IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 12045/19

In the matter between:

RUIGTEVLEI FARM LABOUR TENANT ASSOCIATION	Applicant
and	
ERNEST JULIUS HARBICH	First Respondent
DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Second Respondent
REGISTRAR OF DEEDS (WESTERN CAPE)	Third Respondent
JOHAN STEYN	Fourth Respondent

Bench: P.A.L.Gamble

Heard: 10 September 2020

Delivered: 18 December 2020

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10H00 on Friday 18 December 2020

JUDGMENT DELIVERED ON 18 DECEMBER 2020

GAMBLE, J:

INTRODUCTION

1. The first respondent ("Mr. Harbich") is an Austrian national who owns the farm "Ruigtevlei" in the Wellington district. According to the applicant ("the Association") Mr. Harbich was last seen on the farm in about 2003. The Association (which includes a number of persons formerly employed by Mr. Harbich and who reside on the farm) claims that Mr. Harbich has abandoned the farm, that the land is thus *res nullius* and has accrued to the State as *bona vacantia*.

2. The Association claims transfer of the farm to it from the State once the land has been expropriated. The Association says it has adopted what it calls a 'business plan' to enable it to farm some of the 500 hectares that make up the farm. The Association claims to enjoy the support of the second respondent, the Department of Rural Development and Land Reform ("the Department"), which has filed a notice to abide in these proceedings

3. The relief sought by the Association in its notice of motion is wide ranging. It asks for orders –

(i) Declaring the farm to have been abandoned;

(ii) Directing the Department to expropriate the farm;

(iii) Directing the third respondent (the local Registrar of Deeds) to register the farm in the name of the Association; and

(iv) Directing the fourth respondent (Mr. Johan Steyn, the current lessee of the farm) to pay any rentals due to Mr. Harbich directly to the Association.

4. The relief so sought is, self-evidently, both novel and far-reaching. While Mr. Kilowan, who appeared for the Association, accepted that the case was without precedent in our law, the relief sought in the founding papers is fundamentally grounded on the fact that the farm has been abandoned by its owner. The consequent expropriation of the land and the transfer to the Association was not sought on any other basis.

5. Mr. van Reenen, who appeared for Mr. Harbich, submitted that the relief sought was “frankly bizarre”, noting that it amounted to a declaration of abandonment of land which then vested in the State and an order directing the State to transfer it to the Association without cost to the Association. The perversity in the Association’s case, said Mr. van Reenen, was that it recognized that there was a lessee on the land who was to be directed to pay arrear rental going back some 17 years to the Association. The mere presence of a lessee on the land, it was further submitted, flew in the face of an allegation of abandonment by the owner.

6. Further, said Mr. van Reenen, any relief seeking expropriation of the farm was required to be advanced under the Expropriation Act, 63 of 1975, which provides for the Minister of Public Works to expropriate privately owned land. In so

doing, it was further submitted, the Minister in question is bound by the provisions and procedures contemplated in the Expropriation Act and any interference by the Court in such an executive function was said to amount to an impermissible breach of the separation of powers principle. Finally, said Mr. van Reenen, the Minister of Public Works has not been joined in these proceedings

THE APPROACH TO ESTABLISHING THE FACTS

7. Having elected to utilize motion proceedings to advance its case for final relief, the Association is bound by the rule in Plascon-Evans[1]. Accordingly, where there are disputed facts Mr. Harbich's version will prevail, unless he raises denials which are not *bona fide* or which do not raise genuine disputes of fact. Moreover, where there are facts which, although not formally admitted, cannot be denied, they are to be regarded as admitted.

8. In Zuma[2] the Supreme Court of Appeal reminded litigants that motion proceedings are not designed to resolve factual disputes.

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's … affidavits, which have been admitted by the respondent …together with the facts alleged by the latter, justify such order. It may be different if the

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E – 635C.

[2] NDPP v Zuma 2009 (2) SA 277 (SCA) at [26]

respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

9. Lastly, in Die Dros[3] the court emphasised the function of affidavits in motion proceedings.

"It is trite that the affidavits in motion proceedings serve to define not only the issues between the parties but also to place the essential evidence before the Court…for the benefit of not only the Court but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief being sought is based. Facts may be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts are called secondary facts…Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see Radebe and others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C – E) and accordingly do not constitute material capable of supporting a cause of action."

WHAT ARE THE FACTS?

10. Applying the approach mandated in these cases, and having regard to the affidavits filed by, and on behalf of, Mr. Harbich, the following facts are, in my view, uncontestable.

