

REAL ESTATE ALERT

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IN THIS ISSUE

Can verbal agreements with tenants affect eviction proceedings for property owners down the line?

This article grapples with that question by taking a closer look at *Thepanyega NO and Others v Letsoalo and Others* (73/2021) [2022] ZASCA 30 (24 March 2022).



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BACKGROUND

On 24 of March 2022, the Supreme Court of Appeal (SCA) handed down judgment in *Thepanyega NO and Others v Letsoalo and Others (73/2021) [2022] ZASCA 30 (24 March 2022)* (Thepanyega) – its findings are both a reminder and a reprimand that verbal agreements are binding in South Africa.

In this case, the appellants wanted to evict the respondents from their property, a portion of a farm, Kalkfontein, in Limpopo. The respondents had been exercising grazing rights for their livestock on the property by virtue of a verbal agreement between the Madibeng-Leputi Community Trust (represented by the appellants) and the respondents.

The Magistrate's Court granted both an eviction order and an interdict against the respondents to prevent them from continuing to graze their cattle on the farm. The High Court set aside both the interdict and the eviction order in *Letsoalo and Others v Thepanyega and Others [2020] JOL 48318 (LP)* (Letsoalo v Thepanyega). This alert focuses on the eviction order and the need to cancel the rights of a tenant prior to launching an eviction proceeding. In this regard, it is important to note that the eviction proceedings were brought in terms of the common law in Thepanyega, and not in terms of the Labour Tenants Act 3 of 1996 or the Prevention of Illegal Eviction from an Unlawful Occupier of Land Act 19 of 1998. The court's findings thus relate to common law evictions.

Although the High Court set aside the eviction order on the grounds that the Magistrate's Court lacked jurisdiction to grant a final order, the court also held that in terms of a common law eviction, any lease in respect of a property would have to be cancelled prior to launching eviction proceedings. In this regard, the High Court cited *Morkel v Thornhill (A105/2009) [2010] ZAFSHC 29 (FB)* (Morkel).

THE NEED TO CANCEL RIGHTS PRIOR TO EVICTION

In Morkel, the court held that: *"The object of cancellation is to terminate the primary obligations of an agreement i.e. the obligations of both parties to perform. A notice of cancellation must therefore be clear and unequivocal which takes effect from the time it is communicated to the appellant."*

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The court further stated that: *"It follows from the foregoing that the respondent has not communicated a clear and unequivocal notice of cancellation to the appellant. On the contrary it appears that the respondent elected not to cancel the contract and that she is bound by that election."*

Without getting into the facts of Morkel, two observations may be made from the above excerpts. Firstly, failure to cancel an agreement, whether such agreement is in writing or verbal, means that obligations are still "live" between parties. Thus, in the case of Thepanyega, failure to cancel the verbal agreement meant that the appellants were still under the obligation to avail their farm to the respondents for grazing cattle. It becomes clear that any eviction proceeding brought prior to the cancellation of obligations of the appellants (and rights of the respondents) incurred by the verbal agreement would be premature.

Secondly, cancellation must be communicated clearly and unequivocally. In addition, where parties have elected not to cancel an agreement, they may be bound to that choice, as was the case in Morkel.

In *Letsoalo v Thepanyega*, the High Court confirmed the existence of the verbal agreement and took issue with the fact that the verbal agreement had not been cancelled prior to the appellants initiating eviction proceedings against the respondents. Notwithstanding the fact that the respondents were in arrears regarding payment of their grazing fees to the appellants, the High Court found that *"the respondents were initially allowed to graze their cattle on the property of the applicant, subject to payment of certain fees. This was a verbal agreement."*

Indeed, the SCA in *Thepanyega* pointed out in its judgment that the appellants had not unequivocally cancelled their verbal agreement, since the appellants had demanded payment of grazing fees from the

respondents. In other words, one cannot have one's cake and eat it too. That is, one cannot enforce a verbal agreement by demanding performance by the other party (in this instance, payment of grazing fees) and at the same time claim that there was no verbal agreement to enforce. Thus, the SCA agreed with the High Court's approach and dismissed the appeal.

CANCELLATION OF VERBAL AGREEMENTS

What should property owners know about cancelling verbal agreements prior to eviction? The SCA cites *Chetty v Naidoo* [1974] (3) SA 13 (A) (Chetty) in this regard. In *Chetty*, the court held that if *"the defendant relies on the right conceded by the plaintiff, the latter must prove its termination"*. Thus, where a property owner has admitted that a tenant has a certain right, and the tenant relies on that right, the property owner bears the burden of proof to show that the right has been terminated.



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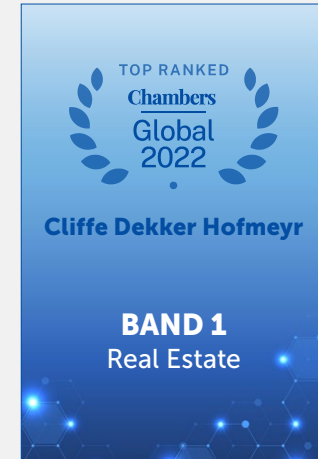
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The SCA in *Thepanyega read Chetty* together with *Morkel* to say that where a tenant relies on a right (or rights) in a verbal agreement with a property owner in response to eviction proceedings, the onus is on the property owner to prove that such verbal agreement has been clearly and unequivocally cancelled. Failing this, eviction proceedings may be set aside, as was done by the High Court in *Letsoalo v Thepanyega* and confirmed by the SCA in *Thepanyega*.

COMMENT

Verbal agreements have the ability to confer personal rights that must be clearly and must unequivocally be cancelled prior to launching eviction proceedings. Property owners who have entered into verbal agreements with tenants would do well to seek legal advice on how to cancel such agreements before launching *eviction proceedings*.

MIKE COLLINS AND
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2021 WINNERS OF M&A DEAL FLOW 2021

2021

1st by M&A Deal Flow.
2nd by General Corporate Finance Deal Flow.
2nd by BEE Deal Value.
3rd by General Corporate Finance Deal Flow.
3rd by BEE Deal Flow.
4th by M&A Deal Value.

2020

1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

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1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
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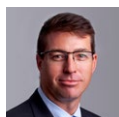
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