

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG**
In Chambers: **MEER J**

CASE NUMBER: LCC59R/99

Decided on 16 November 1999

In the review proceedings in the case between:

SPENCER HUGH RIX

Applicant

and

GODREY ARNOLDS
FANI BALOYI
FANUEL EZEKIEL NGWENYA
BEKUWISE ISIAH NXUMALO
JOHN PHIRI

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

JUDGMENT

MEER J:

[1] This matter was referred to the Land Claims Court by the Magistrate, Krugersdorp, for automatic review in terms of section 19(3) of the Extension of Security of Tenure Act.¹ I will refer to the Act as “ESTA”.

Factual background

[2] The Palabora Foundation Educational Institute (the “Foundation”) is the owner of a property described in the founding affidavit simply as the Palabora Foundation Reef Training

1 Act 62 of 1997.

Centre, N14 Road, Krugersdorp. The respondents are erstwhile employees of the Foundation and occupiers on the property. The title deed attached to the founding affidavit, for the purpose of confirming the Foundation's ownership of the property, describes it as Portion 70 (a portion of Portion 6) of the farm Honingklip and has no reference to the physical address mentioned in the founding affidavit. Although the two descriptions of the property do not tally, this was never raised as an issue between the parties, and appears to have escaped the Magistrate's attention. This is an undesirable state of affairs. Magistrates and parties would do well to ensure that property descriptions in pleadings and annexures accurately cross-reference. The respondents may well be of the view that the property is one and the same, or that the property described in the title deed encompasses the Palabora Foundation Reef Training Centre, N14 Road, Krugersdorp. The respondents did not include the incorrect citing of the property as one in a number of points in limine, which they so vigilantly raised in this case.

[3] The Foundation is described in the title deed as a voluntary and corporate body not for gain. It conducted training programmes on the property. The respondents occupied rooms in the single quarters on the premises and their rights of residence arose solely from their employment with the Foundation. During November 1998 training activities on the property ceased as a result of the operational requirements of the Foundation. All employees, including the respondents, were retrenched. Thereafter respondents' rights of residence were terminated and steps were taken to evict them.

[4] Section 9(2) of ESTA sets out the requirements for an eviction order. I am satisfied that the requirements of sections 9(2)(a), (b), (c), (d)(i) and (d)(ii) of ESTA have been complied with.

- (a) It was common cause that respondents' rights of residence were lawfully terminated in accordance with the provisions of section 8(2) of ESTA and that they did not vacate the property within the period of notice given by the applicant, as is specified at sections 9(2)(a) and (b) respectively. On 3 March 1999 the respondents were given written notice to vacate the premises within two months which they failed to do.
- (b) It was moreover common cause from the pleadings that the prerequisite for an eviction order set out at section 9(2)(c), was present, in that the conditions for an

eviction order in terms of section 10 had been complied with. It was common cause that suitable alternative accommodation was not available to the respondents within a period of 9 months after the date of the termination of their rights of residence, that respondents had made no attempts to procure alternative accommodation and the Foundation had exhausted all reasonable alternatives to find suitable alternative accommodation for them. The Foundation has moreover sold the property and is obliged to give free and unencumbered occupation of the premises to the new owner. The learned Magistrate, correctly in my view, found that it was just and equitable to order the eviction of the respondents in terms of section 10(3)(i) and (ii), bearing in mind the above and the parties' respective interests and hardships.

- (c) It is common cause that in compliance with sections 9(2)(d)(i) and (ii), the requisite two months notices of intention to obtain eviction orders were given to the respondents and the relevant municipality. The notices were served on the respondents in English and Zulu and sent to the Krugersdorp Town Council.

[5] This is not, however, the end of the matter. It was not common cause that notice of applicant's intention to apply for an eviction order had been given to the "head of the relevant provincial office of the Department of Land Affairs" as is required by section 9(2)(d)(iii). In an attempt to comply with this section a letter addressed to the Provincial Director, Department of Land Affairs and a copy of the requisite notice to that department was faxed to the **head office** of the Department of Land Affairs, instead of to the **head of the provincial office** of the Department of Land Affairs. Regulation 9(6)² prescribes how a person serves such a notice.

