



IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG

CASE NO: LCC 197/2021

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

27 May 2022

In the matter between:

**ALAN JEREMY GREEN N.O**

First Applicant

**CAROL MARGARET GREEN N.O**

Second Applicant

**ALAN ROBERT STEPHENSON N.O**

Third Applicant

**ALAN JEREMY GREEN**

Fourth Applicant

and

**KAPENI KHUMALO**

First Respondent

**JABULANI MDUDUZI KHUMALO**

Second Respondent

**FORFOR KHUMALO**

Third Respondent

**BEAUTY SHABALALA**

Fourth Respondent

**LUNGA KHUBEKA**

Fifth Respondent

**MOSES KHUMALO**

Sixth Respondent

**NELLISIWE KHUMALO**

Seventh Respondent

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**JUDGMENT**

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**COWEN J****Introduction**

1. This application concerns duties of landowners and occupiers of agricultural land to use land under grazing in an environmentally sustainable way. It brings to the fore potentially competing rights relating to land tenure security and environmental sustainability, both protected by the Constitution.
2. The First to Third Applicants are the trustees of the Waverley Trust, which owns various properties which constitute a farming unit known as Harmony Farm. The properties include two farms known as Portion 14 and Portion 22 of Kleine Fontein 1160, Registration Division GS, KwaZulu Natal (Kleine Fontein). The Fourth Applicant is the sole proprietor of Harmony Farm and is in control of its farming operations including on Kleine Fontein. He has farmed Harmony Farm since 1983.
3. The First to Seventh Respondents all reside on Kleine Fontein. It is common cause that they are occupiers under the Extension of Security of Tenure Act 62 of 1997 (ESTA). The First and Second Respondents are also Plaintiffs in proceedings instituted in 2016 in terms of the Land Reform

(Labour Tenants) Act 3 of 1996 (the LTA) in which they seek an order declaring them to be labour tenants and for an award of land (including grazing land) on Kleine Fontein (the LTA proceedings).<sup>1</sup> Some of the plaintiffs in those proceedings have reached a settlement entailing their relocation to a nearby farm known as Groote Hoek (the part-settlement of the LTA proceedings) but, at least at this stage, no settlement has been reached in respect of the First and Second Respondents in these proceedings. This matter accordingly stands to be adjudicated on the basis that the Respondents are, at present, ESTA occupiers.

4. The Eighth Respondent is the Minister of Agriculture, Rural Development and Land Reform (the Minister), who holds executive responsibilities under ESTA, the LTA and the Conservation of Agricultural Resources Act 43 of 1983 (CARA). The Minister is not participating in these proceedings.
5. In brief, the Applicants seek interdicts, both mandatory and prohibitory, removing all of the Respondents' livestock from Kleine Fontein within 14 days of the court order, and prohibiting their return until sufficient time has passed (at least five years) to enable the affected area to be rehabilitated. It is contended on behalf of the Applicants that the area where grazing is permitted has been overgrazed in breach of CARA and its Regulations (the CARA Regulations),<sup>2</sup> the National Environmental Management Act 107 of 1998 (NEMA) and section 24 of the Constitution.

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<sup>1</sup> Under case number LCC 187/2016

<sup>2</sup> Conservation of Agricultural Resources Regulations published under GN R1048 in GG 9238 of 25 May 1984, as amended.

6. The Applicants instituted the application urgently on 15 November 2021. On 18 November 2021, this Court issued directives setting the matter down for 17 January 2022 and regulating service and the filing of affidavits and heads of argument. The application was to be served on the Respondents by 22 November 2021 and any notice of appearance and answering affidavit was due by 10 am on Tuesday 14 December 2021. The Applicant's replying affidavit was due by 4 January 2022 and heads of argument by 10 January 2022. As is customary in this Court, and necessary to ensure fairness and protect the interests of justice, the directions did not preclude any party from seeking an amendment of the directives, an extension of dates or a postponement of the hearing, disputing the urgency of the case or telephoning the Registrar for clarification of the directives.
7. The Applicant effected service on the Respondents timeously. On 1 December 2021, a notice of opposition was served on the Applicants' correspondent attorney on behalf of 'the Respondent's (sic)'. A notice of opposition was filed with this Court on 17 December 2021. But no answering affidavit was filed on 14 December 2021 as directed and no communication addressed at that time with the Court requesting any extension or amendment of the directives or postponement. On 15 December 2021, e-mails were exchanged between the Applicants' attorney and the Respondents' attorney, the former noting the failure to comply with the directive. The response indicated that the Respondents' attorneys' offices had closed for the festive season and would re-open on 3 January 2022, and merely advised: "We will further attend to this matter upon



commencement in the New Year.” It was only on 4 January 2022 that the Respondents’ attorneys wrote to the Court requesting an indulgence to file the answering affidavit, by 7 January 2022. That letter indicated that their offices had closed on 15 December 2022 and that they had accordingly not had an opportunity to consult with their clients, whom they had requested to cover their fees before proceeding. No answering affidavit was, however, delivered on 7 January 2022.

