IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 3257 / 2021

In the matter between:

RALPH BOCK N.O. First Applicant

IGNATIUS VILJOEN N.O. Second Applicant

(in their capacities as trustees of the CRL Family Trust IT 3891/96)

and

MR JOSEF ERASMUS First Respondent

MRS HENRIETTA DAWN LENA ERASMUS Second Respondent

THE SALDANHA BAY LOCAL MUNICIPALITY Third Respondent

Coram: Wille, J

Heard: 4th of August 2021

Delivered: 27th of August 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an application primarily for an order for the ejectment of the respondents[1] from

[1] The first and second respondents (hereinafter referred to as the respondents, unless otherwise specifically indicated).

the subject property.[2] This, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[3] Further, a monetary judgment is sought in respect of certain arrear rental, penalties and water usage costs, allegedly due by the respondents. In addition, a punitive costs order is pursued against the respondents' attorney of record.

[2] The respondents contend for an oral agreement concluded with the applicants. Put in another way, the respondents aver that they occupy the property with the consent of the applicants. This, in the form of 'tacit' consent. The alleged terms of this oral agreement also seek to expunge the respondents liability to the applicants for any arrear rental and other charges. The respondents seek to remain on the subject property. The applicants deny the presence of the oral agreement contended for by the respondents.

[3] The respondents progressed a number of alleged procedural irregularities and also raised a shield in connection with the applicants alleged lack of authority. The procedural irregularities complained of have no merit and will accordingly not be dealt with in this judgment. As far as the authority issue in concerned the following is apparent from the material before me: that it is abundantly clear from the papers that the applicants act in their representative capacities as trustees of the trust[4] and that the trust authorised the institution of these proceedings.[5]

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[2] The name of the main parent farm is 'Matjes'.
The 'farm' in turn is known as Farm Number 169 (the 'farm').
This is made up of the remaining extent of the farm styled – 'Adjoining Matjes Fontein' - in extent 478.30389 hectares.
The 'property' is a yet to be sub-divided portion of the farm and in extent about 43 hectares (the 'property').

[3] Act, 19 of 1998 (hereinafter referred to as 'PIE').

[4] The CRL Family Trust.

[5] A copy of the 'letters of authority. and a resolution signed by all the trustees is annexed to the founding affidavit.

THE FACTUAL MATRIX AND AGREEMENTS

[4] The parties concluded a written sale agreement[6] for the sale of certain as yet undivided immovable property. The purchase price was agreed at (2.1) million rand. The purchase price was computed as follows: the land, together with the fencing thereon, was priced at (1 5) million rand and a certain piggery business[7], made up the balance of the purchase price in the sum of R 600 000,00.[8]

[5] It subsequently emerged that the sale agreement was void for want of compliance with certain legislation dealing specifically with the sub-division of agricultural land. As a direct result thereof a separate lease agreement[9] in respect of the property was prepared. This separate agreement was negotiated and signed. It is common cause that the property described in the lease agreement was erroneous and the agreement should have reflected the rental property as reflected in the subsequent addendum thereto. Nothing turns on this.

[6] The material terms of the lease were the following: that the property was leased to the respondents for the purposes of continuing with a piggery business: that the lease commenced on the 1st of March 2016 and endured for a period of (12) months until the 28th of February 2017: that the lease would terminate upon the sale of the property to the respondents: that the lease would be subject to the parties entering into an agreement for the sale of the piggery: that the

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6 The sale agreement.
7 This will be referred to as 'the piggery'.
8 A discrete agreement was subsequently concluded with the respondents for the sale of the 'piggery' business.
9 The lease agreement.

respondents would make payment of the purchase price of the piggery in full and, thereafter in addition, make a payment towards the deposit in respect of the purchase price for the property.

