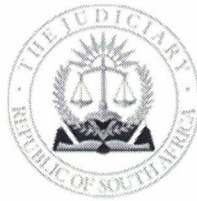


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 3033/2017

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE: 23/08/18	
SIGNATURE: 	

In the matter between:

HLABIRWA SHEMANE KGARIA

APPLICANT

And

DAVID MOKGANENG PHETLA

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant bought the farm Mapochsgronde 854 Registration Division J.S Limpopo ("the farm") from Mr and Mrs Tryhou ("the previous owners"). The farm was registered by the Registrar of Deeds into the applicant's names on the 26th February 2015. According to the applicant prior to buying and taking occupation of the farm, the previous owners informed him of three occupiers of the farm who were Dina Phetla ("third respondent"), her husband January Phetla ("deceased") and one Kleinbooie Stuurman. The previous owners informed him that they found these three individuals on the farm when they bought it during 2002. The third respondent who is now aged 92 years told him that she came to live on the farm as a teenager.
- [2] The first and second respondents are the children of the third respondent. According to the applicant, he started encountering problems after taking occupation of the farm when he was told by the first respondent that it is their farm and that he could not do as he pleases. The first respondent told him never to set his foot on the farm, otherwise he will be in serious trouble. The respondent continued hurling insult at him as he was leaving where the respondents are staying. He told the first respondent that it was his farm and he will do as he pleases on it.

- [3] According to the applicant during August 2015 he and the first respondent laid counter charges of *crimen injuria* against each other. Since this incident, his problems with the respondents increased. The respondents started conducting illegal hunting on the farm with their dogs. He experienced theft of items on the farm. When second respondent was released from prison, they took one of his jojo tank and its stand and took it to their homestead.
- [4] According to the applicant on the 2nd March 2017 the respondents laid false charges of *crimen injuria* against him. However those charges were withdrawn. The respondents' vandalised his water infrastructure on the farm. The respondents threatened to dismantle his entire wind pump and assembled it elsewhere.
- [5] According to the applicant, the respondents' actions prompted him in launching an application seeking an order that the first and second respondents be evicted from the farm. In the alternative he is seeking an order that the respondents be interdicted from interfering with the day to day conduct of farming activities, vandalising the infrastructure on the farm, from removing and/or utilising the infrastructure on the farm without the specific authorisation of the owner of the farm. The applicant acknowledges that the third respondent is an occupier on the farm and does not seek an eviction order against her.

- [6] According to the applicant, the first respondent takes care of the third respondent. The applicant contends that when he bought the farm, the second respondent was neither living on the farm nor did he have any legal right to be on the farm. The applicant submits that at present he is precluded from farming and the respondents have several cattle and donkeys on the farm without his permission. He further submits that neighbours have already complained about the unlawful livestock on his farm.
- [7] According to the first and second respondent, they were born on the farm and are therefore protected by the provisions of the Extension of Security of Tenure Act no 62 of 1997 (ESTA). They are staying on the farm with their mother who is 92 years old and are looking after her. The house they are staying in, they regard it as their only home.
- [8] They came to know the applicant during August 2015 when he came to their homestead being violent, threatening and swearing at them, and that is when they laid charges of *crimen injuria* against him. According to the respondents', the previous owners have constructed a windmill water pump which was supplying them with water. However, the applicant has dismantled that windmill which was closer to their home and installed it to a new borehole which is about a kilometre away from their homestead.

- [9] They used to have four donkeys which they used to go and fetch water on a donkey cart. The applicant has taken away their donkeys and they are now suffering. The applicant has been terrorising them, telling them that he will make sure that they vacate his farm. One day they found that he had locked the gate that they use to enter and exit the portion of the farm where their house is located. They called the police who used a bolt cutter to cut the lock.
- [10] The respondent's contends that they are the lawful occupiers on the farm, and that they are having consent to reside there and such consent was never withdrawn. They deny that they are conducting any illegal hunting on the farm. They denies damaging the applicants farming infrastructure. They deny that they are having any cattle on the farm. According to them, the jojo tank has been at their homestead for a long time. The respondents further contends that they have been occupiers who have been in occupation of the farm prior the 4th February 1997. The respondents dispute that they have told the applicant that the farm is theirs. The respondents submits that they understand very well that they are not the owners of the farm.
- [11] The respondents answering affidavit was filed out of time and they have made an application for condonation for late filing of their answering affidavit. The applicant is opposing the respondents'

application. It is trite that in an application for condonation, the factors which must be considered are the degree of lateness, explanation for the delay, prospects of success and any prejudice which might be suffered by either party.

[12] Even though the respondents were extremely out of time, they have adequately dealt with the explanation for the delay. The respondents have also shown that they are having a fairly good chance of prospects of success in their opposition. If their application is not granted, they will be seriously prejudiced as the applicant will proceed with the matter on unopposed basis. I am therefore satisfied that the respondents' have shown good cause why condonation for late filing of their answering affidavit should be granted.