8. Concerned about the non-compliance with court directives, which have the status of court orders, and the potential impact on court dates, I called a pre-hearing conference under Rule 30 of the Rules of this Court in order to promote the expeditious, economic and effective disposal of the matter. The conference proceeded on 12 January 2022. The First to Fourth Respondents’ answering affidavit was delivered shortly in advance thereof. At the conference, the Applicants’ representatives agreed that they would proceed to deliver their clients’ replying affidavit under tight time frames to enable the matter still to proceed on 17 January 2022. In these circumstances, and while the Respondents’ conduct of the matter was unsatisfactory, I allowed the matter to proceed in this way and afforded the parties an opportunity to deliver heads of argument at or shortly before the hearing which I scheduled for 2pm on 17 January 2022.
9. During the morning of 17 January 2022, however, correspondence was addressed to the Court advising that Mr Nhlabathi had been instructed also to represent the Fifth and Sixth Respondents, subsequently corrected to Sixth and Seventh Respondents. The letter did not indicate whether these

Respondents were opposing or abiding, or if they sought a postponement to file an answering affidavit. During the course of the morning, heads of argument were supplied by both parties.

10. The matter was called at 2pm on 17 January 2022. At its commencement, I raised with Mr Nhlabathi what his instructions are in respect of his new clients. After hearing the parties, I postponed the proceedings until 28 January 2022 to enable a further answering affidavit to be filed on their behalf. I raised a concern that the Court was not informed about the stance the newly participating Respondents intended to take nor the circumstances in which Mr Nhlabathi had been instructed at such a late stage to represent them. I reserved costs. Thereafter, answering affidavits were filed on behalf of both the Sixth and Seventh Respondents and the Applicants replied.

11. The matter proceeded on 28 January 2022, albeit in circumstances where the participating Respondents disputed the urgency of the proceedings as they were entitled to do. Mr Roberts SC appeared for the Applicants and Mr Nhlabathi appeared for the participating Respondents.

12. The issues that require consideration are the following:

- 12.1. Urgency
- 12.2. Whether these proceedings should be stayed pending the finalisation of the LTA proceedings.
- 12.3. Whether the relief sought amounts to an eviction.
- 12.4. Whether the Applicants have made out a case for the interdict sought.

## 12.5. Order and costs.

13. Before dealing with these issues I set out salient features of the relief sought, the applicable legal framework and factual matrix.

### **Relief sought**

14. In sum, the Applicants seek the following relief:

- “14.1      *The First to Seventh Respondents are ordered to remove all the livestock, including cattle, horses, sheep, goats in their possession or under their control from the farm Kleine Fontein within fourteen (14) days of the granting of this order.*
  
- 14.2      *The First to Seventh Respondents are restrained from returning any of their livestock as contemplated in paragraph 1 above or any other livestock onto the farm for a period of five years from the date of the removal of the livestock from the farm.*
  
- 14.3      *In the event of the First to Seventh Respondents failing to comply with the orders set forth in paragraphs 1 and 2 above, the relevant Sheriff, with the assistance of the South African Police Services and/or any other registered private security company, at the Applicants' expense, shall remove all livestock in their possession or under their control to the pound in Bergville alternatively Ladysmith, KwaZulu-Natal Province or such other pound in KwaZulu-Natal who will be able to accommodate the livestock (the pound) for the Pound Master to deal with the livestock in terms of the applicable legislation.*
  
- 14.4      *In the event of livestock remaining on the farm after compliance with paragraph 1 by the First to Seventh Respondents and the execution of the order set forth in paragraph 3 above, an order is issued that the appointed*

*Sheriff for the district wherein the farm is situated, with the assistance of the South African Police Services and/or any other registered private security company at the Applicants' expense, shall remove all remaining livestock on the farm to the pound for the Pound Master to deal with the livestock in terms of the applicable legislation."*

## **Legal framework**

15. It is not uncommon for landowners to approach this Court, sometimes urgently, for interdicts to remove from their properties the cattle or other livestock of either labour tenants or occupiers in terms of ESTA. When bringing these cases, landowners frequently rely on section 24 of the Constitution,<sup>3</sup> NEMA,<sup>4</sup> CARA and the National Environmental Management Biodiversity Act 10 of 2004. As in this case, the relief sought often contemplates the return of livestock only after a substantial period of time.

16. In an ideal world, the assertion of environmental rights should complement and reinforce the realisation of rights relating to land tenure security. But in a country with a history marked by land and cattle dispossession, the assertion of these rights will inevitably conflict at times. The Constitution then requires that these rights – protected primarily through section 24 and section 25 of the Constitution – be duly balanced.

