# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Not reportable**

**Case No: 997/15**

In the matter between:

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| **ADENDORFFS BOERDERYE (PTY) LTD** | **APPELLANT** |
| **and** | |
| **FAYINDOLO SHABALALA** | **FIRST RESPONDENT** |
| **TIMOTHY SHABALALA** | **SECOND RESPONDENT** |
| **THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM** | **THIRD RESPONDENT** |
| **THE MINISTER OF AGRICULTURE** | **FOURTH RESPONDENT** |

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| **Neutral Citation:** | *Adendorffs Boerderye v Shabalala & others* (997/15) [2017] ZASCA 37 (29 March 2017) |
| **Coram:** | Shongwe, Majiedt, Mathopo and Van der Merwe JJA and Mbatha AJA |
| **Heard:** | 28 February 2017 |
| **Delivered:** | 29 March 2017 |

**Summary:** Conservation of Agricultural Resources Act 43 of 1983 (CARA) : Regulation 9 : land users as defined in CARA responsible for ensuring that grazing land is protected from overgrazing and deterioration : CARA not explicitly prohibiting a land owner from pursuing remedy in the form of a restraining order : land users not exercising grazing rights in terms of the provisions of the Extension of Security of Tenure Act 629 of 1997 but in terms of an agreement with landowner.

Court practice : Court orders :overbroad court orders not sought by parties and not supported by pleadings : such orders not sustainable, especially where parties were not afforded opportunity to make prior representations : orders set aside both in appeal and cross appeal.

Costs : *de bonis propriis* : where attorneys flagrantly disregard court rules by late delivery of heads of arguments without proper explanation : additionally, attempting to obtain postponement without proper basis : such conduct prejudicing opponent : appropriate to mulct attorney with costs.

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**ORDER**

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**On appeal from**: The Land Claims Court (Sardiwalla AJ) sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 The cross appeal is upheld with no order as to costs.

3 The orders of the court below are set aside and substituted with the following:

'1 The first and second respondents, with the assistance of the appellant (to provide transport), are hereby directed to remove all livestock belonging to them, from the appellant's farm described as Portion 1 of the farm La Bella Esperance No. 3338, Registration Division HS, KwaZulu-Natal and situated in the district of Newcastle ('the farm') within 30 days of the granting of this order, to a place identified by the first and second respondents.

2 That, in the event of the first and second respondents failing to comply with the order set out in paragraph 1 above, the Sheriff of the High Court, with the assistance of the South African Police Services, if necessary, is hereby ordered and directed to remove all the livestock present on the farm under the control of the respondents referred to in paragraph 1 above, to the nearest pound.

3 That the first and second respondents are interdicted and restrained from returning any of the livestock removed from the farm as prayed for in paragraph 1 and/or 2 above, or any other livestock, until the rehabilitation period of 3 years of the demarcated area where the livestock were kept has expired.'

4 The attorneys of the first and second respondents are ordered to pay the cost of the application for postponement and condonation *de bonis propriis*.

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**JUDGMENT**

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**Mathopo JA (Shongwe, Majiedt and Van der Merwe JJA and Mbatha AJA concurring):**

[1] This appeal concerns an order for the removal of livestock belonging to the first and second respondents (the respondents) from the appellant's farm, La Bella Esperance situated at Portion 1 of the farm La Bella Esperance 3338, in Newcastle, KwaZulu-Natal (the farm). In the Land Claims Court (LCC) (Sardiwalla AJ) where the matter commenced, the appellant, Adendorffs Boerderye (Pty) Ltd, principally sought an order for the removal of the livestock from the farm on the basis that the respondents breached the grazing agreement between the parties by keeping more livestock than allowed on the farm which led to the overgrazing of the land.

[2] The LCC substantially agreed with the appellant that the grazed area required rehabilitation, but instead of granting the orders sought in the appellant's notice of motion, granted further orders which were not asked for and failed to accord the parties an opportunity to file further affidavits or present argument before granting these orders. Aggrieved by the orders, the appellant and the Minister of Rural Development and Land Reform (the third respondent in the court a quo and cross-appellant) appealed against this decision. This appeal and cross-appeal is with leave of the LCC. The core issues are whether it was competent for the LCC to make the impugned orders without affording the parties an opportunity to file supplementary affidavits or present argument and whether the LCC should have granted the relief claimed by the appellant.

**The Parties**

[3] The appellant is the registered owner of the farm. The first respondent and the second respondent, who is now deceased, are occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The Minister of

Agriculture, the fourth respondent, was cited in the court a quo as the Minister responsible for the administration of the Conversion of Agricultural Resources Act 43 of 1983 (CARA).