[6] In a first point in limine the respondents argued, both before the learned Magistrate and in submissions to this Court, that the giving of notice to the head office constituted a failure to comply with section 9(2)(d)(iii). It was argued that the legislature clearly intended the head of the provincial office to be given two months notice and that this requirement could not be

2 There are various methods of service. In terms of regulation 9(6)(e) service of a notice on the head of the provincial office of the Department of Land Affairs may be effected by transmitting a copy of the notice by telegram, telex or telefax to the office concerned.

dispensed with by giving notice to the head office. The head office of the department and the provincial office thereof, they submitted, are separate entities. The two offices cannot be seen as constantly being in contact with each other, so that notice to the one also constitutes notice to the other.

[7] The applicant submitted, both to the learned Magistrate and in written submissions to this Court, that not only had the notice requirement of section 9(2)(d)(iii) been complied with, but that the applicant had gone even further than required by the Act, in giving notice to the national office, which he referred to as “big daddy”, stating that there could not be better notice. The applicant suggested further that because section 9(2)(d)(iii) referred to notice being given to the head of the provincial department of Land Affairs for information purposes only (my emphasis), this notice was not as significant as the notice under section 9(2)(d)(ii) to the municipality. The learned Magistrate accepted the applicant’s argument and dismissed the first point in limine.

[8] I am of the view that the learned Magistrate erred in finding there had been compliance with section 9(2)(d)(iii) and in consequently dismissing this point in limine. The intention of the legislature in providing for notice to the head of the relevant provincial office of the department of Land Affairs, was, I believe, to inform the head of the office of the department in the province where the land is situated and under whose jurisdiction it falls of the intended eviction, presumably so that steps may be taken if this is deemed necessary. This Court has in several judgments commented upon the importance of service upon the provincial office of the Department of Land Affairs.³

[9] If the legislature considered service on the head office to be adequate it would have provided for service upon that head office in the alternative, at section 9(2)(d)(iii). The concerns and functions of the two offices may well differ, and even if a property were to be situated within the jurisdiction of both offices, there is no guarantee that notifications will be passed on from head office to provincial office, as the present matter clearly illustrates. It just so happens that the

3 *Lategan v Koopman and others*, 1998 (3) 457 (LCC) at 465C-D; [1998] 3 All SA 603 (LCC) at 609c-d; *Remhoogte Farms (Pty) Ltd v Mentoer*, LCC12R/99 9 April 1999, website address <http://www.law.wits.ac.za/lcc/1999/remhoogtesum.html> at paras [11] to [13], *City Council of Springs v The Occupants of the Farm Kwa-Thema*, 210 [1998] 4 All SA 155 (LCC) at 162c-163b; *De Kock v Juggels and Another*, 1999 (4) SA 43 (LCC) at 57B-G.

property and both the provincial and national offices of the Department of Land Affairs are all situated in Gauteng province.⁴ Despite this there was no evidence that the notice was passed on from the head office in Pretoria to the provincial office, also in Pretoria. This leads to speculation as to how much more remote the chances of this happening must be, in instances where properties are situated in provinces other than Gauteng.

[10] To find that service upon the national office of the Department of Land Affairs satisfies the requirements of section 9(2)(d)(iii) of ESTA would not only be setting an unfortunate precedent but could also lead to the national office being inundated with section 9(2)(d)(iii) notices. I note in passing that were the applicant able to show that despite notice being given to the head office by its legal representative, such notice had been forwarded to the head of the provincial office timeously, I would have granted condonation. In the circumstances I find that the learned Magistrate erred in dismissing the first point in limine.

[11] From the above I find that there was compliance with all the prerequisites for an eviction order in terms of ESTA as set out at section 9(2), save for section 9(2)(d)(iii), and that the order by the learned Magistrate for the eviction of the respondents should be set aside on this ground alone.

