IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: M420/2020

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between:-

DONOVAN RATKO PIRIJA N.O First Applicant

BRANDON RODNEY TOPHAM N.O Second Applicant
(In their capacity as the duly authorised
Trustees of the Mahemsrus Trust – IT3780/97)

and

ELMARIE ROOS First Respondent

ALL UNLAWFUL OCCUPIERS OF THE PROPERTY KNOWN AS PORTION 167 OF FARM ELANDSHEUVEL 402, REGISTRATION DIVISION IP SITUATED AT 2[...] C[...] STREET IRENEPARK, KLERKSDORP, NORTH- WEST Second Respondent

MATLOSANA LOCAL MUNICIPALITY Third Respondent

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **31 January 2024**.

ORDER

1. **The points in *limine* are dismissed.**

2. **The first and second respondents are ordered to forthwith deliver to the applicants, the property described as Portion 167 Farm Elandsheuvel 402, Registration Division IP Situated at 2[...] C[...] Street, Irenepark, Klerksdorp North West.**

3. **In the event that the first and second respondents fail to deliver the property to the applicants, and remain in occupation for a period of fourteen days of this order, the Sheriff of the Court is authorised to eject the applicants from the property, and where necessary, enlist the assistance of the South African Police Services to give effect to this order.**

4. **Service of this order shall be effected on the respondents by the Sheriff of the Court. To the extent that personal service cannot be effected, service shall be effected by placing copies of the order at the main entrance of the property where possible, and at the most visible areas on the property.**

5. **The counter- application is dismissed with costs.**

6. **The costs of the application shall be borne by the respondent on a scale as between attorney and client.**

JUDGMENT

Mfenyana J

Introduction

[1] The applicants seek an order for the eviction of the first and second respondents (respondents) from a property known as Portion 167, Farm Elandsheuvel 402, Registration Division IP situated at 2[...] C[...] Street, Irenepark, Klerksdorp (the property). The application is brought pursuant to the provisions of Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1996. The applicants are joint trustees of the Mahemsrus Trust (the Trust). The Trust is the owner of the property.

[2] It is not in dispute that the first and second respondents (the respondents) are in occupation of the property. Prior to the first respondent taking occupation of the property, the property was under the occupation and control of one, Petrus Cornelius Meyer (Meyer). Meyer was murdered on the property on 24 December 2016. During his lifetime, he kept various exotic animals in captivity on the property.

[3] Following Meyer's death, the first respondent, as the person occupying the property, took care of Meyer's animals and caused the required licences to be issued in her name. The applicants, through the executors of Meyer's estate reached agreement with Nature Conservation that the animals be donated to the latter, in order to avoid further expenses. According to the applicants, this happened after the first respondent and her attorneys failed to respond to communication sent to them, regarding the purchasing of the animals.

[4] The first respondent has opposed the application, and has filed a counter-application. In the counter- application the first respondent avers that the applicants are indebted to the first respondent in the amount of R3 013 102.89 for expenses she incurred in taking care of the animals, as well as improving and maintaining the property. Presumably, this entitles the respondents to remain in the property until the first plaintiff's claim has been satisfied. They

also raised some preliminary points which are not specifically characterised as points in *limine*. In the event that in raising such points, the respondents consider them to be points of law, it is apposite that I deal with them before delving into the matter.

[5] At the commencement of the proceedings it was submitted on behalf of the applicants, that it would be prudent to dispose of the counter- application before the main application is determined, as it had a bearing and be dispositive of some aspects of the main application, in particular, whether the first respondent has a lien over the property.

[6] To my mind, the existence of the first respondent's claim rests on the nature of her occupancy, and in turn whether she has a valid lien over the property.

[7] The essence of the applicants' contention is that having occupied the property without their consent, the first respondent and her family are refusing to vacate the property, or pay any consideration for municipal services, despite the fact that they are expropriating rental income which previously used to be paid to the Trust, and despite the fact that they are running a 'pet shop' business from the property.

[8] As far as the respondents' opposition goes, it is contended that the applicants lack the *locus standi* to institute the proceedings, as the property is vested in the executor of Meyer's estate or the Master, until the winding up of Meyer's estate has been finalised and the property transferred to the B[...] Meyer and D[...] Testamentary Trust (BMD Trust), as is directed in Meyer's will. The BMD Trust was established by Meyer in his will.