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[3] Die Dros (Pty) Ltd v Telefon Beverages CC and others 2003 (4) SA 207 (C) at 28

11. Mr. Harbich, an Austrian national, began visiting South Africa from 1990 onwards and acquired the farm in February 1991. In 1993 – 1994 and 1997, he was granted a work permit by the Department of Home Affairs. After his 1997 work permit expired, Mr. Harbich continued to travel to South Africa, at all times entering the country on a visitor's visa.

12. In 2002 Mr. Harbich ceased farming activities on Ruigtevlei and leased out the arable land on the farm to Mr. Joachim Steyn (the brother of Mr. Johan Steyn, the fourth respondent) but continued to visit the Republic as before on a succession of visitor's visas in order to attend to his business interests, as he put it.

13. In November 2005, when Mr. Harbich sought to leave South Africa, he was informed by the authorities that he had overstayed his visitor's visa. On attempting to return to the Republic on 5 March 2006, Mr. Harbich was told by Immigration Control at OR Tambo International Airport that his visa exemption had been withdrawn and he was accordingly refused entry into the country. His subsequent attempts to obtain a visa through the South African Embassy in Austria were unsuccessful.

14. On 4 March 2007 Mr. Harbich tried to enter South Africa via Namibia and was once again unsuccessful. His various attempts, both at the border post and later in Austria, to establish the reasons for the refusals were not successful either. This is adequately demonstrated by official documentation attached by Mr. Harbich to the answering affidavit. Subsequently, Mr. Harbich's lawyers in both South Africa and Namibia were unable to secure his return to the Republic.

15. At the commencement of the hearing on 10 September 2020, Mr. Harbich's local attorney produced supplementary affidavits recently deposed by the two Steyn brothers that were admitted into evidence by agreement between the parties. Those affidavits show that on 7 May 2002 Mr. Harbich and Mr. Joachim Steyn concluded a lease agreement in respect 144 ha of arable land on the farm for a period of 3 years. Thereafter, the lease was renewed from time to time and was due to terminate on 31 March 2022.

16. Mr. Joachim Steyn says he lost interest in farming in 2015 and so he sublet the farm to his brother Johan who later concluded a written lease with Mr. Harbich on 9 April 2019. That lease, says Mr. Johan Steyn, is current and the rental due thereunder is paid into a bank account nominated by the lessee in the lease. Further, says Mr. Johan Steyn, he cultivates wheat and canola on the farm and uses his own workers in the furtherance of this business.

17. The position thus is that since he ceased farming activities in 2002, Mr. Harbich has adequately demonstrated a desire to return to South A to attend to his affairs but he has been precluded from doing so by the Department of Home Affairs. It has thus been established that Mr. Harbich evinced an intention to retain the farm as his property and has taken steps consistent with the ordinary rights of ownership in immovable property.

THE ASSOCIATION'S CAUSE OF ACTION

18. The Association claims that some of its members were employed by Mr. Harbich when he left the farm in 2002. In terms of their contracts of employment they

were given accommodation on the farm and supplied with water and electricity. They complain that, after his return to Austria, their contracts of employment were not honoured by Mr. Harbich who effectively left them to their own devices on the land.

19. The deponent to the founding affidavit, Ms. Sarah April, says that she and her husband were employed on the farm at the time that Mr. Harbich acquired it – she as a domestic worker and her husband as a labourer. Mr. Harbich does not dispute these allegations, saying he no longer has any recollection of their employment status due to the passage of time. Nor does he dispute the further allegations by Ms. April that a number of workers and their families employed on other farms in the area also moved onto the land over the years. Currently, she says, there are more than 30 women and 39 children on the land together with some 16 former employees of Mr. Harbich. It is not in dispute that these people live in abject poverty without access to electricity (which has been cut off) and running water (due to the borehole pump having been stolen).

20. According to Ms. April, the Association was established in 2017 as a non-profit organization designed to enable its members to alleviate the poverty in which they found themselves. She says that the Association attempted to secure minimum access to water and electricity but was unsuccessful because it did not own the land. Furthermore, says Ms. April, the Association was unable to establish the whereabouts of Mr. Harbich to attempt to procure his consent and co-operation to enable the Association to access these basic necessities of life through the local municipality.

21. Ms. April points to a newspaper report in 2011 which records that a house in Wellington belonging to Mr. Harbich was auctioned off by the Drakenstein Municipality due to the non-payment of rates and, further, because the building constituted a health hazard. Ms. April also refers to an extract from the Government Gazette in 2008 in which notice was published of the expropriation of certain land owned by Mr. Harbich in the Malmesbury district.

