



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

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

28 November 2022

SIGNATURE

DATE:

CASE NO: LCC 133/2022

In the matter between:

MATHEBA KLAAS SIMELANE

Applicant

and

NICOLAAS JOHANNES DE VILLIERS N.O

1st Respondent

PIERRE DE VILLIERS N.O

2nd Respondent

NJH GENERAL DEALER

T/A MANTSOPA ANIMAL POUND

3rd Respondent

JUDGMENT

COWEN J

1. This is a semi-urgent application in which the applicant, Mr Matheba Klaas Simelane, seeks the return of his 13 (thirteen) cattle, impounded during July 2022. Mr Simelane resides on a farm known as Farm Petronella 579, Reitz, situated in the Magisterial District of Reitz (Petronella farm). The cattle were impounded by the first and second respondents, Nicolaas and Pierre de Villiers, the trustees of the Pierre and Nico de Villiers Trust (the Trust),¹ which owns Petronella farm. The Trust conducts farming operations on Petronella farm as well as on an adjacent farm known as Zandfontein No 533 (Zandfontein) and are the persons in charge of these properties.
2. The third respondent is the NJH General Dealer trading as the Mantsopa Animal Pound (the pound). At the present time, the applicant's cattle are impounded at the pound. They were impounded there on 19 July 2022 at the instance of the Trust purporting to act in terms of section 7(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). Section 7 is entitled 'Rights and duties of owner' and sub-section (1) provides:

' The owner or person in charge may have a trespassing animal usually or actually in the care of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given the occupier at least 72 hours' notice to remove the animal from the place where it is trespassing and the occupier has failed to do so: Provided that the owner or person in charge may take reasonable steps to prevent the animal from causing damage during those 72 hours.'

¹ IT 1158/2013.

3. The application was instituted urgently on 16 September 2022 in circumstances where the applicant's attorney was unable to procure a written undertaking from the pound not to auction the cattle pending the resolution of the dispute between the parties. This Court issued directions that day provisionally setting the matter down for hearing on 17 October 2022, regulating its conduct and directions were issued to prevent any immediate auction of the cattle. A preliminary hearing was then convened on 21 September 2022 to determine whether interim relief should be in place pending the hearing. The court granted interim relief. The parties then exchanged affidavits. The Trust opposes the application. The pound abides the application. On 17 October 2022, Mr Siya appeared for the applicant and Mr Stone appeared for the Trust, in a virtual hearing. While the application was initially dealt with urgently, the immediate urgency dissipated, both because interim relief was granted and, importantly, because of the imposition of restrictions on the movement of cattle in the area due to a foot and mouth outbreak, which are apparently still in place.

4. It is common cause that the applicant is an ESTA occupier on Petronella farm. He has resided there since 1987, for 35 years. In 1998, his wife, Mantwa Esther Mokoena arrived on the farm and they then married. The applicant was employed by Petronella's previous owner and, at least for a period, by the Trust. It is also common cause that, at least during the applicant's employment, he had the right to graze cattle on Petronella farm at a specific camp, separate from the De Villiers' cattle. There is a dispute about the number of cattle: the applicant maintains that he has tacit consent to graze his 13 (thirteen) cattle whereas according to the Trust, he was, during the period of his employment, entitled to graze only 3 (three) cattle.

5. It can be noted that these proceedings arise against the background of a pending eviction application, which the Trust has instituted in the Magistrates Court against the applicant and others occupying Petronella. It is not infrequent that disputes about cattle and grazing arise in such contexts. This Court recently held in *Moladora Trust*² that the termination of consent of an ESTA occupier residing on land to graze cattle is subject to section 8 of ESTA³ and that, 'if an occupier is deprived, against his or her will, of the right to use grazing linked to such right of residence, it will amount to an eviction' and is subject to section 9 of ESTA. That does not mean that owners or owners in charge do not have rights or interests protected by law. Indeed, section 7(1) of ESTA protects such rights and interests. However, the rule of law must prevail.⁴

6. The events giving rise to the application occurred in July 2022. On 7 July 2022, the applicant left Petronella farm and travelled to Bohlokong, where his wife, who was ill, was receiving medical care. He returned on 14 July 2022, a week later. According to the applicant, on his return that day, he received complaints from the Trust that his cattle had strayed onto their corn plantation: He was informed that the Trust had impounded his 13 cattle on Zandfontein, where they had allegedly strayed and caused damage. The applicant contends that the impoundment was without good reason as he had left the cattle in their designated camp which was locked and he had not received any complaint about the cattle while away. The applicant explains that he received a document that purports to be a notice in terms

² *Moladora Trust v Mereki and Others* [2022] ZALCC 32.

³ *Supra* n 2 at para 21.

⁴ See *Ramahloki and others v Raiden (Pty) Ltd and others* [2020] ZALCC 31.

of section 7(1) of ESTA but only on 15 July 2022 after the first respondent had impounded his cattle on Zandfontein.

