

SOUTH AFRICA / JUDGMENT

Mathimbane and Another v Normandien Farms (Pty) Ltd (LCC 06/2012) [2013]

ZALCC 4 (29 January 2013)

[2013] ZALCC 4

COURT

Land Claims Court

BEFORE

Y Sidlova

CASE / FILE NUMBER

LCC 06/2012

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IN THE LAND

CLAIMS COURT OF SOUTH AFRICA

HELD IN RANDBURG

CASE

NUMBER: LCC:

06/2012

Decided on: 29

January 2013

In the case of:

PUMELELO FLORENCE

MATHIMBANE

.....First

Applicant

MLAMULI OBED

MATHIMBANE

.....Second

Applicant

and

NORMANDIEN FARMS

(PTY) LTD

.....Respondent

JUDGMENT

SIDLOVA AJ:

Introduction

[1] This application was launched as an urgent application in January of 2012. The applicants sought to interdict the respondent from threatening, interfering with, intimidating or otherwise communicating with the applicants and their associates save for through legal representatives. They also claimed an order to compel the respondents to provide the applicant with keys for the gate. This Court found that the matter was not urgent in terms of Rule 34(3)1 however, directives as to dates of when affidavits should be filed were issued. The respondent, who wished to oppose the application, filed a notice to oppose and an answering affidavit. The applicants however, failed to meet the timelines in the directives and filed the replying affidavit out of time. A condonation

application followed and such was dismissed.

[2] The first applicant is Phumlelo Florence Mathimbane, who resides at the Farm Albany, Situated in Newcastle District, KwaZulu Natal (hereinafter the farm). She has been resident on the farm for a lengthy period, although the exact number of years was not determined. The second applicant is Mlamuli Obed Mathimbane, who resides at the Farm Albany, Situated in Newcastle District, KwaZulu Natal. He has been resident on the farm for a lengthy period, although the exact number of years was not determined. The respondent Normadien Farms (Pty) Ltd is a company duly registered and incorporated in terms of the Company Laws of South Africa, which owns and manages the farm Albany.

Background Facts

- [3] On 17 November 2011, as a result of a fire that occurred, the farm manager called a meeting with some of the farm dwellers. Minutes of such meeting in both English and Zulu are attached to the founding and answering affidavits. The minutes recorded that a fire had occurred and due to this proper security measures had to be put in place to ensure that this would not occur again. On 18 November 2011, the farm manager locked the gates in terms of the measures that had been agreed upon to prevent a future fire. A security guard was posted at the gate and worked for 12 hours between 6 am and 6 pm; movement into and out of the farm was restricted and could only be achieved through the security guard who has a key to the gate.
- [4] The applicants allege that the respondent's actions are the result of a vendetta with the applicants. It is alleged that the applicants had previously overturned a ruling in favour of the respondent to impound their cattle, and due to this they were being punished and denied access into the farm. The respondent on the other hand alleges that the reason for shutting the gates is that which was recorded in the minutes of the meeting held with the

applicants and other farm dwellers. Measures are being put in to ensure the safety of the residents and the property of the farm by preventing another fire.

Issues Raised

- [5] The following issues have been identified from the parties' oral and written arguments and they will be divided into points in limine and main issues, the points in limine are discussed first as they will determine if it is necessary to discuss the main points.

Points in Limine

- [6] The point with regard to urgency was dispensed of by this Court and as such only the remaining 4 remaining points raised by the respondents will be discussed

Is the notice of motion vague and embarrassing?

Does the founding affidavit lack the necessary relevant and material averments to sustain the relief being sought?

The procedural irregularity of the applicant in serving the application to the wrong firm of attorneys

Does this court have the jurisdiction to adjudicate the matter?

Main Issues

- [7] The following is common cause

There was a fire that occurred on the farm

A meeting was held after the fire broke out

Pursuant to such meeting the gates on the farm were locked

There is a security guard present from 6 am to 6 pm

Taxis and cars not belonging to residents are not allowed on the property

- [8] The following is in dispute:

The reason why the gates were locked

Whether there is a security guard available 24 hours a day from whom keys can be obtained?

Whether emergency vehicles and cars belonging to residents are allowed into the farm?

Points in limine

Vague and embarrassing

- [9] The respondent argues that the applicants' notice of motion is vague and embarrassing in as far as it only refers to one set of keys while there are three gates and in as far as only one applicant is mentioned while there are two applicants. The applicants argued that these

were merely typographical errors and it could be inferred that only the key to the main gate was needed. Vague and embarrassing is a term usually used with regard to pleadings and not in respect of a notice of motion. The notice of motion does not allege fact. If the order claimed is not entirely clear that can be remedied if and when an order is made. The point in limine is dismissed.

