



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DEBATE WHICH WOULD BE NOT AFFORDABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
REVIEWED
25/7/2014

25/7/14

CASE NUMBER: 69165/2013

In the matter between:

MALEBELELE COMMUNAL PROPERTY ASSOCIATION

Applicant

And

MOSTERT, CAREL

First Respondent

LOOTS, MARTHA

Second Respondent

VALLEY OF THE KINGS, GROOT MARICO (PTY) LTD

Third Respondent

WOC HOLDINGS (PTY) LTD

Fourth Respondent

VALLEY OF THE KINGS (PTY) LTD

Fifth Respondent

OCCUPANTS OF PORTIONS 1 AND 2 OF THE

Sixth Respondent

FARM RIETFONTEIN 89, NORTH WEST PROVINCE

JUDGMENT

STRAUSS, AJ

1. An application was brought by the applicant on 11 November 2013, for the eviction of the first to sixth respondents from Portions 1 and 2 of the Farm Rietfontein, Registration Division North West Province within 14 days from date of the court order, and that the first to fifth respondents, jointly and severally, the one to pay the other to be absolved, be directed to pay the costs of the application.

2. At the outset I wish to mention that the first and second respondents (two individuals) and sixth respondents(approximately 25 farm workers on the farm) all occupy the property known as Farm Rietfontein in the Registration Division of the North West, falling under the jurisdiction of the High Court of Mafikeng.

3. The third, fourth and fifth respondents, however, being incorporated companies all have their addresses recorded as No 196 Raymond Avenue, Waterkloof, Pretoria. Thus the third, fourth and fifth respondents' being companies, have registered addresses which fall within the jurisdiction of this Court.

4. The purpose of the application as set out by the applicant in paragraph 4 of the founding affidavit, is to evict the respondents from the occupation of the farm due to the fact that no agreement exists between the applicant and the said respondents, which permit one or more of them to occupy the farm, and further that they have no legal basis upon which they are entitled to remain in occupation of the farm.

5. The applicant became owner of the farm, pursuant to an agreement of sale and purchase which was entered into between Wilbo Investments 4 (Pty) Ltd and the

National Department of Rural Development and Land Reform, in terms of which the property was purchased on behalf of the Baharutse Busebogodi community, and registered in the name of the applicant, on or about 16 August 2012. The applicant's ownership of the farm is set out succinctly in the papers and is not an issue in dispute between the parties.

6. Service of the application took place on the first, second and sixth respondents, personally. Most of the respondents mentioned to the sheriff that they are employed by Carel Mostert the 1st respondent. Service on the 3rd to 5th respondents (the companies) was effected, per address their current attorney of record.

7. During September 2013, an attempt was made by the applicant and other persons a Mr Parson, a Mr Naude and Wilbo (Pty) (the previous owner) to take possession of the farm. The 3rd to 5th respondents brought a spoliation application and Bertelsmann J, gave an order on 1 October 2013, "that the free and undisturbed possession of the property farm Rietfontein, including all assets and game be restored to the 3rd to 5th respondents. The facts of the spoliation do however not, form part of this application.

8. After service and before any opposing papers were filed, and on request of the attorneys of record for the respondents, the parties in regards to this matter, entered into round-table discussions on 21 October 2013, in order to attempt to settle the future course of the matter, and the issue of the continued occupation of the respondents on the farm.

9. From the founding papers it appears that there was an offer from the respondents, although it is not indicated specifically which respondent, to lease the property from the applicant and to draw up a management agreement for a possible joint venture between the applicant and the respondents. Both these proposals were rejected by the applicant and the applicant proceeded with its insistence that the respondents vacate the farm before 7 November 2013.

10. The respondents hereafter filed their opposing affidavit. A replying affidavit was filed by the applicants, and the matter was enrolled on the opposed motion court roll of 21 July 2014, for hearing of the eviction application.

11. From the outset it was evident that the application was not brought in terms of Part A and/or Part B of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), nor was it brought in terms of section 8 of the Extension of Security of Tenure Act ("ESTA") There was therefore no compliance with the provisions of either PIE or ESTA, which inter alia provide that an applicant must give notice of the eviction to each party, serve such notice on each occupier and the local Municipality having jurisdiction over the property. In terms of PIE such notice must be given 14 days prior to the application for eviction and in the case of ESTA such notice must be given two months prior to the application for eviction of any occupier.

12. The provisions of ESTA further calls on an applicant to comply, and serve such notice on the Department of Rural Development and Land Reform.

13. Both PIE and ESTA provides that a court seized with an eviction application may be any division of the High Court or Magistrates Court in whose area of jurisdiction the land in question is situated.

