

SOUTH AFRICA / JUDGMENT

Rustenburg Local Municipality v Tayob (M154/2014) [2015] ZANWHC 5 (9 April 2015)

[2015] ZANWHC 5

COURT

North West High Court, Mafikeng

BEFORE

GURA

CASE / FILE NUMBER

M154/2014

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NO: M154/2014
DATE: 09 APRIL 2015

In the matter between:

RUSTENBURG LOCAL

MUNICIPALITY.....APPLICANT

.....

A

TAYOB.....RESPO

NDENT

.....

JUDGMENT

GURA J

Introduction

[1] The applicant seeks an order in the following terms:

“1. That the respondent or any person occupying through him to vacate the land described as portion 1 of the Farm Town and Townlands 272, JQ Rustenburg;

2. That the respondent or any person authorised by him is ordered to stop operating a car mechanic and panel beating business from land described as portion 1 of the Farm Town and Townland 272, JQ Rustenburg without the council's consent;
3. That the respondent is ordered to demolish any structure erected without approved building plan from the municipality in the land described as portion 1 of the Farm Town and Townlands 272, JQ Rustenburg;
4. That the respondent is ordered to pay any expenses incurred by the applicant in demolishing any structure erected without approved building plan from the municipality in the land described as portion 1 of the Farm Town and Townlands 272, JQ Rustenburg;
5. That the respondent is ordered to pay costs of this application on an attorney and client scale."

The Applicant's case

[2] The applicant is the owner of the land described as portion 1 of the Farm Town and Townlands 272, JQ Rustenburg. The land is also referred to as Portions 235 and 236 of the Farm Town and Townlands, JQ No. 272 Rustenburg. As confirmation of its averment, the applicant has annexed to its founding affidavits a copy of the title deed search dated 10 September 2013. The respondent has not been authorised by the applicant to occupy or use the said property. He is operating a motor vehicle mechanic and panel beating business on the said property without applicant's consent.

[3] On 27 August 2013 the applicant directed a letter to the respondent urging him to stop its illegal activities. Paragraph 1 of that letter reads:

"It's long you have been informed that you must vacate the property that you are illegally operating a car mechanic and panel beating without the council's consent. You are aware that the contract with the previous owner and the council has long lapsed. You have to take out any property that belongs to you with immediate effect as the council would like to take over the property for other purpose."

[4] On 27 August 2013, i.e. on the same day on which respondent received the letter from the applicant, his attorney addressed a letter to the applicant. It reads:

"USE OF PROPERTY: REMAINDER OF PORTION 1 OF FARM TOWN AND TOWNLANDS OF RUSTENBURG

USE OF PROPERTY: REMAINDER OF PORTION 1 OF FARM TOWN AND TOWNLANDS OF RUSTENBURG

OUR CLIENT: A TAYOB

Your letter dated the 27th August 2013 addressed to Mr A Tayob, was handed to us for reply.

It is our instructions that our client took over the existing operation from Mr Le Grange, who has been repairing caravans on the site for almost 20 years. Our client had the legitimate expectation that the operations could carry on in the same vain.

Our client took note of the contents of your letter of the 27th August 2013 and undertake to immediately cease its illegal activity. For the sake of clarity our client will continue to use the storage facility erected on the property.

Our client will make further submission which will be delivered to you by return of mail.”

- [5] The land in question is zoned as “public open space”. The only improvements and development that were done on the said property for which site development plans and building plans were submitted for approval to the applicant were made by one Pieter Andries Le Grange. The latter had a caravan business known as President Gypsey. However apart from the improvements aforesaid, there are presently other illegally erected structures. These were done without site development plans which would have been considered for approval/disapproval by the applicant.
- [6] The applicant prays for an order granting it permission to demolish any structure on the said premises which was not erected by President Gypsey (Le Grange). The structures were not built in compliance with the National Home Builders Registration Council (NHBRC) standards and as such the safety of the said illegally erected structures cannot be guaranteed. They do not have the engineer’s certificates and certificate of compliance. The safety of the people working in those structures is also not guaranteed.