**Background**

[4] The facts giving rise to the appeal are as follows: The appellant owns the farm on which the first respondent resides. The farm is utilised for agricultural purposes and in particular, for grazing and cattle farming. The farm, by virtue of its geographical location and its natural vegetation, is most suitable for cattle farming. Its carrying capacity is approximately three hectares per livestock unit. The extent of the farm is 523.8162 hectares. The appellant financed the purchase thereof by means of a mortgage bond and the monthly repayments in respect of the bond amount to R90 000. In order to meet its financial obligations the farm must be properly managed to avoid the depletion of grazing resources and natural vegetation on the farm.

[5] If the farm is not properly managed and maintained the vegetation will suffer and will require rehabilitation at a considerable cost and this will, no doubt, have an impact on the profitability of the farming operation as a whole. In terms of regulation 9(1)(a) to (e) made in terms of s 29 of CARA, the appellant as the land owner and the respondents as land users are obliged to use agricultural land in a responsible manner to prevent overgrazing on agricultural land. The regulation provides as follows:

‘9(1) 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 utilized 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 that the number of large stock units that may be kept thereon in terms of regulation 11.

(d) A suitable soil conservation work shall be constructed and thereafter be maintained in order to:

    (i) utilize the veld concerned in alternating grazing and rest periods;

(ii) protect the veld concerned against excessive soil loss as a result of erosion through the action of water or wind;

(iii) collect sediment from run-off water.

(e) If the veld concerned shows signs of deterioration –

(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.'

[6] CARA defines a land user, in relevant parts, as follows:

'Land user' means the owner of land, and includes −

(a) any person who has a personal or real right in respect of any land in his capacity as fiduciary, fideicommissary, servitude holder, possessor, lessee or occupier, irrespective of whether he resides thereon;

(b) any person who has the right to cut trees or wood on land or to remove trees, wood or other organic material from land;

(c) . . . .'

[7] Before the farm was purchased in May 2010, the appellant established that the respondents were allowed to keep cattle on the farm pursuant to written agreements concluded with the representative of the erstwhile owner, Mr Johan de Swart. In terms of these agreements, the 'weidingsooreenkomste', the respondents were permitted from 2005 to lease grazing land from the owner and keep a specific number of livestock (ten head of cattle and two horses) on the farm. The respondents' livestock were permitted to graze within the demarcated area and not allowed to stray outside its boundaries.

[8] The first respondent in the answering affidavit stated that he started living on the farm with his parents when he was six years old. His father was employed on the farm by previous owners in the 1960's. He worked on the farm until he passed away. His parents and siblings were buried on the farm. Pursuant to a verbal agreement with a previous owner, Mr Hendricks in 1993, the respondents were allocated 150-200 hectares of land to graze their livestock on that part of the land. The farm was subsequently leased by Mr De Swart, who honoured the agreement concluded with Mr Hendricks and

allowed them to continue with the previous grazing arrangement. They also continued to work as farm labourers for De Swart.

[9] It was only after 2005, when the farm was taken over by Mr Dampie, that the previous land allocated to them by Mr Hendricks, was reduced to 53.7 hectares. This resulted in their cattle now grazing on a small and reduced area. Mr Dampie impounded their cattle whenever they strayed, imposed fines and demanded payment for their release. During 2012 when the appellant acquired the farm, Hubert Paul Adendorff junior, reduced the grazing land despite being privy to the verbal agreement concluded with Hendricks. Adendorff junior did not want them to work on the farm and having reduced the grazing area their livestock were forced to graze in the mountains which are not well vegetated. When the appellant acquired ownership of the farm it accommodated the first respondent on the same terms as the previous owner. It is common cause that both respondents have not been employed by the appellant but their livestock continue to graze on the farm. They do not contribute towards the maintenance and infrastructure of the farm, although they have in the past done so.

[10] The appellant alleges that the first respondent resides with his family in Charlestown and visits the farm mostly over the weekends. The appellant further alleges that the respondents breached the terms of the grazing agreement by exceeding the number of cattle permitted on the farm, kept goats and failed to comply with the provisions of the Animal Health Act 7 of 2000 by not getting cattle inoculated and protected against diseases. In essence, appellant alleges that as a result of the above transgressions harm was done to the farm. The appellant commissioned experts on the vegetation of the land occupied by the respondents. The experts agreed and recommended that the respondents' livestock must be removed from the camp and a long term rehabilitation and veld improvement strategy be compiled and implemented. The costs of the rehabilitation process was estimated at around R35 000 to R60 000. Coincidentally the experts hired by the Department of Rural Development and Land Reform also confirmed the reports of the experts hired by the appellant.