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<sup>3</sup> Section 24 of the Constitution confers the right on every-one "(a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

<sup>4</sup> NEMA is legislation enacted in 1998 to give effect to section 24 of the Constitution.

17. This Court has acknowledged the importance of cattle keeping for some ESTA occupiers<sup>5</sup> and that the “history of cattle keeping is steeped in South Africa’s history of land dispossession which the Constitution seeks to redress.”<sup>6</sup> It has recognised too that the “history of impoundment itself has a draconian history that is intimately linked with the history of land dispossession.”<sup>7</sup> When Courts are seized with disputes in which landowners seek the drastic remedy of removal of cattle of ESTA occupiers (or indeed labour tenants) asserting environmental rights, this history must, in my view, remain in sight.

18. CARA is old order legislation, enacted in 1983. While the constitutional validity of specific provisions of CARA may remain open questions, CARA’s provisions and objects are broadly consistent with section 24 of the Constitution.<sup>8</sup> Its objects are set out in section 3 as follows:

*“The objects of this Act are to provide for the conservation of the natural agricultural resources of the Republic by the maintenance of the production potential of land, by the combating and prevention of erosion and weakening or destruction of the water sources, and by the protection of the vegetation and the combating of weeds and invader plants.”*

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<sup>5</sup> See *Tsotetsi and Others v Raubenheimer N.O and Others* (LCC140/2020) [2021] ZALCC 2; 2021 (5) SA 293 (LCC) (18 January 2021) (Tsotetsi) at para 50, *Ramohloki and others v Radien (Pty) Ltd and others* [2020] ZALCC 31 (Ramohloki) and *Sibanyoni v Holtzhausen and others* [2019] ZALCC 11 (Sibanyoni).

<sup>6</sup> *Tsotetsi* supra n 5 at para 50 with reference to *Sibanyoni* supra n 5 at paras 43 to 50.

<sup>7</sup> *Tsotetsi* supra n 5 at para 50 with reference to *Sibanyoni* supra n 5 at para 50 and the Constitutional Court decision in *Zondi v MEC for Traditional and Local Government Affairs* 2005(3) SA 589 (CC) at paras 38 to 42.

<sup>8</sup> *Adendorffs Boerderye v Shabalala and Others* [2017] ZASCA 37 (Adendorffs) at para 31.

19. This case concerns, centrally, grazing capacity, which is defined in section 1 of CARA to mean, in relation to veld, “the production capacity over the long-term of that veld to meet the feed requirements of animals in such a manner that the natural vegetation thereon does not deteriorate or is not destroyed.” Section 6(1) of CARA empowers the Minister to prescribe control measures which shall be complied with by land users to whom they apply. Section 6(2) of CARA sets out what the control measures may relate to, which includes,<sup>9</sup> amongst other more general measures, the following: the grazing capacity of veld, expressed as an area of veld per large stock unit and the maximum number and the kind of animals which may be kept on veld.

20. The control measures are contained in the CARA Regulations. Regulation 9 provides:

*“Every land user shall by means of as many of the following measures as are necessary in his situation, protect the veld on his farm unit effectively against deterioration and destruction:*

- (a) The veld concerned shall be utilised in alternating grazing and rest periods with due regard to the physiological requirements of the vegetation thereon;*
- (b) Animals of different kinds shall be kept on the veld concerned.*
- (c) The number of animals kept on the veld concerned shall be restricted to not more than the number of large stock units that may be kept thereon in terms of Regulation 11;*
- (d)*
- (e) If the veld concerned shows signs of deterioration: -*

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<sup>9</sup> In subsections 6(2)(h) and (i)

- (i) *The number of animals kept thereon shall be suitably reduced;*
- (ii) *The portions showing signs of deterioration shall be withdrawn from grazing until they have recovered sufficiently;*
- (iii) *...*

21. Regulation 10 is entitled “Grazing capacity of veld” and provides in subsection (1):

*“The grazing capacity of veld, expressed as a specified number of hectares per large stock unit, shall be as indicated on a topo-cadastral map that is kept at the office of the executive officer for this purpose.”*

22. Regulation 11 is entitled:

*“Number of animals that may be kept on veld”. It provides in subsection (1):*  
*“Every land user shall restrict the number of animals, expressed as large stock units, kept on the veld of his farm unit to not more than the number that is obtained by dividing the area of the veld of the farm unit concerned, expressed in hectares, by the applicable grazing capacity referred to in Regulation 10, in respect of that farm unit.”*

23. The obligations imposed by Regulation 9 are placed on both the land owner and the land user.<sup>10</sup> And it is now trite that while there are various compliance measures provided for in CARA itself, these do not preclude a landowner from approaching a Court to obtain an interdict to ensure compliance with its provisions.<sup>11</sup> That is so even where there are proceedings pending under the LTA in respect of the land in question

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<sup>10</sup> Adendorffs supra n 8 para 29.