[7] The relevant agreed terms as recorded in the lease agreement were as follows: that the rental would be R10 000,00 per month: that the rental would be payable on or before the 3rd day of every month: that the respondents would be liable for the costs of electricity, water and gas used, this payable directly to the relevant service provider: that the respondents were not entitled to undertake any alterations or to erect any buildings, installations, irrigations systems, structures or build dams or roads without the applicant's prior written consent and, that the parties agreed that they were desirous of entering into a sale agreement for the property.

[8] Further, it was agreed that the applicant would apply for the sub-division of the property and that any sale of the property would be subject to the successful sub-division of the property from the farm. A payment structure was prepared and agreed. This reflected the payments that the respondents were required to make, which included the sum of R600 000,00 as the purchase price for the piggery and the sum R400 000,00 (as the deposit), for the now styled 'option' to purchase.

[9] The material terms of the 'piggery' agreement were, inter alia, the following: that the 'sole proprietorship' piggery business was sold to the first respondent: that the purchase price was in the agreed amount of R600 000,00. This, plus a deposit for the purchase of the property.

[10] It is common cause that the respondents took occupation of the property[10], for the purposes of operating the commercial piggery, as agreed. Thereafter, the sub-division application was initiated. Finally an addendum[11], was signed to the lease agreement in terms of which, inter alia, the respondents commercial occupation was only to commence upon payment of the full purchase price of the piggery, as agreed. During the course of November 2018, the respondents erected a structure on the farm, in which they now live. This residential occupation of the farm and the manner in which this occurred is the subject of the core dispute between the parties and in my view, is one of the main issues that falls to be decided. The applicants contend for the unlawful residential occupation of the property, whilst the respondents contend for the lawful residential occupation of the property.

THE ALLEGED DISPUTES OF FACT

[11] The respondents deny any knowledge of the proposed sub-division prior to signing of the sale agreement. They say that the applicants withheld certain crucial information from them so as to induce and mislead the respondents. This, in order to assist the applicants in procuring the sub-division of the property from the farm. Significantly, they do not say which crucial information was withheld.

[12] The respondents contend for an oral agreement which preceded the signing of the lease agreement. It is averred that the terms of the oral agreement were, inter alia, the following: that the respondents would lend their co-operation to and with the sub-division application, which

[10] This, during March 2016.
[11] The 'addendum'

application would not take longer than (1) year: that once the sub-division was approved, the parties would again negotiate in good faith to conclude a fresh sale agreement[12], in respect of the property on the same terms, save that the price would now be market related and, that in the event that the parties were unable to agree, the price would be determined by a suitably qualified appraiser of agricultural land.[13]

[13] In addition, they say that they would be liable to pay to the applicants the rental as agreed for (1) year only and, if the sub-division took more than (1) year, then in that event, the respondents would be entitled to remain in occupation of the property. This, without the payment of any rental, until the sub-division was granted.

[14] The applicants, in turn contend that there are no factual disputes at all and that the averments by the respondents have been orchestrated for the purposes of conceiving defences in respect of both the money judgment and the eviction claim. Put in another way, the applicants say that the respondents have no defences to the claims as formulated in the applicants' application.

DISCUSSION

THE EXTENSION OF SECURITY OF TENURE ACT

[12] They contend for an 'agreement to agree' at a later stage.
[13] The 're-purchase' agreement.

[15] The respondents rely on the Extension of Security of Tenure Act[14], to the extent that it provides for certain statutory protections for defined 'occupiers' in eviction proceedings, by requiring, inter alia, specific procedural steps before an eviction order may be granted. The first enquiry in this connection, is to establish whether the respondents qualify as 'occupiers' as defined. Further, in this case the issue of 'consent' bears scrutiny. A rebuttable presumption of consent is created where a person has continuously and openly resided on land[15], for a period of at least (1)year.[16] Once and if, this presumption is rebutted, and if the person sought to be evicted has not demonstrated any other right to occupy the land, then in that event, the eviction proceedings fall to be governed generally by the Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act.[17]

