



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

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

CASE NO.: 1720/2010
Matter heard: 27-03-2018
Delivered: 15-06-2018

In the matter between:

MINISTER OF DEFENCE

Applicant

And

GERT JOHANNES VERMEULEN
PIETER JAKOBUS HUGO
THABA LETSELE (PTY) LTD
JACOB STEYN N.O
DE BRAK BOERDERY CC
CHRIS STRAUSS
BOTH A MARKRAM
ALWYN JOHANNES LÜBBE
SAREL FRANCOIS WEIDEMAN
MIETJIE STEENKAMP
ALEXANDER ABRAHAMS
FREDDY MARKRAM N.O.

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11th Respondent
12th Respondent

J U D G M E N T

WILLIAMS J:

1. This is an application for leave to appeal against the whole of my judgment and orders granted on 15 December 2017. The applicant, the Minister of Defence, raises 36 separate grounds upon which leave to appeal is sought. I do not intend to deal with each ground individually, as certain grounds can be grouped together for the sake of convenience.

Ground 1

2. **The constant permitting of repititious reformulation and discovery of documents during the course of the trial while plaintiffs were testifying (both in chief and under cross-examination) is inconsistent with a fair trial and is a dereliction of the court's duty to encourage a culture of compliance with rules of court.**

2.1 In paragraph 8 of the main judgment I explain why the amendments to the plaintiffs' claims were granted. Likewise, when certain documents were produced by both plaintiffs and defendant while a witness was testifying, I allowed the introduction of such documents in my discretion and on the basis that there could be no prejudice to any party. The applicant has yet to show what prejudice was suffered.

Ground 26.

- 3 **My refusal to allow the expert evidence of the defendant's metallurgists.**

- 3.1 The applicant filed a Rule 36 (9) (b) notice in respect of metallurgical experts on 23 February 2016. At that stage all but one of the plaintiffs still had to testify. No reasonable explanation was given for the late filing of such notice which in terms of the Rules should have been given before the trial commenced on 3 December 2013. Allowing such evidence would have caused further inordinate delays in the trial, at that stage already in its 20th week, since the plaintiffs would in all probability have to be recalled on aspects relating to the expert evidence which they had not had an opportunity to deal with and in addition the plaintiffs would have to be given an opportunity to call their own metallurgical experts, if they so wished. It can never be said in these circumstances, that the interests of justice demand that such evidence be allowed. This ground of appeal has no merits.

Grounds 3, 5, 7, 8, 11, 12, 15 and 19

4. **These grounds all relate to bias the applicant alleges I have shown in preferring the plaintiffs' evidence over that of the defendant, ignoring concessions favourable to the defendant and generally failing to discharge my judicial duties properly.**

- 4.1 If I had been biased in favour of the plaintiffs I would not have dismissed certain of their claims. Where I preferred the evidence of one witness over another I gave full reasons therefore in the main judgment.

Ground 2

- 5. That I erred in not dismissing the claim of the 12th defendant since his cause of action did not arise from the fire of 6 to 9 September 2009.**

5.1 I dealt in detail with this argument in paragraphs 159.1 to 159.1.5 of the main judgment. The applicant cannot now complain when she is the author of her own misfortune. There is no merit in this ground.

Grounds 3 and 4

- 6. I failed to ventilate the question whether the conduct of the defendant's employees was the cause of the plaintiff's loss of income and erred by not holding that the defendant's conduct was not the cause of the plaintiff's loss of income.**

6.1 It should be remembered that the defendant conceded the merits of the action. If what is meant by these grounds is that the plaintiffs failed to mitigate their damages, this issue is specifically addressed in paragraph 190 of the main judgment.

Grounds 9, 10 and 13

- 7. I failed to find that it was common cause between Professors Snyman and Dube that grazing can take place about 6 weeks after a fire, even before the range has fully recovered, subject to the grazing being for relatively short periods and allowing for adequate rest periods.**

- 7.1 This “*common cause*” factor does not advance the applicant’s case one bit. If the cattle should be allowed to graze for a few hours or a day on veld which has not fully recovered, before being removed from it (as suggested by Prof Dube.), the plaintiff’s problem of overgrazing on the unburned camps (during the “adequate” rest periods) will persist.