<sup>11</sup> Adendorffs supra n 8 paras 30 to 34; Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, Mathibane and Others v Normandien Farms (Pty) Ltd and Others [2017] ZASCA 163 (Normandien) at para 43.

because an extant owner remains bound by CARA and entitled to enforce CARA's provisions and land users, including labour tenants, remain obliged to comply with CARA.<sup>12</sup>

24. The right of an ESTA occupier to keep cattle and other livestock does not derive from section 6(2) of ESTA, but are personal rights derived from consent and regulated by agreement.<sup>13</sup> In *Tsotetsi*, this Court noted that

*"where ESTA occupiers have such personal rights, they will at least usually form part of the terms and conditions of their occupation" and held that they "will be integrally connected to their right to reside on and use the property, being primary rights ETSA confers on an occupier in terms of section 6(1)."*<sup>14</sup>

25. During argument, and on enquiry from the Court, Mr Roberts confirmed that the Applicants are relying, for their cause of action, on section 24 of the Constitution, NEMA and CARA, which can be enforced by interdict.<sup>15</sup> The Applicants' also rely, he submitted, on the holding of this Court in *Tsotetsi* that:

*"It will invariably be an implied (if not express or tacit) term of such an agreement that the owner or keeper of the cattle must comply with statutory obligations which concern the environmental protection of the allocated property, such as obligations in terms of CARA."*<sup>16</sup>

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<sup>12</sup> Normandien supra n 11 at para 46 and 61.

<sup>13</sup> Adendorffs supra n 8 para 29.

<sup>14</sup> *Tsotetsi* supra n 5 at para 31.

<sup>15</sup> Adendorffs supra n 8.

<sup>16</sup> Supra n 5 at para 33.



26. Mr Roberts disavowed reliance on features of the Applicants' pleaded case, including any disputed terms of and the purported cancellation of the agreements regulating the keeping of livestock by certain of the Respondents. Indeed, Mr Roberts submitted that the purported cancellation would be unlawful on the basis that no notice of cancellation had been given.

### **Factual matrix**

27. The founding affidavit is deposed to by the Fourth Applicant, Mr Alan Jeremy Green and is confirmed by his co-trustees. The first answering affidavit is deposed to by the First Respondent, Mr Kapeni Khumalo and is confirmed by the Second, Third and Fourth Respondents. The second answering affidavit is deposed to by the Sixth Respondent and confirmed by the Seventh Respondent. These are motion proceedings and the facts will stand to be determined on *Plascon Evans*<sup>17</sup> and *Wightman*<sup>18</sup>. The answering affidavits are inelegantly drafted and sparse in detail, but nevertheless raise important legal and factual issues.

28. Mr Green conducts a mixed farming enterprise on Harmony Farm comprising Brangus Stud cattle, a dairy, and cropping of inter alia maize and sorghum. Every year, Mr Green sells about 70 stud bulls throughout South Africa and neighbouring countries and his wife Carol Green conducts a dairy farming enterprise. Their daughter farms with them.

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<sup>17</sup> *Plascon Evans Paints v Van Riebeeck Paints* 1984(3) SA 623 (A) at 635H-635C.

<sup>18</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008(3) SA 371 (SCA).

29. Kleine Fontein is located in the Ntabamnyama mountain range and has mixed veld. Mr Green informs the Court that he has always prided himself on being a conservationist and always tried to comply with the stocking rate for the area where he farms. The Respondents do not dispute this but dispute that Mr Green is motivated thereby in what they contend are his efforts to secure their relocation.
30. The First Respondent, Mr Kapeni Khumalo, explains that he was born on the farm in April 1949 and was a farm labourer working initially for Mr Green's late father and thereafter for Mr Green. He says he is now retired. Mr Khumalo explains that he survives on the SASSA grant. He resides on Kleine Fontein with his spouse Elena and they do not have any family or dependants living with them.
31. The Applicants allege that the First Respondent is permitted no more than 17 cattle, 10 goats and a horse. That is not substantially in dispute.
32. The Second Respondent, Mr Jamulani Mduduzi Khumalo, also resides on Kleinefontein. Like the First Respondent, he used to work for Mr Green's late father, and thereafter worked for Mr Green. He retired in 2016. The Second Respondent resides on Kleinefontein with his spouse, Reginah and their family, including their son, Mr Forfor Khumalo, who is the Third Respondent. The Third Respondent used to work for Mr Green.
33. The Applicants allege that the Second Respondent has consent to keep 10 cattle and 20 goats. The Second Respondent disputes this alleging that he kept 20 cattle and 20 goats. The Applicants allege that the Third

Respondent is permitted to keep five cattle, but no goats. The Third Respondent denies this.

