



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO.: LCC 224/2017

Before: Molefe J

Heard: 17 April 2018

Judgment delivered: 02 May 2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
02 May 2018	

In the matter between:

ESKOM HOLDINGS SOC LTD

Applicant

And

THEMSENI MKHWANAZI

First Respondent

THOKO MKHWANAZI

Second Respondent

VUSI MKHWANAZI

Third Respondent

BONGINKOSI MKHWANAZI

Fourth Respondent

BHEKISIZWE MKHWANAZI

Fifth Respondent

NONHLANHLA MKHWANAZI

Sixth Respondent

PHUMUZILE MKHWANAZI

Seventh Respondent

PHUMELELE MKHWANAZI

Eighth Respondent

NONHLANHLA MOTHLAPING	Ninth Respondent
MAMOYA MALOYI	Tenth Respondent
XOLANI MKHWANAZI	Eleventh Respondent
SAMKELISWE MKHWANAZI	Twelfth Respondent
JABU MKHWANAZI	Thirteenth Respondent
NTETHE MKHWANAZI	Fourteenth Respondent
MSIZI MKHWANAZI	Fifteenth Respondent
MALIBONGWE MKHWANAZI	Sixteenth Respondent
KHOLEKA MKHWANAZI	Seventeenth Respondent
BONGUMUSA MKHWANAZI	Eighteenth Respondent
SIYANDA MKHWANAZI	Nineteenth Respondent
SIZWE MKHWANAZI	Twentieth Respondent
NTOBE MKHWANAZI	Twenty First Respondent
APHIWE MKHWANAZI	Twenty Second Respondent
NQOBILE MKHWANAZI	Twenty Third Respondent
PHAKAMANI MKHWANAZI	Twenty Fourth Respondent
SILUNGILE MKHWANAZI	Twenty Fifth Respondent
NKAZIMULO MKHWANAZI	Twenty Sixth Respondent

JUDGMENT

MOLEFE J

[1] The applicant seeks an order in the following terms:

- 1.1. *That the respondents, in particular the first respondent, be interdicted and restrained from keeping more than 89 animal units being 74 head of cattle, 65 sheep or goats and horses on the farm described as Portion 3 of the farm Maggies Deel No. 1565, Registration Division, Harrismith, Province of Free State in extent 300 hectares (farm "Maggies Deel");*
- 1.2. *That the respondents be ordered to remove excess livestock of more than 89 animal units from the farm Maggies Deel, (the exchange farm) to which the respondents were relocated as per court order dated 22 December 2016 issued under case number LCC 138/2011 within one (1) month from date of granting of the order;*
- 1.3. *That the respondents be interdicted and restrained from allowing livestock to roam and/or graze and/or enter any other property owned by the applicants, especially the wetlands/proposed Ingula Nature Reserve save for grazing on the farm Maggies Deel;*
- 1.4. *That the applicant be authorised to impound or cause to be impounded by the Sheriff/Pound Master, Harrismith any excess livestock of 89 animal units in the event of the respondents failing to remove the excess livestock from the farm Maggies Deel;*
- 1.5. *That the Sheriff and/or Pound Master, Harrismith impound and remove any livestock belonging to the respondents found grazing outside farm Maggies Deel after a period of one month from the date of the granting of the order;*

1.6. *That the Sheriff and/or Pound Master, Harismith be authorised to sell by way of public auction any or all impounded livestock;*

1.7. *That the respondents pay the costs of this application.*

[2] The applicant is the registered owner of the property described as the Remainder of the Farm Maggies Deel No 1565 Registration Division, Harrismith, Province Free State in extent 438 8638 hectares. The property has been subdivided into 2 (two) portions being 300 hectares which has been allocated to the respondents and another portion which has been allocated to the Solomon Dlamini Family.

[3] The respondents were occupiers in terms of the *Extension of Security of Tenure Act No 62 of 1997* ("ESTA") in respect of the property described as Farm Number 1845 Bedford 2, Registration Division Harrismith, Province of Free State. They were then relocated to farm Maggies Deel in accordance with court orders dated 20 December 2012 and 22 December 2016 issued under case number LCC 138/2011¹. The respondents took beneficial occupation of the farm Maggies Deel on or about 15 January 2017.

