

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 1348/2021

In the matter between:

**AMC PROPERTY (PTY) LTD
HUGHES PROPERTIES (PTY) LTD**

**1ST APPLICANT
2ND APPLICANT**

And

CHRIS KLEYNHANS

1ST RESPONDENT

**ANY OTHER UNLAWFUL OCCUPIERS OF
THE FARMS DESCRIBED AS REMAINDER
OF PORTION 6 OF THE FARM MIMOSA
GLEN 885, BLOEMFONTEIN, DISTRICT
BLOEMFONTEIN AND PORTION 7 OF
THE FARM MIMOSA GLEN 885,
BLOEMFONTEIN, DISTRICT BLOEMFONTEIN,
FREE STATE PROVINCE**

2ND RESPONDENT

**ANY OTHER UNLAWFUL OCCUPIERS OF
THE FARMS DESCRIBED AS PORTION 3
(OF 2) OF THE FARM FAIRVIEW 1756,
BLOEMFONTEIN, DISTRICT BLOEMFONTEIN
AND PORTION 7 OF THE FARM FAIRVIEW
2845, BLOEMFONTEIN, DISTRICT
BLOEMFONTEIN, FREE STATE PROVINCE**

3RD RESPONDENT

MANGAUNG METROPOLITAN MUNICIPALITY

4TH RESPONDENT

CORAM:

VOGES, A J

HEARD ON: 5 AUGUST 2021

DELIVERED ON: 11 AUGUST 2021

[1] INTRODUCTION

- 1.1 In this matter the Applicants apply for an order declaring the First to Third Respondents unlawful occupiers of portions 6 and 7 of the farm Mimosa Glen 885 and portions 3 (of 2) and 7 of the farm Fairview 2845 in the district of Bloemfontein and an order for the First to Third Respondents to vacate the said farms within 20 days from date of service of the order.
- 1.2 This application is opposed by the First, Second and Third Respondents.

[2] FACTS

The following facts are common cause between the parties:

- 2.1 On 3 December 2019 the First Applicant purchased the immovable property known as portions 6 and 7 of the farm Mimosa Glen 885 from the First Respondent for the purchase price of R5 000 000.00.
- 2.2 On the same date the Second Applicant purchased the immovable property known as portions 3 (of 2) and 6 of the farm Fairview 2845 from the First Respondent for the purchase price of R6 500 000.00.
- 2.3 The properties were transferred into the names of the First and Second Applicants on 11 February 2020.

- 2.4 The First Respondent and Mr Hughes, as representative of the Applicants, reached an agreement regarding the occupation of the farms and the removal of livestock and movable property from the farms.
- 2.5 It was agreed that the First Respondent and his family would be entitled to occupy the farms rent free for a period of time, after which they should vacate the farms. Respondent's livestock, all movable property and personal belongings of him and his family should also be removed.
- 2.6 During January 2021 Mr Hughes informed the First Respondent that he and his family must vacate the farms as agreed upon and that the Applicants will invoice him for damages/monthly rental for the farms. The First Respondent denied that they had to vacate the farms by the end of December 2020.

[3] **APPLICANTS' CASE**

The Applicants' case is based on the following:

- 3.1 In terms of the agreement of 28 January 2020 between Mr Hughes and the First Respondent the First Respondent and his family would be entitled to occupy the farms for one year, until the end of December 2020, when they would have to vacate the farms and remove all movable property and personal belongings.

3.2 All livestock of the First Respondent had to be removed before 1 March 2020.

3.3 The agreement was breached in that:

3.3.1 The First Respondent failed and/or neglected to remove his livestock from the farms by 1 March 2020.

3.3.2 The First Respondent and his family failed and/or neglected to remove all movable property and personal belongings from the farms by the end of December 2020.

3.3.3 The First Respondent and his family failed to vacate the farms by the end of December 2020.

3.3.4 The Respondents no longer have any right or consent to occupy the farms and are accordingly in unlawful occupation of the farms.

3.2.4 It will be just and equitable to evict the Respondents from the farms in order to enable the Applicants to use the farms and residence for their own purposes.

[4] **RESPONDENTS' OPPOSITION**

The Respondents oppose the application on the following grounds:

4.1 They deny that they are in unlawful occupation of the farms.

4.2 The offer of the Applicants to purchase the farms was accepted by the First Respondent on 3 December 2019 subject to the following conditions:

- 4.2.1 That First Respondent and his family would have the right to remain on the farms for a period of 24 months from the date of conclusion of the agreement, i.e. until December 2021.
- 4.2.2 That he will not be obliged to pay any rental for the continued occupation of the farms for this period of 24 months, but only had to pay for electricity usage.
- 4.2.3 That he would be entitled to remove all movable assets belonging to him within the period of 24 months.
- 4.2.4 The above proposal was verbally accepted by Mr Jorrie Jordaan, agent of the Applicants, on their behalf on 3 December 2019 and that Mr Theuns Wolmarans, attorney, was present at the time.
- 4.2.5 That the Applicants failed to follow the correct procedure in respect of certain farm workers who are “occupiers” of the farms, as contemplated in the Extension of Security of Tenure Act, 62 of 1997.
- 4.3 That the Applicants have failed to make out a case that the eviction of the Respondents will be just and equitable.

[5] APPLICANTS’ REPLY

- 5.1 The First Respondent’s family is cited as the Second and Third Respondents.
- 5.2 The farm workers were never intended to be respondents. A separate application will be launched against them.