22. These facts are all put up in an endeavour to draw the inference that the farm has been abandoned by its owner. The cause of action on which the Association relies is set out as follows in the founding affidavit of Ms. April.

"44. I respectfully submit that 1st Respondent similarly has no further interest in the farm and that he does not intend to return to the farm.

45. The 1st Respondent's abandonment of the farm will leave me and the other members of the Applicant in the most untenable situation in that government departments who would wish to assist us can only do so to a limited extent and the 4th Respondent will also not release any of the rental money to the Applicant for the purposes of alleviating our living conditions.

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47. We have also made contact with officials from 2nd Respondent and have been given the indication that they would be prepared to assist us. I annex a letter…from the Western Cape Chief Director of the 2nd Respondent in which she confirmed that the department would support the…'people living on the land.'

48. I have been advised that the only sustainable and legal way of accessing government assistance and the rental money that the 6th (sic) Respondent has been depositing into the

trust account, is to approach this Honourable Court for the orders as set out in the Notice of Motion."

23. The founding affidavit does not state, in terms, what the Association's cause of action is. It seems to be the case that, if it is established that the farm has been abandoned, the Department must be ordered to expropriate the land and give it to the Association so that its members can utilize it to advance their own interests. However, that argument is fatally flawed to the extent that it seeks an order against the Department because it does not have the statutory power to expropriate the farm – only the Minister of Public Works can initiate that process.

HAS THE FARM BEEN ABANDONED?

24. Even if the application is brought against the correct Department of State, the expropriation argument can only be advanced if the Association can show that the farm has been abandoned by Mr. Harbich.

25. In Papas[4] the court was required to consider whether certain immovable property had been abandoned in favour of the City of Johannesburg pursuant to an agreement concluded with the municipality in consequence of the failure by the deceased owner to pay rates due on the property. The legal position was summarized by the court thus.

"[4] An abandonment of property by the owner thereof, with the intention to relinquish ownership, results in the loss of ownership by *derelicto.* The abandoned property becomes

[4] Papas NO v Motsere Trading CC and others [2014] ZAGPJHC 144 (6 June 2014)

res nullius and is open to acquisition by another. (see Reck v Mills en 'n ander 1990 (1) SA 751 (A) 757C-D; Wille's Principles of South African Law 9th ed 490/1; CG van der Merwe Sakereg 2nd ed 377) For abandonment there must be an intention by the owner to abandon the property (see Meintjes NO v Coetzer and others 2010 (5) SA 186 (SCA) [16]). Whether a clear intention of abandonment exists is a question of fact to be proved in each case (cf Salvage Association of London v SA Salvage Syndicate 1906 SC 169 at 171; Goldstein & Co (Pty) Ltd v Gerber 1979 (4) SA 930 (A) at 936/7)."

26. It is axiomatic that if an owner of land concludes a lease in respect of his/her immovable property it is to be concluded that there is still an intention to deal with the property *qua* owner. It is common cause that the owner has leased out the farm for the past 18 years or so. This is in fact the case which the applicant advances in the founding papers.

27. In the circumstances, the allegations made in the founding affidavit, the uncontested evidence of Mr. Harbich as set out in the answering affidavit and the objective facts that successive agreements of lease and sub-lease were concluded during the period that he was unable to return to South Africa, lead to the unassailable conclusion that the owner has not given up his rights of ownership in the land. It follows thus that the Association has not discharged the onus that it has drawn to prove the abandonment of the farm.

28. In the result, the primary relief sought by the Association in prayer (a) of the notice of motion must be refused. The refusal of that relief means that the remaining relief, which is predicated on the success of prayer (a), must also be refused, regardless of whether the correct parties are before court or not.

THE CONSTITUTIONAL ARGUMENT

29. In his heads of argument, which were delivered late and after the heads on behalf of Mr. Harbich had been filed, Mr. Kilowan sought to advance a constitutional argument as the Association's fallback position. This argument was to the effect that what was regarded by counsel as the leading case on abandonment, Sonnendecker[5], had been decided in the pre-constitutional era and that the Court was now "enjoined to expand the common law to give effect to the Constitutional imperatives."

30. The argument was based on the provisions of the right to human dignity enshrined in s10 of the Constitution, 1996 read in the context of the provisions of s27(1((b) thereof which embrace the rights to sufficient food and water. The argument then jumped to the decision of the Constitutional Court in Daniels[6] and, in particular, the *dictum* of Justice Madlanga at [2] that links the right to security of tenure to the right to human dignity.

