

SOUTH AFRICA / JUDGMENT

Sokhela and Another v Mhlungu and Others (LCC 41/2019B) [2022] ZALCC 12 (20 May 2022) [2022] ZALCC 12

COURT

Land Claims Court

BEFORE

Y S Meer

CASE / FILE NUMBER

LCC 41/2019B

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT RANDBURG

Case

Number: LCC 41/2019B

Reportable:

No

Of

Interest to other Judges: No

Revised:

No

Before:

The Honourable Acting Judge President Meer

Heard

on: 29 April 2022

Delivered

on: 20 May 2022

In the matter between:

THULANI
SOKHELA
First Applicant
NOZIPHO
MAVIS SOKHELA
Second Applicant
AND
SENZELE
JOHNSON MHLUNGU
First Respondent
ELIZABETH
MARIA MHLUNGU
Second Respondent
IN RE
SENZELE
JOHNSON MHLANU
First Applicant
ELIZABETH
MARIA MHLUNGU
Second Applicant
THULANI
SOKHELA
First Respondent
MAVIS
NGCOBO SOKHELA Second
Respondent
ISITHOMBE
SOKHELA
Third
Respondent
DIRECTOR GENERAL OF
THE DEPARTMENT
OF RURAL DEVELOPMENT
AND
LAND REFORM
Fourth
Respondent
IMPENDLE
LOCAL MUNICIPALITY Fifth
Respondent

JUDGMENT

MEER AJP

Introduction

- [1] On 30 March 2022 the Applicants sought, by way of an urgent application, the suspension of an order granted by this Court on 29 November 2021 for their eviction from the First and Second Respondents' farm, described as Portion 9 of lot 91, farm number 1819 (Kwethu farm) Boston, KwaZulu-Natal ("the farm"), pending the finalisation of a labour tenant application.
- [2] The eviction order was granted in the absence of the Applicants, who concede that they did not respond to the eviction papers served on them, other than to approach the Department of Agriculture, Land Reform and Rural Development and the land rights advocacy organization, Association for Rural Advancement ("AFRA"). It was only when the Sheriff sought to evict them, pursuant to the eviction order, that they launched this urgent application. The labour tenant application on which the Applicants rely for the suspension of the eviction order, is alleged to be that of the First Applicant's late mother. They contend that by virtue of her application, they are protected from eviction in terms of section 14 of the Land Reform (Labour Tenants) Act 3 of 1996 ("the Act").^[1]
- [3] The Applicants, a husband and wife, have been resident on the farm since the 1990s. The First and Second Respondents have been joint owners of the farm since 2001. They, as aforementioned, obtained the eviction order against the Applicants in November 2021, and oppose this application for its suspension. I shall refer to them as the Opposing Respondents. The Third Respondent, the official with whom applications for awards of land are lodged in terms of the Act, and the Fourth Respondent have not participated in these proceedings.
- [4] On 5 April 2022 the parties agreed, at a telephonic conference which I convened, that the eviction order would be suspended pending the determination of this application. The matter proceeded by way of a virtual hearing before me on 29 April 2022.
- [5] Contrary to the relief sought in the notice of motion, namely the suspension of the eviction order, the heads of argument on behalf of the Applicants, disquietingly, sought the rescission of that order. As no application for rescission is before me, and indeed the requirements therefor have not been met, such an application cannot be entertained. This judgment considers only whether there are grounds for suspending the eviction order pending the determination of an alleged labour tenant application. As such, the relief is in the form of an interim interdict.

Background Facts and Evidence

[6] The background facts are in the main provided in the First Respondent's answering affidavit, as set out below, together with the First Applicant's replies, where given.

6.1 The First Applicant and his mother were granted permission to reside on the farm in the 1990s by a previous owner, Mr Padmore. The farm was later sold to a Mr Walsh, with a condition of sale that the First Applicant's mother and family would have to be relocated, alternatively evicted from the farm prior to Mr Walsh taking ownership. This did not occur and throughout Mr Walsh's ownership of the farm he endeavoured to have the family evicted.

6.2 At no material time were either the First Applicant or his mother employees or labourers on the farm. This allegation is met with a bald denial by the First Applicant in reply. In 2001 Mr Walsh sold the farm to the Opposing Respondents, such sale being contingent upon the Opposing Respondents inheriting the matter of the Applicants' residency on the farm, which they accepted.