14. Currently the first to sixth respondents are still in occupation of the farm. The respondents state that their continued occupation is exercised, firstly, the 3rd to 5th respondents (the companies) exercising a lien that they have, arising from improvements made to the land concerned, and secondly in regards to the other respondents, a continuous occupation as employees of the 3rd to 5th respondents .The respondents contend that their occupation is "unlawful" and they therefore contend, that PIE is applicable to any application claiming their eviction.

15. I pause to mention that there was a previous unsuccessful liquidation application against the previous owner, Wilbo (Pty) Ltd, brought by the 3rd – 5th respondents, for their lien over the property for improvements made, and they are continuing with their claim in another form, but hold no claim against the applicant for their lien.

16. The 3rd to 5th respondents further claim that the sale agreement between the applicant and the previous owner, Wilbo Investments (Pty) Ltd, was subject to a suspensive condition in that a management or JV (joint venture) agreement had to be entered into between the applicant and the respondents. This litigation will have to run its course based on the parties rights in terms of the contract of sale.

17. What is not in dispute is that currently the property is utilised as a game farm. The game on the farm include lion, elephant, leopard, buffalo, hippo's, crocodiles and various other game species, worth in excess of R7 million. The respondents contend that it is necessary and also crucial that they remain on the farm as they attend to the game, protect the surrounding community from the dangerous game, and that the animals cannot be removed without proper measures being put in place.

18. The applicant, when bringing the application and certainly after the round table meeting, knew this to be the factual position on the farm, and was aware that a party known as Hunting Legends managed the property and managed the hunting on the farm, through one Phillip Mostert the son of Carl Mostert.

19. The respondents raised two points in limine in their opposing papers, and I will deal with each of them. The main point taken being the jurisdiction of this court to hear the eviction application.

20. The respondents argued that this court does not have the necessary jurisdiction to adjudicate this matter due to the fact that the North West High Court situated in Mafikeng, has jurisdiction to deal with the matter, as the farm Rietfontein falls within the Mafikeng High Court's jurisdiction. In terms of PIE and ESTA the jurisdiction of the court is determined by the location of the property in question.

21. The respondent's main argument in this regard is that jurisdiction of a court is determined on the day that an action is initiated and it was argued that in the case of an application, when the application is served. Therefore, when the application was served by the applicant in November 2013, the court's jurisdiction was established.

22. I was referred to the matter of *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) more specifically to page 85 thereof, where it refers to section 28(1) (a) of Act 32 of 1944. Insofar as it is relevant to the present enquiry it reads:

"The person in respect of whom the court shall have jurisdiction shall be the following and no other: any person who resides, carries on business or is employed within the

district and it is trite law that a court once it is seized with jurisdiction retains that jurisdiction until the suit is concluded."

23. It was argued therefore that once the court is seized with jurisdiction an applicant or a respondent is not allowed and may not be allowed later on to manipulate its relief or action to change the jurisdiction of the court. It was further argued by the respondents that although it is not clear whether the application was brought in terms of ESTA or PIE, they contend that such application was brought in terms of PIE, and therefore had to comply with the provisions of PIE.

24. Both PIE and ESTA, specifically provide that the court has jurisdiction to hear an eviction application if the property concerned is situated within the court's jurisdiction. It was therefore submitted that, the court does not look at the normal jurisdiction of people residing in its jurisdiction, but that the court must have regard to where the property is situated.

25. It is not in dispute between the parties that the property is situated in North West and falls under the North West Province and therefore under the North West High Court situated in Mafikeng.

26. Due to this being raised as a point in limine in the opposition of the application, I can come to no other conclusion that this is the reason the applicant filed an amended notice of motion dated 11 November 2013, wherein the applicant sought only eviction of the third, fourth and fifth respondents (the companies) and, further sought a declaratory order that the first, second and sixth respondents (the occupiers) are entitled to remain resident in the houses presently occupied by them. The relief set out is that the 1st and 2nd and 6th respondents are evicted insofar as it may be necessary from the remainder of the farm Rietfontein, and that the eviction is subject to the first, second and sixth respondents' rights to enter and traverse the farm Rietfontein for purposes of entering and exiting the houses occupied by them.

27. It was argued by the applicant's counsel that only a declaratory order is being sought against the actual occupants, labourers or any person residing on the property, simply limiting their rights of occupation over the extent of the farm.

