

SOUTH AFRICA / JUDGMENT

Ludi v Meyer and Others (Reasons) (5356/2023) [2025] ZAMPMBHC 13 (24 January 2025) [2025] ZAMPMBHC 13

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mangena

CASE / FILE NUMBER

5356/2023

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(MPUMALANGA DIVISION,

MBOMBELA)

CASE NO: 5356/2023

In the matter between:

GEHARD

GUNTHER LUDI

1st

Applicant

(ID

No.: 3[...])

and

JUSTUS

MEYER

1st

Respondent

(ID

No.: 7[...])

SUSANNA
SOPHIA MEYER
2nd
Respondent
(ID No.: 8[...])
UNLAWFUL OCCUPIERS
OCCUPYING THROUGH
THE
FIRST AND SECOND RESPONDENT
3rd
Respondent
THE
CITY OF MBOMBELA
MUNICIPALITY
4th
Respondent

REASONS FOR JUDGMENT

MANGENA AJ:

- [1] On the 11th February 2025 I gave an order for the eviction of the first and second respondents together with all persons under their authority occupying the premises described as D[...] C[...] farm, farm 1[...] T[...] W[...] R[...] Estates, Central sections Agricultural Holdings, Mbombela (“the property”). There were other ancillary orders accompanying the main order relating to the date and time of the eviction as well as costs. I also dismissed the three points in limine by the respondents.
- [2] The respondents have requested for the reasons and same are provided below. For convenience and coherence, I will commence with the points in limine raised by the respondents. But first the background.

BACKGROUND

- [3] The applicant is Gerhard Gunder Ludi who is indisputably the registered owner of the property held under a valid title. The property is bonded to Nedbank and its affiliates as security for various credit facilities concluded between applicant and the bank.
- [4] On or about March 2022 the applicant concluded a written lease agreement (“the agreement”) with the respondents. The lease was for a period of six months and the rental was fixed at R9000.00 per month. The agreement is headed “A tenancy and Farming venture Agreement” and provides that the premises shall be occupied by Sania and her family under the normal conditions as specified by tenancy laws of the Republic of South Africa. Occupation was said to be on a month to month basis once the lease period expires and either party would be obliged to give three months’ notice of termination.

- [5] On 01 September 2022 the applicant notified the respondents that the lease has expired and that he is not willing to renew it as he had found a new buyer. He further stated that the respondents are given a notice period as per the tenancy and farming venture agreement and are required to vacate the premises on or before 01 December 2022. The respondents never vacated the property despite being served with a written demand from the applicant's attorneys.
- [6] The applicant instituted court proceedings on 16 November 2023 which were served on the respondents on 31 January 2024. The respondents appointed attorneys who placed themselves on record on 13 February 2024 and undertook to file their client's answering affidavit by no later than 15 March 2024 which was only filed in August 2024 without any condonation.
- [7] In the answering affidavit, the respondents raised three preliminary points which I intend to deal with as they appear in their affidavit. They are (a) improperly commissioned affidavit, (b) lack of locus standi, (c) incompetent relief under incorrect legislation.

IMPROPERLY COMMISSIONED AFFIDAVIT

- [8] The applicant's affidavit was commissioned by one Ms Debbie Hendricks who is an employee at Pieter Swanepoel Attorneys who are the correspondent attorneys for Fernandes attorneys. The respondents contend that Pieter Swanepoel Attorneys were the applicant's attorneys at the time the founding affidavit was commissioned and therefore it was inappropriate for Ms Hendricks, who was an employee at the law firm, to act as the commissioner of oath. For this contention, the respondents found support in Regulation 7(1) of the Justices of Peace and Commissioners of Oath Act, 16 of 1963. The regulation provides that a commissioner of oaths shall not administer an oath or affirmation relating to the matter in which he has an interest. Since Ms Hendricks is an employee at the Pieter Swanepoel Attorneys, she, so it was submitted, has an interest in the matter. This cannot be correct. Regulation 7(2) provides that sub-regulation 1 shall not apply to an affidavit or a declaration mentioned in the schedule. Item 2 of the schedule provides that a declaration taken by a commissioner of oath who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty. Ms Hendricks is not an attorney and commissioned the oath in the course of the performance of her duties. She has no other interest in the matter other than the one arising out of her duties on an employee.
- [9] In *Kouwenhoven vs Minister of Police and Others*[1], the supreme court of appeal had an occasion to review previous cases on this aspect including the authorities relied upon by counsel for the respondents. On analysis, the SCA authoritatively stated the legal position regarding "interest" to mean "pecuniary

interest, or some interest by which the legal rights or liabilities of the commissioner are affected". current position is that employees who are not attorneys are not prohibited from acting as commissioners of oaths in matters where their only interest arises out of their employment and are doing so in execution of their duties. Based on the authority of Kouwenhoven supra, the founding affidavit is properly commissioned.

