

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No. 1631/2012

Date Heard: 6 December 2012

Date Delivered: 13 December 2012

In the matter between:

DTTC INVESTMENTS CC

Applicant

and

HENNIE KLOPPER

Respondent

JUDGMENT

EKSTEEN J:

[1] This is an application for the eviction of the respondent from Owvanhuk Farm (hereinafter referred to as “the farm”) in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (hereinafter referred to as “PIE”). The farm is the registered property of the applicant which is presently occupied by the respondent.

[2] Two points *in limine* arise. The application was originally launched on notice pursuant to the provisions of Rule 6 of the Uniform Rules of Court. The application was duly served upon the respondent and the respondent filed answering papers. The applicant thereafter replied. When the papers were complete and the matter ready for argument the applicant caused notice in terms of the provisions of section 4 of PIE to be served. On 6 November 2012 Tshiki J made an order in the following terms:

- '1. That the form and contents of the draft notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, which is annexed to the founding affidavit and marked annexure "A" be hereby authorised.
2. That the Applicant be directed to serve the notice referred to in paragraph 1 above together with a copy of this Order on the Respondents in accordance with the provisions of Rule 4(1) of the Uniform Rules of Court.
3. That service as aforesaid shall be effected by the Sheriff, ...'

[3] The notice approved by Tshiki J reflected the date for the hearing of the application as 29 November 2012. After the order had been made but before service thereof the Registrar of this court advised that the application should not be heard on that day as the roll was already overcrowded and he amended the date set out in the proposed notice to 6 December 2012 and duly initialled it.

[4] The notice, as amended, was duly served and the matter was enrolled for 6 December 2012. On 29 November 2012, in accordance with the rules of this court, the respondent filed heads of argument in which the two points *in limine* arise.

[5] Firstly, the respondent complained that the notice of set down in terms of Rule 6(5)(f) of the Uniform Rules of Court advising of the hearing on 12 December 2012 had not been served on the respondent. Secondly, he contended that the alteration of the date of hearing in the notice in terms of section 4(2) of PIE after the order approving the contents and the manner of service had been made constituted an irregularity. It is argued that on either of these grounds the matter should be struck off the roll.

[6] In response to the receipt of the heads of argument the applicant immediately caused a notice of set down in terms of the provisions of Rule 6(5)(f) to be served on the respondent.

[7] In view of the foregoing Mr **van Rooyen**, on behalf of the respondent, intimated at the hearing of the matter, correctly in my view, that he would not persist in the first point *in limine*.

[8] Mr **Marais**, for the applicant advised from the Bar that he is instructed that the alteration of the date occurred after reference to and with the approval of Tshiki J. This assurance Mr **van Rooyen** accepted, I think fairly, and accordingly he did not persist with the second point *in limine*.

Factual background

[9] As recorded earlier the applicant is the owner of the farm. It is common cause that early in October 2011 the respondent approached one Tanja Schroeder, the sole member of the applicant, with a request to hire the farm. After some consideration Schroeder agreed and an oral agreement of lease was entered into between the parties. There is much dispute on the papers relating to the terms of the agreement. Schroeder contends that it was agreed between the parties that the respondent would hire the farm for an initial period of six months at a rental of R4 000 per month and thereafter on a periodic lease from month to month at a similar rental. In addition she contends that the respondent undertook to assume responsibility for the payment of the municipal water and electricity bill.

[10] The respondent contends for a far more elaborate agreement. He is in agreement with the respondent in respect of the monthly rental, and subject to what is set out below, his undertaking to assume responsibility for the payment of the water and electricity bill. He contends however that the lease concluded was for a period of five years with an option to renew and an option to purchase the farm at an amount of R4 million. In addition he contends that the parties agreed that he would undertake a proper “re-establishing of the farm” at his own cost, including the cutting of black wattle trees to make way for natural grazing. Finally, he contends that the parties agreed that whereas the applicant intended to sell the farm the respondent would be entitled to six months notice upon the conclusion of such sale.

[11] It is common cause that the respondent took occupation of the farm on 5 October 2011. The occupation was free and undisturbed. The respondent states in his answering affidavit that shortly after he took occupation of the property he took one Willie Steffens (herein referred to as “Willie”), his wife and his two children in as Willie was unemployed and his family destitute. The arrangement, the respondent contends, was that Willie and his family could occupy a section of the farmhouse and that Willie could earn money by delivering calves to prospective buyers on behalf of the respondent. It is indeed common cause that the said Steffens did take occupation of portion of the farmhouse.

