

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Case Nr: 787/2013
Case Heard: 08/11/2013
Date delivered: 12 /11/2013

In the matter between:

**JACOBUS KEYSER
MARIA MAGDALENA KEYSER**

**FIRST APPLICANT
SECOND APPLICANT**

and

WILLEM CHRISTOFFEL KEYSER

RESPONDENT

Coram: Olivier J

REASONS

Olivier J:

[1]. What follows are the reasons for the following orders granted by me at the hearing of this matter on 8 November 2013:

- [1.1] The applications to strike out and for leave to file a further affidavit are dismissed.
- [1.2] The applicants' application to amend paragraph 1 on the notice of motion is granted.
- [1.3] The respondent is ordered to remove all his livestock and any moveable property kept by him on
Portion 8 of the farm Mier 585
Siyanda District Municipality

Gordonia Registration Division

Northern Cape Province

Title Deed: T214/2013

Size 2591, 6566 hectares

within 30 days of the date of this order, failing which the sheriff is ordered and authorised to do so.

[1.4] The respondent is ordered to pay the costs of this application, including the costs of the applications to strike out and for leave to file a further affidavit

[2]. On 24 May 2013 the applicants lodged an application for an order that the respondent remove his livestock from a farm in the Gordonia area, and therefore within the area of jurisdiction of this Court, within 10 days of the date of the order and that, should the respondent fail to comply with such order, the sheriff be authorised and ordered to not only remove the livestock, but also to sell it on auction on such terms and conditions and at such prices as deemed fit by the sheriff.

[3]. The case made out by the applicants in their founding affidavit was that they had originally leased the farm and that they later became the registered owners of the farm. Approximately 5 years ago the first applicant agreed to let the respondent, his brother, keep livestock on the farm. No compensation was payable by the respondent. The agreement was, however, that the indulgence could at any time be terminated.

- [4]. In terms of a lease agreement which the applicants concluded with Mr J G Human on 14 September 2011 Human leased the farm for a period of 8 years from 1 January 2012. A copy of the lease agreement was annexed to the founding affidavit of the first applicant.
- [5]. After the conclusion of the lease agreement the first applicant requested the respondent to remove his sheep from the farm, so that full and undisturbed possession of the farm could be given to Human. Numerous requests were made by the first applicant, by text messages and to the respondent personally. The respondent failed to remove his livestock.
- [6]. The first applicant then instructed an attorney to address a letter in this regard to the respondent. The letter was served on the respondent by the sheriff on 26 March 2013. Its heading reads as follows:

“PLAAS BLINKKLIPPAN – J + M M KEYSER vs USELF”

- [7]. In the letter the following was recorded:

“Dit is ons instruksies dat hy u van weiding vir ‘n paar van u vee voorsien het. Voormelde het gebeur gedurende ‘n tydperk wat u broer nog die grond by die Mier Munisipaliteit gehuur het. U broer en sy gade het intussen op 8 Februarie 2013 eienaars van die grond geword en is dit hulle begeerte om die grond te verhuur.

Ten einde die grond beskikbaar te stel aan 'n huurder, benodig ons kliënt vakante besit daarvan. Volgens ons kliënt het hy u reeds 4 kere versoek om u diere van die grond te verwyder, sonder enige sukses. Dit laat ons kliënt geen ander alternatief as om regstappe te oorweeg nie.”

- [8]. In the letter the respondent was requested to remove his livestock and any other moveable property of his by 30 April 2013. He has to date failed to do so.

- [9]. In a confirmatory affidavit annexed to the first applicant's founding affidavit Human confirmed that the respondent was interfering with his possession of the farm by not allowing his livestock access to water.

- [10]. The first applicant also annexed to his founding affidavit a so-called SearchWorks Report in substantiation of his averment that he and the second applicant were the registered owners of the farm on which the respondent kept his livestock. The first applicant referred to this document as an extract from the records of the Registrar of Deeds.