34. The Fourth Respondent, Mrs Beauty Shabalala, was apparently born on the farm in 1920. She lives in the former homestead of her son Mr Ngemu Shabalala (who has now relocated to Groote Hoek pursuant to the part settlement of the LTA proceedings). The Applicants assert that the Fourth Respondent has no right to graze livestock on Groote Hoek which is disputed.

35. The Sixth and Seventh Respondents are the children of a Mr Mathanjana Albert Khumalo, who has also relocated to Groote Hoek pursuant to the part settlement of the LTA proceedings. It is common cause that the Seventh Respondent does not have any consent to graze any animals on Kleine Fontein. However, there is a dispute as regards the Sixth Respondent's rights: Mr Green contends that he has no permission to graze any livestock on Kleine Fontein whereas the Sixth Respondent alleges he does. Indeed, he says that he purchased two cattle from Mr Green himself, with Mr Green's full knowledge that he was residing there.

36. The First and Second Respondents are plaintiffs in the LTA proceedings, together with the Fourth Respondent's son and the Sixth and Seventh Respondents' father. Seven of the Plaintiffs have settled their claim resulting in its part settlement. The settlement entails these Plaintiffs' relocation to Groote Hoek together with their livestock, which was meant to ensue during 2020. Neither First nor Second Respondents have settled their claims, which remain pending.

37. On the papers before me, it is clear that the Applicants' concerns about the Respondents' livestock are related to the relocation process. In this regard, Mr Green explains that he became concerned about persons who, in 2020, were not relocating but remaining behind on Kleine Fontein and continuing to graze their livestock allegedly unlawfully. That included the Fourth to Seventh Respondents, who are said to be family members of the Plaintiffs who did elect to relocate.

38. The Applicants say that in circumstances where the majority of the households that resided on Kleine Fontein had relocated to Groote Hoek with their livestock

*"it stood to reason that the First, Second and Third Respondents who were the only individuals that remained on Kleine Fontein who were permitted to graze livestock on Kleine Fontein, would henceforth require less grazing for their livestock compared to the grazing that they previously used together with those that had relocated to Groote Hoek."*

39. The First to Fourth Respondents dispute that the majority of the households had relocated and contend that the removal of grazing land was an unlawful eviction. The date on which this occurred is not stated but it appears to have been in mid to late 2020. The Sixth and Seventh Respondents plead no knowledge of these events.

40. The Applicants allege that, in the result, and on or about 11 November 2020, a verbal "without prejudice" "interim" agreement was concluded between the Fourth Applicant and the Respondents (save for Third Respondent)

concerning the land that could be used for grazing pending a relocation to Groote Hoek. The status of the “without prejudice” agreement is difficult to discern but for present purposes need not be decided. For purposes of background information, however, it is alleged that material terms of the agreement included that the First to Third Respondents could only use the grazing land in the area referred to as the home camp for grazing cattle and goats, being approximately 91 hectares.<sup>19</sup> “Trespassing” goats that grazed in an area known as KwaSani (on a hill adjacent and to the west of the home camp) would, however, not be impounded. Three and a half contours of dry land would be fenced off by the Applicants’ for the First and Second Respondents’ use. No consent was allegedly given to the Fourth to Seventh Respondents to use the home camp for grazing or cultivation under the interim agreement.

41. The First to Fourth Respondents contend that the limitation of grazing land constitutes an unlawful eviction. They further allege that the Applicants failed to erect the fence which meant that it was ultimately not possible to keep the animals in the intended area. While the Applicants accept that the fence was not completed, they do say that the home camp is fenced.

42. The Applicants allege that between June and September 2021, there were various incidents entailing the trespass of the First to Third Respondents’ cattle or goats. These incidents are disputed at least to the extent that in

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<sup>19</sup> This is depicted on an Annexure AJG9.

the absence of the fence, it was not possible to implement the “without prejudice” agreement.

43. The Applicants allege further that when they conducted recent counts of the Respondents’ cattle and goats, they found them to be in excess of the permitted numbers. Thus it is alleged that on 15 September 2021, some 106 cattle were counted in the vicinity of the First and Second Respondents’ homesteads and four cattle in the vicinity of the Fourth Respondents’ homestead. The cattle count was allegedly confirmed on 17 September 2021. These allegations are met with a simple denial. As for goats, the Applicants allege that on 23 September 2021, they counted goats as follows: 34 belonging to the First Respondent, 36 belonging to the Second Respondent and 22 at the Fourth Respondent’s homestead. These allegations are similarly met with a simple denial save that the Respondents point out, correctly, that while the Applicants tender photographs to support their claims regarding numbers, the photographs pertinently do not substantiate the allegations, at least as presented. Put differently, it would have been an easy matter for photographs to have been presented in a manner that would substantiate the numerical claims of the nature made. It was, on the other hand, only during the hearing, and from the bar, that the Respondents’ attorney informed the Court as to the numbers of cattle currently held by the relevant Respondents. The Applicants understandably objected to information of this sort being received by the Court as evidence and I do not refer to it.

