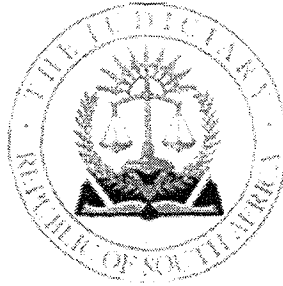


IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 46699/18

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	<u>08/08/19</u>
	DATE
	<u>[Signature]</u>
	SIGNATURE

In the matter between:

**GALLOPTIC TRADE AND INVESTMENTS 15
(PROPRIETARY) LIMITED**

Applicant

and

GROENEWALD DEON

First Respondent

GROENEWALD, KOOS

Second Respondent

**AND THE UNLAWFUL OCCUPIERS OF
PORTION 17 OF THE FARM WELTEVREDEN
NR 517**

Third Respondent

AND THE MOGALE CITY LOCAL MUNICIPALITY

Fourth Respondent

J U D G M E N T

MILTZ AJ:

1. The applicant is the registered owner of Portion 17 (a portion of Portion 1) of the Farm Weltevreden 517, registration division JQ in the Gauteng Province measuring 38.5439 hectares (*"the property"*).
2. The applicant seeks the eviction of the respondents from the property. The applicant does so relying on the Provisions of the Illegal Eviction From and Unlawful Occupation Act 19 of 1998 (*"PIE"*).
3. The first respondent is DEON GROENEWALD and the second respondent is his brother Koos Groenewald. The third respondents were identified in the answering affidavit to include practically three of the first respondent's children one of whom is a minor, Themba Msebela (*"Msebela"*) who is a full-time employee of the first respondent and Msebela's wife and their young child. All of the occupiers resist the application for their eviction. The fourth respondent, the Mogale City Local Municipality does not participate in the application.
4. It is not in issue in the application that the formal procedural requirements of PIE have been satisfied. However the respondents

deny that they are unlawful occupiers of the property within the meaning of PIE and also claim that PIE is not applicable because the application for their eviction ought to have been made in terms of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”).

5. The respondents argued that whereas PIE provides for the prohibition of unlawful eviction and provides procedures for the eviction of unlawful occupiers, ESTA aims to assist long-term security of tenure while also recognising the right of landowners to apply to Court for an eviction order in appropriate circumstances.
6. These defences are inter-related in as much as Section 1 of PIE 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 (ESTA)...”.

7. It follows from this definition that a person who has the express or tacit consent of the owner or person in charge to occupy land or occupies with some other lawful right is not an unlawful occupier. Neither is a person who is an occupier in terms of ESTA.
8. Section 2(1)(a) of ESTA provides that the Act shall apply to all 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 but including any land within such a township which has been designated for agricultural purposes in terms of any law. It follows that the farmland in question subject to what follows may be subject to ESTA by virtue of the provisions of Section 2(1)(a) of ESTA.

9. The first respondent pointed out that the provisions of ESTA avail a person occupying farmland as defined in ESTA with the express or tacit consent or another right in law to do so provided the occupier's annual income is less than R13 268.
10. However the respondents provided no evidence of annual income despite relying on ESTA for their contention that the application ought to have been brought in terms thereof and not in terms of PIE.
11. In the absence of such evidence I am unable to determine whether or not the defence that the respondents are entitled to the rights conferred on them by ESTA can apply. For reasons that follow however it is not necessary to determine this issue.
12. It is necessary to consider the parties' respective factual versions to determine with reference to PIE whether the respondents occupy the property without the express or tacit consent of the applicant or without any other right in law to occupy such land.

13. The applicant represented by Gert du Plessis who deposed to the founding and replying affidavits on its behalf states that the applicant purchased the property at a sale in execution for a purchase price of R1 million. Du Plessis then describes the applicable circumstances in respect of the purchase of the property and the first respondent's occupation as having arisen during the early part of 2018 when the first respondent began to experience financial difficulties. At the time he was aware of the financial difficulties of the first respondent as he and the first respondent were on friendly terms.
14. On 22 May 2018 the first respondent called du Plessis and requested his assistance as the property was to be sold on auction that day. The first respondent requested him to purchase the property on the auction.
15. The applicant then purchased the property as it was envisaged that the applicant would allow the first respondent to occupy the property until the first respondent could afford to purchase the property from the applicant.
16. In this context the initial agreement is described by the applicant as being that the first respondent would be permitted to occupy the property for a reasonable period until such time as he had the finances to purchase the property and provided that he maintained the property and paid for the charges associated with doing so.

