

SOUTH AFRICA / JUDGMENT

Skosana and Others v Jose and Another (LCC 41/2024) [2025]

ZALCC 12 (26 February 2025)

[2025] ZALCC 12

COURT

Land Claims Court

BEFORE

Ncube

CASE / FILE NUMBER

LCC 41/2024

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IN THE

LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE

NO: LCC 41/2024

Before:

Honourable Ncube J

Heard on:

26 November 2024

Delivered on:

26 February 2025
In the matter

between:

ZIMKHONA JOHN
SKOSANA
1st Applicant
ABRAM
SKOSANA
2nd Applicant
SKOSANA
FAMILY
3rdApplicant
and
FERREIRA
JOSE
1st
Respondent
MAGISTRATE BHM MASHELE
NO 2nd
Respondent

THE MINISTER:

DEPARTMENT OF AGRICULTURE
AND LAND
REFORM
3rd
Respondent
COMMISSION ON
RESTITUTION OF LAND RIGHTS 4th
Respondent
ELIAS MOTSOLEDI LOCAL
MUNICIPALITY
5th
Respondent
NDEBELE TRADITIONAL
COUNCIL
6th
Respondent
ORDER

1.
The Application for Condonation by the First Respondent is granted.
2.
A Rule Nisi granted against the First Respondent on 20 March 2024 is discharged.
3.
The Application for Restoration of Residence is dismissed.
4.
There is no order as to costs.

JUDGMENT

NCUBE J

Introduction

[1] This is an application for restoration of possession of residence in terms of section 14 (1) of the Extension of Security of Tenure Act 62 of 1997 (“the Act”). The Applicants allege that the First Respondent unlawfully deprived them of their residence in their home. The Applicants also claim restoration of access to related services and compensation for damaged belongings. The application is opposed by the First Respondent. The Second Respondent filed notice to abide by the decision of the court. It is not clear from the papers if the rest of the Respondents oppose this application as they have not filed notice to participate. The Application was brought on urgent basis, and it is divided into two parts. Part A is application for restoration of residence. Part B is the application for review of the protection order granted by the Second Respondent (“the Magistrate”) against the Applicants on 17 April 2023. This judgement is concerned with Part A only. Part B of the application was adjourned sine

die.

[2] Having read the papers and other documents filed of record, I was of the view that the allegation, if proved, render the matter urgent. I therefore condoned Non – compliance with the Rules relating to service, form and time limits and I issued directives pertaining to filing of further documents. I issued a Rule Nisi calling upon the First Respondent to show cause on 16 May 2024 why an order in terms of paragraphs 2.1 to 2.7 of the Applicants’ Notice of Motion should not be made. I further granted an interim interdict against the First Respondent with regard to restoration of residence, rebuilding of structures demolished and access to certain services. The directives were constantly amended in order to accommodate the First Respondent with the filing of the Answering Affidavit which was not forthcoming.

Parties

[3] The First Applicant is Zimkhona John Skhosana (“John”) who represents the Skhosana Family in these proceedings. Sergeant and Abram Skhosana are John siblings. Their father is Juda Elias Skhosana (“Elias”). Their mother is Stella Johanna Mudau (“Johanna”). The First Respondent is Ferreira Jose (“Mr Jose”) who is the registered owner of Portion 2[...] of the Farm Mapochgronde 500 (“the farm”) Middelburg Mpumalanga

Province. The Second Respondent is Magistrate Mashele (“the magistrate”) who is cited herein in his official capacity. The Third Respondent is the Minister of Agriculture, Rural Development and Land Reform. The Fourth Respondent is the Commission on Restitution of Land Rights. The Fifth Respondent is the Elias Motsoaledi Local Municipality on whose area of jurisdiction the farm is situated. The Sixth Respondent is the Ndebele Traditional Council.