44. As regards the Applicants' concerns about the state of the grazing veld on Kleine Fontein, what is in issue is the current state of the home camp, allegedly overgrazed. In this regard, the Applicants rely on the cattle and goat count of 15 and 23 September 2021 respectively being a total of 110 cattle and 84 goats. These numbers, it is alleged, exceeds the carrying capacity of the home camp in breach of applicable laws and resulting in environmental degradation. They are also well in excess of the alleged agreed amounts being, in total, 32 cattle (one large stock unit each), 30 goats (being 0.17 large stock units each) and 1 horse (2 large stock units).
45. In support of these allegations, the Applicants supply the Court with a report from a Mr Lamprecht of Eco Focus Consulting (Pty) Ltd. Mr Lamprecht describes himself as an ecological specialist and is the author of reports in a number of similar cases that come before this Court. He explains that he was requested to assess the impact of erosion, the establishment of invasive plant species and overgrazing as a result of inadequate farm management practices in the home camp. He visited the home camp on 19 October 2021. He says that there were at least 90 cattle grazing in the home camp at the time of the visit (but understandably does not seek to attribute ownership whether to the Respondents or any-one else). In the absence of historical data, he assesses the state of the home camp with reference to what he describes as a baseline comparison area which is said to be in relatively close proximity to the camp and which represents more natural and less disturbed vegetation.

46. He ultimately concludes, amongst other things, that the current users and occupiers of the grazing camp are breaching CARA (which he says should attract criminal sanction) and that immediate active measures should be implemented to restore and conserve the natural ecology of the area and to achieve legal compliance. He explains that the “official” grazing capacity of the broader area is approximately 4.62 hectares / large stock unit, meaning that it can lawfully carry no more than approximately 20 head of cattle. However, he also points out that a suitably qualified expert in the field of grassland science would need to determine grazing capacity accurately. The carrying capacity of the home camp is thus substantially less than either the alleged cattle counts of Mr Green in September 2021, of Mr Lamprecht in October 2021 and importantly what is permitted in terms of the alleged “without prejudice” agreement. And that does not account for any other livestock.

47. Mr Lamprecht’s findings are dealt with separately in respect of two broad parts of the home camp: the northern portion and the central / southern portions. The northern portion of the home camp was, during August 2021, impacted by fire. The report indicates that the majority of the aboveground grass biomass in this area was thereby destroyed. The area has not regenerated but new regrowth is being grazed, which Mr Lamprecht says is causing further ecological damage. As regards the remaining unburnt part of the northern portion and the central / southern portions, he finds that there is severe or substantial ecological disturbance and selective grazing denudation on the majority of this area evidenced by a dominance of hardy,



low- and unpalatable increase type grass species, a poor grass species diversity and composition and a sparse presence of desired species. There is also low aboveground grass biomass accompanied with higher frequency of bare soil cover, relative to the baseline comparison area.

48. Mr Lamprecht explains that there is only moderate ecological disturbance and selective grazing denudation in the water draining area that traverses the northern part of the home camp. At the time of inspection, the water drainage area is described as possessing low to moderate usable grazing capacity and value but that is significantly lower relative to the baseline comparison area. There is, moreover, a presence of a bush known colloquially as the 'bankrupt bush' in this area requiring immediate active eradication measures.

49. He recommends that the area be completely rested with immediate effect for a period of five years. He is of the view that a passive restoration / improvement approach of removing or decreasing the number of livestock and grazing load of the camp will "not necessarily be sufficient" for combatting and reducing the bankrupt bush throughout the surface water drainage area. An active eradication approach is required in that regard, he opines.

50. The Respondents contend that the Applicants are mistaken regarding the number of livestock in the home area. Moreover, they dispute that the area is degraded and denuded and seek an opportunity to obtain a second

opinion from a suitable expert. They say that they would require State assistance to fund such a report.