[12] Shortly thereafter Willie’s father also showed a keen interest in the farming operation which the respondent was now conducting of the farm. The respondent states that he then allowed Willie’s father to work with him in the enterprise. Matters

between them soured shortly thereafter and the relations between the applicant and the respondent appears to have followed the same course.

[13] The respondent contends that after matters soured between him and the Steffens family he personally advised both Willie and his father to leave the farm. He states that he even caused an attorney's letter to be addressed to them on 15 December 2011. The letter, written by Attorneys Landman Steyn and Ellis records:

“Ons kliënt se instruksies is dat daar 'n mondelinge ooreenkoms tussen u en hom bestaan in terme waarvan u die woning te Owvanukplaas op 'n maand tot maand basis mag bewoon.

Meneer Klopper se posisie het egter verander en benodig hy die woning vir sy privaat doeleindes.

Dit is ons instruksies om die ooreenkoms te kanselleer en gee ons u hiermee kennis om die woning voor of op 15 Januarie 2012 te ontruim.”

[14] The respondent contends on this basis that he holds no responsibility for the occupation of the farmhouse by Willie and his family. He states that he asked them to leave the farm by 15 January and they thereafter told him that they remain in occupation by virtue of the consent of Schroeder, an averment which remains entirely unsubstantiated.

[15] On 19 December 2011 one Jim Boyens, an attorney in Jeffreys Bay directed a letter on behalf of the applicant to the respondent purporting to cancel the agreement of lease and demanding that the respondent vacate the property by no later than 30 January 2012.

[16] I pause to mention that in her founding papers Schroeder records that although she authorised the letter the content of the instruction did not emanate directly from her and that one Steffens (it is unclear whether it was Willie or his father) gave the instructions to Attorney Boyens. The applicant disavows any reliance on this letter of cancellation for purposes of this application.

[17] The letter did, nevertheless, elicit a response from Attorneys Landman Steyn and Ellis. The response acknowledges that the respondent occupies the farm pursuant to an oral agreement in terms of which rental is paid at an amount of R4 000 per month. It then proceeds to record:

“Ons kliënt se verdere instruksies is egter dat hy inderdaad wil voortgaan met die huurooreenkoms tussen homself en die verhuurder, waarvan die terme en voorwaardes in 'n skriftelike ooreenkoms vervat en deur u opgestel word. Ons kliënt is selfs bereid om 'n verhoogde huurbedrag te betaal, mits gemelde bedrag redelik en billik is. U is welkom om die skrywer te kontak ten einde 'n afspraak te bewerkstellig om die terme en voorwaardes van sodanige ooreenkoms te bespreek.”

[18] This letter is, of course, irreconcilable with the version currently advanced by the respondent that a firm agreement was already in place for a period of five years together with an option to renew.

[19] The next development occurred on 7 March 2012 when Attorneys SC Heystek, on behalf of the applicant addressed a further letter to the respondent. He referred to the letter addressed to the respondent by Attorneys Boyens recording that any agreement between the parties is cancelled. The letter proceeds to record that there was at this stage an outstanding electricity bill in the amount of

R15 999,20 which Attorney Heystek contended that the respondent was liable for. In these circumstances Attorney Heystek records that he had advised the applicant to request the municipal authorities to terminate the electricity supply to the farm and reiterated that the respondent had no right of occupation. He requested an urgent indication as to when respondent would be vacating the property. On 9 March 2012 Attorneys Landman Steyn and Ellis again responded on behalf of the respondent now contending that a five year contract of lease was in place. They record their instruction that the respondent denies that the applicant had had the right to cancel the contract unilaterally. In respect of the electricity bill they record that the respondent only became aware of the arrears when Attorney Boyens wrote to him in this regard on 27 January 2012 and that he was already in negotiation with the municipality in respect of the bill, questioning, indirectly, the accuracy of the bill.

[20] This was followed by a further letter from Attorney Heystek on 30 March 2012 advising that he had instructions to bring an application for the eviction of the respondent. The respondent denied that applicant had the right to an eviction order and the battle lines were drawn.

