



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: <del>YES</del> / NO	
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO	
(3) REVISED	
DATE <u>29/6/16</u>	SIGNATURE <u>[Signature]</u>

*29/6/2016*

Case Number 36480/2014

In the matter between:

**ANTHONY GRAHAM ALCOCK**

First Applicant

**SUSAN KAREN ALCOCK**

Second Applicant

and

**ANDRE CARL ERASMUS**

First Respondent

**KUNGWINI LOCAL MUNICIPALITY**

Second Respondent

**JUDGMENT**

**CANCA AJ**

## **INTRODUCTION**

- [1] This is an application for the eviction of the first respondent, and all persons holding under him, from the property situated at Portion 457 of Portion 57 of the farm Zwavelpoort, Registration Division JR, Gauteng Province ("the property").
- [2] The applicants are the registered co-owners of the property and allege that the first respondent is in unlawful occupation thereof.
- [3] The first respondent, who previously owned the property prior to it being sold in execution, opposes the application.
- [4] The second respondent has not opposed the application nor was it represented at the hearing of the matter.

## **BACKGROUND FACTS**

- [5] I set out hereunder the factual history of this matter chronologically.
- [6] On 5 November 2007 Absa Bank Limited ("Absa") obtained a judgment, by default, against the first respondent for, *inter alia*, payment of the sum of R2 622 923.86 and an order declaring the property executable.
- [7] On 25 May 2011 Absa buys the property at a sale of execution.

- [8] On 16 November 2011 the first respondent brings an application for the rescission of Absa's judgment. The application is dismissed on 18 December 2012.
- [9] The first respondent then applies for leave to appeal the dismissal. This application is dismissed on 6 March 2013.
- [10] On 12 November 2013 the Supreme Court of Appeal grants the first respondent leave to appeal to the Full Bench of this Court. He delivers his Notice of Appeal on the respondents in the appeal on 26 November 2013.
- [11] The property is transferred into the names of the applicants on 2 April 2014.
- [12] The applicants then launched this application against the respondents in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 ("the PIE Act") on 20 May 2014.
- [13] Although the first respondent was, in terms of the Uniform Rules of Court ("the Rules"), required to have served his answering affidavit to the first applicant's founding affidavit by 20 June 2014, he only did so on 7 August 2014, a few days before the initial hearing of this matter.
- [14] The first respondent averred that he could not be evicted from the property because the order in terms of which the property was sold in execution was incorrect and that his application to have the sale declared void and set aside was still the subject of an appeal.

- [15] In reply, the applicants averred, *inter alia*, that the outcome of the appeal would not effect this application or their title to the property and finally that, having failed to prosecute the appeal in terms of the Rules, the first respondent's appeal had, in any event, lapsed.
- [16] On 24 November 2014 the application is heard by Mphahlele J who reserved her judgment. On 28 November 2014, the application is postponed *sine die* possibly because of the pending appeal.
- [17] The appeal against the dismissal of the rescission application is struck from the roll with costs on 9 September 2015, possibly for failure by the first respondent to prosecute his appeal.
- [18] The applicants then re-instated the matter and set it down for hearing on 25 April 2016. At the hearing of the matter, Mr Maritz, for the first respondent, raised two issues: Firstly, he contended that the matter could not proceed as it was *res iudicata*. Secondly, he drew my attention to the fact that the first respondent had earlier that morning served an application for condonation on the respondents in the appeal.
- [19] During the course of argument, I raised the question of what would be a reasonable time for the first respondent to move from the property if the eviction application was successful and whether there were special circumstances I would have to consider when determining the equities of the case.
- [20] Following argument, I directed the parties to furnish me with short heads of argument dealing with the issues raised in oral argument. The applicants filed their supplementary heads of argument ("heads") on 4 May 2016 and the first respondent filed his heads the following day, 5

May 2016. However, in his supplementary heads, the first respondent raised, as a point *in limine*, the non-applicability of the PIE Act in these proceedings. This necessitated, at my request, written submissions on the weight to be accorded to this point given that it was raised for the first time at that late stage of the proceedings. The applicants duly furnished their second set of further supplementary heads on 9 June 2016.

### **POINT IN LIMINE**

[21] Mr Maritz contended that, rather than the PIE Act being applicable, it was the Extension of Security of Tenure Act 62 of 1997 ("ESTA") which was of application in this matter. Reliance for this contention was placed on the fact that the property was described as a farm and not a stand in a township. ESTA was applicable to land "other than land in a township established, proclaimed or otherwise recognised as such...", so the contention continued.