28. Counsel for the applicant conceded that the applicant initially in the first application did not comply with any of the pre-emptory provisions of ESTA or PIE. Counsel of the applicant was of the view that if any eviction application should be brought in future, it has to be brought in terms of ESTA. According to the applicant the 6th respondents are occupiers as defined per Section 1 of ESTA" being people who live on land that belongs to another, who has, or on 4 February 1997 had, or thereafter consent or another right in law to do so." In my view ESTA indeed provides greater protection to lawful occupiers than to occupiers who are unlawfully occupying, and are protected by PIE. This property is situated in a rural area and on the applicants concession, it deals with occupants (the 6th respondents) who have permission or had prior permission to be in occupation of the farm.

29. The application for the eviction of the first, second and sixth respondents was, however, not withdrawn by the applicant, nor were any costs tendered. The applicant simply amended its notice of motion not seeking the relief any longer. It is therefore clear that the applicant has essentially abandoned any application for eviction against the first, second and sixth respondents in this application.

30. What the applicant now seeks, after amendment of the notice of motion, is an eviction of the companies, the third, fourth and fifth respondents, and a declaratory order as set out above. As put by the applicant's counsel this application now, is simply about getting the three companies off the property.

31. In dealing with the companies, it can never be said that a company as a legal entity holds occupation of a property. It can only hold occupation through its members, directors or any other person authorised on behalf of the company to hold such occupation.

32. It was further conceded that some, if not all, of the six respondents being labourers on the farm, are also members of the Malebelele Communal Property Association, the applicant, and that these persons currently occupy the property as employees of the third to fifth respondents.

33. Counsel for the applicant submitted during argument that if the court was inclined to grant a declaratory order against the first and second respondents, entitling them to occupy the houses, the court will not be asked to give the same declaratory order against the sixth respondent. The submission was made probably due to the fact that the applicant realised that most of the sixth respondent's members already occupy the property as members of the applicant, and that the applicant may never evict them.

34. It seems therefore that the applicant only wants to persist with its declaratory order against the first and second respondents, also persons employed by the 3- 5th respondent but not members of the applicant.

35. In coming to a conclusion in the matter, I must consider why PIE and/or ESTA was ever introduced into our South African legal system. The law guides the courts in regards to the legislation of PIE and ESTA to determine the approach that is to be followed by the court for eviction.

36. The court is in each instance guided by Section 26(3) of the Constitution. In *Ndlovu v Ngcobo, Bekker & Another v Jika* 2003 (1) SA 113 (SCA) the following dictum is stated in regards to an application in terms of PIE:

"the PIE act applies to unlawful occupiers irrespective if their possession at an earlier stage had been lawful. The landlords problems with the affluent tenant was not as oppressive as it seemed at first, the tenant would obviously be entitled to the somewhat cumbersome procedural advantages of the Act, to the annoyance of the landlord. However what the act did was to delay or suspend the exercise of a landowners full property right until a determination had been made whether it was just an equitable to evict the unlawful occupier, and under what conditions. Held further that provided the procedural requirement had been met, the owner was entitled to approach the court on the basis of ownership and the respondents unlawful occupation".

"Further that building or structures that did not fall under the Act, and since juristic persons did not have dwellings, their unlawful occupation was not protected by the act".

"The court in determining whether or not to grant an order or in determining the date on which the property has to be vacated, has to exercise a discretion based upon what is just and equitable."

"A court of first instance consequently does not have a free hand to do whatever it wishes to do and a Court of Appeal is not hamstrung by a traditional ground on whether the court exercise a discretion capriciously or upon wrong principle or that it did not bring its unbiased judgment to bear on the question or that it acted without substantial reasons. In exercising its discretion the court must find what is just and equitable with reference to all the relevant circumstances."

The SCA came to the conclusion that PIE does not apply to persons who occupy residential, business or industrial dwellings, or buildings under a contractual agreement or in terms of any other right to do so, and to occupy them after their rights to do so, were lawfully terminated or came to an end.

37. The fact remains that if either PIE and or ESTA is applicable, the service on the Municipality is pre-emptory due to the fact that the court has to determine whether other land had been made available or can be reasonably made available, by the Municipality or another Organ of State, or another land owner for the relocation of the unlawful occupier. Secondly, the rights and needs of the elderly, children and disabled persons and households headed by women must be regarded.

38. A court considering ESTA normally looks at how long the parties had been resident on the property. The longer they have been on the land the more they are established. The court when hearing an application for eviction is not resolving a civil dispute as to who has rights under the said law. The existence of "unlawfulness" with PIE is the enquiry, with ESTA the continued occupation, due to consent given previously or consent still in place. The court also has to consider and decide the values of the Constitution in upholding and enforcing land rights or depriving people of their homes.