THE PREVENTION OF ILLEGAL EVICTION FROM AND THE UNLAWFUL OF OCCUPATION OF LAND ACT

[16] The applicants contend for the application of this latter Act.[18] This involves a (3) stage enquiry, which encompasses the following, namely: that it must be determined whether the occupier of the property in question has any extant right to be in occupation. Indeed, if the occupier has such a right, then the application falls to be refused: that in the event that the occupier of a property has no lawful right to be in occupation thereof, then in that event, it is to be determined whether it is just and equitable for the occupier to be evicted and finally: that in the event that it is indeed just and equitable for the occupier to be evicted, then in that event, the

[14] Extension of Security of Tenure Act, 62 of 1997.
[15] As defined or categorized.
[16] Section 3(4) of the Extension of Security of Tenure Act, 62 of 1997.
[17] The 'Unlawful Occupation of Land Act'. ('PIE')
[18] Act, 19 of 1998.

terms and conditions of such eviction fall to be determined by the court.

[17] As a general proposition, the authorities dictate that failing any right in law being established by the respondents to occupy the subject property, the applicants would be entitled to the granting of an eviction order. This of course, if the applicants have in turn, complied with all the procedural requirements for an order of eviction. All that then remains is for the court to determine the timing of the eviction order.[19] Put in another way, the just and equitable enquiry does not necessarily militate against the granting of the eviction order, but confers a discretion upon the court to decide on how much time the respondents ought to be granted, before they need to vacate the property as a result of an order for their eviction.

FACTUAL DISPUTES IN MOTION PROCEEDINGS

[18] It is trite that in motion proceedings, if material facts are in dispute, a final order may be granted only: if the facts stated by the respondent: together with the facts alleged by the applicant (that are admitted or conceded by the respondent), justify such an order.[20] This, notwithstanding, a court must nevertheless follow a - *robust common sense approach* - and not hesitate to decide an issue on affidavit merely because it is difficult to do so.[21] That having been said, a bare denial in general terms by a respondent is not good enough to defeat an applicant on motion.

THE JUDGMENT SOUNDING IN MONEY

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[19] *City of Johannesburg Metro Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) at paragraph 74.
[20] *Plascon Evans v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.
[21] *Truth Verification Testing Centre CC v PSE Trust Detection CC and Others* 1998 (2) SA 689 (W) at 698H-J.

[19] The respondents contend for the position that they bore no knowledge that the sub-division was still due to take place, prior to the signing of the sale agreement. This on the face of it, is not consistent with the respondents narrative that the applicants manipulated the respondents only for the purposes of obtaining the said sub-division. These (2) versions are irreconcilable with each other.

[20] Turning now to the allegations by the respondents that the agreed purchase price for the property was exaggerated. This is not fully engaged with by the respondents at all, save in an attempt to reinforce their argument in support of the oral agreement. This, insofar as it may have a bearing on the re-purchase agreement contended for by the respondents. The respondents have failed to put up any credible evidential material in support of their averments in this connection. Very little probative weight, if any, can be attached to the respondents latter averments in connection with the value of the property.

[21] The respondents case on this score is, inter alia, the following: that the Land Bank 'informed' them that the property was only worth between R300 000,00 to R400 000,00. This tiggered a notice[22], at the instance of the applicants. The respondents however refused to provide any corroborating documentary evidence in connection with these allegations. Moreover, the respondents contended that according to them the farm is now worth between an additional R300 000,00 to R400 000,00. Again, this leaves a lot to be desired.

[22] I say this also because the purchase price in terms of the sale agreement is the sum of (1.5) million rand for the land and the fencing. This price was arrived at based upon a property

[22] In terms of rule 35 of the Uniform Rules of Court.

valuation in the amount of (2.7) million rand. This price was inclusive of the piggery which was valued at approximately R600 000,00. Further, a professional valuer specializing in farm property valuations determined the value of the property to be the amount of (1.8) million rand.

