



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 1685/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES / NO
<u>8/5/2015</u>	
DATE	SIGNATURE

In the matter between:

ZWELI HLONGWANE

8/5/2015
Appellant

and

PAPILLON MOTSOENYANE N.O.

1st Respondent

MOLIFI SLATIEL MOTSOENYANE N.O.

2nd Respondent

MADODA SHADACK ZIBI N.O.

3rd Respondent

MOLEFE PETER MOALUSI N.O.

4th Respondent

BADIRI ANNA MFELANG N.O.

5th Respondent

NATGEJI KETTA TGYKIL N.O.

6th Respondent

MOLELFE AARON MOTSOENYANE N.O.

7th Respondent

JUDGEMENT

DE VOS J:

- [1] This is an appeal against summary judgement granted against the Appellant (1st respondent in the court a quo) for his ejectment from the farm Droogespruit, being the remaining extent of portion 2 (Aurora) of the farm Droogespruit 416. The Motsoenyane Family Development Trust is the owner of the farm mentioned above.

The 1st – 7th Respondents, in their capacity as trustees of the said Trust, are cited as applicants in the court a quo. The City Council of Tlokwe, a local government institution, was cited as the 2nd Defendant in the court a quo.

- [2] It is common cause that the Respondents, as Applicants, issued summons against the Appellant under case no. 1685/2013 on 14th May 2013 for his ejectment from the said farm. In paragraph 13 of the summons it is pleaded that *“the Defendant (Appellant – own insertion) is occupying a certain portion of the above-mentioned farm and is conducting farming activities on the said property. The Defendant has no right to occupy and/or any claim to the farm Droogespruit”*.
- [3] Before dealing with the issues raised in the grounds of appeal it is necessary to determine the cause of action as set out in the particulars of claim. It is clear from the contents of paragraph 13 that what is alleged is that farming activities are conducted on the said farm which is a commercial activity and does not form part of the function or a form of dwelling or shelter. In the case of **Ndlovu v Ngcobo Bekker & Another v Jika, 2003(1) SA 133 (SCA) at p124 paragraph 20** it was held that commercial properties such as farming activities are not subject to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, Act 19 of 1998 (PIE).
- [4] When summary judgement was granted it was held that the cause of action is also not based on the Extension of Security of Tenure Act, Act 62 of 1997 (ESTA). Section 1 of ESTA defines the word “evict”. It means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and “eviction” has a corresponding

meaning. Section 1 of ESTA also defines the word "occupier" to mean a person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding:

"a) ...

b) *a person using or intending to use a 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".*

- [5] The prescribed amount is set out in Government Gazette Vol. 402, No. 19587 dated 18th December 1998, Regulation Gazette, No. 6377, No. R. 1632. The qualifying income is set out in Section 2 of the Regulations and reads as follows:

"2 (1) *The prescribed amount for the purposes of paragraph (c) of the definition of "occupier" in Section 1(1) of the Act shall be an income of R5000 per month.*

(2) *For the purposes of subregulation (1) "income" means –*

(a) *a person's gross monthly cash wage or salary; or*

(b) *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 immediately preceding year; or*

(ii) *in addition to a 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 immediately preceding year; provided that remuneration in kind shall not be taken into account".*

- [6] It was the Respondents' case in the court a quo that neither PIE nor ESTA is relied upon by the Plaintiff as the cause of action. It appears from the reading of paragraph 13 of the summons that the cause of action is simply based on the rei vindicatio as set out in the Common Law. This is however not the end of the matter, as set out hereafter.
- [7] After filing a notice of opposition, the Respondents filed an affidavit confirming the cause of action, stating that the Appellant has no bona fide defence and was defending the action merely to delay the proceedings. The Appellant thereafter filed his opposing affidavit.
- [8] Before dealing with the grounds of appeal it is necessary to deal with the background to this present matter before us. As set out in the second paragraph 13 of Plaintiffs' claim the Respondents as Plaintiffs previously instituted an application (which I will call the first application) in terms of PIE legislation against the appellant and other occupiers under case no. 5315/2009 at the Potchefstroom Magistrates Court. The respondents' application was dismissed as the court indicated that the Plaintiff as cited in the application does not have locus standi and that the application in terms of "PIE" legislation is not applicable. It appears that this action was instituted in the name of a trust and not in the name of the trustees of the trust. The court held that the respondents as a trust do not have locus standi and that the PIE Act is not applicable.
- [9] The Respondents subsequently, which I will call the second application, lodged a claim for eviction against the appellant in terms of ESTA in the Potchefstroom Magistrates Court under case no. 4088/2011. The court gave judgement in favour

