IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case no: AR226/19

In the matter between:

THE NATIONAL LEADERSHIP FORUM OF THE APOSTOLIC FAITH MISSION OF SOUTH AFRICA — **APPELLANT**

and

APOSTOLIC FAITH MISSION OF SOUTH AFRICA (ASSEMBLY: MERCY MINISTERIES) AND ITS OCCUPANTS — **FIRST RESPONDENT**

TE NXUMALO — **SECOND RESPONDENT**

Coram: KOEN, MOODLEY and MNGUNI JJ

Heard: 3 July 2020

Delivered: 10 July 2020

ORDER

On appeal from: The KwaZulu-Natal Division of the High Court, Pietermaritzburg (Bezuidenhout J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

KOEN J (MOODLEY et MNGUNI JJ concurring)

[1] On 10 June 2013 the applicant launched an application seeking the following relief:

'1. That both the 1st and the 2nd Respondents be evicted from the property situated at AFM MERCY MINISTERIES, UMNAMFU WARD 19, UMTWALUMI (GPS CO-ORDINATES: 4185 KZN RURAL SA 30 30 25S; 030 36 15E) ALSO SITUATED NEXT TO LINDELANE STORE AND POST OFFICE UMTWALUMI;

2. Costs of the Application.'

[2] On 25 May 2018 Bezuidenhout J in a written judgment dismissed the application with costs. This appeal is against that judgment with the leave of the Supreme Court of Appeal.

[3] It is trite law that the ejectment of an occupier of property can be obtained by means of:

(a) the *rei vindicatio*, where reliance is placed upon the applicant's ownership and the respondent's occupation of the property; or

(b) a possessory claim, where the applicant's title to the property from which the respondent is to be evicted need not be proved, but the applicant must prove the right of the respondent to have occupied the property,[1] for example an

[1] *Boshoff v Union Government* 1932 TPD 345.

agreement of lease, a valid termination of that right,[2] and the continued occupation by the respondent or someone holding on his behalf or through him.[3]

[4] It is not clear on which basis the application in this appeal was presented. It is perhaps best to say that it might be a combination of both.

[5] On the one hand it was alleged, although it was not stated on what basis the first respondent had initially come to occupy the property, that the first respondent, under the guidance of its pastor, the second respondent, has seceded from the Apostolic Faith Mission, and that it was accordingly obliged in terms of the constitution of the Apostolic Faith Mission, to hand the property to the Regional Leadership Forum. There are however a number of difficulties with that submission: the applicant is cited as the National Leadership Forum; the Regional Leadership Forum allegedly entitled to 'the property' is not a party to the application; it might be thought that the national and regional fora are simply structures in the Apostolic Faith Mission Church. Yet according to an order which the National Leadership obtained in the North Gauteng High Court, Pretoria, under case no 54947/2010, 'the Apostolic Faith Mission of South Africa and all its congregations, councils and institutions, governed and created in terms of its Constitution, as amended' were declared as 'corporate *bodies* under the common law' (emphasis added), thus suggesting they are separate entities.

[6] On the other hand, reliance was placed on an unsigned permission to occupy (PTO) dated 1 February 1996 granted to the 'Apostolic Faith Mission of Africa' to occupy the property. The difficulty with this cause of action, which is vindicatory in nature, is that it required the applicant to establish a valid title to the property. However, the name of the holder of the PTO differs from the name of the applicant, which might or might not be significant given the terms of the declaratory order which had been granted by the Gauteng High Court; and some doubt was cast on the validity of that PTO in the light of a more recent PTO apparently being issued to a Mr Zuma for the Turton Community Centre in respect of the same property.

---

[2] *Myaka v Havemann* 1948 (3) SA 457 (A).
[3] *Pretoria Stadsraad v Ebrahim* 1979 (4) SA 193 (T); *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T).

[7] The court *a quo,* notwithstanding an allegation by the applicant that this second PTO had been issued in error and was to be withdrawn by the chief, correctly pointed out that the letter from the chief annexed to the founding affidavit, said no such thing, but merely indicated that the matter was being investigated. Proceeding on what he considered to be a concession by the applicant regarding the validity of the second PTO, the learned judge in the court a quo concluded that the applicant had to establish 'a valid cancellation of such permission to occupy *and of the lease agreement'* (emphasis added). The answering affidavit alleged that a lease had been concluded in respect of the property by the Turton Community Centre with the Ingonyama Trust Board[4] and that the Mercy Ministries International Church, a separate juristic entity which occupies the property, in turn had a lease with the Turton Community Centre.