6.3 In an attempt to cordially and amicably deal with the residency of the Applicants on the farm, the following rules were communicated to them:

6.3.1 They would not establish any new dwellings on the farm;

6.3.2 They would not allow unauthorised persons to reside on the farm;

6.3.3 They would not introduce and graze livestock on the farm without the owner's consent;

6.3.4 They would not demarcate any portion of the farm for their own use;

6.3.5 They would not threaten anyone with physical violence or death.

6.4 The answering affidavit contends that the Applicants have breached every one of these rules, and attempted to illegally connect electricity. Discussions with the Applicants, in an attempt to resolve the situation, were met with threats of violence. The Applicants refused officials from the Department access onto the farm and accosted them with threats of violence. This too is denied. These allegations are baldly denied in reply.

6.5 The Opposing Respondents offered to relocate the Applicants to an area known as eNcwadi, and to construct a three-bedroom house for them. The offer was not accepted. Thereafter on 8 January 2019 the Respondents instituted proceedings for the eviction of the Applicants, in terms of the Extension of Security of Tenure Act 62 of 1997.

[7] The Probation Officer's report, for the purposes of the eviction application, records the First Applicant stating that he worked partially for the Opposing Respondents' predecessors, that he never worked for the current landowner, was paid 'little money' and nothing else, and that he has never worked fulltime on the farm. The report records further that he is currently working on the neighbouring farm and has always worked there.

[8] An account by Mr Ncanana of the Department of Agriculture, Land Reform and Rural Development, in an e-mail dated 15 March 2022, annexed to the Applicants' founding affidavit and highlighted in the First Respondent's answering affidavit, is not denied in reply. Mr Ncanana states that the First Applicant chased him away with a screwdriver and "[he] had to drive the

car in reverse for almost 500 meters from his house as the situation did not allow [him] to turn around".

[9] As aforementioned, the eviction order was granted in the absence of the Applicants. The First Applicant admits that the papers were served on him, but states that "due to lack of sophistication and being an indigent person" he took the papers to AFRA and assumed the matter was handled by them. The eviction order of 29 November 2021 was served on the Applicants. They neither vacated the property nor applied for the rescission of that order.

[10] An attempt by the Sheriff and members of the South African Police Services on 28 March 2022 to evict the Applicants pursuant to the eviction order, was met with violence, according to the Sheriff's return of service. On 29 March 2022, faced with actual eviction, the Applicants instructed an attorney to bring this urgent application for the suspension of the eviction order, on the basis that a labour tenancy application had been lodged.

[11] As proof that a labour tenancy application had been lodged by his late mother, the First Applicant relied on "Annexure TS2" to his founding affidavit, which he avers is a copy of her application. The annexure is a pamphlet in isiZulu, with dates and a reference number. I consider below the probative value of this document.

[12] Apropos the labour tenancy application, the First Respondent states that on the First Applicant's own version he is not a labourer or employee, and that save for an application lodged in 1999, there is no allegation that the First Applicant's late mother was a labourer or employee of the Opposing Respondents' predecessors. The mere existence of a lodgment of an application some 23 years ago, it is contended, cannot be the basis upon which the Applicants seek to claim the status of labour tenants. This is denied in reply, the Applicants contending that according to section 14 of the Act, as long as a labour tenancy

application has been lodged, they cannot be evicted, unless special circumstances exist, and the Opposing Respondents have not averred any special circumstances.

[13] The First Respondent further points out that during consultations in 2017 to 2019, the Applicants did not raise the labour tenancy status. Opportunistically, it was only once threatened with eviction in March 2022 that they raised the labour tenancy application. The First Respondent refers to this as an abuse of the court processes, an allegation which is met with a bald denial by the Applicants in reply.

[14] Such were the background facts and evidence. For the purposes of the interim relief sought in this application, it is not necessary for me to consider the disputed facts, other than those pertaining to the establishment of a prima facie right or clear right in respect of the relief sought before me, namely the suspension of the eviction order pending the finalisation of the alleged labour tenancy application. The disputed facts pertaining to the eviction application fall to be considered in a condoned rescission application, should there be one.