[21] In respect of the electricity bill it is not in dispute that the municipal account reflected a credit in December 2011 before reflecting a considerable deficit in January 2012. The respondent contends that the applicant had never made any demand upon him for payment of an electricity bill prior to January 2012 and that he embarked upon enquiries immediately upon learning of this debt. He has annexed copies of the farm's municipal accounts for August, September, October and November 2011 from which it appears that there was no electricity reading taken for

the farm for some period prior to January 2012. He records that a municipal official, one Maneli, confirmed to him that there had not been any payment on the account for some period of time and neither had there been proper readings taken.

[22] The import of these averments are that a substantial portion of the account may have been incurred prior to him taking occupation of the farm. In these circumstances the respondent contends that he has, on the estimation of Mr Maneli that R1 500 per month represented a reasonable estimate of the monthly usage, paid such an amount as he believed that he has been utilising each month as from April 2012. He has made no payment in respect of the preceding six months and made no tender in this regard.

[23] Against this background the respondent contends that, acknowledging his obligations in term of his lease with the applicant, he is entitled to a remission on rental and a remission on the electricity and water incurred by virtue thereof that he has had restricted beneficial occupation and no accurate indication of his electricity usage. He has unilaterally withheld portion of the rent and paid only what he considers reasonable for his consumption of water and electricity as from April. He acknowledges that for the period from October 2011 to June 2012 he has paid only R27 000 in respect of rental and that he has paid R7 000 in respect of electricity and water in respect of the period April to June 2012 only.

Disputes of fact

[24] I have recorded above that there is a substantial dispute of fact relating to the terms of the contract. In addition, and perhaps more material to the present

application, there is a dispute as to who is responsible for the continued presence of Willie on the farm. This is significant because, if Willie's presence on the farm is at the instance of the applicant and it detracts from the respondent's right to use the property, then the respondent would indeed be entitled to withhold part of the rental and electricity payment and he could then raise the *exceptio non adimpleti contractus* to resist the present application.

[25] In ***Plascon-Evans Paints v Van Riebeeck Paints*** 1984 (3) SA 623 (A) Corbett JA considered the approach to be adopted to disputes of fact in motion proceedings. At p. 634H-635B he stated:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhotso v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-H)."

[26] I do not think that the dispute of fact relating to the duration of the contract is material to the resolution of the matter. On either version the applicant would be entitled to cancel the contract where a material breach of contract has occurred.

[27] The parties are, as recorded earlier, in broad agreement that it was a term of the agreement that the respondent would accept responsibility for the payment of the electricity bill. The respondent contends, however, that prior to receiving notice from the applicant's attorneys in respect of the status of the account he had no idea what he owed towards his monthly consumption as the applicant had failed to make any demand upon him. The respondent contends that to the best of his knowledge that information was privy to the applicant alone being the owner of the property. He nevertheless contends that once he was confronted with such an excessive account he started making enquiries. He attended at the Thornhill Post Office and enquired if there were any municipal accounts for the farm. There were indeed such municipal accounts dating back to August 2011 which, it appears, were readily made available to him and revealed a credit on the farm account until December 2011. These documents, obtained by the respondent without any difficulty, are annexed to his affidavit.

[28] The respondent continued to state that he approached the Despatch Municipal Office where one Maneli, an employee of the municipality granted him an audience and confirmed to him that there had not been payments on the account for some period, neither had proper readings been taken. Maneli advised that there had been "over-estimations" done on the account and that he would prepare an updated account based on, what he considered to be the average monthly consumption of the farm at about a R1 500 per month.

[29] On this basis it is argued by Mr **van Rooyen** that it was a tacit term of the oral agreement that the respondent would only be liable to pay the electricity bill when the applicant advised him of his consumption. Nowhere in the papers did the respondent contend for a tacit term. Rather he contented himself by stating:

“Despite my obligation to make payment of my municipal consumption charges, I submit that it was the obligation of the Applicant to timeously and accurately notify me of the extent of my liability and thereby allow me a fair opportunity to perform in terms of our agreement and to make payment.”