[4] The farm Maggies Deel has been donated by the applicant to the respondents by way of donation to a trust to be formed for the respondents. The applicant has been unable to transfer the farm to the respondents due to their failure to provide the applicant with the name of the trust and the trustees as well as the names and details of the respondents.

¹ Bundle pages 39 – 42, Annexure "KB2" and "KB3".

[5] It is submitted on behalf of the applicant that in October 2012, the applicant appointed an agricultural expert to conduct a feasibility study on the farm Maggies Deel to assess *inter alia*, suitability of the farm in respect of cattle grazing and subsistence of crop cultivation. The findings by the agricultural expert were *inter alia*, that the grazing capacity is a total of 85 animal units²

[6] Counsel for the applicant³ submitted that when the respondents relocated to farm Maggies Deel, they undertook to comply with the grazing capacity of the property, being 85 animal units. The applicant spent approximately R 3.5 million to effect the relocation of the respondents and a further R 500 000.00 to erect a perimeter fence around the exchange farm.

[7] The respondents, however, and in particular the first respondent who is the head of the household, relocated to farm Maggies Deel with all their belongings and their livestock which is in excess of 200 animal units whilst the maximum permissible carrying capacity of the farm Maggies Deel is 85 animal units.

[8] Applicant's counsel submitted that subsequent to the respondents' relocation to farm Maggies Deel, the respondents are over-grazing the farm by almost two and a half times more than its capacity and despite requests on 23 December 2016 and 18 May 2017⁴, the respondents have failed and/or refused to reduce their animal units on the farm. It was further submitted that despite the farm being fenced by the applicant, the respondents are allowing their livestock to leave the farm and to graze

² Bundle pages 58 – 73, Annexure "KB6A".

³ Mr R Ramdaw

⁴ Bundle page 55, Annexure "KB5" and page 91, Annexure "KB7", respectively.

in other areas including the wetlands as well as on other adjoining farmers' properties.

[9] Applicant's version is supported by an affidavit by Mr Jabulani Hlope, applicant's Environmental Management Officer at the Ingula Pumped Storage Project in the Van Reenen/Harrismith area. In his supporting affidavit, Mr Hlope confirms that since the respondents' relocation to farm Maggies Deel, they have failed to control their livestock which is roaming and grazing on Eskom's soon to be proclaimed Ingula Nature Reserve area, on the wetlands area as well as onto neighbouring farmers' properties. The proposed reserve area has a high biodiversity value being a wetlands ecosystem with bird/small animal life with global conservation significance all unique to the area. The roaming livestock is causing irreparable harm to the wetlands which need to be preserved in terms of the environmental impact report.

RESPONDENTS' POINT IN LIMINE

[10] The respondents raised the point *in limine* that the deponent to the applicant's founding affidavit, Mr K Bedessi has no requisite authority to act on behalf of the applicant in deposing to the affidavit and to institute the proceedings.

[11] Respondents' counsel⁵ however, correctly relied on *Tattersal and Another v Nedcor Bank Limited*⁶ to confirm that in motion proceedings any person who can positively attest to the facts is entitled to depose to an affidavit and no specific authority is required.

⁵ Mr J Hlatshwayo.

⁶ 1995 (3) SA 222 (A) at 252 F – G.

[12] In *Ganes v Telecom Namibia Ltd*⁷, the Supreme Court of Appeal held that an affidavit in motion proceedings need not be authorised by the party concerned to depose to an affidavit. Accordingly, this point *in limine* should fail.

MERITS

[13] In opposing the application, the respondents deny that any agreement exists between the parties that requires the respondents to keep 89 animal units and that it was only in May 2017 that the respondents learnt that the applicant had unilaterally varied the terms of the court order to include a provision that the maximum livestock carrying capacity of the farm is 85 – 89 animal units.

[14] Respondents' counsel argued that the applicant relocated the respondents to the exchange farm with full knowledge of the number of livestock the respondents owned and seeks to restrict that number of livestock *ex post facto* without any agreement.