Factual Background

- [4] Elias had a house on the farm, and he was staying there with his family. Mr Jose and his wife bought the farm in 2019, and it was registered in their name on 3 December 2021. Before Mr Jose bought the farm, he and his wife visited the farm for inspection on eighty-five
- (85) occasions and only found Elias at his home on the farm. Elias passed away on 9 April 2021, Elias's wife, Johanna predeceased Elias. From 29 January 2022 to 19 March 2024, when Mr Jose and his wife visited the farm, they took photos of the house structures which belonged to the Skhosana family. Elias lived on the farm in question till 2016 when he left the farm to stay with the John due to illness.
- [5] On 17 April 2023, John and Abram were summoned to appear in Roossonekal Periodical Court where they met Mr Jose and his wife. Mr Jose and his wife had lodged an application for a protection order against John and Abram. The Magistrate granted the protection order against them. In terms of the protection order, John and Abram were prohibited from breaking Mr Jose's property. They were prohibited from entering Mr Jose's property without prior arrangement or without contacting the Jose family. They were also prohibited from harassing and threatening the Mr Jose and his wife. The protection order was granted in terms of the Protection from Harassment Act[1]
- [6] The First Respondent took pictures of house structures which according to Mr Jose, were unoccupied and dilapidated. Mr Jose demolished those structures. Prior to demolition and on 9 May 2023, Mr Jose attorney wrote to John and Abram reminding them of the terms of the protection order and advising them to remove their deceased parents' belongings which were still on the farm. John and Abram were informed in the letter to remove the belongings on or before 30 June 2023 and that if the belongings were not removed by 30 June 2023 the owner would remove and dump them on the road. The Skhosanas were also given permission to break down the structures which their deceased parents occupied and remove the building material. They were informed further, that if they failed to demolish the said structures, the owners were going to demolish them.
- [7] Paragraph 8 of the letter calls upon the applicants to contact the attorney by no later than 15 June 2023 in case the applicants had questions or in case they wanted to make representations. They were informed that if they did not respond, it would be assumed that they did not want to make representations. On 31 May 2023, Lawyers for Human Rights wrote a letter to Mr Jose on behalf of the Applicants complaining about alleged atrocities committed by the Mr Jose against the Applicants at the same time threatening to take the matter to court on urgent basis in case Mr Jose did not comply.
- [8] On 09 June 2023, Mr Jose's Attorneys responded to Lawyers for Human Rights' letter dated 31 May 2023. In paragraph 8 of the Attorneys' letter, it is stated that a protection order was granted against Abram and John. It is also stated in the response letter that no member of the Skosana family was staying on the farm. Paragraph 9 of the letter alludes to the fact that only the parents of Abram and John resided on the farm before their demise. In paragraph

10, John and Abram were called upon to remove their deceased parents' belongings before 30 June 2023 or failing which, the owners of the farm were going to remove the same and dump on the road. John and Abram were also called upon to demolish the, house structures and salvage the building material, before 30 June 2023, failing which the owner would demolish those structures and remove the building material. There was no response.

- [9] On Tuesday 12 March 2024, a WhatsApp message was sent reminding people to remove the deceased's parents' belongings otherwise the belongings would be regarded as abandoned and will be put on the street. Again, there was no response. On 10 January 2024, Mr Jose removed the parents' belonging from two structures and stored them in a stone structure. On 16 January 2024 Mr Jose then demolished the first two structures. On 19 March 2024 Mr Jose and his wife removed the parents' belongings to the street and demolished the stone structure.

Legal Matrix

- [10] The main issues as I see them are whether the Applicants were occupiers in terms of the Act. If the Applicants were occupiers, the question is whether they were in peaceful and undisturbed occupation of the land and demolished structures and finally whether Mr Jose evicted them from the land, thus unlawfully depriving them of their right of possession or occupation.

- [11] The Act defines the occupier as meaning:

“a person residing on land which belongs to another person, and who, on 4 February 1997, or thereafter, had consent or another right in land 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”

For purposes of this judgement, it is important for the Applicants to establish that they were residing on the farm in question. In terms of the Act, to reside means to live at the place permanently and residence has a corresponding meaning. I also do not have the evidence of the applicants' income in order for them to qualify as occupiers in terms of paragraph (c) of the definition. The prescribed amount at the present moment is R13 625 – 00.

- [12] A person claiming to be an occupier has a duty to prove that he complies with all the components of the definition of an 'occupier' in terms of the Act. The income of a person claiming to be an occupier falls within that person's peculiar knowledge[2]. In *Pieterse v Venter and Another*[3] Classen J writing for the Full Court said:

“The absence of any evidence as to appellant’s monthly income sounded the final death knell to his defence. In fact, Mr Botha acknowledged this fact in a concession contained in paragraph 3.27 of his heads of argument. The appellant did not disclose his income and had not discharged the onus to show that he is an ESTA occupier. The court a quo therefore correctly found that he is not an ESTA occupier”

- [13] Apart from lack of evidence pertaining to the Applicants’ income, the issue of the Applicants’ residence on the farm at the time of demolition of the structures and locking of the gates is highly contested. In his Founding Affidavit, John states that currently, he resides at 1[...] S[...] AA, Kwa-Mhlanga. There is no indication as to when he started residing at that address. At paragraph 24 of his Founding Affidavit, John describes that residence as temporary accommodation which has not been stable since the 17th of April 2023, being the date of their eviction from the farm. However there is no indication as to who is the owner of that residence. Mr Jose, in his Answering Affidavit, contents that no one was residing on that farm since 2016. John states in his Founding Affidavit that the Skosana Family was residing on that farm till 17 April 2023 when they were evicted.
- [14] According to witnesses Pet Bhuda and Aubrey Mahlangu, the Applicants had left the farm sixteen (16) years ago. According to witness Mr Pieter Muller, John only came to the farm, to visit the graves. In his Replying Affidavit, John has avoided to comment on the version of Mr Muller that he told Mr Muller that Elias, who was the only person residing on the farm had left the farm between 2014 or 2015 and went to stay with his family somewhere as he was sick. I am mindful of the affidavits of Mr John Masango, Wilham Makau, Hlophi Skhosana and William Buda. These affidavits are not helpful.