- [11]. In the notice of motion and in the first applicant's founding affidavit the property concerned was described as

“Gedeelte 7 van die Plaas 585

Geleë in die Siyanda Distriksmunisipaliteit

Afdeling Gordonias

Provinsie Noord-Kaap

Groot 2591,6566 hektaar

Gehou kragtens transportakte T214/2013"

- [12]. According to the report the applicants were indeed the owners of a portion of farm number 585, called Mier, in the Siyanda District Municipality, Gordonia Division, Northern Cape, its size indeed being 2591,6566 hectares and indeed held by the applicants in terms of title deed T214/2013. The only difference was that according to the report the portion concerned was Portion 8, and not Portion 7.
- [13]. In the introductory section of the lease agreement it was recorded that the applicants were the owners of "*die plaas Mier 585 Gedeelte 8*". Although it appears that Portion 8 had in fact not been transferred into the names of the applicants at that stage, this part of the lease agreement would have made it clear to any reader thereof that it was Portion 8, and not Portion 7, which had been leased to Human. As already mentioned, a copy of this agreement was annexed to the founding affidavit.
- [14]. In his answering affidavit the respondent did not deny:
- [14.1] that the applicants were the owners of a portion of the farm Mier number 585;
- [14.2] that the size of the portion owned by them was as described in the notice of motion, founding affidavit and in the report;

- [14.3] that their portion of the farm was held by the applicants under title deed number T214/2013;
- [14.4] that the respondent kept his livestock on a farm with this size, within the area described and held by the applicants under the said title deed;
- [14.5] that he had prevented Human's livestock from having access to water; or
- [14.6] that his right to keep his livestock on a farm belonging to the applicants had been terminated.

[15]. The respondent also did not deny what was reflected in the report and in the lease agreement concerning the property which was owned by the applicants, namely Portion 8 (and not portion number 7) of the farm Mier 585.

[16]. Instead, and as will become clear in due course, he opportunistically latched onto the fact that the notice of motion and the first applicant's founding affidavit described the property concerned, in other words the property owned by the applicants and on which the respondent was according to them keeping his livestock, as Portion 7. The only "*defence*" raised by the respondent was a denial that the applicants owned, and that he kept his livestock on, a property as described in the notice of motion and in the first applicant's founding affidavit itself. He submitted that as consequence of this, and because they did not own Portion 7, the applicants had failed to show that they had *locus standi* and a cause of action to have the respondent evicted

from the property described in the notice of motion and in the founding affidavit.

- [17]. The existence of a lease agreement with Human “*in regard to the immovable property*”, in other words the portion of the farm Mier referred to in the notice of motion and in the founding affidavit, was denied by the respondent, on the basis that the contents of the copy of the lease agreement did not support the allegation that the applicants were the owners of Portion 7¹.
- [18]. The respondent’s “*defence*” was therefore solely based on a denial of the allegation that it was Portion 7 of the farm Mier 585 that was owned by the applicants and on which the respondent was keeping his sheep. The contents of the report were, as already mentioned, not denied and it was not denied that the applicants were the owners of Portion 8 of the farm. It was also not denied that the respondent kept his livestock on a farm belonging to the applicants and leased by Human.
- [19]. Not surprisingly the applicants replied by simply stating that the reference to Portion 7 in the notice of motion and in the first applicant’s founding affidavit was a *bona fide* typing error and that the respondent knew perfectly well that it was Portion 8 on which he kept his livestock, and the applicants then gave notice of the intended amendment of their notice of motion to reflect the property concerned as Portion 8 of the farm, and not Portion 7.

¹ As already mentioned, it recorded that the applicants were the owners of Portion 8 of the Farm Mier 585.

- [20]. No objection to the intended amendment was filed. It was also not objected to at the hearing of the application.
- [21]. Instead counsel for the respondent, Ms Hassim SC, chose to argue the so-called defence raised in the answering affidavit. She argued that the reference to Portion 8 in the replying affidavit amounted to the introduction of a new cause of action and that on this basis, and on the basis that references in the replying affidavit to Portion 8 in her submission introduced new matter, the parts of the replying affidavit which referred to Portion 8 should be struck out.
- [22]. In the alternative she argued that, should the contents of the replying affidavit not be struck out, the respondent should be granted leave and the opportunity to file a further affidavit. She argued that the respondent would in any event have needed the Court's leave to file a further affidavit in the event that that the application to strike out failed. She did not, however, tender a further affidavit, as is the practice when leave is sought to file an additional affidavit².
- [23]. Instead Ms Hassim chose to follow a course which would, should leave to file a further affidavit have been granted, inevitably have resulted in a postponement of the matter for the preparation and filing of such further affidavit. If the respondent and his livestock were indeed occupying the applicants' farm, such a delay would

² **Herbstein & Van Winsen – The Civil Practice of the High Courts of South Africa**, 5th edition, vol 1, Cilliers *et al*, p435; **Transvaal Government v The Standarton Farmers' Association** 1906 TS 21; Compare **Wilson-Yelverton v Sharman t/a Wanga Investments and Another** 1992 (1) SA 80 (T) at 85B-H

have further prejudiced them in their obligation to afford Human full and undisturbed possession of the farm.