The Respondent’s case

- [7] The respondent denies that the applicant has the necessary locus standi to bring this application against him. The applicant sold the property on which the respondent’s business is situated to a certain Foxpower Northwest Investments (Pty) Ltd, represented by a certain Mr Roy Henry. When respondent received the first letter from the applicant in 2013, he immediately contacted the applicant to understand what was going on. He met the appropriate sector portfolio manager of the applicant, who informed him that the applicant had no authority to discuss the matter and that respondent should address his requests to the said Mr Henry. The respondent then met Mr Henry in his office and discussed the matter with him. He informed him that he had bought the land and that he intended to develop a complex thereon. He was unwilling to come to respondent’s rescue.
- [8] A few months later, Foxpower Investments placed a notice on respondent’s front gate advertising its intention to rezone the property. Respondent attached a copy of this notice as annexure “AT 1” to its answering affidavit. From annexure “AT 1” it can be seen that Foxpower is the applicant and therefore the rightful incumbent and further that the property is described as portions 235 and 236 of farm Town and Townlands. Annexure “AT1” proves that the applicant is no longer the rightful owner of portions 235 and 236. The applicant disposed of the property to Foxpower and thus no longer has the locus standi to

bring this application.

- [9] Around 24 July 2012 respondent acquired a business known as President Gypsey Rustenburg, as a going concern from a certain Pieter Andries Le Grange. Prior to the acquisition of the aforementioned business Le Grange conducted the business from the premises situated at a portion of certain portions 235 and 236 of the farm Town and Townlands Rustenburg for approximately 20 years. At all relevant times the business (President Gypsey Rustenburg) was properly licenced by applicant to trade as such from the aforementioned premises.
- [10] In addition to acquiring the business from Le Grange, respondent entered into a cession and pledge agreement with Le Grange in respect of which the said Le Grange agreed to cede his right, title and interest in respect of a lease agreement entered into by and between him and the applicant pertaining to the business premises known as President Outdoors Rustenburg, from which the business known as President Gypsey conducted its operations.
- [11] Subsequent to acquiring the business and the business premises from Le Grange, respondent attended to the offices of the applicant to obtain a licence to trade in second hand goods, same was duly issued on or about 21 February 2014 valid for a period of five years. Prior to the issue of the aforementioned trading licence, the applicant conducted an inspection in loco on the business premises to avail itself of the infrastructure, nature and extent of respondent's business operations. Subsequent to the aforementioned inspection, the applicant consented to respondent being issued with the license, which was then issued by the South African Police Services.
- [12] The initial lease agreement entered into by and between Le Grange and the applicant lapsed on an unknown date in the distant past. Le Grange and the applicant did not terminate the lease and it continued indefinitely. As a consequence of the cession, respondent continued to lease the premises from the applicant on an informal basis, but subject to the same terms and conditions as set out in the original lease agreement. The applicant conducted regular inspections of respondent's business premises to ensure proper compliance with the applicable health and safety regulations. At all relevant times, the applicant had first-hand knowledge of the nature and extent of respondent's business activities on the premises.
- [13] Mr Pieter Adries Le Grange filed a supporting affidavit which was attached to respondent's answering affidavit wherein he confirms "... the truth of the contents of the respondent's founding affidavit in as far as it related to me and the transaction between myself and the applicant as well as the subsequent transactions with the respondent." The applicant has further attached to his answering affidavit, a "cession and pledge" between him and Le Grange.

Submissions

- [14] The respondent raised one point in limine to the effect that the applicant had no locus standi to launch this application because it is not the owner of the property in issue.
- [15] It will be seen that the question of ownership of the said property is central to the decision on the merits. So for practical reasons, the Court decided to deal with the point in limine not separately but together with the merits in its

judgment.

- [16] The respondent's counsel submitted, that there can never be any eviction which is lawful except either the Prevention of Illegal Eviction from Unlawful Occupation of Property Act, No. 19 of 1998 (PIE) or the Extension of Security of Tenure Act, No.62 of 1997 (ESTA) is applied. He submitted accordingly that since there is no reference either to PIE or ESTA in the applicant's papers, the application is fatally defective.
- [17] The applicant's counsel submitted that there is presently no valid lease agreement between the applicant and Le Grange. He submitted further that applicant's ownership on the said property has not been denied. Finally he stated that neither PIE nor ESTA found any application in this matter.

Applicability of PIE and ESTA

- [18] CP Smith: Eviction and Rental Claims: A Practical Guide; page 3 – 11 para 3.2.4 holds the following view:

“Buildings or structures that do not perform the function of a form of dwelling or shelter for humans do not fall under PIE, and since juristic persons do not have dwellings, their unlawful possession is similarly not protected by PIE. Therefore PIE does not apply to commercial and/or industrial property. It should be noted however, that although a juristic person may lease property, the determining factor for the applicability of PIE is always the nature of the occupation, i.e. are humans occupying the property for dwelling or commercial purpose? In the former case, PIE will apply even if a juristic person is the lessee.”