LOCUS STANDI

- [10] The respondents argued that the applicant ceded his rights to the bank when he registered the mortgage bonds. It was submitted on their behalf that clause 8.1 of the mortgage agreement expressly stated that the right to institute proceedings against lessees for evictions from the mortgaged property is ceded to the bank. Once cession has taken place, the cessionary, so went the submission, is divested of the rights and they are now vested in the cessionary. In the context of this case, the applicant does not have locus standi to institute eviction proceedings because he had ceded those rights.
- [11] The submission by counsel for the respondents misses one crucial point. The applicant did not institute proceedings for the recovery of arrear rentals nor is he basing his application for eviction on the respondent's failure to pay rental or any other revenue arising out of the lease agreement. The applicant instituted these proceedings on the basis that the lease period has expired and has given the respondents sufficient notice period as per the terms of the agreement. Clause 8.1 read together with other provisions of the mortgage agreement creates cession as security in favour of Nedbank in respect of the rental revenue. The net effect of this cession is that the applicant is deprived of the right to recover the ceded debt which in this case will be rental and revenues arising out of the lease agreement[2]. The cession of debt in respect of rentals does not divest the applicant of his rights as a registered owner from instituting legal proceedings against unlawful occupiers[3].
- [12] The applicant has not ceded his ownership rights in the property but only a right to claim rentals upon non-payment by the tenants. The argument would have carried water had the applicant claimed arrear rentals and accompanied it with eviction. The tenants were never in default in relation to the rental obligations and their basis of opposition to this application for lack of locus standi is without merit.

ESTA

- [13] The last preliminary point raised was that the applicant used a wrong legislation to obtain the relief he sought. It was submitted that the applicable law is the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and not the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). It was argued that this is so because the property is described as a farm, as such, the respondents are tenants

and are employed at the farm. This argument is not supported by the facts. The tenancy and venture agreement does not bring the

respondents within the definition of occupier in ESTA. The respondents did not occupy the property to work on it but as residential tenants willing to pay market related rentals for their stay on the property. The fact that the premises they occupy are on a farm does not make them occupiers within the meaning of ESTA. ESTA defines an occupier as a person residing on land which belongs to

another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so. The applicant has further disputed the assertion by the respondents that the property is a farm. The municipal account showed that the property is rated as residential and not a farm. There has not been any evidence submitted by the respondents in support of their contention that the property is used for agricultural purposes, and it is not within a proclaimed township. On the conspectus of the evidence at hand this point in limine fails.

[14] With the preliminary points out of the way, I turn to determine if the respondents have a valid defence to the application. Such a defence will need to be of such a nature that it entitles them to remain in occupation of the applicant's property. In the absence of a valid defence, the applicant will be entitled to the order subject to the court ensuring that justice and equity prevails.

[15] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd*, the court gave the[4] following guideline in the adjudication of eviction proceedings:

"[25] Reverting then to the relationship between ss 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity."

- [16] The respondents argued that the application should be dismissed because they care for children with autism and if evicted, they will be homeless. It was further argued that the municipality has not provided an alternative accommodation in compliance with its constitutional obligations.
- [17] I gave due regard to these submissions and took them into account in the determination of what justice and equity required. The respondents had occupied the property for six months before applicant terminated the lease on notice. They knew at the time of signing that the agreement was terminable on notice and once terminated they would need to find another place to stay. They have not argued that they cannot afford an alternative accommodation. All they argued was that the place they currently occupy is convenient for them as they need to produce organic food for their children. I was neither persuaded that they will be homeless after the granting of the order, nor did I think that they need assistance from the municipality. As stated above, they have the financial means to find alternative accommodation as they are not destitute. PIE and ESTA are not meant to provide convenience to people who would want to occupy a property against the wishes of the owner. If that was the position, chaos will ensue and the right to property as enshrined in the constitution would ring hollow. To be clear, the two pieces of legislation serve an important constitutional purpose of ensuring that the most vulnerable and destitute amongst us are protected from homelessness as a result of historical injustices based on land inequity. They are not meant for people like the respondents who can afford alternative accommodation.
- [18] Guided by the approach of the SCA I concluded that the respondents did not have a valid defence. I then proceeded to enquire what justice and equity required in relation to the date of the implementation of the order as well as its impact. As stated, the respondents are not candidates for emergency assistance and should vacate the premises by no later than 31 May 2025 which period I considered sufficient to enable them to find alternative accommodation.
- [19] The applicant was successful and the normal rule is that costs follow results. The respondents had a benefit of legal advice from both an attorney and counsel and should have known that their defences are not rooted in law and are therefore shaky. Despite this they continued and attracted a cost order against them. The order is not punitive and in doing so I considered that they may have been advised that they are vindicating a constitutional right to housing and therefore may eschew the costs. It is not in every case that litigants will escape costs liability on the basis of vindicating a constitutional right. I ordered that respondents pay the applicant's costs on a party and party scale.

MI MANGENA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

Appearances:

Counsel for the Applicant: Adv. van den Berg Instructed by: Fernandes Attorneys C/O JJR & Associates Attorneys Counsel for the Respondent: Greyling Botha Van Rensburg Attorneys Instructed by: Adv. X Wahl Date of Judgment: 24 January 2025

[1] (888/2020)

[2021] ZASCA 119 (22 September 2021)

[2] Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd, 2009 (1) SA 493 (SCA)

[3] Grobler v Oosthuizen, 2009 (5) SA 500 (SCA).

[4] 2012

(6) SA 294 (SCA)

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