[12] In a second point in limine, submitted both to the Magistrate and this Court, the respondents attacked the applicant's locus standi. They argued that the applicant had not disclosed the legal nature of the Foundation on whose behalf he purported to act, nor had he shown that the Foundation itself had the capacity to institute legal proceedings. Respondents further alleged that the applicant had not shown that the persons⁵ acting on behalf of the Foundation were duly authorized and competent to do so. The respondents were at pains to point out the extent to which the applicant's conduct in bringing these proceedings fell short of what was required by a trust. Referring to the description of the Foundation as contained in the title

4 The head office of the Department of Land Affairs and the Gauteng provincial office of the Department of Land Affairs are in Pretoria, the two departments are housed in separate buildings and have different telephone and facsimile numbers. See website address: <http://land.pwv.gov.za>

5 Applicant brought the proceedings and Fred Supple, the person in charge of the premises, was authorised to attest to the founding and replying affidavits.

deeds respondents submitted that the Foundation was “a voluntary and corporate body not for gain” and not a trust. Respondents went on to suggest that it would be absurd to uphold an order operating in favor of an entity which is not shown to exist and whose purported representative is not shown to have authority to institute legal proceedings.

[13] The replying affidavit of Supple⁶ stated that the Foundation is a trust, and pointed to the fact that the Foundation was described as “the trust” in the board resolution authorizing the applicant to bring these proceedings. The applicant further stated that the applicant, being a trustee of the Foundation, had the requisite locus standi. The learned Magistrate accepting the applicant’s argument, dismissed this point in limine, and found that the applicant was authorized to act on behalf of the Foundation and that he had the requisite locus standi.

[14] The question of applicant’s locus standi cannot be dispensed with so easily and I find that the learned Magistrate erred in dismissing this point in limine. The point appears to have been given less than careful consideration. From the title deeds it would appear that the Foundation is not a trust but a voluntary and corporate body not for gain. A non-profit-making body may acquire juristic personality by section 21 of the Companies Act No 61 of 1973 or as a *universitas personarum* at common law.⁷ Characteristics of a *universitas* include perpetual succession and the capacity to acquire property separate from its members.⁸ Whether these characteristics are to be found depends on the intention of the founders and can usually be deduced from the constitution.⁹ Prima facie a *universitas* can and should be sued in its own name¹⁰ (but this is subject to the constitution, which may provide otherwise¹¹). Honore warns that one who seeks

6 See above n 5.

7 Honore and Cameron *Honore’s South African Law of Trusts* 4th ed (Juta, 1992) at para 258 (pages 343-345)

8 Hutchinson et al ed *Wille’s Principles of South African Law* 8th ed (Juta, 1991) at 241.

9 See for example *Bantu Callies Football Club (also known as Pretoria Callies Football Club) v Motlhamme and others* 1978 (4) SA 486 (T) at 489-490.

10 *Honore on Trusts* above n 7 at page 343.

11 See Van Winsen et al, *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa*, Dendy (ed), 4th ed (Juta & Co, Cape Town 1997) at 155-6 where the authors say that “even though an association is a *universitas*, it may be that in terms of the constitution, it may be brought before the court

to sue an association should study the constitution before suing or run the risk of having to pay wasted costs. Our case law also suggests that if there is no constitution there is no *universitas*.¹² An examination of the constitution of the Foundation is therefore crucial to a consideration of this point in limine.

[15] A preferable way for respondents to have raised the matter of applicant's locus standi would have been for them to have delivered a notice calling upon the applicant to supply a copy of the Foundation's current constitution and a list of the names and addresses of the office bearers and their respective offices in terms of High Court rules 14(9)(a) and 14(9)(c).¹³

[16] Instead, it fell upon this Court for the purposes of this review, to call for the documentation dealing with the Foundation's power to institute legal proceedings and to authorise persons to act on its behalf. Clause 2 of the Foundation's constitution provides:

“The association was established by the Palabora Foundation Educational Trust for educational purposes at a secondary and tertiary level and is a voluntary and corporate body, not for gain, with perpetual succession and power to acquire property, rights and obligations **and to sue and be sued in its own name.**” (my emphasis)

[17] From this it is evident that the constitution accords the Foundation the requisite locus standi to institute legal proceedings in its own name. It is unclear to me why the Foundation chose not to institute proceedings in its own name and instead authorised the applicant to do so in a representative capacity. Our case law suggests that in a situation such as this an agent should not sue in his own name, but that the correct procedure is to cite the principal.¹⁴ The bringing of proceedings in the name of the applicant does not, however, nullify those proceedings.¹⁵ They

only through the representation of an official or a body such as a board of trustees.”

