IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD IN RANDBURG

CASE NUMBER: **LCC: 85/2010**

Decided on: 18 January 2013

In the case of:

FRANCIS DANIEL JAMES VOGES N.O.	First Applicant
FREDERIKA MARIA CHRISTINA VOGES N.O.	Second Applicant

and

SOPHY MOLUSI	First Respondent
JOSEPHINE MABUNDA	Second Respondent
DAVID MAMOGALO	Third Respondent
MOOSA NGOMANE	Fourth Respondent
AURELIO MKANSI	Fifth Respondent
ALLY ERNESTO DANGO	Sixth Respondent
ISAAC SELOWANE	Seventh Respondent
K.L TWARISANG	Eighth Respondent
JOSEPH RAMOKANE	Ninth Respondent
NELSON	Tenth Respondent
FRANS MOKANSI	Eleventh Respondent
JOSEPH MBELA	Twelfth Respondent
HEAD OF THE NORTH WEST PROVINCIAL OFFICE OF THE DEPARTMENT OF RURAL DEVELOPMENT & LAND REFORM	Thirteenth Respondent
RUSTENBURG LOCAL MUNICIAPLITY	Fourteenth Respondent

JUDGMENT

SIDLOVA AJ:

Introduction

[1] Before me is an application for the eviction of the first to the twelfth respondents from Portion 81 (a portion of portion 65) of the farm Boschfontein 330-JQ, Rustenburg, at the instance of the applicants in their respective capacity as trustees of the Voges Family Trust, the registered owner of the said farm. 1st to 12th Respondents are occupiers as defined in the Extension of Security of Tenure Act 62 of 1997 ("the Act").

[2] The respondents derive their right of residence on the farm by virtue of lease agreements concluded between them and the applicants.

The first respondent entered into a written lease agreement with the applicants on 3 October 2001.

The second respondent entered into a written lease agreement with the applicants on 10 May 2000.

Third respondent entered into a written lease agreement with the applicants on 3 October 2010.

Fourth respondent entered into a written lease agreement with the applicants on 14 August 2010.

Fifth respondent entered into a written lease agreement with the applicants on 3 October 2001.

Respondents 6 to 12 entered into verbal lease agreements with the applicants during October 2001.

[3] According to the applicants, the lease agreements entered between them and first to twelfth respondents were terminated on 19 May 2009. This is, however, disputed by the respondents.

Previous litigation

[4] This matter has been brought before this Court on two previous occasions: on 26 March 2009 under Case number LCC 34/2009 on an urgent basis as a result of allegations tabled against the applicants for the constructive eviction of the respondents by removing corrugated iron roofs from the rooms that the respondents occupied. This court granted an interim order wherein the applicants were ordered to rebuild the structures demolished with immediate effect.

[5] On 14 July 2010 the applicants brought an *ex parte* application to obtain directives as to service of the present application, in which the applicants seek the eviction of the first to twelfth respondents. The application was brought on grounds that service on these respondents may be problematic, cost prohibitive and ineffective.

Background facts

[6] The applicants entered into written and oral lease agreements with the 1st to 12th respondents on dates already mentioned above. As at the date that the applicant gave notice to terminate the lease agreement (19 May 2009) the first respondent had been resident for 9 years; the second respondent for 10 years; the third respondent for 9 years; the fourth respondent for 7 years; the fifth respondent for 9 years and the 6th to 12th respondents for about 9 years. Thus all the respondents had been resident on the property

in terms of lease agreements for an estimated period of between 7 and 10 years at the time of termination.

[7] The applicants gave notice to terminate all the leases with the respondents on the 19 May 2009. The notices indicate that the reason for termination of the agreements is a failure by each of the first 12 respondents to pay their monthly rental from approximately May 2008. Such notices were served on the respondents on 19 May 2009; however the respondents deny receiving the notices. The respondents also deny that they refused to pay their monthly rentals and allege that the applicants had refused to accept the rent when same was tendered.