[9] It is further the respondents' contention that although the property is registered in the name of the Trust, Meyer reserved the right to deal with the property in his will, and accordingly did so. For this proposition the respondents rely on clause 20.1 of the Trust Deed which states:

> *By virtue of the general power of attorney and property right of the TRUSTEES mentioned in paragraph 5 of this deed, it is specially determined that the said TRUSTEES will have the right to prove the last will and prescribe the formula for the distribution of the trust income among the INCOME BENEFICIARIES and of the TRUST FUND among the CAPITAL BENEFICIARIES upon termination of the trust in order to determine which BENEFICIARIES should receive which part of the TRUST FUND. The awards do not necessarily have to be equal in size, value or scope.*[1]

[10] I must immediately state that the above extract from the Trust Deed makes no mention of the property and does not support the contention by the respondents.

[11] In dealing with the issue of *locus standi*, it is necessary to understand the genesis of parties' involvement in the matter. From the reading of the papers, it is clear that the dispute between the parties has a long history. I set out to deal with the relevant aspects of that history, in particular, the parties' connection to Meyer and to whatever extent relevant, with each other.

[12] It is stated that the first applicant and Meyer's daughter B[...] – M[...], who is now deceased, have a son together, named D[...]. At the time the proceedings were instituted, D[...] was 13 years old.

[13] The first respondent is Meyer's niece, her mother, Alta Roos, being Meyer's sister. It is alleged that Alta Roos also resides on the property.

[1] Translation by Google Translate.

[14] The respondents aver that the Trust was established by Meyer as an *inter vivos* trust. This is disputed by the applicants. There is no reason to dwell on this issue as it is clear from the Trust Deed that the Trust was established by one Abrahama De Klerk (De Klerk) on 7 April 1997 as the donor. De Klerk and Meyer were the original Trustees of the Trust. On 5 August 1997, Meyer sold the property to the Trust for an amount of R168 500.00.

[15] In his will, Meyer established a testamentary trust, the B[...] Meyer and D[...] Testamentary Trust (BMD Trust) and bequeathed the property to that trust under specific conditions. As part of the conditions, Kelly Jacobs and Jacqueline Slabbert were granted to reside on the property under specified conditions. It is on this basis that the respondents aver that the applicants do not have the *locus standi* to institute this application.

[16] As for the second applicant, no relation is alleged to Meyer or any of the parties, save to state that he is a practising attorney and a co- trustee together with the first applicant.

[17] Linked to this ground, the first respondent in her answering affidavit avers that the applicants have failed to respond to a notice in terms of Rule 7(1) requiring them to provide a resolution and a confirmatory affidavit by the second applicant, as the respondents contend that the second applicant is not in support of the application. In this regard the applicants referred to a resolution of 9 September 2019 authorising the first applicant to represent the Trust. In addition, the second applicant deposed to a confirmatory affidavit in support of the application and the averments made by the first applicant as the deponent to the founding affidavit. That in my view settles the issue of locus standi. That the confirmatory affidavit was provided only when the replying affidavit was filed, is of no consequence. Rule 7(1) stipulates that where the authority of a person to act on behalf of another is disputed, that person may no longer act unless he has satisfied the court that he is authorised to so act. Upon provision of proof that a person is authorised to act, the requirements of the Rule are satisfied.

[18] It is further the respondents' contention that there is a non- joinder of the executor of Meyer's estate, the Master, Kelly Jacobs, Jacqueline Slabbert and Jan Roos. Jan Roos is Meyer's nephew, and the first respondent's brother, who in terms of Meyer's will is to inherit Meyer's entire estate in the event D[...] does not reach the age of 28. According to the respondents, all these people have a material interest in this matter and would be prejudiced if the respondents are evicted from the property.

[19] The difficulty with this contention is that, the property in question belongs to the Trust. The stated individuals have an interest in the deceased estate as stated in Meyer's will, and not the trust property.

[20] The respondents further contend that there are material factual disputes in this matter, which cannot be adjudicated on paper, and require that the matter be referred to trial. Whether any disputes raised are material to the present application depends on the nature of the disputes raised. There is no dispute that the Trust is the owner of the property. There is also no dispute that the applicants are the appointed Trustees. The only disputes raised by the respondents pertain to Meyer's will and the bequests made therein. Others relate to the first respondent's counter-claim and whether or not she expended money in improving the property and taking care of the animals, as well as the extent thereof. These disputes, in my view, have no bearing on the main application. What cannot be disputed is that Meyer was not legally entitled to bequeath the property as it belongs to the Trust.

[21] According to the respondents, the first respondent has a lien over the property, which is almost equivalent to the value of the property, emanating from the amount she has expended on the property, in so doing enriching the applicants alternatively the executor (executor) or the BMD Trust. This is the essence of the first respondent's counter- application. The applicants deny this and further contend that even if the lien were to be found to exist, it does not extend to all other people staying on the property (the second respondent).