12 *Ex Parte Doornfontein-Judith's Paarl Ratepayers Association* 1947 (1) SA 476 (W).

13 The High Court rules apply because section 17(4) of ESTA provides: “Until such time as rules of court for the Magistrates' courts are made in terms of subsection (3), the rules of procedure applicable in civil actions and applications in a High Court shall apply *mutatis mutandis* in respect of any proceedings in a Magistrate's court in terms of this Act.”

14 *Sentrakoop Handelaars Bpk v Lourens and another* 1991 (3) SA 540 (W).

15 *Sentrakoop* above n 14 especially at 542C and 544I- 545B

can be rescued by substituting the principal as the applicant. This path is clearly still open to the applicant.

[18] The next point in limine raised by the respondents was that in contravention of regulation 6 of ESTA copies of the Section 9(2)(d)(i) notices were not given to the respondents in the language they understand. Regulation 6 of ESTA provides that a notice in terms of Section 9(2)(d)(i) must be completed on Form E or F or must conform substantially thereto. Form E is the form to be used for notice to an occupier in terms of Section 9(2)(d)(i). The following note to the sheriff appears on Form E:

“[Note to sheriff serving this notice: You must read out the highlighted part in an official language which the occupier understands. If you yourself are not fluent in that language you must use an interpreter. A copy of this notice must be given to the occupier in that language, and in another official language. If possible the copy given to the occupier should be signed and dated by him or her and returned to the owner or person in charge as proof of service]”

[19] The notices in terms of section 9(2)(d)(i) were given to the respondents in English and Zulu. The respondents argued that regulation 6 had not been complied with. The replying affidavit of John Phiri, the fifth respondent, stated that Zulu was the official language best understood by the fourth respondent only, and that the languages best understood by first, second, third and fifth respondents were Afrikaans, Shangaan and Tswana respectively. The learned Magistrate dismissed this point on the grounds that it was clear that all the respondents understood what the application was about.

[20] In determining whether the non-compliance with regulation 6 and Form E constitutes grounds for setting aside the eviction order in this case, I am mindful of the fact that the rule simply refers to the language the occupier understands and not the language he or she understands **best** which appears to be the interpretation accorded to the rule by the affidavit of Phiri. The purpose of regulation 6 is to ensure that occupiers, like the respondents, understand the contents of the notice and take appropriate action. That this purpose was achieved is apparent from the respondents' defence of the matter and the fact that they were in court from the outset. In fact, despite respondents' complaints about the language, it was not in dispute that they understood what the notices were about, nor did they show that they had suffered any prejudice as a result of their being in English and Zulu. I am mindful also of the accepted wisdom that rules are not intended to be inflexible, and where it is necessary to relax them in order to do justice, it

is competent for the court to do so.¹⁶ Also, that technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their merits.¹⁷

[21] I am of the view that these comments apply equally to regulations. I am accordingly of the view that the learned Magistrate was correct in dismissing the third point in limine.

[22] Regard being had to all of the above, I make the following order in terms of section 19(3) of ESTA:

- (i) The order of the eviction of the respondents granted by the Magistrate of Krugersdorp under case no 189/99 is set aside.
- (ii) The applicant is granted leave to renew the application on the same papers, duly amended.

JUDGE Y S MEER

For the applicant:

Adv Kilian instructed by Brink Cohen Le Roux and Roodt Inc, Johannesburg

For the respondents:

Adv J Botha instructed by Noko Mokate Inc, Pretoria

16 Gering et al “ Civil Procedure: High Court” in Joubert (ed) 1st Reissue, Vol 3, Part 1, *Law of South Africa*, (Butterworths, Durban 1997) at para 5 and see *Riddle v Riddle* 1956(2)SA 739 (C)at 748.

17 *Law of South Africa* above n 16 and see also *Motaung v Mukubela and another NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 625.