REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NO: LCC272/2016

Before: **Poswa-Lerotholi, AJ**
Heard on: .....
Delivered on:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

21/09/2017 .....
DATE SIGNATURE

In the matter between

JEREMIAH ZULU First Applicant

ELIAS SIBANYONI Second Applicant

(on behalf of his family)

And

EMLAHLENI LOCAL MUNICIPALITY First Respondent

NOMSA NXUMALO: HEAD: DEPARTMENT

OF HOUSING EMLAHLENI LOCAL MUNICIPALITY Second Respondent

Judgment

POSWA-LEROTHOLI, AJ

Introduction

[1] This is an application seeking to interdict the respondents or any person acting through them from interfering with the applicants' right to reside and use the farm which is at Plot 97, Nooitegdacht 300 JS Kromdraai, Emalahleni Municipality, Mpumalanga Province (" the property").

[2] The first applicant is Jeremiah Zulu he resides on the property with his family, he brings the application on behalf of his immediate family. The second applicant is Elias Sibanyoni Paul he resides on the property and brings the application in a representative capacity on behalf of his elderly mother and siblings.

[3] The first respondent is the Emalahleni Local Municipality ("the Municipality"), the local government responsible for the welfare of the citizens of Emalahleni, Ga-Nala and Ogies. The second respondent, Nomsa Nxumalo is the head of the Department of Housing of the Municipality.

Factual Background

[4] On 31 July 1988, the first applicant and the first respondent entered into

an agreement of lease, in terms of which the first respondent let to the first applicant the property for an indefinite period at a rental income of R200.00 per month.

[5] The first applicant continued to enjoy undisturbed possession of the property for over 30 years, during this time, the first applicant established an orphanage named Ethembeni Children's Haven which took-in the local children. The orphanage has since been registered as a non-governmental organisation.

[6] In respect of the second applicant, he has longstanding historical ties to the property having resided thereon with his family since 1980. The second applicant's parents; his late father, Mr Paulos Boyz Sibanyoni and his mother Mrs Phelelia Sibanyoni, were both employed on the farm by the previous owner, Piet Heyns. Their right to reside on the farm stemmed from the employment. Thus initially, the second applicant's right to reside on the farm arose from his parents. When the house was sold to the second applicant and his family remained on the property. To date, second applicant resides on the property with his elderly mother and other members of the family. Both applicants engage in subsistence farming with livestock and crops.

[7] The change of ownership and subsequent lease agreement concluded between the first applicant and the first respondent did not affect the position of the second applicant as he continued to reside thereon.

[8] The applicants assert that they continued to enjoy undisturbed

possession of the property until April 2016 when the first respondent issued a public notice stating that it wished to establish a township in that area where the property is situated. The applicants were only informed of the municipality's intention on 27 June 2016 through what purports to be a written notice of cancellation of the lease agreement.

[9] The notice of cancellation is itself irregular. The municipality relies on clause 1 of the lease agreement as grounds for cancellation. However, a reading of clause 1 of the lease agreement, reveals that it is punitive in nature in that it affords the municipality the right to cancel the lease agreement in the event of a breach of land use by the applicant. It is remarkable that no such breach is alleged in the notice of cancellation, the only basis for the cancellation is said to be the establishment of the township. Furthermore, the first applicant is neither informed of the effective date of the cancellation nor the duration of the notice period.

[10] It is common cause that the applicants objected to the proposed development through a letter of objection served on the municipality 26th July 2016. The crux of the applicant's complaint lies in the fact that the municipality unilaterally designated the property, cancelled the lease and started moving people onto the land. Furthermore, the Municipality's employees or their assigns came to erect poles on the farm mapping out sites.

[11] In paragraph 17 of the founding affidavit the applicant describes the events of 1 August 2016 as follows-

"On 1 August 2016, the second applicant's family was shocked to see a truckload full of poles and other items arriving at their home before being offloaded on the property. Those delivering the truck load informed the family that they were assigned by the first respondent to allot stands on the property."

