



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 73/2021

In the matter between:

MASHAO JOHN THEPANYEGA N O
EPHRAIM SETLABANE RAMOHLALE N O
LESOLE JOHANNES TEPANYEKGA N O
MADUMETSA SOLOMON MACHETE N O
MOSIMA JEANETA BALOYI N O
KGOBUDI JACKSON MANKGA N O
NGWAKO FRANS MAMARIBE N O
NGALETJANE CLAAS RAMAPHOKO N O
PHEEHA FRANS RAMOTLHALE N O
CHIPPA DANIEL RAMOHLALE N O
REKE PEGGY DIKGALE N O
MOSEBJADI ISABEL DIKGALE N O

FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT
FIFTH APPELLANT
SIXTH APPELLANT
SEVENTH APPELLANT
EIGHTH APPELLANT
NINTH APPELLANT
TENTH APPELLANT
ELEVENTH APPELLANT
TWELFTH APPELLANT

and

HERMAN LETSOALO
SEJA LETSOALO
FRANS KWETE RAMOTIHANE

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

Neutral citation: *Thepanyega N O and Others v Letsoalo and Others* (73/2021)
[2022] ZASCA 30 (24 March 2022)

Coram: SALDULKER, ZONDI and HUGHES JJA, and MUSI and SMITH AJJA

Heard: 24 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 24 March 2022.

Summary: Civil procedure – contract – whether a person who claims possession by way of ownership of a property must prove the termination of a contractual right of another to hold such a property prior to the institution of proceedings – agreement must be unequivocally cancelled before an application for eviction is launched.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Naude AJ and Phatudi J, sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Saldulker JA (Zondi and Hughes JJA, and Musi and Smith AJJA concurring):

[1] This appeal, brought by the appellants, Mashao John Thepanyega NO and eleven others, the trustees of the Madibeng Letupi Community Trust (the Trust), is against the decision of the Limpopo Division of the High Court, Polokwane (the high court), whereby Naude AJ (Phatudi J concurring) set aside an order on appeal from the Magistrate's Court for the District of Molemole, held at Morebeng (the magistrate's court).

[2] The Trust is the registered owner of Portion 6 of the Farm Kalkfontein 812, Registration Division L.S, Limpopo Province (the farm) (the trust property). The Trust had for some time allowed the respondents, Messers Herman Letsoalo, Seja Letsoalo and Frans Ramotihane, to graze their livestock on the trust property subject to payment of a grazing fee and other related charges. The appellants, contending that the respondents had in breach of the grazing agreement failed to pay the grazing fee and other related charges, launched proceedings in the magistrate's court against the respondents for, inter alia, the eviction of the respondents' livestock (cattle) from the trust property; authorising the sheriff or the pound master to remove the livestock from the trust property; and to retain same until the grazing fee and related costs have been paid. During the hearing of the application, the Trust sought and obtained an amendment of the notice of motion so as to incorporate a prayer

for an interdict preventing the respondents from grazing their livestock on the trust property. The magistrate granted the relief as sought by the Trust.¹

[3] Aggrieved by the judgment, the respondents approached the high court. The high court upheld the appeal, and found that the magistrate's court lacked jurisdiction, and that the appellants did not make out a case for an interdict. Importantly, the high court found that it was common cause that there was a verbal agreement between the parties, which had entitled the respondents to graze their livestock on the farm belonging to the appellants, and which agreement had not been unequivocally cancelled by the appellants before they launched the application for the eviction. This appeal is with the leave of this Court.

[4] The crisp issue in this matter is whether the respondents had established a right entitling them to graze their livestock on the farm. But first, the facts.

[5] It is common cause that the respondents began to graze their livestock on the farm since 2012. According to the founding affidavit of the appellants, the respondents were allowed to graze their livestock on the farm subject to the payment of fees. However, the respondents paid no fees, and despite many requests by the appellants to formalise the agreement to establish their contractual grazing rights on the payment of fees, the respondents refused to comply. It is apparent from the pleadings that the respondents had a right to graze their livestock on the farm with the appellants' consent. Their use of the appellants' property was therefore not unlawful. It is not alleged by the appellants that they had terminated the respondents' right to graze their livestock.

