position by virtue of it being a public body, when it cancelled the agreement.

[44] Accordingly, the applicant was exercising its common law contractual right to cancel the agreement in the face of the first respondent's material breach thereof.

[45] It follows that the applicant was not exercising a public power when it cancelled the agreement and was not burdened with duties of public fairness in terms of administrative law.

[46] The parties did not refer to the principles articulated in *Barkhuizen v Napier*.¹³

[47] As regards the applicant's claim for an interdict ordering the first respondent to remove his livestock failing which that the Sheriff be authorised to do so, the first respondent denied that he had infringed upon the applicant's rights, denied that there was prejudice to the applicant and that the applicant was entitled to the interdictory relief sought.

[48] The first respondent's unilateral increase of his livestock on the applicant's farm comprised an infringement of the applicant's rights as well as those of the emerging farmers in respect of whom the programme was aimed by the applicant, fourteen (14) of whom were already receiving assistance.

¹³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

[49] The first respondent's conduct adversely impacted the applicant's ability to deliver resources, and prejudiced existing and potential farmers entitled to assistance from the applicant, by unlawfully accessing a greater portion of the available resources than he was entitled to.

[50] Whilst the applicant is entitled to the interdictory relief sought by it in the application, the first respondent should be allowed a reasonable period of time to remove his livestock from the farm. The period of one month submitted by the applicant was insufficient.

[51] The first respondent did not furnish any facts as to possible prejudice to him in the event of an order that he remove his livestock.

[52] As at November 2015, the first respondent was grazing in excess of 200 head of livestock on the farm. I was not furnished with the current updated count but it is possible that the number has increased in the interim with the arrival of offspring. The process of relocation must meet the applicant's need to access the grazing to be made available by the removal of the first respondent's livestock as soon as possible, whilst simultaneously ensuring that the first respondent's farming operation is not prejudiced. A period of six months for the removal of the livestock on a reducing basis over the period, appears to be fair.

[53] In the circumstances, the first respondent must remove the entirety of his livestock from the farm within a period of six (6) months commencing with effect from 1 April 2018. The first respondent must remove not less than forty (40) head of livestock per month on or before the first (1ST) day of each consecutive month commencing with effect from 1 April 2018.

[54] The date of 1 April 2018 should allow the first respondent sufficient time to make the necessary arrangements for an alternate location and transport for the livestock.

[55] The parties were agreed that the costs should follow the merits. Neither party in this matter has entirely clean hands and I intend to make an order on a party and party scale.

[56] In the circumstances, I grant the following order:

1. The first respondent is ordered to remove:

1.1. All of his cattle (marked with orange ear-markers and brandmark
“**Q** ^{**N**} **G**”); and

1.2. All of his sheep (marked with orange ear-markers);

(‘the livestock’)

from the applicant’s immovable property described as Portion 7 of the farm Eleazer 377 I.P. (‘the applicant’s immovable property’), within a period of six (6) months commencing with effect from 1 April 2018.

2. The first respondent must effect the removal of the livestock by removing not less than forty (40) of the livestock per month on or before the first (1ST) day of each consecutive month commencing with effect from 1 April 2018.

3. In the event that the first respondent fails to comply with the orders in paragraphs 1 and 2 above, the Sheriff of this Court is authorised to remove the livestock from the applicant's immovable property and to deliver the livestock to the first respondent.
4. In the event that the Sheriff of this Court, is unable to deliver the livestock to the first respondent after their removal from the applicant's immovable property, the Sheriff is authorised to deliver the livestock to the National Council of Societies for the Prevention of Cruelty to Animals ('NPC') in which event the second respondent is authorised to deal with the livestock at its discretion.
5. Subsequent to compliance by the first respondent with the orders in paragraphs 1 and 2 above, alternatively compliance by the Sheriff with the order in paragraph 3, alternatively paragraph 4 above, the first respondent is interdicted from:
 - 5.1. Conducting any farming activities on the applicant's immovable property; and
 - 5.2. Entering the applicant's immovable property without the applicant's prior written consent.
6. The first respondent is ordered to pay the costs of the application.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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DATE OF HEARING	9 October 2017.
DATE OF JUDGMENT	2 February 2018.