39. One must also bear in mind that currently there is a court order in place granted by Bertelsmann J, on 1 October 2013, granting the third, fourth and fifth respondents free and undisturbed possession of the property known as Portions 1 and 2 of the Farm Rietfontein, including all assets and game on the property and that this possession was restored to the respondents, as it was before 13 September 2013.

40. I find this to be a right the 3-5th respondents have to the property by court order, being a right of "possession", which right certainly includes the right of "occupation".
41. Counsel did not address me on this right the respondents have. There is no application pending to have the order of Bertelsmann, J, rescinded.
42. Therefore, the current application that the third, fourth and fifth respondents are evicted from the property cannot hold muster, I find that there is not enough facts placed before this court to even begin to attempt to determine if the 1st, 2nd and or 6th respondent occupied the property by virtue of rights they acquired by consent or otherwise. The applicant was silent in its application on any of these facts. Secondly the court is confronted with facts that suggest that some of the people residing on the farm could have acquired rights by consent for their occupation which rights are continued by their employment on the farm. This employment is with the 3rd to 5th respondents, in view of the fact that there was no suggestion that the applicant employs the said people, or employed them previously.
43. The applicant is still seeking the eviction of the third, fourth and fifth respondents. Any jurisdictional issue must accordingly be decided with regards to the location of the property. The applicant is not seeking the eviction of the companies merely as a company, but seeking the eviction of any person holding such occupation under the company, as no company can act without any member or employee authorised to act on behalf of such company.
44. The applicant's fancy footwork in amending the notice of motion simply cannot withstand the scrutiny of an eviction application. I find that the applicant was obliged to place facts before this court to convince the court that persons holding the occupation of the property through the third, fourth and fifth respondents should be evicted from the property as they have no prior consent, or that they occupy a residence in terms of which their rights to occupy have been cancelled or come to an end.
45. The applicant has failed to convince me that this court has jurisdiction currently to either hear or make an order to evict the third, fourth and fifth respondents from the North West Province Rietfontein Farm, or to further make any declaratory order to limit

any occupation of any person holding such occupation under the authority of the third, fourth and fifth respondents.

46. The applicant cannot change the jurisdiction of the court by amending his application or notice of motion. The court either has jurisdiction right at the outset or it has not, and it cannot be manipulated by a party amending its notice of motion.

47. A further point in limine was raised by the respondents being non-joinder of a company known as Hunting Legends, the director of Hunting Legends being Phillip Mostert. I was informed that Phillip Mostert is the son of the first respondent, Carel Mostert. Hunting Legends was referred to in a contracting agreement entered into between Wilbo Investments (Pty) Ltd, the previous owner, which recorded that Hunting Legends would manage the property, the hunting services, lodges and animals on the farm. The agreement was not signed by the previous owner, but the respondents place reliance on the intention of the parties to enter into such an agreement, which was also referred to in the main purchase agreement as the JV (joint venture) agreement, the applicant had to enter into with the respondent.

48. I was informed, that Phillip Mostert is still attending to the management of the farm and in so doing he utilises the sixth respondent's members, who are in his employment. No service of this application was, however, made on the said Phillip Mostert.

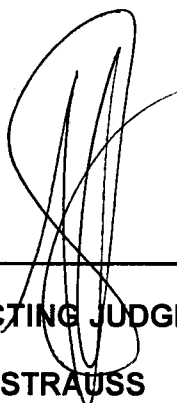
49. The issue of non-joinder, is in my opinion, not an issue to be dealt with at this stage, as the applicant will be obliged to serve on all persons occupying the said property in any future application to evict. As previously stated, however, the applicant concedes that it failed to comply with any of either the provisions of either ESTA or PIE and therefore made the concession, which concession I find is properly made, that they cannot proceed with any eviction against the first, second and sixth respondents.

50. I, however, find that the applicant can therefore also not proceed with any eviction application as it now seeks to do against the third, fourth and fifth respondents due to the fact that the third, fourth and fifth respondents' occupation and possession of the property and the game thereon are, firstly, still in place in accordance with a court

order granted by Bertelsmann, J and, further, that they hold such occupation only through their members and/or employees. The one cannot be separated from the other.

I therefore make the following order:

- 1. The application is dismissed;**
- 2. The applicant to pay the costs of the application.**



ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA
S. STRAUSS

DELIVERED: 25 JULY 2014

ATTORNEY FOR APPLICANT : D'AMICO INC

ATTORNEY: H KARSAS

COUNSEL: R STOCKWELL SC

ATTORNEY FOR RESPONDENTS: SPIES, BESTER, POTGIETER

ATTORNEY : I BESTER

COUNSEL: A MURPHY