- [24]. That Ms Hassim contemplated the possibility that the application to strike out could fail, was borne out by the fact that in her heads of argument she already intimated that in such an event leave would be sought to file a further affidavit.
- [25]. It was never explained what it was that needed to be dealt with in a further affidavit. Ms Hassim submitted that there was no need for this Court to know what the respondent wanted to say in a further affidavit. I disagree. How could a Court be expected to consider the need for a further affidavit without at least an outline of what it is to address?
- [26]. In this case the Court was kept completely in the dark, because it was never disclosed what defence the respondent would raise in respect of Portion 8. That the respondent may have a valid defence in respect of any property on which he is keeping his livestock, was not so much as suggested in the answering affidavit, nor in Ms Hassim's heads of argument.
- [27]. If, for example, the respondent's defence would have amounted to an admission that he was keeping his livestock on a farm belonging to the applicants, but to deny the termination of his right of occupation, or to raise some other right of occupation, it would have been easy to have, right from the outset, prepared a further affidavit to this effect timeously, and to have had it available for the purpose of an application for leave to file it. The respondent's

legal representatives would surely have noticed the references to Portion 8 in the annexures to the founding affidavit and not obtaining the respondents instructions in respect of Portion 8, or in fact in respect of any other property of the applicants which the respondent may have been using for grazing, would in my view have amounted to “*culpable remissness*” on their part³. Instead the respondent’s attorney waited until the day before the hearing to file an application for leave⁴ to file a further affidavit.

- [28]. That the applicants’ case would always have been that the respondent was keeping his animals on a farm belonging to them and that he no longer had a right to do so, would at all times have been very clear to the respondent, at the very least when the letter was served on him. In fact, on the applicants’ undisputed evidence of repeated requests⁵ to the respondent to remove his sheep, the respondent would before the letter was served already have known that the applicants’ case was that he was keeping livestock on their farm. It would have been within the respondent’s knowledge whether he was indeed keeping his livestock on a property belonging to the applicants, and whether he had in fact indeed prevented Human’s livestock, or anyone else’s livestock, from reaching water. It would have been a simple matter to at the very least have dealt with this in a further affidavit on a provisional basis, to cater for the possibility that the need could arise to apply for leave to file such a further affidavit.

³ Compare **Transvaal Racing Club v Jockey Club of South Africa** 1958 (3) SA 599 (W) at 604C

⁴ Should the application to strike out fail.

⁵ Before the letter was served.

- [29]. While maintaining that there was no need to have such a further affidavit available when leave was sought to file it, in order to give the Court an indication of the need for such an affidavit and to have it ready for filing should leave be granted, Ms Hassim submitted that in any event the respondent would have had insufficient time to prepare such an affidavit, due to the fact that his attorney and counsel are respectively from Pretoria and Johannesburg.
- [30]. The replying papers and the notice of amendment were faxed to the respondent's attorney on 29 October 2013 and this matter was heard on 8 November 2013. I cannot accept that in this day and age it would not have been possible to prepare a further affidavit timeously. I also cannot accept that the respondent's legal representatives would not already when the answering affidavit was prepared have discussed any right which the respondent may have had to keep his livestock on Portion 8 of the farm Mier 585. In fact, Ms Hassim's reference to the property being the subject of discriminatory laws, to which I will revert in due course, suggested that the respondent's use of Portion 8 had indeed been canvassed in consultation and that the respondent and his legal team had known perfectly well what property was involved.
- [31]. In fact, it would have been just as simple to deal with this in the answering affidavit already, on the basis of denying occupation of Portion 7 and asserting a right of possession and occupation in respect of Portion 8, should respondent indeed have had such a right.