[22] I agree with the applicants that the enrichment lien alleged by the first respondent, does not extend to them as the respondents are not *bona fide* possessors of the property. It is trite that an entitlement flows from a right. The first respondent's capacity to withhold the property can only arise if the law permits it. There must have been consent from the owners of the property to effect the 'enrichment improvements'. In this case, the counterclaim relates to improvements not consented to by the property owner. There is also no suggestion that the second respondents have carried out any improvements on the property as a result of which they could exercise a lien. Were that the case, they would of necessity, need to prove their contribution in the improvement of the property.

[23] As for the fact that the respondents are running a business on the property, the court held in *Boshoga and Another v Mmakolo and Others* that a lienholder is not legally entitled to commercially exploit the object of the lien.

[24] The respondents further challenge the applicant's reliance on the PIE Act, and aver that the Extension of Security of Tenure Act (ESTA) is applicable as the property is zoned as a farm. For this averment the respondents have annexed a Windeed property report, describing the property as a farm. To this, the applicants aver that as the property is encircled by townships, the ESTA is not applicable. They further contend that the respondents are not covered as "occupiers" within the meaning of the ESTA, and fall within the definition of "unlawful occupier" in the PIE Act. Notably, the same Windeed report indicates that the property is owned by the Trust. Thus there cannot be any further contention as to the ownership of the property.

[25] As for the first respondent's occupation of the property, she avers that she was requested by Bosch, the executor of Meyer's estate on the day Meyer died, to attend to the property and the animals, as Bosch was leaving for holiday. She has been in occupation of the property ever since. She states that Bosch has not revoked that consent. Thus she denies that she or the second respondents are in unlawful occupation of the property. This averment by the first respondent is denied by the applicants. They rely on

correspondence, which has been provided by the executor stating that no such consent was granted by him as he was fully aware that he would require the consent of all the Trustees to do so. In the circumstances, there can be no dispute that the first respondent together with the people who are occupying the property through her are in unlawful occupation of the property. That, coupled with the absence of consent from the Trustees, is dispositive of this contention.

[26] Given what is stated in the preceding paragraph, the question that remains is whether the ESTA or PIE is applicable. In that regard I must point out that not all the respondents are in the same situation or have attained their occupancy in similar circumstances. By the respondents' own admission, Mr Piki Papu (Papu) is said to have lived on the property while Meyer was still alive and has continued to live there until his demise. I will deal with this later in this judgment.

[27] It is trite that in terms of Section 2(1) of the ESTA, this Act applies to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships. The ESTA further sets out three elements necessary to qualify a person as an occupier. These are that the person (i) must be residing on the land of another to which the Act applies, (ii) with consent or by virtue of another right in law, and (iii) must not be in receipt of income in excess of R5000.00.

[28] It seems to me that the character of the land in question cannot be looked at in isolation from the nature of the occupation. As such, if the land in question was not subject to the ESTA, the respondents could not qualify as occupiers under the ESTA, even if their occupation of it had been with consent and their income was below the prescribed amount.[2] Thus, Section 2 provides only the starting point of the enquiry.

[2] Pieters and Another v Stemmett SC and Another (LCC 2022/139) [2023] ZALCC 4; [2023]2 All SA 234 (LCC) (3 February 2023).

[29] In this regard, the applicants argued that the property is encircled by a township and thus the ESTA is not applicable to it. This was denied by the respondents in their answering affidavit, who contend that the property is zoned as farmlands. Interestingly, both parties rely on the same map extracted from Google Earth, depicting the positioning of the property.

[30] From the facts of the matter, and the submissions made by the parties, I am of the view that a conclusion that the property falls within the scope of the ESTA is inescapable. There is no evidence that the property or the properties surrounding it are legally recognised as such by any law, save for what can be gleaned from the picture of the property as attached by both parties. What the evidence shows is that the land was zoned as a farm. It can be inferred from this zoning that the land was designated for agricultural purposes. It does not matter if it has never been used for agricultural purposes or that a shop is operated on the property. That is however not the end of the enquiry.