[8] In the course of argument the applicants did not pursue the reason for termination of the leases mentioned on the notices of termination, but instead argue that as owners they have the right to terminate a lease agreement if notice is given timeously. It is advanced by applicants that a periodic lease[1] can be terminated on reasonable notice by either the lessor or the lessee and the tenancy of the 1st to 12th respondents was provided only as an interim measure susceptible to termination at any time by either party on one (1) month's written notice.

Issues Raised

[9] The respondents challenge the manner of service of the present application on the grounds that the return of service does not comply with this court's direction due to its silence with regard to the number of units, the exact unit number given to each unit and the name of the principal occupier at each unit if available. The respondents dispute

[1]On the nature of a contract of lease, See Joubert *The Law of South Africa* 2nd (ed) LexisNexis Durban 2007 at para 1. A lease agreement cannot run in perpetuity or forever. According to Joubert a contract of this nature is 'not a lease but a contract of emphyteusis or one on its own merits'. And defines a period lease as one which runs from period to period and can be ended by mere notice. However, should the parties elect to omit the duration as to when their lease agreement will run for, termination only requires reasonable notice. At Para 4. Old Roman Dutch writers express it as 'passing over the bounds into another contract.' See also W E Cooper 1994 *The South African Law of Landlord and Tenant* (2nd eds Juta & Co) at 64, Cooper says "rent is invariably expressed in relation to a period of time, a lease which has no terminal point runs from period to period; parties may agree that a lease may be periodic or may be implied in cases where terminal point was specified." This type of contract terminated on reasonable notice by either of the parties to it.

proper service of the main application and the termination notices in terms of section 8 (1) of the Act[2]. While such argument holds merit in that the service order granted by this Court was not fully complied with, the respondents were present and represented and obviously came to know of the application. Given this state of affairs, a case was not made out for striking out the application as the respondents did become aware of it.

Has there been compliance with section 9 (2) of Extension of Security of Tenure Act 62 of 1997

[10] It is settled law that an application for eviction may be granted under sections 10 or 11 of the Act; this of course will be dependent on the date of occupation. In terms of the Act,[3] the owner or person in charge of the property is required to give not less than two (2) calendar months' written notice of the intention to apply for an eviction order to the occupiers, the municipality in whose area of jurisdiction the land is situated and the head of the relevant provincial office of the Department of land Affairs. Further, included in the notice are detailed grounds for eviction. The purpose of the notice is to afford those who may wish to object to the eviction sufficient notice. In addition, it is intended to give the Municipality and the Department of Land Affairs adequate time to conjure up detailed plans on how to best deal with the situation.[4]

[11] Section 9 (2) of ESTA places a limitation on eviction and its provisions must be met prior to any party seeking an eviction from this Court. Provisions are the following:

i. The occupiers right of residence has been terminated in terms of section 8;
ii. The occupier has not vacated the land within the notice period;
iii. The conditions for an order for eviction in terms of section 10 or 11 have been complied with;
iv. Not less than 2 calendar months written notice of the intention to obtain an eviction order has been given to the occupier, municipality in whose area

[2] The Substituted service order only catered for the eviction application and the manner in which the termination notices was served was not addressed in that order.
[3] See section 9(2) (d) of the Act.
[4] *City Council of Springs v Occupants of the Farm Kwa-Thema 210* 2000 (1) SA 476 (LCC)

> of jurisdiction the land is situated and the head of the provincial office of the Department of Rural Development and Land Reform. Provided that if a notice of application to a court has been given to the occupier, municipality and head of the relevant provincial office, after the termination of the right of residence, not less than 2 months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

[12] This application raises the issue as to whether it is just and equitable as required by section 8(1) of the Act for the applicants to terminate of the lease agreements of the respective respondents. The applicants allege that they terminated the lease agreements because of non-payment. This however is disputed by the respondents. It has also been noted that in the heads of argument and during oral argument the applicants did not pursue this argument and instead chose to rely on their need to develop their property as the reason for termination.