[12] Objections raised by the first respondent were dismissed out of hand on the basis that the second respondent family was not paying rent on the property and therefore had no say. And this was followed by further publication of the circular of the proposed township establishment on 5 August 2016. The applicant served another objection on the first respondent.

[13] As a result of the conduct of the respondents the applicants have lost use of the grazing land thus endangering the lives of their livestock as well as the cattle kraal and may soon be forced to cull them. The crops have been destroyed by the illegal occupiers resulting in loss of a primary source of sustenance for the applicants' families.

[14] The respondents challenge the application on three fronts:

14.1 Supervening events have removed the urgency of the application;

14.2 The application is premature;

14.3 The *locus standi* of the applicants.

[15] The respondents explained that the first respondent had invoked its powers in terms of section 107 of the Town Planning and Township Ordinance, 15 of 1986 ("the Ordinance") to establish a township on the property. The Municipality contends that it complied with the empowering provisions of the Ordinance by notifying all interested parties and offering them the opportunity to lodge objections. The applicants have both lodged objections to the proposed township in terms of section 109 of the Ordinance.

[16] According to the applicants, this application is premature in that the procedure is incomplete as the Municipality is yet to afford all the objectors to the establishment of a township a hearing, followed by a review if they are not satisfied with the outcome.

[17] The Municipality has misconstrued the applicant's cause of action, it is not a challenge of the process in terms of the Ordinance, but the unilateral conduct of the Municipality in resizing and allocating stands on the property to unknown persons; without due legal recourse. As a remedy, the respondents seek the restoration of undisturbed possession of the property.

[18] The respondents go to great lengths to justify the declaration of the property as a township, however, that is not the dispute, at issue is whether the applicant's rights as occupiers have been infringed.

[19] In order to qualify for such relief, the applicants need to meet the requirements for a final interdict as the nature of the relief they seek will have the effect of a final determination of the rights of the parties to the litigation.

[20] The requirements for a final interdict are:

20.1 A clear right;

20.2 An injury actually committed or reasonably apprehended; and

20.3 The absence of similar protection by any other ordinary remedy.

Are the applicants' occupiers

[21] The starting point is to determine whether the applicants' claim falls within the purview of the Extension of Security of Tenure Act 62 of 1997. ("ESTA"). Section 1 of ESTA defines an occupier as follows:

> ***"occupier"*** *means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—*
>
> *(a)...*
>
> *(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the*

land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount.

[22] To qualify as an occupier, a person must be 'residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so. The definition excludes certain categories using the land for commercial purposes as well as persons earning above the threshold which currently stands at R5000.00.[1]

[23] The applicants have made averments in paragraphs 11 and 12 of the founding affidavit that seek to place them within the definition of an occupier. In respect of the fist applicant he states-

11. I am an occupier as defined in section 1 of ESTA in that:

11.1 I do not use the farm for Industrial, mining, commercial or commercial farming purposes;

11.2 I earn below the statutory amount determined by the Minister in terms of ESTA:

11.3 the land in question is sold as agricultural land;

[1] Section 20(b) of Act No. 61 of 1998

11.4 I have heard consent to reside on the farm since 1988."

The similar averments are made in respect of the second applicant, except that the second applicant has resided on the property since 1980.

[24] In response to these allegations, the respondent alleges that the first applicant does not live on the property; he is a pastor and has failed to submit evidence of his income. Similarly, the Municipality avers that the second applicant has failed to provide proof of income and therefore he is not an occupier.

[25] The court requested the parties to make further submissions on the legal requirements, whether the failure to allege and prove, in the pleadings that the income is less than R5000.00 places the applicants outside the definition of occupier.

[26] The applicants argued as follows.