[15] In my view there is no merit in this argument. Although the court order dated 22 December 2016 does not specify the maximum allowed animal units to be kept by the respondents, the maximum permissible carrying capacity of the farm Maggies Deel is 85 – 89 animal units as confirmed by the agricultural expert report dated October 2012, which report formed part of the negotiations and which led to the December 2016 court order. Furthermore, in the letter dated 23 December 2016 addressed to the respondents by the applicant's legal representatives the following is recorded:

⁷ 2004 (3) SA 615 (SCA); [2004] 2 All SA 609 (SCA)

*"We confirm that as per the court order you and your family must relocate with all your belongings and livestock which needs to be accommodated at the Exchange property being a Portion of Rem of the Farm Maggiesdeel No 1865 extent 300 hectares which can accommodate 89 livestock units to prevent overgrazing on or before 15th January 2017 failing which the Sheriff and the SAPS will need to implement the court order."*⁸

[16] It was also argued on behalf of the respondents that no evidence has been placed before the court to the effect that the respondents have allowed their livestock to graze on the wetlands as well as on the adjoining properties. In my view, there is no basis for this argument. A supporting affidavit by Mr Hlope and by Mr Peter Nelson, applicant's Conservation Manager at the Ingula Pumped Storage Project confirms the applicant's version.

[17] Mr Nelson confirmed in his supporting affidavit that:

"The Respondents possess over 200 heads of livestock and since on or about the 15th January 2017 when they were relocated to the farm Maggies Deel they failed to control their livestock which began roaming and grazing on other Eskom property earmarked for other families being relocated and on to the wetlands area as well as onto neighbouring farmers' properties."

COSTS

[18] It is the general and accepted practice of courts not to award costs against parties to eviction proceedings brought in terms of ESTA given the nature of

⁸ Bundle page 56, Annexure "KB5".

litigation. In *De Facto Investments 255 (Pty) Ltd v Nkala and Others* (LCC 51/2010) ZALCC 10 at paragraph 33 it was held that:


“The practice of the Land Claims Court, which has been approved by the Supreme Court of Appeal, is to make no order of costs unless there is good reason to do so.”

[19] *In casu*, I am of the opinion that there is no good reason to make a costs order against the respondents. On the respondents own version, they are “small scale and subsistence farmers”.

[20] Accordingly, the following order is made:

1. *The respondents, in particular the first respondent, are interdicted and restrained from keeping more than 89 animal units being 74 head of cattle, 65 sheep or goats and horses on the farm described as Portion 3 of the farm Maggies Deel No. 1565, Registration Division, Harrismith, Province of Free State in extent 300 hectares (farm “Maggies Deel”);*
2. *The respondents are ordered to remove excess livestock of more than 89 animal units from the farm Maggies Deel, (the exchange farm) to which the respondents were relocated in accordance with court order dated 22 December 2016 issued under case number LCC 138/2011 within one (1) month from date of granting of this order;*
3. *The respondents are interdicted and restrained from allowing livestock to roam and/or graze and/or enter any other property owned by the applicants, especially the wetlands/proposed Ingula Nature Reserve save for grazing on the farm Maggies Deel;*

4. *The applicant is authorised to impound or cause to be impounded by the Sheriff/Pound Master, Harrismith any excess livestock of 89 animal units in the event of the respondents failing to remove the excess livestock from the farm Maggies Deel;*
5. *The Sheriff and/or Pound Master, Harrismith impound and remove any livestock belonging to the respondents found grazing outside farm Maggies Deel after a period of one month from the date of the granting of the order;*
6. *The Sheriff and/or Pound Master, Harismith is authorised to sell by way of public auction any or all impounded livestock;*
7. *There is no order as to costs.*



DS Molefe
Judge, Land Claims Court

APPEARANCES:

For the applicant: Mr R Ramdaw

Instructed by: Roy Ramdaw & Associates Inc. Newcastle

For the respondents: Mr J Hlatshwayo

Instructed by: Hlatshwayo Attorneys, Springs