[31] The next part of the enquiry is whether the respondents are occupiers in terms of the ESTA. With the exclusion of Papu, who occupied the property under Meyer during his lifetime until his demise, all the other respondents do not have the consent of the owner of the land and are in unlawful occupation of the property. The finding of the court in *Droomer NO and Another v Snyders and Others*[3] is germane to the present case. In that matter Binns-Ward J (with Cloete and Slingers JJ concurring) observed that:

> *"A person, who is not an 'occupier' as defined in ESTA, and who occupies any land without the consent of the owner and remains there unlawfully falls to be evicted in proceedings instituted in terms of the PIE Act."* [4]

[32] Evidently, the protection afforded by the ESTA is greater than that afforded by the PIE Act. Such is the protection that is afforded to Papu in terms of the ESTA. It is often said that 'this is because an occupier under the ESTA had at

[3] (A336/2019) [2020] ZAWCHC 72 (4 August 2020).
[4] Paragraph 21.

some stage a lawful right to reside on land which was not in the township'[5]. The applicants have provided no evidence to dispute the respondents' submission that Papu's has been in occupation of the property as a worker while Meyer was still alive. As such, he does not claim occupation under the first respondent. He is in a separate category from the rest of the respondents and must be dealt with as such.

[33] If one considers the whole purpose behind the enactment of the ESTA, as a response to Section 25(6) of the Constitution, it comes as no surprise that unlawful occupiers in the circumstances of the first respondent, and all those who claim occupation under her are not covered by the ESTA.

[34] In their replying affidavit, the applicants, while contending that Papu did not obtain consent from the Trust to occupy the premises, do not make much of this contention. They submit that his right to occupy the property, if found to exist, does not extend to the first respondent. On that score they submit that they will engage in discussions with him once the Trust gains possession of the property, with a view to accommodate him, and if necessary, bring the necessary application in terms of the ESTA. To the extent that the description of "second respondents" in these proceedings refers to unlawful occupiers of the property, as an occupier under the ESTA, and with the consent of Meyer as the person who was in control of the property, Papu is not part of the "second respondents".

[35] To add insult to injury, the applicants submit that the first respondent has not satisfied the aspect of the enquiry that her income falls within the threshold set out in the ESTA. This is the last leg of the enquiry. In my view, in the face of the respondents' unlawful occupation (without the consent of the owner or a person in charge of the property), it would not avail the respondents at this stage to argue that their income falls within the amount prescribed in relation to "*occupiers*" as defined in the ESTA. This is in my view, dispositive of the matter.

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[5] Pieters and Another v Stemmett SC and Another supra, at paragraph 14.

[36] The respondents however, had another string to their bow. They argued that the first respondent has a statutory duty to take care of the animals as the permits for the animals on the property are issued in her name and are specific to the property. In this regard, the fact that the animals belonged to Meyer supposes that the animals form part of the deceased estate. As owners of the property the applicants submitted that the animals could either be kept on the premises or donated to the Nature Conservation. The applicants elected to have them donated, and instructed the executor to that effect.

[37] It was thus not open to the first respondent to obtain permits in the circumstances. Having done so, regardless, she has to live with the consequences of her election. That does not in any way, entitle her or the second respondents to hold on to the property or render them immune to being evicted when their occupancy is in illegal. Notably, the applicants aver that these permits were obtained unlawfully as the animals belong to the deceased estate. This therefore suggests that the issue of the animals is within the purview of the executor of the estate, and not the respondents.

[38] Should the first respondent have wished to hold on to the animals, the applicants contend that she was at liberty to purchase them, as the executor had already obtained a valuation for them. They contend that she failed to make an offer after showing interest to purchase the animals. That in my view settles the issue of the respondents' or the first respondent's reliance on a statutory duty to obtain permits for animals that do not belong to her.

[40] Finally, the respondents aver that it is not just and equitable to evict them as the property is a woman-led household with elderly people and minor children residing on it. This contention brings into sharp focus the requirements in Section 4 of the PIE Act. Subsection (2) requires that a written and effective notice be served on the lawful occupier/s and the municipality having jurisdiction over the property. There is no dispute that such a notice was served on the respondents.

[41] Subsections (7) and (8) deal with whether it would be just and equitable to grant an eviction order and the appropriate timeframe for the eviction, if so considered.

[42] Key to these considerations is whether the rights and needs of the elderly, children, disabled persons, and women- headed households ,as well as the length of time the unlawful occupiers have resided on the property have been taken into account. What this translates to is that the court must take into account all these factors in light of the specific circumstances of each case.

[43] The first respondent avers that three elderly people live on the property, as well as her fifteen year old daughter. Save for stating that most of the people who reside in the property are unemployed and in financial distress, it is not the first respondent's case that the respondents are destitute and have nowhere else to go. The first respondent herself is not destitute. The allegation that the property is women headed is not supported by any evidence as the available evidence suggests the contrary. By the first respondent's own admission, there are three men who reside in the property. The court takes a dim view of this submission.

