

REPUBLIC OF SOUTH AFRICA



OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)

16/9/15

CASE NO: 74329/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

16/09/2015

Hen Fourie

DATE

SIGNATURE

IN THE MATTER BETWEEN

FTX INVESTMENTS (PTY) LTD

APPLICANT

and

MOGAETSI SELINAH NAIDOO

FIRST RESPONDENT

STEVE TSHWETE MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

FOURIE AJ

- 1 This is an application for the eviction of the first respondent and all persons occupying through her from Portion 38 of the Farm Vaalbank 289, Middelburg, Mpumalanga ("*the property*"). The application is brought in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("*PIE*").
- 2 The applicant is the registered owner of the property and has been so since taking transfer thereof on 21 February 2012. It purchased the property from one Heinz Rynners for R 1,500,000.00.
- 3 The first respondent is in occupation of the property.
- 4 When the first respondent did not vacate the property pursuant to discussions initiated by the applicant's representative, the applicant brought an application for her eviction in the Magistrates' Court Middelburg during October 2012. The first respondent opposed the first application and deposed to an affidavit. For reasons not disclosed, this application was withdrawn and a new application was instituted in the High Court.
- 5 *In liminé* Mr Malowa, who appeared for the first respondent, argued that the provisions of PIE do not find application and that the Extension of Security of Tenure Act, 62 of 1997 ("*ESTA*") is applicable. No proof, he says, has been provided that the property is situated in an established and approved township.

6 Section 2(1) of ESTA reads as follows:

"Subject to the provisions of s 4, this Act shall apply to all land other than land in a township established, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including—

(a) any land within such a township which has been designated for agricultural purposes in terms of any law; and

(b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition."

7 The learned author CP Smith, in **Eviction and Rental Claims : A practical Guide** (LexisNexis) submits in paragraph 5.3.2 that although agricultural land still exists for the purposes of the Subdivision of Agricultural Land Act, 70 of 1970, all land is presently situated within the area of jurisdiction of some or other local authority. Land falling under the jurisdiction of a local authority is however to be distinguished from an established township. The various provinces have Ordinances or other legislation governing the establishment of townships in that province. If a landowner applies for the establishment of a township, the application must be approved by the Premier of the province or by the local authority itself if it is so authorised. Land only becomes a township when it is declared to be an *"approved township"* by notice in the Provincial Gazette.

- 8 I do not agree with Mr Malowa's submission that section 2(2) of ESTA creates a presumption in favour of that Act. The section provides that any land in issue in civil proceedings under ESTA is presumed to fall within the scope of ESTA unless the contrary is proved (my emphasis). In this case, the civil proceedings have been brought under PIE and the first respondent, who relies on the protection afforded to her by the provisions of ESTA, bears the onus to prove that ESTA is applicable. See: **Woerman and Schutte NO v Masondo and Others** 2002 (1) SA 811 (SCA), **Schaapkraal Community v Cassiem** [2010] JOL 25016 (LCC).
- 9 I cannot simply accept the *ipse dixit* of the first respondent and she did not provide any proof upon which I may find that the property in question does not fall within an established township. The Ghost Convey Deeds Office report relied on by the applicant is not helpful either. Other than stating that the property falls under the Steve Tshwete Local Municipality, it describes the property type as a "*Farm*". However, the property is not a farm. It is described as a "*plot*" by the first respondent herself, in the sale agreement concluded with Mr Kenmuir and on the Eskom invoice upon which the first respondent relies. A smallholding is not necessarily designated for agricultural purposes only and may well fall within an established township. See: **Schaapkraal supra**.
- 10 Under the circumstances, I am unable to find that the application should have been brought under the provisions of ESTA and the point in *liminé* must fail.

11 It is necessary to briefly outline the circumstances under which the first respondent says she came to be in occupation of the property.

11.1 The first respondent and her late husband occupied the property with the consent of the then owner, Mr Kenmuir, from 1980. In 1990, her late husband and Mr Kenmuir concluded a written sale agreement in terms of her late husband purchased the property for an amount of R65,000.00. Although she does not have proof of payment of the full amount, she states that the full purchase price was paid. In the affidavit that she deposed to in the first application, however, she stated that they had only paid the amount of R38,500.00, but when Mr Kenmuir moved they did not know where to find him and did not make further payments.