## **Urgency**

51. The Respondents have, throughout the process, disputed the urgency of the application as they were entitled to do. They say that the issues around reduction of cattle have long been in contention between the parties and indeed, are a feature of the LTA proceedings. Mr Nhlabathi submitted that the Applicants pertinently do not say when it came to their notice that the home camp was becoming degraded. Viewed not least in context of the Applicants' efforts to relocate the Respondents, he submitted, the urgency is, rather, self-created. The Applicants, on the other hand, contended that the urgency arose from the sudden increased number of observed cattle in late 2021. In my view, Mr Nhlabathi's submissions are, in important respects, correct when regard is had to the full factual matrix. Even if I were to accept that the Applicants' number count in September 2021 is correct, I am unable to conclude on the papers before me that this could reasonably have been the moment when any concerns about environmental degradation arose. As appears from Mr Lamprecht's report, there was no historical data to use for purposes of comparison: rather, his report is based on comparison with a nearby site. Moreover, if one applies Mr Lamprecht's assessment that the home camp can only carry some 20 cattle, then it is immediately apparent that even the "without prejudice" agreement – allegedly concluded in November 2020 – would have contemplated a breach

of CARA's requirements. Thus, the difficulties must have arisen at least from that time, being when the Respondents say there was an unlawful limitation on grazing land. At best for the Applicants, the difficulties would then have emerged as a result of the alleged agreement to which the Applicants are not only a party but themselves initiated when they limited access to grazing land. Mr Lamprecht also explains that there was a fire that had impacted upon the northern part of the home camp which was in part the cause of its immediate state – an issue not adequately addressed by the Applicants.

52. Indeed, the Applicants' own account of the events leading up to the application are related to their relocation efforts and concerns about livestock "trespass". There was no letter of demand preceding the institution of proceedings and no dialogue between the parties about measures that might be taken to address any environmental concerns or to find less drastic solutions to what is contemplated by the relief sought. Instead, it appears that following the Applicants' livestock count in September 2021, they proceeded to obtain Mr Lamprecht's report and then institute proceedings. Moreover, as explained above, the September livestock count is disputed and the photographic evidence is inconclusive (at least as explained).

53. I am mindful that Mr Lamprecht expresses the opinion that the home camp should be immediately vacated of livestock so that it can recover and so that further degradation over time is prevented. I am also mindful that breach of CARA can constitute a criminal offence. Not least in circumstances where

the requirements of CARA are, *prima facie*, being breached, these factors introduce a measure of urgency. But on a careful consideration of the factual background, and in the circumstances of this case, and in view of the drastic relief sought, and how it can impact upon important constitutional rights that does not justify approaching the Court as occurred in this case. And fairness remains paramount. The Respondents seek an opportunity to obtain their own expert's report and in my view, they should be permitted a reasonable time to do so. Similarly, they should be afforded a fair and sufficient opportunity to consider whether they wish to institute any counter-claim to restore grazing land.<sup>20</sup> The need to finalise the matter with due expedition having regard to both parties' rights can be achieved through case management.

### **Stay of proceedings**

54. Mr Nhlabathi submitted that the application should be stayed pending the finalisation of the LTA proceedings. In my view this submission cannot be accepted in light of the *Normandien* decision<sup>21</sup> and the legal position I set out in paragraph 23 above. What is warranted, however, is that the LTA proceedings be case-managed to enable that they be brought to finality within a reasonable time and to enable considerations germane to its resolution to inform lawful environmental management of the relevant properties as the process unfolds.

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<sup>20</sup> See the recent decision of the SCA in *Loskop Landgoed Boerdery (Pty) Ltd and Others v Petrus Moeleso and Others* [2022] ZASCA 53 (Loskop Landgoed Boerdery), which postdates the hearing in this matter, regarding the nature of such an action.

<sup>21</sup> *Supra*, n 11 at para 46 and 61.

### **Do the ESTA eviction protections apply?**

55. The Respondents submitted that the relief sought cannot be granted because it would be tantamount to an eviction and the eviction procedures have not been followed. The Applicants submitted that when an owner enforces CARA by seeking an interdict to remove cattle from land overgrazed in breach of its provisions, this does not amount to an eviction. The Applicants' submission accords with SCA authority, specifically *Normandien*,<sup>22</sup> in context of the LTA, and *Loskop Landgoed Boerdery*,<sup>23</sup> in context of ESTA.

56. However, on careful consideration of what the SCA held in the above cases and on the facts and in the circumstances of this case, it is perhaps not surprising that the Respondents advanced this contention. In *Normandien*, the SCA qualified its finding that an eviction was not in issue in that case by saying:

"In the present case *Normandien* did not purport to terminate or repudiate the relationship between itself and the occupants as labour tenants. *Normandien* did not contend that the occupants no longer had the right to reside on the farm. *Normandien* did not contend that the occupants' right, as between themselves and *Normandien*, to graze their livestock on the farm as an incident of their occupation was at an end. *Normandien* asserted that the continued presence of the livestock on the farm contravened CARA and that this was

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<sup>22</sup> Supra n 11 at paras 59 and 60.

<sup>23</sup> *Loskop Landgoed Boerdery* at paras 14 to 17 esp 17.

damaging Normandien's land and causing Normandien to be in violation of its obligations under CARA. (Emphasis supplied.)"