- [32]. Ms Hassim, as already mentioned, made the submission that the farm was the subject of discriminatory laws. When I attempted to establish whether this was in some way going to be the basis of a defence to be set out in such a further affidavit, Ms Hassim replied that she had merely made the submission in reaction to the accusation of Mr Haddad, the attorney who appeared for the applicants, that the respondent's approach amounted to delaying tactics. She did not want to commit to any defence on this basis and she did not provide any further details in this regard. The vague reference to discriminatory laws provided no indication of how the respondent may have intended to rely on that as a defence.
- [33]. It was also only in argument that Ms Hassim submitted that the Extension of Security of Tenure Act⁶ would apply to the property concerned and that this Court therefore did not have the jurisdiction to entertain the application. She relied on the presumption created in section 2 (2) of the Act and argued that, because on the applicants' own version the respondent would at some stage have had their consent to use the land, as envisaged in section 3 (1) of the Act, an eviction order could not be granted without certain procedural requirements having been satisfied.
- [34]. Section 3 (1) of that Act clearly only applies to the termination of an occupier's use of land, and the word "*occupier*" is defined⁷ as "*a*

⁶ 62 of 1997

⁷ In section 1 of the Act.

person residing ...” on the land in question, which is not the case on these papers.

- [35]. It has clearly all along been the strategy not to deal with the merits, but instead simply to rely on the technical and dilatory “*defence*” that was solely based on what was very clearly a *bona fide* mistake in the description of the property in the notice of motion and in the founding affidavit.
- [36]. I must say that I find it extremely disappointing, to say the least, that the respondent had according to him been advised to adopt this strategy, not only by his attorney and junior counsel, but also by senior counsel. It has repeatedly been held that civil litigation is not a game⁸.
- [37]. The strategy adopted by the respondent, advised and clearly supported by his legal team, invited me to disregard the clear references to Portion 8 in the report and in the lease contract, and to strike out the explanation in the replying affidavit that a *bona fide* mistake had led to the obvious mistaken references to Portion 7 in the notice of motion and in the founding affidavit, rather than to Portion 8.
- [38]. This while the contents of the report and of the lease agreement, which were annexed and referred to in the founding affidavit, would already and in themselves have made it clear that the references to Portion 7 in the notice of motion and in the founding

⁸ **Le Grand (t/a Jeannes) v Carmelu (Pvt) Ltd (t/a Lynwood Fashions)** [1980] 3 All SA 280 (ZAR) at 282 – also cited as 1980 (1) SA 240 (ZAR) at 242; **Take & Safe Trading CC and Others v Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA) – also cited as [2004] 1 All SA 597 (SCA) para [3]

affidavit itself were mistakes, and in circumstances where the respondent would have known what the correct position was and could easily have dealt with it in his answering affidavit.

- [39]. Ms Hassim referred to the report as a document with no status. There was no application for the striking out of this document. It is commonly annexed to affidavits to substantiate allegations of ownership. The applicants had no reason to believe that their ownership of the property on which the first applicant's brother had for 5 years been keeping his sheep on the basis of an indulgence granted by the first applicant, would be disputed. In any event, the respondent as a lay person would not himself have ignored the contents of the report on the basis of it having no legal status. On his own version he had read the papers and he would have known whether the portion referred to in the report was owned by the applicants and whether his livestock were on that portion.
- [40]. Even a lay person reading the founding papers, which would obviously by reference have included the annexures thereto, would immediately have noticed that the description of the property concerned in the report and in the lease agreement differed from that in the notice of motion and in the founding affidavit itself, and would have been forewarned that a mistake may have been made and that the applicants may have intended to refer to Portion 8.

- [41]. If such a lay person furthermore knew full well that he or she was in possession of Portion 8 it would have been simple to deal with his or her right to occupy that portion.
- [42]. There was no suggestion at all that the respondent had livestock on more than one farm, let alone on more than one farm belonging to the applicants.
- [43]. I therefore had no hesitation in rejecting the respondent's allegation in his answering affidavit that, when he read the papers, he *"was confused as to what my brother was seeking and why he was seeking it against me"*. At the very least the reference to the farm Blinkklippan in the letter of 26 March 2013 would in all probability have made it very clear to the respondent which farm was concerned. He was, however, advised to adopt the obstructive approach of simply denying the allegations insofar as they pertained to Portion 7 and of not dealing with any right which he may have had to occupy Portion 8 or other any property of the applicants.
- [44]. It was submitted on his behalf that nothing would prevent the applicants from instituting fresh proceedings should the application be dismissed on the basis of the mistaken references to Portion 7. With the exception that the number of the particular portion would in the notice of motion and in the founding affidavit be substituted with the number 8, such a new application would be identical to this application. This would have made no sense and it would obviously have delayed the finalisation of the matter.

