

SOUTH AFRICA / JUDGMENT

Van Rensburg and Others v Mutongi and Others (004659/2022) [2024] ZAGPJHC 641 (15 July 2024)

[2024] ZAGPJHC 641

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Bezuidenhout

CASE / FILE NUMBER

004659/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBER:

004659/2022

1. REPORTABLE:

NO

2. OF

INTEREST TO OTHER JUDGES: NO

3. REVISED:

YES.

15 July 2024

In

the matter between: -

LOUIS

HENDRIK VAN RENSBURG

First applicant

THEONETTE

GROENEWALD

Second applicant

GESINA

JOHANNA VAN RENSBURG

Third applicant

(in their capacities as

the trustees of the

PETRUS JACOBUS VAN

RENSBURG TESTAMENTÊRE TRUST

IT9317/96)
and
BENGU
MUTONGI
First respondent
PESANI
MIPIWI
Second respondent
ERASMUS
MASENDU
Third respondent
KUDAKWASHE
CHINGEZI
Fourth respondent
LLOYD
MURADYA
Fifth respondent
CHARICE
TSIKWAURERE
Sixth respondent
HLANGANANA
MAPOSA
Seventh respondent
GIDIEON
MPHOFU
Eighth respondent
JOHANNES
LUPAHLA
Ninth respondent
BHEKUMUZI
MAPHOSA
Tenth respondent
CYNTHIA
MASEKO
Eleventh respondent
FAITH
SIBANDA
Twelfth respondent
GLADYS
LEBERE
Thirteenth respondent
LESEGO
LEBERE
Fourteenth respondent
LLOYD
KANYONGWA
Fifteenth respondent
LOVEMORE
ZIWEWE
Sixteenth respondent
PROMISE

NCUBA
Seventeenth
respondent
MARIVEN
MANGWANAZI
Eighteenth respondent
COLLECT
MTHNGA
Nineteenth respondent
ELSIE
NJAYA
Twentieth respondent
MUSA
MUKWADA
Twenty-first respondent
MMBANGO
PHIRI
Twenty-second respondent
PUMLA
NAKI
Twenty-third respondent
THULISWE
SHONGWE
Twenty-fourth respondent
MALIBONGWE
SHONGWE
Twenty-fifth respondent
PRINCE
MDHULI
Twenty-sixth respondent
TINWHE
CHIMENI
Twenty-seventh respondent
TREVOR
MADANGWEALE
Twenty-eighth respondent
THE UNLAWFUL INVADERS
OF HOLDING 2,
CATHERINE
ROAD, MOSTYN PARK
Twenty-ninth respondent
THE CITY OF
JOHANNESBURG METROPOLITAN
MUNICIPALITY
Thirtieth respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 15 July 2024.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] This is an application for the eviction of the first to twenty-ninth respondents ("the respondents"), and those who reside through them, from the property known as Holding 2, Catherine Road, Mostyn Park ("the property"), in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE").
- [2] In terms of the joint practice note filed by the parties, it is admitted that the applicants are the owners of the property and that the respondents received notice to vacate.
- [3] This court was called upon to determine the following issues: -
 - [3.1] Whether PIE is applicable or whether the provisions of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA") are applicable;
 - [3.2] Whether the respondents have demonstrated a right to occupy;
 - [3.3] Whether the respondents hold a lien over the property for the security of deposit held by the applicants;
 - [3.4] Whether it is just and fair that an eviction order be granted;
 - [3.5] Whether the respondents will be homeless if the order is granted.

DOES PIE OR ESTA APPLY?

- [4] The primary defence raised by the respondents in this application is the contention that they are occupiers as contemplated in ESTA. The applicants do not dispute that the respondents occupied the property with consent. Is this sufficient though, to establish their right to continued occupation in terms of ESTA?
- [5] From a reading of the answering papers and the heads of argument prepared on behalf of the respondents, the respondents profess that they qualify as occupiers in terms of section 11 of ESTA in that they occupied the land in terms of agreements either written or verbally concluded between the parties. For this reason, the respondents argue, this court lacks jurisdiction to entertain this application in terms of section 20(2) and (3) of ESTA read with section 17 which excludes the jurisdiction of this court.
- [6] The respondents contend that ESTA is applicable for the following reasons: -

[6.1] The property is designated as agricultural holding;

[6.2] The respondents qualify as occupiers in terms of section 1 of ESTA;

[6.3] The respondents occupied the land in terms of written and verbal agreements concluded between the parties, and therefore they qualify in terms of section 11 of ESTA;

[6.4] The average income per respondent is lower than the prescribed income of R13 625.00.

[7] Section 1 of 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, 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.”

[8] ESTA shall apply to all land other than land in a township established, approved or proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including: -

[8.1] any land within such a township which has been designated for agricultural purposes in terms of any law; and

[8.2] 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 established, approval, proclamation or recognition.

[9] It is clear from a reading of section 1 of ESTA and the exclusions contained therein, that the enquiry encompasses far more than that of occupation with consent. Whether or not the persons so occupying, use the land for industrial, mining, commercial or commercial farming purposes is a further consideration.