Founding Affidavit

- [10] The respondent alleges that the founding affidavit lacks relevant and material averments necessary to sustain the relief being sought. It is submitted that the applicant has not made a case that the respondent was threatening, interfering with or intimidating the applicants.
- [11] The applicant must in the founding affidavit set out sufficient facts to disclose a cause of action, which as a general rule should exist at the time of the initiation of the proceedings². The general rule is that the applicant has to make out a case in his founding affidavit. To determine whether the founding affidavit has done so, the matter is considered on the basis of an exception; that is the founding affidavit is taken on its own and those allegations are presumed to be correct and the question is whether they are sufficient to warrant a finding in favour of the applicant³.
- [12] In the founding affidavit the applicants set out and explained a series of events which portrayed a picture that certain actions were being performed to threaten them. While the applicants merely stated that there were threats and intimidation, these statements must be read in context of the entire founding affidavit. Read in context one can understand how the applicants aver they are being threatened, if their statements regarding the meeting and the previous litigation are presumed to be true it is easy to see how the chain of events can indicate that the applicants were being punished for trying to assert their rights. Therefore, the respondent's argument that the founding affidavit lacks necessary material averments cannot be sustained given that the applicant is only required to make a prima facie case.

Procedural irregularities

- [13] The respondent raises as a point in limine that undue pressure was put on it by the applicants' failure to serve the application properly. Such failure is not denied by the applicants and it is duly noted, Rule 32(3) (d) of the Land Claims Court provides that:

"Should any party-

Perform any act in contravention of these rules or of an order or direction of the Court,

This will be an irregular step'

- [14] The applicants served the application on the incorrect attorney and only through courtesy of such firm the application reached the correct attorney of record. This is a failure to comply with the service requirements. Rule 32(5) (d) provides that in the event of an irregular step any party may within reasonable time of becoming aware of such irregular step, give notice to the defaulting party to rectify or withdraw the irregular step or comply with applicable

provisions. If within 5 days the defaulting party fails to comply the Court may upon application, set aside, condone, strike out, order the defaulting party to comply or make any order it considers just. This is the proper procedure with regard to irregular steps, raising it as a point in limine in the course of argument is not sufficient. If the respondent requires this Court to take action with regard to the applicants

failure it should have properly addressed the irregular step.

Jurisdiction

[15] The respondent argues that this Court does not have the jurisdiction to hear the matter because it is an application for interdictory relief in terms of the mandament van spolie. The applicants on the other hand argue that this court has jurisdiction in terms of either the Land Reform (Labour Tenants) Act 3 of 1996 (hereinafter the Act) or the Extension of Security of Tenure Act 62 of 1997 (hereinafter ESTA), because they are labour tenants or alternatively occupiers in terms of ESTA and the respondent's actions are tantamount to eviction.

[16] The applicants allege that they are labour tenants and this is denied by the respondent. A labour tenant is defined in Section 1 of the Act:

"Labour tenant" means a person –

- (a) who is residing or has the right to reside on a farm;
- (b) who has or had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of sections 3(4) and (5), but excluding a farm worker."

[17] This Court in *Mahlangu v De Jager*⁴ held the following in regard to satisfying the Court that a person is a labour tenant:

"To achieve that, the applicant must set out facts to establish every requirement of the definition, including the negative requirement

that he must not be a farm worker"

While it is not disputed that the applicants reside on the farm, the problem lies in that the applicant is required to set out facts establishing every requirement of the definition including the negative one.

[18] The applicants allege their parents and themselves have provided labour in exchange for rights to reside on and use the farm. However, it seems that the statement is just paying lip service to part (b) of the definition; if it is assumed that they satisfy this requirement, the applicants have none the less failed in that the founding affidavit was silent on the negative requirement (that they are not farm workers). The applicants have not set out facts to establish every requirement of the definition they have merely stated that they are labour tenants.

[19] *Van Zuydam v Zulu*⁵ it was held by the Court; in determining whether a party was a labour tenant, that:

“In conducting this enquiry, I must examine whether the defendant has shown that he satisfied all three requirements of the definition of labour tenant as set out in section 1 of the Labour Tenants Act and that he fulfilled these requirements on 2 June 1995”

[20] This Court is required to examine all three requirements and find that the applicants have fulfilled these requirements as at 2 June 1995. This in casu is an almost impossible task. The only fact that is clear is that the applicants are resident on the farm. The applicants’ attorney was unable to give a time period with regard to their residency, simply stating that he thinks it is from birth. The Court is not aware when the applicants were born, if indeed they were resident from birth. Furthermore, it has merely been stated that they provide labour in exchange for the right to use cropping or grazing land on the farm, again such is stated without any further evidence being adduced. The respondent is a large scale timber farmer. The applicants have not indicated if they are also involved in the farming of timber or subsistence farming nor have they alluded to any livestock that they are allowed to keep except in the context of impoundment. In fact the Court is not privy to any information regarding their rights of cropping and grazing. No

evidence has been given to indicate that the applicants are not farm workers.