It would, rather significantly, also have helped the respondent to further avoid and delay dealing with the averment that his use of the land concerned had been terminated.

- [45]. The same obstructive approach was then adopted by counsel in the provisional application for leave to file a further affidavit, by not having at least a draft of such an affidavit available for the purposes of the application, by not being prepared to disclose at all what needed to be addressed in such a further affidavit and by adopting an approach which would, instead, have assisted the respondent in further delaying the matter.
- [46]. I am in any event of the view that the replying affidavit did not introduce “*something unexpected*” or “*new matter*”⁹. It deals with the applicants’ ownership and the respondent’s possession of Portion 8 of the farm Mier 585, a matter clearly at the very least already raised in the annexures to the founding affidavit.
- [47]. The respondent took a calculated risk, and persisted in the same obstructive strategy adopted in his answering affidavit, when he decided not to have a further affidavit ready when applying for leave to file such an affidavit. He did not show *bona fides* and good cause for such an affidavit to be allowed, because as already mentioned not so much as a hint was given of what it was that the respondent would deal with in such an affidavit and that he could not have been expected to deal with in his answering affidavit.

⁹ Compare **Zarug v Parvathie**, NO 1962 (3) SA 872 (D) at 873-874; **Wilson-Yelverton v Sharman t/a Wanga Investments and Another**, *supra*

[48]. This Court had a discretion¹⁰ whether to allow a further affidavit or not and in my view it would have been extremely unfair to the applicants, and it would have reflected negatively on our judicial system and our Courts, if I had in those circumstances allowed a further delay in the applicants' attempts to give effect to the lease agreement with Human. It would obviously also have prejudiced Human in the exercise of his rights as a lessee. No costs order could have remedied these consequences of a postponement to allow the filing of a further affidavit.

[49]. To summarise:

[49.1] The respondent had the opportunity to deny the presence of livestock belonging to him on any property belonging to the applicants or to assert a right which he may have had to keep his livestock on property of the applicants. Despite the contradictory references in the founding papers and notice of motion to what portion of the farm Mier 585 was involved, the respondent could and should have dealt with the merits and with the real issue, namely whether he was occupying any property belonging to the applicants and, if so, whether he had the right to do so.

[49.2] There is no basis for striking out any part of the replying affidavit.

[49.3] No case was made out that the respondents should under such circumstances be allowed leave and a postponement to file a further affidavit. To have granted leave to file a

¹⁰ Compare **Transvaal Racing Club v Jockey Club of South Africa**, supra, at 603

further affidavit, especially in circumstances where it would because of the strategy adopted on behalf of the respondent inevitably have resulted in a delay in the finalisation of this matter, would have been unfair to the applicants and not in the interest of justice.

- [50]. It was for these reasons that I ordered the respondent to remove his livestock and any other movable property of his from Portion 8 of the farm Mier 585.
- [51]. I was, however, inclined to grant the respondent more than the 10 day period suggested in the notice of motion, despite the fact that he had on numerous occasions over a period of time been requested to do so. According to the first applicant the respondent had at times kept up to 200 sheep on the farm. There was no information about whether the respondent had alternative grazing available and I was of the view that it could in any event take some time to remove so many sheep.
- [52]. I was also not prepared to grant the order that, should the respondent fail to comply with the order to remove the sheep, the sheriff be authorised to not only remove the sheep, but also to sell the sheep on the basis set out in the notice of motion. Should the need arise, and in the event that the sheriff has to remove the livestock, any of the parties could approach this Court for such further relief as may be required.

[53]. There was no reason why costs should not follow the result. The respondent's dilatory and obstructive attitude may have been cause for a punitive costs order, but this was not argued or applied for.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

For the Applicant:	Mr V Haddad, Elliott, Maris, Wilmans & Hay, KIMBERLEY
For the Respondent:	Adv S K Hassim, SC
Instructed by:	Duncan & Rothman, KIMBERLEY