

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC36/06

In RANDBURG: Bam JP

Decided: 30 July 2007

In the case between:

KIEPERSOL POULTRY FARM

Applicant

and

GIDEON PASIYA

Respondent

JUDGMENT

BAM JP:

1]This is an application brought in terms of Extension of Security of Tenure Act 62 of 1997 ('the Act') for an order of eviction of the respondent from the premises situated on the farm Zandspruit in the district of Krugersdorp.

2]The applicant conducts the business of poultry farming and processing and is the person in charge of the farm as contemplated in 'the Act'.

3]The respondent is a male clerk at a firm of attorneys who has resided on the farm since childhood and continues to do so with the members of his family. He is the son of (Sam Pasiya) a former employee of the applicant to whom the premises were originally allocated during 1977.

4]Although the application was originally launched by Notice of Motion on affidavits, the parties by agreement obtained an order from this court on 31 January 2007, to adduce oral evidence in respect of a special defence put up by the respondent and contested by the applicant. The case was then set down for trial on the 28th February

and 1st March 2007 on the special defence.

5]The respondent's special defence was signaled in his answering affidavit. It was to the effect that he, the respondent, was not occupying the premises in his own right but was merely living under his father's roof who was still the actual long-term occupier in terms of section 8(4) of the Act¹.In consequence, thereof, the applicant had misconceived its remedy and was barking up the wrong tree by suing him a mere dependant of his father, Sam Pasiya.

6]It was common cause that if the respondent's special plea was successful then that would end the matter. If not, the application for eviction would take its normal course.

[7] The historical sequence of events and background relevant to this enquiry were largely common cause and a brief summary will suffice. Since 1977 the applicant provided accommodation on the premises to Sam Pasiya and permitted him to reside on the allocated dwelling with his wife and three sons who included the respondent. Twenty seven years later, in 2004, Sam Pasiya retired from employment.

[8] According to the applicant, Sam Pasiya and his wife moved out of the dwelling to live with one of his sons, Martin, in Honeydew but the respondent, his elder son Gideon, remained behind with his wife and three minor children. The respondent disputes that his father moved out of the dwelling and states that his father went to live with his son Martin for a short while to receive medical attention. It was precisely to resolve this material factual dispute that the parties agreed to refer and resort to oral evidence.

[9] The dispute was viewed as being material since the applicant was to argue

¹ 8(4) The right of residence of an occupier who resided on the land in question or any other land belonging to the owner for 10 years and-

- a) has reached the age of 60 years; or
- b) is an occupier or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10(1) (a), (b) or (c)

that when the respondent's father moved out of the dwelling in February 2004 he lost his status as an occupier as defined in the Act. To this end the applicant called three witnesses starting with Mr du Plesis, the Managing Director of the applicant, who had deposed to the founding affidavit. He was a credible witness but did not have first hand knowledge as regards the central question whether Sam Pasiya voluntarily and physically abandoned his occupancy of the dwelling completely. He had, however, formed such an impression when, in February 2004, Sam had told him that he, Mr Sam Pasiya, was not staying on the farm anymore but was staying with his son, Martin in Honeydew which was 'a lot nicer place than on the farm'.

[10] For the rest, Mr du Plesis concedes that he only heard from another that Mr Sam Pasiya had moved with his belongings from the farm. His impression was further reinforced when he went to inspect the dwelling in preparation for these proceedings and was told by the respondent's wife that Mr Sam Pasiya only came to visit from time to time but did not stay with them.

[11] The next witness called on behalf of the applicant was Ms Selinah Tshunga, a domestic worker to Mr du Plesis's mother. She occupied a dwelling next to that occupied by the respondent. She was not a very useful witness particularly on the question whether Mr Sam Pasiya and his wife moved their belongings from the premises on the farm. Nonetheless, she did throw some light on two significant aspects. The first was that she testified to seeing Mr Sam Pasiya regularly coming to eat breakfast with the respondent between February and September 2004. After that she did not again see Mr Pasiya and his wife until just before these proceedings during 2007. She claimed that she had been told by Mr Sam Pasiya, during February 2004, that he had been bought a house in Sundowner by his son Martin.

[12] The third and final witness on behalf of the applicant was Mr Josias Mmbodi. He, like Mr Sam Pasiya, was employed as a co- driver of the small bakkie used for deliveries and for collecting post and buying newspapers. While Mr Sam Pasiya was still in employment but still staying in Honeydew, Mr Mmbodi drove the bakkie on Saturdays but had to return it to Mr Sam Pasiya on Sundays so that the latter could

drive back in it on Monday morning. He testified further that after Mr Sam Pasiya had stopped working in September 2004, he collected his personal letters from the farm post box but that from about March 2005, Mr Pasiya's private letters no longer reached the farm's post box. He last saw Mr Sam Pasiya on the farm in December 2004.