**Litigation history**

[11] In the LCC the main argument for the appellant was that the respondents are occupiers in terms of s 6 of ESTA and that their grazing rights are exercised and controlled in terms of the 'weidingsooreenkomste' concluded with Mr de Swart. It was submitted that they had breached the agreements by keeping more livestock than agreed upon and have overgrazed the land. The respondents denied that the grazing of their livestock on the farm was unlawful and relied on the verbal agreement concluded with Mr Hendriks for their right to graze. In argument the respondents disputed the written agreements relied upon by the appellant and alleged that, as illiterate and unsophisticated persons, the agreements were in Afrikaans and were neither read nor explained to them. In a nutshell, they put the blame on the reduction of the farmland by the appellant's predecessor, Mr de Swart, and further perpetuated by the appellant, as the reason why they were without sufficient grazing land to sustain and plough the crops for their sustenance. They averred that their livestock was the only source of their livelihood and with the land now being reduced, they were left with no grazing land for their livestock.

[12] Acting in terms of the rules of the LCC Sardiwalla AJ called various pre-trial conferences aimed at resolving the issues. On 13 November 2014 after some deliberations the learned Judge agreed with the appellant that the area occupied by the respondents required rehabilitation and made an order in the following terms:

'It is common cause that the grazing land occupied by the first and second respondents requires rehabilitation over a period of three years.'

This order was in line with what the appellant's experts had recommended. Thereafter the learned Judge issued a directive requiring the third and fourth respondents to explore possibilities of assisting the respondents with alternative grazing land. Following this directive they commissioned a report which concluded that 'the vegetation in the camp is badly degraded due to continuous grazing system and overstocking practised over a long period'. That report recommended that all cattle, goats and horses be immediately

withdrawn from the fenced area. The respondents were afforded a period of six months to find alternative land for their livestock. As a result further directives were given by the court a quo and another pre-trial conference aimed at resolving the impasse was held on 27 March 2015, to determine the number of livestock to be moved, the location and date where they will be moved and the persons responsible for the payment of the rental from the date of occupation of the alternate land for a period of three years.

[13] It bears mentioning that during these discussions the appellant's counsel informally proposed to contribute towards the costs of the relocation of the livestock. This offer was rejected by the respondents because they refused to move or relocate their livestock from their place of abode. There was thus no undertaking on the part of the appellant to contribute towards the cost of relocation.

[14] In the meantime the third and fourth respondents (in the court a quo) pursuant to the court a quo's directives, identified two farms where the livestock may be moved to. The one farm was about 67 km from where the respondents' reside and they rejected it because it was too far. The other farm, which is owned by Charlestown Trust and situated near the farm where the first and second respondents reside, was acceptable to them. The Charlestown Trust was prepared to lease 100 hectares of the farm to the first and second respondents at a rental of R2 000 per month for 20 head of cattle. Unfortunately the respondents could not afford the rental due to their impecunious circumstances. The appellant and the third and fourth respondents were not prepared to contribute towards the rental.

[15] The fourth respondent stated that it did not have any mandate or obligation in terms of CARA to pay for the rental on behalf of the first and second respondents. The third respondent on the other hand could only assist labour tenants as defined in ESTA, not occupiers like the respondents. In particular it was asserted that the third respondent had no mandate to pay rental on behalf of occupiers who had not been declared labour tenants.

[16] The LCC agreed with the appellant and the third respondent that the grazed area required rehabilitation for a period of three years. It also agreed that the livestock must be removed immediately. It correctly adopted the approach that the grazing rights in respect of the livestock did not derive from ESTA but were governed by the separate agreements between the respondents and the appellant. It concluded that no joint responsibility exists between ESTA occupiers and owners to fulfil the provisions of CARA. In doing so it held that the appellant as owners and custodians of the entire property had an obligation to monitor the land and take remedial measures at the first sign of degradation. This finding is at odds with the provisions of CARA. It disregarded the submissions by the parties. As stated earlier these orders were made without due regard to the parties' rights to file further affidavits or present argument aimed at persuading the court otherwise.

**In this court**

[17] Apart from the main issue and the cross appeal, there were two preliminary issues namely an application for postponement by the first and second respondents and their condonation application for late filing of the heads of argument. I proceed to deal with them.