[13] The argument advanced by applicants is that under common law a periodic lease can be terminated on reasonable notice by either the lessor or the lessee and that the tenancy of 1st to 12th respondents was only an interim measure susceptible to termination at any time by either party on one (1) month's written notice. The lease agreements did not stipulate any definite period of duration, and there is no provision for a notice period; so the argument goes. Therefore cancellation of the lease agreements did not depend on breach or good reason, reasonable notice for cancellation sufficed[5]. Further the applicants outlined details on which the property is to be utilized upon vacation by the respondents. The applicants argue that this Court has pronounced in *Labuschagne & Another v Ntshwane 2007 (5) SA 129 (LCC)* that it was reasonable for lease agreements to be ended for being irreconcilable with land development in the long term.

[5] It must be however noted that section 8 of the Act imposes the additional requirement of Just and Equitable

[14] The applicants' argument is premised on the ground of a possessory claim for eviction of the first to the twelfth respondents. To be successful the applicants argue they bear the onus of alleging and proving the following:

(a) the original right of possession of the respondents;
(b) that the said right was terminated in a valid manner;
(c) that the respondents are still in occupation; and
(d) the requirements of the Act were given effect to.

[15] The applicants rely on *Tiopaizi v Bulawayo Municipality 1923 AD 317* to argue that they were only required to serve reasonable notice on the respondents and not a breach or good reasons. The applicants' version is that the 1st to 12th respondents' right of residence was terminated accordingly by personally being served by the Sheriff in accordance with section 9 (2) (a) read with section 8 of the Act.

[16] None of the respondents work for the applicant and it is not disputed that their occupancy is in terms of lease agreements. The agreements were indeed periodical as they did not indicate a fixed term, and the applicants terminated these agreements by way of written notice an option which is available to the lessee or the lessor. The lease agreements from their wording are pretty straightforward and fair, and the conduct of the applicants of refusing to accept rental and proceeding to seek eviction has led to a situation whereby the respondents were residing rent free for a period of more than 2 years. Given this state of affairs it is found that section 9 (2) (a) was complied with as the principal reason for termination is that the applicants need the land for further development.

[17] Section 9 (2) (b) has been complied with in that the occupiers have not vacated the land within the notice period.

[18] Section 9 (2) (c) provides that the conditions of section 10 or 11 should be met before an eviction order is granted. All the occupiers entered into agreements with the

applicants after the 4 February 1997; they are therefore, governed by section 11. However the respondents argue that the first respondent was resident on the property prior to 4 February 1997 and is an occupier as meant in section 10. The applicants concede that the first respondent occupied the farm before 1997 but say she was not an occupier in terms of the Act as she resided with her mother who had consent to occupy the property. She only became an occupier when a lease agreement was entered into between herself and the applicants in 1999. This is not disputed by the respondents; therefore all the respondents are treated as occupiers as meant in section 11. Given the agreements entered into were periodic leases, it is trite that such lease could be terminated by either of the parties giving reasonable notice and section 11 (1) applies read with section 8 of the Act applies.

[19] In exercising my discretion on whether to grant the eviction or not, I am bound to consider whether or not the right of occupation has been terminated in accordance with the Act as well as whether the procedural requirements were met. However, it is mandatory for me, given requirement of "just and equitable" provided for by section 8 of the Act, to consider other relevant factors, not limited to, such as the interests of the parties, the fairness of the procedure followed by the applicants, the availability of suitable or secure accommodation should I find in favour of the applicants. A probation officer's report in terms of section 9 (3) explains that there is no suitable alternative accommodation available to the respondents in the nearby areas, and such must be taken into consideration when exercising my discretion.