[23] Of equal importance is the issue of the sub-division of the farm. The respondents say that the first applicant gave them an assurance that the application for the sub-division of the property from the farm would not endure for longer than (1) year. This again, in support of the oral lease contended for on behalf of the respondents. Present is the objective evidence that the first respondent was specifically told that the sub-division could take up to (2)years, this prior to the signing of the sale agreement. The correspondence that emanated thereafter, clearly demonstrates that the first applicant bore no knowledge of how long the sub-division would take, given the extensive involvement of certain town planners in this exercise.

[24] What is abundantly clear to me, is that the first applicant was never in a position to make any representations or give any assurances regarding any time period for the granting of the proposed sub-division of the property, from the farm.

[25] One of the further core issues in connection with this application, goes to the allegations by the respondents (in support of an oral lease with the applicants), which would transform, if upheld, into consent to occupy the property. The averments by the respondents in this connection are, inter alia, the following, namely: that the written lease is tainted, void, illegal and unenforceable by virtue of the applicants' motives as evidenced in their application: that there was an oral lease in terms of which the respondents would only be liable for rental for a

period of (1) year and thereafter the respondents were entitled to occupy the property, absent the payment of any rental.

[26] It is common cause that the respondents took commercial occupation of the property after the initial agreements were signed[23], but significantly, not any 'residential' occupation. In this context, the respondents aver that they took commercial occupation before there was even talk of a lease agreement. Despite this, the lease agreement is thereafter concluded, in terms which contradict, the terms of the oral lease contended for by the respondents. The lease agreement also provides that it will terminate upon the sale of the property to the respondents. Absent is any provision that rental payments will cease to be made after (1) year.

[27] On their own version, the respondents concede that the agreed rental was not paid as any of the payments so effected, were made by an entirely discrete entity.[24] This notwithstanding, the first respondent agrees to enter into an acknowledgement of debt[25], which provides for, inter alia, the following: that the agreed monthly rental and the monthly water accounts are payable monthly in advance and he further acknowledges that an amount of R438 436,21 is due, owing and payable. Moreover, the correspondence that was subsequently exchanged between the parties during this time must be taken into account, when dealing with the purported disputed factual issues.

[28] I say this also because, the applicants' position regarding the existence of the lease

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[23] During March 2016.
[24] An entity styled 'Jaymo Enterprises'.
[25] During October 2018.

agreement and accordingly, the respondents liability for the rental and water charges is very much the subject of corroboration in the correspondence at the instance of the attorneys for the applicants. It is significant that despite legal representation, the respondents failed to take issue with the version by the applicants as set out in these letters. A major shift involving a general denial, only occurred upon the filing of the affidavits in opposition to the application.

[29] By way of example, in a letter[26], the respondents' attorneys of record advanced the following:

'...our client is currently lawfully renting certain agricultural land...'

This with reference to the lease agreement. The first respondent's position as far as the oral lease is concerned is highly improbable, not supported by the objective facts and may be safely rejected.

[30] A further analysis of the papers reveals a diverse position taken by the respondents regarding their ownership of the piggery. The piggery agreement stipulates that the entire piggery operation (lock-stock & barrel), is sold for an amount of R600 000,00. Further, it was agreed that the respondents would pay an additional amount in the amount of R400 000,00 as a deposit for a first option to purchase the property. Similarly, the different versions put up by the respondents on this score are mutually destructive of one another.

[26] During June 2020.

[31] This because, on the one hand, they aver that they purchased completely different assets from the first applicants' son and they did not in fact purchase anything from the sole proprietorship as identified in the written piggery agreement. This, also against the backdrop and the addendum agreement. The latter being in confirmation of the factual position that the respondents had not yet paid the full purchase price for the piggery. In addition, the payment and allocation of the price in connection with the piggery business is confirmed by way of the various letters that passed between the attorneys on behalf of the parties. The position now taken by the respondents as formulated in their opposing affidavits, contradicts this objective evidence and is accordingly inherently improbable in the circumstances.