**Application for postponement**

[18] At the hearing of this appeal the respondents launched a two-pronged application for the postponement of the matter and condonation for the late filing of the heads of argument in the appeal. As regards the application for the postponement the reason advanced was that the second respondent had passed away in November 2017, and an executor had not been appointed in his stead to proceed with the matter. Counsel for the respondent argued that time was needed to adjust the papers and substitute the prospective executor, Mr Dlamini, in the place of the second respondent. During argument it became clear to counsel that the non-substitution of the executor could still be

done at a later stage[1] and counsel wisely abandoned the application for a postponement. It was agreed that the attorneys for the respondents would furnish this court with a formal notice of substitution of the respondent and appointment of the executor.

**Condonation**

[19] The history of the matter reflects that, after leave to appeal was granted, the appellant in the main appeal and the third appellant as appellant in the cross appeal, filed the record and their heads of argument during July and August 2016 respectively. The respondents were obliged in terms of rule 10(b) of this court's rules, to file their heads of argument within a period of two months thereafter ie by August and September 2016 respectively. The respondents' heads of argument were only filed in February 2017, this was after the registrar of this court had enquired whether they still intended to oppose the appeal or not. In the affidavit supporting the application for

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[1] In terms of Uniform rule 15 which reads as follows:
'**Change of parties**
(1) No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished.
(2) Whenever by reason of an event referred to in subrule (1) it becomes necessary or proper to introduce a further person as a party in such proceedings (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and to the registrar, add or substitute such further person as a party thereto, and subject to any order made under subrule (4) hereof, such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue of full force and effect: Provided that save with the leave of the court granted on such terms (as to adjournment or otherwise) as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter; and provided further that the copy of the notice served on any person joined thereby as a party to the proceedings shall (unless such party is represented by an attorney who is already in possession thereof), be accompanied in application proceedings by copies of all notices, affidavits and material documents previously delivered, and in trial matters by copies of all pleadings and like documents already filed of record, such notice, other than a notice to the registrar, shall be served by the sheriff.
(3) Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted.
(4) The court may upon a notice of application delivered by any party within 20 days of service of notice in terms of subrule (2) and (3), set aside or vary any addition or substitution of a party thus affected or may dismiss such application or confirm such addition or substitution, on such terms, if any, as to the delivery of any affidavits or pleadings, or as to postponement or adjournment, or as to costs or otherwise, as to it may seem meet.'

condonation the reason advanced by the respondents was attributable to a change of counsel in November 2016. The newly appointed counsel was furnished with the record of appeal and cross-appeal on 30 November 2016. To compound the problem, and despite a considerable lapse of time, the newly appointed counsel and the appellant's attorneys of record did not deem it prudent to file the heads of argument in December 2016 opting instead to break for the Christmas holidays on 9 December 2016. They also did not request an extension to deliver their heads at a later state. This conduct is to be deprecated. I will revert to the ineptitude and flagrant disregard of the rules of the court by the first and second respondents' attorneys when dealing with the appellant's request for an order of costs *de bonis propriis* against their attorneys. It suffices to say at this point that in view of the attitude we take of the matter and to prevent any further prejudice to the other parties the application for condonation with its insuperable problems was granted in the interest of justice.

[20] Before us the main issue for determination is whether the LCC was correct in making orders that it did in instances where these were not asked for nor pleaded by the parties. In the notice of motion and at the hearing of the matter before the LCC the appellant inter alia asked for the following orders:

'1 That the first and second respondents be ordered to forthwith remove all their or any grazing animals under their control, including but not limited to cattle, goats, horses and sheep from the applicant's farm, Portion 1 of the farm La Bella Esperance 3338, Registration Division HS, KwaZulu-Natal and situated in the district of Newcastle ("the farm").

2 That should the respondents fail to adhere to the order prayed for in 1, within 14 (fourteen) days from the date of the order, that the Sheriff of the High Court or his deputy be ordered to, with the assistance of the South African Police Services and the Pound Master for the district within which the farm is situated or his/her lawful substitute, remove and impound such animals to which the order in the above is applicable.

3 That the first and second respondents, at their expense, and with the assistance of the third and fourth respondents, where possible, be ordered to implement the rehabilitation measures, as recommended in annexure "HPA 7" of the founding affidavit, in respect of the camp on the farm, currently utilized by the first respondent

for the grazing of his cattle, horses, goats and other livestock and within which his homestead is situated.