[30] In any event, a tacit term can only be introduced into a contract where it is “necessary in the business sense to give efficacy to the contract”. It must accordingly be necessary to give business efficacy and not merely reasonable. (See *Christie Law of Contract in South Africa* 6th ed p. 176 and the authorities referred to therein.) This distinction was succinctly stated by Millin J in **Rapp and Maister v Aronovsky** 1943 WLD 68 at 74-75 as follows:

“It has often been pointed out that it is not sufficient to show that a term would be highly reasonable or convenient to one or other or even both of the parties. The cases show that the Court has to be continually on its guard against being persuaded to introduce a term which, on analysis of the argument, appears to be no more than a term which would make the carrying out of the contract more convenient to one of the parties or to both of the parties and might have been included if the parties had thought of it and if they had both been reasonable. You are not to imply the term merely because if one of the parties or a bystander had suggested it, you think only an unreasonable person would have disagreed. You have to be satisfied that both parties did agree. It is quite a different proposition, if in the hypothetical case Scrutton LJ puts in, you feel the parties might say: ‘You have called our minds to something we have not thought of and what you say is not unreasonable, let us discuss it.’ If that is all that the Court feels might have happened then the Court is not entitled to imply the term.”

[31] I think that at best for the respondent, on the case made out in the papers, it could be said that it would have been a reasonable term. The facts show that it was entirely within the means of the respondent, without the assistance of the applicant, to obtain information relating to the electricity consumption from the municipal authorities and even to collect the accounts themselves. He chose not to do so and made no attempt to pay anything at all towards his electricity consumption prior to April 2012.

[32] In these circumstances I do not think that there is a real or *bona fide* dispute of fact, relating to this clause. On the facts which are common cause the respondent accepted responsibility for the payment of the electricity accounts. He did not honour this obligation.

[33] Since April 2012 to the date of the issue of process in this matter the respondent, by his own admission, paid a reduced rental. This, he alleges, he is entitled to do by virtue of the occupation of Willie and his family in the farmhouse. For her part Schroeder states that the applicant is not responsible of the presence of Willie and his family on the farm nor for their consumption of electricity. The respondent accordingly contends in argument that there is a dispute of fact relating to who is responsible for the presence of Willie and his family in the farmhouse. Mr **van Rooyen** argues that I should accept the version of the respondent in this regard, alternatively, I should refer the matter to oral evidence on this issue.

[34] It is not in dispute that the free and undisturbed possession of the property was given to the respondent on 5 October 2011. Having the right to the full use of

the property the respondent chose, as he was entitled to do, to permit Willie and his family to take occupation in the farmhouse. The occupation of Willie and his family in the farmhouse was accordingly solely on the strength of the agreement between Willie and the respondent. It did not affect the respondent's obligations towards the applicant in any manner. This the respondent acknowledges.

[35] When relations between Willie and the respondent soured the respondent gave notice to Willie to vacate the premises. He failed to do so. The applicant has no obligation in these circumstances to evict him. There is no acceptable allegation of an agreement between Schroeder and Willie. He is there at the instance of the respondent and it is only the respondent who has the authority to evict him, the respondent being the tenant of the property and having the full use thereof.

[36] In the circumstances, the unsubstantiated hearsay allegations relating to Willie's alleged justification for his continued occupation do not create a material dispute of fact. I do not think that the respondent can be heard to lay the blame for Willie's presence on the farm upon the applicant. That being so I am similarly not persuaded that there is a real or *bona fide* dispute of fact relating to Willie's occupation.

Cancellation

[37] Irrespective of whether the applicant's version of the contract is accepted or that of the respondent the applicant would have been entitled to cancel the contract upon a material breach. The agreement, on either version, makes no provision for a particular procedure of cancellation. It must accordingly be governed by common

law. At common law a notice of cancellation must be clear and unequivocal but need not correctly identify the cause of cancellation. (See *Christie The Law of Contract in South Africa* 6th ed p. 562 and the authorities referred to therein.) In argument before me Mr **van Rooyen**, correctly in my view, conceded that the letter of 7 April 2012 by Attorney Heystek constitutes a clear and unequivocal communication of cancellation. At that time the applicant contends that the respondent was in breach of his contractual obligations by virtue of his failure to have paid any sum due in respect of electricity.

[38] Cancellation would take effect from the date of the delivery of the notice of cancellation. Where there has been no notice of cancellation communicated cancellation would take effect from the date of the service of the summons or the notice of motion. (See *Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk* 1987 (2) SA 244 (T) 249A-G; *Du Plessis v Government of the Republic of Namibia* 1995 (1) SA 603 (Nm) 605C-F; and *Win Twice Properties (Pty) Ltd v Binos and Another* 2004 (4) SA 436 (W).) In these circumstances, in any event, provided there was a valid reason for cancellation, the service of the notice of motion and founding papers would constitute notice of cancellation. Indeed in the founding papers Schroeder states:

- “34. The Respondent is fully aware thereof that I seek, on behalf of the Applicant, the termination of the agreement and the eviction of the Respondent.
- 35. In the event of demand being required by the Respondent, I respectfully submit that this application (should it be necessary) will serve as demand.”