of the Plaintiffs in their capacity as trustees of the trust and the Defendant was ordered to evict the property on or before the 30th November 2012. The Court's judgement was referred to the Land Claims Court for automatic review in terms of the said Act. The Land Claims Court of South Africa, under case no. LCC62R/2012 made the following order:

- "a) *The whole of the order is set aside;*
- b) *The case is remitted to the Magistrate;*
- c) *The parties are free, if they so desire, to institute proceedings in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land, Act 19 of 1998 (PIE)".*

[10] Subsequent to this judgement the Respondents preferred not to proceed with either the first or the second applications. A new summons was issued, based on the rei vindicatio, which is a vindicatory remedy or a type of mandatory interdict restoring possession to the lawful owner. The necessary confirming affidavit was then lodged and filed by the Respondents where after the Appellant filed an affidavit in support of its opposition in terms of the provisions of Rule 14(3)(b) of the Magistrates Court Rules. In the opposing affidavit the locus standi of the Respondents is not denied as set out in this summons and therefore deemed to be admitted. It is also not denied that there were two previous applications and what the outcome of each case was as set out before.

[11] The main issues raised in opposition to the summary judgement application is that the Respondents (Plaintiffs) are abusing the court process because the order granted by the Magistrates Court was set aside by the Land Claims Court and that the eviction claim is res judicata. The same ground is raised in the grounds of appeal. In his reasons for judgement the court a quo held that a plea of res judicata

is not a special plea in abatement. It may be raised where the Plaintiffs' claim has been previously heard by any court that has given final judgement. The court also referred to the principle that a matter is res judicata where the parties are the same and the cause of action is the same. In such a situation the matter may not be heard again. The Magistrate found that although the Land Claims Court did set the order aside and remitted the case to the Magistrate, the cause of action is not the same. The cause of action is rei vindicatio. In its argument the Appellant contends that a plea of res judicata was not raised in respect of the proceedings in the Land Claims Court but was raised in respect of the proceedings under the PIE Act. Case no. 5315/2009 was instituted on the basis of PIE. The court found in the first application that the PIE Act is not applicable and that the Trust did not have any locus standi.

- [12] The Appellant contends that the judgement in the first application as attached as Annexure MM5 to the papers before us is binding on the Respondents. The judgement reads as follows:

"Hof bevind: Trust nie locus standi.

PIE n.v.t"

The rest of the judgement consists of two handwritten lines which are illegible. None of the parties referred to what was said in the two lines that I cannot read. I accept that no relevance is placed on the indecipherable part of the judgement.

- [13] Nowhere in this judgement is there any explanation as to why the Trust as Plaintiff has no locus standi. In contrast thereto and in the matter now on appeal, Respondents pleaded in paragraph 13 thereof (the second paragraph 13) that:

"The Plaintiffs' application was dismissed as the court indicated that the Plaintiff as cited in

the application does not have locus stand and the application in terms of PIE legislation is not applicable”.

The Appellant's contention is that the court a quo was bound by the first decision that the Trust has no locus standi.

- [14] Advocate Harms appearing on behalf of the Respondents argued that the summons in case no. 1685/2013 was issued in the name of the Trust only and not in the names of the individual trustees as in the present matter. Therefore it cannot be found that the parties are the same. This might be correct. Unfortunately the record in case no. 5315/2009 is not before us. In the absence of the relevant pleadings the Appellant's argument cannot be sustained. In this matter there is nothing on record to determine what the true position is. Paragraph 12 of the particulars of claim in the matter under appeal reads as follows:

“The Plaintiffs and more specifically the Motsoenyane Family Development Trust is the owner of the farm Droogespruit...”

This quotation supports the explanation given by the Respondents' counsel.

- [15] In the absence of a clear explanation by any of the parties and the absence of the record pertaining to the first and second applications, the first prerequisite for a plea of res judicata (namely that the parties are not the same) cannot be sustained.