4 That the first and second respondents be interdicted and restraint from returning any of the animals removed from the farm as prayed for in 1 and/or 2 above, up until such time when the area in 3 above has been fully rehabilitated to the satisfaction of the applicant's experts or any other reputable grazing expert and that would permit the re-introduction of grazing animals to the camp, without posing a threat of future soil erosion, the destruction of the rehabilitated natural vegetation, overgrazing and bush encroachment.'

The order in paragraph 3 was abandoned before the LCC and does not form part of this appeal.

[21] Related to this issue is the court's order directing that 'the [appellant] provide alternate grazing on [its] property if available, alternatively, the third respondent secures suitable grazing for the first and second respondents' animals within 30 days of the date of the order. The appellant took issue with the court's finding that it should bear the costs for the removal and return of the livestock and leasing of alternate grazing land.

[22] To fully appreciate and contextualise the gravamen of the appellant's objection, it is apposite at this stage to state that the impugned parts relate to paragraphs 1, 2, 4 and 6 of the court order. For the sake of completeness the orders are set out:

'1. The applicant provides alternate grazing on applicant's property if available;

2. Alternatively, the third respondent secures suitable grazing for the first and second respondents' animals within 30 days of the date of this order;

4. The applicant is ordered to, at the expiry of the rehabilitation period of three years, pay the costs to transport and re-settle the livestock belonging to the first and second respondents' original grazing area;

6. The applicants and first and second respondents shall jointly in equal amounts pay the costs of leasing alternate grazing land.'

In view of the submission that these orders were incompetent the case advanced is that these orders were not asked for nor pleaded by the parties. It was argued that the court a quo impermissibly granted them without affording the parties an opportunity to present argument.

[23] To buttress his argument counsel for the appellant submitted that at various pre-trial conferences called by Sardiwalla AJ, at no stage did he forewarn them that he would grant a different order to the one sought by the appellant. We were urged to accept that the court a quo ignored the evidence placed before him and in doing so departed from the pleaded case of the appellant.

[24] The learned Judge's failure to forewarn the parties that he was inclined to grant orders not prayed for in the notice of motion is contrary to well-established principles stated by the Constitutional Court in *Molusi & others v Voges & others NO* [2016] ZACC 6: 2016 (3) SA 370 (CC) paras 27-28 where the court said:

'It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:

"If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on."

The court further went on to state:

'The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (mero motu) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

"A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."'

[25] If one has regard to the orders made by the LCC it is clear that the court went beyond the parties' pleaded case. The appellant had made it clear in its founding affidavit and during pre-trial discussions or meetings that it did not have alternative land available for the respondents. In my view the fact that during the pre-trial conference all the parties explored the possibility of finding alternative grazing land for the respondents off the farm indicates without doubt that no such land was available on the farm. It is clear that the orders granted are in conflict with the evidence presented by the parties at the pre-trial conferences and repeated when this matter was argued before the LCC and in this court. It is inexplicable how the LCC granted such orders which were not supported by the facts and the evidence.

[26] With regards to the appellant's order seeking rehabilitative relief, it relied on the provisions of CARA which place an obligation or responsibility on the land owner or land user to manage the agricultural land in a responsible way, to preserve and not overgraze it. It is the appellant's case that the respondents' breach of the grazing agreements is the cause of the degradation. Degradation, erosion and overgrazing is a violation of the provisions of CARA and is contrary to s 24 of the Constitution. It was correctly submitted that the obligation or responsibility to manage the agricultural land in a responsible way, to preserve it and not overgraze it is the responsibility of the land user or land owner.

[27] The finding by the LCC seeking to place the obligation solely on the appellant (as the land owner) is misplaced and contrary to the provisions of CARA. The fallacy in the judgment is demonstrated in the finding by the LCC which purported to place an onerous obligation on the appellant land owner to intervene at the first signs of degeneration of the land and enforce rotational grazing to comply with the provisions of CARA. In the present matter the first respondent conceded that he did not reside on the property and further conceded that he was granted grazing rights by the appellant's predecessor.