[13] The applicant is seeking an order to evict the first and second respondent. The first and second respondents are arguing that they are occupiers as defined in ESTA. What the court must first determine is whether the respondents are occupiers in terms of ESTA.

[14] In **Snyders and Others v De Jager and Others [2016] ZACC 55 (21 December 2016)** at para 52 the court said:

“The word ‘occupier’ in ESTA is defined as meaning ‘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’ is an occupier if he or she does not fall within the exceptions provided for in paragraph (b) and (c) of the definition”

[15] The first and second respondent are brothers, whilst the third respondent is their mother. The third respondent is 92 years of age, and she is therefore of advanced age. The applicant has conceded that the third respondent is protected under ESTA and he therefore does not seek any eviction order against her. At her age the third respondent will need someone to look after her. The respondents are a family.

[16] In **Hattingh v Juta 2013 (3) SA 275 (CC) at 290 A-C Zondo J said:**

“There is no need to attempt to define the term ‘family’ with any precision other than to say that it cannot be limited to nuclear family. The first and third applicants are two of Mrs Hattingh’s sons. The second applicant is Mrs Hattingh’s daughter-in-law. In my view, whatever notion of family is contemplated in s 6 (2) (d) it will include the children of the occupier. I do not think that the attainment of the age of majority or being independent of their parents takes a person out of the ambit of his or her parent’s family.”

[17] It has been established that third respondent is an occupier in terms of ESTA and the applicant does not dispute that. The first and second respondents are the children of the third respondent, they have reached the age of majority and are no longer dependant on the third respondent. The first applicant is now working at the neighbouring farm but still reside in the same house with the third respondent. The second respondent has served some time in prison and on his release he returned to the farm. In line with the principles formulated in *Hattingh v Juta supra*, as long as the third respondent is still alive it is immaterial whether the first and second respondent have reached the age of majority or are independent, they will remain under the wing of the third respondent. Therefore, in my view they are occupiers protected by ESTA.

[18] Section 10 (1) of ESTA makes provision for eviction of a person who was an occupier on 4 February 1997. It reads as follows:

“(i) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-

(a) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

- (b) *the owner or the person in charge has complied with the terms of any agreement pertaining to the occupiers right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar months' notice in writing to do so;*
- (c) *the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which would reasonably restore the relationship; or*
- (d) *the occupier –*
 - (i) *is or was an employee whose right of residence arises solely from that employment; and*
 - (ii) *has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour relations Act”*

[19] Section 6 (3) of ESTA reads as follows”

“An occupier may not-

(a) Intentionally and unlawfully harm any other person occupying the land;

(b) Intentionally and unlawfully cause material damage to the property of the owner or person in charge;

(c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or

(d) enable or assist unauthorised persons to establish new dwellings on the land in question”

[20] In this case there are counter accusations against both the applicant and respondents. What is clear is that after the applicant took occupation of the farm, he did not introduce himself properly to the respondents. The parties did not sit with each other and determine and/or agree how they were going to live with each other on the farm, hence the laying of counter charges with SAPS and counter accusations with each other. In my view, the parties have differences with each other. However, those differences are not so material to justify an order for the eviction of the first and second respondents from the farm. Their relationship can still be mended. Therefore, in my view, it will not be just and equitable to evict the first and second respondents from the farm. The respondents for all these years have regarded their house on the farm as their only home.

- [21] Turning to the order for a final interdict. It is trite that in order to succeed in obtaining a final interdict, the applicant has to establish the existence of a clear right, that an injury had actually been committed and the absence of any other satisfactory remedy. (See **Setlogelo v Setlogelo 1914 AD 221 at 227**).
- [22] The applicant by virtue of been the registered owner of the farm, and the respondents have also acknowledged the applicant's ownership of the farm, in my view satisfy the requirements of a clear right. On the second requirement, both parties have counter accusations against each. Basically the parties are accusing each other of been the aggressor. In my view, on these aspects, there is a serious and genuine dispute of fact which will not be decided on the papers. On the papers as it stand, it will be difficult to find what act the respondents did that is prejudicial to the applicants rights.
- [23] With regard to the absence of any satisfactory remedy, as I have already pointed out above that the applicant did not properly introduce himself to the respondents, the parties can still sit together and iron out their differences. As a dispute of fact existed on papers as to who did what, the applicant's application stands to fail. (See **Plascon Evans Paints v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634e- 635 C**)

[24] In the result I make the following order

24.1 The respondent's application for condonation for late filling of their answering is granted.

24.2 The applicant's application is dismissed with costs.



MF. KGANYAGO

JUDGE OF THE HIGH COURT

POLOKWANE, LIMPOPO DIVISION

APPEARANCE:

COUNSEL FOR THE APPLICANT : Adv ZF Kriel

INSTRUCTED BY : Wagener Attorneys

COUNSEL FOR RESPONDENTS : Adv LA Nkoana

**INSTRUCTED BY : Maboku Mangena
Attorneys**

DATE OF HEARING : 06 August 2018

DATE OF JUDGEMENT

: 23rd August 2018