[32] As far as the re-purchase agreement is concerned, as a matter of logic, the existence of the re-purchase agreement is premised upon the contention that the initial agreed purchase price was unrealistically high or exaggerated. Because the foundation for the re-purchase agreement has been euthanized, the entire existence of the re-purchase agreement falls to be rejected. Similarly the existence of this re-purchase agreement arises for the first time in the respondents' opposing papers.

[33] This beseeches the question whether the unqualified oral agreement relied upon by the respondents falls to be inaugurated at all. I mind that the oral agreement contended for has no merit for, inter alia, the following reasons: that the respondents cannot entirely wish away the prior existence of the written lease agreement: that even if the terms of the written lease agreement do not find application, the tacit lease clearly applied for the payment of the rental in the amount of R10 000,00 per month, together with the water charges.

THE EVICTION PROCEEDINGS

[34] The respondents' case is that ESTA finds application. In order to succeed with this argument the respondents must have been in lawful residential occupation of the property. The respondents may well have enjoyed the rights to the commercial occupation of the subject property for a farming enterprise. Residential occupation is however an entirely discrete issue. Absent lawful consent to residential occupation, the provisions of PIE must find application. It is so that the respondents indeed resided on the property. This, since at least November 2018.

[35] This occupation was under severe protest from the applicants and undoubtedly absent their consent, which was brought to the respondents attention. The consent chartered for by the respondents is totally contrary to the correspondence and the other communications that were exchanged during this period. The consent granted in terms of the written lease was limited strictly to the commercial occupation for the purposes of the pig farming operation. Besides, the written lease strictly prohibited the erection of any structures, save by prior written consent. Such written consent is absent the papers.

[36] It must be so that at best for the respondents, they commercially occupied the property in accordance with a tacit lease. This, on the same terms as contained in the written lease. In turn, this would govern the relationship between the parties. The building of residential structures at the instance of the respondents, commenced in earnest upon the first applicant's departure to Botswana. Prior to his departure, the first applicant met with the first respondent and informed him, in terms, that he was not permitted to erect a residential structure on the subject property.

[37] The absence of the applicants consent is recorded and emphasized in contemporaneous correspondence. Significantly, the respondents, never rebuffed the absence of consent to reside on the property. These denials only materialized in their opposing affidavits.

[38] In another throw of the dice, the respondents contend for the position that their 'rights' to occupation of the property, were never formally, nor expressly terminated. I disagree. One is dealing here essentially with an issue of commercial occupation and the mere service of the application, operates in law, as an effective termination of any underlying agreement in terms of which the respondents may have enjoyed any rights to the commercial occupation of the property.

JUST AND EQUITABLE

[39] In my view this is one of the core issues which requires more careful scrutiny. On this score, the applicants contend for the following: that the respondents have to a large extent, failed to pay rental and water charges for more than (5) years: that they out of their own volition unlawfully erected a residential structure on the subject property: that the applicants bore some kind of duty to accommodate the respondents for an extended period of time: that this occurred without any remuneration and at enormous cost to the applicant trust: that the respondents have known for more than (3) years that the applicants were not prepared to countenance their unlawful residential occupation of the property and that they descended to be the subject of an eviction application.

[40] The respondents' peculiar personal circumstances are the following: that the second respondent is gainfully employed as a teacher earning as salary of approximately R18 000,00 per month: that the respondents are both in good health: that their daughter is about to reach the age of majority and that the respondents contend for the position that they are not in a financial position so as to enable them to obtain any alternative accommodation. This latter averment is not underpinned by any evidential material and very little, if any, probative weight falls to be attached to these latter allegations.

[41] I need to attempt to strike a balance between the interests of the applicants and that of the respondents, as the latter are undoubtedly unlawful residential occupiers on the subject property. It is indeed so, that when dealing with the 'just and equitable' enquiry, the respondents do not have to establish a right of occupation to resist an eviction on the basis that the result, is not just and equitable. This notwithstanding, I need to apply a constitutional 'lens' to the respondents initial and continued unlawful residential occupation of the property.

