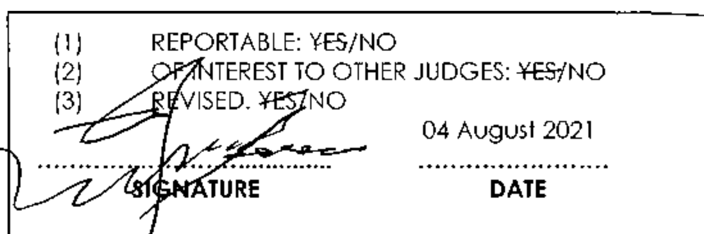
REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 15/2021


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

04 August 2021

SIGNATURE DATE

In the matter between:

ARBEIDSKROON BOERDERY (PTY) LTD Applicant
Registration: 1965/009856/07

and

AMOS HEZEKIAN MKWANAZI First Respondent

SIZWE MKHWANAZI Second Respondent

ALL OTHER PERSONS RESIDING IN THE BUIDLING/STRUCTURES THE HOUSE KNOWN AS PORTION 6 OF THE FARM RIETFONTEIN Third Respondent

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM Fourth Respondent

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APPLICATION FOR LEAVE TO APPEAL JUDGMENT

NCUBE AJ

Introduction

[1] This is opposed application for leave to appeal. It is not immediately clear from the Notice of Leave to Appeal if the Applicant seeks leave to appeal against the whole or part of the judgment and order of this court. The Notice of Leave to Appeal indicates that leave is sought to appeal against part of the judgment, but the grounds of appeal indicate the contrary. Leave sought is to appeal to the Supreme Court of Appeal ("SCA"). The judgment appealed against was delivered on 13 May 2021.

Facts

[2] The Applicant is the owner of Portion 6 of Rietfontein 40, Registration Division H.S. Mpumalanga Province ("the farm"). Daniel Adries Du Plessis ("Mr Du Plessis") is the sole director of the Applicant. The First Respondent ("Mr Mkhwanazi") is the occupier on the farm. He occupies the farm in terms of the relevant provisions of the Extension of Security of Tenure Act[1] ("ESTA"). The Second Respondent ("Sizwe") is the grandson of Mr Mkhwanazi. Mr Mkhwanazi and Sizwe reside on a fenced-off and properly demarcated portion of the farm ("the Mkhwanazi portion").

[3] Mr Mkhwanazi and his wife arrived on the farm in 1962. In 1969, Mr Mkhwanazi and his wife moved into the present Mkhwanazi portion of the farm. The farm owner by then, was one Mr Lourens. Mr Mkhwanazi was employed on the farm as a tractor

[1] Act 62 of 1997.

driver, harvester operator and supervisor of seasonal workers. The wife did cleaning, washing and took care of the children. Between 1969 and 1975, Mr Mkhwanazi was earning R14.00 per month.

[4] The Mkhwanazi family now consists of eight persons occupying one-eight roomed mud house, being six bedrooms, a sitting room and a kitchen. This house needs constant repairs. In 1969 Mr Mkhwanazi and his wife built a hut with a corrugated iron roof. That hut collapsed in 2002. The Mkhwanazi Respondents built a one roomed brick house replacing the hut which collapsed in 2002. They did not obtain or seek consent from Mr Du Plessis to build the brick house. The Applicant approached this court, seeking interdict, prohibiting the Mkhwanazi Respondents from *"encroaching upon the and/or the construction of the house/building or structure as depicted in annexures "DADP 3.1" to "DADP 3.7" and "DADP 4.1" to "DADP 4.2" together with any further additions thereto, hereto on the Applicant's farm...."*

[5] Mkhwanazi Respondents averred that the brick house which they were constructing did not encroach on the Applicant's farm, outside the demarcated boundaries of the Mkhwanazi portion. The Respondents further averred that the brick house was an improved rebuild of the mud house which collapsed in 2002. Relying on the Constitutional Court decision in *Daniels v Scribante*[2] the Respondents averred that the brick house was an improvement from the mud house and to make improvements they did not require the consent of the Applicant or person in charge if they are building within the demarcated Mkhwanazi portion of the farm. In any event, they contend, they

[2] 2017 (4) SA 341 (CC)

had never sought consent from the previous owner, Mr Lourens, if they were building within the boundaries of the Mkhwanazi portion of the farm.

Judgment appealed against

[6] This court found that the Respondents were not effecting improvements to an existing structure, to bring it to the standard of human dignity as in *Daniels case*. This court further found, that a brick house, which the Respondents were building, would be more durable than the mud house and that the brick house is in the standard of human dignity. This court found that by analogy, the Respondents did not need consent of the owner of the farm to build a house which is more durable than a mud house and which is in the standard of human dignity, built within the properly demarcated boundaries of the Respondents' portion of the farm. However, this court found that meaningful engagement was still a requirement.

[7] This court found that it was going to be an exercise in futility to order the Respondents to demolish the house and seek consent from the Applicant and only approach the Court once the Applicant has refused to give consent. The situation was volatile, tensions between the parties were running high. There was no way the Applicant was going to grant consent.

