

Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST HIGH COURT, MAFIKENG**

CASE NO: M 166/2016

In the matter between:

AMORE RHYN INVESTMENTS (PTY) LTD

Applicant

And

KARIN STOFFBERG N.O

1st Respondent

ELIZABETH CORBAN OLIVIER N.O

2nd Respondent

DATE OF HEARING

: 04 AUGUST 2017

DATE OF JUDGMENT

: 11 AUGUST 2017

COUNSEL FOR THE APPLICANT

: ADV. DE VILLIERS

COUNSEL FOR THE RESPONDENT

: ADV. VAN DER MERWE SC

LEAVE TO APPEAL

HENDRICKS J

Introduction

[1] This is an application for leave to appeal against the judgment of this Court handed down on 20th April 2017. The application for leave to appeal is premised on the following grounds:

“1.1 *The Court a quo did not consider that the Respondent used, cultivated and fertilised pastures since October 2014 and had unfettered access to the pastures from or since April 2014.*

1.2 *The Court a quo did not consider that the Respondent cultivated and fertilised the pastures in, both October 2014 and November 2015, in full view of the Applicants.*

1.3 *The Court a quo did not consider that the Respondent's cattle stayed in the pastures in or from January 2016 and fed on the pastures.*

2. *The allegations mentioned in paragraph 1,1 to 1.3 above, were not dealt with by the Applicants in reply, and are accordingly common cause facts.*

2.1 *The Court a quo did not consider, **alternatively** failed to apply the legal principles as set out in **Plascon-Evans v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** and **National Director of Public Prosecutions v Zuma 2009(2) SA 277 (S CA) par 26-27.***

- 2.2 *On the common cause facts alone another Court may possibly find that the Applicant could not succeed, with the rei vindication in respect of the bales cut from the pastures, and dismisses the application.*
3. *The Court a quo should have found that the Respondent rights were, not only not opposed by the Applicant in case M121/2014, but also confirmed in the judgment of this Court, per Gura J.*
- 3.1 *Another Court may find that the Respondent enjoyed peaceful and undisturbed use and possession of the farm, its infra-structure, including the pastures (excluding the house and its immediate garden and buildings) as from the order in case M121/2014 and/or from April 2014.*
4. *The Court a quo should have found that the Respondent was a bona fide possessor because the Respondent enjoyed open and unfettered access and possession to the cultivated pastures.*
- 4.1 *The Court a quo did not consider the fact that the Applicant as bona fide possessor cut and baled the pastures and as such was entitled to the grass in terms of the common law.*
- 4.2 *The Court a quo did not apply the legal principles as set out in **LAWSA: The Law of Property at p 285-286.***
- 4.3 *The Court a quo did not apply the legal principles as set out in **Rademeyer and others v. Rademeyer and others 1967(2) SA 702.***

4.4 *Another Court may possibly find that the Respondent as bone fide possessor acted in good faith and acquired ownership of the bales from the pastures (the fruits) immediately upon separation.*

4.5 *The Court a quo should have found that the Respondent was in bona fide possession of the land and that the Respondent acquired ownership of the bales cut from the pastures.”*

[2] Leave to appeal is sought to the Full Bench of this division. This Court had delivered a comprehensive judgment and need not regurgitate it. The trial was finalized before Landman J. The order/judgment of Landman J. is not appealed and it therefore stands. This Court found in paragraph [9] of its judgment:

“[9] This declaratory order is in my view the judgment on paragraph 1 of the order of 18th April 2016. In other words, by implication the preserved bales of fodder were according to the findings of Landman J from the cultivated pastures and the Respondent had no right to make the bales of fodder or to remove it. The judgment and orders granted by Landman J were not appealed.”

[3] As far as the issue of ownership and/or possession is concerned that were raised as grounds of appeal, it need to be mentioned that these aspects were not canvassed during the trial before Landman J. It was

never pleaded nor was it raised in any affidavit which ought to have been filed by the Applicant in response to the supplementary affidavit filed by the Respondents. This, in my view, is but a belated effort by the Applicant to place an issue about ownership and/or possession before this Court which ought to have been dealt with during the trial before Landman J.

- [4] In my view, there are no reasonable prospects of success on appeal. The Application for leave to appeal should therefore be dismissed. Costs should also follow the result.

Order

Consequently, the following order is made:

- (i) The application for leave to appeal to the Full Bench of this division is dismissed.
- (ii) The Applicant is ordered to pay the costs of the application for leave to appeal.

**R D HENDRICKS
ACTING DEPUTY JUDGE PRESIDENT,
NORTH WEST HIGH COURT, MAHIKENG**