[13] Four witnesses were called on behalf of the respondent: Mr Sam Pasiya and his three sons, Gideon, Martin and Lucas. Their evidence was substantially the same as regards the crucial question whether Mr Sam Pasiya was still the occupier of the dwelling on the farm after February 2004 to date. It was to the effect that he never gave up occupation and he never moved out. All that happened, according to them, was that, after he was involved in an accident he became sickly and crippled, he required greater medical and nursing care that was not available on the farm and so spent some nine months at the posh house of his youngest son, Martin, in Sundowner (Honeydew). For the rest of the time, according to their evidence, Mr Sam Pasiya 'rotated' regular visits from one son to another including spending time and sleeping over on the farm with his son Gideon and family. This latter assertion was strongly challenged on behalf of the applicant.

[14] The challenge, on behalf of the applicant, was based on the improbabilities of an old man of 72 years, confined to a wheel chair, and yet regularly sleeping over in a cramped homestead with limited bedroom space and no ablution facilities when his other son's posh residence, just a few kilometers away, had every comfort. I am in full agreement that this is indeed an improbability and that this piece of evidence is an embellishment at best or a figment of the imagination at worst. This, however, does not put an end to the matter in deciding whether Mr Sam Pasiya permanently and voluntarily abandoned occupation of his homestead on the farm. There are several pointers to the contrary.

[15] The evidence of Mr Sam Pasiya that it was never his intention to permanently abandon his occupation of the dwelling that had been his home for 28 years was very convincing and credible. It was given with the passion and indignation of one whom

the vagaries of fate have dealt a cruel and painful blow.

[16] There is undisputed evidence from both Mr Sam Pasiya and from his son, Martin, that Martin only took occupation of his house during May 2004 and so Sam Pasiya could not have prior experience in February that it was 'a lot nicer' there than staying on the farm. At that stage, Sam Pasiya could only have been articulating a 'notion' or 'expectation' completely insufficient to strip him of his legal right as an 'occupier' resident on the farm. It is inconceivable that Mr Sam Pasiya could have evinced and communicated a resolve to permanently abandon his residence on the farm during February 2004 even while still employed on the farm and had not yet been securely anchored in accommodation elsewhere.

[17] An important indicator of an intention to abandon one's residence permanently is to move lock stock and barrel and take away one's furniture and clothing. The evidence in this regard is that given by Ms Selinah Tshunga on behalf of the applicant. She was not present over the weekend when, according to her, Sam Pasiya and his wife moved from the farm to live in Sundowner (Honeydew). She is not certain whether this was in February or in September 2004 but remembers being told by the Pasiyas themselves in September that they had moved. On later being pressed specifically on the removal of any furniture, her answer was that it was her kids who had told her that they had taken their goods and furniture away. In his evidence, Mr Sam Pasiya vehemently denies this and insists that all his furniture is still in the homestead on the farm and that his son, Gideon the respondent, does not possess any furniture of his own. This was not challenged and I find the version of Sam Pasiya to be the more credible and accept it.

[18] Finally, there is ample and undisputed evidence that the farm house and the farm life itself was always an important focal point in the life of Sam Pasiya even after February 2004 and that he maintained contact with his son Gideon. Ms Selina Tshunga who was testifying on behalf of the applicant, yet admits to have observed Sam Pasiya having breakfast with Gideon every now and then during the week after February 2004 but while still working for the applicant- Kiepersol. There is evidence

that Sam Pasiya buried his brother on the farm and that he still attended church services at a neighbouring church. All this, and particularly Sam Pasiya's own protestations, convince me that he never abandoned his homestead at Kiepersol but merely spent more time at the more comfortable house of his son, Martin, while allowing his other son, Gideon, to be keeper of the family home on his behalf.

[19] This application was launched and argued only on the basis that Sam Pasiya had by word of mouth and by deed ceased to be an occupier of the dwelling on the applicant's farm. My judgment is that the applicant has failed to make out that particular contention on a balance of probabilities. There is still the more interesting legal question hovering in the background whether in fact and in law an occupier, as it were, can by word of mouth or by deed lose or waive the status without further ado. The case was not on that basis this time around and I do not deal with that approach further.

[20] The effect of my conclusions on the facts is that Mr Sam Pasiya, the patriarch, is still the occupier of the homestead originally allocated to him at Kiepersol. Gideon Pasiya, his son, is not an occupier in his own right but only as a dependant of his father. In so far as this application has been launched in terms of the Extension of Security of Tenure Act it cannot be sustained.

Order:

[21] The application is dismissed with no order as to costs.

JUDGE PRESIDENT F C BAM

For the Applicants:
Adv Beaton instructed by Erasmus Els Inc.

For the Respondents:
Adv S Bunn instructed by *Wits Law Clinic*