26.1 In the interpretation of the provisions of the ESTA it is important to apply the purposive approach; to promote the spirit, purport and objects of the Bill of Rights. Thus, the inquiry should be conducted with the Constitution of the Republic of South Africa No. 108 of 1996, ("the Constitution") which guarantees the protection of property rights. Section 25 of the Constitution enjoins the government to ensure these rights are realised. The same rights are reflected in the long title of ESTA.

26.2 There is ample decided authority on the approach this court should follow when determining the meaning of occupier. In *Klaase and Another v Van Der Merwe No and Others* 2016 (6) SA 31 (CC) at paragraph 50. In the following paragraph, the court warns against taking a 'blinkered approach' at the language of the legislation but rather to seek an approach that will afford the occupier the maximum protections of their constitutional rights.

26.3 In *Mathebula and Another v Harry* 2016 (5) SA 534 at paragraph14, Ngukaithobi AJ held that the occupier could not be blamed for omissions committed by her legal representatives in the pleadings. It was sufficient that the evidence before court pointed to earnings below the R5000.00 threshold.

[27] From the above precedents, it is clear that the court has a wide discretion in determining whether the requirements of ESTA have been met. In this matter, it is important to take cognisance of the fact that this matter had initially been brought on an urgent basis and therefore in the harried state of drafting, some facts were omitted. Although there is no that the applicants earn more than R5000.00 a month.[2] The evidence is clear that the applicants are subsistence farmers. I am not persuaded that the applicants fall outside ESTA

[28] The applicants are occupiers within the meaning of ESTA and are

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[2] *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* 2010 (3) SA 152 (SCA) at para 24

therefore entitled to the protections of occupiers under ESTA. The first applicant's right of residence of arises from the lease agreement, whilst that of second applicant's family arises from consent in terms of section 3(5) of ESTA which provides-

> *"For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge."*

[29] As occupiers, the applicants enjoy the right to use the land as envisaged in section 6 (1) of ESTA. Due to the fact that the applicants have resided on the land before the watershed date of 4 February 1997, they are long-term occupiers and any proposed termination of their right to residence must fall within the more stringent requirements of section 10 of ESTA.

[30] I am therefore, not persuaded by the respondents' dispute that the applicants are occupiers within the meaning of ESTA and thus place in issue whether the applicants have a clear right as it were. The respondents also dispute the applicants' *locus standi* to lodge this application. I have already determined that the applicants are occupiers and therefore possess the requisite *locus standi.*

An injury actually committed or reasonably apprehended

[31] Applicant must prove an injury all or one that is reasonably apprehended.

The applicants have pleaded that hitherto they enjoyed undisturbed possession of the property has been infringed upon by the conduct of the applicant of the first respondent against applicants. The gravamen of the applicants' complaint is the plotting and sizing on the property which affects their grazing rights and destroys their crop. The first respondents deny that they are responsible for the encroachment and lament the problem with unlawful occupiers.

[32] The encroachment by the respondents and or their assigns has limited the grazing area for the applicant's livestock, moreover some of their crops have been destroyed, affecting the occupiers' substance.

[33] I find the apprehension of the respondents to be real.

The absence of similar protection by any other ordinary remedy

[34] There is no alternative remedy, the respondents are the only authority to prevent the encroachment either by either their assigns or unlawful occupiers.

[35] Significantly, the respondents' version is interspersed with contradictions. On one hand, they claim that the process prescribed in the Ordinance is incomplete but at the same time serve the first applicant with a cancellation of the contract. Elsewhere, the respondents claim that the applicants never had undisturbed possession but on the other hand they deny encroachment on the property. Likewise, the respondents claim to have made provision for the applicants in the plans, but simultaneously

claim the applicants have no right of residence.