[10] In their answering papers, the respondents did not exactly state for what purpose the property is used. It is common cause and not disputed that the property was utilised as business premises when it was purchased by the applicants in 1999. The property was used as a bus depot and the structures on the property consist of two office buildings and open undercover parking bays. The business ceased to operate, however the respondents are still utilising the property for commercial interest. They state as much in their answering papers at paragraph 8.1: -

“Ten households on the property. Who reside and conduct business on the property.”

[11] After the deficiencies of the answering papers were pointed out in the applicants' replying affidavit, the respondents filed a supplementary affidavit during September 2023. It however does not improve matters for the respondents as the following paragraphs quoted from the supplementary affidavit demonstrate: -

"4. ... Some of the respondents have signed written lease agreements and the applicants though (sic) their agent collected security deposits. The agreements allowed them to reside and conduct (sic) only 4 of the respondents to conduct business on the property, as vehicle mechanics, painters, panelbeaters and a trailer maker.

6. The respondents earn a living through informal trades concluded on the property while some reside on the property."

[12] On the respondents' own version, initially put forward in their answering papers and amplified in their supplementary papers, the respondents not only reside at the property but also use it for business purposes. Accordingly, on this ground I find that the provisions of ESTA do not apply.

[13] I pause to state that the applicants opposed the submission of the supplementary affidavit into evidence. I allowed the supplementary affidavit in the interest of justice and Mr Kloek on behalf of the applicants elected to argue with mere reference to the supplementary affidavit and did not see it necessary to file a further replying affidavit.

[14] As far as the income requirement is concerned, the respondents in their supplementary affidavit contend that the average income per household does not exceed R10 000.00 per month. A schedule of 27 occupiers and their income was attached to the supplementary affidavit. This was the only proof that was submitted on behalf of the respondents. Confirmatory affidavits and documentary proof of the earned income were glaringly absent.

[15] It was argued on behalf of the applicants that the threshold relied on by the respondents of R13 625.00 does not apply. According to the applicants, the threshold was increased to R13 625.00 per month during February 2018 whereas the previously threshold was R5 000.00 per month.

[16] Regulation 1 of the regulations to ESTA stipulates how income is calculated: -

"2. Qualifying income

(1) The prescribed amount for the purpose of paragraph (c) of the definition of occupier in section 1(1) of the Act shall be an income of R3 625.00 per month.

(2) For the purpose of sub regulation (1) 'income' means -

(a) a person's gross monthly cash, wage or salary; or where a person earns money -

(i) other than in the form of a monthly cash, wage or salary, the average monthly amount of such person's gross earnings during the immediate preceding year; or

(ii) in addition to the monthly cash, wage or salary, such person's gross monthly cash, wage or salary together with the average monthly amount of such person's additional gross earnings during the immediate preceding year;

providing that remuneration in kind shall not be taken into account.”

[17] The respondents' right to occupation and the consent to occupy was terminated with the notices that provided for a period of fourth months to vacate were served. That was during March 2021. In *Lebowa Platinum Mines Ltd*[1] the Supreme Court of Appeal found that the relevant time for calculating the qualifying income is on the plain meaning of the provisions when lawful occupation ceases. The increase in income only came into effect during February 2018.[2]

[18] In the answering papers no information relating to the respondents' was provided. An attempt was made to amplify this deficiency in the supplementary papers, but even in this instance it does not assist the respondents as the schedule attached was not accompanied by any corroboratory evidence.

[19] In the circumstances the respondents have failed to satisfy the requirements of ESTA insofar as income is concerned.

[20] It is pertinent that in the answering papers the defence advanced in terms of ESTA was premised only on the respondents' contention that the land in question was described as agricultural holding. This is also not enough.

[21] In *Khuzwayo*[3] the Land Claims Court specifically stated that: -

“The fact that a property is described as a farm does not necessarily mean that it has not been proclaimed as a township.”[4]

[22] The court held further that: -

“In circumstances where the defendant wishes to defend an action, brought on the basis of a rei vindicatio, on the grounds that he or she is a protected occupier under ESTA, the defendant bears the onus to prove that he or she complies with all components of the definition of an occupier.”

[23] *Esterhuysen*[5] went further by stating that: -

“... closer scrutiny of the definition of ‘occupier’ reveals that previous consent and farmland is not sufficient to render the defendant and occupier in terms of ESTA. There are three categories of consensual occupiers or rural land who are excluded from the definition. They are labour tenants, persons using the land for what might be described loosely as purposes other than substance, agricultural and persons earning in excess of R5 000.00 per month.”

[24] In the premises I find that the respondents have failed to discharge the onus of proving that ESTA applies and I find that the provisions of PIE apply.