[22] Although Mr Maritz was contrite in not having canvassed this issue in any of the previous papers, he is well within his rights to raise a point of law at any stage before judgment. However, save for making the bald assertion that section 20 of ESTA specifically excluded the jurisdiction of this Court, Mr Maritz neither cited the relevant provisions of section 20 on which he based his argument nor did he support his argument with any authority.

[23] Mr Campbell, for the applicants, correctly conceded the first respondent's right to raise a legal point at this late stage. However, he argued that there was no merit to the point raised *in limine*. Mr Campbell deals fairly comprehensively in his further supplementary heads with this issue. I am grateful to him for this point can now be satisfactorily discussed.

[24] The differences between the PIE Act and ESTA are set out briefly as follows by Tshiqi AJA in *Randfontein Municipality v Grobler and Others* [2010] 2 All SA 40 (SCA) at 42 e-h:

*"The main distinction is that broadly speaking ESTA applies to rural land outside townships and protects the rights of occupation of persons occupying such land with consent after 4 February 1997, whilst PIE is designed to regulate eviction of occupiers who lack the requisite consent to occupy. Occupiers protected under ESTA are specifically excluded from the definition of "unlawful occupier" in PIE. An order for the eviction of occupiers may be granted under ESTA by a competent court on just and equitable grounds, having regard to the different considerations applicable in each instance. The Land Claims Court is a specialist tribunal established by section 22 of the Restitution of Land Rights Act 22 of 1994 and enjoys jurisdiction, subject to sections 17, 19, 20 and 22 of ESTA, to deal with cases determined under ESTA. It follows, therefore, that if the land was occupied with consent, either express or tacit, the jurisdiction of the High Court to deal with it is excluded in the absence of consent to its jurisdiction."*

It is also important to note that the PIE Act applies in respect of all land throughout the Republic and defines land to include a portion of land.

- [25] In order to succeed with his point *in limine*, it is not sufficient for the first respondent to merely show that the property in question was rural in nature. The hurdle to be surmounted is steeper than that.
- [26] The first respondent has to show that he is an occupier in terms of ESTA. An occupier is defined as "*a person residing on land which belongs to another and who has or on 4 February 1997 or thereafter had consent or another right in law to do so...*"
- [27] The first respondent commenced living on land belonging to another from the date when he lost his ownership pursuant to the transfer thereof to Absa and the subsequent owners of the property. The first respondent also had to show that he earned less than R5 000.00 per month.
- [28] The intention of the Legislature in enacting ESTA was held in *Molusi v Voges* NO 2016 (3) SA 370 (CC) at [1] to be the regulation the eviction of vulnerable occupiers from land in a fair manner, while recognising the rights of land owners.
- [29] There is no evidence that the first respondent has been occupying the property with the applicants' consent or that he is a vulnerable occupier. On the contrary, the applicants initiated these eviction proceedings shortly after they acquired ownership of the property. Therefore it cannot be seriously argued that the first respondent occupied the property with the applicants' express or tacit consent. Even if there was such consent between the period when the applicants acquired ownership and the launch of these proceedings, the notice served on the first respondent in terms of section 4 (2) of the PIE Act was sufficient

notification that such consent was being revoked. See the dictum of Harms JA in *Ndlovu v Ngcobo* 2003 (1) SA 113 at 121 D-E where the learned Judge states that an erstwhile owner becomes an unlawful occupier once his property has been sold in execution and thereafter transferred to a purchaser.

[30] In my view, the first respondent is not an occupier as defined in ESTA. Whilst the first respondent might be entitled to re-transfer of the property if his rescission application succeeds, until the property is transferred back to him, he is not the owner thereof.

[31] It follows that, in my view, there is no merit to the point *in limine*.

[32] This brings me to the next enquiry.

#### **IS THIS MATTER RES IUDICATA?**

[33] Mr Maritz argued that when Mphahlele J, following argument by the parties, postponed the matter *sine die*, the learned Judge had considered the same papers and the same arguments before me, rendering the issue *res iudicata*.