[28] It thus follows that his rights of grazing does not derive from ESTA. He has a personal right to use the land for the purpose of grazing. I agree with

the remarks by Pickering J in *Margre Property Holdings CC v Jewula* [2005] 2 All SA 119 (E) at 7 when he said the following:

'The right of an occupier of a farm to use the land by grazing livestock thereon is a right of a very different nature to those rights specified in s 6 (2) [in ESTA]. In my view such use was clearly not the kind of use contemplated by the Legislature when granting to occupiers the right to use the land on which they reside. Such a right would obviously intrude upon the common law rights of the farm owner and would, in my view, thereby amount to an arbitrary deprivation of the owner's property. There is no clear indication in the Tenure Act such an intrusion was intended. It is relevant in this regard that respondent is neither an employee not a labour tenant as defined by the section 1 of the Land Reform (Labour Tenants) Act 3 of 1996. His right, if any, to graze stock on the farm does not derive from that Act. In my view the use of land for purposes of grazing stock is pre-eminently a use which would be impossible to regulate in the absence of agreement between the parties. I am satisfied in all the circumstances that an occupier is not entitled as of right to keep livestock on the farm occupied by him as an adjunct of his right of residence. His entitlement to do so is dependent on the prior consent of the owner of the property having been obtained.'

[29] The respondents supported the finding of the LCC and contended that their relocation would cause severe prejudice and a great hardship to their livelihood as well as their livestock. It was urged upon us to adopt its findings that the responsibility to ensure compliance with control measures in terms of CARA rests with the appellant. The argument advanced was that the appellant as the owner of the farm has the responsibility to intervene if the farm showed any signs of degradation by reducing the number of livestock on the farm and withdrawing them from the grazing land until such time that the land had recovered. The effect of this argument is that the responsibility to provide alternative grazing land, bear the costs for the removal and return of the livestock when the land has been fully rehabilitated rests with the appellant as the land owner and not the respondents as the land user. This argument has no merit. A reading of the provisions of regulation 9(1)(a)-(e) of CARA read together with the definition of land user in s 1 thereof squarely places the obligation on both the land owner and the land user to protect the veld from deteriorating.

[30] It was also submitted that the appellant ought to have invoked the provisions of regulation 9 of CARA instead of instituting civil proceedings against the respondents. To this end, it was said that had the appellant acted promptly upon noticing the respondents' transgressions, the matter should have been reported to the executive officer whose task is to enforce and monitor them. This argument is without merit. It cannot reasonably be expected of the appellant to adopt a supine attitude and wait for the executive officer to enforce or monitor the respondents' transgression while the land continues to deteriorate. The executive officer can only issue directives and failure to comply with his directives attract criminal sanction only. There is no power to institute civil proceedings and the executive officer also does not have the powers to remove the livestock. Similarly the regulation in terms of CARA does not empower the land owner to take action against the recalcitrant land user. That remedy is located in civil proceedings. In my view CARA does not exclude the right of the land owner to institute civil proceedings to vindicate his right.

[31] In any event, s 38 read with s 24 of the Constitution accords the right to anyone acting in his or her own interest to approach a competent court alleging that a right in terms of the Bill of Rights has been infringed or threatened. The provisions of CARA are consistent with the Constitution or Bill of Rights because they, amongst others, seek to promote the conservation of the soil and protect vegetation against unlawful degradation. Section 24 of the Constitution provides as follows:

'**Environment** – Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; 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.'

[32] Evidently what the appellant is asserting is the right enshrined and protected by the Constitution and this right is echoed in CARA whose objectives are defined in s 3 thereof which provides 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.'

[33] The fact that the executive officer, acting in terms of regulation 9(2) of CARA, is empowered to direct a land user in writing to adopt additional measures to protect the veld effectively against deterioration or destruction and to apply additional measures if necessary, does not preclude the appellant from instituting the present proceedings. In *Madrassa Anjuman Islamia v Johannesburg Municipality*, 1917 AD 718 the court held that the general rule of construction is that if it is clear from the language of a statute that the legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy. However, an exception to this general rule is found in the right of the court, unless the legislature has expressed a contrary intention, to grant an ancillary remedy by way of interdict.'

At 725 the Court went on to say:

'To exclude the right of a Court to interfere by way of an interdict, where special remedies are provided by statute, might in many instances result in depriving an injured person of the only really effective remedy that he has, and it would require a strong case to justify the conclusion that such was the intention of the Legislature.'

See also the instructive remarks by Wallis JA in *SA Maritime Safety Authority v Mckenzie* 2010 (3) SA 601 SCA at 612 where he said the following:

'Where a statute creates both a right and a means for enforcing that right the position is that:

"We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact

that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded.'" (footnotes omitted).

[34] To conclude on this aspect, CARA does not expressly preclude the appellant from approaching the court to invoke an effective remedy and to enforce, in essence, an agreement that the parties were subject to.