17. Allegations of unlawful activities including theft of funds by the first respondent are made in the founding affidavit presumably to create the impression that the first respondent is dishonest. The bald allegations are not substantiated on the papers.
18. Despite this the applicant relies on the allegations of dishonesty to attempt to justify what du Plessis describes as the termination of all relationships with the first respondent thereafter. He also relies on the allegations to attempt to justify his having informed the first respondent that he *"could only purchase the Farm if he paid the true market value of the Farm and also repaid all the funds that he had stolen or unlawfully appropriated."*
19. Because the first respondent informed du Plessis that he was unwilling to pay the market value as also the allegedly stolen or misappropriated funds, the applicant purported to terminate the first respondent's right to occupy the property. Du Plessis did so without placing the first respondent on terms and without following the provisions of the sale agreement more fully referred to below¹.
20. The applicant contends finally that the first respondent's right to occupy the property was terminated by his breach of the initial agreement because he failed to pay electricity, water and other ancillary charges associated with the property. The applicant has provided no

¹ On the contrary he apparently took the law into his own hands and spoliated the first respondent's possession of the property.

information whatsoever as to the amounts referred to or when the right to occupy the property was terminated.

21. Although the applicant also alleges that no right to occupy the property was ever granted by the applicant to the second and third respondents it is manifest from the contents of the answering affidavits that they derive their rights from and through the first respondent. Accordingly the existence of rights on their part will be determined by whether the first respondent has a right to remain in occupation of the property.
22. The first respondent having described his business relationships with du Plessis and certain other events in the answering affidavit explained events surrounding the applicant's purchase of the property.
23. The first respondent says that at the time he approached du Plessis for assistance with the purchase of the property they had a good relationship and so du Plessis through the applicant was willing to assist the first respondent to retain the property. The applicant purchased the property for R1 million at the auction which the first respondent attended.
24. This occurred in circumstances in which it had previously been expressly agreed that the first respondent would repurchase the property from the applicant. According to the first respondent the applicant provided him with a Special Power of Attorney on 22 May

2018 (*“the power of attorney”*). The date coincides with that of the request for assistance and of the auction. A copy of the power of attorney was attached to the answering affidavit. In terms of the power of attorney du Plessis amongst other specific powers irrevocably nominated, constituted and appointed the first respondent to deal with and attend to the buying and selling of immovable properties in favour of the applicant. The power of attorney apparently was signed by du Plessis at Krugersdorp on 22 May 2018.

25. The first respondent said that with the knowledge of du Plessis he immediately executed an offer to purchase the property for an amount of R1 million after the auction. In doing so he left open the identity of the purchaser. He explains the reason therefor as being that he still had to decide whether to take registration in his personal name or rather in another entity to be nominated by him. The first respondent said that he delivered the incomplete offer to purchase to attorneys who later informed him that du Plessis had attended the offices and uplifted the file with the incomplete offer.
26. The first respondent later prepared a fresh offer to purchase the property for a price of R1.25 million so as to provide for the applicant's costs for arrear rates and Sheriff's commission. A copy of the fresh offer to purchase is also attached to the answering affidavit. The figure of R1.25 million is explained by the first respondent as being R1 million in respect of the purchase price, R156 806.08 in respect of arrear rates

paid by the applicant to the third respondent and the balance of approximately R93 194 in respect of Sheriff's commission and transfer costs.

27. The date that appears on the second offer to purchase alongside the signature of the first respondent for the applicant as seller and himself as the purchaser was 22 May 2018 (*"the agreement of sale"*). The first respondent's version suggests that the date probably was a little later than 22 May 2018 but nothing turns on this.
28. The first respondent then explains how du Plessis apparently requested that the first respondent should provide a guarantee for payment of R900 000 in respect of the balance of the purchase price required for the transfer of the property to the applicant after the sale in execution.
29. In any event the applicant apparently later applied for and was granted a bond and the transfer of the property into the name of the applicant occurred on 27 November 2018.
30. During July 2018 the first respondent had been unlawfully despoiled of his possession and occupation of the property by du Plessis and others and the first respondent applied successfully to the Krugersdorp Magistrates Court for the restoration of his possession and occupation of the property.