Grounds of Appeal

[8] There are no specific grounds of appeal. The Applicant has cast the net wide and it says:

"The part of the judgment the Applicant seeks leave to appeal against are sub paragraphs 1 and 2 of paragraph 24 thereof..."

Paragraph 24 of the judgment is the order which states:

"24 In the result, I make the following order:

1. *The rule nisi is discharged.*
2. *The application is dismissed.*
3. *There is no order as to costs."*

[9] However, what is clear is that the gravamen of the Applicant's contention is firstly the finding of this court in that there is no evidence that the Mkhwanazi Respondents' building is encroaching on other part of the farm, outside the boundaries of the Mkhwanazi portion of the farm. According to the Applicant, building a house, without consent from the Applicant, constitute encroachment on the Applicant's farm, it does not matter whether the house is built within the boundaries of the Mkhwanazi portion of the farm or not.

[10] The Applicant approached this court, seeking relief to prohibit the Respondents from encroaching on the Applicant's farm. The Collins Concise English Dictionary defines the word "encroach" thus:

"1. to intrude gradually or stealthily upon rights, property etc. of another.

2. to advance beyond certain limits."

It was not the Applicant's case that the Mkhwanazi Respondents were intruding upon the rights of the Applicant. The Applicant's case was that the Respondents were

encroaching or intruding upon the Applicant's property. To that end, this court could not find evidence to support that allegation.

[11] Secondly, the Applicant contends that this court erred in its finding that by analogy the structure which the Mkhwanazi Respondents were building, was improvement from the mud hut which collapsed in 2002, for which the Respondents did not need the Applicant's consent as they were building within the boundaries of the Mkhwanazi portion of the farm. In this regard, this court found that the Mkhwanazi Respondents still needed to engage with the Applicant with regard to the building of the new house. However, looking at the sour relations between the parties, it was doubtful if engagement was going to serve any purpose.

The Law

[12] The starting point of exercise is section 17(1) of Superior Courts Act[3] which provides:

> ***"Leave to Appeal may be given where a Judge or Judges concerned are of the opinion that:***
>
> *(a) (i) The appeal would have a reasonable prospect of success; or*
>
> *(ii) There is some other compelling reason why the appeal should be heard including conflicting judgments on the matters under consideration;*
>
> *(b) the decision sought on appeal does not fall with the ambit of section 16(2)(a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[3] Act 10 of 2013

[13] The main consideration is whether there are reasonable prospects of success on appeal should leave be granted. Section 17(1) raises the threshold higher and it differs from the traditional test previously stated by our courts. Thus in *Mont Chevaux Trust v Tina Goosen and 18 Others*[4] Bertelsmann J said:

> *"It is clear that the threshold of granting leave to appeal against the judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Crown-right & Others 1985 (2) SA 342 (T) at 343 H."*

[14] In *casu*, there is no doubt that the new structure built by the Mkhwanazi family is not intruding upon the Applicant's farm beyond the boundaries of the Mkhwanzi portion of the farm. In this regard, there is no reasonable prospect of success. However, there is another reason why the appeal should be heard.

[15] The reason is that the rights of the occupier should be balanced against the rights of the farm owner or person in charge. There is a need for the Supreme Court of Appeal to determine whether the occupier, whose boundaries are clearly defined, still needs to consult the owner of the farm each time he puts up a new structure within the boundaries of his portion of the farm. There is also a need for the Supreme Court of Appeal to determine if building using bricks is an improvement from building with mud and whether the Respondent's brick house cannot be described as an improved rebuild.

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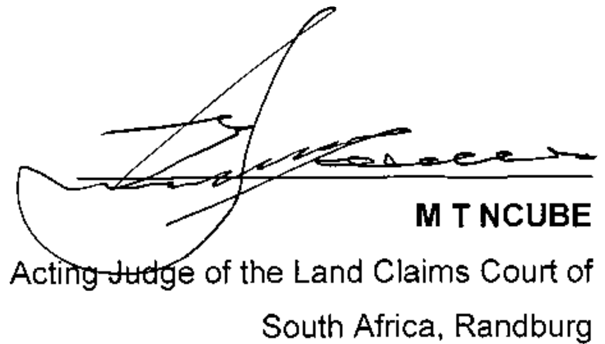
[4] [2014] ZALCC 20 (3 November 2014)

Order

[16] In the result, I make the following order:

1. Leave to appeal to the Supreme Court of Appeal is granted.
2. Costs will be costs on appeal.



M T NCUBE

Acting Judge of the Land Claims Court of South Africa, Randburg

Date judgment reserved: 21 July 2021

Date judgment delivered: 04 August 2021

Appearances

For the Applicant: Advocate JE Kruger

Instructed by: Moolman & Pienaar Incorporated Potchefstoom

For the First, Second to Third Respondent: Advocate N Luthuli

Instructed by: The LAIC Law Clinic Parktown