John Masango states in his affidavit that Skhosana family has been resident on the farm since he was born till 2024. However,

according to John, in 2024 the family was no longer residing on the farm since they were evicted on 17 April 2023. According to the other witnesses, the new owner locked the gates in 2021. This contradicts the evidence of John who says they were evicted on 17 April 2023, the date, according to him, on which the gate was closed.

- [15] In any event, on the Applicants’ own version, they have not been residing on the farm since 17 April 2023. The Applicants left the farm because in terms of the Protection Order, they are prohibited from entering the farm. They did not appeal the protection order so it still stands until it is set aside by a competent court of law. Section 165(5) of the Constitution[4] provides:

“ (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies”

In my view, the Applicants should have challenged the Magistrates Protection Order first. Part A of this application should have been the challenge to the Protection order. The problem is that the review of the protection order, is Part B of this application and it has been adjourned sine die.

[16] Cell Phone data for the last three years which Mr Jose obtained from Vodacom and MTN service providers, shows that the majority of calls and message's made and received by John and Abram respectively, originated from Kwa-Mhlanga and Mamelodi. The Applicants registered themselves in National Elections, giving their residential addresses as being Kwa-Mhlanga (1st applicant), Mamelodi (2nd applicant) and Emalahleni Witbank (3rd applicant). The Applicants registered their phones with service providers in terms of RICA. The information shows that John has been residing at Kwa-Mhlanga since 2014 and Abram has been residing at Mamelodi since 2010. I am also alive to the evidence of the expert witness Mr Kusel indicating that at a certain stage, there was no indication that there were people residing at the Applicants' homestead.

Restoration of Residence

[17] Section 14 of the Act deals with restoration of residence[5] and it provides:

“A person who has been evicted contrary to the provisions of this Act may institute proceedings in the Court for an order in terms of subsection (3)”

Section 3 provides –

“In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order-

- (a) for the restoration of residence on and use of land by the person concerned; on such terms as it deems just;
- (b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately, prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;
- (c) for the restoration of any services to which the person had a right in terms of section 6;
- (d) for the payment of compensation contemplated in section 13;
- (e) for the payment of damages including but not limited to damages for suffering or inconvenience caused by the eviction; and
- (f) for costs.”

In all the circumstances mentioned in subsection 3, the emphasis is on residence. The Applicants should have been resident on the farm.

Disputes of Fact

[18] It is clear that there is a genuine dispute of fact on the issue of residence. This dispute of fact should have been foreseen by the Applicants and they should have applied for referral of their application to oral evidence or trial. In *Robert Victor Benyon v Rhodes University and Another*[6] Lowe J, with regards to factual disputes, expressed himself in the following terms:

“In Plascon-Evans Paint Ltd v Van Riebeck Paints(Pty) Ltd [1984] ZASCA51;1984(3) SA 623(A) 634-635, the rule was established that where in motion proceedings disputes of facts arise on the affidavits, a final order can be granted only if the facts averred in Applicant’s affidavits, which the Respondent, together with the facts alleged by the latter, justify such order. It may be different if the Respondent’s version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers. National Director of Public Prosecutor’s v Zuma 2009(2) SA 279 SCA [26]”

The disputes of fact in this case are so glaring that it makes it impossible for me to grant the relief sought. One can only be thankful that the Applicants collected their belongings from where they had been dumped.

Condonation

[19] Mr Jose filed an Answering Affidavit which did not contain the Commissioner’s certificate. The Applicants filed the Notice to Oppose the filing of that Answering Affidavit. A fresh and properly commissioned affidavit was later filed by Mr Jose. The Applicants have replied to Mr Jose Answering Affidavit. The Applicants have no qualms with Mr Jose condonation application.

Costs

[20] Mr Guldenpfenning SC, Counsel for Mr Jose asked me to dismiss the application with costs including costs of Senior Counsel. The practice in this court is not to award costs unless there are special circumstances which warrant an award of costs. There are no special circumstances in this case which warrant an award of costs.

Order

[20] In the result, I make the following order:

5. The Application for Condonation by the First Respondent is granted.
6. A Rule Nisi granted against the First Respondent on 20 March 2024 is discharged.
7. The Application for Restoration of Residence is dismissed.
8. There is no order as to costs.

Judge of the Land Court of South Africa

Appearances:

For the Plaintiffs: Adv D. Sono

Instructed by : Legal Aid South Africa

Emalahleni Local Office

For the Defendants: Adv S. Guldenpfenning SC

Instructed by : Van Dyk Theron Inc Attorneys

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Pretoria

Heard: 26 November 2024

Delivered on: 26 February 2025

[1] Act 17 of 2011

[2] See *Sikhosana and Others v Roos t/a Roos se Oord and Others* (LCC50/99)

[1999] ZALCC22 (10 May 1999)

[3] (A5016/2011[2012] ZAGPJHC7(10 February 2012)

[4] Act 108 of 1996

[5] My own emphasis

[6] 95351/2016)

[2016] ZAECGHC161921 November 2016) para 28

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