31. On 29 November 2018 the first respondent's attorney wrote to the applicant informing it of the first respondent's intention to take transfer of the property.
32. In terms of the oral agreement between the parties the first respondent was entitled to occupy the property for a reasonable period which clearly would be until he would be in a financial position to take transfer of the property. The first respondent's attorney's letter of 29 November 2018 recorded amongst other things that:
 - 32.1. the first respondent in terms of the power of attorney as well as the terms of the agreement between him and the applicant had proceeded with the sale of the property. A copy of the agreement of sale was attached to the letter;
 - 32.2. Brian Alberts Attorneys would proceed with the transfer of the property and so they requested the applicant to do all things necessary to give effect to the transfer of the property.
33. Nothing else has happened since then to advance the transfer of the property to the first respondent pursuant to the agreement of sale except that it is recorded in the answering affidavit that the first respondent's attorney was in the process of preparing the necessary paperwork to claim specific performance in terms thereof.

34. Clause 4.1 of the agreement of sale which was recorded to have become unconditional upon the registration of the property into the name of the applicant also contemplated that the seller would vacate the property on acceptance of the offer to purchase and that when all the suspensive conditions of the agreement of sale had been fulfilled the first respondent would be entitled to occupy the property.
35. The first respondent's right of occupation of the property in terms of the agreement of sale was sealed upon the registration of transfer of the property into the name of the applicant.
36. In the replying affidavit the applicant joined issue with many of the allegations in the answering affidavit. Du Plessis then alleged that when the applicant purchased the property there was an agreement that the first respondent could immediately repurchase the property from the applicant.
37. Du Plessis also alleged the existence of a material condition of the further agreement that he introduced in his replying affidavit to the effect that the first respondent would sign an acknowledgment of debt to satisfy outstanding rates and taxes on the property but that because he never did so no valid agreement of sale came into being.
38. Du Plessis also alleged in the replying affidavit that towards the end of 2018 he had advised the first respondent that he could repurchase the

property if he repaid everything that he owed to him. The applicant also disputed the authenticity of the power of attorney as being fraudulent, denied his signature on it and attacked the first respondent's authority to bind the applicant or to enter agreements on behalf of the applicant.

39. Since at least 29 November 2018 the applicant was in possession of the offer to purchase that du Plessis alleged in the replying affidavit was a forgery that the first respondent had signed without authority.
40. Nevertheless the applicant launched the application for final relief by way of motion proceedings on approximately 13 December 2018. It did so in the face of existing material disputes of fact that already existed and are manifest in the parties' different versions on affidavit.
41. The question whether the respondents are unlawful occupiers for the purpose of PIE cannot be determined without a resolution of the material disputes of fact. These go to the root of the application being the question whether they occupy the property without the express or tacit consent of the applicant or any other right in law to do so.

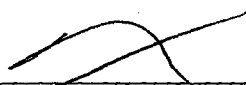
42. The first respondent's version is not so far-fetched or untenable that it can be rejected on the papers alone². I have no alternative in the circumstances but to accept the first respondent's version.
43. I accordingly find that the applicant has not discharged the onus of proving that the respondents are unlawful occupiers of the property who are liable to ejected in terms of PIE.
44. On the contrary it appears as if the respondents occupy the property with the original permission, knowledge and consent of the applicant and that they have done so at least since the date on which the agreement of sale became unconditional when the applicant became the registered owner of the property³.
45. When it launched the application the applicant would have known that it could not succeed in obtaining the final relief that it seeks in motion proceedings⁴.
46. For all the above reasons I find that the applicant has failed to prove that the respondents are unlawful occupiers of the property as envisaged by the provisions and definition of PIE.

² *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A) at 634E to 635C/D.

³ On the facts contained in the first respondent's answering affidavits he discharges the common law onus that he has a right of possession in respect of the property. See *Woerman NO v Masondo* 2002(1) SA 811(SCA) Furthermore having conceded the original right of possession the applicant fails to prove a valid termination of the right. See *Chetty v Naidoo* 1974 (3) SA 13 (A).

⁴ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949(3) SA 1155 (T) at 1161.

47. In the circumstances the application is dismissed with costs.



I. MILTZ
 ACTING JUDGE OF THE HIGH
 COURT, JOHANNESBURG

Counsel for the Applicant :
 Instructed by:

R Bhima
 Attorneys Swanepoel Van Zyl

Counsel for the Respondent:
 Instructed by:

CJC Nel
 Attorneys Schuler Heerschop
 Pienaar

Date of Hearing:

1 August 2019

Date of Judgment:

08 August 2019