[20] Section 29 of the Act provides as follows:

“The Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power to grant interlocutory orders and interdicts, and shall have all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial

division of the Supreme Court having jurisdiction in civil proceedings at the place where the affected land is situated, including the powers of such a division in relation to any contempt of the Court”

This Court’s jurisdiction in respect of labour tenants is in terms of this section and it is stated that the Court’s jurisdiction is derived from the Act. The applicants have failed to prove that they are labour tenants and therefore the Act does not apply. This Court accordingly has no jurisdiction to hear this matter in terms of the Act.

[21] The applicants alternatively contend that their rights as occupiers in terms of ESTA have been limited. An occupier is defined in section 1 of ESTA as:

“...a person residing on land which belongs to another person, and who has or on (sic) 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—

(a).

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount;”

[22] Applicants are both resident on the land, it is suggested that they have been resident from birth however the exact date of their occupation is not clear. Given both applicants are adults it can safely be assumed that they were born before 4 February

1997. But even if that is so and part (b) is answered negatively, part (c) of the definition must be met. The prescribed income as provided in the Regulations to ESTA is to be R5000; the applicants have not indicated what their income is or if they have an income. The problem that was created with regard to the question of labour tenancy is that the applicants have simply stated they are occupiers and have made no attempt to prove that they meet the definition. Section 20 of ESTA awards this Court jurisdiction in terms of ESTA; such jurisdiction would only be applicable if a person was an occupier. The onus is on the applicants to show that they are occupiers and that ESTA applies to them, again they have failed to do this, therefore, this Court has no jurisdiction

in terms of ESTA.

[23] Given the above finding it is unnecessary to discuss the main issues. Therefore it remains only to deal with the costs of this application.

Cost order

[24] The respondent is seeking a cost order in terms of Rule 33 (10) and they are seeking costs de bonis propriis. The respondent alleges that the applicants counsel should have advised against this application as the applicants are lay people and are unaware of the law, counsel being in a better position should have been more cautious. The respondent relies on the dicta in *Clemson v Clemson*⁶:

“The Court expects attorneys acting on behalf of such people, as professional people and officers of the court, to display objectivity

and sound common sense in assisting their clients. Fortunately most attorneys perform this task admirably. However there is a minority of attorneys who approach each divorce as a war between the two litigants. The rules of court and legal principles are utilised as weapons in a fight to destroy the opposition.”

[25] The general rule in this Court is that no order as to costs is made unless there are special circumstances. In *Baphalane Ba Ramokoka Community v The Minister of Agriculture & Land Affairs*⁷, Gildenhuys J held:

*“I conclude that, as a mark of the court's utmost displeasure, a de bonis propriis costs order needs to be made against the plaintiff's counsel and attorney. The plaintiff itself adopted the offensive assertions. There will accordingly be an order against the counsel Mr Makhumbeni, the attorney Mr Matloga and the plaintiff to jointly and severally pay the second to seventy-fourth defendants' cost in the application to strike out. Because of the seriousness of the accusations, the costs will be awarded on an attorney and client scale, and will include the costs of two counsel. I intend, by this order, to send out a strong message that the court will not allow its process to be abused by legal practitioners hurling gratuitous insults at their colleagues.”*⁸

[26] In *SA Liquor Trader's Association & others v Chairperson, Gauteng Liquor Board & others*⁹ O'Reagan J held that:

"An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."¹⁰

[27] Such an order is usually punitive to counsel who is deemed to have been negligent to a serious degree. In *Baphalane Ba Ramokoka Community* the order was granted against the plaintiff's legal representatives for statements that accused senior counsel of the opposition of breaching ethical duties, misleading the courts as well as trampling on the Constitutional duties of the plaintiff¹¹. This gives an indication of what is deemed to be serious enough to warrant such an order. In casu, the conduct of the applicants' attorney has indeed been below par. The irregular service, the failure to timeously file the replying affidavit and the pursuant condonation application at the eleventh hour are indicative of incompetence on the part of the attorney. However, such incompetence does not amount to negligence of such a serious degree as to warrant a cost order de bonis propriis.

Order

I accordingly make the following order:

The application is dismissed;

There is no order as to costs

Y SIDLOVA

ACTING JUDGE: LAND CLAIMS COURT

For the applicant: Mr. S Singh

Instructed by: S Singh of Sundeep Singh and Associates

For the respondents: Advocate C Hattingh

Instructed by: P Vinnicombe of Vinnicombe and Associates

1Land Claims Court Rules, Government Notice 300 in Government Gazette 17804 of 21 February 1997

2Harms D. Civil Procedure in the Superior Courts (LexisNexis, Durban

1990) Service issue 45, April 2012 at B-46

3Harms D. Civil Procedure in the Superior Courts (LexisNexis, Durban

1990) Service issue 45, April 2012 at B-47

4 [1996] 2 All Sa 522 (LCC)

5 [1999] JOL 4572 (LCC)

6 [2000] 1 All SA 622 (W)

7 [2011] JOL 27937 (LCC)

8 [2011] JOL 27937 (LCC) at para 41

92009 (1) SA 565 (CC)

102009 (1) SA 565 (CC) at 528F

11 [2011] JOL 27937 (LCC) at para 30

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