[20] The lack of suitable alternative accommodation requires me to address the deadlock between rights of ownership and protection of occupation. The normality is that, should I be minded to order an eviction, this might result in homelessness. It goes without saying that this is a clash of competing rights a practical dilemma wherein I am required to find a way out that will result in the preservation of the owners' rights and also a practical solution for the occupiers. The Constitutional Court in *Maphango &*

others v Aengus Lifestyle Properties (Pty) Ltd 2012 (5) BCLR 449 (CC)[6], had to answer the question as to when would a landlord be entitled to cancel a lease agreement and as a consequence evict its tenants within the parameters of section 26(3) of the Constitution. Cameron J writing for the majority, granted the appeal but made a postponement order. Zondo AJ dissenting[7] took the view that the appeal should not be stayed as the appeal ought to have been decided on the same record by the SCA. In arriving at this decision, the learned judge took into account the three (3) year litigation in these courts as well as the fact that a final determination was overdue in particular the applicants did not seek an order for stay.

[21] As in every case where it is necessary to balance interests those of the land owners must also be considered. All the procedural requirements were met by the applicants, and while it is clear that the service order was not fully complied with the respondents did become aware of the application. Considering the dicta in *Federated Trust Ltd v Botha*[8], where it was held that the Court does not encourage formalism in the application of its rules, the failure to comply fully with the substituted service order alone cannot defeat this application as the principle with regard to service which is to ensure both parties are in court was still met. The section 9 (3) report offers no solutions with regard to alternative accommodation and this is unfortunate, however, it was held per Meer AJ (as she then was) in *Glen Elgin Trust v Titus and Another [2001] 2 All SA 86 (LCC)*[9] that:

> "Whilst the Act requires these respective rights to be considered, and imposes complex procedural and substantive obstacles for landowners to overcome before they can evict occupiers, it should, of course, not be construed to suggest that the constitutional rights of the occupier stand to be enforced against the landowner. For clearly they cannot and indeed ought not to be so enforced lest the ludicrous situation arises whereby landowners

[6] Even though this matter was determined with reference to the provisions of the Rental Housing Act 50 of 1999, the principle remains the same, which I am enjoined to apply. In this case the South Gauteng High Court found that the lease agreements were validly terminated. On appeal, the Supreme Court of Appeal upheld the High Court's decision and dismissed the appeal. The appellants, aggrieved by these decisions appealed to the Constitutional Court.
[7] Id at para 135
[8] 1978 (3) SA 645 (A)
[9] at Para 8

> are expected to take over the State's responsibility to provide housing to occupiers and education to their children."

[22] The interests of the applicants must be balanced with those of the occupiers; there has been a period of more than 2 years since notice to terminate the leases was served and the failure of the State to provide suitable alternative accommodation cannot lead to a situation where the applicants are obliged to provide housing. That is quite frankly not their duty. Additionally, the area in which the land is situated is peri-urban. It is not so remote that other facilities with housing do not exist, in the period since notices were given, the respondents should also have been pro-active in trying to seek other accommodation, knowing full well that their occupancy was dependent on lease agreements.

[23] It is necessary to consider the effect of an order of eviction in terms of section 13 (1) of the Act. There was no indication by the occupiers that they made any improvements or built any structures on the land for which they should be compensated. The papers indicate that there are rooms which were available for rent, which were then leased by the occupiers. The construction of such rooms was not at the instance of the occupiers and thus section 13 (1) (a) is not applicable. None of the occupiers were employed by the applicants and thus section 13 (1) (b) is not applicable. In the circumstances, an order for compensation as envisioned by section 13 (1) of the Act is not applicable.

Order

In the event, I make the following order:

(a) The first to twelfth Respondents and all persons occupying under or through them are ordered to vacate portion 81 (a portion of portion 65) of the farm Boschfontein 330-JQ, Rustenburg, at the instance of the applicants by 31 March 2013.

(b) The Sherriff for the district of Rustenburg is authorised to remove the first to twelfth Respondents, and all persons occupying under or through them, from portion 81 (a portion of portion 65) of the farm Boschfontein 330-JQ, on or after 3 April 2013, if they have not complied with the order in paragraph one above.

(c) There is no order as to costs

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Y SIDLOVA
ACTING JUDGE: LAND CLAIMS COURT

For the applicant: Advocate Voster
Instructed by: I P Gurovich of Notton Lambrianos Attorneys

For the respondents: Advocate AJ Botha

Instructed by: I Matshitse of Matshitse Attorneys