Urgency

[15] The Opposing Respondents contend that the urgency the Applicants rely on is self-created, as they were only spurred into action when they were confronted with actual eviction in terms of the court order. They did nothing before this, both in respect of the eviction and labour tenancy applications. The stance of the Opposing Respondents is understandable.

[16] I was however satisfied that the matter warranted to be treated as urgent when it was launched, in circumstances where persons who might possibly be protected from eviction in terms of section 14 of the Act, were faced with homelessness. I have not been dissuaded from my view.

Applicant's Entitlement to an Interim Interdict

[17] In *Chief Nchabeleng v Chief Phasha* 1998 (3) SA 578 at paragraph 6 to 18, this Court considered the requirements for an interim interdict. At paragraph 6, the oft-quoted requirements

according to the decided cases, are recorded, namely:

“(a) that the right which is the subject matter of the main action and which (the applicant) seeks to protect by means of interim relief is clear or, if not clear, is prima facie established though open to some doubt;

(b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right (it is implicit in this requirement that the harm apprehended must be the consequence of an actual or threatened interference with the right referred to in (a));

c) that the balance of convenience favours the granting of interim relief; and

d) that the applicant has no other remedy.” (Internal references omitted.)

[18] In applying these principles, this Court endorsed the approach in *Olympic Passenger Service (Pty) Ltd v Ramlagan*[2] as well as that in *American Cyanamid Co v Ethicon Ltd*[3]. In the former case, Holmes J, commenting on the prima facie right requirement said:

“It thus appears that where the applicant’s right is clear, and the other requisites are present, no difficulty presents itself about granting the interdict. At the other end of the scale, where the prospects of ultimate success are nil, obviously the court will refuse an interdict.”

In the latter case, Lord Diplock stated that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there “is a serious question to be tried”.

Proof of Labour Tenancy Application

- [19] The right which the Applicants seek to assert is that of protection from eviction, in terms of section 14 of the Act, due to a pending application by a labour tenant. It must therefore be established if this right is *prima facie*, if not clear.
- [20] The labour tenancy application on which the Applicants rely, as aforementioned, is that of the First Applicant’s deceased mother. The Applicants do not attempt to ascribe any labour tenancy status to themselves and advance no evidence that they are labour tenants. According to the First Applicant, his late mother’s application was filed on 16 November 1999 and is “Annexure TS2” to his founding affidavit. It is however not at all evident from the annexure that it is a labour tenancy application by the First Applicant’s mother. The annexure, as aforementioned, is a pamphlet in isiZulu with certain dates (one of which is 16 November 1999), and reference numbers. No name appears on the document, nor is it evident therefrom that it is an application for labour tenancy by any person.
- [21] The supporting affidavit of Applicants’ attorney, Ms Ndlovu, refers to confirmation that “Annexure TS2” is proof of submitting an application to be declared a labour tenant. She states that she enquired and sought confirmation from the Department and the Special Master for Labour Tenants, and refers to “Annexure APN3” to her affidavit as confirmation of the alleged labour tenancy application. She further states that “Annexure APN4” is confirmation and an explanation from the Special

Master’s Office and AFRA of the labour tenant application.

- [22] These two annexures provide no such confirmation. They consist of a series of emails between Ms Ndlovu and various persons, seeking confirmation that a labour tenant application was submitted. “Annexure APN4”, for example is, *inter alia*, correspondence from a Mondli Zondi from AFRA stating that proof of the client’s claim for land acquisition under the Act is attached. The attachment consists of various e-mails between a Mr Thabiso Mbhense, of Legal Aid, and Mr Zondi. In one of the e-mails, of 23 March 2022, Mr Zondi refers to the First Applicant as a labour tenant associate who is being evicted from the farm, and that his mother had a labour tenant claim. Mr Mbhense’s e-mail records the Department as stating that they were unaware of the client being a labour tenant associate who has proof of his mother’s claim. Another e-mail, sent on 16 March 2022, by Sbaningi Mngadi of the Department, suggests that enquiries about whether the First Applicant had lodged a labour tenant claim drew a negative response to the question. A further e-mail, of 3 March 2022, by Mondli Zondi of AFRA to various persons in the Department, states that the First Applicant

is the son of the late labour tenant claimant, Norah Gasa.