57. In *Loskop Landgoed Boerdery*, the SCA held that this dictum was equally applicable in context of ESTA.<sup>24</sup>

58. As indicated above, on the pleadings in this case, the Applicants plead breach of the agreements governing the holding of cattle, where applicable, and purport to cancel these agreements. The relief sought, in turn, entails the drastic remedy of the removal of all cattle from Kleine Fontein for at least five years. This in circumstances where the Respondents are apparently reliant on their cattle for any wealth and their relocation is actively being sought. Mr Roberts conceded however that any such cancellation would, at least absent notice, be unlawful, and confined the Applicants' case to one seeking to enforce CARA. In light of this concession, the case can be adjudicated on the principle that the agreements remain in place and it is not necessary for me to consider, at least at this stage, whether this is a case where the eviction protections apply (directly or constructively). The circumstances present when the case is finally adjudicated should, however, be placed before the Court.

### **The requirements for an interdict**

59. In view of my conclusion that the Respondents should be permitted an opportunity to obtain their own expert report, it is premature for me to

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<sup>24</sup> Supra n 20 at para 17. In this case, the cattle were not to be removed from the property itself.

consider whether the Applicants have established any clear right that justifies enforcement of CARA and other laws relied upon including by way of the drastic relief sought. That question should be determined when the Respondents have been afforded a reasonable opportunity to obtain their own expert report. In my view two months should suffice for that purpose.

60. That however is not the only issue that will require determination when the case is finally adjudicated. One of the requirements for an interdict is that there is no satisfactory alternative remedy. In this case, the Applicants plead that they have previously issued notices in terms of section 7 of ESTA, which provides a remedy to owners in respect of trespassing animals. What is not explained, however, is why contractual remedies short of cancellation to resolve the dispute are of no assistance and have not been pursued.

61. At this juncture, I pause to express various concerns about these proceedings and the terms and conditions of the agreements which are in place governing the holding of livestock. In this regard it is common cause that the First to Third Respondents have consent to keep livestock on Kleine Fontein although there is some dispute about the agreed numbers and there is a dispute about the existence of any agreement with Fourth and Sixth Respondents. As indicated above, it appears from the information placed before me that the "without prejudice" agreement (whatever its status) is not, and when allegedly concluded, was not, capable of giving effect to the requirements of CARA, yet grazing land hitherto available was removed from the relevant Respondents' use. The duties to comply with CARA and related legislation are shared duties and agreements concluded must be

capable, both procedurally and substantively, of giving effect to applicable legal requirements governing environmental sustainability. The agreements must accord with common law, and where applicable, constitutional prescripts. Procedurally, at the very least, landowners or persons in charge and ESTA occupiers who are entitled to keep livestock must engage with each other as required to enable mutual compliance.

### **Order and costs**

62. In light of the above, I have concluded that I cannot grant relief at this stage and leave should be granted to the parties to supplement their papers. Both this application and the main action in LCC 198/2016 should be placed under case management. Furthermore, the parties should engage with each other as required regarding compliance with applicable environmental prescripts. In this regard I am mindful that there is a dispute as to whether the Fourth and Sixth Respondents have any consent to keep cattle. It is not necessary for me to adjudicate that dispute (at this stage). The order I grant would apply also to the Respondents also on the basis that irrespective of the status of any agreement, engagement can reasonably be expected to facilitate the expeditious, economical and efficient resolution of the dispute.


63. I have concluded that each party should pay their own costs to date in accordance with this Court's usual practice. Different considerations may have applied should the Applicants have been unwilling to file their initial



replying affidavit under tight time constraints. This Court has noted their co-operative approach with appreciation.

64. I make the following order:

- 64.1. The application is placed under case management.
- 64.2. The Applicants and each Respondent who keeps livestock on Kleine Fontein shall, as soon as possible, embark on a meaningful engagement regarding measures necessary to ensure mutual compliance with CARA.
- 64.3. The Applicants are granted leave to supplement their papers on or before 30 June 2022.
- 64.4. The Respondents are granted leave to supplement their papers on or before 31 July 2022, including by delivering any expert report and instituting any counter-claim.
- 64.5. The Applicants shall thereafter deliver a practice note and request the Registrar to allocate a date for case management to deal with the further conduct of the application.
- 64.6. LCC 179 / 2016 is placed under case management and the parties are directed to arrange a suitable date for a case management conference with the Registrar.
- 64.7. Each party shall pay their own costs to date.

A handwritten signature in black ink, appearing to read 'COWEN J', written over a horizontal line.

**COWEN J**

**Judge**

**Land Claims Court**

Appearances:

*For the Applicants* Mr M G Roberts SC instructed by Christopher Walton & Tatham Attorneys.

*For the Respondents* Mr L M Nhlabathi, L M Nhlabathi Inc.