[36] In *Stellenbosch Farmers Winery Ltd Stellenvalle Winery (Pty) Ltd* 1957 (4) SA 234 (C) at page 235E- G ("*Stellenbosch Farmers Winery*") the court held that

> *"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts stated by the respondents together with the committed facts in the applicants' affidavits justify such an order... Where it is clear that affects though not formally admitted, cannot be denied, they must be regarded as admitted."*

[37] In the *locus classicus* on disputes facts in motion proceedings *Plascon-Evans Paints Ltd v Van Riebeck Paints* (Pty) Ltd [1984] 2 All SA 366 qualifies the general rule laid down in *Stellenbosch Farmers Winery Ltd*

> *"The power of the court to give such final relief on the papers before it is, however, not find to such a situation. In certain instances, the denial by the respondent of the fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact."*

[38] Due to the inconsistences highlighted above, I find that there is no real dispute of fact. There has been real harm resulting in prejudice to the respondents. It is not an exaggeration to conclude that the conduct of the respondents began after the notice in terms of the Ordinance was

issued. It may be presumed that the effect of the conduct complained of is to prejudice the occupiers in anticipation of the impending legal steps.

[39] *In Ntshangase v The Trustees of the Terblanche Gesin Familie Trust & Another* [2003] JOL 10996 (LCC) at paragraph 14

> "Evict" is defined in section 1(1) of ESTA as follows:
>
> *"'evict' means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and 'eviction' has a corresponding meaning."*
>
> *Cutting off the applicant's access to portions of the farm which she is entitled to use, constitutes a form of eviction."*

[40] ESTA *inter alia* governs the relationship between the land owner and the occupier. ESTA ensures that a balance is created between the protection of the interests of the occupier against those of the landowner. The interests of the parties are maintained as far as is possible without the arbitrary deprivation of each other's rights.

[41] Sections 5 and 6 of ESTA detail the rights and duties of occupiers and owners. Section 5 reads thus-

> *"Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity. equality and freedom, an occupier, an owner and a person in charge*

shall have the right to—

(a) human dignity;

(b) freedom and security of the person;

(c) privacy;

(d) freedom of religion, belief and opinion and of expression:

(e) freedom of association; and

(f) freedom of movement,

with due regard to the objects of the Constitution and this Act."

[42] Section 6(2) *inter alia* affirms the rights in section 5 and provides that the rights shall be *"balanced with the rights of the owner or person in charge".* In *Hattingh v Juta,*[3] the Constitutional Court elucidated how this balance is to be achieved-

> *"In my view, the part of section 6(2) that says "balanced with the rights of the owner or person in charge", calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner.*

[43] It follows therefore that the applicants have specific rights which must be

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3 2013 (3) SA 275 (CC) at para [32]

counter-balanced against those of the respondent as the owner of the land, infused with the principles of what is just and equitable in the circumstances.

[44] There is a lease agreement between the first applicant and the first respondent. Clause of the lease agreement provides for cancellation of the lease on notice. With the first applicant, coupled with the limitations on use of the farm demonstrate a real treat of eviction.

[45] Any termination of the applicants' rights should comply with section 10 of ESTA, there is no evidence to suggest that any attempt was made to comply with ESTA.

[46] In the circumstances, I make the following final order-

1. The respondents are directed forthwith to restore the undisturbed possession of the farm on Plot 97, Nooitegdacht 300 JS, Kromdraai properties to the applicants;

2. No order as to costs.

S POSWA-LEROTHOLI

Acting Judge of the Land Claims Court

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO. LCC 272/16

In the case of:

JEREMIAH ZULU	**1ST APPLICANT**
ELIAS SIBANYONI	**2ND APPLICANT**

AND

EMALAHLENI LOCAL MUNICIPALITY	**1ST RESPONDENT**
NOMSA NXUMALO	
HEAD, DEPARTMENT OF HOUSING	**2ND RESPONDENT**
EMALAHLENI LOCAL MUNICIPALITY	

FILING COVER

DOCUMENTS	:	**RESPONDENT'S PRACTICE NOTES AND HEADS OF ARGUMENTS**
FILED BY	:	**DOLAMO ATTORNEYS**

DATED and **SIGNED** at **WITBANK** on this the **27TH** day of **PRETORIA 2017**.

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