[6] At the hearing counsel for the appellants pointed out that what was being sought by the appellants was an interdict, not eviction. To succeed in their claim for a final interdict the appellants had to establish, among other things, the existence of a clear right and its infringement by the respondents. Thus, at least at the time the

¹ The magistrate granted the following order: the eviction of the cattle or livestock from the property; the sheriff or pound master keep the cattle or livestock in pound until the respondents have paid the costs of the application; the respondents are interdicted from grazing their cattle or livestock on the property; and the respondents to pay the party and party costs.

application was launched, there was still a valid oral agreement between the parties in terms of which the respondents were allowed to graze their livestock on the farm.

[7] The high court accordingly correctly found that there was some tacit agreement between the parties and that agreement had not been cancelled. Furthermore, the appellants do not explain why it took them four years to enforce a claim for grazing fees. More importantly, when they eventually wrote to the respondents claiming grazing fees, there was no suggestion that an election had been made to cancel the agreement.

[8] From the foregoing, it is clear that there must have been some tacit agreement between the parties which entitled the respondents to graze their livestock. This agreement clearly conferred a personal right on the respondents. The appellants have also not proved that they would suffer any harm or the nature of such harm. The appellants can also obtain adequate redress through other remedies, such as a claim for damages, and/or cancellation of the agreement.

[9] It is common cause that the appellants are the owners of the farm. The respondents are not beneficiaries, nor trustees of the Trust. However, there was an oral agreement in place whereby the appellants allowed the respondents the right to graze their livestock on the farm. As mentioned, the high court correctly found that the agreement between the parties was not unequivocally cancelled before the application for eviction was launched. Thus, this right has not been terminated. This is in line with the decision in *Morkel v Thornhill* (A105/2009) [2010] ZAFSHC 29 (FB), where it was held that a notice of cancellation must be clear and unequivocal and only takes effect from the time it is communicated to the relevant party. Furthermore, in the seminal case of *Chetty v Naidoo* 1974 (3) SA 13 (A), this Court held that:²

'[A]lthough a plaintiff who claims possession by virtue of his ownership, must *ex facie* his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination, the necessity for this proof falls away if the defendant does not invoke the right conceded by the plaintiff, but denies that it existed. Then the concession becomes mere surplusage as it no longer bears upon the real issues

² *Chetty v Naidoo* [1974] 3 All SA 304 (A) at 310.

then revealed. If, however, the defendant relies on the right conceded by the plaintiff, the latter must prove its termination. This is so, not only if the concession is made in the statement of claim, but at any stage.'

[10] In argument before us, the appellants' counsel conceded that they do not claim to have cancelled the agreement, but urged us, on the basis of the *Plascon-Evans* rule, to ignore the appellants' version and decide the appeal on the version proffered by the respondents. The argument being that the respondents claim that they had obtained the permission to graze their livestock from the beneficiaries of the Trust, meaning that the contract asserted by them was void *ab initio*, since they did not contract with the trustees. This argument, however, conveniently ignores the fact that it is common cause that the trustees ultimately accepted that there was such an agreement in place and had in fact attempted to enforce it by claiming grazing fees from the respondents.

[11] In view of all the foregoing, the appeal falls to be dismissed. There appears to be no equitable reason why an order for costs should not follow the result.

[12] In the result, the following order is made:
The appeal is dismissed with costs.

H K SALDULKER
JUDGE OF APPEAL

APPEARANCES

For appellants:	D Prinsloo (with M Bresler)
Instructed by:	Naude & Britz Attorneys, Polokwane Symington & De Kok Incorporated, Bloemfontein
For respondents:	M E Phooko
Instructed by:	Moloko Phooko Attorneys, Polokwane Phatshoane Henney Attorneys, Bloemfontein