**The cross-appeal**

[35] I now turn to deal with the cross-appeal. The Minister of Rural Development and Land Reform appeals against the order of the LCC which reads as follows:

'Alternatively the third respondent secures suitable grazing for the first and second respondents' animals within 30 days of the date of this order.'

[36] This order is clearly misconceived. Again, as with the appellant, it was not asked for nor pleaded by the parties. The LCC simply granted the order without affording the Minister an opportunity to file a supplementary affidavit or present further argument. This order runs contrary to the affidavit of Thembeka Ndlovu, the acting deputy-director of Land Tenure and Administration, who stated that since the respondents were not labour tenants, the Minister had no mandate to pay rentals on their behalf. This order was accordingly incompetent, and should be set aside.

[37] What is untenable about the order is that it sought to place responsibility on the Minister when the administration of CARA falls within the domain of the Minister of Agriculture. It is common cause that the respondents are land users in terms of CARA. A reading of the provisions of regulation 9(1)(a)-(e) of CARA places the obligation to protect the land squarely on the land owner or land user. No such obligation rest on the Department of Rural Development, neither has the Department of Agriculture such an obligation.

[38] In the present case there were agreements between the appellant and the first and second respondents. The Minister was not a party to the agreements. Directing the Minister to secure alternative grazing land for the

respondents was clearly incompetent and the Minister is not enjoined by CARA to offer assistance towards rehabilitation for land users. It follows that the order of the LCC cannot be allowed to stand and falls to be set aside.

**Costs**

[39] I turn to consider the appellant's request for costs *de bonis propriis* on the basis of the conduct of the first and second respondents' attorneys. It is necessary to record the events preceding the hearing of this matter. As mentioned earlier, pursuant to the court a quo's judgment, the appellant and the Minister of Rural Development and Land Reform lodged applications for leave to appeal. The respondents did not oppose the application nor attended court at the hearing of such application. Leave was granted to this court.

[40] Subsequent thereto the appellant served the record of the proceedings on the respondents' attorneys during May 2016. The attorneys acknowledged receipt of the record on 27 May 2016. On 15 July 2016 the appellant served heads of argument, list of authorities, chronology of events and practice notes on the respondents' correspondent attorneys in Bloemfontein. The third respondent, the appellant in the cross-appeal served their heads of argument on all the parties on 15 August 2016. At that stage it should have been clear to the respondents' attorney that the judgment of the court a quo was vigorously challenged.

[41] In terms of the rules of this court the respondents' attorneys were obliged to file their heads of arguments within two months thereof (ie in August and September respectively). Fully aware of their obligations they did not do so. It bears mentioning that at that time the respondents were represented by different counsel. It would seem to me none of the counsel were aware or saw it prudent to file the heads of argument. The respondents' affidavit in the condonation application does not explain whether the counsel were ever briefed to prepare the heads of argument. In the absence of any explanation the inference to be drawn is that they were not. It was only on 25 November 2016 that the decision was taken to appoint new counsel to represent both respondents for the preparation of heads of arguments. No

adequate explanation was proffered for the delay despite the lapse of a significant period for the filing of the heads of argument. All that is stated is that the record of appeal and cross-appeal was sent to counsel on 30 November 2016. No effort is made to try to explain why counsel was briefed so late after the last set of heads were received on 15 August 2016. It can be expected of the respondents' attorney to be aware of the trite principles regarding condonation applications and ought to have addressed all aspects fully. This was regrettably not done. This is symptomatic of the nonchalant attitude adopted by the respondents' attorney throughout this matter.

[42] Another disconcerting feature regarding the conduct of the respondents' attorney is the averment made that even after counsel was briefed late, there was no sense of urgency in getting the heads of argument prepared, or at the very least, requesting an indulgence from court for an extension. Instead both the attorneys and newly briefed counsel decided to take an early Christmas break on 9 December and resumed work on 23 January 2017. The respondents' attorneys at that stage were fully aware that they had not complied with the rules regarding service of the heads of argument and again no effort was made to prevail upon counsel to expedite the matter. This conduct is unreasonable, slack and evidently demonstrates discourteous conduct to the court and their opponents. This flagrant disregard of the rules cannot be countenanced. As an officer of the court the conduct of the respondents' attorney was egregious.

[43] It appears from the affidavit of the first respondent that the work on the preparation of the heads only commenced after 28 January 2017. This is another indication that the respondent's attorney abandoned his duty to the court. Support for this can be found in the first respondent's affidavit where he stated as follows:

'In that process, it dawned on counsel that the appellant and the cross-appellant had already filed their respective practice notes, heads of argument and chronology of events during July 2016 and August 2016, respectively.'