7. According to the Trust, on 7 July 2022, one of its workers, a Mr Mokoena, informed Mr Nicolaas de Villiers that unmarked cattle were roaming unattended on the maize fields on Zandfontein. Mr de Villiers explains that the cattle were trespassing on the maize fields and causing damage by trampling and eating the crop still to be harvested. Mr Mokoena has confirmed the evidence on affidavit. Mr de Villiers tried to call the applicant on his cell number but the applicant did not answer the phone, which did not allow for a voicemail. He also searched for the applicant to no avail. In these circumstances, Mr de Villiers says he had no choice but to remove the cattle to avoid further damage. He considered moving the cattle back to their designated camp but he says the fences were in a state of disrepair and the camp was overgrazed. He was also concerned about stock theft. He then took the cattle to a separate camp of the Trust on Zandfontein, secured them and fed them with fodder from the Trust's stocks. He tried to call the applicant again on 8 July 2022. On 14 July 2022, Mr de Villiers saw the applicant walking to his homestead and approached him advising that the cattle had strayed to Zandfontein and caused damage. He explained that he had incurred costs feeding and watering them and insisted on being compensated before he released them. He would moreover provide the necessary notice under section 7(1) of ESTA before proceeding to impound the cattle.
8. It is common cause that on 15 July 2022, Mr de Villiers delivered a notice purportedly in terms of section 7(1). The notice, attached to the answering affidavit,

refers to the cattle as two mix breed bulls, five mix breed cows and six calves. It states that they were found without permission on Petronella. It proceeds:⁵

‘You must remove the animals within 72 (seventy two) hours of receiving this notice and after payment of the amount of R10 988.00 (ten thousand nine hundred and eighty eight) ... the cost incurred by the person in charge to feed the cattle that were found trespassing [from 7 to 15 July 2022] from [Petronella]. If you do not do so, it / they may be impounded in accordance with applicable pound ordinances or regulations. The costs of impounding the animals will be charged to you.’

9. The expenditure is sought to be justified on the basis of a cost of 13 cattle over 9 days at a cost of R94.00 per head per day. This is said to be the same as the cost levied by a pound which, the Trust contends, represents a minimum reasonable remuneration for the services rendered.

10. Mr Siya submitted, *inter alia*, that on the evidence, the Trust had impounded the cattle when it removed them to the camp on Zandfontein. Because that was done without notice the impoundment was unlawful. The conduct that then followed was all tainted by this unlawful impoundment. He submitted that the Trust had failed to establish that the cattle had trespassed on Zandfontein or caused any damage giving rise to any entitlement to take reasonable steps to prevent damage. In any event, he submitted, it was not reasonable for the Trust to incur such expenditure: the cattle should have been returned to their designated camp. There is no cognisable evidence, Mr Siya submitted, warranting a conclusion that the designated camp could not hold the cattle pending the applicant’s return.

⁵ Obvious typographical errors corrected.

11. On behalf of the Trust, Mr Stone submitted, *inter alia*, that applying the principles in *Plascon Evans* and *Wightman*,⁶ the evidence on affidavit establishes both that the cattle trespassed onto Zandfontein on 7 July 2022 and were causing damage. What then transpired between 7 and 15 July was not an act of impoundment as contemplated by section 7(1) but the taking of reasonable steps to prevent further damage, which section 7(1) authorises. In doing so, the Trust acted as *negotiorum gestor* and was then entitled both to be reimbursed for necessary and useful expenditure and exercise a lien in respect of the cattle. In the absence of payment following the passage of 72 hours, the argument continued, Trust was entitled to impound the cattle in terms of section 7(1) under the applicable by-law.

12. The Trust's evidence is not wholly satisfactory and there are features that generate doubt in my mind as to its veracity. However, I accept, applying *Plascon Evans* and *Wightman*, that on 7 July 2022, the applicant's cattle were trespassing on Zandfontein and causing damage. Moreover, I assume in favour of the Trust that the steps it then took were taken in good faith. Nevertheless, the Trust's conduct in dealing with the situation did not comply with section 7(1) for at least two reasons.

13. First, on the facts of this case, it was not, in my view, reasonable for the Trust to secure the cattle in a Trust camp on Zandfontein and then incur significant cost feeding and keeping them pending the applicant's return. Even if I accept that Mr De Villiers' acted in good faith in this regard to protect the applicant's cattle, as he

⁶ *Plascon Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) at 634H-635C (*Plascon Evans*); *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008(3) SA 371 (SCA) (*Wightman*) at para 13.