[23] Ms Ndlovu, for the Applicants, very properly did not persist during argument with the assertion that the aforementioned annexures proved that a labour tenancy application had been lodged by the First Applicant's mother.

[24] In view of the above, I am unable to find that Annexure "TS2" to the First Applicant's founding affidavit is a labour tenancy application by the First Applicant's mother. I am also unable to find that the annexures referred to by Ms Ndlovu suffice as proof of a labour tenancy application by the First Applicant's mother.

Protection from Eviction in terms of section 14 of the Act

[25] The protection from eviction in section 14 of the Act upon which the Applicants rely, is a protection afforded only to a labour tenant whose application is pending and not to their family members, like the Applicants, or associates.[4] The section, which appears as a footnote above, is repeated here for convenience.

"No labour tenant may be evicted while an application by him or her in terms of Chapter III is pending: Provided that the Court may order eviction if it is satisfied that special circumstances exist which make it fair, just and equitable to do so, taking all the circumstances into account."[5]

[26] Section 14 does not give the Applicants a right to be protected from eviction by virtue of the alleged pending labour tenancy application of the First Applicant's mother. This is so because, firstly and obviously, there is no pending application, given that their mother is deceased. Upon her death her alleged application would no longer have been pending. Secondly, even were she to have been a labour tenant (and here I pause to mention that there is no evidence whatsoever that she was a labour tenant as defined in the Act)[6], with a pending application in terms of Chapter III of the Act, this would not have brought the Applicants within the ambit of the section 14 protection, which would apply only to the First Applicant's mother as the applicant labour tenant. At best she would have been protected from eviction, not her family members or associates, like the Applicants.

[27] The protection from eviction afforded to associates or family members of labour tenants upon the death of a labour tenant, is prescribed at section 9(2) of the Act, which provides:

"On the death of a labour tenant who has retained the right to occupy the farm in terms of the provisions of subsection (1), all his or her associates may be given 12 calendar months' notice to leave the farm."

At best, were the First Applicant's mother to have been a labour tenant, upon her death, the Applicants would have been entitled to protection from eviction for 12 months.

[28] In view of all of the above, the Applicants have established neither a prima facie right, nor a clear right to protection from eviction in terms of section 14 of the Act. They have certainly not shown a serious

question to be tried. The prospects of ultimate success are therefore nil. For this reason alone, the application stands to be dismissed without consideration of the other requirements for an interim interdict. They are accordingly not entitled to a suspension of the order of 29 November 2021, pending the finalisation of the labour tenant application.

Costs

[29] In keeping with the practice of this Court not to award costs except in exceptional circumstances, of which I find there to be none in this application, I intend granting no order as to costs.

[30] I order as follows:

1. The application is dismissed.
2. There is no order as to costs.

Y S MEER

Acting Judge President

Land Claims Court

APPEARANCES

For the Applicants:

Ms P Ndlovu

AP Ngubo Attorneys

For the First and

Second Respondents:

Adv. L Msomi

Instructed by:

Cari du Toit Incorporated Attorneys

[1] Section 14 of the Act states: “No labour tenant may be evicted while an application by him or her in terms of Chapter III is pending: Provided that the Court may order eviction if it is satisfied that special circumstances exist which make it fair, just and equitable to do so, taking all the circumstances into account.”

[2] 1957

(2) SA 382 (D) at 383C-G.

[3]

[1975] UKHL 1; [1975] 1 All ER 504 (HL) at 510c-f.

[4]Associate means: “a family member of a labour tenant, and any other person who has been nominated in terms of section 3(4) as the successor of such labour tenant, or who has been nominated in terms of section 4(1) to provide labour in his or her stead”.

[5] Chapter III, titled “Acquisition of ownership or other rights in land by labour tenant”, provides, at section 16, for the right of labour tenants to acquire land and, at section 17, for this Court to determine disputed labour tenancy status.

[6] Labour tenant means: “a person- (a) who is residing or has the right to reside on a farm; (b) who has or has 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 section 3(4) and (5), but excluding a farmworker”. There is no evidence of the First Applicant’s mother providing labour in consideration for the right to use cropping or grazing land on the farm.

[6] Labour tenant means: “a person-

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has 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 section 3(4) and (5), but excluding a farmworker”.

There is no evidence of the First Applicant’s mother providing labour in consideration for the right to use cropping or grazing land on the farm.

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