This averment indicates that nothing was done by the respondents' attorney to prepare heads of argument, or to try and expedite counsel's preparation of

the heads of argument – which were not lengthy. It is inexplicable how it could have 'dawned' only at that late stage that the other parties had filed their heads of argument in July 2016 and August 2016 already.

[44] What further exacerbates the problem is that the first respondent stated in his affidavit that his attorneys were not aware of the date of appeal i.e. 28 February 2017 until the cross-appellant attorneys alerted them. At that stage nothing had been done to prepare the heads of argument. It was only during February when the respondent sought postponement of the matter on the basis that the second respondent, Mr Timothy Shabalala, had passed on. This is despite the fact that he passed away on 1 November 2016. Quite clearly the respondents' attorney was not aware of his demise and this again indicates the laxity on the part of the respondents' attorneys. The application for postponement was clearly opportunistic and a ruse aimed at delaying the hearing of this appeal. During argument it quickly dawned on counsel for the respondent that this was an ill-conceived application and he wisely abandoned it.

[45] The conduct of the respondents' attorney demonstrates wanton disregard to the rules of the court and discourtesy to his colleagues. There was, in my view, a serious dereliction of duty calculated to cause prejudice to the other parties. The respondents' attorney's nonchalant conduct is to be deprecated. I agree with Le Grange J in *Thunder Cats Investments 49 (Pty) Ltd & others v Fenton & others* 2009 (4) SA 138 (C) para 30 that:

'An order to hold a litigant's legal practitioner liable to pay the costs of legal proceedings is unusual and far-reaching. Costs orders of this nature are not easily entertained and will only be considered in exceptional circumstances.'

[46] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited & another v Blue Label Telecoms Limited & others* [2013] 4 All SA 346 (GNP) the principles relating to costs orders *de bonis propriis* against legal practitioners were re-stated and explained as follows:

'[34] Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket . . . [T]he obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner . . .

[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of the court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.'

See also *Darries v Sheriff Magistrate's, Court Wynberg & another* 1998 (3) SA 34 (SCA).

[47] In the circumstances, the respondents' attorney was not only late but remiss in regard to almost every step of the appeal. This conduct shows gross negligence and ignorance of the rules governing the appeals. We were urged to mark our displeasure by means of a punitive cost order against the attorney. This conduct does not fall within the errors of law nor an everyday occurrence. In my view taking into account the unexplained litany of delays and flagrant disregard of the rules the circumstances of this case warrant

punitive costs to be paid *de bonis propriis* by the attorney. It will be unjust to mulct the respondents who do not have the means with a cost order when the attorneys dismally failed them. The heads of argument were only filed on the eve of the hearing of this matter. This court has repeatedly admonished attorneys who purport to practise in this court for their failure to familiarise themselves and comply with its rules – see *Chairperson of the National Council of Provinces v Malema & another* (2016) 3 All SA 1 (SCA). This is an appropriate case for an order that the attorney pay the costs of the applications for postponement and condonation *de bonis propriis*. I therefore make the following order:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The cross appeal is upheld with no order as to costs.

3 The orders of the court below are set aside and substituted with the following:

'1 The first and second respondents, with the assistance of the appellant (to provide transport), are hereby directed to remove all livestock belonging to them, from the appellant's farm described as Portion 1 of the farm La Bella Esperance No. 3338, Registration Division HS, KwaZulu-Natal and situated in the district of Newcastle ('the farm') within 30 days of the granting of this order, to a place identified by the first and second respondents.

2 That, in the event of the first and second respondents failing to comply with the order set out in paragraph 1 above, the Sheriff of the High Court, with the assistance of the South African Police Services, if necessary, is hereby ordered and directed to remove all the livestock present on the farm under the control of the respondents referred to in paragraph 1 above, to the nearest pound.

3 That the first and second respondents are interdicted and restrained from returning any of the livestock removed from the farm as prayed for in paragraph 1 and/or 2 above, or any other livestock, until the rehabilitation period of 3 years of the demarcated area where the livestock were kept has expired.'

4 The attorneys of the first and second respondents are ordered to pay the cost of the application for postponement and condonation *de bonis propriis*.

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R S Mathopo
Judge of Appeal

APPEARANCES:

For appellant: M G Roberts SC and G F Ackerman
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For first and second respondents: G Shakoane SC and L L M Mashapa
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For third respondent: T V Norman and C M Nqala
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For fourth respondent: T V Norman SC and C M Nqala
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