31. The development of the common law is sanctioned by s173 of the Constitution, but it is not relief which is simply there for the asking. In Mighty Solutions[7] the Constitutional Court explained the approach to be adopted in such an application.

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[5] Minister van Landbou v Sonnendecker [1979] 2 All SA 19 (A)

[6] Daniels v Scribante and another 2017 (4) SA 341 (CC)

[7] Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and another 2016(1) SA 612 (CC) at [38]

"Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law."

32. The injunction that the Court should develop the common law regarding the approach to the abandonment of immovable property is manifestly an after-thought on the part of the Association's counsel that appears only in his heads of argument - not a word is said thereof in the affidavits or the notice of motion. And, it is not insignificant that the claim was advanced only after receipt of Mr. van Reenen's heads of argument in which the folly of the Association's claims is thoroughly dealt with.

33. That really is the end of any case for constitutional relief which a court might consider under s172(1) of the Constitution. As noted earlier, in motion proceedings the affidavits constitute both the pleadings and the evidence and in this matter there is not a tittle of evidence nor a conclusion of law flowing therefrom to sustain any constitutional argument under s173.

34. Cases for the advancement of constitutional rights and, most importantly, the reconsideration and development of the common law, should be properly articulated in the papers, with the requisite notice being given under Rule 16A (if necessary), and the joinder of interested parties and *amici* being facilitated

where appropriate. Importantly, as the Constitutional Court pointed out in Carmichele[8] arguments in favour of developing the common law must be raised timeously and fully, given the myriad considerations which come into play in any given set of circumstances.[9]

35. At the very least, the court must be told what aspect of the common law is being assailed, how that part of the common law is considered to be inconsistent with the Constitution and what the desired outcome is. The Constitution is not a booklet to be hauled out of the litigator's jacket-pocket and whose contents are to be resorted to loosely in argument when the case as pleaded is heading down a cul-de-sac.

36. The plight of labour tenants and the invidious position they occupy in our constitutional dispensation is a tenuous one, as was recently highlighted by the Constitutional Court in Mwelase[10]. Yet, this case is *prima facie* not about labour tenancy at all: there has been no attempt to drive the occupants of Ruigtevlei off the land. Rather, the case appears to be about the consequences of an employer effectively abandoning his contracts of employment with his farm workers.

37. If indeed there is a constitutional claim to be advanced in such circumstances (and I must not be understood to suggest that there is an argument one way or the other), the argument needs to be properly thought through, articulated

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[8] Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at [31]; [51] *et seq.*

[9] See the considerations taken into account by Moseneke J in Thebus and another v S 2003 (6) SA 505 (CC) at [28] *et seq.*

[10] Mwelase and others v Director-General for the Department of Rural Development and Land Reform and another 2019 (6) SA 597 (CC)

and presented to the court for adjudication. It is only in that way that the interests of marginalized litigants can be advanced and the requisite relief ultimately granted under the Constitution.

CONCLUSION

38. In light of the aforegoing, I conclude that the application must fail.

39. In regard to the issue of costs, Mr. van Reenen asked the Court to consider making an order against the Association's legal representatives *de bonis propriis.* This argument was based on the fact that a hopeless case which any competent lawyer would have realised was doomed to fail was none the less advanced, and then with some gusto. In addition, it was said that the Association did not possess any assets and that any costs order made against it would be worthless.

40. No request for such a costs order was made in the answering papers nor was there such a submission in the heads of argument filed on behalf of Mr. Harbich. It is a salutary practice to alert the opposing legal practitioners to the fact that they may be asked to later be mulcted in costs. The attorneys representing the Association conduct a small practice which, the Court was told, seeks to help marginalized persons. It is not likely to be possessed of sufficient surplus funds to meet a hefty costs bill.

41. While I agree that the case advanced was a hopeless one and that the effect thereof may have been to unduly raise expectations of success for the Association and its members on the thorny issue of land ownership and occupation, I

do not believe that a costs order *de bonis propriis* is warranted in this matter. After all, the attorneys were instructed by the Association to advance the case and there is not suggestion that the attorneys were acting off their own bat. Moreover, the treatment by Mr. Harbich of his workers leaves much to be desired and the cost of this litigation is a small price to pay in the greater scheme of things.

ORDER OF COURT

The application is dismissed with costs.

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GAMBLE, J