Grounds 14 and 15

- 8. These grounds relate to my acceptance of the plaintiffs’ experts opinion that an entire camp should be withdrawn from grazing if more that 10% thereof had been burned – and that it would not be reasonable or prudent to accommodate all the animals on the rest of the farms.**

- 8.1 The plaintiffs’ experts opinions in this regard were reasonable and logical, unlike that of Prof Dube who did not take into account the fact that farms were divided into camps. See paragraphs 143 and 189 – 191 of the main judgment.

Grounds 16 and 17

- 9. I erred in holding that the plaintiffs’ physical measurements of the fire scar were more reliable than the SANSA measurements.**

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9.1 Only the 1st, 7th, 9th, 11th, and 12th, plaintiffs are affected in this regard. I accepted their physical measurements at the hand of the evidence of Mr Emery as discussed at paragraph 157 of the main judgment. Accordingly I am of the view that there are no merits in this ground of appeal.

Ground 27

10. That I erred in accepting lay witnesses evidence as to the cause of damage to the plaintiffs' fences.

10.1 The plaintiffs testified that the fire caused the damage to their fences. So too Mr Swanepoel and Mr De Jager. There was no cogent reason for me to reject the plaintiffs' evidence as to the state of their fences before and after the fire.

Grounds 28 and 29

11. That I erred in affording Mr Swanepoel and Mr De Jager the status of experts on all the aspects they testified on and erred in relying on their evidence to support the plaintiffs' claims.

11.1 Mr Swanepoel and Mr De Jager were properly qualified to testify as experts on the aspects they testified on. As such I was justified in relying on their evidence.

Grounds 19 and 20

- 12. That I erred in accepting the plaintiffs' evidence as to the value of trees burned in the fire and awarding damages for the loss of trees.**

12.1 I accepted the plaintiffs and their experts evidence in this regard which made far more logical and reasonable sense than that of the defendant's expert.

Ground 21

- 13. This ground, that the claim for lost trees amounted to duplication of damages, was abandoned during argument.**

Grounds 22, 23, 24, 25

- 14. These grounds relate to my acceptance of the plaintiffs' and Mr Swanepoel's evidence relating to the claims for firefighting expenses, transport costs, fuel and the like.**

14.1 I deal with these claims in paragraphs 170 to 172 of the main judgment. In my view there can be no merit in these grounds.

Ground 30

- 15. I erred in holding that those plaintiffs leasing land from the government have claims against the government for damaging its own property.**

15.1 This argument was fully dealt with in paragraphs 159.2 and its sub-paragraphs in the main judgment. I have not been referred to any authority to the contrary.

Grounds 31 and 32

16. I erred in awarding damages for loss of income as the plaintiffs did not take contingencies into account in quantifying their damages alternatively I erred by not taking past and future contingencies into account when quantifying the plaintiffs' damages.

16.1 In this regard the applicant has failed to show any contingencies which would serve to reduce the award of damages. There is no merit in this particular ground.

Grounds 33 and 34

17. These grounds refer to the credibility of the plaintiffs and their expert witnesses.

17.1 I have expressed my views on the credibility and cogency of the plaintiffs and their experts in the main judgment. In my view no other court would reasonably come to a different conclusion.

Ground 35

18. I erred in awarding costs against the defendant.

18.1 There exists no reason in this matter why costs should not follow the event.

Ground 36

19. I erred in accepting reliance on the report of Mr du Toit on matters on which he was not qualified and did not testify about.

19.1 Mr Du Toit's report was placed before court in terms of Rule 36(9). He was present in court for most of the proceedings. When the plaintiff's testified they had no inclination that Mr Du Toit would not be called. Mr Weideman, the 9th plaintiff, accepted Mr Du Toit's calculating of his farm's affected area since it accorded with his own calculation. Mr Matthee who testified on behalf of the 8th plaintiff, accepted Mr Du Toit's calculation of the 8th plaintiff's affected area as 300 hectares. It also accorded with the 8th plaintiff's claim. The acceptance of these plaintiffs' reliance on Mr Du Toit's report was thus not done in a vacuum. It is rather disingenuous of the applicant, at this stage, to contend that their own expert was not qualified to report on such aspects.

20. In the circumstances I am of the view that the applicant would not have a reasonable prospect of success on appeal and the application thus stand to be dismissed.

The following order is made:

The application for leave to appeal is dismissed with costs.



C C WILLIAMS

JUDGE

For Applicant:

Adv. FR Memani

Mjila & Partners

For Defendent:

Adv. B Knoetze (SC)

Elliott Maris Wilamans & Hay