- [16] It is further argued by the Appellant that in the first matter under case no. 5319/2013 the Magistrates Court made a finding that the PIE Act is not applicable. However, in contrast thereto the Land Claims Court, when deciding the second application under ESTA, set the whole order aside, and remitted the matter to Magistrate and indicated to the Plaintiffs that they are free to institute proceedings in terms of the

PIE Act. It is submitted that as a decision was already given in the first application that PIE is not applicable, the first decision still stands and accordingly the court should have found that the present matter is *res judicata*.

[17] I do not understand the reference to the PIE Act in the first decision to mean that a decision was taken on this point. It can also be interpreted that PIE is not applicable for the simple reason that the Plaintiff as cited lacks legal persona and that the Plaintiffs' reliance on PIE is not applicable. In the absence of the records of the previous litigation this aspect cannot be decided on the papers before me. Having regard to what I have said before it is my conclusion that the defence of *res judicata* cannot succeed.

[18] The Appellant must establish a bona fide defence to the Respondents' claim for ejectment. See ***Nair v Chandler, 2007(1) SA 44 (T)***. The court a quo held that this was not done as the Defendant did not fully disclose the nature and grounds for his defence.

[19] In its amended heads of appeal the Appellant raised the point that the Magistrate failed to consider compliance with the provisions of ESTA by the Respondents. It is clear from the particulars of claim that the Respondents did not state whether they instituted the action in terms of this particular legislation. However, it appears – notwithstanding Respondents' counsel contending during argument that they do not rely on PIE or ESTA – that reliance is placed on the Land Claims Court judgement where it was held that the parties are free to institute proceedings under the PIE Act. In the present matter before us, the City Council of Tlokwe is cited as the 2nd Defendant. No order is sought against the 2nd Defendant. I, however, agree with

the Appellant's counsel's submission that the only reason why the City Council was cited as a defendant is to make provision for PIE to be applied.

[20] Where a person is residing on a farm and ESTA is not applicable, the PIE Act still applies. The Appellant stated in paragraph 1 of his affidavit opposing summary judgement that he is "*an adult male residing at Droogespruit farm...*". The Respondents did not comply with the formal requirements of the PIE Act as no notice was given in terms of section 4(2) of the Act. This requirement is compulsory. Summary judgement can only be granted after proper notice was given in terms of section 4(2) of PIE. Appellant's opposing affidavit is extremely vague. Notwithstanding the vagueness of the defence, the Appellant stated that he is residing on the farm. The Appellant also denies that is indebted to the Plaintiff as set out in paragraph 6 of his opposing affidavit. The Appellant's denial thereof constitutes a bona fide defence to the Plaintiffs' claim.

[21] Appellant also contends that in the alternative the matter is *lis pendens* and was referred back to the Magistrate by the Land Claims Court. There may be merit in this argument. I am not prepared to make a decision on this point. The complete records of the first and second applications are not before me and it is impossible to make a finding in this regard without perusing the said case records. Due to the finding I am going to make this argument can be raised in later proceedings.

[22] Lastly it must be mentioned that the Respondents also oppose the appeal on the basis that the Appellant did not comply with the provisions of Rule 51(4), Rule 50(1) and Rule 50(4) of the Uniform Rules of Court read with the Magistrates Court Rules. I do not intend dealing with these objections due to the Respondents' concession in

Court that they do not proceed with their opposition to the condonation applied for by the Appellant.

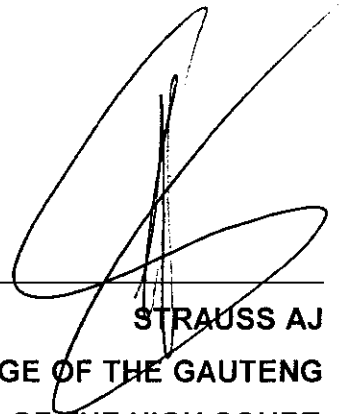
[23] Accordingly the appeal should succeed and I propose that the following order be made:

- a) The appeal is upheld with costs;
- b) The Magistrate's order is set aside and replaced with the following:
 - (i) The Defendant is granted leave to defend;
 - (ii) The Plaintiffs shall pay the Defendants costs pertaining to the application for summary judgement.



DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

I agree.



STRAUSS AJ
ACTING JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

It is so ordered.