For purposes hereof I shall accept that the service of the application constitutes the notice of cancellation.

[39] What remains from a contractual point of view, is whether a material breach justifying the cancellation of the agreement, irrespective of whether it is the agreement contended for by the applicant or that of the respondent, has occurred. A contract of letting and hiring is concluded where one party undertakes to let or to give to the other the use of the property in exchange for a fixed or fixable rental. (See *Wille's Principles of South African Law*, 9th ed p. 907 and the authorities referred to therein.) The essentials of the contract are accordingly that the one party is to give the use of the property to the other in exchange for the payment of rental. The use of the property and the payment of rental are the two issues which go to the root of the contract.

[40] In respect of the dispute relating to the outstanding electricity account which may have predated the occupation of the respondent I think the uncontested explanation of the respondent is valid. Whilst he is liable for the monthly escalation in the outstanding bill, exclusive of interest, the breach contended for by Attorney Heystek had not, in my view, occurred. This, however, does not preclude the applicant from relying on the breach relating to the monthly consumption of electricity nor non-payment of rental. In ***Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*** 2001 (2) SA 284 (SCA) Nienaber JA stated at 299F:

“It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was discovered after, the time.”

[41] In the present case, relying on service of the process as notice of cancellation, the cancellation takes effect upon the service of the application. The non-payment of rental is indeed relied upon in the application and it is not in dispute that respondent he has wilfully failed to pay the full rental agreed upon.

[42] On behalf of the respondent it was argued that because the respondent is not enjoying the full beneficial occupation of the farm he is relieved of having to pay the full rental. Reliance was placed on *Fourie NO en 'n Ander v Potgietersrus se Stadsraad* 1987 (2) SA 921 (A). The difficulty with this argument, as set out above, is that the respondent did obtain full and undisturbed possession and it was the respondent who chose to permit Willie and his family to occupy a portion of the farmhouse. While he has purported to cancel his agreement with Willie he has taken no steps to evict him. In the circumstances Willie's presence there, as I have found earlier, is at his instance. He is accordingly not entitled to withhold payment of rental.

[43] Whereas the non-payment of rental constitutes a fundamental breach of contract I think, irrespective of which version of the contract one accepts, that the applicant has established that it has validly cancelled the contract as it was entitled to do.

PIE

[44] Section 4(7) of PIE provides that where a occupier has occupied land in question for more than six months at the time when the proceedings were initiated the court may grant an order for eviction if it is of the opinion that it is just and

equitable to do so, after considering all relevant circumstances, including whether the land has been made available or can reasonably be made available by the municipality, an organ of state or another land owner for the relocation of the unlawful occupier, including the rights and needs of the elderly, children, disabled persons and households headed by women.

[45] The plaintiff is a warrant officer in the South African Police Services. He conducts a cattle farming enterprise on the farm. The facts of the matter reveal that the respondent is not a man of straw. He is resident on the farm with his daughter, a minor child, he being a single parent. I do not think that this is a matter in which the respondent can claim to be destitute or where the rights of his daughter are likely to be infringed. The respondent claims to be entitled to be on the property by virtue of a contract of lease. Once the contract is terminated the respondent has no right to be on the property. In these circumstances I think that it is just and equitable that the respondent be evicted.

[46] I have recorded that the respondent farms on the property. He runs a herd of cattle, apparently buying and selling calves, presumably after fattening them for some period. In these circumstances I think that it would be just and equitable to afford the respondent a period of thirty days from the date of this judgment to vacate the farm.

[47] In the result I make the following order:

1. The respondent, and all those occupying through him, are evicted from the property known as the Remainder of Farm 448, Thornhill, more commonly known as Owvanhuk Farm, Thornhill.
2. The respondent is ordered to vacate the said property within thirty (30) days of the date of this judgment.
3. The respondent is ordered to pay the costs of this application.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv P Marais instructed by Jacques du Preez Attorneys, Port Elizabeth

For Respondent: Adv C van Rooyen instructed by James Riley Attorneys, Port Elizabeth