contends, the Trust has failed to establish that it could not have returned the cattle to their own enclosure and thereby prevent further damage being caused and avoid the incurrance of significance costs. The Trust has supplied several photographs to substantiate the contention that the fence was in such a state of disrepair that the cattle would have broken out of it again and cause further damage. However, the photographs do not establish this. To the extent that one of the photographs depict one detached line of wire on one portion of a four wire fence, it is not explained why the detached wire could not have been re-attached nor is it self-evident that cattle would have escaped through the remaining three wires. Mr de Villiers' remaining objects in securing the cattle in Zandfontein are allegedly to protect the cattle from stock theft and to ensure that they were adequately fed in circumstances where their camp was overgrazed. These concerns are not, however, with damage to the Trust and are, rather, allegedly benevolent concerns about damage to the applicant himself, specifically his cattle. But even assuming these concerns relate to damage cognisable under section 7(1), I am not persuaded that they reasonably justified the course adopted which entails the incurrance of significant costs that, unsurprisingly, the applicant resisted. First, there is insufficient evidence for this Court to conclude that there was any imminent threat of livestock theft or insufficient grazing available in the designated camp to see the cattle through. Second, it is common cause that the applicant had his telephone with him, no short message was sent and Mr De Villiers did not know when the applicant would return. Third, it cannot be gainsaid that Mr De Villiers was at least also concerned with whether the applicant was keeping cattle in excess of the agreed number or complying with the grazing capacity requirements of the Conservation of Agricultural Resources Act 43 of 1983 (CARA). He says so

himself. But while those concerns can, in an appropriate case, ground relief,⁷ they do not entitle a person to take the law into their own hands by removing cattle: the Court must be approached.

14. But even assuming the Trust took reasonable steps to prevent damage as contemplated by section 7(1), there is another fundamental difficulty with the Trust's approach. Section 7(1) contemplates a notice 'to remove the animal from the place where it is trespassing'. In this case, the notice given both demanded the removal of the cattle within 72 hours and simultaneously asserted a lien. In my view, even assuming the Trust was entitled to assert a lien, which I need not decide, those legal processes cannot ensue simultaneously as they are inherently in conflict with one another. A notice to remove under section 7(1) within three days must in fact afford that opportunity. The demand for payment through the exercise of a lien serves a different purpose: it allows a creditor to retain possession as security for payment. Accordingly, when the Trust demanded payment in the section 7(1) notice as a prerequisite for the release of the cattle, it thereby defeated the very purpose of that section. In the result, the notice given cannot be said to be a notice in terms of section 7(1) and the impoundment to the pound was unlawful.

15. The above conclusions obviate the need to decide whether the Trust impounded the cattle without notice when it placed the cattle in the Zandfontein camp.

⁷ See, in respect of CARA, *Adendorffs Boerdery v Shabala and others* [2017] ZASCA 37.

16. Mr Stone submitted that if the Court concludes the impoundment was unlawful, it should in any event not order the cattle's return. This is because, on the respondents' version, their return would entail return of livestock in excess of the agreed number, being 3 (three). It would also be in breach of CARA's restrictions. In my view, both of these matters should, at the least, have been raised by way of a counter-claim. That would have enabled the issues to be duly and fairly ventilated with due consideration given to whether the unlawful removal of the cattle precludes, or otherwise impacts upon the grant of any appropriate relief.
17. In the result, the applicant is entitled to relief to secure the return of his cattle which the Trust unlawfully impounded. In the nature of the things, that will entail that the costs of their restoration, including those of the pound, must be borne by the Trust. This Court has not been told if there are any ongoing restrictions on the movement of cattle due to the foot and mouth outbreak. I make provision for this in my order.
18. This Court only orders costs in special circumstances. One consideration is the costs of an application of the Trust to strike out certain paragraphs of the founding affidavit which contain privileged information including the content of settlement negotiations. The applicant opposed the application, submitting that the material should be admitted exceptionally as it reveals a threat or other matter that would be contrary to public policy to protect.⁸ Specifically, the material suggests that the cattle were being held to secure the applicant's agreement to vacate the property. The removal of cattle amounting to constructive eviction is a serious matter. However, it has not been necessary for me to have regard to this material to decide

⁸ Relying on *Naidoo v Marine & Trade Insurance Co Ltd* 1978(3) SA 666 (A) at 681B.

the application and accordingly I do not decide the application to strike. For costs purposes, I am of the view that there should be no special costs order. The opposition is not unreasonable and constructive eviction is a serious matter affecting vulnerable rural people with insecure tenure.

19. I make the following order:

- 19.1. Non-compliance with the forms and notice periods prescribed by the Court's Rules is condoned and the application is heard as one of urgency.
- 19.2. The First and Second Respondents' conduct of removing and impounding 13 of the applicant's cattle from Farm Petronella 579, Reitz, Free State Province, held under title deed T 14977/2015, is declared unlawful.
- 19.3. The First and Second Respondents are directed forthwith to take such steps as are necessary to restore the Applicant's possession of his 13 cattle within 5 (five) days of this Court order, subject to any restrictions imposed by law.
- 19.4. There is no order as to costs.



S J COWEN
JUDGE, LAND CLAIMS COURT

Appearances:

Applicant: Mr Siya instructed by Tshitso Thuntsi Inc Attorneys

Respondent: Mr Stone instructed by JP Niemann Attorneys Inc