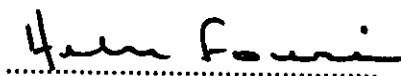
11.2 The property was never registered in their names as they are illiterate and did not know that they should take registration of transfer upon payment. I pause to point out that this allegation is in direct contradiction of the terms of the agreement upon which she relies, which placed an obligation on the purchaser to take steps and make payment required for transfer of the property. In any event, in terms of the sale agreement, Mr Naidoo purchased half of the property, and it is doubtful that this agreement would have been enforceable, had it not been cancelled.

- 11.3 Her husband passed away during 2005 and she remained on the property with her children. She does not state how the rights that her husband would have obtained, as purchaser, were transferred to her.
- 11.4 During the years other people had claimed to have purchased the property and had threatened to evict her, but on her producing proof of purchase of the property, they would disappear. In her first affidavit, the first respondent conceded that Kenmuir had attempted to evict them "*gedurende die vroeë jare 2000*", but she denies this in her second affidavit.
- 12 The applicant was not party to the agreements upon which the first respondent relies, but obtained an affidavit from Mr Kenmuir in the course of the first eviction application. Therein he stated that the Naidoo's started renting the property in 1986. Thereafter they concluded a sale agreement but the late Mr Naidoo did not pay the full purchase price in terms of the agreement, and he had accordingly cancelled the sale agreement. Mr and Mrs Naidoo had thereafter not made any payments in respect of their continued occupation of the property. He attached a copy of the signed sale agreement. Mr Kenmuir attempted to evict the first respondent from the property during the course of 2006, prior to selling it to a third party. He also attached a copy of a notice to vacate to his affidavit, signed by the first respondent and bearing the stamp of the South African Police Services dated 12 December 2006.

- 13 A robust approach to the resolution of disputes of fact is called for when a respondent's denial or allegations are so far-fetched or clearly untenable that the Court is justified in rejecting them on the papers.
- 14 The contradictions in the two affidavits deposed to by the first respondent, and referred to above, are material and such that I find her version to be so untenable that it may be rejected on the papers. This is especially so when weighed up against the evidence of Mr Kenmuir.
- 15 Insofar as the first respondent may have had a right to occupy the property in terms of a rental agreement, that agreement was replaced by the agreement of sale. There is no evidence on the papers of the "*lease to buy*" agreement contended for by Mr Malowa. The agreement of sale was cancelled. The first respondent was given notice to vacate the property on 12 December 2006 and right of occupation that was granted to the husband of the first respondent was clearly cancelled by Kenmuir on that date at the very latest. In the premises, the first respondent's occupation of the property became unlawful. The belated argument that the first respondent purchased a "*right of occupation*" is also not supported by the terms of the agreement of sale.
- 16 Although the first respondent had brought a counter-application to declare that she is the lawful owner of the property, this application was fatally defective and her counsel wisely did not persist in arguing that she was entitled to relief in terms thereof.

- 17 The facts or circumstances relevant to the eviction order and upon which I may exercise my discretion not to grant an order for her eviction, were in essence that the first respondent is 62 years old, she is a pensioner and she does not have alternative housing. No information was provided in respect of the other occupiers of the property. The applicant simply states that it is unable to use the property for the purpose for which it was purchased. There is no obligation on the applicant to provide housing to the first respondent and the availability of alternative land or accommodation is but one of the factors to consider. **City of Johannesburg v Changing Tides 74 (Pty) Ltd** 2012 (6) SA 294 (SCA) at [25]. I am limited by the information provided by the parties.
- 18 The question that remains to be determined is a just and equitable date upon which the first respondent must vacate the property. The first respondent has lived on the property for a particularly long time and she has had the additional benefit of remaining in the property since the applicant issued the first application for her eviction in October 2012. The applicant has not stated for what purpose it requires the property, or that it requires the property urgently. Under the circumstances I am of the view that the period provided for in the order below will afford the first respondent and the persons occupying through her, sufficient time to make arrangements for alternative accommodation.
- 19 The following order is made:

- 19.1 The first respondent and all persons occupying through her are evicted from the property Portion 38 of the Farm Vaalbank Number 289, Middelburg, Mpumalanga (*"the property"*);
- 19.2 The first respondent is ordered to vacate the property on or before 3 January 2016, failing which, the Sheriff of the High Court in whose jurisdiction the property is situated, is authorised and ordered to evict the first respondent and all persons occupying the property through her;
- 19.3 The first respondent is ordered to pay the costs of the application.



H R FOURIE
ACTING JUDGE OF THE HIGH COURT