[42] In my view, considering and applying the principles as set out in the Constitutional Court in *Scribante*[27], viewed through the lens of fairness and equity, there is no reason for upholding the legal conclusion that the applicants' real rights in and to the property should be diluted by the respondents' disputed personal rights to unlawfully residentially occupy the subject property. Considering the historical and continued unlawful residential occupation of the property by the respondents, viewed within the proper constitutional context, I am of the view that preference should be given to the applicants' position.

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[27] *Daniels v Scribante* 2017 (4) SA 341 (CC).

[43] I say this also because, the property was the subject of a commercial occupation in accordance with a suite of commercial agreements and there are no weighty factors that afford the respondents protection. In my view, the lawful commercial occupation enjoyed by the respondents, could not have morphed into that of lawful residential occupation in view of the provisions in the commercial suite of agreements and the cascading legal effects thereof as a result of activities taking place in connection with the proposed sub-division of the property, from the farm.

[44] Section 4(7) of PIE, grants to a court the power to decide whether an unlawful occupier should be evicted, the test being whether it is just and equitable to do so. All relevant circumstances should be considered and in giving this power to a court, the legislature has expanded upon the provisions of section 26(3) of our Constitution[28], in terms of which no-one may be evicted from their home without an order of court made after considering all the relevant circumstances.

[45] It must be so that this responsibility must be viewed through a 'constitutional lens' and our courts are enjoined to decide on unique cases, not on principles of the law of property, but on principles of fairness and equity. Wallis JA, in *Changing Tides*[29], held that an eviction order may only be granted if it is just and equitable to do so and that in considering whether an eviction is just and equitable, the court must come to a decision that is just and equitable to all parties.

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[28] The Constitution of the Republic of South Africa, 1996.

[29] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA).

[46] In my view, the true test is to determine if the applicants' rights to this property fall to be diluted in view of the circumstances and the unique facts of this case, with reference to the principles of justice and equity. Considering the circumstances of the respondents, coupled with the manner and duration of their unlawful residential occupation of the property, justice and equity undoubtedly demand that the applicants' rights of ownership should not be derogated for an extended period, in favor of the respondents' unlawful residential occupation of the property.

COSTS

[47] The applicants vigorously contend for a costs order '*de bonis propriis'* against the respondents' attorney of record because of the disruptive and frivolous technical approach adopted to the opposition to the application. I disagree. I must however record that the entire approach by the respondents entire legal team, leaves a lot to be desired. Whether this approach amounted to a material departure from their responsibility of their office has, in my view, not been clearly demonstrated. What is abundantly clear is that the unfortunate approach adopted by the respondents legal team, most certainly necessitated the need for the employment of (2) counsel on behalf of the applicants.

ORDER

[48] In the result the following order is granted:

1. That an order is hereby issued out evicting the first and second respondents and all those occupying under or through them, from the property (known as the remaining farm adjoining ‘Matjes Fontein Number 169’ situate at Saldanha Bay, Malmesbury Division, Western Cape), (the ‘property’).

2. That the first and second respondents and all persons who occupy the property through or under them, shall vacate the property by no later than the last day of November 2021, failing which the sheriff of the court is herein hereby authorised to evict the first and second respondents and all persons who occupy the property through or under them, from the property.

3. That the first respondent and the second respondent, jointly and severally, the one paying the other to be absolved, are hereby ordered to pay to the applicants the sum of R624 041,00 by no later than (10) days from date of this order.

4. That the first respondent and the second respondent, jointly and severally, the one paying the other to be absolved, are hereby ordered to pay to the applicants interest, *a temporae morae*, on the sum of R624 041,00.

5. That any further amounts due owing and payable, from the 1st of March 2021 to date of final vacation of the property by the respondents, shall be held over and stand over for later determination.

6. That the first respondent and the second respondent, jointly and severally, the one paying the other to be absolved, are hereby ordered to pay the costs of and incidental to this application, on the scale as between party and party (including the costs of (2) counsel where so employed), as taxed or agreed.

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E. D. WILLE

(Judge of the High Court)