[44] It was further contended by the applicants, with regard Mr Jan Hendrik Roos, that he had previously deposed to an affidavit, citing his address as [...] L[...] Street, Klerksdorp. Whether or not that is indeed the case, there is no suggestion that the eviction of the respondents would result in homelessness. The first respondent is a business owner whose occupation of the property occurred in the sinister circumstances described in this judgment. On the strength of the first respondent's submissions that she had expended in excess of R3 000 000. 00 in improving the property and tending the animals, it is clear that the respondents are not destitute and are not in financial distress.

[45] It is settled law that the respondents' rights in the circumstances of Section 4(7) do not extend to the right of occupation of the property, but their right to dignity, the right not to be treated in a cruel, inhumane and degrading way. That being said, the duty of the court is to regulate the exercise of the right to

possession of the property by the owner, in a manner that is not only achievable, but consistent with the Constitution. It is not intended to divest the owner of their property.

[46] The converse is that the applicants as owners of a property held in trust for the benefit of the first applicant's son, are simply not able to deal with their property in any manner whatsoever. They aver that the first respondent has appropriated for her own benefit, the income derived from the property while at the same time refusing to pay utilities and property expenses. The Constitutional Court in *Occupiers of Erven 87 and 88 Berea v De Wet NO and another (Poor Flat Dwellers Association as Amicus Curiae)*[6] observed that:

> *" The effect of PIE is not and should not be to effectively expropriate the rights of the landowner in favour of unlawful occupiers. The landowner retains the protection against arbitrary deprivation of property. Properly applied, PIE should serve merely to delay or suspend the exercise of the landowner's full property rights until a determination has been made whether it is just and equitable to evict the unlawful occupiers and under what conditions."*[7]

[47] It should follow that in these circumstances, it would be just and equitable that the respondents are evicted from the property.

Costs

[48] The applicants seek a punitive cost order against the respondents. They contend that the answering affidavit is riddled with untruths and that a punitive costs order is justified as a result. The law as it stands is that the issue of costs is within the discretion of the court which discretion should be exercised judicially.

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[6] [2017] JOL 38039 (CC).
[7] Paragraph 80; In this regard see also: *Grobler v Phillips & Others* 2023 (1) SA 321 (CC).

[49] If the court considers it just to award a punitive costs order against the losing party, it does so, not only as punishment, but also to protect the successful party so that it is not left out of pocket.[8] In *Public Protector v South African Reserve Bank*[9] the Constitutional Court reasoned that a punitive costs order is justified where the conduct of a party is extraordinary and worthy of the court's rebuke. The Constitutional Court referred to *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others*[10], where the Labour Court stated that attorney client costs should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner.

[50] The conduct of the first respondent in this matter is nothing short of vexatious. She has employed every trick in the book to avoid eviction at great prejudice to the heirs and beneficiaries of the deceased estate, in circumstances. This is so, as the issue of the property is to some extent connected to the winding up of the deceased estate, as well as the rental income, which she is alleged to have embezzled. She has told obvious untruths in her papers. One such untruth pertains to the issue of her occupancy of the property, which she stated was granted to her by the executor of the estate. This was refuted by the executor, and she said no more of it. She has clearly embarked on a scheme to trifle with the court. In sum her conduct in this litigation was vexatious.

Order

[51] In the result, I make the following order:

1. **The points in *limine* are dismissed.**

2. **The first and second respondents are ordered to forthwith deliver to the applicants, the property described as Portion 167 Farm Elandsheuvel**

[8] In this regard see: *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597.
[9] 2019 (6) SA 253 (CC)
[10] (2016) 37 ILJ 2815 (LAC).

402, Registration Division IP Situated at 2[...] C[...] Street, Irenepark, Klerksdorp North West.

3. **In the event that the first and second respondents fail to deliver the property to the applicants, and remain in occupation for a period of fourteen days of this order, the Sheriff of the Court is authorised to eject the applicants from the property, and where necessary, enlist the assistance of the South African Police Services to give effect to this order.**

4. **Service of this order shall be effected on the respondents by the Sheriff of the Court. To the extent that personal service cannot be effected, service shall be effected by placing copies of the order at the main entrance of the property where possible, and at the most visible areas on the property.**

5. **The counter- application is dismissed with costs.**

6. **The costs of the application shall be borne by the respondent on a scale as between attorney and client.**

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

Appearances:

On behalf of the applicants	:	PL Uys
Instructed by	:	Savage Jooste & Adams Inc.
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On behalf of the 1st respondents	:	H. J Scholtz
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Date of hearing	:	21 April 2023
Date of judgment	:	31 January 2024