See also MC Denneboom Service Station CC and Another v Phayane 2015 (1) SA 54(CC)

2015 (1) SA 54

- [19] In contrast with PIE, ESTA applies:

“. . . to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships. ESTA also applies to any land within such a township which has been designated for agricultural purposes in terms of any law; as well as any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition. The provisions of section 2(1) of ESTA are subject to section 4, which provides for measures to facilitate long-term

security of tenure for occupiers.”

(CP Smith at para 5.3.1)

In terms of ESTA, an occupier is:

“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, but excluding –

- (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.”

(CP Smith at para 5.4)

[20] In my view therefore, the provisions of PIE and ESTA are not applicable to the present case because the respondent does not occupy the property for residential but for business or industrial purposes.

A lease

[21] “A lessee in occupation of immovable property has acquired a real right and there is no-one against whom his right to occupy during the currency of the lease will not prevail. In the case of a written lease, the lessee will prove his right of occupation by production of the lease agreement, and if the lease is oral, by way of evidence. Either way, the occupier (lessee) bears the onus to prove his right to occupation against the owner. . .”

(CP Smith, *supra* at para 1.5.2)

There is no valid lease agreement presently between the applicant and Le Grange over this property. The respondent also confirms this situation because the lease agreement expired long ago. Le Grange has no just cause to exercise the rights of an owner over this property. Therefore whatever agreement is there between the respondent and Le Grange over this property cannot affect the rights of the owner of the property (the applicant). Already on 27 August 2013 the respondent’s attorneys wrote to the applicant “our client took note of the contents of your letter dated 27 August 2013 and undertake to immediately cease its illegal activity. (my emphasis)

Conclusion

[22] The applicant has discharged its onus of proving that it is the owner of the property. Documentary proof is before court. On the other hand none of the documents which the respondent annexed to its papers disprove that the applicant is the owner of the property. The respondent himself has failed to show any legally valid reason why he should not be evicted.

[23] In relation to costs the respondent's attitude in opposing this application has been frivolous, vexatious and malicious. He knew as early as August 2013 that he had no better title on the property as against the applicant. He persisted however with his belligerent attitude of remaining on the property and disregarded all attempts by the applicant to evict him. It would be unfair to expect the applicant to be out of pocket because of the attitude of the respondent. He is the one who forced the applicant to litigate, something which could easily have been avoided. A proper remedy for the respondent is a punitive cost order.

[24] Consequently, the following order is made:

24.1 That the respondent or any person occupying through him are to vacate the land described as portion 1 of the Farm Town and Townlands 272, JQ Rustenburg (Portions 235 and 236 of the Farm Town and Townlands, No.272 Rustenburg) on or before 24 April 2015;

24.2 That the respondent or any person authorised by him is ordered to stop operating a car mechanic and panel beating business from land described as portion 1 of the Farm Town and Townland 272, JQ, Rustenburg (Portions 235 and 236 of the Farm Town and Townlands, No.272 Rustenburg) without the council's consent;

24.3 That the respondent is ordered to demolish any structure erected without approved building plan from the municipality in the land described as portion 1 of the Farm Town and Townland 272, JQ Rustenburg (Portions 235 and 236 of the Farm Town and Townlands, No.272 Rustenburg);

24.4 Should the respondent fail to demolish and remove any structure erected illegally on the premises on or before 17 April 2015, the applicant is directed to demolish and remove any such structure, rubble, material or anything whatsoever at its own costs;

24.5 That the respondent is ordered to pay any expenses incurred by the applicant in demolishing, removing and storing any structure erected without approved building plans from the municipality in the land described as portion 1 of the Farm Town and Townland 272, JQ Rustenburg (Portions 235 and 236 of the Farm Town and Townlands, No.272 Rustenburg);

24.6 That the respondent is ordered to pay costs of this application on an attorney and client scale.

SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING: 13 NOVEMBER 2014

DATE OF JUDGMENT: 09 APRIL 2015

COUNSEL FOR THE APPLICANT: ADV M. G. MASHABA

COUNSEL FOR THE RESPONDENT: ADV J. H. SULLIVAN

ATTORNEYS FOR THE APPLICANT: KGOMO MOKHETLE & TLOU INC.

ATTORNEYS FOR RESPONDENT: SMIT STANTON INC.

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