[8] Whatever criticism may be attached to the learned judge's statement that the applicant had conceded that a subsequent PTO was granted to the Turton Community Centre, the conclusion he reached in regard to the lease cannot be faulted.

[9] However, even assuming in favour of the applicant that it had established that it held a PTO in respect of the property:

(a) insofar as its claim was a possessory claim and it relied on the first respondent having seceded from it, the second respondent denied a secession and alleged that the first respondent was dissolved in 2009.[5] The consequences which would follow on secession, whatever those consequences might be, accordingly were disputed;

(b) insofar as the claim was a vindicatory claim, the second respondent alleged that the property is owned by His Majesty, King Goodwill Zwelithini kaBhekuzulu under the KwaZulu-Natal Ingonyama Trust Act.[6]

---

[4] A copy of this lease was provided subsequently as an annexure to the supplementary answering affidavit.

[5] For that reason too, the second respondent, being the deponent to the answering affidavit, did not profess to represent the first respondent, as it had ceased to exist.

[6] KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994.

Material disputes of fact accordingly exist in respect of the applicant's locus standi in respect of either basis on which the applicant might have wished to proceed.

[10] Further, regardless of the basis on which the applicant sought to proceed, in order to succeed with the eviction, the applicant had to establish in respect of both causes of action that the respondents were in occupation of the property. The second respondent's version is that the first respondent no longer exists, and accordingly, it cannot be in occupation. Insofar as it was alleged that he was in occupation, he alleged that he is not in occupation but is the pastor of a separate juristic entity, namely the Mercy Ministries International Church, which is the occupant and leases the property from the Turton Community Centre. There is accordingly also a material dispute as to who occupies the property. The second respondent only exercises any rights through the Mercy Ministries International Church and the Turton Community Centre.

[11] The aforesaid contentions were disclosed in the answering affidavit. It was readily apparent that they gave rise to a number of material disputes of fact.[7] Where disputes of fact arise in application proceedings the party seeking the relief is placed before an election to request either that the matter be referred to oral evidence or trial, or to argue the matter on the papers, as they stand. It is an election that must be made at the outset.[8] If a party elects to argue the matter on the affidavits, then, in accordance with the well-known *Plascon-Evans*[9] principle, the facts on which the court must decide whether the applicant has made out a case for the relief claimed, are the facts stated by the respondent together with the admitted facts. The facts stated by a respondent must be accepted 'unless they constitute bald or uncreditworthy denials, or are palpably implausible, farfetched or so clearly untenable that they can safely be rejected on the papers'.[10] The respondent's version cannot be rejected on any of these grounds. The denials in the replying affidavit do not assist the applicant.

---

[7] *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1159 – 1162.
[8] *Di Meo v Capri Restaurant* 1961 (4) SA 614 (N).
[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635F.
[10] *Media 24 v Oxford University Press* 2017 (2) SA 1 (SCA) para 36.

[12] Leaving aside the issue that the papers did not establish that the respondents were in occupation of the property, and assuming in the applicant's favour that at least the second respondent may be physically present on the property, the court a quo did not err in referring to the lease upon which the second respondent relies for the occupation of the property by the Turton Community Centre, and through it, the Mercy Ministries International Church. The applicant had not established, on the facts the court a quo was required to have regard to, that the lease with the Ingonyama Trust had been cancelled or was otherwise invalid.

[13] The defences raised in the answering affidavit also necessarily implicated the legal interests of the Turton Community Centre and the Ingonyama Trust, neither of which had been joined. That non-joinder was also fatal to the application.

[14] In the circumstances the application as presented to the court a quo had no prospects of succeeding and had to be dismissed with costs.

[15] When the Supreme Court of Appeal granted the petition for leave to appeal, it set aside the costs order granted by the court a quo when it dismissed the applicant's application for leave to appeal. It directed that those costs and the costs relating to the petition for leave to appeal to the Supreme Court of Appeal were to be costs in the appeal. The costs order issued in this appeal shall accordingly include those costs. They do not have to be specified separately.

[16] The appellant has been unsuccessful. There is no reason why it should not be ordered to pay the costs of the appeal.

[17] The appeal is accordingly dismissed with costs.

_____

KOEN J

Appearances

For appellant:	Mr S. Tshabalala
Instructed by:	Meintjies & Petzer Attorneys c/o Venns Attorneys Pietermaritzburg Ref: 04176732 AL/gail/A369 docl@venns.co.za
For respondent:	Mr W. S. Kuboni
Instructed by:	Justice Nzimande & Associates c/o Tenza Attorneys Pietermaritzburg tenzaattorneys@telkomsa.net