THE LIEN DEFENCE

- [25] The respondents rely on what they call a deposit hypothec. They allege that the applicants collected deposits from certain of the respondents and because of these payments, so the respondents argue, they are all entitled to occupation of the property until the total amount of R19 000.00 is reimbursed to them by the applicants.
- [26] The hypothec defence again fails due to a lack of evidence. In the answering papers the respondents merely attached a letter dated 21 Jun 2021 which was addressed by their legal representatives to the applicants regarding the deposits. The applicants' attorneys replied on 1 July 2021. All the letter states is that several occupants have paid security deposits and that on arrangements have been made to process these deposits.
- [27] Even if the respondents had made out a case and had proven the payment of security deposits, they have a further difficulty in that on their own version they concede that they stopped paying rentals. I am not persuaded that they are entitled to a reimbursement of the deposits or to raise a hypothec defence under circumstances where they, on their own version, breached the lease agreements due to non-payment.

IS IT JUST AND EQUITABLE TO GRANT AN EVICTION?

- [28] Where a private landowner applies for eviction, a court has to make two enquiries. First it has to consider all relevant factors and decide if it is just and equitable to order eviction. If it decided it is just and equitable to evict, it has to make a second enquiry into what justice and equity require in respect of the date of eviction and conditions attaching to the order. Once the first and second enquiries are concluded, a single order is to be made.[6]
- [29] PIE imposed a new role on the courts in that they are required to hold a balance between legal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned.[7] However, the extent to which the court must go beyond normal functions was also placed in perspective by the Supreme Court of Appeal in *Changing Tides*. It stated that this injunction must be seen in the context that courts are neither vested with powers of investigation, nor equipped
- with the staff and resources to engage in broad-ranging enquiries into socio-economic issues.[8]
- [30] Having considered the facts, I find that the respondents have failed to disclose a bona fide defence and they are in unlawful occupation.
- [31] The personal circumstances furnished by the respondents are scant. At their own peril they failed to take the court into their confidence. Be that as it may, the supplementary affidavit in any event demonstrates that at least 27 of the occupiers do earn an income and are therefore able to find suitable and affordable accommodation elsewhere.
- [32] In the premises, the respondents failed to make out a case for homelessness. It has also not been suggested by the respondents that there is a shortage of immediately available accommodation for the occupiers.

- [33] As a consequence of my finding that the respondents will not be rendered homeless in the event of their eviction, there is no reason for the thirtieth respondent to report. In the circumstances I consider it just and equitable to evict the respondents.
- [34] Considering the fact that notice to vacate was given to the respondents as far back as March 2021, I find that a period of three months afforded to the respondents within which to vacate the property would be just and equitable in the circumstances.
- [35] I am also satisfied that the statutory requirements of PIE have been met.

ORDER

I accordingly grant an order in the following terms: -

1. The first to twenty-ninth respondents, as well as all other persons occupying the property through or under the first to twenty-ninth respondents' authority are ordered to vacate the immovable property situated at Holding 2, Catherine Road, Mostyn Park ("the property") on or before 30 September 2024.
2. Should the first to twenty-ninth respondents as well as all other persons occupying the property through or under the first to twenty-ninth respondents' authority fail and/or refuse to vacate the property on or before 30 September 2024, the order may be carried out by the sheriff of this court on or after 1 October 2024.
3. The first to twenty-ninth respondents and any other persons occupying the property through or under the first to twenty-ninth respondents' authority, are interdicted and restrained from entering the property at any time after they have vacated the property or after they have been evicted therefrom by the sheriff of this court or his/her lawfully appointed deputy.
4. In the event of the first to twenty-ninth respondents, and/or any other persons occupying the property through or under the first to twenty-ninth respondents' authority, contravene the order contained in paragraphs 1 and 3 above, the sheriff of this court or his/her lawfully appointed deputy is authorised to remove the first to twenty-ninth respondents and any other persons occupying the property through or under the first to twenty-ninth respondents' authority, from the property as soon as possible after their reoccupation thereof.
5. The sheriff of this court or his/her lawfully appointed deputy is authorised to instruct the South African Police Service to accompany the sheriff or his/her lawfully appointed deputy, in the performance of their duties as set out in paragraphs 1 to 4 above.
6. Each party shall pay their own costs.

F BEZUIDENHOUT

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

6 February 2024

DATE OF

JUDGMENT:

15 July 2024

APPEARANCES:

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[1] Lebowa Platinum Mines Ltd v Viljoen 2009 (3) SA 511 (SCA).

[2] Regulation 2 under Extension of Security of Tenure Act, 62 of 1997, sub-regulation (1) substituted by Government Gazette GN72 of 16 February 2018 and by GN84 of 23 February 2018 provide that the prescribed amount for the purpose of paragraph (c) of the definition of “occupier” shall be an income of R13 625.00 per month.

[3] Khuzwayo v Dlodla 2001 (1) SA 714 (LCC).

[4] At 717F.

[5] Esterhuyse v Khamadi 2001 (1) SA 1024 (LCC).

[6] City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at paragraph [25].

[7] Port Elizabeth Municipality v Various Occupiers

[2004] ZACC 7; 2005 (1) SA 217 (CC) paragraph [13].

[8] Changing Tides (supra) paragraph [27] at 313.

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