- 5.3 It was never agreed that the sale would be subject to the conditions alleged by the First Respondent.
- 5.4 The First Respondent's request for occupation for a period of two years was declined. The Applicants were only willing to allow them occupation for one year until the end of December 2020.
- 5.5 No verbal agreement as alleged by the First Respondent was concluded.
- 5.6 Mr Hughes informed the First Respondent that the applicants will invoice him for damages being the amount of reasonable rental for the property during January 2021, after the Respondent and his family failed to vacate the farms.

[6] **ISSUES**

The main issue to be determined is if the Respondents are unlawfully occupying the land of the Applicants.

Section 1 of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998** ("the Act") defines an 'unlawful occupier' as

"a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the

provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996)."

[7] Although it is common cause that there was an oral agreement between the Applicants and the First Respondent in respect of the Respondents' continued occupation of the farms after the sale thereof, they do not agree on the following:

- 7.1 Which of the parties were present when the oral agreement was entered into;
- 7.2 On which date it was concluded; and
- 7.3 The period of rent free occupation for the Respondents that was agreed upon.

Without knowing the period of occupation allowed to the Respondents it is impossible to determine if they are unlawful occupiers.

[8] The Respondents argued that the above is a factual dispute that cannot be determined on the papers and that the application should be dismissed.

[9] At the start of the proceedings in this court the Applicants applied for the referral of the matter for oral evidence. This application is opposed by the Respondents.

[10] **LEGAL PRINCIPLES**

10.1 Rule 6(5)(g) of Uniform Rules of Court:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as

it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise”.

10.2 ERASMUS, Superior Court Practice, 2nd Edition at D1-69 to D1-78 and the authorities cited there set out the principles applicable on the adjudication of applications that cannot be decided on the papers. The following principles are inter alia referred to:

D1-69 : “If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.”

See also: Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235

D1-70: “As a general rule an application for the hearing of oral evidence must be made in limine and not once it

becomes clear that the applicant is failing to convince the court on the papers or on appeal”.

See also: **De Reszke v Maras and Others 2006 (1) SA 401 (C) at 412B-C and 413B**

D1-73 *“In resolving to refer a matter to evidence a court has a wide discretion. In every case the court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence. The test is a stringent one that is not easily satisfied.*

See also: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634I.**

D1-74 *“... the court must take ‘a robust, common-sense approach’ to a dispute on motion and not hesitate to decide an issue on affidavit merely because it is difficult to do so. This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of viva voce evidence”.*

See also: **Wiese v Joubert en andere 1983 (4) SA 182 (O)**

D1 -75 *“As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party’s*

allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits.”

D1-76 *“The court will dismiss an application if the applicant should have realized when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop”.*

See also: **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162 and 1168**

D1 – 77 *“The court will adopt this course (oral evidence to be heard) where the factual dispute is within a narrow compass and can be expeditiously disposed of”.*

See also: **Standard Bank of SA Ltd v Neugarten 1987 (3) SA 695 (W) at 699C.**

“In exercising its discretion under the subrule, the court will to a large extent be guided by the prospects of viva voce evidence tipping the balance in favour of the applicant. If on the affidavits the probabilities are evenly balanced, the court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant”.

See also: **KALIL v DECOTEX (PTY) LTD AND ANOTHER 1988 910 SA 943 (A) AT 979 H – J**

D1 -78 *“As a general rule an application to refer a matter to evidence must be made at the outset and not after argument on the merits, but the rule is not an inflexible one and a party is entitled to persist in his application without being precluded, when a dispute becomes apparent and incapable of resolution on the papers, from asking for evidence viva voce”.*

See also: **KALIL V DECOTEX, supra at 981D-E**

DE RESZKE v MARAS AND OTHERS, supra

10.3 **Section 4(7)** of the PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT, 19 OF 1998:

*“If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, **a court** may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”*

As it is abundantly clear that the facts pertaining to the oral agreement are in dispute and that this application cannot be decided on the affidavits this court may, in terms of the rules, 1) dismiss the application with costs, 2) order the parties to go to trial or 3) direct that oral evidence be heard. The final decision remains in the discretion of the court.

[12] Taking the principles as set out above into consideration, I do not lose sight of the fact that the factual dispute already existed at the time the Applicants' representative made the founding affidavit and that the application for referral for oral evidence was only brought at the onset of arguments in this court.

[13] In taking into account that the Applicant had to approach a court for the eviction order in terms of Act 19 of 1998, that the probabilities on the affidavits are evenly balanced, but can be easily solved by the hearing of oral evidence and that the evidence can be narrowed down and expeditiously disposed of, I am of the opinion that it will be the most suitable method for determination of the dispute. The Applicants' application for referral of the matter for oral evidence must be granted.

[14] Accordingly the following order is made:

1. The matter is referred for *viva voce* evidence to determine the terms of the oral agreement reached between the Applicants

and the First Respondent in respect of occupation of the farms Mimosa Glen and Fairview.

2. The witnesses who may be called will be limited to Mr Warwick Leonard Ronald Hughes, Mr Johannes Petrus Jordaan, Mr Chris Kleynhans and Mr Theuns Wolmarans.
3. The witnesses to be subpoenaed to testify and be cross examined.
4. Costs to stand over for adjudication when the issue in order 1 is decided.

M. VOGES, A J

On behalf of the plaintiff

Adv J. Els
Instructed by:
Van Wyk & Preller Attorneys
BLOEMFONTEIN

On behalf of the defendant:

Adv.J.J. Zietsman SC
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