[34] Mr Campbell countered this argument, relying on the dictum of Brand JA in *Prinsloo NO & Others v Goldex 15 (PTY) Ltd & Another* [2012] JOL 28866 (SCA) at [10] where the learned Judge described *res iudicata* to mean that:

*"...the matter has already been decided. The gist of the plea is that the matter or question raised by the other side has been finally adjudicated*



*upon in proceedings between the parties and that it therefore cannot be raised again."*

[35] I have difficulty in understanding on what basis Mr Maritz, merely because the matter was argued but ended up being postponed *sine die*, is seriously contending that these proceedings have been "finally adjudicated". A matter that is postponed *sine die* clearly means that no final decision has been taken. Any party to such a matter is well within his or her rights to re-enrol same in order to obtain a final determination thereof. This is what the applicants have done *in casu*. The order granted by Mphahlele J which postponed the matter *sine die*, does not state that such postponement should endure until finalisation of the appeal.

[36] There is, in my view, no traction to the *res iudicata* argument. It therefore cannot be sustained.

### **IS THE APPEAL RELEVANT TO THESE PROCEEDINGS?**

[37] The first respondent contended that in view of the provisions of Section 18(1) of the Superior Court's Act 10 of 2013 which states that "*The operation and execution of the decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application on appeal.*" these proceedings could not be determined until the appeal has been disposed of. The sale and transfer of the property was in contravention of the aforesaid section 18(1) and therefore void, the contention continued. Mr Maritz relying on the judgments of the South Gauteng Full Bench in *Vosal Investments (PTY)*

*Limited v City of Johannesburg* 2010 (1) SA 595 at para 16 and *Knox v Mofokeng & Others* 2013 (4) SA 46 (GSJ) at 50 A-G further contended that should the rescission application succeed on appeal, the sale and registration of the property into the name of the applicants will be impeachable.

[38] The essence of these authorities is that an owner of immovable property is entitled to its restoration from a *bona fide* purchaser at a sale in execution, following a rescission of the judgment, particularly where the purchaser was aware of an attack on the judgment.

[39] In the view that I take it is irrelevant whether or not there is substance to Mr Maritz's argument and whether the appeal is relevant to these proceedings. The fact of the matter is that there is no pending appeal and no pending application for leave to appeal. The application delivered on the morning of 25 April 2016 is for condonation and other relief relating to the lapsed appeal against the dismissal of the rescission application. It does not constitute a bar to this PIE ACT application.

#### **FACTORS RELEVANT TO THE EVICTION**

[40] As stated in paragraph 18 above, I requested the parties to furnish me with written submissions on, *inter alia*, factors I should consider regarding the equities of the matter in the event that I found that the applicants were successful in these proceedings. The first respondent elected not to address this issue.

[41] According to Mr Campell's further supplementary heads, the first respondent is 54 years of age and neither party has contended that the property, which has two dwellings on it, is occupied by persons warranting the attention of this Court. There is also no indication that any farming is undertaken on the property. The first respondent has also not indicated that he cannot afford alternative accommodation.

### **CONCLUSION**

[42] The applicants have complied with the statutory provisions entitling them to the relief they seek. I can find no reason for them to continue to be deprived of their right to the use and enjoyment of the property.

[43] In the result, I order as follows:

1. Andre Carl Erasmus and all persons holding under him are hereby ordered to vacate the property situated at Portion 457 of Portion 57 of the farm Zwavelpoort, Registration Division JR, Gauteng Province, measuring 1,0005 (ONE COMMA ZERO ZERO ZERO FIVE) hectares, held by Deed of Transfer T23737/2014, on or by 29 July 2016.

2. Should Andre Carl Erasmus and all persons holding under him, fail and or refuse to vacate the property situated at Portion 457 of Portion 57 of farm Zwavelpoort, Registration Division JR, Gauteng Province by 29 July 2016, the Sheriff for the District or his Deputy, where the property is situated, are hereby authorised to evict Andre Carl Erasmus and all persons holding under him from the property on or after 1 August 2016.

3. The first respondent is ordered to pay the costs of the eviction application.



**MP Canca**

**Acting Judge of the High Court**

**Gauteng Division, Pretoria.**

**APPEARANCES:**

**For the applicants: Mr AG Campbell**

**Instructed by: REG JOUBERT ATTORNEY, Edendale.**

**For the first respondent: Mr S Du T Maritz**

**Instructed by: CMM ATTORNEYS INC,**

**C/O VAN RENSBURG JORDAAN & OLIVIER Centurion.**

**Date Heard :**

**Date of Judgment :**

